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First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 1

TUESDAY, JUNE 28, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

Mr. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel.
Mr. Justice A. A. M. Walsh, Senate Commissioner.

APPENDICES

1. Acts of the Parliament of Canada Relating to Divorce.
2. The New System of Parliamentary Divorce.
3. Acts of the Parliament of the United Kingdom Relating to Divorce as of July 15, 1870.
4. Contemporary Acts of the Parliament of the United Kingdom Relating to Divorce.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

24688—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, *Joint Chairman*

The Honourable Senators:

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

FOR THE HOUSE OF COMMONS

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

Members of the House of Commons

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

(Quorum 10)

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 bill 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*

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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 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, C.P., moved, seconded by the 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.

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, June 28, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 11.00 a.m.

Present: *For the Senate:* The Hon. Senators Aseltine, Baird, Burchill, Connolly (*Halifax North*), Croll, Fergusson, Flynn, Gershaw and Roebuck (*Joint Chairman*).

For the House of Commons: Messrs. Aiken, Brewin, Cameron (High Park) (*Joint Chairman*), Forest, Goyer, MacEwan, Mandziuk, McCleave, Peters, Trudeau and Wahn.

On motion of Mr. Wahn, seconded by Mr. McCleave, it was resolved to report recommending that the House of Commons section be granted leave to sit while the House is sitting.

The following were heard:

Mr. E. Russell Hopkins, Senate Law Clerk and Parliamentary Counsel.

Mr. Justice A. A. M. Walsh, Senate Commissioner.

The following documents, submitted by Mr. Hopkins, were ordered to be printed as appendices to these proceedings:

1. Acts of the Parliament of Canada Relating to Divorce.
2. The New System of Parliamentary Divorce.
3. Acts of the Parliament of the United Kingdom relating to Divorce as of July 15, 1870.
4. Contemporary Acts of the Parliament of the United Kingdom Relating to Divorce.

At 1.00 p.m. the Committee adjourned until Tuesday next, July 5th, 1966, at 3.30 p.m.

Attest.

John A. Hinds,
Assistant Chief Clerk of Committees.

THE SENATE

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

EVIDENCE

TUESDAY, June 28, 1966.

The Special Committee of the Senate and the House of Commons on Divorce met this day at 11.00 a.m.

Honourable Senator Arthur W. Roebuck, Q.C. and Mr. A. J. P. Cameron, Q.C., M.P. (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, this is the first meeting for the taking of evidence, and it might be wise to read the order of reference as an opening statement:

> 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.

That was carried. Now you have your resolution, Mr. Cameron.

The CO-CHAIRMAN (*Mr. Cameron*): Yes. This is slightly different, and reads as follows:

> 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.

The Co-CHAIRMAN (*Senator Roebuck*): What is Standing Order 66?

The Co-CHAIRMAN (*Mr. Cameron*): Standing Order 66 is in regard to the printing of papers, and so on.

The Co-CHAIRMAN (*Senator Roebuck*): What about ability to sit?

The Co-CHAIRMAN (*Mr. Cameron*): We have not that ability. I think you will need a motion, and I have one drawn up.

The Co-CHAIRMAN (*Senator Roebuck*): You are going to make that in the Commons?

The Co-CHAIRMAN (*Mr. Cameron*): If I can persuade some of my colleagues from the House of Commons to make this motion and second it, I think it will carry.

The Co-CHAIRMAN (*Senator Roebuck*): The general program of meetings that we have in mind—nothing is settled, of course, because we have just been thinking about it—is to meet once a week.

Mr. MCCLEAVE: Mr. Chairman, we have just seen the motion.

The Co-CHAIRMAN (*Mr. Cameron*): It is in the exact language of the Senate resolution.

The Co-CHAIRMAN (*Senator Roebuck*): Our proposal for your consideration is that we meet on Tuesday of each week at 3.30 p.m. That will give the members of the Commons an opportunity to stay in their chamber for the question period or the first questions at all events, and then attend here. It was thought by some of the Commons members of our committee that we would get a better attendance in that way. If we keep that program up after we come back we will get through a lot of work. In the meantime we have this meeting today, and we have a meeting planned for this day next week and then nothing more until the fall.

The Co-CHAIRMAN (*Mr. Cameron*): It is moved by Mr. McCleave, seconded by Mr. Wahn, that the members of the House of Commons on the Special Joint Committee on Divorce be authorized to sit during sittings and adjournments of the house. Is there any discussion on this motion? The committee has heard the motion. If there is no further discussion, is it carried?

MEMBERS OF THE COMMITTEE: Agreed.

The Co-CHAIRMAN (*Senator Roebuck*): We have an important program today in which we shall lay the foundation of legal knowledge for the work we have in hand. The Steering Committee has consented to this, and Mr. Cameron and I have been working on it. Naturally, the first thing we should consider in opening our discussion, and before hearing briefs and presentations, is the law as it stands now not only in Canada but in each of the provinces and also in England. Possibly there will be a reference to what is the situation in the republic to the south of us. For that purpose nobody is better fitted than the Law Clerk of the Senate, Mr. Hopkins, with whom I have worked for the last ten or twelve years in the closest association.

I have asked Mr. Hopkins to be present this morning to address us. Following his address the Senate Commissioner, Mr. Justice Walsh, will attend. He is hearing cases at the moment, but he promised me he would be here by 12 o'clock. The interval between now and then will be fully taken up, I think, by Mr. Hopkins in presenting his brief to us, and the questions which we may ask him at his conclusion.

With your permission, ladies and gentlemen, I will call on Mr. Hopkins.

Mr. E. Russell Hopkins, Law Clerk and Parliamentary Counsel, the Senate: Messrs. Chairmen, honourable members of the joint committee; I was at first somewhat apprehensive at being in the lead-off position, but then it occurred to me—and I derived some comfort from this fact—that the lead-off man in baseball is not expected to hit any home runs.

The Co-CHAIRMAN (*Mr. Cameron*): He is just expected to get on base.

Mr. HOPKINS: Yes, that is right. So my modest objective, whether through bunting, walking or getting hit by a pitched ball, is to get on first base. In a more serious vein may I say that I am impressed by the scope of this inquiry which appears to touch all phases of divorce in Canada, and by the collective experience and expertise which is obviously enjoyed by the committee and its joint chairmen. I know that the qualifications of Mr. Cameron are very high indeed, and I can speak from personal knowledge of Senator Roebuck.

The Co-CHAIRMAN (*Senator Roebuck*): Keep it quiet.

Mr. HOPKINS: He said that he has known me for ten or twelve years as his legal adviser, and I should point out that during all that time he has been my father confessor.

The product of the committee's work may well affect Canadians in the vital area of domestic affairs for a generation or more. It is not for me to say that the present law of divorce is outmoded or inadequate or to indicate to what extent, if any, it should be modified in the public interest. That, of course, is the function of the committee.

However, I think I may properly say that this planet has turned on its axis many times since 1857 when the grounds for divorce in most Canadian provinces were established. I might add that the present law of divorce in Canada is a curious and somewhat delicate mosaic which has been adjusted from time to time in a piecemeal, pragmatic and, perhaps, typically Anglo Saxon manner, and that any further improvement in its design will require not only a steady hand but a fine chisel indeed. There will be needed also a sort of liquid cement compounded of caution and confidence in equal parts.

I propose, therefore, to describe, first, the statutory mosaic in Canada, and to conclude with an account of the present position in the United Kingdom, in each case with special reference to the grounds for dissolution of marriage.

Perhaps I should also indicate what I do not propose to cover. It is my intention to leave some vacant ground. I will deal only incidentally with the constitutional issue, for example. My understanding is that a representative of the Department of Justice will appear before the committee, and he will discuss, presumably, the ambit of the legislative jurisdiction of Parliament and of the provincial legislatures respectively in relation to divorce, as to the grounds therefor, the defences to an action therefor, and the ancillary relief such as alimony, custody and education of children, property settlements, *et cetera*.

The Parliament of Canada is vested with exclusive legislative authority in respect of "marriage and divorce", by Head 26 of section 91. On the other hand, the provincial legislatures are vested with such authority, by section 92 of the Act, in respect of the following classes of subjects:

(1) Head 12—"The Solemnization of Marriage in the Province."

(2) Head 13—"Property and Civil Rights in the Province."

(3) Head 14—"The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminel Jurisdiction, and incuding Procedure in Civil Matters in those Courts."

Nor do I propose to deal with the practice and procedure or the laws of evidence in force in the several provinces, and I shall not deal at this time with the divorce laws in the several states of the union to our south. That will require a separate effort by somebody, who I hope will not be me.

With those introductory remarks, I shall proceed with my submission, in which I deal first with Canada and then with the United Kingdom.

The Parliament of Canada, though it enjoys exclusive legislative jurisdiction over "marriage and divorce" by virtue of Head 26 of Section 91 of the British North America Act, 1867, has exercised that jurisdiction quite sparingly. It has not, for instance, provided a standard divorce code or even established divorce courts for Canada as a whole, although seemingly it might have done so under section 102 of the B.N.A. Act, 1867, which confers on Parliament power to establish courts with respect to matters within federal competence. It has contended itself with amending, in certain limited respects, the laws of divorce which, for reasons referred to later, had been held to be in force in all the provinces except Ontario, Quebec and Newfoundland. It has also introduced into the law of Ontario, subject to such aforementioned amendments, the English law as to dissolution and annulment of marriage as it stood on July 15, 1870—a magical date in this matter. In addition, it has recently conferred on the Senate of Canada power to dissolve or annul marriages by resolution, on the recommendation of a divorce commissioner to be appointed pursuant to the statute, on any ground recognized by the law of England, again as it stood as of July 15, 1870. In the result, the divorce law of Canada, like Canada itself, is in the nature of a mosaic.

Attached hereto as Appendix 1 are the texts of all the statutes relating to divorce thus far enacted by the Parliament of Canada.

The first of these statutes was the Marriage and Divorce Act of 1925, which put an end to the so-called "double standard" by providing that in any court having jurisdiction to grant a divorce *a vinculo matrimonii* a wife may sue for divorce on the ground of her husband's adultery only. Prior to this enactment, this right was limited to the husband's wife suing for divorce had to prove not merely adultery on the part of the husband but (1) incestuous adultery or (2) bigamy coupled with adultery or (3) adultery coupled with desertion for at least two years or (4) adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *a mensa et thoro* (judicial separation).

The CO-CHAIRMAN (*Senator Roebuck*): That is, null and void.

Mr. HOPKINS: Yes. The second statute was the Divorce jurisdiction Act of 1930. This act relaxed the rigidity of the law of domicile by providing that a wife whose husband has deserted and has been living apart from her for at least two years may sue for divorce in the province in which her husband was domiciled immediately prior to such desertion. This relaxed the rule, as stated in *A.G. for Alberta v Cook*, (1926) A.C. 444, to the effect that a wife may sue for divorce only in the province in which the husband is domiciled at the time of the petition.

The Supreme Court of Ontario derived its divorce jurisdiction from the federal Divorce Act (Ontario) of 1930, which introduced into Ontario the law of England as to dissolution and annulment as of July 15, 1870.

I think those words dissolution and annulment should be mentally underlined.

That date was selected because the decisions of *Board v Board*, (1919) A.C. 956, *Fletcher v Fletcher*, (1920) 50 D.L.R. 23, and *Walker v Walker*, (1919) A.C. 947, had held that the courts of Alberta, Saskatchewan and Manitoba possessed jurisdiction to administer the law of England as to matrimonial causes as it stood on that date. Alberta and Saskatchewan were held to have inherited such jurisdiction from the laws previously in force in the Northwest Territories, out of which those provinces were carved following Confederation. As to Manitoba, the law of England, as of July 15, 1870, was declared by a federal Act (chapter 33 of the statutes of 1888) to be applicable to that province.

The laws of England as of November 19, 1858, were proclaimed in force in British Columbia by a Royal Proclamation of that date, and an Ordinance of 1867 made the same provision after the union of Vancouver Island and British Columbia under the latter name. These provisions were continued in force by the terms of the Imperial Order in Council admitting that colony into the union on May 16, 1871.

This led to a curious result in British Columbia, which had to be corrected by an act of the Canadian Parliament. In 1857, petitions for divorce in England had to be heard by three judges, from whom there was an appeal to the House of Lords. But when the laws of England were introduced into British Columbia the powers granted to three judges were granted to a single judge, and no provision was made at the time for an appeal therefrom. Since provision for an appeal must be made by express enactment, it was held by the courts prior to 1937 that no appeal lay from a single judge in British Columbia either granting or refusing a divorce petition. However, in 1937, a federal Act (chapter 4 of the statutes of that year) conferred such a right of appeal to the court of appeal of British Columbia.

Nova Scotia, New Brunswick and Prince Edward Island each has a divorce law of its own, enacted prior to Confederation and continued thereafter in force in these provinces except as modified by the Acts of the Parliament of Canada reproduced as Appendix 1.

In 1758, and those who are from Nova Scotia may take a bow—one century before judicial divorces were obtainable in England, the first legislative assembly of Nova Scotia passed an act (chapter 17 of the statutes of that year) which provided that all matters related to prohibited marriage and divorce should be heard and determined by the Governor or Commander-in-Chief for the time being and His Majesty's Council for the province. It also provided that no marriage should be declared null and void except for impotence or consanguinity within the degrees prohibited by 32 Henry VIII, c. 38,—and now approximating those in the Anglican Book of Common Prayer. I have a note on consanguinity, but I do not need to go into that now, because it is not related to divorce but to nullity—and that no divorce should be granted except for either of those two causes, for adultery and desertion, without necessary maintenance, for three years.

In those days they did not draw the nice distinction between nullity and divorce which we do today; you could get a divorce on the same ground as for nullity.

In 1761 by an amending act (chapter 7 of the statutes of that year), "cruelty" was added and "desertion" dropped as a ground for divorce. Cruelty is thus a ground for divorce in Nova Scotia, and not in any other province. It is, however, a ground for judicial separation in those provinces where such an action lies, and is also a discretionary bar to such an action. There is thus a considerable body of jurisprudence in Canada with respect to cruelty. (See Kent Power on Divorce, chapter XXI). The latest amendment to the Nova Scotia Act prior to Confederation was that of 1866 when a new court, styled the "Court for Divorce and Matrimonial Causes" was established, and it was provided, *inter alia,* that the court would retain its pre-existing jurisdiction and that it would also have the same powers in respect of, or incidental to, divorce and matrimonial causes: and the custody, maintenance and education of children possessed by the divorce courts in England, as of that time.

The CO-CHAIRMAN (Senator Roebuck): Is a date given?

Mr. HOPKINS: I have not the precise date, but the year was 1866.

By virtue of section 129 of the B.N.A. Act, 1867, this act is still in force in Nova Scotia, except as subsequently modified by the Dominion Acts reproduced in Appendix 1.

New Brunswick, too, has its own pre-Confederation Divorce Act, dating from an act of 1791 (chapter 5 of the statutes of that year), which superseded an even earlier act of 1787, the text of which apparently cannot now be found but which was in any event repealed by the Act of 1791. (See *Rex v Vesey*, (1938) 2 D.L.R. 70.)

So presumably it does not make much difference whether the text was lost or not—it is gone in every sense of the word.

This act established a divorce court for New Brunswick and provided that the causes of divorce from the bond of matrimony and of dissolving and annulling marriage are frigidity or impotence, adultery and consanguinity within the degrees prohibited by 32 Henry VIII. Cruelty was not included as a ground for divorce. The provisions of the New Brunswick law relating to divorce, as amended from time to time, may be found in the Divorce Court Act (R.S. N.B., 1952, c. 63), as amended.

Prior to and at the time of its entry into Confederation, Prince Edward Island possessed a divorce court consisting of the lieutenant-governor or other administrator of the government and His Majesty's Council or any five members thereof, with power vested in the lieutenant-governor or administrator to appoint the Chief Justice of the Supreme Court of Judicature to preside in his stead.

However, the act of 1835 is said to have remained a "dead letter" until it was revived in 1946: concurrent jurisdiction was conferred on the Supreme Court of Prince Edward Island in 1949.

The laws of England introduced into Newfoundland prior to its joining Canada in 1949 were those of 1832, and it has been held by the Newfoundland Supreme Court (see *Hounsell v Hounsell* (1949) 3, D.L.R. 38, Nfld.) that the Newfoundland courts possessed at that time only the jurisdiction then possessed by the ecclesiastical courts in England, which could not decree divorces *a vinculo matrimonii,* but only divorces *a mensa et thoro*—"from bed and board". When Newfoundland became a province in 1949, these pre-existing laws were continued in force, by virtue of the Newfoundland Act, so that it appears that Newfoundland courts have no jurisdiction to decree divorces *a vinculo matrimonii.* The same is of course true in the Province of Quebec, the courts of which have no jurisdiction to dissolve marriages but have a substantial jurisdiction in respect of other forms of matrimonial relief, such as nullity and judicial separation.

I understand from my colleague, Dr. Maurice Ollivier, that he will speak on this and may have some comments on the interrelation and interaction of the matrimonial laws of Quebec and of statutory divorces obtained here in respect of persons domiciled in that province.

In the result, since Confederation, the Parliament of Canada has granted, by private act of Parliament, divorces *a vinculo matrimonii* on the petition of persons domiciled in Quebec, and also, since 1949, on the petition of persons domiciled in Newfoundland (or of persons whose provincial domicile is in reasonable doubt). The jurisdiction of Parliament is of course absolute as to the grounds upon which it may pass a bill of divorce. However, as a matter of policy it has generally granted such relief only on the grounds formerly recognized by the House of Lords and latterly by the courts in England as of July 15, 1870, the magic date. I will not elaborate further on this legislative jurisdiction since I understand subsequent witnesses may expand upon what has just been said. It is my understanding that I will be followed by the Divorce Commissioner, Mr. Justice Walsh, in this regard.

I must also refer, again in passing, to the Dissolution and Annulment of Marriages Act, chapter 10 of the statutes of 1963, whereby Parliament delegated to the Senate legislative authority to dissolve marriages, by resolution of that body, on any ground recognized by the courts in England, again as of the magic

date, July 15, 1870. Such resolutions must be founded upon a recommendation and report by a divorce commissioner appointed under that statute to conduct the hearing and upon a further report, under our Senate rules, by the Divorce Committee of the Senate to which the commissioner's recommendations are presented in the first instance. The act also provides for an appeal to Parliament as a whole by any person considering himself or herself aggrieved by a resolution of divorce adopted by the Senate. A 30-day delay takes place during which such an appeal might be made. I do not know that any appeals have been made.

The CO-CHAIRMAN (*Senator Roebuck*): None have been made.

Mr. HOPKINS: I will say no more on this matter, since I understand that Mr. Justice Walsh will deal with it in some depth. However, I have written an article for *The Canadian Banker* entitled "The New System of Parliamentary Divorce," which outlines the parliamentary history and background of this unique piece of legislation. The text of the article could be printed as an appendix.

The CO-CHAIRMAN (*Senator Roebuck*): I will have a resolution to that effect moved later.

Mr. HOPKINS: It might be interesting to have it so printed, as I see here two members of the House of Commons, Mr. Mandziuk and Mr. McCleave, and Senator Roebuck, all of whom played a prominent role in that connection.

To conclude this examination of the Canadian law of divorce, it should be added that the laws of divorce in force in the Northwest Territories are those of England, once more as of the magic date July 15, 1870, and that the procedure to be followed in the territorial courts is that obtaining in the Province of Alberta. I cite the acts concerned, and they are incorporated in the appendix. (See the Northwest Territories Act, R.S., c. 331, s. 17, as amended by the statutes of 1955 (Can.), c. 48, s. 9). When the act of 1886 originally conferred such jurisdiction, the present Yukon was still part of the Northwest Territories, so that the Yukon has the same basic jurisdiction, later confirmed by Dominion act. (See now R.S.C., c. 53, s. 31).

In view of the significance attaching to the statutory law of the United Kingdom relating to divorce and matrimonial causes as it stood on July 15, 1870, appendix 3 hereto contains the texts of the United Kingdom statutes applicable that date. Prior to January 1, 1858, when the Divorce and Matrimonial Causes Act of 1857 came into force, no court in England had jurisdiction to grant a decree of divorce in the modern sense of the word; that is a divorce *a vinculo matrimonii* which effectively dissolves the marriage tie for all purposes. Until then, matrimonial causes were under the jurisdiction of ecclesiastical courts administering the canon law of England—which is somewhat different from the canon law on the continent—whose authority in divorce was limited tothe granting of divorces a *mensa et thoro* from bed and board. Prior to that time a marriage could be dissolved in England only by an act of Parliament obtainable only after expensive and formidable obstacles had been overcome.

I am about to quote something which is of interest here and which, among other things, was responsible for the amendment of the law of England in this matter, in much the same way as Uncle Tom's Cabin had an effect on slavery in the United States. The quotation is as follows:

(See *Sheppard v Sheppard* (1908) 13 BCR 486, at 515.)

> The well known anecdote of Mr. Justice Maule gives a forcible illustration of the process. A hawker who had been convicted of bigamy urged in extenuation that his lawful wife had left her home and children to live with another man, that he had never seen her since, and that he married the second wife in consequence of the desertion of the first. The judge, in passing sentence, addressed the prisoner somewhat as follows:

"I will tell you what you ought to have done under the circumstances, and if you say you did not know, I must tell you that the law conclusively presumes that you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages; that would have cost you about £100. Having proceeded thus far, you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro*, that would have cost you £200 or £300 more. When you obtained a divorce *a mensa et thoro*, you had only to obtain a private Act for a divorce *a vinculo matrimonii*. The bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor. You will be imprisoned for one day."

These observations exposing the absurdity of the existing law, attracted much public attention, and probably did more than anything else to prove the need of its reform.

Then followed the Matrimonial Causes Act of 1857. The Act of 1857 terminated the jurisdiction of the ecclesiastical courts in all matrimonial matters and causes, and directed that all such jurisdiction conferred by the Act should henceforward be exercised in Her Majesty's name by a court of record to be called "The Court for Divorce and Matrimonial Causes". It substituted the expression "judicial separation" for divorce *a mensa et thoro*, and enacted that such a decree could be obtained "either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards".

The Act of 1857 also provided for the dissolution of marriage on the petition of a husband on the ground of his wife's adultery since the celebration of the marriage. On the other hand, it provided that a wife might petition for a dissolution on any of the following grounds: namely, that since the celebration of the marriage her husband had been guilty of: (1) incestuous adultery; or (2) bigamy with adultery; or (3) rape, sodomy or bestiality, or (4) adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or (5) adultery coupled with desertion, without any reasonable excuse, for two years or upwards.

As mentioned earlier, this so-called "double standard" in respect of adultery has since been removed both in Canada and in the United Kingdom.

To complete the Canadian mosaic in respect of divorce, it becomes necessary to revert briefly to the law of Ontario. I do not know whether this happened while you were attorney general or not, Senator Roebuck, you can tell me when I read this.

The CO-CHAIRMAN (*Senator Roebuck*): I plead not guilty.

Mr. HOPKINS: As previously mentioned, the English law "as to the dissolution of marriage and as to the annulment of marriage" as that law existed on July 15, 1870, was incorporated into the law of Ontario by the federal Divorce Act (Ontario) of 1930. It is to be noted that this provision did not incorporate the whole of the matrimonial law of England but only that part of it related to "dissolution or annulment". One result of this limitation has been that the Ontario courts have held that an action for judicial separation does not lie in the Ontario courts since it is not an action for dissolution and annulment.

The CO-CHAIRMAN (*Senator Roebuck*): Dissolution does not lie?

Mr. HOPKINS: Dissolution lies, but judicial separation does not because it does not fall into the category of "dissolution" which was the only jurisdiction conferred.

Of equal interest is the circumstance that, in case any aspect of the federal act of 1930 was beyond the legislative capacity of Parliament, the Legislature of Ontario confirmed its provisions in the Marriage Act of 1933 (chapter 29 of the statutes of that year), which provided that "so many of the provisions of the Divorce Act (Ontario) as are or may be within the legislative competence of this Legislature are hereby enacted as if fully set out in this Act".

It is pretty difficult to get a constitutional lead out of that when it is covered both ways at the same time.

It is also of constitutional interest to note that the federal act of 1930 was "supplemented"—if that is the correct word—by an Ontario statute of 1931 (chapter 25 of the statutes of that year), which dealt with maintenance, alimony, property settlements, the custody of the children and the making of rules of procedure.

That deals with Canada as far as I propose to go. The second part is shorter, but I have tried to summarize the case law in England as to cruelty, desertion and insanity.

Mr. PETERS: When the Ontario Legislature passed the statute in 1931 deciding on the maintenance of children and custody, where did this come from? Is this an inherent part of the federal legislation transferred in 1930? Where did we lose the jurisdiction of the federal field over children?

Mr. HOPKINS: I remarked that the situation was interesting constitutionally in that it was working both ways. My opinion was this: That the Divorce Act of Ontario conferred on the Province of Ontario all the laws of England as to dissolution and annulment, and that in my opinion would include the ancillary forms of relief. Those are the actual words, and therefore I would say there was an assumption of jurisdiction over these ancillary forms of relief by the Parliament.

Mr. PETERS: Does the legislation conferred by Confederation in the British North America Act, carry with it in section 102 the custody and maintenance and other provisions relating to matrimony in England at that time?

Mr. HOPKINS: In Ontario at that time the United Province of Canada did enact parliamentary divorces, but there was no general law providing for judicial divorce in force at that time. There was no inherited body of law at all in Ontario on divorce.

Mr. PETERS: Then speaking of the law of England at that time, I am trying to ascertain where the power is that allows Ontario in passing the act of 1931 to include things not spelled out in the substantive legislation passed by the federal Government in the 1930s.

Mr. HOPKINS: I said that in my view the broadness of the language in the federal act would include in the law of Ontario all the ancillary forms of relief set out in the Matrimonial Causes Act of 1857. Therefore I stated it could be said that Ontario assumed jurisdiction over such ancillary forms.

The CO-CHAIRMAN (*Senator Roebuck*): Was not that because we had not occupied the field at that time?

Mr. HOPKINS: This all depends on the Divorce Act (Ontario) 1930. That conferred on the provincial courts all the law of England as to dissolution and annulment. It is arguable whether they occupied the field or not. As I say it is of constitutional interest. I hope when the officials from the Department of Justice appear before us a decision will be reached on this. I assure you, as in every area of constitutional law, that formulating an opinion is no more than a prediction, a studied speculation as to what the Supreme Court of Canada might say. It is very hard to control the opinions of a body that is the judicial sovereign in this country.

Senator CROLL: Is there any case law on the point?

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

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

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

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

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

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

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

The case law in England has been fully dealt with in Rayden's *Practice and Law of Divorce,* in its Ninth Edition published in London by Butterworths, 1964. I think it is pretty well up to date. This is the source of what I am now saying.

"Legal cruelty" has 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. Where conduct over a period of years is relied on, it is very difficult to prove to the satisfaction of the court that there was reasonable apprehension of danger to health where actual injury is not proved. The fact that a marriage has broken down is not of itself a sufficient reason for a finding of cruelty. Deliberately inducing a belief in an adulterous situation may constitute cruelty where there is injury, actual or apprehended, to the other spouse's health; and wilful neglect to maintain, wilful refusal to maintain, may constitute cruelty or an act of cruelty in a series of such acts sufficient to justify a finding of cruelty. See, inter alia, *Russell* v *Russell,* (1897) A.C. 395, 467; *Jamieson* v *Jamieson,* (1952) A.C. 525, 544; *Simpson* v *Simpson,* (1951) p. 320, 328; *Gollins* v *Gollins,* (1963) 2 All E.R., 966; *Williams* v *Williams,* (1963) 2 All E.R., 994. (*Gollins* v *Gollins,* read with *Williams v Williams,* has been said to be "the most important decision on cruelty in modern times".)

To find cruelty it is not necessary to show actual physical violence. The general rule in all questions of cruelty is that all of the matrimonial relations between the spouses must be considered, specially when the alleged cruelty consists not of violent acts but of persistent and injurious reproaches, complaints, accusations, taunts, or "nagging". The knowledge and intention of the respondent, the nature of his or her conduct, and the character and physical and mental weaknesses of the spouses, must all be fully considered. It has been said that the divorce acts were not intended to punish but "to afford a practical alleviation of intolerable situations with as little hardship as may be against the party against whom relief is sought". See, inter alia, *King* v *King,* (1953) A.C. 124, 129, and the leading cases cited under the preceding paragraph.

Senator CROLL: What is the year of that decision—*Gollins* v *Gollins*?

Mr. HOPKINS: 1963.

Senator BURCHILL: Is the phrase "mental cruelty" used there at all?

Mr. HOPKINS: The way they treat that is that, unless it results in physical or mental deterioration in the person by whom the cruelty is alleged, it is not cruelty.

The CO-CHAIRMAN (*Senator Roebuck*): By the victim?

Mr. HOPKINS: In *Gollins v Gollins,* to which I have already referred as a very recent leading case—and, if I may say so, a sensible sort of case—the House of Lords held that an actual or presumed intention to hurt is not a necessary element in cruelty, the real test being actual or probable injury to life, limb or health. Lord Pearce in that case stated that when reprehensible conduct or departure from the normal standards of conjugal kindness caused injury to health or an apprehension of it, it was cruelty if a reasonable person, after taking account of the temperament of the parties and all the other particular circumstances, would consider that the conduct complained of was such that "this spouse should not be called on to endure it".

It is pretty hard to go much further than that.

Senator BURCHILL: That is pretty wide.

Mr. HOPKINS: It is a question of fact in each case whether the conduct of this man or this woman, or vice versa, is cruelty.

It has been held that a single act of violence might be so grievous as to constitute cruelty of itself, but that this is seldom the case. However, a single blow followed by minor injurious acts may be sufficient. Cruelty may well

consist of a course of conduct, and the more grave the original offence the less grave need be the subsequent acts complained of. But mere incompatibility of temperament does not constitute cruelty. See, inter alia, *Frombold* v *Frombold*, (1952) 1 T.L.R. 1522; *King* v *King*, (1953) A.C., 124, 130.

It has been held to be cruelty for one spouse to infect the other with a venereal disease, and a successful attempt by a husband, who knows he is suffering from venereal disease, to have intercourse against her will with his wife, who knows that he is so suffering, may amount to cruelty although in fact the disease is not communicated. See, e.g., *Browning* v *Browning*, (1911) p. 161.

Moreover, refusal of sexual intercourse without good reason, or insistence on inordinate sexual demands or malpractices may be cruelty where injury results to the spouse by reason of the refusal or practice. See, inter alias, *Walsham* v. *Walsham*. (1949) p. 350, 352. Any unnatural or perverted practices by a wife with another woman may constitute cruelty and may certainly be taken into account as part of a course of conduct amounting to cruelty. See *Gardner* v *Gardner*, (1947) 1 All E.R. 630.

Cruelty to the children of the marriage may be cruelty to the other spouse. See *Wright* v *Wright*, (1960) 1 All E.R., 678; *Cooper* v *Cooper*, (1955) p. 99.

Threats of personal violence, the use of offensive language, false accusations of adultery or of unnatural practices, if persistence therein gives rise to injury to health or reasonable apprehension thereof, constitute cruelty. See *Nevill* v *Nevill*, (1959) 1 All E.R., 619.

I think this is interesting and important. Drunkenness, gambling and wilful neglect to maintain are not cruelty *per se*, but may become so if persisted in, particularly after warnings that such conduct may be injurious to the health of the other spouse. See *Hall* v *Hall*, (1962) 3 All E.R., 518.

A spouse who provokes the cruelty complained of is not entitled to relief, but the provocation must be such as to deprive a reasonable person of self-control; the party must be acting under the stress of such provocation and the mode of expressing resentment must not be unreasonable. See *King* v *King*, (1955) A.C. 124, 129; *Robinson* v *Robinson*, (1961), 105 Sol. Jo. 950.

Desertion was not an offence known to the ecclesiastical law or the common law as founding a decree of separation from bed and board (*a mensa et thoro*) but section 19(b) of the Matrimonial Causes Act, 1857, made "desertion without cause for two years and upwards" a ground whereon a husband or wife might obtain such a decree. Moreover, by section 27 of the same act, such desertion if coupled with adultery was made a ground whereon a wife might obtain a divorce *a vinculo matrimonii*. By the Matrimonial Causes Act, 1937, desertion without cause for a period of at least three years, immediately preceding the presentation of the petition, was made a ground for divorce *a vinculo matrimonii*. The Act of 1937 is now consolidated in the Matrimonial Causes Act, 1950, as modified by the Divorce (Insanity and Desertion) Act, (1958, c. 54) and the Matrimonial Causes Act, 1963 (1963, c. 45). Copies of these statutes are annexed hereto as Appendix 4.)

The English courts have been strangely reluctant to define desertion, but in its essence it is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanentaly to an end without reasonable cause and without the consent of the other spouse. However, the physical act of departure by one spouse does not necessarily make that spouse the deserting party. Desertion is not a withdrawal from a place, but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state: that state of things may be termed, for short, "the home". There can be desertion without previous cohabitation, or without the marriage having been consummated, and the fact that a husband makes an allowance to a wife he has abandoned is no answer to a charge of desertion. The question is, as one judge said: Has there been a

"forsaking and an abandonment"? See, for example, *Edwards v Edwards*, (1948), p. 268; *Kinname v Kinnane*, (1954), p. 41; *Ingram v Ingram*, (1956), 390, 411; *Phair v Phair*, (1963), 107 Sol Jo. 554.

In calculating the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period, not exceeding three months, during which the parties resumed cohabitation with a view to reconciliation. Desertion as a ground for divorce differs from adultery and cruelty in that the offence of desertion is inchoate until the action is instituted. Desertion is a continuing offence. See, inter alia, *Jordan v Jordan*, (1939) 2 All E.R., 29, 33, 34; *Perry v Perry*, (1952), p. 203, 211, 212; *W. V W.* (No. 2), (1954), p. 486, 502.

Where a petitioner for divorce has at anytime been granted a decreee of judicial separation or an order having that effect, and the petition for divorce is based on substantially the same facts, a period of desertion immediately preceding such decree or order must, if the parties have not resumed cohabitation and the decree or order has been continuously in force, be deemed immediately to precede the presentation of the petition for divorce. See *Turses v Turses*, (1958), p. 54.

Desertion commences from the time when the *factum* of separation and the *animus deserendi* coincide in point of time. But a *de facto* a separation may take place without the necessary *animus*, as where the separation is by mutual consent or is compulsory—such as being stationed in South Vietnam or something like that. On the other hand, the *animus deserendi* may arise first and the factum only when the other spouse is in fact driven out of cohabitation. It is immaterial that the other spouse has ostensibly consented to the separation on the fraudulent misrepresentation that it is only for a limited time: if the respondent intended at the time of the withdrawal that it should be permanent, desertion arises at the moment of withdrawal. See, inter alia, *Harrison* v *Harrison*, (1910) 54 Sol. Jo. 619; *Legere v Legere*, (1963) 2 All E.R., 49, 58; *Beaken v Beaken*, (1948), p. 302; *Ingram v Ingram*, (1956), 1 All E.R., 875, 797.

Desertion, like other matrimonial offences, must be clearly proved. Corroborative evidence is not required as an absolute rule of law, but is usually insisted on, particularly as to the circumstances and terms of the parting. See *Stone v Stone* (1949), p. 165, 167, 168; *Lawson v Lawson*, (1955), All E.R. 341; *Barron v Barron*, (1950), 1 All E.R., 215.

Desertion is not established merely by ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the "driving out" is guilty of desertion. This is the doctrine known as "constructive desertion". See *Lawrence v Lawrence* (1950), p. 84, 86; *Gollins v Gollins*, above cited.

As to the relation between constructive desertion and cruelty, see *King v King*, (1953) A.C. 124; also *Gollins v Gollins*, above cited.

For further refinements and defences against charges of desertion, see *Rayden on Divorce*, pp: 183, 212.

Mr. PETERS: With respect to desertion, your wording indicated that it might be voluntary or involuntary. For instance, if a person becomes insane he has, in fact, deserted his spouse, but he has done so involuntarily. Would the same be true in respect of extreme alcoholism or drug addiction?

Mr. HOPKINS: Yes, that is correct.

Mr. PETERS: Have the courts in England decided any cases of that nature? Are there any cases that involve what I would call involuntary desertion?

Mr. HOPKINS: Yes, there have been such cases. The cases I have cited on that page of my submission are all cases of that type. The judgments I have

extracted were based on facts of that nature, and which called for such judgment.

Senator FERGUSSON: Are there any cases involving desertion which have to do with the fact that one of the spouses was sent to prison?

Mr. HOPKINS: That would not be desertion.

Senator FERGUSSON: Is there not any case where such was the fact?

Mr. HOPKINS: There might be states in the union where imprisonment itself, *per se,* is a ground for divorce. I have not gone through the laws of all the states in respect to this.

I have just one page left on unsoundness of mind, and that is my last contribution.

Unsoundness of Mind: Since the Matrimonial Causes Act, 1937, either the husband or the wife may petition for divorce (or judicial separation) on the ground that the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of a least five years immediately preceding the presentation of the petition, but if the neglect—and here is something somebody raised—or other conduct of the petitioner has conducted to the insanity, a decree may be refused. See *Chapman v Chapman,* (1961) 3 All E.R., 1105. That is, if the other spouse caused the insanity by actions, reproaches, *et cetera.*

As to continuity of care and treatment, the satutory requirements relating to the detention of persons of unsound mind must have been strictly fulfilled and non-compliance may have the effect of breaking the continuity of the detention. It is not provided—and I think this might be noted—by statute (in s. 1(2) of the Divorce (Insanity and Desertion) Act, 1958) that any break in the continuity of detention for a period of less than 28 days may be disregarded. Even before that statutory qualification, continuity of detention was not broken by a removal of a patient from one mental hospital to another, or to a general hospital for needed physical treatment where mental care is continued. See *Murray v Murray,* (1941) p. 1, 8; *Sevyner v Sevyner,* (1955), p. 11.

The court is not concerned with the degree of insanity: the phrase "incurably of unsound mind" describes a mental state which, despite five years' treatment, makes it impossible for the spouses to live a normal married life, with no prospect of improvement which would make it possible in the future. See *Whysall v Whysall,* (1960), p. 52; *Greer v Greer,* (1961) 605 Sol. Jo. 1011.

I thank you for your kind attention, and I apologize for going on for so long.

Senator CROLL: I have one question to ask. In Nova Scotia, where they have had a long tradition of divorce on the ground of cruelty, have they no case law of their own?

Mr. HOPKINS: Yes, but it is not very extensive or particularly helpful. There are a few cases, I think.

Senator CROLL: Have they followed the British precedent?

Mr. HOPKINS: Of course, they were ahead of the British.

The CO-CHAIRMAN (*Senator Roebuck*): Their reporting has been poor, has it not?

Mr. HOPKINS: Yes. If the committee would like me to provide it with such jurisprudence as I can dig up on cruelty as a ground in cases decided by the courts in Nova Scotia then I would be delighted to do so.

Mr. BREWIN: I was thinking of the fact that cruelty and desertion are both grounds recognized in other Canadian jurisdictions as a basis for granting alimony. In a study of divorce I think that those cases might well be looked at to see what they mean. Therefore, Messrs. Chairmen, it seems to me that it would be very helpful to have a few of the leading Canadian cases so that we

can see whether they vary in any way from the English jurisprudence. I suspect that our courts might prefer to look at their own decisions.

Mr. HOPKINS: Yes, it might be.

Senator ASELTINE: During the recess counsel might be able to do that.

Mr. HOPKINS: Yes. I am at the disposal of the committee. If cruelty, undefined, were enacted by Parliament as a ground then I think it would be optional to the courts to find their jurisprudence where they can. They might be guided more by the English precedents, because there it is a ground for divorce, rather than the Canadian precedents where it is not a ground for divorce but a ground for something else.

Mr. BREWIN: It is a ground for matrimonial judicial action.

Mr. MACEWAN: I think the ground in Nova Scotia is gross cruelty.

Mr. MCCLEAVE: In Nova Scotia they have tended to follow the practice or principles set out in the House of Lords case that was cited.

Senator CROLL: Mr. Chairman, it seems that we need some further enlightenment on the matter of insanity, because it may loom up as one of the things we should consider. The bones have been laid out for us, but in respect of divorce on the ground of insanity surely there must be more to it than that. I think that something should be presented to the committee in detail besides that which has been presented as to the law.

The CO-CHAIRMAN (*Senator Roebuck*): I suggest that we hear from Mr. Hopkins at a later date, after he has examined these several things that have been suggested. He can give us another brief on a later date.

Mr. HOPKINS: A supplementary brief.

The CO-CHAIRMAN (*Senator Roebuck*): Yes, a brief supplementary to this one.

Mr. MCCLEAVE: Mr. Chairman, I will ask the clerk of the Divorce Court in Nova Scotia to provide some decisions, and I will send them along to Mr. Hopkins.

The CO-CHAIRMAN (*Senator Roebuck*): That will be very useful.

Ladies and gentlemen, we have with us today, Mr. Justice Walsh, our own Commissioner, who was not only a lawyer of high standing before he came, but has since had wide experience in the handling of a very large number of the cases which we in the Senate have since made law.

Before Mr. Justice Walsh addresses us, I wish to express my appreciation for the labour, application and attention that our counsel gave to the address he presented to us. There is a vast amount of information in his words. I am glad they were reported, because I for one want to read them when they are in print, perhaps not just once, but many times. I am sure that the committee universally expresses this appreciation.

Senator ASELTINE: Hear, hear.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, we now have before us Mr. Justice Walsh. I cannot tell you what he is going to say, except that he will give us the benefit of his experiences as a distinguished lawyer and as the Senate Commissioner in the trial of a great series of both contested and uncontested cases.

The Honourable Mr. Justice Allison A. M. Walsh, Senate Commissioner: Mr. Chairman, ladies and gentlemen: I have not prepared a written brief for you today, but I have made a number of notes under certain headings with which I should like to deal.

Senator Roebuck mentioned my legal practice. While it was primarily of a commercial and corporation nature, I did do a certain amount of domestic work, in the course of which I handled a substantial number of legal separations in the Quebec courts, and probably four or five divorces a year through Parliament. Therefore, in some 20 to 25 years I appeared before the divorce committees 100 or 125 times under the old system. Since my appointment as Commissioner I have had an opportunity of dealing with some 2,000 petitions over a period of two and a half years. I am therefore in the position of looking at it from both sides of the picture, that of the practicing lawyer and the litigants, and from the point of view of someone sitting on the bench hearing the evidence.

The situation as to the existing law has been outlined for you by Mr. Hopkins, and he has dealt with the English law regarding possible enlargement of the grounds.

I understand that the terms of reference of this committee are quite wide, so I am going to confine myself to discussing possible new grounds for divorce, but will deal with the procedure generally and what I believe to be suggestions as to how it could be improved, and some of the problems that we encounter and will continue to encounter under whatever system we have. In doing so, I am going to be quite frank and I hope I shall not hurt anybody's sensibilities, because you may not all agree with some of the things I have to say.

In the first place, I believe that if any amendments are to be made so as to enlarge the grounds for divorce, Parliament by virtue of its jurisdiction over marriage and divorce should make such changes applicable throughout Canada, and not to certain provinces only. I think that as long as our Constitution remains unchanged and that power is vested in Parliament, it should be used for the whole of Canada and that the provinces of Quebec and Newfoundland should not be excluded. I think that would be a step backward.

The grounds at present are the same throughout Canada, with the exception of Nova Scotia which has the additional ground of cruelty. I think it is desirable that they should stay the same throughout Canada, whether extended or not, and I think from the practical point of view it is unrealistic to say, "Let Quebec and Newfoundland ask for the extended grounds if they want them."

There is a big difference between taking a positive step and merely riding with the tide. I do not believe any government in Quebec would wish to go on record passing a resolution asking for extended grounds for divorce. On the other hand, if Parliament by virtue of its authority did extend them I would be inclined to the view that there would not be any very serious outcry if this was legislation for all Canada at the same time. But if Parliament legislated for the other eight provinces and asked Quebec to pass a resolution, or some legislative body were asked to do so, to include Quebec in those extended grounds, I am sure that would never take place, at least, in the foreseeable future, and it would be a step in the wrong direction.

I do think that whatever body hears the cases on behalf of the Canadian Parliament, it has to, in the present state of our Constitution, confine itself merely to dissolving or annulling the marriage, as the case may be.

I know there are two schools of thought about whether the question of alimony and custody of the children is not an ancillary right arising out of the law of marriage and divorce. However, I myself belong to the school of thought that holds that it is a matter of property and civil rights, and that to attempt to give any federal court or federal body itself authority to make rulings dealing with custody of the children or alimony would be very offensive to Quebec and to the whole system of Quebec law.

In Quebec you have a system of community of property and alimony depends in part on the value of the community property and the assets the wife

is going to receive from it. It is all intertwined. I do not think any court except a Quebec court can deal with alimony or custody of the children in Quebec, but should confine itself to the dissolution or annulment of marriage.

Admittedly, that has certain practical difficulties, but they are not as bad as might be assumed under the present system. The question of custody of the children and alimony is frequently dealt with in the Superior Court of Quebec first, but even more frequently the parties simply agree on it. It is not too often, in an uncontested case, that there is any real dispute as to who is going to have the children. Normally young children would remain with the mother in any event, and more often the father does not want to have their custody, so I would say that in 60 or 70 per cent of the cases the custody of the children is not really in issue; and in about 20 or 25 per cent more cases it has already been settled in the courts of the province, and so also has the question of alimony.

It is unfortunate that under Quebec law a wife herself, following a divorce, has no right to alimony, but I do not think the Parliament of Canada can change that; I think that is a matter of provincial law.

The right to alimony in Quebec exists from the relationship between husband and wife, between parent and child, and when the husband and wife relationship ceases, the right to alimony ceases. However, that does not mean the wife cannot continue to receive alimony for the children, if there are children who are still dependent on her and in her custody.

Those are questions that we have now, and I do not think they can be altered. However, I think in practice the Quebec courts, or agreement between the parties—and the same would apply to Newfoundland—can still deal with them, while in Ottawa we should concern ourselves solely with the question of dissolution or annulment of the marriage, which the Quebec courts do not deal with—except for certain annulments—and, I would venture to submit, never will agree to deal with.

I should like to say a word about the present procedure. It is a great improvement over the old procedure. It does not have to go through both houses now, and has the advantage that the Commissioner can sit all the year round, save for holidays. The sittings are not dependent upon Parliament being in session. However, there are still a great many disadvantages. I am sure the Chairmen will agree with me. One disadvantage is that although the hearings can continue, the petitions cannot proceed any further unless the Senate is in session.

We had a situation last year where petitions heard in, say, the second week in June could not be dealt with before Parliament adjourned. Because of the prorogation and because of the election—which admittedly does not happen every year—it was January before Parliament met again and February before they could be dealt with by the Senate. Therefore, in some cases we had petitions which already waited eight months, although they had been heard, before Parliament could approve them.

That causes great hardship to many people, there may be adulterines or other children concerned, and there may be remarriages prevented. Although this long delay does not happen every year, it happens to a lesser extent.

There is not, as a rule, such a long delay between sessions, but this delay is one of the disadvantages.

The second disadvantage is that there is a great deal of paper work involved, which would not be necessary under another system.

There is a great loss of time involved. The Senate committee, very properly, if they are going to have to decide whether to agree with the commissioner's recommendation or not, must have a fairly complete summary of the evidence before then. They cannot be expected to agree with it blindly. This means that, after the hearing, the commissioner has to dictate a very

lengthy resumé, summarizing every item of the evidence that is at all relevant, and that has to be prepared and read and signed by him before it goes to the committee. So that only about half his time is spent in hearing evidence. If he were sitting as a court, as any other court he could say "granted" or "rejected", as the case may be, without the necessity of writing a lengthy judgment—unless it were a contested case or some particular point of law were involved. At present, even in the most simple and clear-cut case, it is necessary to write these lengthy judgments or reports.

After the committee has approved it, there is a great deal more paper work involved. There are five different stages it has to pass through before the Senate completes dealing with it. The report of the committee has to be drawn up and signed by the chairman. The formal resolution has to be drawn up, it is signed by the chairman of the committee and by the commissioner who heard the case.

Then the journals of the Senate contain the introduction of the petitions. Then they contain the reports. On the next day, the reports are approved. Then, the same day or the day after that, the resolution has to be introduced. Then, after 48 hours, the resolution has to be approved. That makes five separate steps, all of which involve a great deal of paper work and are time consuming.

The CO-CHAIRMAN (*Senator Roebuck*): I can confirm that.

Mr. Justice WALSH: The third problem that arises under the present system is—as I think the chairman will agree—the appeal provisions, which are really hopelessly inadequate. Within 30 days after a resolution has been passed, either party can appeal. Presumably the person who gets the resolution is not going to wish to have it reopened. To do so, a person has to proceed by introducing an act of Parliament. Then there is a new hearing which in this case would take place before the committee itself—and not, I take it, by the commissioner. It is a very cumbersome thing. Unless there were new and different evidence, you are really asking the committee to consider reversing itself, because it is the same committee which has already heard the commissioner's report and read and approved that report. Therefore, to a certain extent, unless there are new factors or evidence, it really is a case of asking the committee to reverse itself.

It provides no appeal whatsoever for the losing party—which is perhaps the most serious and unavoidable defect in the present system. There is an appeal within 30 days after the resolution is passed; but if the petition is dismissed there is never a resolution so in that case there is no appeal because the case never goes to the Senate in the form of a resolution.

The CO-CHAIRMAN (*Senator Roebuck*): He could still introduce his bill.

Mr. Justice WALSH: Yes, he could introduce a bill.

The CO-CHAIRMAN (*Senator Roebuck*): He has the same appeal as the present respondent has. He has not under the provisions of the new act but he has the old provisions that have always existed.

Mr. Justice WALSH: I see. Under the old procedure. Another problem is that there is not adequate provision—again, the chairman and I have discussed this—for defaulting witnesses. The procedure whereby they could be brought before the bar of the Senate by the Gentleman Usher of the Black Rod is simply not practical. It cannot be done out of session; and during sessions we have not used it because it is cumbersome. So it means that a witness can ignore a subpoena and there is nothing you can do about it.

Those, I think, are valid reasons why the present system, although it is working reasonably well, has serious objections.

I feel, though there are many who will not agree with me, that the sooner these cases are referred to the Exchequer Court as such, the better. You have there is a federal court which gets its jurisdiction from the federal Parliament. Parliament can give it the jurisdiction, in the same manner as they can amend the grounds for divorce. They can amend the Judges Act, to provide additional

judges, if necessary. They can provide the physical space requirements for the hearing of cases.

The provinces would not be involved in any way, if these cases were referred to the Exchequer Court.

Divorce would not be facilitated in any way in the sense that it would not be any easier to get a divorce.

I like to think that, in my hearings and in those of Mr. Justice Cameron, we make a very strict inquiry into all the facts put forward and watch for any attempt at perjury, and we believe that if these cases were transferred to the Exchequer Court, sitting as such, that court would continue to do the same under the new system. Therefore, I am not aware that Quebec Province would have any serious objection to that. The people in Quebec who object to the present system would still object to the new one, but those who do not object to the present system would have no reason to object to the cases being heard by the Exchequer Court sitting in Ottawa.

At present, these hearings are held by Exchequer Court judges sitting under the divorce rules. The step from there to having the cases heard by an Exchequer Court judge sitting in that capacity is a very minimal one and I doubt if it would cause any objection.

That system would have various advantages. One is that there would be a variety of judges who could hear these cases. It might be necessary to appoint additional judges but they would rotate on it and one person would not be left doing nothing but divorce work for his life, as it might be at present. I personally feel not only that it is not an assignment one would want to continue for life but that it is not good for any judge to hear just one type of case. After three, four or five years, inevitably he will become somewhat stale at it and a fresh approach would be better. I think it is more desirable that there should be three, four, five or six different judges contributing to the jurisprudence on the matter and hearing the cases, than that one or two judges should do nothing else indefinitely.

Secondly, this new proposal would avoid those difficulties that I raised about the delays when Parliament is not in session. If a court could have three or four terms a year, for divorce cases, it would mean that, except for the summer recesses, the judgments could be rendered and the divorce granted or rejected immediately after it was heard.

Thirdly, there would be a proper appeal, in that appeals from the Exchequer Court go to the Supreme Court. Some people have expressed alarm that the Supreme Court might be swamped with work as a result of this. My experience does not indicate that. About 800 cases are heard per year now. Only about 40 of them are contested, the other 760 are uncontested. Of those 40 contested cases, less than half are seriously contested. In the case of half of them the contestation is frivolous or to obtain delay and perhaps retain rights to alimony. In some cases the evidence is so weak that the petitioner's attorneys are unwilling to submit it to a hearing.

That means you get about 20 cases a year where there is serious contestation. Of those 20, 15 or 16 would involve questions of fact only. Only four or five would involve questions of law, and the higher courts will not interfere with the discretion of a lower court, properly exercised, on questions of fact alone. This means you may get down to the point where there might be four or five appeals a year to the Supreme Court from the Exchequer Court decision in divorce cases, and that those would all involve serious points of law which should be decided by higher courts, and then the decisions could be followed by other courts and a real jurisprudence would develop in Canada for our system. I think from that point of view alone it is very desirable.

Now as to the question of flexibility, I venture to suggest—and I know our Chairman would disagree with this point of view; in fact I think he has already stated so—but if the grounds are changed and extended, I believe there will be a substantial increase in the number of petitions presented. I think it is inevitable that of the people who cannot bring themselves within the existing grounds of adultery alone but have been waiting for an opportunity to dissolve their marriages if desertion and insanity are included and perhaps some other grounds, there will certainly at first be a number who will immediately take advantage of the extended grounds and instead of having 800 a year we will find that we will have 1,500. At the present time the Senate can barely cope with the 800 a year. With Mr. Justice Cameron hearing contested cases one day a week, and myself hearing the uncontested cases four days a week, we can just about keep abreast. If the number were doubled, you would need to double the number of Commissioners, the number of court clerks, the number of verbatim reporters and the number of staff generally. The paper work would become so colossal that I am afraid we would reach a bottleneck again. There would be a danger of that in any event.

There would, moreover, be historical precedent for referring cases to the Exchequer Court. In Great Britain it is the Exchequer Court which is the Court of Admiralty, Probate and Divorce. Here probate is a provincial matter, but the Exchequer Court has jurisdiction in admiralty and it could quite properly have jurisdiction in divorce. The arguments that Exchequer Court judges should not sully their hands with divorce are not valid. In England it is the higher courts which handle divorce. I frequently have cited decisions by Lord Denning who is Master of the Rolls, and decisions from the House of Lords. If it is not beneath them to deal with divorce it is not beneath any court to deal with it in a legal and proper manner.

Now as regards the possibility of extending the grounds for divorce with which this committee is perhaps primarily concerned, I shall not have too much to say because you will be hearing much about that from other witnesses. I want to say that if the objective or one of the objectives is to cut down on the amount of perjury being committed, I don't think a change would have that result. One often hears it said that most of the divorce evidence is fabricated. It would be adopting an ostrich-like attitude to say that no case ever approved by the Senate was approved on perjured evidence, but I would venture to suggest from my own experience that there is a great deal less than many people think.

I had occasion a few months ago to make a study for Senator Roebuck of the last 200 cases I happened to hear. In 134 cases there was a common law relationship and in another 33 the adultery had taken place on several occasions either in the respondent's home or in the co-respondent's home and there was every indication that it could not have been fabricated. Only 28 of these took place in hotels or motels with the husband being the respondent and only five took place in hotels or motels with the wife being the respondent. That is only 15 per cent which depended on hotel on motel evidence, and of that number a great many would undoubtedly be genuine. It is certainly not inconceivable that the man who goes out on the town and picks up a woman in a night club or some place like that would go to a hotel or a motel. The mere fact that the adultery took place in a hotel or a motel should not make us believe that it is not genuine. So we come down to the situation where 5 or 10 per cent of the total could be fabricated. Of course if it is found in a case that there is fabricated evidence, it is dismissed, and a prosecution taken.

Now I don't think that by extending the grounds to cruelty and desertion and so on, the what I might call immoral element will be gone and that nobody will commit perjury to get a divorce. Frankly I don't think you will get rid

of that. It is as easy to lie about cruelty as it is to lie about adultery. A petitioner can say that her husband has beaten her up four or five times and she may not be telling the truth. In the case of desertion, a wife may have left her husband for good and sufficient cause. Would this be a ground then for proceedings by him for desertion? There will still be some people, no matter what the law is, who will try to get around it. I don't think that would be a main reason for changing it. I think there are many things that can go wrong with a marriage that are as bad as if not worse than adultery. Constant physical cruelty can be as damaging to a marriage as adultery. But I am very much afraid of the undefined ground of cruelty. I do not like the idea of mental cruelty as a ground. If I were called to interpret cruelty I would interpret it very strictly. When you admit the ground of mental cruelty, you get into a situation where a wife sues for divorce because the husband forgot to get her flowers for her birthday and he did not take her out to dinner. We do not wish to go as far as the American courts have gone in that direction.

I recognize there can be such a thing as mental cruelty, but it would have to be extreme to be allowed as a ground for divorce.

The Co-CHAIRMAN (*Senator Roebuck*): You think it could be excluded entirely from cruelty?

Mr. JUSTICE WALSH: I think it is something the committee might consider. The committee might consider whether to define cruelty as something of a repeated and continuous physical nature.

The Co-CHAIRMAN (*Senator Roebuck*): That is injurious to health?

Mr. JUSTICE WALSH: Yes.

The Co-CHAIRMAN (*Senator Roebuck*): Would you exclude injury to mental health? For instance I heard of one case recently where a woman persistently called her husband up on the telephone at two, three or four o'clock in the morning and worried him to the extent that he became insane. This is the story as it was told to me, at all events. He was confined to a mental hospital. Would that be within your idea of cruelty?

Mr. JUSTICE WALSH: I would think in a case like that where there is corroborating evidence from a doctor to say that the cruelty had been injurious to health it would be acceptable. But you would have to make evidence other than that of the petitioner himself.

The Co-CHAIRMAN (*Senator Roebuck*): You would not exclude mental cruelty?

Mr. JUSTICE WALSH: No, I would not exclude it 100 per cent, but how would you define the nature of mental cruelty? Would you add the words "which has injured or tended to injure the health"?

The Co-CHAIRMAN (*Senator Roebuck*): Do you think we could leave a discretion in these matters to the common sense of Canadian judges?

An Hon. MEMBER: Or to commissioners?

Mr. JUSTICE WALSH: I would like to hope so, certainly. But it is a difficult matter to draw a dividing line in what gradually gets eroded away, and when it comes to a question as to what is mental cruelty I am afraid you reach the stage where witnesses who are quite prepared to embellish their story with perjury would get relief while those who are honest would not. Cruelty unless it is corroborated can very easily be fabricated in an uncontested action.

The Co-CHAIRMAN (*Senator Roebuck*): But you would leave the question of corroboration to the judge, would you not?

Mr. JUSTICE WALSH: Yes, definitely. One of the other grounds that have been suggested is that bona fide desertion would serve as a ground for divorce. I think it is up to the courts to try and separate out the cases of genuine desertion

from mere mutual agreement to separate. If two parties agree to live apart and intend to get a divorce, you are going to have divorce by consent after a three-year delay. I think it has to be real desertion and not mere separation. In the case of real desertion, inevitably you have to enter into the question of fault: who deserted whom?

The insanity ground, I think, is good.

The CO-CHAIRMAN (*Senator Roebuck*): Commissioner Walsh, if we drew the bill up saying desertion without due cause—something of that kind—could we not leave the interpretation of it to the courts?

Senator ASELTINE: I agree, Mr. Chairman.

Mr. JUSTICE WALSH: I would think so.

The CO-CHAIRMAN (*Senator Roebuck*): You would not attempt to define it in a particular way?

Mr. JUSTICE WALSH: No.

The CO-CHAIRMAN (*Senator Roebuck*): You would not bind judges in their decision as to what is desertion?

Mr. JUSTICE WALSH: No, I think we have to develop a Canadian jurisprudence on it.

Regarding the other grounds that have been dealt with lightly by Mr. Hopkins, insanity under the existing English jurisdiction is very restrictive. If a person has to be continuously in an institution for five years, well, under modern methods of treatment they normally let a person out for a month or two on parole, and then he has a relapse and has to go back again, and then is paroled out to the custody of relatives, and goes backwards and forwards. A person may be more or less constantly insane, but to require him, without intermission, to be committed to an institution for five years is perhaps too strict. A schizophrenic may be in an institution two or three times a year, but in between times is out. I think perhaps the British jurisprudence is too restrictive on that.

One of the things you have to watch for, in insanity in Quebec arises from the fact that the husband is not responsible to his ex-wife for alimony, so you would have to be careful, if it were the husband bringing divorce proceedings from Quebec on the basis of insanity of his wife, that he was not merely making her a charge on the state and doing it solely to avoid his financial obligation to support her. There might be the necessity to put in a requirement, in the case of a petition by her husband, that, if he is financially able to do so, he be required to make provision for his insane spouse.

The CO-CHAIRMAN (*Senator Roebuck*): That is something we should remember.

Senator ASELTINE: Mr. Chairman, I have to go, but I would like to make one suggestion to his lordship that would solve the problem entirely that he raised a short time ago with regard to the hearing of divorces from Quebec and Newfoundland, as we are hearing them now. All we have to do is to amend the Exchequer Court Act and give that court complete jurisdiction with regard to Quebec and Newfoundland, if they do not want to set up courts themselves. That would eliminate all this paper work you speak of, and I would be willing to bring in another bill like the bill I brought in in 1956 to that effect, if the committee decided that were the appropriate step to take.

Mr. PETERS: The Senate did not support us two years ago when we tried to do this.

The CO-CHAIRMAN (*Senator Roebuck*): That is two years ago.

Mr. JUSTICE WALSH: The ground of repeated imprisonment of a husband is another ground where certainly I can see the wife suffers greatly when the

husband is a repeated offender, but it has to be carefully drawn to make it apply only to the case of a person who is practically an incurable offender because certainly one of the factors which the parole board and criminologists consider important in the rehabilitation of criminals, is that it is important that they have a home to come back to. 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. I think certainly the grounds for divorce should be extended. I like the English law. I think it goes far enough without going too far. I think it covers most of the genuine cases of marriage discord without falling into the weakness of some American states or Mexican divorces, or of giving a divorce by consent.

There are two other brief comments I would like to make. It has been suggested by some people that there be some form of compulsory counselling or reconciliation procedure effected before the final decree is entered. I hate to say it, but I think from the practical point of view that would be worthless. Marriage counselling can do a great deal for people when the marriage is beginning to break up; it can be very valuable before marriage as a preparation for marriage; and when the parties are still trying to make a go of it marriage counselling can help and very often does; but by the time they separate and they have evidence of adultery for a divorce and they have paid very substantial fees to attorneys for it, and the delays have gone by and they come to Ottawa to testify it is too late. We always ask if there is any chance of a reconciliation, and in 2,000 cases I have heard I have never had one where there has been a reconciliation at the hearing. I venture to suggest that if the decree were delayed for two or three months and they were ordered to go to a marriage counsellor you would still get the same result. Either the petitioner has become so embittered that he or she would not have the respondent back, or the respondent has no desire to come back, and, quite often, both.

Senator FERGUSSON: This is just your opinion.

Mr. JUSTICE WALSH: Yes, this is just my opinion.

Senator FERGUSSON: I think there are jurisdictions in which it has been used. I cannot give any particular statistics on it, but I think it has proven to be successful in some instances.

Mr. JUSTICE WALSH: Yes, it might be, but I think it would be minimal—perhaps one case in 500, or something. Now of course I have not seen the statistics.

Senator FERGUSSON: No.

Mr. JUSTICE WALSH: Of course we have a considerable delay still. There is this 60-day delay after service before the time for hearing so that there is, at the very least, a delay of three months after the evidence has been obtained. I think the delay should be retained to give the parties the chance to get together, but I wonder whether a further delay after the hearing is going to prove beneficial.

The CO-CHAIRMAN (*Senator Roebuck*): There are quite a number of withdrawals.

Mr. JUSTICE WALSH: Yes, before the hearing. We have reconciliations where the parties get together and withdraw.

Mr. WAHN: Many of the specific grounds which have been mentioned by the witness have been cases of wrong-doing on the part of the defendant or respondent. In his view, would it be better to generalize and apply for a divorce where it is clear to the court there has been a complete breakdown of the marriage without any possibility of reconciliation, rather than to try to list a large number of specific instances which are merely probably evidence of a

marriage breakdown? In other words, would it be his view, based on his past experience, that it would be desirable to base findings for a divorce on the theory of marriage breakdown rather than list a large number of specific offences on the part of the defendant which would justify the petitioner in getting a divorce? For example, insanity is not really a question of fault on the part of the defendant or respondent, but does involve the breakdown of a marriage.

Mr. JUSTICE WALSH: I think the real problem is—and the committee is far better qualified to deal with that than I am—that when you eliminate the concept of fault altogether you reach a stage of divorce by consent after a period of time. It is true the breakdown has to be scrutinized to see whether there are grounds for it, but you would get the case where the petitioner says, "This marriage is hopelessly broken up. I cannot go ahead," and the respondent agrees, and the court has to accept that conclusion. I think the danger is that if you eliminate grounds for a divorce and make it solely a question of the breakdown of the marriage you get divorce by consent and run into all sorts of theological and philosophical objections to the breakdown of the marriage.

Mr. AIKEN: Further to Mr. Wahn's question, do you not now often find the court on the defensive? In other words, in these uncontested cases they will be just as much on the defensive against a divorce by consent as they are now against divorce by default. I am supporting Mr. Wahn's view, that the court, even if the action was based on the breakdown of marriage, would still have to satisfy itself that there was a bona fide breakdown and that it was not just a matter of convenience. It would be a double protection, and not the single one that you have now.

Mr. JUSTICE WALSH: In answer to that I will say that I think there is some merit in the Queen's Proctor system that they have in England. It would be helpful to the court if there were some official who could make an independent investigation in cases where there is doubt. If I feel there has been perjury committed, or something of that nature, I can refer the matter to the chairman, and he can refer it to the Minister of Justice, who refers it to the R.C.M.P. who will investigate it, but that is a cumbersome procedure and we have to be reasonably certain an offence has been committed before using it. Every day I hear cases in which I do not believe that a certain witness lives at a certain address, or that he signed the register at a certain hotel, and I think it would be useful if there were someone who could check those things.

If you were going to have a divorce depend upon a hopeless breakdown of the marriage rather than in a defined fault, then you would almost always have to have a third party witness, other than the parties themselves, and have an independent investigation which would involve a large investigative staff, whether it be done by an officer such as a Queen's Proctor or someone else.

Mr. MCCLEAVE: How many cases from Newfoundland do you hear?

Mr. JUSTICE WALSH: I would say from 12 to 15 a year. That is out of a total of 800.

Mr. MCCLEAVE: Are some of these cases decided on evidence by affidavit?

Mr. JUSTICE WALSH: They can get permission to file affidavits in cases of financial need, and that very often happens. We will often hear the evidence of the petitioner by affidavit provided that other witnesses are present to prove the adultery, or conversely we will accept affidavit evidence as to the adultery if the petitioner is present. But, we will not decide cases solely upon affidavit evidence.

Mr. MCCLEAVE: You make no recommendation in regard to divorces from Newfoundland? Newfoundland is a great distance from Ottawa. What do you

think of the idea of an *ad hoc* commissioner who could live in Newfoundland and hear cases in that province, or even of the idea of you going there?

Mr. JUSTICE WALSH: I did not speak about Newfoundland because I am not all familiar with the situation there. I would think that Newfoundland has the remedy in its own hands. It could set up its own divorce court quite readily. So far as having an *ad hoc* commisisoner going there is concerned, I am inclined to believe that as long as we have the present procedure under the Senate then the commissioner has to sit in Ottawa. I do not think he could sit elsewhere than in Ottawa. I think we had an opinion on that at the start.

The CO-CHAIRMAN (*Senator Roebuck*): Aside from the opinion—by the way, I do not agree with it—and from a practical standpoint, what do you say?

Mr. JUSTICE WALSH: I think it is desirable to go a step further, to my recommendation that it be referred to the Exchequer Court, although there I think you might run into serious objections from Quebec unless there were a proviso to the effect that it be the Exchequer Court sitting in Ottawa. Of course, the Exchequer Court can sit anywhere, but the moment you have it sitting in Quebec on divorce you will then be accused of setting up a federal divorce court in that province. As long as it sits in Ottawa I do not think there will be any great objection from Quebec. If you put in the proviso that the court has to sit in Ottawa on divorce then you eliminate the possibility of a judge going to Newfoundland, but there might be some way around that. Newfoundland might request that the hearings be held in that province. Perhaps it could be provided that the court would have to sit with respect to divorce in Ottawa unless a request were received from the Attorney General of the province, or some other official, that it sit in the province.

The CO-CHAIRMAN (*Senator Roebuck*): I think we have reached the end of our allotted time, but before we adjourn there is one matter that we must attend to. There were four appendices which Mr. Hopkins asked to be printed in the record of today's proceedings. Is it the wish of the committee that they be printed?

Senator BURCHILL: I so move.

Mr. MCCLEAVE: I second the motion.

The CO-CHAIRMAN (*Senator Roebuck*): Then that is carried. I ask the members of the Steering Committee to stay for a few minutes.

The committee adjourned.

APPENDIX No. 1

ACTS OF THE PARLIAMENT OF CANADA RELATING TO DIVORCE

(1) Acts of General Application

MARRIAGE AND DIVORCE ACT

(R.S.C. 1952, c. 176)

1. This Act may be cited as the Marriage and Divorce Act.

Marriage

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.

Divorce

4. In any court having jurisdiction to grant divorce *a vinculo matrimonii* any wife may commence an action praying that her marriage may be dissolved on the ground that her husband has since the celebration thereof been guilty of adultery.

5. If the court is satisfied by the evidence that the case of the wife has been proved, and does not find that the wife has been in any manner accessory to or has connived at the adultery of her husband, or that she had condoned the adultery complained of, or that the action was commenced and is prosecuted in collusion with the husband or the woman with whom he is alleged to have committed adultery, then the court shall pronounce a decree declaring such marriage to be dissolved; but the court is not bound to pronounce such decree if it finds that the wife during the marriage has been guilty of adultery, or if the wife in the opinion of the court has been guilty of unreasonable delay in presenting or prosecuting such action or of cruelty towards the husband, or of having deserted or wilfully separated herself from the husband before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

6. Nothing in sections 4 and 5 affects, restricts, or takes away any right of any wife existing before the 27th day of June, 1925.

DIVORCE JURISDICTION ACT

(R.S.C. 1952 c. 84)

1. This Act may be cited as the Divorce Jurisdiction Act.

2. 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 and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jursidiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds

that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

(2) Acts from which Jurisdiction is Derived

NORTH-WEST TERRITORIES AMENDMENT ACT, 1886

(49 Vict. c. 25)

[Note: Section 3 is the only section applicable.]

3. Subject to the provisions of the next preceding section the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

AN ACT RESPECTING THE APPLICATION OF CERTAIN LAWS THEREIN MENTIONED TO THE PROVINCE OF MANITOBA, 1888

(51 Vict. c. 33)

1. Subject to the provisions of the next following section the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the fifteenth day of July, one thousand eight hundred and seventy, were from the said day and are in force in the Province of Manitoba, in so far as the same are applicable to the said Province and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the said Province, or of the Parliament of Canada.

2. [Not applicable.]

3. [Saving of existing rights.]

DIVORCE ACT (ONTARIO)

(R.S.C. 1952, c. 85)

1. This Act may be cited as the Divorce Act (Ontario).

2. The law of England as to the dissolution of marriage and as to the annulment of marriage, as the law existed on the 15th day of July, 1870, in so far as it can be made to apply in the Province of Ontario, and in so far as it has not been repealed, as to the Province, by any Act of the Parliament of the United Kingdom or by any Act of Parliament of Canada or by this Act, and as altered, varied, modified or affected, as to the Province by any such Act, is in force in the Province of Ontario.

3. The Supreme Court of Ontario has jurisdiction for all purposes of this Act.

BRITISH COLUMBIA DIVORCE APPEALS ACT

(R.S.C. 1952, c. 21)

1. This Act may be cited as the British Columbia Divorce Appeals Act.

2. The Court of Appeal of the Province of British Columbia shall have jurisdiction to hear and determine appeals from an order, judgment or decree of a court of the Province or a judge thereof having jurisdiction in divorce and matrimonial causes.

12 ELIZABETH II

CHAP. 10

An Act authorizing the Senate of Canada to Dissolve or Annul Marriages.

[*Assented to 2nd August, 1963.*]

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 *Dissolution and Annulment of Marriages Act.*

Marriage dissolved or annulled.

2. (1) The Senate of Canada may, on the petition of either party to a marriage, by resolution declare that the marriage is dissolved or annulled, as the case may be, and, subject to the provisions of subsections (2) and (3), immediately on the expiration of thirty days from the date of the adoption of the resolution the marriage is dissolved or annulled, as the case may be, and shall be null and void, and thereafter either party thereto may marry any person whom he or she might lawfully marry if the said marriage had not been solemnized.

Operation of resolution suspended.

(2) If, before the expiration of the thirty days referred to in subsection (1), a petition to the Parliament of Canada by either party to a marriage in respect of which a resolution for its dissolution or annulment has been adopted by the Senate, together with a draft bill based thereon and the required fee, is filed with the Clerk of the Parliaments praying for the passage of an Act annulling of modifying such resolution, the operation of the resolution shall be suspended until an Act based upon the petition has received Royal Assent, whereupon the resolution shall have no force or effect or shall have such other force and effect as may be prescribed in that Act.

Resolution to have full force and effect.

(3) If the bill referred to in subsection (2) is disposed of otherwise than by becoming law or by reason of prorogation or dissolution of Parliament, the resolution dissolving or annulling the marriage shall have full force and effect on the date on which the bill has been so disposed of.

In case of prorogation or dissolution.

(4) Where a petition or a bill seeking the annulment or modification of a resolution of the Senate dissolving or annulling a marriage has been disposed of by reason of prorogation or dissolution of Parliament, and a new petition and a draft bill to the same effect are not filed with the Clerk of the Parliaments within thirty days of the commencement of the next ensuing session of Parliament, such resolution shall come into force on the expiration of such thirty days. If such petition and draft bill are so filed within such thirty days, the operation of such resolution shall be suspended in accordance with the provisions of subsection(2).

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,

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.

Rules and orders.

4. The Senate may make such rules and orders respecting petitions for dissolution or annulment of marriages, the procedure at hearings theron and all other matters as it considers necessary or desirable for the carrying out of the provisions of this Act.

Evidence of dissolution or annulment.

5. Evidence of a resolutiion of the Senate declaring that a marriage is dissolved or annulled may be given by the production of a copy of the resolution purporting to be under the seal of the Clerk of the Parliaments and signed by him or on his behalf.

Application of Act.

6. This Act shall apply in respect of any petition for the dissolution or annulment of marriage presented to the Senate of Canada, and not reported upon by the Senate Standing Committee on Divorce before the coming into force of this Act.

APPENDIX No. 2

THE NEW SYSTEM OF PARLIAMENTARY DIVORCE

E. Russell Hopkins

What follows is a general account, in historical context, of the system of parliamentary divorce inaugurated during the session of Parliament which concluded in December, 1963. The new system, both novel and experimental, has been in operation only since January, 1964. While it is difficult, as yet, to appreciate all its implications, the importance of the subject provides a plausible warrant for the present attempt. As will be seen, the new system makes a significant contribution to the conservation of the time and effort of the House of Commons, and thus to the streamlining of the procedures of Parliament as a whole.

In eight of the 10 provinces of Canada, and in the Territories, there exist courts having jurisdiction to dissolve marriages on the ground of adultery. (Cruelty constitutes, for historical reasons, an additional ground in Nova Scotia.) In the remaining two provinces, Quebec and Newfoundland, the courts have no jurisdiction to grant divorces, although they are empowered to afford certain other forms of matrimonial relief, such as judicial separation and nullity. These two provinces adhere, on religious grounds, to the principle of English canon law applied by the ecclesiastical courts before the establishment of divorce courts in England in 1857. This principle is that a marriage, once properly made and consummated, is indissoluble on any ground. There has been no attempt by the Parliament of Canada to confer an unwanted divorce jurisdiction on the courts of Quebec or Newfoundland, although by the British North America Act of 1867 it has sovereign and exclusive legislative power to make laws with reference to marriage and divorce.

However, it was not contemplated by the authors of Confederation that the people in those two provinces, who do not share the moral and religious objections to divorce entertained by the majority, should be denied that form of matrimonial relief. The legislative power of the Parliament of Canada includes power not only to pass general legislation relating to divorce but also to pass acts dissolving particular marriages. Ever since Confederation, Parliament has been prepared, in an appropriate case, to pass a private act dissolving a marriage, on the ground of adultery, on the petition of a person domiciled in Quebec or Newfoundland.

At present the grounds on which Parliament will grant a divorce are the same as those applied by the divorce courts in England in 1870. The one exception is that in England in that year, while a husband could obtain a divorce on the ground of his wife's adultery, a wife could obtain a divorce only on the ground of her husband's adultery if it was coupled with incest, bigamy, cruelty or desertion (she was also entitled to a divorce on the grounds of rape, sodomy or bestiality on the part of her husband). The Parliament of Canada, on the other hand, has always been prepared to grant a divorce to a wife on the ground of her husband's adultery alone.

Similarly, Parliament has always been empowered to grant a divorce at the instance of a petitioner domiciled anywhere in Canada. However, on the general theory that Parliament will not interfere when an alternative remedy is available, petitions for divorce have been heard only when the petitioner was

domiciled in Quebec or Newfoundland, or where there was at least a genuine doubt about his domicile.

The preamble to the British North America Act of 1867 declared that it was the desire of the federating provinces to have a constitution "similar in principle to that of the United Kingdom." The British Parliament, by virtue of its sovereign legislative power, had always possessed the authority to pass acts dissolving or annulling marriages, even before the establishment of divorce courts in 1857. It was not unnatural, therefore, that the Canadian Parliament should exercise the same jurisdiction following Confederation.

The enactment of bills of divorce by the Parliament of Canada was quite rare until about 1900. However, from that year onward these bills have been presented in increasing numbers; recently 400 or 500 have been passed in each session. Even this progressive increase did not cause undue concern among parliamentarians until 15 years ago. The system had operated tolerably well, without any noticeable public clamour for its reform or vocal objection from the two provinces concerned. Senators and members of Parliament from Quebec did not serve on the divorce committees of either House and regularly registered their opposition to divorce in principle by calling out "on division" whenever divorce bills were called for their readings. This did not prevent the bills from passing, but simply indicated, for the record, that they were not being passed unanimously. The principal work, including the hearing of actual evidence, was done by the Staning Committee of the Senate on Divorce, and large numbers of bills, on the recommendation of that Committee, went through their several readings in both Houses and were passed en masse. By this method, the minority in Quebec and Newfoundland was not denied the remedy of divorce, and the consciences of Quebec's parliamentarians were apparently sufficiently salved. There seemed to be a consensus among those primarily concerned that this system of divorce was perhaps the least offensive way of dealing with a knotty and distastful legislative problem.

This acquiescent attitude began to wane noticeably about 15 years ago. By then, it was beginning to be felt that the time of parliamentarians was being increasingly and unnecessarily taken up with the consideration of individual petitions of divorce, whereas parliamentarians were sent or summoned to Ottawa primarily for the consideration of national policies and general legislation. There was also an increasing body of opinion that divorce was a matter for the courts, and that if the courts of Quebec and Newfoundland were not given jurisdiction in divorce, it should be given to a federal court. It was argued that this would relieve Parliament of an unwelcome chore for which is was neither specially designed nor particularly suited.

This feeling manifested itself in the introduction of private members' bills, both in the House of Commons and the Senate, providing for the delegation of the traditional divorce jurisdiction of Parliament to the Exchequer Court of Canada. Ever since 1949, when Stanley Knowles first introduced such a bill, there has been at least one on the order paper of the House of Commons. All, until 1962, were "talked out" and not allowed to come to a vote. Under the Standing Orders of the House, only a limited number of hours is allotted for the consideration of private members' business. Once the time is used up the bill under consideration drops to the bottom of the list of private bills and is unlikely to be reached again at the same session. Moreover, all bills not passed at one session die at prorogation or dissolution, and must be re-introduced and dealt with *de novo* at the next session.

By 1962, some members were getting so impatient with this situation that, in order to focus public attention on the problem, they undertook a blockade of individual divorce bills. A few members of the New Democratic Party, notably Frank Howard (Skeena) and Arnold Peters (Timiskaming), prevented the

passage of the bills by talking them out in the same way that private bills to reform divorce procedure had hitherto been talked out. That year 327 divorce bills passed the Senate but not the House of Commons.

In 1962, presumably by tacit all-party agreement and certainly with the consent of those who had been conducting the blockade, a general bill passed the House of Commons which provided that divorce bills could be passed by the Senate and receive royal assent without having to pass the House of Commons. The idea of making one House of Parliament solely responsible for a certain type of bill was probably suggested by the British system for passing money bills which become law without going to the House of Lords. Although the strict constitutionality of the bill was not questioned, no Senator could be found who was prepared to sponsor it and it died on the Senate order paper. The Senators seemed to regard it as a kind of constitutional monstrosity. The feeling was that the same result could be obtained by the simpler expedient of authorizing the Senate to grant divorces by resolution rather than by a truncated Act of Parliament.

In consequence, the blockade was continued in the session of 1962-63 at which no fewer than 494 additional divorce bills passed the Senate but not the House of Commons. At this session, Nicholas Mandziuk (PC—Marquette) introduced into the House another bill which delegated to the Senate the power to grant divorces by simple resolution, subject to an appeal to Parliament as a whole. Evidence in respect of divorce petitions would continue to be heard by the Standing Committee of the Senate on Divorce; the Committee would recommend to the Senate whether or not to pass a resolution of divorce. In introducing the bill, Mr. Mandziuk was careful to disclaim its authorship, pointing out that it had been conceived, by Robert McCleave (PC—Halifax) and Senator Arthur Roebuck, in conjunction with the Praliamentary Counsel of the House of Commons and the Senate. Although it seemed for a time that the bill was likely to pass both Houses, it did not even receive second reading in the Commons, presumably because it proved impossible to procure all-party agreement or the acquiescence of those who had been conducting the blockade.

The situation had become intolerable. There existed at this juncture 821 divorce applications which had been passed by the Senate, but which were being held up in the House of Commons. Several hundred more petitions had been received, but the Senate was reluctant to deal with them until the backlog had been cleared up and there was some assurance that the new bills stood a chance of passing both Houses. Almost a thousand people were being denied divorces, and thousands more—the families and relatives concerned—were being affected. Moreover, the absurdity of the situation was reflecting on Parliament, which had proved to be inadequate in the discharge of certain of its functions. The impasse could not continue much longer. Accordingly, a great deal of all-party negotiation took place behing the scenes. The result was that a second bill was introduced by Mr. Mandziuk. From all appearances this second bill, which passed both Houses without a dissenting voice, was based upon all-party agreement, including the acquiescence of Quebec parliamentarians and those who had been conducting the blockade. This is evidenced by the fact that all divorce bills previously held up rapidly passed both Houses. It is perhaps worthy of note that the sponsor of the second Mandziuk bill in the Senate was Senator Roebuck who had been one of the joint authors of the first Mandziuk bill.

The second Mandziuk bill—which is now law—was much like the first. Authority to adopt resolutions of divorce (as distinguished from bills) was conferred on the Senate. An appeal to Parliament against the resolution can be made within 30 days of its adoption by an aggrieved party petitioning Parliament for a bill annulling the resolution. In this event, the resolution will remain

in abeyance pending the enactment or rejection of the bill attacking the resolution. In the absence of such a petition, the divorce will take effect 30 days after the adoption by the Senate of the resolution.

No limitation was imposed on the Senate by the legislation either as to the grounds on which a divorce might be granted or as to the domicile of the petitioner. It was to have a jurisdiction in respect of individual divorces as ample as that of Parliament itself—except for one stipulation. Under the new Act, each petition is required to be referred to an officer of the Senate, designated by the Speaker, who is to hear evidence in each case and to report thereon to the Senate. However, this officer is not allowed to recommend that a marriage be dissolved or annulled except (in the words of the Act) "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 appointment of this officer and the restriction on his conduct is the only difference between the second Mandziuk bill which became law and the first which did not.

However, once there has been the required reference to this officer, and he has heard evidence and submitted his report, there remains a discretion on the part of the Senate to grant or refuse a resolution of divorce on any ground (subject as noted to an appeal to Parliament as a whole). Furthermore, the new Act does not derogate from the right of Parliament to pass divorce bills exactly as in the past. What has been given to the Senate is an extraordinary and additional jurisdiction in respect of divorce, but nothing either is or could be subtracted from the sovereign power of Parliament in matters relating to marriage and divorce.

Some Senators, in particular Hon. C. G. Power, were insistent that the Senate should not be subservient to the Commissioner, as the new officer was to be called, and that it should not be bound to rubber-stamp his recommendations. This was fully assured before the Senate finally approved the legislation, five amendments to the original draft having been made in the Senate prior to its passage.

A wide discretion as to the formulation of the new rules was given to the Senate by the Act, section 4 of which reads:

> The Senate may make such rules and orders respecting petitions for dissolution or annulment of marriages, the procedure at hearings thereon and all other matters as it considers necessary or desirable for the carrying out of the provisions of this Act.

The Senators lost no time in getting the system in operation. On November 19, 1963, it was announced in the Senate by Hon. W. Ross Macdonald, then Government Leader, that Allison Arthur Mariotti Walsh had been appointed an officer of the Senate. Later the same day, the Speaker, Hon. Maurice Bourget, designated Mr. Walsh as the officer authorized to hear evidence on divorce and to report under the new Act.

On December 10, Senator Macdonald moved that the matter of formulating the new divorce rules be referred to the Standing Committee on Divorce. That Committee promptly recommended the adoption of an addition to Part IV to the Standing Rules and Orders of the Senate relating to Resolutions for the Dissolution or Annulment of Marriages. The new rules were adopted without debate on December 15. They were patterned on the existing Senate rules governing bills of divorce and, since the new procedure is an alternative to, not a substitute for, the older procedure, the rules for the latter were retained intact. The differences between the two sets of rules mainly concern the Commissioner. The new rules allow the Commissioner to sit continuously

(instead of only when the Senate is sitting—like the Divorce Committee which had hitherto performed his functions). They also define the relationships to exist among the Commissioner, the Divorce Committee and the Senate itself.

With regard to these relationships, it is now the responsibility of the Commissioner to hear the evidence and recommend to the Senate either for or against the adoption of a resolution of divorce. Responsibility for actually adopting the resolutions is vested in the Senate itself. In order that it might be in a position to discharge this responsibility effectively, it was provided in the new rules that the Divorce Committee would act as a buffer between the Commissioner and the Senate. The Commissioner's report on each case goes in the first instance to the Divorce Committee, which examines it and associated documents together with a transcript of the evidence it required, and recommends a course of action to the Senate. In conducting this examination the Committee may call upon the Commissioner to explain his report, to hear further witnesses or otherwise re-examine the situation.

Following receipt of the Commissioner's report with the Committee's recommendation, it becomes the duty of the Senate to decide whether or not to adopt a resolution dissolving or annulling the marriage. As we have seen, the resolutions become effective 30 days after their adoption by the Senate, unless, meanwhile, a bill is filed appealing the resolution. In that case the effect of the resolution is suspended pending the disposition of the bill.

It is too early to say how well the new system will work in practice: difficulties will certainly have to be resolved from time to time as they arise. At the same time, there will be some immediate advantage to petitioners for parliamentary divorce. Their petitions will be no longer subject to any blockade in the House of Commons and the sordid details of individual divorce applications will no longer be aired on the floor of that House. Moreover, the Commissioner will sit all year round, so that petitions may be heard whether or not Parliament is sitting, although the consequent resolutions obviously cannot be adopted by the Senate unless it is sitting.

Finally, there will be much less unpleasant publicity attaching both to applications for divorce and to their hearings. Formerly applications had to be published in local newspapers and in four successive issues of the *Canada Gazette;* the only public notice now required is publication in a single issue of the *Canada Gazette* at least one month before the hearing. Needless to say, there are elaborate precautions taken to ensure that all persons who might possibly be affected by a resolution of divorce, including any identified co-respondents, are given adequate notice of the application and the hearing.

There are also manifest advantages to be gained by each House of Parliament. First, the time of the House of Commons will not, henceforth, be consumed by the consideration of evidence, occasionally in quite sordid detail, in respect of individual divorce applications. Second, the members of the Divorce Committee of the Senate, while they will serve henceforward as a reviewing and checking authority, will no longer be required to spend long hours hearing evidence—a task now performed by the Commissioner. On the final day of the last session, a bill to confer on the Commissioner the status of a judge of the Exchequer Court passed the Commons, but not the Senate, because insufficient notice had been given to enable the Senators to reach a mature judgment in the matter. A similar bill was introduced in the House at the beginning of the present session, but had not been disposed of at the time of writing.

The new machinery is both novel and experimental. It is constitutionally novel in that it represents the first occasion on which the Parliament of Canada

as a whole—a trinity made up of the Queen, the Senate and the House of Commons—has delegated specific legislative powers to one of its constituent elements, the Senate. It is experimental in that it remains to be seen whether the new system will in fact perpetuate itself, or whether it will prove to be merely a way-station leading to the final delegation of Parliament's jurisdiction in divorce to a federal court, whether it be the Exchequer Court or another.

APPENDIX No. 3

ACTS OF THE PARLIAMENT OF THE UNITED KINGDOM RELATING TO DIVORCE AS OF JULY 15th, 1870.

MATRIMONIAL CAUSES ACT, 1857

(20 and 21 Vict. c. 85)

1 - 5. [Transitional provisions.]

6. As soon as this Act shall come into operation, all jurisdiction now vested in or exercisable by any Ecclesiastical Court or person in England in respect of divorces *a mensa et thoro,* suits of nullity of marriage, suits for restitution of conjugal rights, or jacitation of marriage, and in all causes, suits, and matters matrimonial, except in respect of marriage licences, shall belong to and be vested in Her Majesty, and such jurisdiction, together with the jurisdiction conferred by this Act, shall be exercised in the name of Her Majesty in a court of record to be called "The Court for Divorce and Matrimonial Causes".

7. No decree shall hereafter be made for a divorce *a mensa et thoro,* but in all cases in which a decree for divorce *a mensa et thoro* might now be pronounced the court may pronounce a decree for a judicial separation, which shall have the same force and the same consequence as a divorce *a mensa et thoro* now has.

8 - 15. [Practice and procedure.]

16. A sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law, and such other legal effect as herein mentioned), may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards.

17. Application for restitution of conjugal rights or for judicial separation on any one of the grounds aforesaid may be made by either husband or wife, by petition to the court, or to any judge of assize at the assizes held for the county in which the husband and wife reside or last resided together, and which judge of assize is hereby authorized and required to hear and determine such petition, according to the rules and regulations which shall be made under the authority of this Act; and the court or judge to which such petition is addressed, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and where the application is by the wife may make any order for alimony which shall be deemed just: [remainder of section purely procedural].

18 - 20. [Practice and procedure.]

21. [Protection of property of deserted wife.]

22. In all suits and proceedings, other than proceedings to dissolve any marriage, the said court shall proceed and act and give relief on principles and rules which in the opinion of the said court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act.

23. Any husband or wife, upon application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at

any time thereafter, present a petition to the court praying for a reversal of such decree on the ground that it was obtained in his or her absence, and that there was reasonable ground for the alleged desertion, where desertion was the ground of such decree; and the court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but the reversal thereof shall not prejudice or affect the rights or remedies which any other person would have had in case such reversal had not been decreed in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof.

24. In all cases in which the court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf, to be approved by the court, and may impose any terms or restrictions which to the court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the court expedient so to do.

25. In every case of judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole,* and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

26. In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; provided, that whereupon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband he shall be liable for necessaries supplied for her use; provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise at any joint power given to herself and her husband.

27. It shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that since the celebration thereof her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion, without any reasonable excuse, for two years or upwards; and every such petition shall state as distinctly as the nature of the case permits the facts on which the claim to have such marriage dissolved is founded: provided that for the purposes of this Act incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom if his wife were dead he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere.

28. Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties or either of them may insist on having the contested matters of fact tried by a jury as hereinafter mentioned.

29. Upon any such petition for the dissolution of a marriage, it shall be the duty of the court to satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or no the petitioner has been in any manner accessory to or conniving at the adultery, or has condoned the same, and shall also inquire into any countercharge which may be made against the petitioner.

30. In case the court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the court shall dismiss the said petition.

31. In case the court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the court shall pronounce a decree declaring such marriage to be dissolved: provided always, that the court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the court, have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.

32. The court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveyancing counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties; and the said court may in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed; and upon any petition for dissolution of marriage the court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation.

33. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner . . . (balance of section procedural only).

34. Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been

established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings.

35. In any suit or other proceeding for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of such suit or other proceeding, and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery.

36. In questions of fact arising in proceedings under this Act it shall be lawful for, but, except as hereinbefore provided, not obligatory upon, the court to direct the truth thereof to be determined before itself, or before any one or more of the judges of the said court, by the verdict of a special or common jury.

37. Practice and procedure.

38. When any such question shall be so ordered to be tried such question shall be reduced into writing in such form as the court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the court or judge shall have the same powers, jurisdiction, and authority as any judge of any of the said superior courts sitting at *nisi prius*.

39-44. [Practice and procedure.]

45. In any case in which the court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made appear to the court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, the benefit of the innocent party, and of the children of the marriage, or either or any of them.

46-54. [Practice and procedure.]

55. Either party dissatisfied with any decision of the court in any matter which, according to the provisions aforesaid, may be made by the judge ordinary alone, may, within three calendar months after the pronouncing thereof, appeal therefrom to the full court, whose decision shall be final.

56. [Appeal to House of Lords. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra*.]

57. When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such a decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: provided always, that no clergyman in Holy Orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.

58. Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for the refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in Holy Orders of the said United Church, entitled to

officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

59. After this Act shall have come into operation no action shall be maintainable in England for criminal conversation.

60-68. [Practice and procedure.]

MATRIMONIAL CAUSES ACT, 1858

(21 & 22 Vict. c. 108)

1-4. [Practice and procedure.]

5. In every cause in which a sentence of divorce and separation from bed, board, and mutual cohabitation has been given by a competent Ecclesiastical Court before the Act of the twentieth and twenty-first Victoria, chapter eighty-five, came into operation, the evidence in the case in which such sentence was pronounced in such Ecclesiastical Court may, whenever from the death of a witness or from any other cause it may appear to the court reasonable and proper, be received on the hearing of any petition which may be presented to the said Court for Divorce and Matrimonial Causes.

6-10. [Protection of property of deserted wife.]

11. In all cases now pending, or hereafter to be commenced in which, on the petition of a husband for a divorce, the alleged adulterer is made a co-respondent, or in which, on the petition of a wife, the person with whom the husband is alleged to have committed adultery is made a respondent, it shall be lawful for the court, after the close of the evidence on the part of the petitioner, to direct such co-respondent or respondent to bed is missed from the suit, if it shall think there is not sufficient evidence against him or her.

12-16. [Practice and procedure.]

17. [Appeal to House of Lords in nullity suits. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra*]

18-23. [Practice and procedure.]

MATRIMONIAL CAUSES ACT, 1859

(22 & 23 Vict. c. 61)

1-3. [Practice and procedure.]

4. The court after a final decree of judicial separation, nullity of marriage, or dissolution of marriage, may upon application (by petition) for this purpose make, from time to time, all such orders and provision with respect to the custody, maintenance, and eductation of the children the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the Court of Chancery, as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending: [balance of section procedural only].

5. The court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit.

6. On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

7. [Appeals under Legitimacy Declaration Act, 1858.]

MATRIMONIAL CAUSES ACT, 1860

(23 and 24 Vict. c. 144)

1. It shall be lawful for the Judge Ordinary of the Court for Divorce and Matrimonial Causes alone to hear and determine all matters arising in the said court, and to exercise all powers and authority whatever which may now be heard and determined and exercised respectively by the full court or by three or more judges of the said court, the Judge Ordinary being one, or where the Judge Ordinary shall deem it expedient, in relation to any matter which he might hear and determine alone by virtue of this Act, to have the assistance of one other judge of the said court, it shall be lawful for the Judge Ordinary to sit and act with such one other judge accordingly, and, in conjunction with such other judge, to exercise all the jurisdiction, powers, and authority of the said court.

2. Provided always, that the Judge Ordinary may, where he shall deem it expedient, direct that any such matter as aforesaid shall be heard and determined by the full court; and in addition to the cases in which an appeal to the full court now lies from the decision of the Judge Ordinary, either party dissatisfied with the decision of such judge sitting alone in granting or refusing any application for a new trial which by virtue of this Act he is empowered to hear and determine may, within fourteen days after the pronouncing thereof, appeal to the full court, whose decision shall be final.

3. [Appeal to House of Lords. Repealed by s. 2 of 1868 Act; see now s. 3 of that Act, *infra.*]

4. [Practice and procedure.]

5. In every case of a petition for a dissolution of marriage it shall be lawful for the court, if it shall see fit, to direct all necessary paper in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the court any question in relation to such matter, and which the court may deem it necessary or expedient to have fully argued; and Her Majesty's Proctor shall be entitled to charge and be reimbursed the costs of such proceeding as part of the expense of his office.

6. And whereas by section forty-five of the Act of the session holden in the twentieth and twenty-first years of Her Majesty, chapter eighty-five, it was enacted that [see Act of 1857, s. 45]: be it further enacted, that any instrument executed pursuant to any order of the court made under the said enactment before or after the passing of this Act, at the time of or after the pronouncing of a final decree of divorce or judicial separation, shall be deemed valid and effectual in the law, notwithstanding the existence of the disability of coverture at the time of the execution thereof.

7. Every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the court; and, on cause being so shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require; and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's Proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or

expedient; and if from any such information or otherwise the said Proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may under the direction of the Attorney-General, and by leave of the court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the court to order the costs of such counsel and witnesses, and otherwise, arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property; and in case the said Proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.

8. [Act to expire July 31, 1862, but note that the Act was made perpetual by 25 & 26 Vict c. 81, and was in force on July 15, 1870.]

MATRIMONIAL CAUSES ACT, 1866

(29 & 30 Vict. c. 32)

1. In every such case [*i.e.* on a decree for dissolution against a husband who has no property on which a gross or annual sum for maintenance can be secured] it shall be lawful for the court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the court may think reasonable: provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the court to discharge or modify the order, or temporarily to suspend same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the court may seem fit.

2. In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground in case of such a suit instituted by a husband of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief.

3. No decree *nisi* for a divorce shall be made absolute until after the expiration of six calendar months from the pronouncing thereof unless the court shall under the power now vested in it fix a shorter time.

MATRIMONIAL CAUSES ACT, 1868

(31 & 32 Vict. c. 77)

[NOTE: Although, by s. 5 thereof, this Act is given the short title "The Divorce Amendment Act, 1868", by s. 2 of the Matrimonial Causes Act, 1873 (36 & 37 Vict. c. 31) it may, along with all the other Matrimonial Causes Acts passed to that date, be cited as shown above.]

1. Throughout this Act the expression "the court" shall mean the Court for Divorce and Matrimonial Causes.

2. [Repeals s. 56 of 1857 Act, s. 17 of 1858 Act, and s. 3 of 1860 Act.]

3. Either party dissatisfied with the final decision of the court on any petition for dissolution or nullity of marriage may, within one calendar month after the pronouncing thereof, appeal therefrom to the House of Lords, and on the hearing of any such appeal the House of Lords may either dismiss the appeal or reverse the decree, or remit the case to be dealt with in all respects as the House of Lords shall direct: provided always that in suits for dissolution of

marriage no respondent or co-respondent, not appearing and defending the suit on the occasion of the decree *nisi* being made, shall have any right of appeal to the House of Lords against the decree when made absolute, unless the court, upon application made at the time of the pronouncing of the decree absolute, shall see fit to permit an appeal.

4 Section fifty-seven of the said Act of twenty-first Victoria, chapter eighty-five, shall be read and construed with reference to the time for appealing as varied by this Act; and in cases where under this Act there shall be no right of appeal, the parties respectively shall be at liberty to marry again at any time after the pronouncing of the decree absolute.

5. [Short title.]

6. [Application to pending suits.]

APPENDIX No. 4

CONTEMPORARY ACTS OF THE PARLIAMENT OF THE UNITED KINGDOM RELATING TO DIVORCE.

MATRIMONIAL CAUSES ACT, 1950

(14 Geo. 6, c. 25)

An Act to consolidate certain enactments relating to matrimonial causes in the High Court in England and to declarations of legitimacy and of validity of marriage and of British nationality, with such corrections and improvements as may be authorised by the Consolidation of Enactments (Procedure) Act, 1949.

[28th July, 1950]

Divorce and Nullity of Marriage

1.—(1) Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent—

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) 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;

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

This subsection replaces s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937 (p. 1303, *ante*).

For statutory exception to sub-s. (1) (*b*), see Divorce (Insanity and Desertion) Act, 1958, s. 3 (p. 1464, *post*). In calculating the period of desertion and in considering whether such desertion has been continuous, no account is to be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation: Matrimonial Causes Act, 1963, s. 2 (2) (p. 1504, *post*).

(2) For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—

(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Act, 1890 to 1930, or of any order or warrant under the Army Act, the Air Force Act, the Naval Discipline Act, the Naval Enlistment Act, 1884, or the Yarmouth Naval Hospital Act, 1931, or is being detained as a Broadmoor patient or in pursuance of an order made under the Criminal Lunatics Act, 1884 [*while he is liable to be detained in a hospital mental nursing home or place of safety under the Mental Health Act, 1959*];

The words in square brackets replace the italicised words except so far as relates to any time before the commencement of the Mental Health Act, 1959: see the 7th Schedule of that Act (p.1479, *post*).

[(*b*) while he is liable to be detained in a hospital or place of safety under the Mental Health (Scotland) Act, 1960];

The words in square brackets were substituted for "while he is detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919" by the Mental Health (Scotland) Act, 1960, Sched. IV, as from the 1st June, 1962.

(*c*) while he is liable to be detained in pursuance of any order for his detention or treatment as a person of unsound mind or a person suffering from mental illness made under any law for the time being in force in Northern Ireland, the Isle of Man or any of the Channel Islands (including any such law relating to criminal lunatics);

(*d*) while he is receiving treatment as a voluntary patient under *the Mental Treatment Act, 1930, or under* any such law as is mentioned in paragraph (*c*) of this subsection, *being treatment which follows without any interval a period during which he was detained as mentioned in paragraph (a), paragraph (b) or paragraph (c) of this subsection;*

The words "the Mental Treatment Act, 1930, of under", except so far as relates to any time before the commencement of the Mental Health Act, 1959, are omitted: see the 7th Schedule of the Act of 1959 (p. 1479, *post*). The words "being treatment. . .this subsection" were repealed by the Divorce (Insanity and Desertion) Act, 1958, s. 4 (p. 1465, *post*).

and not otherwise.

This subsection replaces s. 3 of the 1937 Act (p. 1303, *ante*), as added to by s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1949 (p. 1376, *ante*), and has since been amended by the Divorce (Insanity and Desertion) Act, 1958, s. 4 (p. 1465, *post*), and by the Mental Health Act, 1959, 7th and 8th Schedules (pp. 1479, 1480, *post*).

2.—(1) 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 marriage:

Provided that a judge of the court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed 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 if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree nisi, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition, without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) 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 reasonable probability of a reconciliation between the parties before the expiration of the said three years.

The reference to "any children of the marriage" shall be construed as including a reference to any other child in relation to whom the Court would have jurisdiction by virtue of s. 26 (1) of the Matrimonial Causes Act, 1950 (p. 1390, *post*) in proceedings instituted by the petition: see Matrimonial Proceedings (Children) Act, 1958, s. 2 (3) (p. 1461, *post*).

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

The first three subsections replace s. 1 of the 1937 Act (p. 1303, *ante*).

(4) This section shall not apply in the case of marriages to which section one of the Matrimonial Causes (War Marriages) Act, 1944, applies (being certain marriages celebrated on or after the third day of September, nineteen hundred and thirty-nine, and before the first day of June, nineteen hundred and fifty).

For s. 1(1) (*b*) of the 1944 Act, see p. 1316, *ante*.

3.—(1) On a petition for divorce presented by the husband on the ground of adultery or in the answer of a husband praying for divorce on the said ground, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

This section replaces s. 177 of the 1925 Act (p. 1266, *ante*).

4.—(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.

(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 shall dismiss the petition:

Words in italics repealed by Matrimonial Causes Act, 1963, s. 4 (1) (*a*) (p. 1504, *post*). Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent: see Matrimonial Causes Act, 1963, s. 1 (p. 1503, *post*). Adultery or cruelty is not to be deemed to have been condoned 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 is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation: see Matrimonial Causes Act, 1963, s. 2(1) (p. 1503, *post*). Adultery which has been condoned is not capable of being revived: see Matrimonial Causes Act, 1963, s. 3 (p. 1504, *post*).

See also, as to the duty of the Court, Matrimonial Causes Act, 1963, s. 4 (2) (p. 1504, *post*), and, as to agreements made or proposed to be made, *ibid.* s. 4 (3) (p. 1504, *post*).

Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds [that the petition is presented or prosecuted in collusion with the respondent or either of the respondents or] that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—

(i) of unreasonable delay in presenting or prosecuting the petition; or

(ii) of cruelty towards the other party to the marriage; or

(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

(iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as had conduced to the adultery or unsoundness of mind or desertion.

Words in square brackets inserted by the Matrimonial Causes Act, 1963, s. 4 (1) (*b*) (p. 1504, *post*).

This section replaces s. 178 of the 1925 Act (p. 1266, *ante*), as substituted by s. 4 of the 1937 Act (p. 1304, *ante*).

5. In any case in which, on the petition of a husband for divorce on the ground of adultery, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce on the ground of adultery, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

This section replaces s. 179 of the 1925 Act (p. 1266, *ante*).

6. If in any proceedings for divorce the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

This section replaces s. 180 of the 1925 Act (p. 1266, *ante*).

7.—(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a judicial separation or an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion, or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Acts having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

This section replaces s. 6 of the 1937 Act (p. 1305, *ante*).

8.—(1) In addition to any other grounds on which a marriage is by law void or voidable, 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 the marriage; or

(*b*) that either party to the marriage was at the time of the marriage of unsound mind or *a mental defective within the meaning of the Mental Deficiency Acts,* 1913 to 1938 [was then suffering from mental disorder within the meaning of the Mental Health Act, 1959, of such a kind or to such an extent as to be unfitted for marriage and the procreation of children], or subject to recurrent *fits* [attacks] of insanity or epilepsy; or

The words in italics are replaced by those in square brackets by the Mental Health Act, 1959, 7th Schedule, except so far as related to a marriage celebrated before the commencement of that Act (see p. 1479, *post*).

(*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:

Provided that, in the cases specified in paragraphs (*b*), (*c*) and (*d*) of this subsection, the court shall not grant a decree unless it is 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 has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

This subsection replaces s. 7 (1) of the 1937 Act (p. 1306, *ante*).

(2) Nothing in this section shall be construed as validating any marriage which is by law void, but with respect to which a decree of nullity has not been granted.

This subsection replaces s. 7 (3) of the 1937 Act (p. 1306, *ante*).

9. Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the mariage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

This section replaces s. 7 (2) of the 1937 Act (p. 1306, *ante*), as amended by s. 4 of the 1949 Act (p. 1376, *ante*).

10. In the case of any petition for divorce or for nullity of marriage—

(1) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;

(2) any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the

case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient;

(3) if in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion.

This section replaces s. 181 of the 1925 Act (p. 1266, *ante*).

11.—(1) Where His Majesty's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce or for nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(2) So far as the reasonable costs incurred by His Majesty's Proctor in so intervening or showing cause are not fully satisfied by any order made under this section for the payment of his costs, he shall be entitled to charge the difference as part of the expenses of his office, and the Treasury may, if they think fit, order that any costs which under any order made by the court under this section His Majesty's Proctor pays to any parties shall be deemed to be part of the expenses of his office.

This section replaces s. 182 of the 1925 Act (p. 1267, *ante*).

12.—(1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

(3) Where a decree nisi has been obtained and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

This section replaces s. 183 of the 1925 Act (p. 1267, *ante*), as added to by s. 9 of the 1937 Act (p. 1306, *ante*).

13.—(1) Where a decree of divorce has been made absolute and either there is no right of appeal against the decree absolute or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, either party to the marriage may marry again.

(2) No clergyman of the Church of England or of the Church in Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife

is still living, or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.

This section replaces s. 184 of the 1925 Act (p. 1267, *ante*), as amended by s. 12 of the 1937 Act (p. 1308, *ante*).

Judicial Separation and Restitution of Conjugal Rights

14.—(1) A petition for judicial separation may be presented to the court either by the husband or the wife on any grounds on which a petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857, and the foregoing provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

(2) Where the court in accordance with the said provisions grants a decree for judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

This section replaces s. 185 (1), (2), (3) of the 1925 Act (p. 1268, *ante*), as amended by s. 5 of the 1937 Act (p. 1304, *ante*).

15.—(1) A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

This subsection replaces s. 186 of the 1925 Act (p. 1268, *ante*).

(2) A decree for restitution of conjugal rights shall not be enforced by attachment.

This subsection replaces part of s. 187 (1) of the 1925 Act (p. 1268, *ante*).

Presumption of death and dissolution of marriage

16.—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, if he is domiciled in England, 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, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards 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 he or she is dead until the contrary is proved.

(3) Sections ten to thirteen of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

(4) In determining for the purposes of this section whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

This section replaces s. 8 of the 1937 Act (p. 1306, *ante*), as amended by s. 1 (3) of the 1949 Act (p. 1375, *ante*).

Declaration of Legitimacy, etc.

17.—(1) Any person who is a British subject, or whose right to be deemed a British subject depends wholly or in part on his legitimacy on on the validity of any marriage, may, if he is domiciled in England or Northern Ireland or claims any real or personal estate situate in England, apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents, *and* [or] that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage.

This subsection replaces s. 188 (1) of the 1925 Act (p. 1067, *ante*), as amended by the British Nationality Act, 1948, Sched. IV. The word "and" was replaced by the word "or" by the Legitimacy Act, 1959, s. 2 (6) (p. 1481, *post*).

(2) Any person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may apply [to the court by petition or to a county court] for a decree declaring that he or his parent or remoter ancestor, as the case may be, became or has become a legitimated person.

In this subsection the expression "legitimated person" means a person legitimated by the Legitimacy Act, 1926, and includes a person recognised under section eight of that Act as legitimated.

This subsection replaces s. 2 (1) of the Legitimacy Act, 1926 (p. 1284, *ante*), and Administration of Justice Act, 1928, s. 19 (3) and Sched. I, Part III. the words in square brackets were substituted for "by petition to the court" by Administration of Justice Act, 1956, s. 31 (2) (p. 1428, *post*).

(3) [Where an application under the last foregoing subsection is made to a county court] the county court, if it considers that the case is one which owing to the value of the property involved or otherwise ought to be dealt with by the High Court, may, and if so ordered by the High Court shall, transfer the matter to the High Court, and on such transfer the proceeding shall be continued in the High Court as if it had been originally commenced [by a petition presented to the High Court].

This subsection replaces s. 2 (2) of the Legitimacy Act, 1926 (p. 1284, *ante*).

The words in the first set of square brackets were substituted for the words "A petition under the last foregoing subsection may be presented to a county court instead of to the High Court. Provided that, where a petition is presented to a county court" and the words in the second set of square brackets were substituted for the word "therein" by the Administration of Justice Act, 1956; see ss. 31 (2), 57 and Second Schedule (pp. 1428, 1432, *post*).

(4) Any person who is domiciled in England or Northern Ireland or claims any real or personal estate situate in England may apply to the court for a decree declaring his right to be deemed a British subject.

(5) Applications to the court (but not to a county court) under the foregoing provisions of this section may be included in the same petition, and on any application under the foregoing provisions of this section (including an application to a county court) the court shall make such decree as the court

thinks just, and the decree shall be binding on His Majesty and all other persons whatsoever:

Provided that the decree of the court shall not prejudice any person—

(*a*) if it is subsequently proved to have been obtained by fraud or collusion; or

(*b*) unless that person has been cited or made a party to the proceedings or claims through a person so cited or made a party.

(6) A copy of every petition [or other application] under this section and of any affidavit accompanying the petition [or other application] shall be delivered to the Attorney-General at least one month before the petition [or other application] is presented [or made], and the Attorney-General shall be a respondent on the hearing of the petition [or other application] and on any subsequent proceedings relating thereto.

Words in square brackets added by Administration of Justice Act, 1956, s. 31 (2) (p. 1428, *post*).

(7) In any application under this section such persons shall, subject to rules of court, be cited to see proceedings or otherwise summoned as the court shall think fit, and any such persons may be permitted to become parties to the proceedings and to oppose the application.

(8) No proceedings under this section shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction.

Sub-ss (4) to (8) replace s. 188 (1) to (5), (7) of the 1925 Act (p. 1269, *ante*).

Additional jurisdiction in proceedings by a wife

18.—(1) Without prejudice to any jurisdiction exercisable by the Additional court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—

(*a*) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has beeen deported from the United Kingdom under any law for the time being in force relating to *the* deportation *of aliens*, and the husband was immediately before the desertion or deportation domiciled in England;

The words in italics were repealed by virtue of the Commonwealth Immigrants Act, 1962, s. 20.

(*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.

(2) Without prejudice to the jurisdiction of the court to entertain proceedings under section sixteen of this Act in cases where the petitioner is domiciled in England, the court shall by virtue of this section have jurisdiction to entertain any such proceedings brought by a wife, 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.

(3) In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings.

This section replaces s. 13 of the 1937 Act (p. 1308, *ante*) and s. 1 of the 1949 Act (p. 1375, *ante*), except so much of s. 1 (4) of the 1949 Act as relates to the 1944 Act.

Alimony, Maintenance and Custody of Children

19.—(1) On any petition for divorce or nullity of marriage, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) *On any decree for divorce or nullity of marriage* [Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable; and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties, and may, if it thinks fit, suspend the pronouncing of the decree until the deed or instrument has been duly executed.

This subsection replaces s. 190 (1) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(3) *On any decree for divorce or nullity of marriage* [Subject to the provisions of the said section twenty-nine, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court may, if it thinks fit, by order direct the husband to pay to the wife, during their joint lives, such monthly or weekly sum for the maintenance and support of the wife as the court may think reasonable, and any such order may either be in addition to or be instead of an order made under the last foregoing subsection.

This subsection replaces s. 190 (2) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(4) The foregoing provisions of this section shall have effect, in any case where a petition for divorce is presented by a wife on the ground of her husband's insanity, as if for the references to the husband there were substituted references to the wife, and for the references to the wife there were substituted references to the husband.

This subsection replaces s. 10(2) of the 1937 Act (p. 1307, *ante*).

20.—(1) On any petition for judicial separation, the court may make such interim orders for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) *On any decree* [On or at any time after a decree] for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (4) of the 1925 Act (p. 1270, *ante*). The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 1 and Schedule, pp. 1437, 1443, *post*.

As to power to order a lump sum payment, see Matrimonial Causes Act, 1963, s. 5 (1) (p. 1504, *post*).

(3) The foregoing provisions of this section shall have effect, in any case where a petition for judicial separation is presented by a wife on the ground of her husband's insanity, as if for the references to the wife there were substituted references to the husband.

This subsection replaces in part s. 10 (2) of the 1937 Act (p. 1307, *ante*).

21.—(1) In every case of judicial separation—

(*a*) any property which is acquired by or devolves upon the wife on or after the date of the decree whilst the separation continues shall, if she dies intestate, devolve as if her husband had been then dead;

(*b*) if alimony has been ordered to be paid and has not been duly paid by the husband, he shall be liable for necessaries supplied for the use of the wife.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree shall be deemed to be property to which this section applies.

This subsection replaces s. 194 of the 1925 Act (p. 1271, *ante*), as amended by Law Reform (Married Women and Tortfeasors) Act, 1935, Schedule (p. 1300, *ante*).

22.—(1) On any petition for restitution of conjugal rights, the court may make such interim order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (3) of the 1925 Act (p. 1270, *ante*).

(2) Where any decree for restitution of conjugal rights is made on the application of the wife, the court may make such order for the payment of alimony to the wife as the court thinks just.

This subsection replaces in part s. 190 (4) of the 1925 Act (p. 1270, *ante*).

(3) Where any decree for restitution of conjugal rights is made on the application of the wife, the court, at the time of the making of the decree or at any time afterwards may, in the event of the decree not being complied with within any time limited in that behalf by the court, order the respondent to make to the petitioner such periodical payments as the court thinks just, and the order may be enforced in the same manner as an order for alimony.

This subsection replaces in part s. 187 (1) of the 1925 Act (p. 1268, *ante*).

(4) Where the court makes an order under the last foregoing subsection, the court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all the necessary parties.

This subsection replaces in part s. 187 (2) of the 1925 Act (p. 1269, *ante*).

23.—(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to

make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

The words "infant children of the marriage" include a reference to an illegitimate child of both parties to the marriage: Matrimonial Proceedings (Children) Act, 1958 s. 1 (4) (p. 1461, *post*). Under s. 4 (1) of the Matrimonial Proceedings (Children) Act, 1958 (p. 1262, *ante*), the Court has jurisdiction to make custody orders in respect of any child referred to in s. 23 (1) of the Matrimonial Causes Act, 1950 (and, as in a case under s. 26 of the Act of 1950) for the period of the duration of an order in force under s. 23. Payments for the children may be made to the child or to any other person for the benefit of the child: Matrimonial Proceedings (Children) Act, 1958, s. 4 (2) (p. 1262, *ante*).

(2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court.

This section replaces s. 5 of the 1949 Act (p. 1377, *ante*).

24.—(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them.

(2) Where a decree for restitution of conjugal rights is made on the application of the husband, and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the benefit of the petitioner and of the children of the marriage or either or any of them, or may order such part of the profits of trade or earnings as the court thinks reasonable to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage or either or any of them.

This section replaces s. 191 of the 1925 Act (p. 1270, *ante*), as amended by s. 10 (3) of the 1937 Act (p. 1307, *ante*).

25. The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or postnuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage.

This section replaces s. 192 of the 1925 Act (p. 1271, *ante*).

26.—(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.

(2) On an application made in that behalf, the court may, in any proceedings for restitution of conjugal rights, at any time before final decree, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

(3) *On any decree of divorce or nullity of marriage* [Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi of divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute], the court shall have power to order the husband, and *on a decree of divorce,* [where the decree is a decree of divorce and is] made on the ground of the husband's insanity, shall also have power to order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties:

The words in italics were replaced by the words in square brackets by the Matrimonial Causes (Property and maintenance) Act, 1958, s. 1 and Schedule (pp. 1437, 1443, *post*).

Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child will attain twenty-one years of age.

This section replaces s. 103 of the 1925 Act (p. 1271, *ante*), as amended by s. 10 (4) of the 1937 Act (p. 1307, *ante*). For extended jurisdiction in regard to children, see Matrimonial Causes (Children) Act, 1958, ss. 1, 3, 5 and 6 (pp. 1461, 1462, 1463, *post*).

27.—(1) In any case where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or the husband, as the case may be, or to a trustee approved by the court on her or his behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient so to do.

(2) In any case where—

(*a*) a petition for divorce or judicial separation is presented by a wife on the ground of her husband's insanity; or

(*b*) a petition for divorce, nullity or judicial separation is presented by a husband on the ground of his wife's insanity or mental deficiency [or disorder],

and the court orders payments of alimony or maintenance under section nineteen or section twenty of this Act in favour of the respondent, the court may order the payments to be made to such persons having charge of the respondent as the court may direct.

This section replaces s. 190 (5) of the 1925 Act (p. 1270, *ante*), as amended by s. 10 (2) of the 1937 Act (p. 1307, *ante*). The words in square brackets are added by the Mental Health Act, 1959, 7th Schedule (p. 1479, *post*) as from the date of the commencement of that Act.

28.—(1) Where the court has made an order under section nineteen, section twenty, section twenty-two, section twenty-three or subsection (2) of section twenty-four of this Act, the court shall have power to discharge or vary the

order or to suspend any provision thereof temporarily and to revive the operation of any provisions so suspended:

Provided that in relation to an order made before the sixteenth day of December, nineteen hundred and forty-nine, being an order which by virtue of subsection (2) of section thirty-four of this Act, is deemed to have been made under subsection (2) of section nineteen of this Act, the powers conferred by this section shall not be exercised unless the court is satisfied that the case is one of exceptional hardship which cannot be met by the discharge variation or suspension of any order made, or deemed as aforesaid to have been made, under subsection (3) of the said section nineteen.

(2) The powers exercisable by the court under this section in relation to any order shall be exercisable also in relation to any deed or other instrument executed in pursuance of the order.

(3) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.

This section replaces s. 14 of the Administration of Justice (Miscellaneous Provisions) Act, 1938 (p. 1310, *ante*), as amended by s. 6 of the 1949 Act (p. 1376, *ante*).

29. (When a petition for divorce or nullity of marriage has been presented, proceedings under section nineteen, twenty-four, twenty-five or subsection (3) of section twenty-six of this Act may, subject to and in accordance with rules of court, be commenced at any time after the presentation of the petition:

Provided that no order under any of the said sections or under the said subsection (other than an interim order for the payment of alimony under section nineteen) shall be made unless and until a decree nisi has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.

This section replaces s. 10 of the 1937 Act (p. 1306, *ante*).

Miscellaneous

30.—(1) A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.

(2) A claim for damages on the ground of adultery shall, subject to the provisions of any enactment relating to trial by jury in the court, be tried on the same principles and in the same manner as actions for criminal conversation were tried immediately before the commencement of the Matrimonial Causes Act, 1857, and the provisions of this Act with reference to the hearing and decision of petitions shall so far as may be necessary applied to the hearing and decision of petitions on which damages are claimed.

(3) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

This section replaces s. 189 of the 1925 Act (p. 1269, *ante*).

31. In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

This section replaces s. 197 of the 1925 Act (p. 1273, *ante*).

32.—(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.

(3) The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

(4) In any proceedings for nullity of marriage, evidence on the question of sexual capacity shall be heard in camera unless in any case the judge is satisfied that in the interests of justice any such evidence ought to be heard in open court.

This section replaces s. 7 of the 1949 Act (p. 1377, *ante*), amending s. 198 of the 1925 Act (p. 1273, *ante*) and s. 198A added by s. 4 of the Supreme Court of Judicature (Amendment) Act, 1935 (p. 1298, *ante*).

Interpretation, Repeal and Short Title

33. In this Act the expression "the court" means the High Court, except that in section seventeen, where the context so requires, it means or includes a county court, and the expression "prescribed" means prescribed by rules of court.

34.—(1) The enactments set out in the Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(2) without prejudice to the provisions of section thirty-eight of the Interpretation Act, 1889—

(*a*) nothing in this repeal shall affect any order made, direction given or thing done, under any enactment repealed by this Act or the Supreme Court of Judicature (Consolidation) Act, 1925, or deemed to have been made, given or done respectively under any such enactment, and every such order, direction or thing shall if in force at the commencement of this Act continue in force, and, so far as it could have been made, given or done under this Act, shall be deemed to have been made, given or done respectively under any such of this Act;

(*b*) any other order in force at the commencement of this Act which could have been made under any provision of this Act shall be deemed to have been so made;

(*c*) any document referring to any Act or enactment repealed by this Act or the said Act of 1925 shall be construed as referring to this Act or to the corresponding enactment in this Act;

(*d*) for the purposes of the India (Consequential Provision) Act, 1949 this Act shall be deemed to have been in force on the twenty-sixth day of January, nineteen hundred and fifty.

35.—(1) This Act may be cited as the Matrimonial Causes Act, 1950.

(2) This Act shall come into operation on the first day of January, nineteen hundred and fifty-one.

(3) This Act shall not extend to Scotland or Northern Ireland.

MATRIMONIAL CAUSES (PROPERTY AND MAINTENANCE) ACT, 1958

(6 & 7 Eliz. 2, c. 35)

An Act to enable the power of the court in matrimonial proceedings to order alimony, maintenance or the securing of a sum of money to be exercised at any time after a decree; to provide for the setting aside of dispositions of property made for the purpose of reducing the assets available for satisfying such an order; to enable the court after the death of a party to a marriage which has been dissolved or annulled to make provision out of his estate in favour of the other party; and to extend the powers of the court under section seventeen of the Married Women's Property Act, 1882.

[7th July, 1958]

1.—(1) Any power of the court, under the enactments mentioned in the next following subsection, to make an order on a decree for divorce, nullity of marriage or judicial separation shall (subject as mentioned in subsection (3) of this section) be exercisable either on pronouncing such a decree or at any time thereafter.

(2) The said enactments are the following provisions of the Matrimonial Causes Act, 1950 (in this Act referred to as "the Act of 1960"), that is to say,—

(*a*) subsections (2) and (3) of section nineteen (whereby, on a decree for divorce or nullity of marriage, the court may order the husband to make a secured provision for the wife or to pay her a monthly or weekly sum), and those subsections as extended by subsection (4) of that section (whereby the like provision or payments may be ordered for a husband where a petition for divorce is presented by his wife on the ground of insanity);

(*b*) subsection (3) of section twenty-six (whereby, on a decree of divorce or nullity of marriage, the court may order the husband, and, on a decree of divorce made on the ground of the husband's insanity, may order the wife, to make a secured provision for the benefit of the children); and

(*c*) subsection (2) of section twenty (whereby, on a decree for judicial separation, a husband may be ordered to pay alimony to his wife), and that subsection as extended by subsection (3) of that section (whereby the like payments may be ordered to be made by a wife where a petition for judicial separation is presented by her on the ground of her husband's insanity)

For ss. 19 (2), (3), 26 (3), 20 (2), (3) of the Matrimonial Causes Act, 1950 see pp. 1388, 1391, and 1389, *ante*.

(3) In relation to the provisions of the Act of 1950 specified in paragraphs (*a*) and (*b*) of the last preceding subsection,—

(*a*) any reference in subsection (1) of this section to a decree shall be construed as a reference to a decree nisi, and the reference to any time after a decree shall be construed as a reference to any such time whether before or after the decree has been made absolute; but

(*b*) nothing in subsection (1) of this section shall be construed as affecting the provisions of section twenty-nine of the Act of 1950 as to the commencement of proceedings for an order under the provisions specified in those paragraphs or as to the making or effect of such an order.

For s. 29 of the Matrimonial Causes Act, 1960, p. 1392, *ante*.

(4) In accordance with the preceding provisions of this section, the provisions of the Act of 1950 specified in the Schedule to this Act shall have effect subject to the amendments specified in that Schedule.

(5) Nothing in this section, or in any amendment made by this section in any of the enactments referred to therein, shall be construed as requiring the court, in determining any application for an order under any of those enactments, to disregard any delay in making or proceeding with the application.

2.—(1) Where under any of the relevant provisions of the Act of 1950 proceedings are brought against a man (in this section referred to s "the husband") by his wife or former wife (in this section referred to as "the wife") for financial relief, the wife may make an application under this section to the court in those proceedings with respect to any disposition made by the husband within the period of three years ending with the date of the application under this section, whether the dispoition was made before or after the commencement of those proceedings.

(2) Subject to the following provisions of this section, if on an application by the wife under this section it appears to the court—

(a) that the disposition to which the application relates was made by the husband with the intention of defeating the wife's claim for financial relief, and

(b) that, if the disposition were set aside, financial relief, or, as the case may be, different financial relief, would be granted to her,

the court may by order set aside the disposition and may give such consequential directions (including diections requiring the making of any payment or the disposal of any property) as the court thinks fit for the purpose of giving effect to the order under this subsection.

(3) The power conferred by the last preceding subsection shall not be exercisable in respect of a disposition made for valuable consideration to a person who, at the time of the disposition, acted in relation thereto in good faith and without notice of any intention on the part of the husband to defeat the wife's claim for financial relief.

(4) Where an application is made under this section with respect to a disposition, not being a disposition falling within the last preceding subsection, and the court is satisfied that the disposition would (apart from this section) have the consequence of defeating the wife's claim for financial relief, the disposition, not being a disposition falling within the last preceding subsection, by the husband with the mitention of defeating the wife's claim for financial relief.

See also Matrimonial Causes Act, 1963, s. 6 (3) (p. 1505, *post*).

5. The preceding provisions of this section shall have effect for enabling an application to the High Court to be made thereunder by a woman after she has obtained an order against her husband or former husband under any of the relevant provisions of the Act of 1950 as they apply for enabling an application to be made in proceedings for such an order:

Provided that for the purposes of the application of those provisions in accordance with this subsection—

(*a*) subsection (2) of this section shall apply as if paragraph (*b*) thereof were omitted, and

(*b*) the presumption mentioned in the last preceding subsection shall apply (in the case of a disposition not falling within subsection (3) of this section) if the court is satisfied that in consequence of the disposition the wife's claim for financial relief was defeated.

(6) The provisions of this section do not apply to a disposition made before the commencement of this Act.

(7) In this section any reference to defeating the wife's claim for financial relief is a reference to preventing financial relief from being granted to her, or reducing the amount of any such relief which might be so granted, or frustrating or impeding the enforcement of any order which might be made on her application under any of the relevant provisions of the Act of 1950.

See also Matrimonial Causes Act, 1963, s. 6 (3) (p. 1505, *post*).

(8) In this section—

"financial relief" means relief under any of the relevant provisions of the Act of 1950;

For the purposes of this section, "financial relief" includes relief under s. 26 (1), (3) of the Matrimonial Causes Act, 1950 (p. 1390, *ante*) and relief under s. 5 (1) of the Matrimonial Causes Act, 1963 (p. 1504, *post*): see Matrimonial Causes Act, 1963, s. 6 (4) (p. 1505, *post*).

"the relevant provisions of the Act of 1950" means the following provisions of that act, that is to say,—

(*a*) subsections (2) and (3) of section nineteen;
(*b*) subection (2) of section twenty;
(*c*) subsections (2) to (4) of section twenty-two (whereby, in connection with a decree for restitution of conjugal rights, a husband may be ordered to pay alimony to his wife, or to make or secure periodical payments to her); and
(*d*) section twenty-three (which confers additional power on the court to make orders for maintenance);

"valuable consideration" does not include marriage.

For ss. 19, 20, 22, 23 of the Matrimonial Causes Act, 1950, see pp. 1388, 1389, 1390, *ante*.

3.—(1) Where after the commencement of this Act a person dies domiciled in England and is survived by a former wife of his who has not re-married, the former wife may apply to the High Court for an order under this section on the ground that the deceased has not made reasonable provision for her maintenance after his death:

Provided that an application under this section shall not be made except—

(*a*) before the end of the period of six months beginning with the date on which representation in regard to the estate of the deceased is first taken out, or
(*b*) that the deceased has made no provision, or has not made reasonable before the administration and distribution of the estate have been completed.

(2) If on an application by a former wife under this section the court is satisfied—

(*a*) that it would have been reasonable for the deceased to make provision for her maintenance, and
(*b*) that the deceased has made no provision, or has not made reasonable provision, for her maintenance,

the court may order that such reasonable provision for her maintenance as the court thinks fit shall be made out of the net estate of the deceased, subject to such conditions or restrictions (if any) as the court may impose.

(3) Where the court makes an order under this section requiring provision to be made for the maintenance of a former wife, the order shall require that

provision to be made by way of periodical payments terminating not later than her death and, if she re-marries, not later than her re-marriage:

Provided that if the value of the net estate of the deceased does not exceed five thousand pounds the order may require the provision for her maintenance to be made, wholly or in part, by way of a lump sum payment.

(4) On any application under this section, the court shall have regard—

(*a*) to any past, present or future capital of the applicant and to any income of hers from any source;

(*b*) to her conduct in relation to the deceased and otherwise;

(*c*) to any application made by her during the lifetime of the deceased, under the Act of 1950 or the enactments repealed by that Act, for such an order as is mentioned in subsection (2) or subsection (3) of section nineteen of that Act, and to the order (if any) made on any such application, or (if no such application was made by her, or such an application was made by her and no such order was made thereon) the circumstances appearing to the court to be the reasons why no such application was made, or no such order was made, as the case may be; and

(*d*) to any other matter of thing which, in the circumstances of the case, the court may consider relevant or material in relation to her, to persons interested in the estate of the deceased, or otherwise.

For s. 19 (2), (3) of the Matrimonial Causes Act, 1950, see p. 1388, *ante*.

(5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order under this section, the court shall have regard to the nature of the property representing the net estate of the deceased, and shall not order any such provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the dependants of the deceased, of the applicant, and of the persons who, apart from the order, would be entitled to that property.

(6) In this and the next following section "former wife", in relation to a deceased person, means a woman whose marriage with him was during his lifetime dissolved or annulled by a decree made under the Act of 1950 or under any of the enactments repealed by that Act, and "net estate" and "dependant" have the same meanings respectively as in the Inheritance (Family Provision) Act, 1938.

By s. 1 of the Inheritance (Family Provision) Act, 1938 (as amended by the Intestate's Estates Act, 1952) (32 Halsbury's Statutes (2nd Edn.) 139) it is enacted that the word "dependant" in that Act shall include

(i) a wife or husband,

(ii) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself,

(iii) an infant son, or

(iv) a son who is, by reason of some mental or physical disability incapable of maintaining himself.

"Net estate" is defined by s. 5 of the same Act as follows:—

" 'net estate' means all the property of which a deceased person had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death."

4.—(1) Subject to the following provisions of this section, where an order (in this section referred to as "the original order") has been made under the

last preceding section, the High Court, on an application under this section, shall have power by order to discharge or vary the original order or to suspend any provision thereof temporarily and to revive the operation of any provision so suspended.

(2) an application under this section may be made by or on behalf of any of the following persons, that is to say,—

(*a*) the former wife on whose application the original order was made;

(*b*) any other former wife of the deceased;

(*c*) any dependant of the deceased;

(*d*) the trustees of any relevant property;

(*e*) any person who, under the will of the deceased or under the law relating to intestacy, is beneficially interested in any relevant property.

(3) An order under this section varying the original order, or reviving any suspended provision thereof, shall not be made so as to affect any property which, at the time of the application for the order under this section, is not relevant property.

(4) In exercising the powers conferred by this section, the court shall have regard to all the circumstances of the case, including any change in the circumstances to which the court was required to have regard in determining the application for the original order.

(5) In this section "relevant property" means property the income of which, in accordance with the original order or any consequential directions given by the court in connection therewith, is applicable (wholly or in part) for the maintenance of the former wife on whose application the original order was made.

5.—(1) Subject to the next following subsection, the provisions of section two of this Act shall have effect for enabling an application thereunder to be made by a man with respect to a disposition made by his wife or former wife, as those provisions have effect for enabling an application thereunder to be made by a woman with respect to a disposition made by her husband or former husband.

For the purposes of this section, "financial relief" in section 2 of this Act (to which reference is made in this sub-section) includes relief under s. 26 (1), (3) of the Matrimonial Causes Act, 1950 (p. 1390, *ante*) and relief under s. 5 (1) of the Matrimonal Causes Act, 1963 (p. 1504, *post*): see Matrimonial Causes Act, 1963, s. 5 (4) (p. 1504, *post*).

(2) For the purposes of the application of those provisions in accordance with the preceding subsection—

(*a*) for references to a man and to a wife or former wife there shall be substituted respectively references to a woman and to a husband or former husband, and for references to a woman and to a husband or former husband there shall be substituted respectively references to a man and to a wife or former wife;

(*b*) "the relevant provisions of the Act of 1950" (instead of having the meaning assigned to it by subsection (8) of section two of this Act) means the following provisions of that Act, that is to say—

(i) subsections (2) and (3) of section nineteen as extended by subsection (4) of that section,

(ii) subsection (2) of section twenty as extended by subsection (3) of that section,

(iii) subsection (1) of section twenty-four (which, in a case where the court pronounces a decree for divorce or judicial separation

by reason of the adultery, desertion or cruelty of the wife, enables the court to order a settlement of property to which she is entitled), and

(iv) subsection (2) of section twenty-four (which enables the court, where a decree for restitution of conjugal rights is made on the application of the husband, to make an order for the settlement of property to which the wife is entitled or for periodical payments in respect of profits or earnings received by her).

For ss. 19, 20 and 24 of the Matrimonial Causes Act, 1950, see pp. 1388-1390, *ante.*

(3) The provisions of sections three and four of this Act shall have effect in relation to a former husband of a deceased woman as they have effect in relation to a former wife of a deceased man, as if any reference in those sections to a former wife were a reference to a former husband:

Provided that, for the purposes of those provisions as applied by this subsection, the reference in paragraph (c) of subsection (4) of section three of this Act to such an order as is mentioned in subsection (2) or subsection (3) of section nineteen of the Act of 1950 shall be construed as a reference to any such order as could be made either—

(*a*) under the said subsection (2) or subsection (3) as extended by subsection (4) of the said section nineteen, or

(*b*) under subsection (1) of section twenty-four of that Act.

For ss. 19 and 24 of the Matrimonial Causes Act, 1950, see pp. 1388, 1390, *ante.*

(4) In the last preceding subsection (but without prejudice to the generality of any reference to a former husband in subsection (1) or subsection (2) of this section) "former husband", in relation to a deceased woman, means a man whose marriage with her was during her lifetime dissolved or annulled by a decree made under the Act of 1950 or under any of the enactments repealed by that Act.

6.—(1) The provisions of sections three and four of this Act shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased after the end of the period of six months referred to in subsection (1) of section three of this Act, on the ground that they ought to have taken into account the possibility that the court might permit an application under that section after the end of that period, or that an order under that section might be varied under section four of this Act; but this subsection shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under section three or section four of this Act.

(2) In considering, under subsection (1) of section three of this Act, the question when representation was first taken out, a grant limited to settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal estate shall be left out of account unless a grant limited to the remainder of the estate had previously been made or is made at the same time.

(3) For the purposes of subsection (1) of section one hundred and sixty-two of the Superme Court of Judicature (Consolidation) Act, 1925 (which relates to the discretion of the court as to the persons to whom administration is to be granted), a person by whom or on whose behalf an application under section three or section four of this Act is proposed to be made shall be deemed to be a person interested in the estate of the deceased.

For the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162 (1), see 9 Halsbury's Statutes (2nd Edn.) 777.

(4) Section three of the Inheritance (Family Provision) Act, 1938 (which relates to the effect and form of orders under that Act) shall have effect in relation to orders under sections three and four of this Act as it has effect in relation to orders under that Act.

For the Inheritance (Family Provisions) Act, 1938, see 9 Halsbury's Statutes (2nd Edn.) 795.

(5) In this section any reference to any of the provisions of section three or section four of this Act shall be construed as including a reference to those provisions as applied by the last preceding section.

7.—(1) Any right of a wife, under section seventeen of the Married Women's Property Act, 1882, to apply to a judge of the High Court or of a county court, in any question between husband and wife as to the title to or possession of property, shall include the right to make such an application where it is claimed by the wife that her husband has had in his possession or under his control—

(*a*) money to which, or to share of which, she was beneficially entitled (whether by reason that it represented the proceeds of property to which, or to an interest in which, she was beneficially entitled, or for any other reason), or

(*b*) property (other than money) to which, or to an interest in which, she was beneficially entitled,

and that either that money or other property has ceased to be in his possession or under his control or that she does not know whether it is still in his possession or under his control.

For s. 17 of the Married Women's Property Act, 1882, see p. 1231, *ante*.

(2) Where, on an application made to a judge of the High Court or of a county court under the said section seventeen, as extended by the preceding subsection, the judge is satisfied—

(a) that the husband has had in his possession or under his control money or other property as mentioned in paragraph (*a*) or paragraph (*b*) of the preceding subsection, and

(b) that he has not made to the wife, in respect of that money or other property, such payment or disposition as would have been appropriate in the circumstances,

the power to make orders under that section shall be extended in accordance with the next following subsection.

(3) Where the last preceding subsection applies, the power to make orders under the said section seventeen shall include power for the judge to order the husband to pay to the wife—

(*a*) in a case of falling within paragraph (*a*) of subsection (1) of this section, such sum in respect of the money to which the application relates, or the wife's share thereof, as the case may be, or

(*b*) in a case falling within paragraph (*b*) of the said subsection (1), such sum in respect of the value of the property to which the application relates, or the wife's interest therein, as the case may be,

as the judge may consider appropriate.

(4) Where on an application under the said section seventeen as extended by this section it appears to the judge that there is any property which—

(*a*) represents the whole or part of the money or property in question, and

(*b*) is property in respect of which an order could have been made under that section if an application had been made by the wife thereunder in a question as to the title to or possession of that property,

the judge (either in substitution for or in addition to the making of an order in accordance with the last preceding subsection) may make any order under that section in respect of that property which he could have made on such an application as is mentioned in paragraph (*b*) of this subsection.

(5) The preceding provisions of this section shall have effect in relation to a husband as they have effect in relation to a wife, as if any reference to the husband were a reference to the wife and any reference to the wife were a reference to the husband.

(6) Any power of a judge under the said section seventeen to direct inquiries or give any other directions in relation to an application under that section shall be exercisable in relation to an application made under that section as extended by this section; and the provisos to that section (which relate to appeals and other matters) shall apply in relation to any order made under the said section seventeen as extended by this section as they apply in relation to an order made under that section apart from this section.

(7) For the avoidance of doubt it is hereby declared that any power conferred by the said section seventeen to make orders with respect to any property includes power to order a sale of the property.

8.—(1) In this Act, except in so far as the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say:—

"disposition" does not include any provision contained in a will, but, with that exception, includes any conveyance, assurance or gift of property of any description, whether made by an instrument or otherwise;

"property" means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, and any other right or interest whether in possession or not;

"will" includes a codicil.

(2) Except in so far as the context otherwise requires, any reference in this Act to an enactment shall be construed as a reference to that enactment as amended by or under any other enactment.

9.—(1) This Act may be cited as the Matrimonial Causes (Property and Maintenance) Act, 1958.

(2) This Act shall come into operation on such day as may be appointed by the Lord Chancellor by an order made by statutory instrument.

The Act was brought into operation by the Matrimonial Causes (Property and Maintenance) Act (Commencement) Order, 1958 (1958 No. 2080 (C.15)), on the 1st January, 1959.

(3) This Act shall not extend to Scotland or to Northern Ireland.

SCHEDULE

Amendments of Matrimonial Causes Act, 1950

In section nineteen, in subsection (2), for the words "On any decree for divorce or nullity of marriage" there shall be substituted the words "Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi

for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute"; and in subsection (3), for the words "On any decree for divorce or nullity of marriage", there shall be substituted the words "Subject to the provisions of the said section twenty-nine, on pronouncing a decree nisi for divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute".

In section twenty, in subsection (2), for the words "On any decree" there shall be substituted the words "On or at any time after a decree".

In section twenty-six, in subsection (3), for the words "On any decree of divorce or nullity of marriage", there shall be substituted the words "Subject to the provisions of section twenty-nine of this Act, on pronouncing a decree nisi of divorce or nullity of marriage or at any time thereafter, whether before or after the decree has been made absolute" and for the words "on a decree of divorce" there shall be substituted the words "where the decree is a decree of divorce and is".

For ss. 19, 20 and 26 of the Matrimonial Causes Act, 1950, see pp. 1389-1390, *ante*.

MAINTENANCE ORDERS ACT, 1958

(6 & 7 Eliz. 2, c. 39)

An Act to make provision for the registration in the High Court or a magistrates' court of certain maintenance orders made by the other of those courts or a county court and with respect to the enforcement and variation of registered orders; to make provision for the attachment of sums falling to be paid by way of wages, salary or other earnings or by way of pension for the purpose of enforcing certain maintenance orders; to amend section seventy-four of the Magistrates' Courts Act, 1952; to make provision for the review of committals to prison by magistrates' courts for failure to comply with maintenance orders; to enable Orders in Council under section twelve of the Maintenence Orders (Facilities for Enforcement) Act, 1920, to be revoked or varied; and for purposes connected with the matters aforesaid. [7th July, 1958]

PART I

REGISTRATION ENFORCEMENT AND VARIATION OF CERTAIN MAINTENANCE ORDERS

1.—(1) The provisions of this Part of this Act shall have effect for the purposes of enabling maintenance orders to which this Part of this Act applies to be registered—

(*a*) in the case of an order made by the High Court or a county court, in a magistrates' court; and

(*b*) in the case of an order made by a magistrates' court, in the High Court,

and, subject to those provisions, while so registered—

(i) to be enforced in like manner as an order made by the court of registration; and

(ii) in the case of an order registered in a magistrates' court, to be varied by a magistrates' court.

(2) This Part of this Act applies to maintenance orders made by the High Court, a county court or a magistrates' court, other than orders registered under Part II of the Maintenance Orders Act, 1950.

For Part II of the Maintenance Orders Act, 1950, see pp. 1397 *et seq.*, *ante*.

(3) Without prejudice to the provisions of section twenty-one of this Act, in this Part of this Act, unless the context otherwise requires, the following expressions have the following meanings—

"High Court order", "county court order" and "magistrates' court order" means an order made by the High Court, a county court or a magistrates' court, as the case may be;

"order" means a maintenance order to which this Part of this Act applies;

"original court" and "court of registration", in relation to an order, mean the court by which the order was made or, as the case may be, the court in which the order is registered;

"registered" means registered in accordance with the provisions of this Part of this Act, and "registration" shall be construed accordingly;

and for the purposes of this Part of this Act an order for the payment by the defendant of any costs incurred in proceedings relating to a maintenance order, being an order for the payment of costs made while the maintenance order is not registered, shall be deemed to form part of that maintenance order.

2.—(1) A person entitled to receive payments under a High Court or county court order may apply for the registration of the order to the original court, and the court may, if it thinks fit, grant the application.

(2) Where an application for the registration of such an order is granted—

(*a*) no proceedings shall be begun, and no writ, warrant or other process shall be issued, for the enforcement of the order before the registration of the order or the expiration of the prescribed period from the grant of the application, whichever first occurs; and

(*b*) the original court shall, on being satisfied within the period aforesaid by the person who made the application that no such proceedings or process begun or issued before the grant of the application remain pending or in force, cause a certified copy of the order to be sent to the clerk of the magistrates' court acting for the petty sessions area in which the defendant appears to be;

but if at the expiration of the period aforesaid the original court has not been so satisfied, the grant of the application shall become void.

(3) A person entitled to receive payments under a magistrates' court order who considers that the order could be more effectively enforced if it were registered may apply for the registration of the order to the original court, and the court shall grant the application on being satisfied in the prescribed manner that, at the time when the application was made, an amount equal to not less, in the case of an order for weekly payments, than four or, in any other case, than two of the payments required by the order was due thereunder and unpaid.

(4) Where an application for the registration of a magistrates' court order is granted—

(*a*) no proceedings for the enforcement of the order shall be begun before the registration takes place and no warrant or other process for the enforcement thereof shall be issued in consequence of any such proceedings begun before the grant of the application;

(*b*) any warrant of commitment issued for the enforcement of the order shall cease to have effect when the person in possession of the

warrant is informed of the grant of the application, unless the defendant has then already been detained in pursuance of the warrant; and

(c) the original court shall, on being satisfied in the prescribed manner that no process for the enforcement of the order issued before the grant of the application remains in force, cause a certified copy of the order to be sent to the prescribed officer of the High Court.

(5) The officer or clerk of a court who receives a certified copy of an order sent to him under this section shall cause the order to be registered in that court.

(6) Subsections (1) to (4) of section nineteen of the Maintenance Orders Act, 1950 (which provide for the suspension, while a magistrates' court order is registered under Part II of that Act, of any provision of the order requiring payments to be made through a third party, for ordering payments under an order so registered in a magistrates' court to be paid through a collecting officer, and for authorising a person to make payments otherwise than in accordance with the requirements of that section until he has notice of those requirements) shall have effect for the purposes of this Part of this Act as if for any reference in that section to the said Part II and a maintenance order there were substituted a reference to this Part of this Act and a maintenance order to which this Part of this Act applies.

For s. 19 of the Maintenance Orders Act, 1950, see p. 1,399, *ante*.

(7) In this section "certified copy" in relation to an order of a court means a copy certified by the proper officer of the court to be a true copy of the order or of the official record thereof.

3.—(1) Subject to the provisions of this section, a registered order shall be enforceable in all respects as if it had been made by the court of registration and as if that court had had jurisdiction to make it; and proceedings for or with respect to the enforcement of a registered order may be taken accordingly.

(2) Subject to the provisions of the next following subsection, an order registered in a magistrates' court shall be enforceable as if it were an affiliation order; and the provisions of any enactment with respect to the enforcement of affiliation orders (including enactments relating to the accrual of arrears and the remission of sums due) shall apply accordingly.

In this subsection "enactment" includes any order, rule or regulation made in pursuance of any Act.

(3) Where an order remains or becomes registered after the discharge of the order, no proceedings shall be taken by virtue of that registration except in respect of arrears which were due under that order at the time of the discharge and have not been remitted.

(4) Except as provided by this section, no proceedings shall be taken for or with respect to the enforcement of a registered order.

4.—(1) The provisions of this section shall have effect with respect to the variation of orders registered in magistrates' courts, and references in this section to registered orders shall be construed accordingly.

(2) Subject to the following provisions of this section—

(*a*) the court of registration may exercise the same jurisdiction to vary any rate of payments specified by a registered order (other than jurisdiction in a case where a party to the order is not present in England when the application for variation is made) as is exercisable, apart from this subsection, by the original court; and

(*b*) a rate of payments specified by a registered order shall not be varied except by the court of registration or any other magistrates' court to

which the jurisdiction conferred by the foregoing paragraph is extended by rules of court.

(3) A rate of payments specified by a registered order shall not be varied by virtue of the last foregoing subsection so as to exceed whichever of the following rates is the greater, that is to say—

(*a*) the rate of payments specified by the order as made or last varied by the original court; or

(b) in the case of payments for the maintenance of a person as a party to a marriage (including a marriage which has been dissolved or annulled) [seven pounds ten shillings] a week and, in the case of payments for the maintenance of a child or children [fifty] shillings a week in respect of each child.

The words in square brackets are substituted for the former figures "five pounds" and "thirty shillings" by the Matrimonial Proceedings (Magistrates, Courts) Act, 1960, s. 15 (*b*) (p. 1496, *post*).

(4) If it appears to the court to which an application is made by virtue of subsection (2) of this section for the variation of a rate of payments specified by a registered order that, by reason of the limitations imposed on the court's jurisdiction by the last foregoing subsection or for any other reason, it is appropriate to remit the application to the original court, the first-mentioned court shall so remit the application and the original court shall thereupon deal with the application as if the order were not registered.

(5) Nothing in subsection (2) of this section shall affect the jurisdiction of the original court to vary a rate of payment specified by a registered order if an application for the variation of that rate is made to that court—

(*a*) in proceedings for a variation of provisions of the order which do not specify a rate of payments; or

(*b*) at a time when a party to the order is not present in England.

(6) No application for any variation of a registered order shall be made to any court while proceedings for any variation of the order are pending in any other court.

(7) Where a magistrates' court, in exercise of the jurisdiction conferred by subsection (2) of this section, varies or refuses to vary a registered order, an appeal from the variation or refusal shall lie to the High Court; and so much of subsection (1) of section sixty-three of the Supreme Court of Judicature (Consolidation) Act, 1925, as requires an appeal from any court to the High Court to be heard and determined by a divisional court shall not apply to appeals under this subsection.

For appeals to High Court, see R.S.C., Ord. 41 D, p. 1509, *post*. For sub-s. (1) of s. 63 of the Supreme Court of Judicature (Consolidation) Act, 1925, see 18 Halsbury's Statutes (2nd Edn.) 796.

5.—(1) If a person entitled to receive payments under a registered order desires the registration to be cancelled, he may give notice under this section.

(2) Where the original court varies or discharges an order registered in a magistrates' court, the original court may, if it thinks fit, give notice under this section.

(3) Where a magistrates' court discharges an order registered in the High Court and it appears to the magistrates' court, whether by reason of the remission of arrears by that court or otherwise, that no arrears under the order remain to be recovered, the magistrates' court shall give notice under this section.

(4) Notice under this section shall be given to the court of registration; and where such notice is given—

(*a*) no proceedings for the enforcement of the registered order shall be begun before the cancellation of the registration and no writ, warrant or other process for the enforcement thereof shall be issued in consequence of any such proceedings begun before the giving of the notice;

(*b*) where the order is registered in a magistrates' court, any warrant of commitment issued for the enforcement of the order shall cease to have effect when the person in possession of the warrant is informed of the giving of the notice, unless the defendant has then already been detained in pursuance of the warrant; and

(*c*) the court of registration shall cancel the registration on being satisfied in the prescribed manner—

(i) that no process for the enforcement of the registered order issued before the giving of the notice remains in force; and

(ii) in the case of an order registered in a magistrates' court, that no proceedings for the variation of the order are pending in a magistrates' court.

(5) On the cancellation of the registration of a High Court or county court order, any order made in relation thereto under subsection (2) of section nineteen of the Maintenance Orders Act, 1950, as applied by subsection (6) of section two of this Act, shall cease to have effect, but until the defendant receives the prescribed notice of the cancellation he shall be deemed to comply with the High Court or county court order if he makes payments in accordance with any order under the said subsection (2) as so applied which was in force immediately before the cancellation and of which he has notice.

For s. 19 (2) of the Maintenance Orders Act, 1950, see p. 1400, *ante*.

PART II

ATTACHMENT OF EARNINGS ORDERS

6.—(1) If, on the application of a person entitled to receive payments under a maintenance order, it appears to a court by which payment of any arrears under the order is enforceable—

(*a*) that, at the time when the application was made, there was due under the order and unpaid an amount equal to not less, in the case of an order for weekly payments, than four or, in any other case, than two of the payments required by the order; and

(*b*) that the defendant is a person to whom earnings fall to be paid, then, subject to the next following subsection, the court may, if it thinks fit, by an order or orders require the person to whom the order in question is directed, being a person appearing to the court to be the defendant's employer in respect of those earnings or a part thereof, to make out of those earnings or that part thereof payments in accordance with the Schedule to this Act; and any such order is in this Act referred to as an "attachment of earnings order".

(2) The court shall not make an attachment of earnings order if it appears to the court that the failure of the defendant to make payments in accordance with the maintenance order in question was not due to his wilful refusal or culpable neglect.

(3) An attachment of earnings order shall—

(*a*) specify the normal deduction rate, that is to say, the rate at which, after taking into account any right or liability of the defendant to deduct income tax from payments made under the related maintenance order, the court making or varying the attachment of earnings order thinks it reasonable that the earnings to which that order relates should be applied from time to time in satisfying the requirements of the maintenance order, not exceeding the rate appearing to that court to be necessary for the purpose of—

(i) securing payment of the sums falling due from time to time under the maintenance order; and

(ii) securing payment within a reasonable period of any sums already due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order which are payable by the defendant;

(*b*) specify the protected earnings rate, that is to say, the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court aforesaid thinks it reasonable that the relevant earnings within the meaning of the Schedule to this Act should not be reduced by a payment made in pursuance of the attachment of earnings order;

(*c*) designate the officer to whom any payment under the said Schedule is to be made, being—

(i) if the order is made by the High Court, the registrar of such county court as may be specified by the order or, if the High Court thinks fit so to provide, the proper officer of the High Court;

(ii) if the order is made by a county court, the registrar of that court;

(iii) if the order is made by a magistrates' court and payments under the related maintenance order are for the time being required by an order under subsection (1) of section fifty-two of the Magistrates' Courts Act, 1952, to be made to the clerk of a magistrates' court, that clerk;

(iv) in any other case where the order is made by a magistrates' court, the clerk of that court; and

(*d*) contain, so far as they are known to the court making the order, such particulars as may be prescribed for the purpose of enabling the defendant to be identified by the person to whom the order is directed.

(4) An attachment of earnings order shall not come into force until the expiration of seven days from the date when a copy of the order is served on the person to whom the order is directed.

(5) For the avoidance of doubt it is hereby declared that, in relation to a maintenance order made by the High Court, the reference in subsection (1) of this section to a court by which payment of any arrears under the order is enforceable includes a reference to a county court.

7. Without prejudice to the powers to make attachment of earnings orders conferred by the last foregoing section, where proceedings are brought—

(*a*) in the High Court or a county court under section five of the Debtors Act, 1869 (which authorises the committal to prison of persons refusing or neglecting to pay certain debts which that have had the

means to pay) in respect of a default in making payments under a maintenance order; or

(*b*) under the Magistrates' Courts Act, 1952, to enforce the payment of any sum ordered to be paid by a maintenance order,

and it appears to the court that, at the date when the proceedings were begun, such an amount as is mentioned in paragraph (*a*) of subsection (1) of the last foregoing section was due under the maintenance order and unpaid and that the defendant is a person to whom earnings fall to be paid, then, subject to subsection (2) of that section, the court may, if it thinks fit, make an attachment of earnings order instead of making any other order to enforce the making of payments under the maintenance order.

For s. 5 of the Debtors Act, 1869, sec 2 Halsbury's Statutes (2nd Edn.) 294. For the Magistrates' Courts Act, 1952, see pp. 1408 *et seq.*, *ante*, and 32 Halsbury's Statutes (2nd Edn.) 416.

8. Where an attachment of earnings order is made, no order or warrant of commitment shall be issued in consequence of any proceedings for the enforcement of the related maintenance order begun before the making of the attachment of earnings order.

9.—(1) The court by which an atachment of earnings order has been made may if it thinks fit, on the application of the defendant or a person entitled to receive payments under the related maintenance order, make an order discharging or varying the attachment of earnings order.

(2) An attachment of earnings order shall cease to have effect—

(*a*) upon the grant of an application under section two of this Act for the registration of the related maintenance order under Part I of this Act, notwithstanding that, in the case of an application under subsection (1) of that section, the grant may subsequently become void under subsection (2) thereof;

(*b*) where the related maintenance order is registered under the said Part I, upon the giving of notice with respect thereto under section five of this Act;

(*c*) upon the making of an order of commitment or the issue of a warrant of commitment, for the enforcement of the related maintenance order, or upon the exercise for that purpose of the power conferred on a magistrates' court by subsection (2) of section sixty-five of the Magistrates' Courts Act, 1952, to postpone the issue of such a warrant:

(*d*) upon the discharge of the related maintenance order while it is not registered under Part I of this Act;

(*e*) upon the related maintenance order ceasing to be registered in a court in England, or becoming registered in a court in Scotland or Northern Ireland, under Part II of the Maintenance Orders Act, 1950;

and where an attachment of earnings order ceases to have effect as aforesaid the proper officer of the prescribed court shall give notice of the cessation to the person to whom the order was directed:

Provided that where the related maintenance order is discharged as mentioned in paragraph (*d*) of this subsection and it appears to the court discharging the order that arrears thereunder will remain to be recovered after the discharge, that court may, if it thinks fit, direct that this subsection shall not apply.

For Part II of the Maintenance Orders Act, 1950, see pp. 1397 *et seq.*, *ante*.

For Magistrates' Courts Act, 1952, see pp. 1408 *et seq.*, *ante*, and 32 Halsbury's Statutes (2nd Edn.) 416.

(3) Where notice is given to a court in pursuance of subsection (4) of the next following section, the court shall discharge the attachment of earnings order to which the notice relates.

(4) Where at any time it apears to the officer designated in pursuance of paragraph (*c*) of subsection (3) of section six of this Act by an attachment of earnings order made by the High Court or a county court that—

(*a*) the aggregate of the payments made for the purposes of the related maintenance order by the defendant (whether under the attachment of earnings order or otherwise) exceeds the aggregate of the payments required up to that time by the maintenance order; and

(*b*) the normal deduction rate specified by the attachment of earnings order (or where two or more such orders are in force in relation to the maintenance order, the aggregate of the normal deduction rates specified by those orders) exceeds the rate of payments required by the maintenance order; and

(*c*) no proceedings for the variation or discharge of the attachment of earnings order are pending.

the said officer shall give the prescribed notice to the person to whom he is required to pay sums received under the attachment of earnings order and to the defendant, and the court which made that order—

(*i*) shall make the appropriate variation order unless the defendant requests the court in the prescribed manner and before the expiration of the prescribed period to proceed under the following paragraph and the court decides to proceed thereunder;

(*ii*) if the court decides to proceed under this paragraph, shall make an order either discharging the attachment of earnings order or varying that order in such manner as the court thinks fit.

In this and the next following subsection "the appropriate variation order" means an order varying the attachment of earnings order in question by reducing the normal deduction rate specified thereby so as to secure that that rate (or, in the case mentioned in paragraph (*b*) of this subsection, the aggregate of the rates therein mentioned) is the same as the rate of payments required by the maintenance order or is such lower rate as the court thinks fit having regard to the amount of the excess mentioned in paragraph (*a*) of this subsection.

(5) Where at any time it appears to the officer designated as aforesaid by an attachment of earnings order made by a magistrates' court that the conditions specified in paragraphs (*a*) to (*c*) of the last foregoing subsection are satisfied, that officer shall make an application to that court for the appropriate variation order, and the court—

(*a*) shall grant the application unless the defendant appears at the hearing thereof and requests the court to proced under the following paragraph and the court decides to proceed thereunder;

(*b*) if the court decides to proceed under this paragraph, shall make an order either discharging the attachment of earnings order or varying that order in such manner as the court thinks fit.

(6) An order varying an attachment of earnings order shall not come into force until the expiration of seven days from the date when a copy of the first-mentioned order is served on the person to whom the attachment of earnings order is directed; and where an attachment of earnings order ceases to have effect under subsection (2) of this section, or is discharged otherwise than

under subsection (3) thereof, the said person shall not incur any liability in consequence of his treating the order as still in force at any time before the expiration of seven days from the date when the notice required by the said subsection (2) or, as the case may be, a copy of the discharging order is served on him.

10.—(1) A person to whom an attachment of earnings order is directed shall, notwithstanding anything in any other enactment but subject to the following provisions of this Act, comply with the order or, if the order is subsequently varied under the last foregoing section, with the order as so varied.

(2) Where on any occasion on which earnings fall to be paid to a defendant there are in force two or more attachment of earnings orders relating to those earnings, then, for the purpose of complying with the Schedule to this Act, the employer shall—

(*a*) deal with those orders according to the respective dates on which they came into force, disregarding any later order until any earlier order has been dealt with;

(*b*) deal with any later order as if the earnings to which it relates were the residue of the defendant's earnings after the making of any payment under the said Schedule in pursuance of any earlier order.

(3) An employer who, in pursuance of an attachment of earnings order, makes a payment under the said Schedule shall give to the defendant a statement in writing specifying the amount of that payment.

(4) a person to whom an attachment ofearnings order is directed who, at the time when a copy of the order is served on him or at any time thereafter, has on no occasion during the period of four weeks immediately preceding that time been the defendant's employer shall forthwith give notice in writing in the prescribed form to the court which made the order.

11.—(1) Where proceedings relating to an attachment of earnings order are brought in any court, the court may, either before or at the hearing and, in the case of proceedings brought in a magistrates' court, any justice of the peace acting for the same petty sessions area as that court may before the hearing—

(*a*) order the defendant to give to the court, within such period as may be specified by the order, a statement signed by him of—

(i) the name and address of his employer, or of each of his employers if he has more than one;

(ii) such particulars as to the defendant's earnings as may be so specified; and

(iii) such prescribed particulars as may be so specified for the purpose of enabling the defendant to be identified by any employer of his;

(*b*) order any person appearing to the court or justice to be an employer of the defendant to give to the court, within such period as may be specified by the order, a statement signed by him or on his behalf of such particulars as may be specified by the order of all earnings of the defendant which fell to be paid by that person during such period as may be so specified.

(2) A document purporting to be such a statement as is mentioned in the foregoing subsection shall, in any such proceedings as are so mentioned, be received in evidence and be deemed to be such a statement without further proof unless the contrary is shown.

12.—(1) 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 or 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 by the application are earnings for the purpose of that order; and the person to whom the order is directed shall be entitled to give effect to any determination for the time being in force under this subsection.

(2) A person to whom an attachment of earnings order is directed who makes an application under the foregoing subsection shall not incur any liability for failing to comply with the order as respects any payments of the class or description specified by the application which are made by him to the defendant while the application, or any appeal in consequence thereof, is pending:

Provided that this subsection shall not apply as respects such payments if the said person subsequently withdraws the application or, as the case may be, abandons the appeal.

13.—(1) The officer to whom an employer pays any sum in pursuance of an attachment of earnings order shall pay that sum in accordance with rules of court to such person entitled to receive payments under the related maintenance order as is specified by the attachment of earnings order.

(2) Any sums received by virtue of an attachment of earnings order by the person aforesaid shall be deemed to be payments made by the defendant, with such deductions (if any) in respect of income tax as he is entitled or required to make, so as to discharge first any sums for the time being due and unpaid under the related 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 which were payable by the defendant when the attachment of earnings order was made or last varied.

(3) On any occasion on which an employer makes a payment under the Schedule to this Act in respect of a defendant, the employer may, notwithstanding anything in any other enactment, retain for his own use out of any balance of the defendant's earnings remaining after the making of that payment the sum of sixpence or, if on that occasion the employer makes such payments in pursuance of two or more attachment of earnings orders relating to the defendant, the sum of sixpence in respect of each such payment.

14.—(1) In relation to earnings falling to be paid by the Crown or a Minister of the Crown or out of the public revenue of the United Kingdom, this Part of this Act shall have effect subject to the following modifications, that is to say—

(*a*) the earnings shall be treated as falling to be paid by the chief officer for the time being of the department, office or other body concerned; and

(*b*) the next following section shall not apply except in relation to a failure by the defendant to comply with an order under section eleven of this Act.

(2) If any question arises, in connection with any proceedings relating to an attachment of earnings order, as to what department, office or other body is concerned for the purposes of this section, or as to who for those purposes is the chief officer thereof, that question shall be referred to and determined by the Treasury, but the Treasury shall not be under any obligation to consider a reference under this subsection unless it is made by a court.

(3) A document purporting to set out a determination of the Treasury under the last foregoing subsection and to be signed by an official of the Treasury shall, in any such proceedings as are mentioned in that subsection, be admissible in evidence and deemed to contain an accurate statement of such a determination unless the contrary is shown.

(4) Subsection (2) of section two hundred and three of the Army Act, 1955, and subsection (2) of section two hundred and three of the Air Force Act, 1955 (which restrict the powers of courts to make orders attaching, among other things, pension payable in respect of service in Her Majesty's military and air forces) shall not apply to the making or variation of attachment of earnings orders.

For s. 203 of the Army Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 575; for s. 203 of the Air Force Act, 1955, see 35 Halsbury's Statutes (2nd Edn.) 735.

15.—(1) A person who—

(*a*) fails to comply with subsection (1) or subsection (4) of section ten of this Act or an order of a magistrates' court or justice of the peace under section eleven thereof; or

(*b*) gives such a notice as is mentioned in the said subsection (4), or a statement in pursuance of such an order as aforesaid, which he knows to be false in a material particular; or

(*c*) recklessly gives such a notice or statement which is false in a material particular,

shall, subject to the following subsection, be liable on summary conviction to a fine not exceeding ten pounds and in the case of a second or subsequent conviction (being, in the case of a failure to comply with the said subsection (1), a second or subsequent conviction relating to the same attachment of earnings order) to a fine not exceeding twenty-five pounds.

(2) It shall be a defence for a person charged with failing to comply with the said subsection (1) to prove that he took all reasonable steps to comply with the attachment of earnings order to which the failure relates.

PART III

MISCELLANEOUS AND SUPPLEMENTAL

Miscellaneous

16.—(1) Section seventy-four of the Magistrates' Courts Act, 1952 (which relates to the enforcement of payments under affiliation orders and orders enforceable as affiliation orders) shall have effect, in relation to complaints under that section made on or after the date on which this section comes into operation and to proceedings in pursuance of such complaints, as if for subsections (3) to (7) thereof there were substituted the following subsections that is to say—

"(3) In relation to complaints under this section, section forty-seven of this Act shall not apply and section forty-eight thereof shall have effect as if the words 'if evidence has been received on a previous occasion' were omitted.

(4) Where at the time and place appointed for the hearing or adjourned hearing of a complaint under this section the complainant appears but the defendant does not, the court may proceed in his absence:

Provided that the court shall not begin to hear the complaint in the absence of the defendant unless either it is proved to the satisfaction of the court, on oath, or in such other manner as may be prescribed, that the summons was served on him within what appears to the court to be a reasonable time before the hearing or adjourned hearing or the defendant has appeared on a previous occasion to answer the complaint.

(5) If a complaint under this section is substantiated on oath, any justice of the peace acting for the same petty sessions area as a court having jurisdiction to hear the complaint may issue a warrant for the defendant's arrest, whether or not a summons has been previously issued.

(6) A magistrates' court shall not impose imprisonment in respect of a default to which a complaint under this section relates unless the court has inquired in the presence of the defendant whether the default was due to the defendant's wilful refusal or culpable neglect, and shall not impose imprisonment as aforesaid if it is of opinion that the default was not so due; and, without prejudice to the foregoing provisions of this subsection, a magistrates' court shall not impose imprisonment as aforesaid—

(*a*) in a case in which the court has power to make an attachment of earnings order under the Maintenance Orders Act, 1958, unless the court is of opinion that it is inappropriate to make such an order;

(*b*) in any case, in the absence of the defendant.

(7) Notwithstanding anything in subsection (3) of section sixty-four of this Act, the period for which a defendant may be committed to prison under a warrant of commitment issued in pursuance of a complaint under this section shall not exceed six weeks.

(8) The imprisonment or other detention of a defendant under a warrant of commitment issued as aforesaid shall not operate to discharge the defendant from his liability to pay the sum in respect of which the warrant was issued."

For s. 74 of the Magistrates' Courts Act, 1952, see p. 1416, *ante*.

(2) Subsections (7) and (8) of the said section seventy-four as amended by the foregoing subsection shall have effect in relation to a warrant of commitment issued on or after the date on which this section comes into operation in pursuance of a complaint under that section made before that date (not being a warrant of which the issue was postponed before that date by virtue of section sixty-five of the said Act of 1952) as those subsections have effect in relation to a warrant of commitment issued in pursuance of such a complaint made after that date.

For s. 65 of the Magistrates' Courts Act, 1952, see p. 1414, *ante*.

17. Where a defendant has been imprisoned or otherwise detained under an order or warrant of commitment issued in respect of his failure to pay a sum due under a maintenance order, then, notwithstanding anything in this Act, no such order or warrant (other than a warrant of which the issue has been postponed under paragraph (ii) of subsection (5) of the next following section) shall thereafter be issued in respect of that sum or any part thereof.

18.—(1) Where, for the purpose of enforcing a maintenance order, a magistrates' court has exercised its power under subsection (2) of section sixty-five of the Magistrates' Courts Act, 1952, or this section to postpone the issue of a warrant of commitment and under the terms of the postponement the warrant falls to be issued, then—

(*a*) the warrant shall not be issued except in pursuance of subsection (2) or paragraph (*a*) of subsection (3) of this section; and

(*b*) the clerk of the court shall give notice to the defendant stating that if the defendant considers there are grounds for not issuing the warrant he may make an application to the court in the prescribed manner requesting that the warrant shall not be issued and stating those grounds.

For s. 65 of the Magistrates' Courts Act, 1952, see p. 1414, *ante*.

(2) If no such application is received by the clerk of the court within the prescribed period, any justice of the peace acting for the same petty sessions area as the court may issue the warrant of commitment at any time after the expiration of that period; and if such an application is so received any such justice may, after considering the statements contained in the application—

(*a*) if he is of opinion that the application should be further considered, refer it to the court;

(*b*) if he is not of that opinion, issue the warrant forthwith;

and when an application is referred to the court under this subsection, the clerk of the court shall give to the defendant and the person in whose favour the maintenance order in question was made notice of the time and place appointed for the consideration of the application by the court.

(3) On considering an application referred to it under the last foregoing subsection the court shall, unless in pursuance of subsection (6) of this section it remits the whole of the sum in respect of which the warrant could otherwise be issued, either—

(*a*) issue the warrant; or

(*b*) further postpone the issue thereof until such time and on such conditions, if any, as the court thinks just; or

(*c*) if in consequence of any change in the circumstances of the defendant the court considers it appropriate so to do, order that the warrant shall not be issued in any event.

(4) A defendant who is for the time being imprisoned or otherwise detained under a warrant of commitment issued by a magistrates' court for the purpose of enforcing a maintenance order, and who is not detained otherwise than for the enforcement of such an order, may make an application to the court in the prescribed manner requesting that the warrant shall be cancelled and stating the grounds of the application; and thereupon any justice of the peace acting for the same petty sessions area as the court may, after considering the statements contained in the application—

(*a*) if he is of opinion that the application should be further considered, refer it to the court;

(*b*) if he is not of that opinion, refuse the application;

and when an application is referred to the court under this subsection, the clerk of the court shall give to the person in charge of the prison or other place in which the defendant is detained and the person in whose favour the maintenance order in question was made notice of the time and place appointed for the consideration of the application by the court.

(5) On considering an application referred to it under the last foregoing subsection, the court shall, unless in pursuance of the next following subsection it remits the whole of the sum in respect of which the warrant was issued or such part thereof as remains to be paid, either—

(*a*) refuse the application; or

(*b*) if the court is satisfied that the defendant is unable to pay, or to make any payment or further payment towards the sum aforesaid and if it is of opinion that in all the circumstances of the case the defendant ought not to continue to be detained under the warrant, order that the warrant shall cease to have effect when the person in charge of the prison or other place aforesaid is informed of the making of the order;

and where the court makes an order under paragraph (*b*) of this subsection, it may if it thinks fit also—

(i) fix a term of imprisonment in respect of the sum aforesaid or such part thereof as remains to be paid, being a term not exceeding so much of the term of the previous warrant as, after taking into account any reduction thereof by virtue of the next following subsection, remained to be served at the date of the order; and

(ii) postpone the issue of a warrant for the commitment of the defendant for that term until such time and on such conditions, if any, as the court thinks just.

(6) On considering an application under this section in respect of a warrant or a postponed warrant, the court may, if the maintenance order in question is an affiliation order or an order enforceable as an affiliation order, remit the whole or any part of the sum due under the order; and where the court remits the sum or part of the sum in respect of which the warrant was issued or the postponed warrant could have been issued, section sixty-seven of the Magistrates' Courts Act, 1952 (which provides that on payment of the sum for which imprisonment has been ordered by a magistrates' court the order shall cease to have effect and that on payment of part of that sum the period of detention shall be reduced proportionately) shall apply as if payment of that sum or part had been made as therein mentioned.

For s. 67 of the Magistrates' Court Act, 1952, see p. 1415, *ante*.

(7) Where notice of the time and place appointed for the consideration of an application is required by this section to be given to the defendant or the person in whose favour the maintenance order in question was made and the defendant or, as the case may be, that person does not appear at that time and place, the court may proceed with the consideration of the application in his absence.

(8) A notice required by this section to be given by the clerk of a magistrates' court to any person shall be deemed to be given to that person if it is sent by registered post addressed to him at his last known address, notwithstanding that the notice is returned as undelivered or is for any other reason not received by that person.

19. Her Majesty may by Order in Council revoke or vary any Order in Council made under section twelve of the Maintenance Orders (Facilities for Enforcement) Act, 1920 (which provides for the extension of that Act by Order in Council to certain oversea territories), and an Order under this section may contain such incidental, consequential and transitional provisions as Her Majesty considers expedient for the purposes of that Act.

For s. 12 of the Maintenance Orders (Facilities for Enforcement) Act, 1920, see p. 1245, *ante*.

Supplemental

20.—(1) Notwithstanding anything in this Act, the clerk of a magistrates' court who is entitled to receive payments under a maintenance order for transmission to another person shall not—

(*a*) apply for the registration of the maintenance order under Part I of this Act or give notice in relation to the order in pursuance of subsection (1) of section five thereof; or

(*b*) apply for an attachment of earnings order, or (except as required by subsection (5) of section nine of this Act) an order discharging or varying an attachment of earning order, in respect of those payments,

unless he is requested in writing to do so by a person entitled to receive the payments through him; and where the clerk is requested as aforesaid—

(i) he shall comply with the request unless it appears to him unreasonable in the circumstances to do so;

(ii) the person by whom the request was made shall have the same liabilities for all the costs properly incurred in or about any proceedings taken in pursuance of the request as if the proceedings had been taken by that person;

and for the purposes of paragraph (ii) of this subsection any application made by the clerk as required by the said subsection (5) shall be deemed to be made on the request of the person in whose favour the attachment of earnings order in question was made.

(2) An application to a magistrates' court by virtue of subsection (2) of section four of this Act for the variation of a maintenance order and an application to a magistrates' court for an attachment of earnings order, or an order discharging or varying an attachment of earnings order, shall be made by complaint.

(3) It is hereby declared that a magistrates' court has jurisdiction to hear a complaint by or against a person residing outside England for the discharge or variation of an attachment of earnings order made by a magistrates' court; and where such a complaint is made against a person residing outside England, then—

(*a*) if he resides in Scotland or Northern Ireland, section fifteen of the Maintenance Orders Act, 1950 (which relates to the service of process on persons residing in those countries) shall have effect in relation to the complaint as it has effect in relation to the proceedings therein mentioned; and

(*b*) if the said person resides outside the United Kingdom and does not appear at the time and place appointed for the hearing of the complaint but it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the complainant has taken such steps as may be prescribed to give to the said person notice of the complaint and of the time and place aforesaid, the court may, if it thinks it reasonable in all the circumstances to do so, proceed to hear and determine the complaint at the time and place appointed for the hearing or for any adjourned hearing in like manner as if the said person had then appeared.

For s. 15 of the Maintenance Orders Act, 1950, see p. 1396, *ante*.

(4) For the purposes of section forty-three of the Magistrates' Courts Act, 1952 (which provides for the issue of a summons directed to the person against whom an order may be made in pursuance of a complaint)—

(*a*) the power to make an order in pursuance of a complaint by the defendant for the discharge or variation of an attachment of earnings order shall be deemed to be a power to make an order against person in whose favour the attachment of earnings order was made; and

(*b*) the power to make an attachment of earnings order, or an order discharging or varying an attachment of earnings order, in pursuance of a complaint by any other person (including a complaint in proceedings to which paragraph (*b*) of section seven of this Act applies) shall be deemed to be a power to make an order against the defendant.

For s. 43 of the Magistrates' Courts Act, 1952, see p. 1409, *ante*.

(5) Where the court referred to in subsection (1) of section twelve of this Act is a magistrates' court—

(*a*) the power conferred by subsection (2) of section one hundred and twenty-two of the Courts Act, 1952, to provide by rules for jurisdiction expressly conferred on a magistrates' court to hear a complaint to be extended to any other magistrates' court shall be exercisable, and

(*b*) subsection (1) of section seventy-seven of that Act (which relates to the attendance of witnesses) shall apply,

as if subsection (1) of the said section twelve required an application thereunder to be made by complaint; and on making a determination under that subsection the court may in its discretion make such order as it thinks just and resonable as to the payment by any of the persons mentioned in that subsection of the whole or any part of the costs of the determination, and costs ordered to be paid under this subsection shall—

(i) in the case of costs to be paid by the defendant to the person in whose favour the attachment of earnings order in question is made, be deemed to be a sum due under the related maintenance order; and

(ii) in any other case, be enforceable as a civil debt.

For s. 122 of the Magistrates' Courts Act, 1952, see 32 Halsbury's Statutes (2nd Edn.) 516.

(6) In subsection (3) of section fifty-two of the Magistrates' Courts Act, 1952 (which provides for the clerk through whom payments under a magistrates' court order are required to be made to proceed in his own name for the recovery of arrears under the order) for the words "Where an order under subsection (1) of his section requires the payments to be made weekly" there shall be substituted the words "Where periodical payments under an order of any court are required to be paid to or through the clerk of a magistrates' court"; and in subsection (4) of that section (which provides that nothing in that section shall affect any right of a person to proceed in his own name for the recovery of sums payable on his behalf under any order under subsection (1) of that section) for the words "any order under subsection (1) of this section" there shall be substituted the words "an order of any court."

For s. 52 of the Magistrates' Courts Act, 1952, see p. 1410, *ante*.

(7) A complaint for an attachment of earnings order may be heard notwithstanding that the complaint was not made within the six months allowed by section one hundred and four of the Magistrates' Courts Act, 1952.

For s. 104 of the Magistrates' Courts Act, 1952, see p. 1418, *ante*.

(8) For the avoidance of doubt it is hereby declared that a complaint may be made to enforce payment of a sum due and unpaid under a maintenance order notwithstanding that a previous complaint has been made in respect of that sum or a part thereof and whether or not an order was made in pursuance of the previous complaint.

21.—(1) In this Act, unless the context otherwise requires, the following expressions have the following meanings—

"affiliation order", "magistrates' court" and "petty sessions area" have the meanings assigned to them by the Magistrates' Courts Act, 1952, and for the purposes of the definition of a magistrates' court the reference to that Act in subsection (2) of section one hundred and twenty-four thereof shall be construed as including a reference to this Act;

For s. 124(2) of the Magistrates' Courts Act, 1952, see p. 1419, *ante*.

"Attachment of earnings order" has the meaning assigned to it by subsection (1) of section six of this Act;

"defendant", in relation to a maintenance order or a related attachment of earnings order, means the person liable to make payments under the maintenance order;

"earnings", in relation to a defendant, means any sums (other than excepted sums) payable to him—

(*a*) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary by the person paying the wages or salary or payable under a contract of service);

(*b*) by way of pension (including an annuity in respect of past services, whether or not the services were rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition of relinquishment, or any diminution in the emoluments, of any office or employment);

"employer" means a person by whom, as a principal and not as servant or agent, earnings fall to be paid to a defendant, and references to payment of earnings shall be construed accordingly;

"England" includes Wales;

"excepted sums" means—

(*a*) sums payable by any public department of the government of any territory outside the United Kingdom or of Northern Ireland;

(*b*) pay or allowances payable to the defendant as a member of Her Majesty's forces;

(*c*) pension, allowances or benefit payable by the Minister of Pensions and National Insurance, other than such part of any pension as is so payable to the defendant in respect of his service in Her Majesty's forces or in respect of any employment of his;

(*d*) pension or allowances payable to the defendant in respect of his disablement or disability; and

(*e*) wages payable to the defendant as a seaman or apprentice, other then wages payable to him as a seaman or apprentice of a fishing boat;

and in paragraph (*e*) of this definition expressions used in the Merchant Shipping Act, 1894, have the same meanings as that Act;

"maintenance order" means—

(*a*) an order for alimony, maintenance or other payments made or deemed to be made by a court in England under any of the following enactments, that is to say—

(i) sections nineteen to twenty-seven of the Matrimonial Causes Act, 1950;

For ss. 19-27 of the Matrimonial Causes Act, 1950, see p. 1388, *ante*.

(ii) the Summary Jurisdiction (Separation and Maintanance) Acts, 1895 to 1949;

For the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1949, see pp. 1329, 1245, 1277, 1307, 1408, *ante*.

(iii) subsection (2) of section three, subsection (4) of section five or section six of the Guardianship of Infants Act, 1925;

For sub-s. (2) of s. 3, sub-s. (4) of s. 5 or s. 6 of the Guardianship of Infants Act, 1925, see p. 1250, *ante*.

(iv) section four of the Affiliation Proceedings Act, 1957, section forty-four of the National Assistance Act, 1948, or section twenty-six of the Children Act, 1948;

Fo s. 4 of the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 40; for s. 44 of the National Assistance Act, 1948, see 16 Halsbury's Statutes (2nd Edn.) 970; for s. 26 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn) 1122.

(v) section eighty-seven of the Children and Young Persons Act, 1933, or section forty-three of the National Assistance Act, 1948; or

For s. 87 of the Children and Young Persons Act, 1933, see 12 Halsbury's Statutes (2nd Edn.) 1036; for s. 43 of the National Assistance Act, 1948, see 16 Halsbury's Statutes (2nd Edn.) 969.

(b) an order registered in a court in England under Part II of the Maintenance Order Act, 1950, or the Maintenance Orders (Facilities for Enforcement) Act, 1920, or an order confirmed by such a court under the last-mentioned Act,

For Part II of the Maintenance Orders Act, 1950, see p. 1397, *ante*; for the Maintenance Orders (Facilities for Enforcement) Act, 1920, see p. 1241, *ante*.

and includes any such order which has been discharged if any arrears are recoverable thereunder;

"prescribed" means prescribed by rules of court;

"proper officer", in relation to a magistrates' court, means the clerk of the court;

"Rules of court", in relation to a magistrates' court, means rules under section fifteen of the Justices of the Peace Act, 1949.

For s. 15 of the Justices of the Peace Act, 1949, see 28 Halsbury's Statutes (2nd Edn.) 856.

(2) Any reference in this Act to a person entitled to receive payments under a maintenance order is a reference to a person entitled to receive such payments either directly or through another person or for transmission to another person.

(3) Any reference in this Act to proceedings relating to an order includes a reference to proceedings in which the order may be made.

(4) Any reference in this Act to costs incurred in proceedings relating to a maintenance order shall be construed, in the case of maintenance order order made by the High Court, as a reference to such costs as are included in an order for costs relating solely to that maintenance order.

(5) Any earnings which, in pursuance of a scheme under the Dock Workers (Regulation of Employment) Act, 1946, fall to be paid to a defendant by a body responsible for the local administration of the scheme acting as agent for the defendant's employer or as delegate of the body responsible for the general administration of the scheme shall be treated for the purposes of this Act as falling to be paid to the defendant by the last-mentioned body acting as a principal.

For the Dock Workers (Regulation of Employment) Act, 1946, see 9 Halsbury's Statutes (2nd Edn.) 186.

(6) Any reference in this Act to any enactment is a reference to that enactment as amended by or under any subsequent enactment.

22. No limitation on the powers of the Parliament of Northern Ireland imposed by the Government of Ireland Act, 1920, shall preclude that Parliament from making laws for purposes similar to the purposes of this Act.

For the Government of Ireland Act, 1920, see 17 Halsbury's Statutes (2nd Edn.) 56.

23.—(1) This Act may be cited as the Maintenance Orders Act, 1958.

(2) This Act, except paragraph (*a*) of subsection (3) of section twenty, shall not extend to Scotland or, except section nineteen, the said paragraph (*a*) and the last foregoing section, to Northern Ireland.

(3) This Act shall come into operation on such date as the Secretary of State may by order, made by statutory instrument, appoint; and different dates may be so appointed for the purposes of different provisions of this Act.

This Act was brought into operation by the Maintenance Orders Act, 1958 (Commencement) Order, 1958 (1958 No. 2111 (C. 17)), on the 16th February, 1959.

(4) Subsection (2) of section eight of the Guardianship of Infants Act, 1925, and section ten of the Affiliation Proceedings Act, 1957, are hereby repealed; but nothing in this subsection shall affect any order in force or deemed to be in force under either of those provisions at the commencement of this subsection, and any such order may be discharged or varied as if this subsection had not been passed.

For s. 8 (2) of the Guardianship of Infants Act, 1925, see p. 1252, *ante*. For section 10 of the Affiliation Proceedings Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 47.

SCHEDULE

Payments under Attachment of Earnings Orders

1. The provisions of this Schedule shall have effect in respect of each occasion (in this Schedule referred to as a "pay-day") on which any earnings to which an attachment of earnings order relates fall to be paid.

2. In this Schedule, the following expressions have the following meanings respectively—

"normal deduction" and "protected earnings", in relation to any pay day, mean the amount which would represent a payment at the normal deduction rate specified by the order or, as the case may be, at the protected earnings rate so specified in respect of the period between the pay-day in question and either the last preceding pay-day or, where there is no last preceding pay-day, the date last before the pay-day in question on which the employer became the defendant's employer;

"relevant earnings", in relation to any pay-day, means the amount of the earnings aforesaid falling to be paid on the pay-day in question after the deduction from those earnings of any amount falling to be deducted therefrom by the employer by way of income tax or of contributions under the National Insurance (Industrial Injuries) Acts, 1946 to 1957, the National Insurance Acts, 1946 to 1957, or the National Health Service Contributions Act, 1957, or of lawful deductions under any enactment, or in pursuance of a request in writing by the defendant, requiring or authorising deductions to be made for the purposes of a superannuation scheme within the meaning of the Wages Councils Act, 1945.

For the National Health Service Contributions Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 805; for the Wages Councils Act, 1945, see 9 Halsbury's Statutes (2nd Edn.) 158.

3. If the relevant earnings exceed the sum of—

(*a*) the protected earnings; and

(*b*) so much of any amount by which the relevant earnings falling to be paid on any previous pay-day fell short of the protected earnings for the purposes of that pay-day as has not been made good by virtue of this sub-paragraph on any other previous pay-day,

the employer shall, so far as that excess permits, pay to the officer designated for the purpose in the order—

(i) the normal deduction; and

(ii) so much of the normal deduction for any previous pay-day as was not paid on that pay-day and has not been paid by virtue of this sub-paragraph on any other previous pay-day.

MATRIMONIAL PROCEEDINGS (CHILDREN) ACT, 1958

(6 & 7 Eliz. 2, c. 40)

An Act to extend the powers of courts to make orders in respect of children in connection with proceedings between husband and wife and to require arrangements with respect to children to be made to the satisfaction of the court before the making of a decree in such proceedings. [7th July, 1958]

Part I

This Part of this Act was brought into operation on the 1st January, 1959, by the Matrimonial Proceedings (Children) Act (Commencement) Order, 1958 (1958 No. 2081 (c. 16)).

Jurisdiction in England and Wales

1.—(1) Subject to the provisions of this section, section twenty-six of the Matrimonial Causes Act, 1950 (which enables the High Court to provide for the custody, maintenance and education of the children of the parties to matrimonial proceedings), shall apply in relation to a child of one party to the marriage (including an illegitimate or adopted child) who has been accepted as one of the family by the other party as it applies in relation to a child of both parties.

(2) In considering whether any and what provision should be made by virtue of the foregoing subsection for requiring any party to make any payment towards the maintenance or education of a child who is not his own, the court shall have regard to the extent, if any, to which that party had, on or after the acceptance of the child as one of the family, assumed responsibility for the child's maintenance and to the liability of any person other than a party to the marriage to maintain the child.

(3) It is hereby declared that the reference in subsection (2) of the said section twenty-six to the children of the petitioner and respondent includes a reference to any illegitimate child of the petitioner and respondent.

(4) In subsection (1) of section twenty-three of the said Act (under which a husband guilty of wilful neglect to maintain his wife or the infant children of the marriage may be ordered to make periodical payments to his wife) the

reference to the infant children of the marriage shall be construed as including a reference to an illegitimate child of both parties to the marriage.

(5) In this section "adopted child" means a child adopted in pursuance of an adoption order made under the Adoption Act, 1950, or any enactment repealed by that Act, or under any corresponding enactment of the Parliament of Northern Ireland.

(6) This section shall not apply in relation to proceedings instituted before the commencement of this Part of this Act.

For ss. 23, 26 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*. The Adoption Act, 1950 was replaced as from the 1st April, 1959, by the Adoption Act, 1958 (38 Halsbury's Statutes (2nd Edn.) 538).

2.—(1) Subject to the provisions of this section, in any proceedings for divorce, nullity of marriage or judicial separation where the High Court has, by virtue of subsection (1) of section twenty-six of the Matrimonial Causes Act, 1950, jurisdiction in relation to any child, the court shall not make absolute any decree for divorce or nullity of marriage or pronounce a decree of judicial separation unless and until the court is satisfied as respects every such child who has not attained the age of sixteen years—

(*a*) that arrangements have been made for the care and upbringing of the child and that those arrangements are satisfactory or are the best which can be devised in the circumstances, or

(*b*) that it is impracticable for the party or parties appearing before the court to make any such arrangements.

For the commencement of this sub-s., see sub-s. (4), *infra*.

(2) The court may if it thinks fit proceed without observing the requirements of the foregoing subsection if it appears that there are circumstances making it desirable that the decree nisi should be mdae absolute, or, as the case may be, that the decree for judicial separation should be pronounced, without delay and if 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.

(3) In subsection (2) of section two of the said Act (which requires the judge in determining an application for leave to present a petition for divorce before the expiration of three years from the date of the marriage to have regard to the interests of any children of the marriage) the reference to any children of the marriage shall be construed as including a reference to any other child in relation to whom the court would have jurisdiction by virtue of subsection (1) of the said section twenty-six in proceedings instituted by the petition.

For s. 2 (2) of the Act of 1950, see p. 1382, *ante*, and for *ibid.*, s. 26 (1), see p. 1390, *ante*.

(4) Subsection (1) of this section shall not aply in relation to proceedings instituted before the commencement of this Part of this Act.

3.—(1) Where proceedings instituted after the commencement of this Part of this Act in the High Court for divorce, nullity of marriage or judicial separation are dismissed at any stage after the beginning of the trial, the court may, either forthwith or within a reasonable period after the proceedings have been dismissed, make such provision with respect to the custody, maintenance and education of any child as could be made in the case of that child under subsection (1) of section twenty-six of the Matrimonial Causes Act, 1950, if the proceedings were still before the court.

For s. 26 (1) of the Matrimonial Causes Act, 1950 see p. 1390, *ante*.

(2) Where an order has been made under the foregoing subsection as respects a child, the court may from time to time make further provision with respect to his custody, maintenance and education.

4.—(1) Where the court makes an order after the commencement of this Part of this Act under subsection (1) of section twenty-three of the Matrimonial Causes Act, 1950, the court shall also have jurisdiction from time to time to make such provision as appears just with respect to the custody of any such child as is referred to in that subsection (and, as in a case under the last foregoing section, with respect to access to the child), but the jurisdiction conferred by this subsection, and any order made in exercise of that jurisdiction, shall have effect only as respects any period when an order is in force under subsection (1) of the said section twenty-three.

For s. 23 of the Matrimonial Causes Act, 1950, see p. 1389, *ante*.

The "last foregoing" section would appear to mean s. 26 of the Matrimonial Causes Act, 1950 (p. 1390, *ante*).

(2) In any case where the court would have power, on an application made under subsection (1) of the said section twenty-three, to order the husband to make to the wife periodical payments for the maintenance of any such child as is referred to in that subsection, the court may, if it thinks fit, order those payments to be made to the child, or to any other person for the benefit of the child, instead of to the wife) and the reference to the wife in subsection (2) of that section (which relates to security for maintenance) shall be construed accordingly.

For s. 23 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*.

5.—(1) Where the court has jurisdiction to make provision as to the custody of a child, either by virtue of section twenty-six of the Matrimonial Causes Act, 1950, or of this Part of this Act and it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage or to any other individual, the court may if it thinks fit make an order committing the care of the child to the council of a county or county borough (hereinafter referred to as the local authority) and thereupon Part II of the Children Act, 1948 (which relates to the treatment of children in the care of a local authority), shall, subject to the provisions of this section, apply as if the child had been received by the local authority into their care under section one of that Act.

For s. 26 (1) of the Matrimonial Causes Act, 1950, see p. 1390, *ante*. For the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1103.

(2) The authority specified in an order under this section shall be the council of the county or county borough in which the child was, in the opinion of the court, resident before the order was made to commit the child to the care of a local authority, and the court shall before making an order under this section hear any representations from the local authority, including any representations as to the making of an order for payments for the maintenance and education of the child.

(3) While an order made by virtue of this section is in force with respect to any child, the child shall continue in the care of the local authority notwithstanding any claim by a parent or other person.

(4) An order made by virtue of this section shall cease to have effect as respects any child when that child attains the age of eighteen years and the court shall not make an order committing a child to the care of a local authority under this section after he has attained the age of seventeen years.

(5) In the application of the said Part II of the Children Act, 1948, under this section—

(*a*) the exercise by the local authority of their powers under sections twelve to sixteen of that Act shall be subject to any directions given by the court, and

(*b*) section seventeen of that Act (which relates to arrangements for the emigration of a child under the care of a local authority) shall not apply.

For Part II of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1113.

(6) *If a child who is committed to the care of a local authority under this section comes under the control of any person or authority under the provisions of the Mental Deficiency Acts,* 1913 *to* 1938, *or the Lunacy and Mental Treatment Acts,* 1890 *to* 1930, *he shall thereupon cease to be committed to the care of the local authority under this section.*

This sub-section is repealed, as are the statutes referred to therein, by the Mental Health Act, 1959, 8th Schedule (p. 1480, *post*).

(7) It shall be the duty of any parent or guardian of a child committed to the care of a local authority under this section to secure that the local authority are informed of his address for the time being and a person who knowingly fails to comply with this subsection shall be liable on summary conviction to a fine not exceeding five pounds.

(8) The court shall have power from time to time by an order under this section to vary or discharge any provision made in pursuance of this section.

6.—(1) Where the court has jurisdiction to provide for the custody of a child under section twenty-six of the Matrimonial Causes Act, 1950, or this Part of this Act and it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may, as respects any period during which the child is, in exercise of that jurisdiction, committed to the custody of any person, order that the child be under the supervision of an officer appointed under this section as a welfare officer or under the supervision of a local authority.

For s. 26 of the Matrimonial Causes Act, 1950, see p 1390, *ante*.

(2) Where the court makes an order under this section for supervision by a welfare officer, the officer responsible for carrying out the order shall be such probation officer as may be selected under arrangements made by the Secretary of State and where an order is for supervision by a local authority, that authority shall be the council of a county or county borough selected by the court and specified in the order.

(3) This section shall be included among the enactments specified in subsection (1) of section thirty-nine of the Children Act, 1948 (which lists the functions which are matters for the children's committee of a local authority and in respect of which grants are payable under section forty-seven of that Act), and a local authority shall discharge the duties conferred on them by an order under this section through an officer employed in connection with those functions.

For sub-s. (1) of s. 39 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1132.

(4) The court shall not have power to make an order under this section as respects a child who in pursuance of an order under the last foregoing section is in the care of a local authority.

(5) Where a child is under the supervision of any person in pursuance of this section the jurisdiction possessed by a court to vary any order made with respect to the child's custody, maintenance or education under section twenty-six of the Matrimonial Causes Act, 1950, or this Part of this Act shall, subject to any rules of court, be exercisable at the instance of the court itself.

For s. 26 of the Matrimonial Causes Act, 1950, see p. 1390, *ante*.

(6) The court shall have power from time to time by an order under this section to vary or discharge any provision made in pursuance of this section.

PART II

JURISDICTION IN SCOTLAND

* * * * *

PART III

GENERAL

16. There shall be paid out of moneys provided by Parliament any increase attributable to this Act in the sums payable out of moneys so provided—

(*a*) under section forty-seven of the Children Act, 1948, or

(*b*) under Part I of the Local Government Act, 1948, or the Local Government (Financial Provisions) (Scotland) Act, 1954, as amended by the Valuation and Rating (Scotland) Act, 1956.

For s. 47 of the Children Act, 1948, see 12 Halsbury's Statutes (2nd Edn.) 1138; for Part I of the Local Government Act, 1948, see 14 Halsbury's Statutes (2nd Edn.) 455.

17. Any order for maintenance or other payments made by virtue of this Act or any corresponding enactment of the Parliament of Northern Ireland shall be included among the orders to which section sixteen of the Maintenance Orders Act, 1950, applies (which section specifies the maintenance orders which are enforceable under Part II of that Act) and, in the case of an order made by virtue of Part I of this Act, shall be a maintenance order within the meaning of the Maintenance Orders Act, 1958.

For s. 16 of the Maintenance Orders Act, 1950, see p. 1397, *ante*, and for the Maintenance Orders Act, 1958, see p. 1444, *ante*.

18.—(1) This Act may be cited as the Matrimonial Proceedings (Children) Act, 1958.

(2) Any reference in this Act to any enactment shall be construed as a reference to that enactment as amended or extended by any other Act, including this Act.

(3) This Act (except so far as it affects Part II of the Maintenance Orders Act, 1950) shall not extend to Northern Ireland.

(4) Part I of this Act shall come into force on such a day as may be appointed by the Lord Chancellor by an order contained in a statutory instrument and Part II of this Act shall come into force on such day as may be appointed by the Secretary of State by such an order.

Part I was brought into operation on the 1st January, 1959, by the Matrimonial Proceedings (Children) Act (Commencement) Order, 1958 (1958 No. 2081 (C. 16)).

DIVORCE (INSANITY AND DESERTION) ACT, 1958

(6 & 7 Eliz. 2, c. 54)

An Act to amend the law as to the circumstances in which, for the purposes of proceedings for divorce in England or Scotland, a person is to be treated as having been continuously under care and treatment and as to the effect of insanity on desertion; and to enable a petition for divorce to be presented on the ground of desertion notwithstanding any separation agreement entered into before desertion became a ground for divorce in English law. [23rd July, 1958]

1.—(1) Notwithstanding anything in subsection (2) of section one of the Matrimonial Causes Act, 1950, or subsection (3) of section six of the Divorce (Scotland) Act, 1938, a person shall be deemed to be under care and treatment for the purposes of the said section one, and under care and treatment as an insane person for the purposes of the said section six, at any time when he is receiving treatment for mental illness—

(a) as a resident in a hospital or other institution provided, approved, licensed, registered or exempted from registration by any Minister or other authority in the United Kingdom, the Isle of Man or the Channel Islands; or

(b) as a resident in 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 paragraph *(a)* of this subsection.

For s. 1 (2) of the Matrimonial Causes Act, 1950, see p. 1381, *ante*.

(2) For the purposes of the foregoing subsection a certificate by the Admiralty or a Secretary of State that a person was receiving treatment for mental illness during any period as a resident in any naval, military or air-force hospital under the direction of the Admiralty, the Army Council or the Air Council shall be conclusive evidence of the facts certified.

(3) In determining for the purposes of the said section one or the said section six whether any period of care and treatment has been continuous, any interruption of such a period for twenty-eight days or less shall be disregarded.

For the discussion of "interruption" in relation to a "continuous" period, see Ch. III, para. 185, p. 215, *ante*.

2. For the purposes of any petition or action for divorce or judicial separation 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 he not been so incapable, the court would have inferred that that intention continued at that time.

3. For the purposes of paragraph *(b)* of subsection (1) of section one of the Matrimonial Causes Act, 1950 (which provides that a petition for divorce may be presented to the High Court on the ground that the respondent has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition), any agreement between the petitioner and the respondent to live separate and apart, whether or not made in writing, shall be disregarded if the agreement was entered into before the first day of January, nineteen hundred and thirty-eight, and either—

(a) at the time when the agreement was made the respondent had deserted the petitioner without cause; or

(b) the court is satisfied that the circumstances in which the agreement

was made and the parties proceeded to live separate and apart were such as, but for the agreement, to amount to desertion of the petitioner by the respondent without cause.

For s. 1 (1) *(b)* of the Matrimonial Causes Act, 1950, see p. 1381, *ante*.

4.—(1) This Act may be cited as the Divorce (Insanity and Desertion) Act, 1958.

(2) This Act does not extend to Northern Ireland.

(3) In paragraph *(d)* of subsection (2) of section one of the Matrimonial Causes Act, 1950, the words from "being treatment" to "this subsection", and in subection (3) of section six of the Divorce (Scotland) Act, 1938, the words "other than treatment as a voluntary patient" are hereby repealed.

MATRIMONIAL CAUSES ACT, 1963

(1963 c. 45)

An Act to amend the law relating to matrimonial causes; to facilitate reconciliation in such causes; and for purposes connected with the matters aforesaid. [31st July 1963.]

1. Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent.

2.—(1) For the purposes of the Matrimonial Causes Act, 1950, and of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, adultery or cruelty shall not be deemed to have been condoned 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 is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation.

(2) In calculating for the purposes of section 1(1)(*b*) of the Matrimonial Causes Act, 1950, the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation.

3. Adultery which has been condoned shall not be capable of being revived.

4.—(1) Section 4 of the Matrimonial Causes Act, 1950 (duty of court on presentation of petition), shall be amended as follows:—

(*a* paragraph (*c*) of subsection (2) (proof of absence of collusion), together with the word "and" immediately preceding that paragraph, shall be omitted;

(*b*) in the proviso to that subsection, after the words "if it finds" there shall be inserted the words "that the petition is presented or prosecuted in collusion with the respondent or either of the respondents or".

(2) Nothing in this section affects the duty of the court under the said section 4 to inquire whether any collusion exists between the parties, or any duty of the parties to disclose to the court any agreement or arrangement made between them in contemplation of or in connection with the proceedings, or any power or duty of Her Majesty's Proctor under the said Act.

(3) Provision may be made by rules of court for enabling the court, upon application made either before or after the presentation of a petition for

divorce, to take into consideration for the purposes of the said section 4 as amended by this section any agreement or arrangement made or proposed to be made between the parties, and to give such directions in the matter as the court thinks fit.

5.—(1) In any case in which the court has power to make an order (other than an interim order) under section 19 or section 20 of the Matrimonial Causes Act, 1950 (maintenance and alimony), the court may, in lieu of, or in addition to, making such an order, make an order for the payment of a lump sum.

(2) Notwithstanding anything in the said Act of 1950 or in the Matrimonial Causes (Property and Maintenance) Act, 1958, rules of court may provide, in such cases as may be prescribed by the rules—

(*a*) that applications for ancillary relief shall be made in the petition or answer; or

(*b*) that applications for ancillary relief which are not made as aforesaid shall be made only with the leave of the court.

(3) Any rules of court made before the commencement of this Act shall be deemed to have been validly made if such rules could be made after that date under the last foregoing subsection; but nothing in this subsection affects any order for ancillary relief made on or after 20th December, 1962, and before the commencement of this Act.

(4) In subsections (2) and (3) of this section "ancillary relief" means relief under section 19, section 20, section 22 and section 26 of the said Act of 1950.

6.—(1) Where proceedings are brought for financial relief and the court is satisfied, on an application under this section by the person bringing those proceedings—

(*a*) that the person against whom the proceedings are brought is about to make any disposition with the intention of defeating the claim for financial relief made in the proceedings, or

(*b*) that that person is about to transfer any property out of the jurisdiction of the court, or otherwise to deal with any property, with that intention,

the court may make such order restraining that person from making the disposition or transferring or otherwise dealing with the property, as the case may be, or otherwise for protecting the claim, as the court thinks fit.

(2) In this section "financial relief" means relief (otherwise than by way of an interim order) under section 19, section 20, section 22, section 23, section 24 or section 26 of the Matrimonial Causes Act, 1950, or under subsection (1) of section 5 of this Act, and "disposition" and "property" have the same meanings as in the Matrimonial Causes (Property and Maintenance) Act, 1958.

(3) Subsections (4) and (7) of section 2 of the said Act of 1958 (except so much of subsection (4) as refers to a disposition falling within subsection (3) of that section) shall apply to this section, and to any transaction or claim to which this section applies, as they apply to that section and to any disposition or claim to which that section applies.

(4) For the purposes of sections 2 and 5 of the said Act of 1958, "financial relief" shall include relief under subsections (1) and (3) of section 26 of the said Act of 1950 and subsection (1) of section 5 of this Act.

7.—(1) This Act may be cited as the Matrimonial Causes Act, 1963.

(2) This Act shall be construed as one with the Matrimonial Causes Act, 1950.

(3) This Act does not apply to Scotland or Northern Ireland.

First Session—Twenty-seventh Parliament
1968

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

DIVORCE

No. 1

WEDNESDAY, JULY 3, 1968

Joint Chairmen
The Honourable A. W. Roebuck
and
Mr. A. J. P. Cameron, M.P.

WITNESS:
Dr. R. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1968

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 2

TUESDAY, JULY 5, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESS:

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

24690—1

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

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

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

FOR THE HOUSE OF COMMONS

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

Members of the House of Commons

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
Woolliams—(24).

(Quorum 10)

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—thaat 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 bill 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."

24690—1½

"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, Bruchill, 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, C.P., 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."

June 28, 1966:

"With leave of the Senate,
The Honourable Senator Beaubien (*Provencher*), moved, seconded by the Honourable Senator MacDonald (*Cape Breton*), that the name of the Honourable Senator Denis be substituted for that of Honourable Senator Bourget on the list of Senators serving on the Special Joint Committee on Divorce; and

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

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

J. F. MACNEILL,
Clerk of the Senate.

MINUTES OF PROCEEDINGS

TUESDAY, July 5, 1966.

Pursuant to adjournment and notice of the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: *For the Senate:* The Hon. Senators Aseltine, Croll, Denis, Fergusson, Flynn, and Roebuck (*Joint Chairman*).

For the House of Commons: Messrs. Aiken, Cameron (*High Park*) (*Joint Chairman*), Cantin, Fairweather, Forest, Goyer, Honey, MacEwan, Mandziuk, McCleave, Peters, and Trudeau.

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons, was heard.

At 5.15 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

John A. Hinds,
Assistant Chief Clerk of Committees.

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At 5.15 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

John A. Hinds,
Assistant Chief Clerk of Committees.

THE SENATE

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

EVIDENCE

TUESDAY, July 5, 1966.

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

Honourable Senator Arthur W. Roebuck, Q.C. and Mr. A. J. P. Cameron, Q.C., M.P. (*High Park*), Co-Chairmen.

The CO-CHAIRMAN (*Senator Roebuck*): Honourable members, I see a quorum. I have two very interesting matters to bring before you.

May I introduce Dr. Peter J. King, who will be our special assistant. The sittings of this committee will extend into the fall, this being the last sitting before the summer holidays. In that interval, I hope, with Dr. King's assistance, to organize a full program for our fall sittings.

Dr. King is a professor at Carleton University in the Department of History, specializing in the modern history of the nineteenth century. He is very interested in our work and will be of tremendous assistance to us in organizing it and in bringing it to a happy conclusion.

I may add that it was the dean of Carleton who assisted me in finding Dr. King and who recommended him for this task.

The next point of interest is the presence of Dr. P. M. Ollivier, who has informed me that someone accused him of being an expert in divorce. He has had no personal experience—for that matter, neither have I nor has any other member of the committee. Nevertheless, Dr. Ollivier has an extensive knowledge of the law of divorce and will be able to give us much information which we need on the situation in Quebec as it affects the general situation in Canada. He knows the kind of information we need and, with your consent, I shall call upon him now.

Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons: Mr. Chairman and honourable members, when I was invited to appear before your committee, my first thought was that I should start with an historical review of divorce in Canada, consider the law as it stood in all provinces and the efforts that were made in the last fifty years to change that law, and then end up with some conclusions of my own.

However, having read the splendid speech made by the honourable Senator Roebuck in the Senate on March 3, and having had the privilege of reading what was said in this committee by the Parliamentary Counsel of the Senate, I came to the conclusion that what I had in mind to deal with had already been covered much better than I could have covered it myself.

I would, on the other hand, if I may be allowed to do so, mention some highlights in Senator Roebuck's speech, as I would like to refer to them later on in dealing more specially with the situation in the province of Quebec.

Senator Roebuck said there are two types of decrees of courts, one from bed and board, and the other from the bonds themselves. This is a complete divorce, in other words, *a vinculo matrimonii*.

This, of course, is the great distinction. However, it might be of some use to this committee if I borrow at this time the definition of divorce from Bouvier's Law Dictionary, a definition which is more complete and more detailed and which is as follows:

> "Divorce. The dissolution or partial suspension, by law, of the marriage relations.
>
> The dissolution is termed divorce from the bond of matrimony, or, in the Latin form of the expression, *a vinculo matrimonii*; the suspension, divorce from bed and board, *a mensa et thoro*. The former divorce puts and end to the marriage; the latter leaves it in full force. The term divorce is sometimes also applied to a sentence of nullity, which establishes that a supposed or pretended marriage either never existed at all, or at least was voidable at the election of one or both of the parties.
>
> The more correct modern usage, however, confines the significance of divorce to the dissolution of a valid marriage. What has been known as a divorce *a mensa et thoro* may more properly be termed a legal separation. So also a sentence or decree which renders a marriage void *ab initio,* and bastardizes the issue, should be distinguished from one which is entirely prospective in its operation; and for that purpose the former may be termed a sentence of nullity. The present article will accordingly be confined to divorce in the strict acceptation of the term.
>
> "For the other branches of the subject, see *separation a mensa et thoro; nullity of marriage.*
>
> Marriage, being a legal relation, and not—as sometimes supposed—a mere contract, can only be dissolved by legal authority."

There is much more under this heading, in this Encyclopaedia of the Law by Bouvier, which, however, deals mostly with the situation in the United States, for he also defines some of the more important grounds for divorce such as desertion, abandonment, cruelty, habitual drunkenness, conviction of crime, incurable insanity, failure to support, impotence—I think some of these have already been dealt with in the committee incapacity to enter into the contract, fraud, duress, etc. Then he refers to the consequences of divorce, as alimony, maintenance, the custody of the children, etc. As these subjects are dealt with mainly from the point of view of the United States, it is not necessary to do more than mention them in this memorandum.

Now, summarizing the situation in all provinces, the honourable Senator stated that: "There are now 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."

Of course, those two provinces are Quebec and Newfoundland, but before coming to that, that is the situation in Quebec in relation to parliamentary divorce, I would like to refer to a matter of interest which shows the evolution that has taken place in the very first years of Confederation in relation to parliamentary divorce.

Before 1878, the instructions given to the Governor General were to the effect that he should reserve his assent to certain bills, that is, to seven categories of bills, the sixth of those categories being bills relating to divorce. The right of reserving bills, granted by section 55 of the Constitution, did not permit the Governor General to refuse his sanction to a bill, but allowed him to reserve it for the signification of the King's pleasure. Pursuant to instructions received before 1878, the Governors had up to that time reserved twenty-one bills I would say one-third of them were divorce bills. After Mr. Blake had visited England, the practice of enumerating the acts to be reserved was

discontinued and, in 1879, the first bill of divorce received Royal Assent (42 Victoria, ch. 79). That is to say it received Royal Assent in Canada. The act is entitled, An Act for the Relief of Eliza Maria Campbell, and from many points of view it is very interesting. In a long preamble of nearly three pages it starts by reciting the alleged adultery of Eliza Maria Campbell, then refers to an action for criminal conviction brought against one George Gordon by the husband and a verdict for $1,500 in favour of the husband. Then of a suit for alimony by the defendant which suit was dismissed; following this, reference is made to the fact that the said Robert Campbell prayed that the said marriage might be dissolved, annulled and put an end to. Then it is stated that Mr. Campbell petitioned to the effect that Campbell had treated her with cruelty, and ill used and insulted her and asked that she be divorced *a mensa et thoro*.

What now becomes more interesting in the recital within the preamble is that Mrs. Campbell asks for "judicial separation" and adequate provision for her support and the support of her children; asks also for the care and custody of at least the two youngest of her children. It is also noted, in the preamble, that her adultery has not been proven but that the cruelty of the husband has been so proven.

Now, I find these words in Senator Roebuck's speech where he is dealing with the custody of the children: "We have not done so up to this time," said the senator, and he added: "I am perfectly satisfied that the care of the children, the division of property between the parties and alimony, are ancillary to divorce."

It is time that we have a look at the act itself, and the first remark I would make is that this Act for the relief of Mrs. Campbell is not a complete Divorce Act but rather an act respecting a separation from bed and board, and also that the relief was granted to her not for the reason of adultery but on account of the cruelty of her husband.

There are nine sections in the statute, and section 1 reads as follows:

> "1. From and after the commencement of this act, the said Eliza Maria Campbell shall be and shall remain separated from the bed and board of her husband, the said Robert Campbell."

The rest of the act—which is a federal statute—deals with those questions which the Senate has since then been loath to deal with, although Senator Roebuck and others, among them Senator Pouliot, have said they were within the exclusive jurisdiction of Parliament as being ancillary to marriage and divorce. For instance, section 2 provides that the separation shall have the same force and the same consequences as judicial separation in England pronounced by the proper court. The following section, that is section 3, provides for alimony and how it shall be paid, then provision is made for custody of one child and the allowance for support of same. There is provision for the registration of the act in the Court of Chancery and, finally, for the effect of the act if there should be reconciliation and cohabitation.

Bora Laskin in his book on Constitutional Law has referred to these ancillary powers—he writes, at page 641:

> Is it competent for the Dominion to deal with alimony or custody of children as coming within its authority in relation to marriage and divorce? Would it make any difference if such dealing were unrelated to divorce proceedings?
>
> Are judicial separation and decrees for the restitution of conjugal rights within exclusive federal authority or within exclusive provincial authority or are they susceptible of treatment by either provinces or Dominion, subject to the doctrine of Dominion paramountcy?

In answer, he quotes two decisions to the following effect:

> ". . . .the right to maintain an action for damages caused by an adulterer is, in my opinion, a civil right within the jurisdiction of the provincial legislature and is not a matter of marriage and divorce within the jurisdiction of the Dominion: *Mitchell v. Mitchell* and *Croome*, 44 Man. R.23(1936) 1 W.W.R.553. . . . .' per Laidlaw, J.A., in *Mowder v. Roy*, (1946) O.R.154 at p. 166."

This last statement, of course, might leave some doubt as to the question of jurisdiction. It remains that it would have been interesting to have such an act as the Act for the Relief of Eliza Maria Campbell tested before the Supreme Court of Canada.

Perhaps it would be proper at this time to consider divorces that were granted in the ten previous years; that is, up to 1879. There were eight cases altogether. The first one I would refer to is that of Joseph Frederick Whiteaves. That was in 1868, and it became chapter 95. This chapter appears in the Statutes of Canada for 1869. The act reserved for the signification of Her Majesty's pleasure thereon on the 22nd May, 1868; Royal Assent given by Her Majesty in Council on the 7th July, 1868; Proclamation thereon made by His Excellency the Governor General on the 26th November, 1868. In this case the marriage was declared null and void to all intents and purposes whatsoever, as well as the marriage contract before the notary. It is a curious fact that not only they voided the marriage but they voided the marriage contract, and the children of the marriage were declared to be legitimate. I think this happened in practically all cases before 1878.

The following year, that is 1869 in the Stevenson case,—that was the case of the marriage of a minor without his father's consent—the bill was reserved, assented to, and proclaimed a few months after having been reserved. The marriage was made void and the issue of the marriage declared legitimate. The third case is that of Henry William Peterson. Again the bill was reserved and later assented to.

Then, in 1877, the case of Mary Jane Bates: the marriage was dissolved and the children were declared to be legitimate and the bill was reserved in April and assented to in August. The same remarks apply to cases 5 and 6, those of Walter Scott and Martha Holiwell. In those three cases the bills were reserved on the same date, 28th April, assented to on the 13th August and proclaimed on the 5th September of that year, 1877.

There were two cases in 1878, that of Victoria Elizabeth Lyon and that of George F. Johnston. Both these bills were reserved on the 10th May, 1879, both received Royal Assent on the 29th June and were proclaimed on the 18th August, 1878. These eight cases cover the divorces that were granted from Confederation to the Campbell case of 1879, to which we have already referred at length.

As we have stated, divorce bills were not reserved for Her Majesty's assent after 1878, since the instructions had by then been amended to permit the Royal Assent in Canada.

The next act we come upon is also of some interest. It is in 1884 and is entitled, An Act for the relief of John Graham, chapter 107 of 47 Victoria. This is really a divorce bill, for here the marriage is dissolved and is declared to be null and void to all intents and purposes whatsoever. Graham is given the right to marry again, his children are declared legitimate and their rights to inherit declared to be and remain the same as they would have been if the marriage had not taken place.

This, to my mind, is not a very happy wording. It seems to me it would have been preferable to say that they would have had the right to inherit as if

the divorce had not taken place. However, it is not important. What is important is that reference is made to the children; the act attempts to provide for them and to protect them.

The Co-CHAIRMAN (*Senator Roebuck*): The marriage not having taken place, they would have been illegitimate, so I fancy the courts would have read a real meaning into the wording of the act.

Dr. OLLIVIER: Yes.

I would like here to open a parenthesis. In evidence before this committee, if I am not mistaken, it would appear that the enlargement of grounds for divorce is being discussed only as to the application in those provinces where the courts have jurisdiction to grant divorce *a vinculo matrimonii.*

The Co-CHAIRMAN (*Senator Roebuck*): No, our reference is quite unlimited, and I think our intention is also unlimited. We are certainly going to take into consideration the situation in Quebec.

Dr. OLLIVIER: I was going to make a plea for that, and perhaps I could still make it.

The Co-CHAIRMAN (*Senator Roebuck*): By all means, make it.

Dr. OLLIVIER: On the other hand, the Act of Parliament, 1963, ch. 10, authorizing the Senate of Canada to dissolve and annul marriages, does not mention at any time that parliamentary divorce will apply only to cases originating in Quebec and Newfoundland, and it is further to the effect that a marriage could only 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, ch. 176 of the Revised Statutes of Canada, 1952. Is that not restricting the powers you had before?

The Co-CHAIRMAN (*Senator Roebuck*): Yes, but understand, it leaves our powers complete so far as the bill is concerned, so nothing was taken away from the Senate's powers. The bill merely adds the right of the Senate to grant a dissolution under certain circumstances.

Dr. OLLIVIER: That was the amendment Mr. Mandziuk added, which was later on amended by Mr. McCleave and yourself.

The Co-CHAIRMAN (*Senator Roebuck*): Yes. Mr. Mandziuk has the honour of having introduced the bill which was amended and finally passed.

Dr. OLLIVIER: In spite of what you said, if this committee should recommend the extension of grounds for divorce and if its conclusions should be given effect by legislation, should not this legislation be uniform throughout Canada? In other words, should not the extension of those grounds apply to parliamentary divorce as well as to divorce granted by the courts?

The Co-CHAIRMAN (*Senator Roebuck*): I might say right now that that is one of the things we will very seriously consider and be very glad to have your views in connection with.

Dr. OLLIVIER: Before the adoption of the Dissolution and Annulment of Marriage Act in 1963, Parliament was not so restricted, the granting of divorce was altogether discretionary with Parliament. If you bring in a private act, you are not restricted. If you want to, you still have the power.

The Co-CHAIRMAN (*Senator Roebuck*): Our jurisdiction remains as it was prior to the bringing in of that act, except to the extent our powers were increased by that act.

Dr. OLLIVIER: Answering the question: Within what limit should Parliament act? John Alexander Gemmill wrote in 1889, at pages 60-61 of his book on Parliamentary Divorce:

> It being clear then that the Parliament of Canada has jurisdiction to grant statutory divorces, and that it is not limited in its power, and can

grant such divorces for any cause and without any cause, the only question which can exist therefore, is within what limit ought Parliament to act?

As a matter of policy and good morals, it is universally admitted that that power should not be exercised arbitrarily and without cause.

By some it has been submitted that it is obligatory on us in Canada to follow the principles and precedents recognized in the House of Lords, but in view of the unlimited powers of our own Parliament, this argument is fallacious.

The CO-CHAIRMAN (*Senator Roebuck*): "Obligatory", yes, but if instead of the word "obligatory" you had said that we should, that I think would be a matter of opinion.

Dr. OLLIVIER: I agree the argument is fallacious.

I now come to this proposition. Parliamentary divorce is a legislative act originating and now being completed in the Senate. It is a legislative act because of the Statute of 1963, which has delegated to the Senate the powers previously exercised by Parliament itself. The act of 1963 has not created a court nor has it changed the general law. Each divorce resolution is like each divorce act passed previously, a law of exception. As far as the Province of Quebec is concerned, the general law as found in the Civil Code as it was in 1867 remains unchanged since it has not been repealed by a general act of Parliament. In other words, just as each divorce act was a private bill, each particular resolution is of a private nature and stands by itself as an exception to the general law.

As an example of what I mean and by way of illustration, in each province there are general laws providing for the admission to the practice of law, or medicine, and that is the general law. The legislature may well adopt private bills admitting certain individuals to the practice of law, or medicine, under special circumstances but that does not change the statutes which have regulated the exercise of those professions within the province.

In the same manner divorce bills were not passed, nor resolutions adopted, by virtue of a general law on divorce. They have been, and are in each case, special private acts or resolutions applicable to individual cases. The act of 1963 deals simply with the procedure to be followed and conditions to be applied.

Parliamentary divorce has been discontinued for the Province of Ontario by chapter 14 of the Statutes of 1930 and jurisdiction given to the Supreme Court of Ontario for the purpose of that act, but what is the law in the Province of Quebec?

There is a chapter in the Civil Code intituled "Of the Dissolution of Marriage". This chapter has only one article, Article 185 which reads:

> 185. Marriage can only be dissolved by the natural death of one of the parties, while both live it is indissoluble.

Mr. PETERS: May I ask a question for purposes of clarification?

Dr. OLLIVIER: Yes.

Mr. PETERS: Do you mean that the Legislature of Quebec cannot repeal this article, but the federal Parliament can?

Dr. OLLIVIER: Yes, Parliament can, but the Legislature of Quebec, although it is an article of the Civil Code, cannot repeal that article. When the federal Parliament passed an act to the effect that a man could marry the sister of his deceased wife, or that a woman could marry the brother of her deceased husband, and so on, the provisions of the Civil Code were not affected. There are different provisions there and they are still in the code. However, they are superseded by those amendments to the Marriage and Divorce Act. Generally, editors of the Civil Code in Quebec do not include those provisions, but some

do. They put them in as a footnote so that we know what is going on. But, the legislature itself should not repeal its own section, since it has been repealed by the federal law.

Mr. MANDZIUK: I do not want to take the doctor away from his subject, Mr. Chairman, but is not the question of consanguinity a matter which each province decides for itself? I think in Manitoba we have our own provincial statutes with respect to it.

Dr. OLLIVIER: If it relates to the celebration of marriage, if it is one of the conditions of the celebration of marriage, then the province still has jurisdiction. If you want to prevent a marriage from taking place then I suppose you could use those provisions to do it, but if the marriage does take place in spite of that then it is validated by the fact that we have appropriate legislation.

Mr. PETERS: Is this an indication of the fact that even if it wanted to the province could not withdraw this section?

Dr. OLLIVIER: Article 185, which says that marriage is indissoluble, was in the Code in 1867, but jurisdiction as to marriage and divorce is here, and the province itself cannot repeal that section. It would have to be changed here at Ottawa. That is my contention.

Mr. PETERS: Is the whole Napoleonic Code not amendable?

Dr. OLLIVIER: The province could not repeal those sections dealing with marriage and divorce. This matter was debated by Senator Pouliot. I would not go so far as he went, but he said in the Senate that many of the amendments made to the marriage clauses in Quebec would not be valid because Quebec did not have the jurisdiction to deal with marriage and divorce. I would make a distinction between a divorce of *a vinculo matrimonii* and a divorce *a mensa et thoro*. I would not say that the province does not have the right to deal with a divorce *a mensa et thoro,* but it has not the right to deal with divorce *a vinculo matrimonii.* If the conditions respecting marriage relate to the celebration of marriage, such as religious impediment, then I would say the province has the right, but now they are strictly confined to marriage itself.

Mr. PETERS: Is the whole Code involved?

Dr. OLLIVIER: The whole Code covers more than marriage and divorce.

Mr. PETERS: But it cannot be amended—any of it?

Dr. OLLIVIER: Some of those parts dealing with marriage could not be amended.

Mr. PETERS: But can any of the Code be amended by Quebec today?

Dr. OLLIVIER: Oh, yes. They can amend the whole Code, except those parts dealing with marriage and divorce.

Mr. PETERS: Why the distinction?

Dr. OLLIVIER: The distinction is that the British North America Act gives to the central authority the right to legislate with respect to mariage and divorce.

Senator ASELTINE: Exclusively?

Dr. OLLIVIER: Yes, exclusively.

Mr. FOREST: There exists jurisprudence in this matter?

Mr. OLLIVIER: Indeed, there have been cases related to this matter, but not cases which have determined the issue; whatever jurisprudence exists is restricted to these clauses.

Mr. FOREST: Not a single clause, except clause 185?

All clauses concerning marriage and divorce?

Dr. OLLIVIER: There may have never been any issue raised, in view of the difficulties involved; it was less trouble not to do so.

Mr. FAIRWEATHER: The practical aspect, Mr. Chairman, surely, is that the British North America Act supersedes these sections of the Napoleonic Code.

Dr. OLLIVIER: Yes, but I shall be coming back to this point a little later on when I deal with the Constitution, and which provides that all the acts that were in force before Confederation remain in force after Confederation up to the time that they are amended by the proper authorities.

My claim is that that question of indissolubility is still the law, and since jurisdiction has been given to Parliament by Head 26 of section 91 of the British North America Act, 1867, the legislature itself could neither repeal nor amend this article of its Civil Code. That is my answer to Mr. Peter's question.

Mr. PETERS: Before you leave that, there may be other sections of the Napoleonic Code that come into conflict with the common law—

Dr. OLLIVIER: Yes.

Mr. PETERS: It must do that in a large number of fields. I cannot think of any offhand, but I assume the Napoleonic Code covered labour conditions, for instance, in France at the time the code was developed, elementary as it may have been.

Dr. OLLIVIER: In the first instance, the Civil Code of Quebec is not all the Napoleonic Code. It contains ordinances that existed in France previously, but it is quite different from the Napoleonic Code. At that time I think there were about 70 different codes. There was a code for forests, a code for rivers, and so on. There were many codes. The Napoleonic Code dealt with persons and, later on, with commercial ventures, and its provisions may well come into conflict with present-day legislation governing trade and commerce. As you know, there are nearly a thousand cases on questions concerning constitutional differences between the Code and federal legislation.

Mr. PETERS: Was it not worded in such a way in our passing of the divorce act of 1930 that the Province of Ontario was able to take advantage of it and use enabling legislation? Would this legislation not have been available to the Province of Quebec if it had so wished?

Dr. OLLIVIER: Oh, yes.

Mr. PETERS: This clause then would not be barred?

Dr. OLLIVIER: In 1930 the Supreme Court of Ontario was given the right to deal with divorces, and then having that right there was no trouble afterward as to what they would do with the ancillary powers, because they had those ancillary powers by virtue of the federal power given to the courts or by virtue of the power they have under the provincial right of common law which corresponds to our Civil Code. But there is no conflict here between the common law material and the civil law of Quebec.

The CO-CHAIRMAN (*Senator Roebuck*): May I ask this question, doctor? The Napoleonic Code, when it was drawn up at first, of course, applied to France. Did it apply to New France prior to the Revolution?

Dr. OLLIVIER: No, it did not apply to New France because the Napoleonic Code came into force in 1804.

Mr. MCCLEAVE: Would it not be better to call it the Civil Code of Quebec?

Dr. OLLIVIER: It is the Civil Code of Quebec. It is not the Napoleonic Code, which was simply used as a model. Our code was based more on the ordinances that had been registered and had force of law in French Canada.

Mr. MANDZIUK: Does that not apply to the laws which existed before the B.N.A. Act?

Dr. OLLIVIER: If I understand your question well, we had laws before 1867, of course.

Mr. MANDZIUK: Yes.

Dr. OLLIVIER: And we have those powers. The powers of the Province of Quebec in matter of property and civil rights had been recognized in the Quebec Act of 1774, and we were exercising those civil rights without any difficulty then because there was no central power.

Mr. MANDZIUK: Where is it recognized in the B.N.A. Act in 1867?

Dr. OLLIVIER: In section 129, I believe.

Mr. MCCLEAVE: Section 129.

Dr. OLLIVIER: Section 129 says that whatever laws were in force at the time of Confederation continue in force until they are repealed or amended, but then they can only be repealed or amended by the proper authority.

Mr. MANDZIUK: Thank you, doctor.

Dr. OLLIVIER: To continue: By virtue of section 129 of the Constitution, the laws existing at the time of Confederation were continued in force after the 1st of July, 1867, subject "to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province according to the Authority of the Parliament or of that Legislature under this Act."

This article 185 existed, as it is now at the time of Confederation. It is a fundamental principle enunciated by the Civil Code giving expression to the doctrine of ancient French law as well as of canon law. It has not been repealed or amended by enactment of Parliament. Each divorce bill has been an exception to the general rule, which is that in Quebec "marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

So much so that even absence—it does not matter how lengthy it is—does not alter the situation. Article 108 reads:

> 108. The presumptions of death arising from absence, whatever be its duration, do not apply in the case of marriage; the husband or wife of the absentee cannot marry again without producing positive proof of the death of such absentee.

It might be pertinent at this point to look at section 240 of the Criminal Code, dealing with the offences against conjugal rights:

> (2) No person commits bigamy by going through a form of marriage if
>
> (*a*) that person in good faith and on reasonable grounds believes that his spouse is dead,
>
> (*b*) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years,

I do not need to read any further. There is a distinction in this case between the Criminal Code and the Civil Code. In Quebec, according to the code you cannot presume that a person is dead even if that person has been away for 20 years.

Mr. PETERS: Does the Criminal Code override that?

Dr. OLLIVIER: In the case of bigamy a person cannot be convicted if he or she in good faith has reasonable ground to believe the other spouse is dead.

Mr. FAIRWEATHER: In the common law provinces you can petition for a declaration.

Mr. MCCLEAVE: These, of course, are legislative presumptions.

Dr. OLLIVIER: To continue: This also is still the law in the Province of Quebec, and I still say that the act of 1963 entitled "An Act authorizing the Senate of Canada to dissolve or Annul Marriage" has not created a divorce court.

Senator Choquette stated in the Senate on March 4, "It is my opinion that the Senate Committee on Divorce has been constituted and recognized as a court for some 12 or 13 years." Here I respectfully beg to disagree, for neither the amendment to the Criminal Code defining "judicial proceeding," nor the act of 1963 for Dissolution and Annulment of Marriages has created a court. It is the Senate of Canada which declares that a marriage is dissolved or annulled after the officer appointed by the Senate has so recommended. The fact that the officer is a judge of the Exchequer Court does not make the committee part of that or any other court.

I am inclined to agree with Senator Aseltine who said, as reported on March 8, "So I have come to the conclusion that the Senate Divorce Committee is not a court. The proceedings of that committee are and have been judicial proceedings, made so by this section on Interpretation which I have read from the Criminal Code.

As I have said before, if there is to be an extension of the grounds of divorce in the courts of the land, this extension should, for the sake of uniformity apply as well to parliamentary divorce and the reasons for such extension are just as valid in the case of divorces granted by the Senate."

Of course, even if you could not make it apply you still, to put it in another way, could apply it to the Senate. The Senate could do so by virtue of its authority.

As previously noted, the act passed by our Parliament in 1963 limits the Senate to the causes expressed in the English act of 1870.

Adultery, of course, is not the worst of offences; cruelty in many instances would appear to be a much better reason for granting a divorce. Adultery is not a crime. Some people say it is only a pastime.

As once stated by Lord Birkenhead in the Lords in 1920, "I am concerned 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. . ." Or as A. P. Herbert once said: "Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?"

In the Province of Quebec, before 1954, articles 187 and 188 under the heading "Causes of separation from bed and board" were as follows:

> "187. A husband may demand the separation on the ground of his wife's adultery".

But listen now to 188:

> "A wife may demand the separation on the ground of her husband's adultery, if he keep his concubine in their common habitation."

This was adding insult to injury and was considered a form of cruelty. This last article was replaced, on the 16th of December, 1954, by the following:

> "188. A wife may demand the separation on the ground of her husband's adultery."

Therefore, both parties are equal now. This to me appears to be the fact of a province dealing with divorce, for separation as to bed and board is divorce *a mensa et thoro* and as only Parliament can deal with marriage and divorce, one may very well question the validity of such an amendment. I will leave the answer to Senator Pouliot.

One of the worse consequences of having only adultery as the only reason for divorce is that when divorce should really be granted for extreme cruelty or

for some other valid reason, then adultery sometimes has to be invented or simulated, which leads to perjury, fabrication of evidence, collusion, connivance or conspiracy.

We have had quite a few cases of divorce in the Senate and the House in years gone by where such crimes have been committed. Unfortunately, it has been impossible either to trace them all, or to do anything about them, except perhaps refuse the grant of a divorce. In the Senate Debates of March 4, Senator Choquette has referred to one of them which brought a subsequent amendment to the Criminal Code, but how many others took place which were never questioned or even suspected? Mr. McCleave will remember the number of cases that were reopened in the House of Commons.

The bills introduced in the Senate and in the House this year enlarging the grounds for divorce have already been enumerated and discussed; and reference has also been made to similar bills introduced in years gone by. There is no need here to duplicate the work already done. My only suggestion, if I may respectfully make one, would be that a list be made of all the grounds advocated in those bills, that a not too large selection of those be made by voting on each one separately and then that the selection made be included in the report of the committee as a guide line to the government if it should be decided to introduce a bill following such report.

I have already referred to what should be a rather restricted list. In the United States there are more than forty grounds which have received the approbation of the legislators. I am convinced that we should not in Canada, or in this committee, open such a Pandora's box.

Before closing my remarks, I would like to take a few more moments of your time to refer to a very interesting article in the *Canadian Bar Journal* of April 1966. The article is by Mr. Douglas F. Fitch of Calgary and the title is "As Grounds for Divorce let's abolish Matrimonial Offences". It constitutes a new approach and is well worth reading. The title explains the purpose of the plea that is made and I have no intention even of giving a summary of the contents thereof. The article concludes with a draft section, the object of which is to eliminate the present abuses that arise in Canada from divorce being granted upon proof of a single act of adultery and to substitute therefor a divorce granted on account of the permanent breakdown of the marriage. I would like, if I am allowed to do so, for the convenience of the committee, to place on record the conclusions of the article:

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 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."

I may perhaps now state my own conclusions which in a general manner are as follows.

1. Grounds for divorce should be extended and rationalized.

2. There should be a strict limitation to that extension.

3. The grounds for divorce should be uniform throughout Canada, that is, the same for parliamentary or non-parliamentary divorce.

4. The time has not arrived yet for establishing a divorce court in the Province of Quebec. I have no opinions about Newfoundland.

Here I am in disagreement with Mr. Justice Walsh. I think that in Quebec marriage is still indissoluble and that that province is not yet ready, for a divorce court. So we should proceed by degrees and later on establish divorce proceedings there. But that is a matter of opinion.

I would like to end this memorandum with a last quotation, also from the article by Mr. Fitch, a quotation that echoes the sentiments often expressed in the Senate by Senator Roebuck, sentiments which are also mine and are those, I imagine, of this committee.

> 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 awaken 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 should not 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.

The CO-CHAIRMAN (*Senator Roebuck*): Dr. Ollivier is now ready to answer questions, I presume.

Mr. AIKEN: At the last meeting the question of the breakdown of marriages as a new approach to divorce, which Dr. Ollivier has raised again now, was raised by Mr. Wahn, and I indicated some support for that view as well. I take it from your paper, Dr. Ollivier, that you at least considered this approach worthy of consideration by the committee.

Dr. OLLIVIER: Yes, otherwise I would not have brought it in. I have read the article he referred to. I have not read Mr. Wahn's testimony. He probably got his information from the same source as I did. I think it is a new idea that is worth-while suggesting to the committee; it might be considered that in spite of divorce being granted for absence or cruelty, the reason might be that the parties could not be brought together again for one reason or another. The main consideration is that this marriage is finished; it is no use trying to go on; you cannot bring the parties together. That would be the main reason for a divorce. Of course it is still tied to the other reasons.

Mr. AIKEN: I read that whole article and I must admit I was impressed with the possibility. It is a new approach which I think we should welcome.

Mr. MCCLEAVE: At a meeting of the Nova Scotia Barristers Society we made the point that it should be the failure of the marriage, and we listed the grounds for the failure. I think society is adopting a more practical approach in this matter. Marriage may not fail simply because of adultery.

Senator CROLL: Dr. Ollivier, I don't understand the purpose of this. As I recall it, time and again during the course of our hearings in the Senate committee we were not sure whether the proof was absolute or not, but we came to the conclusion that there was no marriage left. On those grounds we often granted a divorce. We rationalized in that fashion.

Dr. OLLIVIER: But you were still seeking proof of adultery.

Senator CROLL: We were seeking proof of adultery, but what do you suggest we should have proof of now in rationalizing?

Dr. OLLIVIER: In rationalizing—that suggestion is not mine. I am suggesting what I have suggested because it is a new approach. It could be that the parties could not be brought together again; the woman is not ready to forgive the adultery, or she has been treated so cruelly that she would not want to live with the husband again under any circumstances, and so the marriage has broken down. For whatever the reason, the marriage is ended. You might have both reasons at the same time.

Senator CROLL: Suppose you had neither; suppose a woman just came in and said the marriage has broken down and I refuse to live with him.

Dr. OLLIVIER: She would have to have a serious reason. If she said it was broken down simply because her husband reads the newspaper at breakfast instead of looking at her—it would have to be something more than that.

Senator FERGUSSON: It would have to be something more than incompatibility.

Dr. OLLIVIER: I would not want it to be suggested that somebody could come before the court and say, without any other reason, that the marriage had broken down and therefore wanted a divorce.

Senator CROLL: What I gather you are saying in effect is that there could be an accumulation of offences.

Dr. OLLIVIER: There could be. Mind you, I am only quoting.

Senator CROLL: It must be an accumulation of offences. That is what I gather from what you say, and if that be so, in what respect do we liberalize? As it is we have an offence, and it is quite true that at times it is evaded, but in what respect do we liberalize if we depart from this?

Dr. OLLIVIER: When I say "liberalize," if you brought only two or three reasons for divorce—for example, cruelty, absence for so many years, or because one of the parties is in an asylum—if you limit it to things like that, then you are rationalizing. If you follow the examples in the United States where there are 40 different causes, then I say you are not rationalizing but you are liberalizing.

Senator CROLL: Nobody thought in those terms. By the way, in Nova Scotia is it extreme cruelty?

Mr. MCCLEAVE: The definition quoted here is often used down there.

Senator CROLL: I noticed in the press reports that the term was cruelty.

Mr. MCCLEAVE: It is either extreme cruelty or gross cruelty.

Mr. MACEWAN: I asked Mr. Hopkins about this at the last committee meeting and he did not know.

Senator CROLL: I looked it up and it said cruelty—without "extreme" or "gross".

Mr. AIKEN: I think Mr. Hopkins undertook to get a number of definitions of cruelty for us.

Mr. PETERS: What are the legal and moral arguments against divorce by consent? We have noticed in the past that the Senate, and I presume the courts, have always paid a great deal more attention to a divorce that was apparently contested than to an uncontested divorce.

Dr. OLLIVIER: I suppose the legal contention is that marriage is not purely a contract. If it was only a contract it could be dissolved by consent. But here you are dealing with legislative action when granting a divorce, and you cannot break up this particular type of contract. You can break up an ordinary contract by consent, but marriage is not an ordinary contract.

Mr. PETERS: Is this a carry-over from our ecclesiastical law?

Dr. OLLIVIER: It is possibly so, at least from yours and mine.

Mr. PETERS: Not mine, really. I do not belong to the Jewish faith where you protest that you are divorced on a number of occasions and it is automatically granted. Why is the assumption so strong that the Province of Quebec will not avail itself of the federal legislation which enables them to set up a provincial divorce court?

Dr. OLLIVIER: Because, I believe, of the proportion of the population that is Catholic. The law is still that marriage is indissoluble and therefore as the people cling to the Civil Code, and according to the Code which has not been changed, marriage is still indissoluble. Therefore it is against their religion.

Senator ASELTINE: How do you account for the fact that at least one-third of the divorces heard in the Senate in the past have been by people who have that belief?

Dr. OLLIVIER: I suppose the answer to that question is very easy. Of the 85 or 90 per cent Catholics in the Province of Quebec there are probably quite a number who do not practise.

Mr. PETERS: Is it not true that states such as Italy, France and Spain, and a number of other countries have much more liberal divorce laws than you have?

Senator CROLL: No, they don't have any divorce laws at all.

Mr. PETERS: It is a legal term, but it amounts to the same thing. You can become separated legally there and you can remarry.

Dr. OLLIVIER: There are a number of people in Italy who would like a divorce but cannot get it. Some succeed in getting an annulment, but not everybody. When you talk about annulments it is more rare than divorce.

Senator FLYNN: On the same matter I was inclined some time ago to agree with your conclusion that the time was not ripe for establishing a divorce court in Quebec, but there are many ways of doing this. I understand that where a divorce court exists in other provinces it is because the provincial legislature has granted authority to a court created by the legislature to hear divorce cases. Is not that the situation?

Dr. OLLIVIER: Yes. While the province has provided for the procedure—

Senator FLYNN: And given the jurisdiction.

Dr. OLLIVIER: —I would rather we have a real court in Quebec rather than send it to the Exchequer Court. I think that is just hypocrisy. If you are going to have a court, have the Superior Court hear divorces.

Senator FLYNN: Where would you see any problems with giving jurisdiction all across Canada to the Exchequer Court, even if you were to appoint a justice of the Superior Court in Quebec or the Supreme Court?

Dr. OLLIVIER: Do you mean a justice of the Exchequer Court would sit in Montreal or Quebec? That would not make much difference. If you sent it to the Exchequer Court here you would not have a court in Quebec, but still a court outside Quebec, except that you allowed the justice to go and sit in Montreal.

Senator FLYNN: The justice could travel, on circuit. There is a second point I want to put to Dr. Ollivier, if I may, Mr. Chairman. It is on page 9 of his brief, where he suggests that separation as to bed and board is divorce *a mensa et thoro* and, therefore, any provincial legislation in this matter might be *ultra vires*. I might be inclined to accept this conclusion, but I think everybody

realizes that if we were to accept this conclusion it would make the solution of the problem much more difficult. Would Dr. Ollivier agree that if we were to adopt a law respecting divorce and if we were to define divorce as having the strict meaning of final and complete and irrevocable dissolution of marriage, we would not avoid this difficulty?

Dr. OLLIVIER: If you pass such a law you might include in it a provision like the decision rendered by the Supreme Court in Washington lately, that that legislation would not have a retroactive effect. Otherwise, if you applied it to all the persons separated as to bed and board in the last 50 years it would certainly create a lot of trouble.

Senator FLYNN: It seems to me that if we were to accept this definition of divorce which is suggested, we would be complicating the problem immensely.

Mr. MANDZIUK: Mr. Chairman, I feel the committee should be grateful to the steering committee for having given Mr. Hopkins and Dr. Ollivier an opportunity to give us the groundwork of what the law is. I personally feel that we should not delve too much as a committee or ourselves individually as to how far we are prepared to liberalize the grounds for divorce, because this is one matter where we have to follow public opinion. I respect that Quebec wants to retain the law as is. We are going to hear briefs from various agencies from across the land. I would rather meet these representations that are going to be made with an open mind. That is, I have my opinions and I know every member of the committee has his or her opinions, but are we not trying to jump before we come to the stile? Let us approach it with an open mind. When we hear those representations we will question them only with a view to eliciting more information as to how strongly they feel about this, because I do not think we can legislate or be ahead of public opinion, if public opinion is not ready, as I think one gentleman has mentioned it is not ready in Quebec, to have courts. Let it be so. But I agree with the point in particular that what recommendations we make should be applicable not only to divorce courts in respect of the provinces, but these grounds, if they are liberalized or extended, should apply to the Senate divorce committee as well. I agree it is not a court, doctor. Supposing we just leave it at that for the time being and are prepared, as a jury, to hear what the country has to say about it—and I am sure the country will say plenty.

Dr. OLLIVIER: I have to make a little correction here, as to the Senate and what I say about parliamentary divorce. The Senate committee can deal with it as it wishes. It is rather a guideline to your committee than anything else.

The CO-CHAIRMAN (*Senator Roebuck*): May I say here that, of course, we all agree with you, Mr. Mandziuk, that we should keep an open mind, and when we have heard all the evidence that is to be presented to us it will be time enough to come to conclusions. I might also add that nobody is to be bound by the discussions that take place in the meantime, prior to the time for decisions.

Senator CROLL: Doctor, I am rather on a matter you did not cover. Can you take a minute or so and give us the legal position of children in the Province of Quebec, give us the procedure from the beginning? They can make an application in the court?

Dr. OLLIVIER: Up to now the Senate committee has never dealt with, except in the very much earlier cases, the question of the children. What has happened is that the aggrieved party, the party who wants the maintenance or anything, makes an application to the court and takes an action to the courts, as if it were an entirely provincial matter. Seeing the Senate has not dealt with it, or Parliament previously when they had divorce acts did not deal with it, the woman would ask for alimony for the care of the children before the courts. What happened very often was this, the men who were paying alimony to their

wives would come here to get a divorce so that they would not have to continue to pay alimony. That is what happened very often, because then the courts would say, "Why should this man pay you alimony, since you are completely separated? You are not husband and wife, and are in the same position as if you had never been married." There has been a conflict of decisions there.

Senator CROLL: The wife in some respects enters into it with her eyes open; she can see what is happening. An order is made for maintenance, $10, $20, $15 a week, there is an infant child, a divorce is granted. What are the child's rights? How do we protect the child? The husband says, "I am not interested any more."

Dr. OLLIVIER: I think the child is in a better position than the wife, because although it is as though the marriage has never taken place the child is still the child of the father, and the father is still obliged to feed and clothe him and provide the money for that. It is what we call a putative marriage, that although the marriage is dissolved the courts in Quebec, as far as the children are concerned, will in every case decide the father is responsible for the upbringing, and if sometimes a woman does not succeed in getting alimony she will succeed in getting money for the children.

Senator CROLL: As maintenance?

Dr. OLLIVIER: Yes, as maintenance. That is in the Superior Court.

Senator CROLL: So we have no worry on that ground at all?

Dr. OLLIVIER: Not for the children, but you might have a worry for the wife.

Senator CROLL: Let us deal with the children first.

Mr. PETERS: Mr. Chairman, on a point of order, is it not true in the case of children that this is really nothing to do with the act taken in divorce? This has to be a separate court action that can take place either before or after the dissolution; it is an overt act?

Dr. OLLIVIER: In the divorce cases here, in some of those cases Parliament itself has provided for the maintenance of the wife and children.

The CHAIRMAN: But not in recent times?

Dr. OLLIVIER: But not in recent times.

Senator FERGUSSON: I found those cases very interesting, where Parliament did take this upon themselves, Dr. Ollivier. In your searching through the cases, could you tell us when Parliament dropped doing this, because in our divorce committee we have had the idea, and it has been expounded a number of times, that we had no authority to do that.

Dr. OLLIVIER: Yes, but take this case of Mrs. Campbell with which I was dealing. The act provides:

> 3. The said Robert Campbell shall pay annually to his said wife for her support and maintenance the sum of five hundred dollars during her separation as aforesaid, in two equal instalments, payable half-yearly, on the last days of May and November in each year.
>
> 4. The said Eliza Maria Campbell may, after the commencement of this Act, have the custody and care of one of the children of the said marriage, namely, Francis Wililam Campbell, during her separation as aforesaid.
>
> 5. The said Robert Campbell shall pay annually to his wife, the said Eliza Maria Campbell, the sum of two hundred dollars for the support and education of the said child, while he remains in her custody during the separation as aforesaid. The said sum of two hundred dollars shall be

payable in equal half-yearly instalments of one hundred dollars, on the last day of May and November in every year during the minority of the said child.

Senator CROLL: Let us talk just about the position of the wife for a moment, Doctor. She is receiving, say, $30, $40 or $50 a month, and then she is divorced. Do you say that these payments will not continue?

Dr. OLLIVIER: What I say is this, that sometimes a man and a woman are separated as to bed and board, and the judge in Quebec has declared that the wife should receive so much money. Then the husband comes here and obtains a divorce. In that case the money paid by the husband for the support of his wife while they were separated as to bed and board does not need to be paid by reason of the fact that he has obtained a divorce.

Senator CROLL: Yes, but the wife knows that at the time she comes here.

Dr. OLLIVIER: Yes.

Mr. HONEY: May I ask you, Dr. Ollivier, in respect of the last question that the senator put to you, this question: If a wife from Quebec comes here for a divorce and is, prior to that time, receiving alimony under a judgment of the Superior Court of Quebec, is she denied alimony or maintenance, if she goes back to the Quebec court, because of the dissolution of the marriage or because there is evidence of her misconduct which supported the dissolution?

Dr. OLLIVIER: No, it is simply on account of the dissolution of the bond. I think that Senator Flynn has had more practice in this line than I have, and—

The CO-CHAIRMAN (*Senator Roebuck*): Gentlemen, it is 5 o'clock—

Mr. MANDZIUK: I have a supplementary question to ask, Mr. Chairman. Does the Civil Code of Quebec recognize a divorce granted by Parliament?

Dr. OLLIVIER: It does not recognize it formally.

Mr. MANDZIUK: If it does—

Dr. OLLIVIER: It does in a way, because once you grant a divorce here the woman is worse off, because she cannot ask for alimony.

Mr. MANDZIUK: If Quebec does not recognize the divorce why should not the protection the wife gets under the Code remain with her and the children?

Dr. Ollivier: For the reason that divorce is not granted here by virtue of the general law. It is granted by virtue of the jurisdiction of Parliament, and each case is an exception. It has to be recognized in Quebec otherwise there would be chaos.

Mr. AIKEN: May I ask a supplementary question, Mr. Chairman?

The CO-CHAIRMAN (*Senator Roebuck*): Yes.

Mr. AIKEN: We seem to have been skating around what I take to be your theory in the first part of your paper, namely, that there may be a dual authority in respect of maintenance, alimony and custody of children. There is, first, a separate right which belongs to the provinces and, secondly, a right ancillary to marriage and divorce. Perhaps we have not, as a federal authority gone into the question of ancillary rights; that we have gingerly walked around them. Perhaps the time has come to reconsider this.

Dr. OLLIVIER: I suppose the answer to that is if there is a wrong somewhere there should be a remedy—*ubi jus ibi remedium*. If a person comes here and gets a divorce and all Parliament says is: "Here, you are divorced", and does nothing, then surely there must be a remedy somewhere for that person in respect of maintenance, alimony, the care of children and all of those things. If we refuse to deal with that in Ottawa then that right, not having been exercised by us, is exercised by the provinces who occupy the field that Parliament has refused to occupy.

The Co-CHAIRMAN (*Senator Roebuck*): Mr. McCleave has a question.

Mr. MCCLEAVE: This is in the line of the question of the so-called ancillary rights. I ask the witness if he will agree with me that because this is a field in which many poor people are involved, naturally, it might be a field that is dangerous to step into because the courts might hold that our view on ancillary rights was wrong. For that question to be determined it should really be taken to the Supreme Court of Canada. Does the witness not agree with this?

Dr. OLLIVIER: Yes, I agree.

The Co-CHAIRMAN (*Senator Roebuck*): When the doctor answers the question, that will terminate the meeting.

Mr. MCCLEAVE: He has answered. He agrees with me.

Senator CROLL: May I make one observation, Mr. Chairman? In this day and age how can we deal with divorce in a vacuum. It seems to me that we have not dealt with divorce in this country for 99 years, and then suddenly we have an opportunity of dealing with it. This is a new condition—a new aspect. How can we possibly, without knowing where we are going, deal with divorce and say: "This is it"? We may have enlarged the grounds for divorce, or decided to do other things, but the country will have no confidence in that, and we will not have done our job. Surely, somebody must present some new line on this subject as it affects women, and as it affects children, and those aspects are as important as the divorce itself. I think we have to get some evidence before us as to these questions.

Senator ASELTINE: That applies only to Quebec. Other provinces have divorce courts.

Senator CROLL: Yes, I know, but we have to have a law that is applicable all over the country—a law that appeals to Quebec and Newfoundland, and which they will accept.

Dr. OLLIVIER: What strikes me, Senator, is the fact that in the early days when Parliament did deal with those matters such as maintenance there was never any difficulty. It was never contested, and it never went to the Supreme Court.

Senator CROLL: What you are saying is that we just stopped.

Dr. OLLIVIER: Yes, Parliament just stopped, after doing it for about 30 years.

The Co-CHAIRMAN (*Senator Roebuck*): The field is wide open—

Mr. MCCLEAVE: Cannot we hear from somebody from the Montreal Bar, a lawyer who has not only handled these cases in Ottawa but has handled them in respect of maintenance, property rights and the rights of children before the Quebec courts? Could not we ask one of those gentlemen to appear before us?

Dr. OLLIVIER: I do not know whether that will be conclusive or not. You could present a bill respecting divorce containing all of those conditions and then, as you have the right to do, by virtue of the Supreme Court Act, refer that bill to the Supreme Court for a decision as to its validity.

Mr. PETERS: Do we not have the right as a committee to make use of that section of the Supreme Court Act? Cannot we refer a hypothetical case to the Supreme Court of Canada for a decision as to the validity of a proposition we wish to make? I know this has been done on a limited basis by governments in the past.

Dr. OLLIVIER: That cannot be done by the committee itself. It can be done by the Senate or the House of Commons.

Senator CROLL: The Senate can do it. The Standing Committee on Divorce of the Senate can give a divorce on any ground with any conditions.

Mr. PETERS: I am asking about what is actually a reference to the Supreme Court of Canada as to the legality of our jurisdiction in respect of passing federal divorce legislation which would provide for maintenance of children and custody of children, and alimony for the woman. As the senator has said, when we get into the Province of Quebec we have done worse things, until the last two or three years. We have taken away from the wife any money she may have had before because of the peculiar fact that a woman in the Province of Quebec was not entitled to hold money in her own right. The *Terry* case was a good example of that. A million dollars was involved, and a parliamentary divorce would have eliminated the wife's having a share in that money. Is it not possible for us to ask the House or the Senate to have this question referred to the Supreme Court of Canada so that we may obtain a judicial decision—

Dr. OLLIVIER: The only way to do it is to propose a bill.

Senator FLYNN: If you do that you will sidetrack the whole matter. You will not solve a thing.

The CO-CHAIRMAN (*Senator Roebuck*): May I have the floor for a minute in order to answer that question? If you read the Judicature Act you will see that the only authority for the reference of questions to the Supreme Court of Canada is in the Government, and not in the House of Commons or the Senate.

Dr. OLLIVIER: But, senator, is there not a clause that says you may refer a bill?

The CO-CHAIRMAN (*Senator Roebuck*): The Government may.

Mr. PETERS: Is it done by way of joint address?

The CO-CHAIRMAN (*Senator Roebuck*): No, it is referred by the Government to the Supreme Court.

Senator CROLL: The Senate referred the margarine bill to the Supreme Court, not to the Government.

Mr. PETERS: Could I suggest that the steering committee pursue this matter of the reference, and if possible to get this kind of reference before the Supreme Court, because it seems to me that our deliberations would be much easier if we were able to come to that fairly simple conclusion.

Senator CROLL: Oh, that would be two years away. The reference would take two years before you got through with it.

Mr. PETERS: What I had in mind was that if it were considered and became the subject of a reference we could go along with the rest of the act in the meantime. I do not want to see anything held up by protracted judicial proceeding.

The CO-CHAIRMAN (*Senator Roebuck*): It is now past five o'clock, and before we adjourn I would like to hear from my co-chairman.

The CO-CHAIRMAN (*Mr. Cameron*): On behalf of the committee, I think I should express our appreciation to Dr. Ollivier for his learned, most interesting, clear and comprehensive statement on the subject matter of divorce. I know that I have learned a great deal from it, and I am sure that we have all benefited very much from it. I think we should thank Dr. Ollivier for the perspiration that went toward the inspiration of what he has put before this committee this afternoon.

The CO-CHAIRMAN (*Senator Roebuck*): That expresses the thanks of us all, Dr. Ollivier. This meeting is adjourned.

The committee adjourned.

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 1

THURSDAY, OCTOBER 13, 1966

Joint Chairmen
The Honourable A. W. Roebuck
and
Mr. A. J. P. Cameron, M.P.

WITNESSES:

Department of Justice: E. A. Driedger, Deputy Minister and Deputy Attorney General. *Seventh-Day Adventist Church in Canada:* Rev. Darren L. Michael, Barrister, Secretary for public affairs, National Executive Committee.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 3

TUESDAY, OCTOBER 18, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

Department of Justice: E. A. Driedger, Deputy Minister and Deputy Attorney General. *Seventh-Day Adventist Church in Canada:* Rev. Darren L. Michael, Barrister, Secretary for public affairs, National Executive Committee.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

24692—1

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

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

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

FOR THE HOUSE OF COMMONS

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

Members of the House of Commons

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
Woolliams—(24).

(Quorum 10)

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 bill 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

TUESDAY, October 18, 1966

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Hon. Senators Roebuck (*Joint Chairman*), Baird, Fergusson and Haig.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Goyer, Honey, Mandziuk, McCleave, Peters, Ryan and Stanbury.

The following witnesses were heard:

Department of Justice: E. A. Driedger, Deputy Minister;
Seventh-Day Adventist Church in Canada: Rev. Darren L. Michael, Barrister, Secretary for public affairs, National Executive Committee.

At 5.55 p.m. the Committee adjourned to the call of the Joint Chairmen.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

TUESDAY, October 13, 1936

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: For the Senate: The Hon. Senators Hoodless (Joint Chairman), Baird, Ferguson and Hall.

For the House of Commons: Messrs. Cameron (High Park) (Joint Chairman), MacCreave, Perry, Ryan and Shumiatcher.

The following witnesses were heard:

Department of Justice: E. A. Driedger, Deputy Minister.
Seventh-Day Adventist Church in Canada: Rev. Darrel L. Mitchell, Barrister, Secretary for Public Affairs, National Executive Committee.

At 3.35 p.m. the Committee adjourned to the call of the Joint Chairman.

Attest.

Patrick L. Savoie,
Clerk of the Committee.

THE SENATE

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

EVIDENCE

OTTAWA, Tuesday, October 18, 1966.

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 come to order. We have a quorum, and we have two very distinguished and well-informed witnesses to present to you, the first of whom is the Deputy Minister of Justice of the Dominion of Canada, Mr. Driedger. I have some notes which I wish to place on the record and also to inform you who are here, so that others who read what will be presented to us will have some better idea of who it is who is speaking. Mr. Driedger was born at Osler, Saskatchewan. He received his primary education there and completed high school at Rosthern, Saskatchewan. He attended the University of Saskatchewan at Saskatoon, from which he received B.A. degree in 1932 and an LL.B. in 1934. He received an honorary LL.D. degree from the University of Ottawa in 1963. He was articled to F. F. MacDermid of the firm of Ferguson, MacDermid and MacDermid in Saskatoon, and continued with that firm after admission to the Bar. He entered into parnership with the late Wilson M. Graham of Yorkton, Saskatchewan, in 1939.

He was appointed Librarian of the Supreme Court of Canada on June 1, 1940, and transferred to the legal branch of the Department of Justice in December, 1941, as Junior Advisory Counsel. He was appointed Senior Advisory Counsel in 1945, Assistant Deputy Minister on July 1, 1954, and Deputy Minister of Justice and Deputy Attorney General of Canada on July 1, 1960. He was created a Dominion K.C. on July 1, 1949.

He has written numerous articles and papers on legislation and related subjects, including an annotated Consolidation of the British North America Acts, and is the author of a text *Composition of Legislation* and *Legislative Forms and Precedents*, both standard reference works on legislation. He was a member of the Statute Revision Commission which prepared the Revised Statutes of Canada for 1952, and is a member of the Statute Revision Commission of 1966.

He was awarded the Gold Medal of the Professional Institute of the Public Service of Canada in February, 1960. In 1939 he lectured in Company Law at the University of Saskatchewan, and from 1958 to 1960 lectured in Legislation and Administrative Law in the Faculty of Law at the University of Ottawa.

He is the representative of the Department of Justice on the Conference of Commissioners on Uniformity of Legislation in Canada and the National Council on the Administration of Justice. He is a member of the Canadian Bar Association, the Law Society of Saskatchewan, the Law Society of Upper Canada and the Federal Lawyers Club. He is a member and Past President of the Kiwanis Club of Westboro.

He is married to the former Elsie V. Norman of Yorkton, Saskatchewan, and has two sons, Alan and Tom.

His hobbies and recreation—that is what we want to hear about—include photography, philately and music.

I am not going to ask him to sing, but I am going to ask him to speak, and you will realize from what I have told you that we have a very distinguished representative here today, whose words will be full of wisdom and information, and whom we are glad to welcome.

Mr. E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General: Mr. Chairman, ladies and gentlemen.

1. Introduction of English Law:

The divorce laws of Canada consist of English statutes, pre-Confederation provincial statutes and post-Confederation federal statutes, with the result that the source and nature of the divorce laws for Canada vary from province to province. A brief survey of the history of the divorce laws in Canada might therefore be useful as a preliminary step to the consideration of possible changes in the law.

The divorce law of five of the provinces is the Divorce and Matrimonial Causes Act of 1857, which came into force in England on January 1, 1858. Before we see how this became the law of some provinces and not of others, it is necessary to say something about the introduction of English law into English colonies or possessions.

The extent to which English law applies to a colony or possession depends upon the manner in which it was acquired. In the case of a colony acquired by settlement, the common law of England and the statute law as existing at that date apply. (See Halsbury, 3rd ed. Vol. 5, at pages 619-697; Keith—*Responsible Government in the Dominions*, 2nd ed. Vol. 1, at pages 3-5). In the case of colonies acquired by conquest or by cession, which at the time of their acquisition had laws of their own, the Crown had power to alter and change those laws, but unless this was done the laws of the conquered or ceded colony remained in force. (See Halsbury and Keith above: *Uniacke v. Dickson*, James N.S.L.R. (1853-55) 2 *Cooper v. Stuart* (*1889*) 58 L.J.P.C.93.)

In the eighteenth century the further doctrine was developed that in a colony acquired by settlement, laws could only be made with the assent of the assembly in which the people were present in person or by representatives.

Once an elective assembly was established in a colony it made its own laws, and laws thereafter passed in England were not automatically applicable. They could, however, be made applicable in one of two ways. First, the Imperial Parliament was absolutely supreme and, at least until the Statute of Westminster, 1931, had unfettered jurisdiction to legislate for the whole Empire. Imperial legislation, however, was *prima facie* applicable to the United Kingdom only, and ordinarily it did not apply to the colonies. Certain acts, however, were applicable to the colonies. There were those that were enacted expressly for particular colonies, as, for example, the British North America Act, 1867, and there were those that by express terms or necessary implication extended to the whole Empire, as, for example, the Merchant Shipping Act of 1894. Whether an Imperial statute applied outside the United Kingdom was therefore a matter of construction.

English laws also could be made to apply in a colony by an enactment of the colony itself. A colony could adopt English law in whole or in part, and it then became part of the law of the colony, not because the original law by its terms extended to the colony, but because the colony had in effect re-enacted that law for itself.

Imperial laws that extended to the colonies by their own terms—*in proprio vigore*—could not be changed by the colonial legislature. Imperial laws adopted by a colony, of course, could be changed by the colonial legislature.

THE ATLANTIC PROVINCES:

Nova Scotia, which originally included what is now New Brunswick, was a settled British Colony. In such cases, the Crown could by ordinance, and the Imperial Parliament or its own legislature when it came to possess one could by statute, declare what parts of the common and statute law of England should have effect within its limits. When that was done the law of England became from the outset the law of the colony, in so far as it was reasonably applicable to the circumstances of the colony, and until abrogated or modified either by ordinance or statute.

From 1713 to 1758 the provincial government in Nova Scotia consisted of a Governor or Lieutenant-Governor and a Council, and the latter body presumed to possess both legislative and executive powers. However, on April 29, 1755, the Attorney General and Solicitor General gave the opinion that the Governor in Council did not have power to make laws for the government of Nova Scotia. (See Houston—*Constitutional Documents of Canada,* pp. 17 and 18; for constitutional documents pertaining to the establishment of representative governments in Prince Edward Island, Nova Scotia and New Brunswick, see *Sessional Papers* 1883, No. 70). A Legislative Assemby was then established pursuant to instructions to the Governor. Prince Edward Island was formerly part of Nova Scotia, but it was created a separate province by Letters Patent issued to the Governor in 1769. Authority was conferred to convene an Assembly and the Assembly was organized and met in 1773.

In 1784, New Brunswick was carved out of Nova Scotia and created a province with a Legislative Assembly, also by instructions to the Governor.

Applying the principles just outlined, the English law was brought to the provinces of Nova Scotia, New Brunswick and Prinve Edward Island. The first representative legislature there—and indeed on the North American continent —was established in Nova Scotia in 1758 and the first day of the meeting of the first general assembly was October 3, 1758. That, then, is the cut-off date. The English law as of October 3, 1758, was the law of Nova Scotia, and thereafter as changed by the legislature of Nova Scotia, or as changed by Imperial legislation that by express terms or necessary implication extended to Nova Scotia. At that date there was no divorce law in England, so there was then no divorce law in Nova Scotia. The classic decision of the courts on the introduction of English law into Nova Scotia is *Uniacke v. Dickson*—James N.S.L.R. (1853-55) 287.

Prince Edward Island and New Brunswick were originally part of Nova Scotia, and October 3, 1758, is therefore also the cut-off date for these two provinces. Prince Edward Island was created a separate province in 1769 and its first assembly met in 1773. The law of Prince Edward Island was therefore the English law up to 1758, Nova Scotia law until 1773 and Prince Edward Island law thereafter. Prince Edward Island, however, was not added to Nova Scotia until 1763. New Brunswick was created a separate province in 1784 with its own Legislative Assembly, so that the law of New Brunswick was therefore English law until 1758, Nova Scotia law until 1784 and New Brunswick law after 1784. It follows that there was then also no divorce law for Prince Edward Island and New Brunswick, because the Divorce and Matrimonial Causes Act of England was not enacted until 1857.

In Newfoundland, the Assembly was not established until December 31, 1832. Its law was therefore the English law until 1832 and thereafter Newfoundland law. Again, the English Divorce Act did not become the law of Newfoundland, since the colony had its own Assembly before the English act was passed.

ONTARIO:

> The Royal Proclamation of 1763 authorized the Governor to establish courts for hearing and determining all causes ... as near as may be agreeable to the laws of England.

By the Quebec Act of 1774, however, the law in force previously, relating to property and civil rights, was restored, but the criminal law of England was continued. In 1791, the Constitutional Act divided Quebec into the two provinces of Lower Canada and Upper Canada. On October 15, 1792, the Legislative Assembly of Upper Canada, at its first session, enacted that from and after that date

> in all matters of controversy relative to property and civil rights, resort should be had to the laws of England, as the rule for the decision of the same.

This provision has continued to the present day and now appears as the Property and Civil Rights Act of Ontario, R.S.O. 1960, c. 310. Alterations in the law by Imperial statutes, by pre-Confederation legislation of Upper Canada or Canada, or by Ontario, are of course excepted.

The criminal law was in force by virtue of the Quebec Act and section 33 of the Constitutional Act, and no further legislation was necessary except to fix the precise day. This was done by the statutes of Upper Canada, 40 Geo. III, c. 1. The date of introduction fixed was September 17, 1792.

In *Doe d. Anderson v. Todd,* 2 U.C.Q.B. 82 it was held that the enactment of October 15, 1792, did not place Upper Canada in a position materially different from the settled colonies.

Here again, the English divorce Act did not become the law of Upper Canada.

QUEBEC:

The Royal Proclamation of 1763 provided for the government of the newly acquired territory of Quebec by a Governor and an appointed Council with power to make ordinances for the peace, welfare and good government of the province. The Constitutional Act of 1791 divided Quebec into the two provinces of Upper Canada and Lower Canada with a Governor and an appointed Council for each province, and also provided for an Assembly for each province.

The Union Act of 1840 re-united the two provinces with a Legislative Council and an Assembly, which continued until Confederation in 1867.

Whether the Royal Proclamation of 1763 introduced English civil law is a matter of doubt. In any case, it is clear that the Quebec Act of 1774 established French law as the civil law of Quebec, and this was continued in the province of Lower Canada by the Act of 1791. See *Citizens Insurance v. Parsons* 7 A.C. 96:

> ...the law which governs property and civil rights in Quebec is in the p. 111 main the French law as it existed at the time of the cession of Canada ...

Obviously, the English divorce law was not introduced into Quebec.

MANITOBA:

Manitoba was carved out of the Northwest Territories. The Hudson's Bay Company surrendered Rupert's Land and the Northwestern Territory by Deed of Surrender dated November 19, 1869. In anticipation of the surrender and the admission of these territories into the Canadian Confederation, the Parliament of Canada (32-33 Victoria, c. 3) enacted a statute providing for the temporary government of these territories. Section 5 of this Act provided that all laws in force therein at the time of their admission into the Union should remain in

force until altered. Also, in anticipation of the admission, the Parliament of Canada enacted the Manitoba Act (33 Victoria c. 3) establishing the Province of Manitoba. This Act contained no continuation of law provision, except the general one (section 2) applying the provisions of the British North America Act, which presumably included section 129, which provided for the continuation of laws.

The Rupert's Land Act of the Imperial Parliament (31-32 Victoria, c. 105) provided for the acceptance of the surrender from the Hudson's Bay Company. These territories were admitted to the Union by Imperial Order in Council of June 23, 1870, effective July 15, 1870.

In *Sinclair v. Mulligan,* a Manitoba case, it was held that the common law of England was introduced on May 2, 1670 the date of the Hudson's Bay Company Charter.

In 1874 the Legislature of Manitoba passed a statute incorporating English law existing on July 15, 1870—

Co-Chairman Senator ROEBUCK: Have you the reference for that case that you quoted?

Mr. DRIEDGER: Yes. 1888, 5 Man. L.R. 17. I may say that this case I believe created great consternation in Manitoba, and it was as a result of that that Manitoba, in 1874, passed this statute incorporating English law, but only in respect of matters over which the legislature had jurisdiction. See 1874 c. 12, which provided that the Court of Queen's Bench should

> decide and determine all matters of controversy relative to property and civil rights according to the laws existing, or established and being in England, as such were, existed and stood on the 15th day of July, 1870, so far as the same can be made applicable to matters relating to property and civil rights in this province.

The Parliament of Canada enacted a corresponding statute in relation to matters over which Parliament had jurisidiction. See 51 Victoria, c. 53. So that by a combination of the wto statutes, the English law as of July 15, 1870, was incorporated into the laws of Manitoba.

NORTHWEST TERRITORIES AND YUKON TERRITORY:

The Northwest Territories Act enacted by the Parliament of Canada in 1886 incorporated the civil and criminal laws of England as they existed on July 15, 1870

> in so far as the same are applicable to the Territories, and in so far as the same have not been, or may not hereafter be, repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the Territories or of the Parliament of Canada, or by any ordinance of the Lieutenant-Governor in Council.

This law has continued to the present day and now appears as section 17 of the Northwest Territories Act, R.S.C. 1952, c. 331.

The Yukon Territory was carved out of the Northwest Territories in 1898 by the Yukon Territory Act, 61 Victoria, c. 6. Section 9 of that Act continued in force the then existing laws of the Northwest Territories. The result is that the Yukon is in the same position as regards English law.

SASKATCHEWAN AND ALBERTA:

These provinces were carved out of the Northwest Territories in 1905 by the Alberta Act, 1905, c. 3, and the Saskatchewan Act, 1905, c. 42. Each Act continued the laws of the Northwest Territories then in force, so that again the

law of England of July 15, 1870, subject to any changes made before 1905 by the Parliament of Canada or by Northwest Territories Ordinance, was adopted.

Thus, in the provinces of Manitoba, Saskatchewan and Alberta, and in the Northwest Territories and the Yukon, the law of England of July 15, 1870, was incorporated in positive terms.

BRITISH COLUMBIA:

By Ordinance No. 70 of March 6, 1867, the civil and criminal laws of England as of November 19, 1858, were introduced

> so far as the same are not from local circumstances inapplicable.

This now appears as the English Law Act, contained in the *Revised Statutes of British Columbia*. The Ordinance of 1867 was carried forward after the admission of British Columbia by section 129 of the British North America Act.

SUMMARY:

The result is:

(1) that at the cut-off date for the introduction of English law the Divorce and Matrimonial Causes Act, 1857, was not introduced into the provinces of Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Ontario or Quebec;

(2) the Divorce and Matrimonial Causes Act became the law of the other provinces of Saskatchewan, Manitoba Alberta and British Columbia. It has been so held by the following decisions:
(B.C.) *Watts v. Watts*—(1908) A.C. 573
(Man.) *Walker v. Walker*—(1919) A.C. 947
(Alta.) *Board v. Board*—(1919) A.C. 956
(Sask.) *Fletcher v. Fletcher*—(1920) 1 W.W.R. 5

Pre-Confederation Provincial Legislation:

I. Continuation of Laws:

Before dealing with special pre-Confederation provincial legislation it might be of assistance to say something at this point about the continuation of laws by our constitutional documents. Many pre-Confederation laws are still valid today, notwithstanding the creation of new political entities and the abolition of old, because laws and courts have been continued from one entity to another.

The Royal Proclamation of 1763 gave authority to the Governor of Quebec to establish courts for hearing and determining civil and criminal causes

> according to the law and equity, and as near as may be agreeable to the laws of England.

A change was made by the Quebec Act of 1774. Section 8 of that Act provided that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada. Section 11, however, continued the criminal law of England in force in the province of Quebec.

The Constitutional Act of 1791 divided Canada into the two provinces of Upper Canada and Lower Canada. Section 33 provided that all laws in force on the coming into force of that Act should remain and continue in effect in each province, subject to repeal or amendment by the legislatures of the new provinces.

The Act of Union of 1840 re-united the two provinces, and section 46 of that act provided that all laws in force in the provinces of Upper Canada and Lower Canada at the time of union should continue in force until altered or repealed under the authority of that act by the legislature of the province of Canada.

The provinces of Canada, New Brunswick and Nova Scotia, were united by the British North America Act of 1867, and section 129 of that act provided that all laws in force in Canada, Nova Scotia or New Brunswick at the time of union and all courts should continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, subject to alteration by the Parliament of Canada or the legislature of the province according to their authority under that act. It may be noted in passing that there was excepted from this authority to repeal, abolish or alter laws in force any laws of the Parliament of Great Britain or of the United Kingdom; this limitation was removed by the Statute of Westminster, 1931.

The Rupert's Land Act of 1869, enacted by the United Kingdom Parliament to provide for the acquisition of Rupert's Land and the Northwest Territory from the Hudson's Bay Company provided in section 5 that all laws in force in Rupert's Land and the Northwest Territory at the time of their admission into the Canadian Union as of July 15, 1870, should remain in force until altered by the Parliament of Canada or by the Lieutenant-Governor of the Northwest Territories pursuant to the Rupert's Land Act. The Lieutenant-Governor was authorized to make ordinances for the peace, order and good government of the Territories.

The Northwest Territories Act of Canada of 1886 provided in section 3 that the laws previously in force should continue.

The Alberta Act of 1905, as well as the Saskatchewan Act of 1905, also provided that all laws in force at the time of the creation of those provinces should continue in force, subject to alteration by the Parliament of Canada or the legislatures of the provinces. The law in force of the provinces of Alberta and Saskatchewan therefore goes back to the law of England as of July 15, 1870.

The situation in Manitoba has already been explained. There was some doubt as to the date of incorporation of English law in the Province of Manitoba. This doubt was removed by concurrent legislation passed by Manitoba and by Canada, which also brought the law of England as of July 15, 1870, into force in the Province of Manitoba.

The British North America Act of 1949 added the Province of Newfoundland to the Canadian Confederation and Term 18 continued in force existing laws, subject to alteration by Parliament or the Legislature of Newfoundland.

British Columbia and Prince Edward Island were brought into the Union by Orders in Council passed under section 146 of the British North America Act. There was no express continuation of laws provision, but there was in each case a provision making applicable to the new provinces the provisions of the British North America Act of 1867. This would make applicable to these two provinces section 129 of the act of 1867, and the laws in force in each of those provinces at the time they entered Confederation continued in force thereafter, subject to alteration by Parliament or by the legislatures, according to their jurisdiction under the Act of 1867.

II. Pre-Confederation Divorce Laws:

NOVA SCOTIA:

The Nova Scotia Assembly passed a Divorce Act in 1758, Chapter 17, 17 Geo. II. This act gave the Governor authority to hear and determine matters relating to prohibited marriages and divorce and provided for the grant of divorce for adultery and for desertion. The grounds were changed in 1761 by chapter 7 of the Statutes of 1 Geo. III. In 1841, by chapter 13 of 4-5 Vict., the constitution of the courts was somewhat altered. The act was included as chapter 126 of the Revised Statutes of Nova Scotia, Third Series, 1864, and there was one further amendment before Confederation by chapter 13 of the

Statutes of 1866. These laws therefore continued in force after Confederation and still constitute the basic law of divorce for the province of Nova Scotia.

NEW BRUNSWICK:

New Brunswick first passed a Divorce Act in 1787, which was repealed and revised in 1791 by chapter 5 of the Statutes of 31 Geo. III. This was the law in force at the time of Confederation, and it continued in force after Confederation by virtue of section 129 of the British North America Act.

PRINCE EDWARD ISLAND:

An act was passed in 1833, 3 William IV, providing for the establishment of a court of divorce. This was repealed and revised in 1835 by 5 William IV, chapter 10, and was amended in 1866. These statutes were continued in force after Confederation, as indicated above. The act of 1835, however, was not used until 1945, when Rules of Practice and Procedure especially applicable to the divorce court were promulgated. In 1949 the jurisdiction was transferred to the Prince Edward Island Supreme Court of Judicature.

QUEBEC:

In the Province of Quebec there is no provision for the grant of a divorce. However, the Civil Code contains provisions for obtaining separation from bed and board. The Quebec Civil Code which contained these provisions was enacted by an act of the Province of Canada before Confederation, which came into force on August 1, 1866. They were therefore in force prior to Confederation and continued in force after Confederation by virtue of section 129 of the British North America Act of 1867.

III. Post-Confederation Legislation:

I was going to say something about post-Confederation legislation by the Parliament of Canada. There have been three or four short acts, but I notice from the earlier proceedings that Senator Roebuck had covered this, so I do not think it is necessary for me to discuss the 1925 Marriage and Divorce Act, the 1930 Divorce Act (Ontario) and the 1937 British Columbia Divorce Appeals Act, and the act that was passed within the last year or two.

IV. The Nature of Judicial Relief:

Dissolution—Divorce *a vinculo matrimonii:*

A divorce *a vinculo matrimonii* puts an end to the marriage union after the date the decree becomes final. Until then the marriage is considered to be a valid one, but thereafter it no longer exists, and the parties to the dissolved marriage are free to marry again.

The grounds for which a divorce *a vinculo matrimonii* will be granted in Canada are as follows:

(a) to either party in all provinces except Quebec and Newfoundland as a result of the adultery of the other;

(b) in Nova Scotia, also for cruelty, impotence and consanguinity within the prohibited degrees;

(c) in New Brunswick and Prince Edward Island, also for frigidity or impotence and marriage within the prohibited degrees;

(d) in jurisdictions where the 1957 Divorce and Matrimonial Causes Act (Imp.) c. 85 applies (British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario), rape, sodomy and bestiality but only where the wife is the petitioning party.

ANNULMENT:

A defective marriage may be either void or voidable. A void marriage is invalid *ab initio* without a judicial decree; a decree of nullity in such cases is merely declaratory of the status of the parties. A voidable marriage, however, is regarded as a valid marriage until it is declared invalid by judicial decree, but then the marriage is deemed to be void *ab initio*.

In England, jurisdiction with respect to nullity was originally exercised by the ecclesiastical courts, but was transferred to a new divorce court by the Divorce and Matrimonial Causes Act of 1857, but without any change in substantive law. Since that act was incorporated into the laws of the western provinces, it follows that the ecclesiastical law of England as confirmed by the act of 1857 became the law of British Columbia, Alberta, Manitoba and Saskatchewan, and of course the Territories.

In Ontario, prior to the Divorce Act (Ontario) of Canada of 1930 the courts had but limited jurisdiction in annulment actions. The act of 1930, however, incorporated the English Act of 1857 so that the position in Ontario is now the same as in the western provinces.

In Quebec, Title V of Book I of the Civil Code provides for nullity proceedings.

In the maritime provinces of Prince Edward Island, New Brunswick and Nova Scotia, the pre-Confederation acts already referred to included suits for nullity, and in Newfoundland the courts have been held to have the same powers as were exercised by the ecclesiastical courts in England before 1832, which was the final date for the introduction of English law.

Substantially, the law respecting nullity is the same in all provinces. There may be some differences, but it is not material to dwell on them at present.

A marriage will be regarded as void *ab initio* where

(1) there is non-compliance with the ceremonial or evidentiary requirements of the place where the marriage is celebrated; or
(2) either party lacks the legal capacity to contract a marriage by reason of
    (a) incompetence owing to age or mentality,
    (b) a prior subsisting marriage,
    (c) a marriage within the prohibited degrees, or
    (d) lack of real consent owing to mistake as to the person or the nature of the ceremony, to duress or to fraud.

A marriage will be regarded as voidable where there is impotence. Also, a marriage of minors entered into without parental consent where the local law requires such consent is usually only voidable because it is usual to impose conditions, such as non-consummation and a time limit within which the action must be brought.

Judicial Separation—Divorce *a mensa et thoro:*

A judicial separation is in effect a divorce but without the right to remarry.

The English act of 1857 also transferred to the courts the jurisdiction formerly exercised by the ecclesiastical courts with respect to judicial separation, and the English law of 1857 therefore also became the law of the western provinces. Howerver, Alberta passed an act in 1927 purporting to govern judicial separation. The validity of this legislation may be open to question.

As for Ontario, the Act of Parliament of 1930 introduced into Ontario only the laws of England relating to the dissolution and annulment of marriage, and the courts in Ontario have held that they have no power to decree judicial separations.

In Nova Scotia, New Brunswick and Prince Edward Island the courts have jurisdiction to decree judicial separations by virtue of the pre-Confederation statutes referred to, and in Newfoundland the courts acquired the jurisdiction of the ecclesiastical courts of England prior to 1832.

Co-Chairman Senator ROEBUCK: Have you the reference there to the case in Ontario where it was declared?

Mr. DRIEDGER: I have one reference that I could give you, yes. I did not go into the details of these decisions. This is judicial separation: *Vamvakidis v. Kiskoff* (1964) Ont. L.R. 585.

I think there are a number of decisions in Ontario, although some text writers I think conclude that the reasoning is perhaps not correct and that Ontario should have jurisdiction, but the courts apparently have said otherwise. That is my recollection.

In Quebec, Title VI of Book I of the Civil Code, which was enacted before Confederation, provides for separation from bed and board. It was enacted before Confederation, and I have stressed that because, since it was enacted before Confederation, it was valid law and was continued in force after Confederation, so that question of validity does not arise.

The grounds for judicial separation in all provinces except Quebec therefore go back to the ecclesiastical rules in England. They are, briefly, adultery, cruelty and desertion without cause for more than two years. Alberta and Saskatchewan have expanded these grounds to include desertion where there is failure to comply with a judgment for restitution of conjugal rights, sodomy, bestiality or attempt to commit sodomy or bestiality. As has been indicated, the validity of such provincial legislation may be open to question.

The grounds on which separation from bed and board may be obtained in Quebec are set out in articles 187 to 191 of the Civil Code as follows:

> 187. A husband may demand the separation on the ground of his wife's adultery.
>
> 189. Husband and wife may respectively demand this separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other.
>
> 190. 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.
>
> 191. The refusal of a husband to receive his wife and to furnish her with the necessaries of life, according to his rank, means and condition, is another cause for which she may demand the separation.

OTHER RELIEF:

There are other forms of judicial relief in matrimonial matters, but I assume it is not expected that I should deal with them here. They are restitution of conjugal rights, alimony, criminal conversation and enticement, and jactitation of marriage.

I have taken up quite a bit of time, but I should like to make a general comment on legislative jurisdiction.

Co-Chairman Senator ROEBUCK: Do not drop anything. We are thoroughly interested in what you are giving us.

Mr. DRIEDGER: Thank you.

V. Legislative Jurisdiction:

The British North America Act assigns to Parliament exclusive jurisdiction over "Marriage and Divorce" and to the provincial legislatures exclusive jurisdiction over "Solemnization of Marriage in the Province."

There can be little doubt that Parliament's jurisdiction extends to divorce *a vinculo matrimonii*, especially since only ten years before the British North America Act the British Parliament enacted the Divorce and Matrimonial Causes Act in which the expression "divorce" was used in that sense.

As for judicial separation, this form of relief was designated in ecclesiastical law as divorce *a mensa et thoro*, but the Divorce and Matrimonial Causes Act provided that no decree for a divorce *a mensa et thoro* should thereafter be granted, but in all cases in which such a decree might be pronounced the court may pronounce a decree for judicial separation which shall have the same effect. It is therefore, perhaps, arguable that "divorce" in the British North America Act does not include judicial separation, but, having regard to the nature of the decree, since it was exactly the same as the previous decree, it is reasonable to conclude that Parliament's jurisdiction extends to both divorce *a vinculo matrimonii* and judicial separation.

The jurisdiction of Parliament in relation to "marriage" would by itself no doubt confer jurisdiction to deal with the validity of marriages and the grounds on which a marriage may be declared void. However, this authority must be read in the light of head 12 of section 92, which confers on the legislatures exclusive jurisdiction over the "Solemnization of Marriage in the Province". The courts have held that this provincial power operates as an exception to Parliament's power and extends only to enact conditions as to solemnization that might affect the validity of the contract.

Parliament's jurisdiction over "Marriage and Divorce" would seemingly include jurisdiction to prescribe judicial procedures, although, in the absence of any federal laws, the provinces could prescribe, and have prescribed, the necessary procedural rules under authority derived from head 14 of section 92, which authorizes the legislatures to make laws in relation to the

> administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

The courts for the administration of divorce laws are at present the provincial courts established under head 14 of section 92, which I have just read. Parliament, however, could establish a divorce court under section 101 of the British North America Act, which authorizes Parliament to provide for the establishment of courts for the better administration of the laws of Canada.

It would seem, also, that Parliament has exclusive jurisdiction to confer divorce jurisdiction on provincial courts. However, where Parliament enacts a law without establishing a court for its administration, it must be presumed that Parliament intended such law to be administered by the provincial courts and must therefore be taken to have conferred such jurisdiction.

Co-Chairman Senator ROEBUCK: Any questions?

Mr. BREWIN: Mr. Chairman, I wonder if I could ask Mr. Driedger a question that has come up sometimes in the discussions. Does he think the legislative jurisdiction to grant divorce includes, as necessarily ancillary to that, the right in granting divorce to make provision for maintenance of the divorced spouse, or support, and maintenance for the children of the marriage.

In that connection, I might remind Mr. Driedger—probably he does not need reminding—that the 1857 act in Great Britain—which, as he pointed out, was passed ten years before the British North America Act, which conferred jurisdiction on divorce—did contain provision that when divorce was granted by the courts in Great Britain it could include these remedies. I assume that these matters could be regulated by the provinces, in regard to property and civil rights, in the absence of federal legislation. My question is: Is the federal Parliament competent to legislate in regard to these matters?

Mr. DRIEDGER: I do not know how I should answer your question, Mr. Brewin. The provinces have legislated; I believe that there is provincial legislation in this field on the question of alimony. I believe that the provinces have dealt with alimony.

Mr. BREWIN: Yes.

Mr. DRIEDGER: On the other hand, alimony could perhaps be regarded as something that follows, that is necessarily incidental or so closely related to the subject-matter of divorce that the authority that has jurisdiction to legislate with respect to divorce can also deal with the consequences that flow from it. How far Parliament could go in legislating over these matters I do not know. It is a very debatable point.

Co-Chairman Senator ROEBUCK: What you say would cover custody of children too.

Mr. DRIEDGER: It would cover custody of children and alimony, maintenance and all these related matters.

Co-Chairman Senator ROEBUCK: And the distribution of the property.

Mr. DRIEDGER: Yes.

Mr. BREWIN: I wonder, Mr. Driedger, if you agree that the fact that these incidental remedies were part of the jurisdiction of the courts when they granted a divorce at the time of Confederation is something of a basis for arguing that the British North America Act conferring legislative competence over divorce was, I would assume, incidental to it?

Mr. DRIEDGER: Yes, indeed I think it would be. I referred to that kind of argument when speaking on judicial separation. I referred to the Divorce and Matrimonial Causes Act passed in 1857, and if we now construe the British North America Act passed only ten years later one can at least argue—it is not conclusive perhaps but one can at least argue it—that the word "divorce" means the same thing in the two statutes. As for alimony, or some of the relief that flows, that may follow divorce; the British act did I think provide for some of these. I think it is arguable.

Alimony is one thing, but when you get on to support and maintenance of children, the further you go into the area of property and civil rights the further you perhaps get away from federal jurisdiction and the closer to provincial jurisdiction and there may be a twilight area here. I do not know where you draw the line.

Mr. BREWIN: There might be an area in which the matter could be dealt with by one jurisdiction on the aspect of property and civil rights, but that would not prevent the federal jurisdiction exercizing an overriding jurisdiction.

Mr. DRIEDGER: That may be.

Mr. RYAN: Supplementary to that, Mr. Chairman, I take it there would be no problem at all as long as we have the divorce and all the incidental laws administered by provincial courts and territorial courts. There would be a real problem, I think, if we tried to get too far afield with the federal court.

Mr. DRIEDGER: I think perhaps it goes a little deeper than that. It goes to the substantive law pertaining to alimony and maintenance. Once the law is there there would not be much difficulty in finding the court to administer it. But who has authority to enact or change these laws?

I must confess, I have not gone into this in any great detail myself, but I see a possible difference between provision for alimony for the wife, or for the former wife, and perhaps provision for maintenance and support of the children during their minority.

Mr. BREWIN: It has always seemed to me, if I may put it this way, totally irresponsible for any human institution, be it a court or anything else, to decree

the termination of a marriage without providing for the victims of the termination. The children are just as much victims of the termination as the spouses. Personally, I do not like to see any jurisdiction in this field exercized without consideration for these incidentals. That is why I wanted to get the constitutional basis in your thinking towards these considerations.

Mr. DRIEDGER: I have not the references here, Mr. Brewin, but I think perhaps the Court of Appeal decisions in the provinces have favoured provincial competence in this field.

Mr. BREWIN: Well, there has been no challenge to it.

Mr. DRIEDGER: No.

Mr. BREWIN: Because there has been no federal legislation dealing with it, as far as I know.

Mr. RYAN: Provincial law fills the vacuum, apparently, satisfactorily in most places today. What about a federal court? The federal court can take cognizance of provincial law, can it not?

Mr. DRIEDGER: At the present time there is no federal court that has jurisdiction in these matters. There are certain federal courts. There is the Supreme Court, of course, which has appellate jurisdiction, and the Exchequer Court which deals with a different class of action. There are miscellaneous courts, like the Transport Commissioners and bankruptcy courts.

Mr. RYAN: Could we have a little précis of just what the Exchequer Court as a divorce federal court is dealing with now?

Mr. DRIEDGER: Perhaps the Chairman or other senators would be more qualified to speak on that than I. That is the new act which was passed by Parliament a year or two ago dealing with the senate activities in the area of divorce, but, as I understand it, that did not establish a court, or a divorce court.

Co-Chairman Senator ROEBUCK: No.

Mr. DRIEDGER: That merely described a mode of parliamentary procedure in obtaining a legislative divorce.

Mr. MCCLEAVE: Mr. Chairman, Mr. Brewin has taken my question away from me, or anticipated it. I think, however, it should be pointed out that alimony is the award that is made up until the final decree, and maintenance is the award that follows the final decree, so that we have our terms precisely. The question I wanted to ask was this. We as a Parliament have the right, as it were, of provincial enactments. This would be quite true, Mr. Driedger, would it not? That is, we could alter pre-existing Confederation statutes if there were a conflict with them.

Mr. DRIEDGER: Only if the subject-matter falls within Parliament's powers under Section 91.

Mr. MCCLEAVE: I was thinking of the power on marriage and divorce.

Mr. DRIEDGER: As for divorce, any pre-Confederation law that falls under the heading "Marriage and Divorce" is subject to alteration by Parliament. When these laws were continued by Section 129, the cases are quite clear that they are continued subject to alteration by Parliament or the legislatures according to their jurisdiction under the Act of 1867.

Co-Chairman Senator ROEBUCK: Well expressed.

Mr. MCCLEAVE: The other question was this. Is there not a provision in the Quebec Civil Code that marriages are not, in fact, divorceable? We do not run into any problem there. We can pass one general law that covers the whole province.

Mr. DRIEDGER: I do not know of any negative provision in the Quebec Civil Code. There are other provisions dealing with separation from bed and board, but offhand I would not want to say.

Mr. FAIRWEATHER: This follows from what Mr. Brewin and Mr. McCleave have said. I wanted to pin Mr. Driedger down a little bit. Should this committee recommend, and should Parliament adopt, an enlarged statute on divorce, does Mr. Driedger feel that we could not recommend certain provisions for the care of the children?

Mr. DRIEDGER: I am afraid, Mr. Fairweather, that I would not at this point be prepared to express any offhand view on that. I was only indicting that under the heading of divorce, divorce deals with the marriage union, and the separation, the bringing of the marriage union to an end, might include power to deal with related matters. How far you can go, as for example in dealing with the children, I do not know. I am just suggesting that there might be a difference, but I am not prepared to say that there would be.

Mr. FAIRWEATHER: You used the expression "twilight zone", as I think you called it, in saying how awkward it is. It is more than awkward. Mr. Brewin used the word "irresponsible". I always felt that we never knew when these bills came before us what happened to the children. We were asked to sit in judgment and had no information at all as to custody and so on. I am firmly of the view that we must complete our duty here or else be quite sure that the provinces fill the vacuum, not in some twilight zone but immediately.

Co-Chairman Senator ROEBUCK: Would the witness consider giving us a considered opinion on this? It is a very important feature of our work, as to what we may recommend or what subjects we may discuss in our report.

Mr. DRIEDGER: Well, perhaps I could. It is not only a difficult problem, it is rather a delicate one too, bearing in mind that the provinces have legislation in this field. I could perhaps put together what I can find on the state of the law as it now is, and as it has been.

Co-Chairman Senator ROEBUCK: That would certainly be useful, if you would do that.

Mr. DRIEDGER: Then we could see where we go from there.

Mr. PETERS: Is Mr. Driedger saying that the only way for us to really test this is by a Supreme Court reference or something of that nature?

Mr. DRIEDGER: I do not know if that is the only way. It could be tested by any person now challenging the validity of provincial legislation taking it to the Supreme Court.

Co-Chairman Senator ROEBUCK: That is the reverse way of doing it.

Mr. BREWIN: On a point of order. I was not suggesting that the provincial legislation was invalid or should be challenged. What I was suggesting was that it is perfectly valid in the aspect of property and civil rights until replaced by some positive enactment by the federal Parliament relating to divorce.

Mr. DRIEDGER: That still raises the question whether Parliament would have jurisdiction.

Mr. BREWIN: I appreciate that.

Mr. DRIEDGER: Jurisdiction to pass legislation.

Mr. BALDWIN: Would it not be possible, without offending against the objection which has been pronounced by the Privy Council that one legislative body cannot delegate authority to another, for the Parliament of Canada to instruct those courts dealing with this matter, when dealing with the question of custody, maintenance and alimony, to make such orders as the provincial legislatures for the respective provinces have made? In other words, there would be an instruction to the court to take into calculation in this grey

debatable area what legislative acts the respective legislatures have passed to deal with these particular problems. Would that be legal and acceptable?

Mr. DRIEDGER: I am afraid I could not answer that offhand without thinking a little more about it.

Co-Chairman Senator ROEBUCK: Now, we must go on, because we have another important delegation to hear from. If the Deputy Minister would take this into his consideration and give us a memorandum, as far as he can go, I am sure it would be useful to us. Is that the will of the committee?

Mr. PETERS: Mr. Chairman, more than that. I think it is not what he wishes to do. He will have to outline, if he is not able to give this kind of decision, how we are going to arrive at it, because we certainly do not want to be in the position of being *ultra vires* in whatever legislation we propose. I think that if this cannot be obtained this way, then it should be obtainable in another manner.

The history of the three witnesses we have had to date has indicated that originally there was no question about the jurisdiction of the courts in England as to the whole matrimonial problem—or marriage, divorce, maintenance of children, annulment and the other things. We have lost this by not operating in this field for some time, and we are going to have to be assured that whatever we decide will—

Co-Chairman Senator ROEBUCK: I do not think we have lost it. I do not think we can lose it in that way. While the field is open the provinces certainly have the constitutional right to legislate in it. But if later on we entered it and ours was the top jurisdiction, I think our jurisdiction still remains. That is what I would like Mr. Driedger to consider, and give us a memorandum on it.

Mr. BALDWIN: Mr. Chairman, might I ask the witness to consider one other question, if he is coming back on this. This is I think of importance to the people in the Northwest Territories. It does not concern a great number of people, but it is something that might be considered.

The witness will have knowledge of the decision of Mr. Justice Sisson about the right of Eskimos to have marriages performed acceptable to their native custom. This was a case Mr. Justice Sissons decided some time ago. I think the department was not too happy about it. I have often wondered if the parallel applies so that a divorce according to native custom of the Eskimo people might be considered as being legal and proper. I wonder if, when you are reporting back, you would consider that question as well.

Mr. MCCLEAVE: What do they do up there, rub noses and say "I am divorced"?

Co-Chairman Mr. CAMERON: May I, Mr. Chairman, through you, on behalf of the committee, express to Mr. Driedger our very sincere appreciation for the presentation he has made to us today. It was exhaustive, it was learned and it was authoritative, and it will be of great benefit to the committee when we are making our report and studying the whole matter. Through you, Mr. Chairman, I express the appreciation of the members of the committee, and our very sincere thanks to you, Mr. Driedger.

Co-Chairman Senator ROEBUCK: Ladies and gentlemen, we have a further submission, from a very distinguished representative of one of the great Churches of Canada, and that is the Seventh-day Adventist Church in Canada. Will Mr. Michael please come forward?

I would like to say for the record that the Seventh-day Adventist Church has something of the order of one and a half million members all around the world. It is located in no fewer than 200 countries. In Canada there are about 17,000 members of this Church, and something of the order of 200 congregations, so it is a very important Christian institution in our country.

Its representative, Rev. Darren L. Michael, of Oshawa, Ontario, is a Minister of the Seventh-day Adventist Church in Canada, and serves his communion as its secretary for public affairs for its National Executive Committee.

Mr. Michael was born of missionary parents in India in 1923. He received his early education in India and completed his high school and undergraduate education in the United States. He graduated in 1946 with a Bachelor of Theology degree from Atlantic Union College. In 1947 he received a Master of arts degree from the Denomination's Theological Seminary affiliated with Andrews University.

Mr. Michael has served parishes in the Niagara Peninsula, Kingston and Windsor before coming to his present post in 1952.

As well, Mr. Michael is a graduate of Osgoode Hall Law School, where he received his LL.B degree in 1964, and is now a member of the Bar of Ontario.

I have known Mr. Michael for a long time, and I had the honour to introduce the bill in the Senate that re-organized the Church in great degree. From that time and some time forward I have had a great admiration for him, for his outlook and his industry, and I may say his courage, after holding an important position for a number of years, to go back, as I did, Mr. Michael, to Osgoode Hall, take the medicine that is involved in a law course and finally graduate as a barrister of Ontario.

Rev. Darren L. Michael, Barrister, Seventh-day Adventist Church: Thank you, Mr. Chairman, for your very kind remarks. We hope that after we have completed our submission you will feel as charitably inclined towards us.

Summary: The following grounds for the dissolution of marriage should be recognized by the Courts and by Parliament in the case of Parliamentary divorces:

1. Adultery
2. Cruelty
3. Desertion
4. Life imprisonment
5. Incurable insanity
6. Narcotic and alcoholic addiction
7. Wilful refusal to consummate the marriage

In addition, consideration should be given to the following:

(a) For purposes of jurisdiction the creation of a Canadian domicile.
(b) The absolute bars to divorce being made discretionary.

The Seventh-day Adventist Church in Canada believes that a thorough and comprehensive review of marriage and divorce legislation should be undertaken by Parliament, if the whole problem of family instability is to be dealt with by the law, covering the following areas of topics.

1. Marriage breakdown thesis
2. Laws governing nullity for void and voidable marriages
3. Prevention of marriage failure by pre-marital preparation
4. Custody and support of the children of a marriage ending in divorce.

INTRODUCTION:

The National Executive Committee of the Seventh-day Adventist Church in Canada wishes to express its appreciation to the Chairman and members of the Special Joint Committee of the Senate and House of Commons on Divorce for the opportunity of expressing its views on the subject of divorce law reform.

At this point I wish to violate one of the rules of public speaking, and that is to apologize for not having had time to prepare a French version of this submission. It was because of the question of time and not because of a lack of recognition of the importance of it.

It is recognized that a difficult task confronts this committee in dealing with a subject fraught with so much controversy and intensity of feeling. Parliament is to be commended, and the members of this committee congratulated, for taking this long overdue step. It is the fervent hope of the members of this communion that the points of view expressed herein will serve to assist the committee in its formidable undertaking.

It is felt that the committee could have found its task somewhat easier, to say nothing of being able to do a more thorough job, if its terms of reference could have been wide enough to include the entire field of marriage and divorce law in so far as it falls within the competence of the Parliament of Canada. It is the view of this Church that divorce as a social and moral problem cannot be dealt with effectively in a vacuum. Many of the fundamental and basic causes of marriage breakdown are to be found in the circumstances leading up to marriage and not just in the conditions immediately preceding the decision to seek a divorce.

We do not expect that all will agree with all that is presented herein, nor do we take the position that ours is the only point of view worthy of consideration. What we do hope to accomplish is to provide the members of this committee with some positive and constructive suggestions that will assist them in drafting a report that will form the basis of action by Parliament which will bring Canada well into the twentieth century in terms of the law governing divorce.

I do not know, Mr. Chairman, how much of the historical background of this communion I should give.

Co-Chairman Senator ROEBUCK: Mr. Driedger took one hour, so that you I think have one hour. You do not need to limit your remarks at all. It is only five minutes after five, and we will hear you through.

Mr. MICHAEL: Thank you, sir.

Co-Chairman Senator ROEBUCK: Am I right? There is no objection taken by the Committee. Now give us what you have prepared.

Mr. MICHAEL: It was felt that it might assist the committee to know something of the historical background of the Seventh-day Adventist Church and the reasons for its desire to submit its views on this subject to the members of this committee.

Seventh-day Adventists are a conservative Christian communion with theological antecedents that unite them in some respects with their co-religionists in the Catholic, Anglican, Lutheran, Presbyterian, Baptist, Methodist (United Church) and Congregational faiths.

Growing out of the great religious renaissance of the 14th-16th centuries, and more particularly the re-awakening of the mid-19th century with its emphasis on the eschatological teachings of Scripture—

Mr. RYAN: What is that word?

Mr. MICHAEL: Last day—Seventh-day Adventists emerged as a distinct church organization. Believing in the Holy Bible as the only sufficient guide or rule of faith, the name fairly sums up the outstanding and distinguishing features of their faith.

A conviction that the seventh day of the week, Saturday is the only day of religious worship mentioned in the Bible and observed by Christ and his apostles leads Seventh-day Adventists to observe the Sabbath from sundown Friday night to sundown Saturday night. The Biblical teaching of the literal, visible and physical return of Christ to this earth and the need for men

and women to prepare for this cataclysmic triumph of the Christian faith is the other salient doctrine summed up in the name.

Numbering over a million and a half members around the world—practising baptism by immersion only adults are counted—and almost 17,000 in Canada, Seventh-day Adventists conduct a world-wide programme of Christian missions, education, welfare, evengelism and medical service to the community. It is their firm conviction that devout Christianity and a strong sense of social responsibility are not incompatible.

They believe that governments are ordained of God, and teach obedience to properly constituted civic authority within its legitimate sphere as a religious obligation. Adventists are known for their loyalty to Queen and country, and for their devotion to the great traditions of responsible government, parliamentary institutions and liberty. They view the preservation of our tradition of personal liberty as the inescapable responsibility of every loyal citizen. For, in their view, freedom of conscience is the heart and core of all other basic liberties.

Seventh-day Adventists believe firmly in the sanctity of the home and in the ideal of the permanence of marriage as a divine institution going back to the creation of man. Within this communion, divorce with the right of re-marriage is only allowed to the party who is innocent of adultery, with adultery being considered as the only permissible ground for the dissolution of a marriage. This position is predicated upon the teachings of Christ as found in the Gospel of Saint Matthew, Chapter 5, verse 32; and Chapter 19, verse 9, as well as upon the seventh precept of the Ten Commandments.

Having said this, Seventh-day Adventists, who also believe passionately in the freedom of conscience for each man, do not subscribe to the view that the moral standards which ought to be maintained by its members should, through the civil laws of the land, be imposed upon citizens who do not share such convictions. Great suffering has been inflicted upon mankind when the Church, sometimes with the best of intentions, has sought to force its conception of morality upon member and non-member alike through the alien arm of the State. The considerations which should govern the adoption of religious standards and civil standards, while often parallel, are not identical.

GENERAL OBSERVATIONS:

There are some general observations which we would like to make prior to dealing with the submissions.

The integrity of the family as a fundamental pre-requisite to the welfare of society has been stressed wherever Judeo-Christian principles of morality have been accepted. Any study of the history of Western civilization will reveal the importance attached to this principle throughout the development of the social and political structures of our civilization.

The desire for material prosperity, with all that it involves in the development of a complex and stress-ridden society, has not completely obliterated the concern for the welfare of the family. What is often overlooked is that the insatiable quest for affluence creates pressures and conditions that are highly disruptive and destructive of family life.

The safeguards that society considered sufficient to protect the family a century or more ago founded on primitive values may not be adequate today when an almost infinite range of values deserving of recognition and protection clamour for attention. The emerging role of women in society, the new insights into the numerous factors that affect the welfare of the child in forming the patterns of adulthood with the growing awareness of the far-reaching significance of inter-personal relationships all make demands that push to the breaking point the older, simpler and more primitive safeguards of the integrity of the family.

There is much that commends the approach, suggested in some quarters, that the courts dealing with matrimonial and domestic disputes should veer away from the commercial, contractual and criminal concept of marital offences with consequent penalties and relief for the parties involved. There is something very much more realistic and honest in the "marriage breakdown" point of view of the role of the state in matrimonial and domestic problems than that which prevails in the current "matrimonial offence" concept that permeates the law in this area of human conduct and relationship.

The "marriage breakdown" approach would permit an objective, judicial appraisal of the state of the marriage, the welfare of the children, if any, the rights and interests of the parties and whether the marriage was capable of revival, renewal and rehabilitation. With the provision of court-directed counselling services, practical steps could be taken to provide assistance in determining whether the marriage could be saved. If the evidence pointed unmistakably to the irreparable rupture of the marriage, then the court's decree would be essentially a finding of fact—the fact of the death of the marriage, with ancillary provisions to minimize upon the parties, the children and society the impact of the undoubted death of a particular marriage.

An even better approach would be to provide comprehensive pre-marital preparation for every contemplated marriage. Certainly, if modern society is concerned with the preservation of the family, and marriage in particular, and if society is concerned with the prevalence of sick and dying marriages, then the clinically sound approach of prevention should not be overlooked. Such a programme of compulsory pre-marriage training and counselling could be provided by both the private and public sector, and would undoubtedly prove to be the major contributing factor in reducing the incidence of sickly and moribund marriages requiring appraisal or intervention.

THE NEED FOR REFORM:

The question might well be asked, "How is it that a Church that opposes divorce, and only permits its members to seek such relief on the ground of adultery, can advocate the reform of the law dealing with the dissolution of marriage?" The answer lies in the recognition of the fact that we live in a pluralistic society with a democratic form of government. This means that the views of no single group or element in the body politic must be imposed upon all others without their freely given consent. Indeed, the democratic form of government relies on a free electorate arriving at a consensus as to what laws are desirable and should be enforced.

Not all marriages are made in heaven. In fact, many are made a long way from that felicitous clime! Some may even commence life in that benificent atmosphere only to find other levels of existence. With the provision in many jurisdictions for civil marriages, not all marriages are entered into with the blessing of the Church. Not all partners to a marriage accept the teachings of the Church that ideally marriage must be the union of one man and one woman for life to the exclusion of all others.

While in matters of morality we do not subscribe to the idea of finding the lowest common denominator, nevertheless, if the law is to be obeyed and respected it must find endorsement and support by a significant majority. The present state of the law with respect to divorce does not enjoy a broad base of public approval or respect. Where at one time adultery sufficed as a ground for divorce because it alone constituted the one generally accepted matrimonial offence of infidelity, today a great many people consider adultery as only one of many evidences of marital infidelity giving rise to a dissolution of the marriage.

The present state of the law is conducive to the growing number of so-called common-law unions in which many of the victims of sick and dying

marriages take refuge. However much we may try to deny it, the fact is that the law as it now stands tends to encourage the commission of adultery, or a plausible facsimile of adultery, in order to achieve the dissolution of a marriage on the only terms prescribed by the law. This singular stress on physiological infidelity overlooks the fact that for many married persons a marriage can fall apart and cease to exist without the slightest hint of physical disloyalty.

While the Church believes and teaches that no person is beyond the reach of a loving and understanding God, and that no marriage, however anaemic or lifeless it may appear to be, is beyond the saving grace of God, not everyone accepts the eternal verities proclaimed by the Church. Therefore, while the Church has every right to hold out to its members, and indeed to all who wish to listen, a way of life and a philosophy of life that it feels provides mankind with meaningful answers to very real problems, it must not force its viewpoints upon member and non-member, believer and non-believer alike, through the arm of the laws of the state. An individual who declines to accept the Church's teaching in the exercize of the freedom of choice with which he has been provided by his Creator must not find that freedom denied and withheld at the behest of the Church by the laws of the state.

It is for these reasons that the Seventh-day Adventist Church in Canada does not desire to impose its views upon all the citizens of the country through the civil laws of the land. What the Church cannot achieve by intelligent persuasion, education and demonstration, it must not impose by resort to the police power and civil law of the state. Therefore, if an individual wishes to decline to avail himself of the facilities of the Church or its teachings, he must not find himself forced to accept them by the law of the land. In this context, Seventh-day Adventists find no difficulty in supporting those measures for the reform of our country's divorce laws that will once agan inspire respect for the law, that will enable people who have made mistakes in their marriages to forgive, forget and try again, that will hold out for the children of sick and dying marriages hope for a reasonably happy home life before it is too late.

SUBMISSION:

As long as the rationale of the law governing divorce is that of relief for the innocent victim of a matrimonial offence and a penalty for the offender, the following grounds for divorce should be recognized by the courts and by Parliament in terms of parliamentary divorces:

1. Adultery: as it is now defined by the courts with specific provision to include acts of lesbianism and homosexuality.

2. Cruelty: without any specific legislative definition, but with the provision for the exercize of judicial discretion as to the definition of cruelty so as to include both physical and mental cruelty.

3. Desertion: if without cause and for more than three years. If there has been an absence of seven years by one partner to a marriage without any contact, the presumption of death that now applies for certain purposes should be extended to a presumption of death of the absent partner sufficient to allow the deserted partner to re-marry.

4. Life imprisonment: if the sentence does not permit of parole or if the confinement is to be "at the pleasure of" the government so that there is not reasonable hope of release, the partner on the outside should be entitled to ask for a dissolution of the marriage.

5. Incurable insanity: where one partner to a marriage is certified as being incurably insane, the other spouse should be free to apply for a divorce which will be granted, if the court is satisfied that there is no reasonable expectation of a cure.

6. Narcotic addiction: where one spouse has been certified as chronically addicted to narcotics, including alcoholism, and the court is satisfied upon proper evidence that there is no reasonable hope of the addict being cured, the other spouse may be granted a divorce.

7. Wilful refusal to consummate: this should be considered not only as a ground for a decree of nullity where there has been no consummation at the outset, but where there is any doubt as a ground for divorce as well, if there is persistent and wilful refusal by one spouse to engage in sexual union with the other spouse.

In addition, it is submitted that consideration should be given to the following questions:

(a) For purposes of jurisdiction, whether the creation of a Canadian domicile would be desirable in view of the rapidity and ease of transportation from one part of Canada to the other and the highly mobile characteristics of Canada's population and manpower requirements.

(b) Whether the present absolute bars to divorce (connivance, condonation and collusion) should be merely discretionary bars which the court would be free to apply or not apply in its discretion upon all the facts presented to it.

Again, we would wish to point out that a comprehensive review of marriage and divorce legislation would be most desirable, and indeed is urgently required, if the total problem of family instability is to be properly dealt with by the law. It is hoped that such a study might seriously consider the advantages and disadvantages of the marriage breakdown thesis, the problems relating to the present law governing nullity in respect of void and voidable marriages, the larger issue of the prevention of marriage failure through a comprehensive program of marriage counselling and pre-marital education and preparation by private and public agencies, as well as the most important problem relating to the welfare and custody of the offispring of a marriage terminating in divorce.

In the appendix will be found copies of two resolutions adopted by the highest governing body of the Church in Canada, which serve as the basis for this submission and is submitted for the information of the members of the committee.

In conclusion, the Seventh-day Adventist Church in Canada wishes to re-affirm its belief in the Christian ideal of marriage presented in the teachings of the Bible as being the union of one man and one woman for life. However, it must be recognized that we live in an imperfect society, in a world that the theologian would describe as a sinful world, where the relationships of human being are far from perfect. The role of the Church, indeed of all religious faiths, is to point mankind to a better and higher plane of endeavour, to a more excellent way of life. The role of the state is to protect the individual as far as possible from the harsh impact of man's inhumanity to man, to preserve a modicum of law and order with a maximum of individual freedom consistent with the general welfare of others with equal rights, and to provide the means for resolving as peacefully as possible the conflicting claims of individuals, groups and of society itself.

It is within this context that this submission has been presented to the chairmen and members of the Special Joint Committee of the Senate and House of Commons on Divorce by the Seventh-day Adventist Church in Canada. It is the hope of the members of this communion that this brief will be of assistance to you in completing your difficult task, and that it has not made your undertaking more obscure, nor the success of your mission less certain.

We wish to assure you of our prayers for Divine guidance to attend and sustain you in all your deliberations. We are confident that your report will be one which will commend intself to the Government and to Parliament, as well as to the higher tribunal of the people, for its thoroughness, reasonableness, humanity and justice.

While we continue to regard the preservation of the family as essential to our way of life, we recognize that changing needs arising out of the changing nature of the assaults on the integrity of the Divine institution of marriage and the family call for fresh approaches by both Church and state to provide for the security and strength of these fundamental institutions.

I wish to express our appreciation, Messrs Chairmen and honourable members, for your willingness to hear us out and to permit us to make these views known to you.

Co-Chairman Senator ROEBUCK: Mr. Michael, you referred to two documents which are an appendix to your brief. Would you mind telling us what they are?

Co-Chairman Mr. CAMERON: I would suggest he reads them.

Co-Chairman Senator ROEBUCK: Yes, why not read them.

Mr. MICHAEL: Exhibit "A" is a resolution adopted by the Fifth Quadrennial Session of the Seventh-day Adventist Church in Canada, held in Ottawa, and it reads as follows:

On Marriage and Divorce:

WHEREAS the sanctity of the home as the basic and fundamental institution in a free society is being seriously threatened by the pressures and strains of modern-day living, and

WHEREAS the growing instance of divorce and marital disintegration reflects a grave spiritual inadequacy, and

WHEREAS existing provisions governing marriage and divorce can create grave disabilities for certain citizens,

RESOLVED that:

1. Seventh-day Adventists state their belief in the Christian ideal of a happy, harmonious and lasting marriage and affirm the duty of the church to inculcate among its members the sacredness and permanence of the home and the marriage relationship.

2. Divorce is not an ideal solution to many problems of marital maladjustment but can be resorted to by Christians only on the grounds laid down in Hold Scripture, and that

3. Remarriage of divorced persons is permissible in the teachings of Christ for the innocent party to a divorce that has been obtained in accordance with the Scriptural injunctions, and that

4. We recognize the right of the state to enact certain statutory provisions governing the formation and dissolution of the marriage contract.

Then four years later, at the Sixth Quadrennial Session, held in Edmonton, the following resolution was adopted by the delegates:

On Marriage and Divorce:

WHEREAS the sanctity of the family, as the basic and fundamental institution in a free society, is being gravely threatened by the stress and pressures of many complex social factors in modern life, and

WHEREAS there is an increasingly indifferent attitude on the part of many toward the essential permanency of marriage, and

WHEREAS there is a growing tendency among some religious bodies to seek in the legislative authority of the state support for the moral and spiritual ideals in marriage which they proclaim but with which many individuals are in disagreement, thus causing extensive disregard of the law and the formation of extra-legal marital alliances which result in confusion and sorrow,

RESOLVED, that

1. Seventh-day Adventists reaffirm their belief in the Christian ideal of a happy and lasting marriage and recognize anew their responsibility to provide, through the facilities of the Chruch, every encouragement in terms of practical assistance and counsel to its members so that the sacredness and permanence of the home and marriage relationship may be fully realized and preserved, and that

2. Since divorce rarely provides the ideal solution to the problems of marital maladjustment, and often creates more problems than it solves, it should be undertaken by the Christian only as a last resort, and then only on grounds laid down in Holy Scripture, and that

3. Remarriage of divorced persons, with the approval of the Church, be entered upon only in accordance with the teachings and principles of Scripture, and that

4. It is incumbent upon the Church to uphold the highest ideals in respect to the formation and dissolution of the marriage bond amongst its members, and that

5. The Church exceeds its authority when seeking to impose universal adherence to its peculiar teachings on this subject through the authority of the state.

Mr. MCCLEAVE: May I ask the witness two questions? This is an excellent brief, and it is well written. You have mentioned the death of a marriage or failure of a marriage, but the brief is silent on two points, and these are the two points I raise.

First, what about the marriage that has failed or is practically dead because of the criminal habits of one of the spouses? That is, the man who goes continuously to penitentiary, and perhaps his only contribution to the marriage is short visits in between penitentiary stays, in which he usually adds to the woes of society by begetting more children. Do you not think that should be a ground for divorce, where criminal habits have really made a marriage unworkable?

Mr. MICHAEL: I think there would be very strong argument for that if we first accept the idea that life imprisonment gives some ground for believing that the marriage has in fact ended. With a pattern of habitual criminal conduct that binds one spouse almost continuously in prison, I think there would be some strong support for believing that that should give a ground, with this possible exception, that the marriage might, if it was preserved, prove to be one of the factors that could ultimately help this person. That might be the one element that would modify taking a categorical position and saying that habitual criminal conduct should be a ground, because the marriage might hold within it the potential seeds of stability for that person.

Mr. MCCLEAVE: A very fair answer. The other question, sir, I would like your opinion on is this. Suppose the marriage has failed and the parties have entered into a legal agreement to separate, and have maintained themselves separate and apart for, say, a period of three years or more, so that it is very likely they will never come together again. Would you consider this as a ground for divorce? This is really divorce by consent, but it is also a case of a marriage having failed.

Mr. MICHAEL: I am not always sure that it is separation or divorce by consent, because many times the entering into a separation agreement comes after the actual physical separation, more to regulate or provide ground rules to protect the rights of the separated parties. In my limited experience in one profession and a little longer in another, I would say that a separation agreement is sometimes a subsequent development of a separation, and is encouraged and urged to bring some semblance of order to and protection of the rights. If the separation basically and initially is without cause, then, whether or not you have an agreement to try to regulate it or police it, I do not think this should prohibit or prevent an application for divorce then.

Mr. MCCLEAVE: Perhaps I should have added this one further point, Mr. Chairman. This is where both parties who have entered into the agreement make the application for divorce after three years of separation.

Co-Chairman Senator ROEBUCK: May I just say at this point that the speaker is Mr. McCleave, the Member for Halifax.

Mr. MICHAEL: Thank you, Mr. Chairman. I think, Mr. McCleave, where both parties have agreed to disagree and go their separate ways, possibly this is coming close to the idea of divorce by consent. If after a period of separation, let us say three years, there is no disposition to try it again, then it would appear that the evidence was rather cogent that the marriage is dead.

Mr. MCCLEAVE: Thank you very much.

Mr. BREWIN: I too thought this was a very excellent brief, but is there some inconsistency here, or do I misunderstand? The brief suggests that the breakdown theory or breakdown approach is perhaps the right direction to go, and then afterwards, perhaps just as an alternative or secondary approach, suggests expanding individual grounds.

My understanding of the breakdown approach is that you study as a fact, without consideration of offences, except insofar as the offences may lead to the breakdown, whether the marriage has in fact broken down. I mean, this excludes specific grounds. To take an illustration, it may narrow the specific grounds; a single act of adultery might or might not lead to a breakdown of the marriage.

I just wanted to clarify whether in your brief you are urging us to go along the road of making breakdown the basic consideration—which I know has been recommended by others, including a committee that advised the Archbishop of Canterbury—or whether, on the other hand, you suggest the best approach for us is to enlarge or liberalize the existing offences or grounds for divorce.

Mr. MICHAEL: Mr. Chairman and Mr. Brewin, we feel the breakdown theory has certain features that are worthy of closer examination and study, and perhaps some research. We think it ought to be studied more carefully. We welcome the decision of the committee that reported to His Grace, to which you have referred. However, I think there is the explanation or rationale of the two submissions here on page 10, where we say:

> As long as the rationale of the law governing divorce is that of relief for the innocent victim.

This is the approach we would favour. If later on—and the reason for this is that there was some suggestion made to us that the breakdown theory was still some distance in the future; first of all it needs to be studied and examined perhaps a little more thoroughly, but in the meantime—

Co-Chairman Senator ROEBUCK: You think it is sufficiently understood by the population of Canada as a whole to make it politically possible?

Mr. MICHAEL: Well, in my inexpert and unlearned opinion in that area, I do not think it is. I think my first introduction to it was an article in the *Canadian*

Bar Journal this year, in April, which I found extremely intriguing and fascinating to read. Then the report of the committee of the Archbishop of Canterbury lent credence to that. It has many initial attractive and appealing facets, but I would like to hear the case against it, and I think it needs to be studied and examined.

I think the feature that appeals to us in it is that it provides for examining the possibilities of saving the marriage, that first of all nothing can be done for a stipulated period, during which time the parties are subjected to examination and counselling, and the matter of divorce is not looked at. While morally it might be considered an offence in the civil context, it is not looked on as an offence, and the marriage is looked on as something live and viable, and if it is dying or dead why try to keep the corpse around? Physically it is unhygienic to do so, and perhaps sociologically it is equally unhygienic to do so.

Mr. BREWIN: You are not suggesting, are you, sir, that anything approved of by a committee of lawyers and judges advising the Archbishop of Canterbury is unduly radical?

Mr. MICHAEL: I did not say that.

Co-Chairman Senator ROEBUCK: Mr. Perry Ryan, the Member for the City of Toronto, has a question.

Mr. RYAN: Thank you, Mr. Chairman. I would like to draw attention to page 4 of your brief, where you say:

> Within this communion, divorce with the right of remarriage is only allowed to the party who is innocent of adultery, with adultery being considered as the only permissible ground for the dissolution of a marriage.

Going further on, in Exhibit "A" at the back of the book, under the heading "On Marriage and Divorce" resolution No. 3 says:

> Remarriage of divorced persons is permissible in the teachings of Christ for the innocent party to a divorce that has been obtained in accordance with the Scriptural injunctions.

Then in Exhibit "B", resolution No. 3, which was passed at some later point in time, says:

> Remarriage of divorced persons, with the approval of the Church, be entered upon only in accordance with the teachings and principles of Scripture.

It seems to me that there is a possible evolution here in the Seventh-day Adventist Church. Maybe I am taking it wrongly, but on the face of it it would seem, from what I have just read, that the original position of the Church was that they would only remarry a person who had been divorced and who was innocent of adultery, and therefore there would have to be a civil divorce on the basis of adultery before you could remarry even the innocent party. But these subsequent resolutions seem to be moving in another direction, as if anticipating that there may be a change in the law, and your Church would possibly be moving in the direction of remarrying other innocent parties to divorce if the grounds were extended. Is this so?

Mr. MICHAEL: Mr. Chairman, Mr. Ryan, I do not believe so. I may have been guilty of perhaps inexact expression. What is stated on page 4 and then in paragraphs 3 of both resolutions in the two exhibits is essentially the same, that in our Church divorce is only recognized if there is adultery by one partner.

We do not stipulate that the civil action for divorce must be grounded on that necessarily, because in some jurisdictions where that is done it has to be a contested divorce. I am talking about some jurisdictions in the United States. There may be adultery and there may be proof of it, but to avoid that kind of

contest the plaintiff will sue on another ground that is permitted in that state. Now, the Church will not say, "Well, you didn't sue in the courts for adultery". We have to be satisfied that there was adultery, and if there was we admit divorce, and then we only recognize the so-called innocent party's right of remarriage and still enjoying the blessing of the Church.

Mr. RYAN: If we were to bring about an alteration of the law of divorce in Canada so as to permit desertion, cruelty and certain other grounds, would your faith then remarry the innocent party who obtained a divorce on one of those additional grounds?

Mr. MICHAEL: Our approach would be the same as it has been in other countries or jurisdictions where the grounds of divorce are wider than adultery. We would not take any attitude of disrespect towards the decree or order of the court, but as far as membership of the Church is concerned the divorce would have to be one that would come within the understanding of the teachings of the Scriptures.

Mr. RYAN: First of all the civil tie would have to be broken, then you would have to be satisfied that it came within your faith?

Mr. MICHAEL: Yes. We would not stipulate that the suit for divorce had to be for adultery, but we would, as long as this is our position, have to be satisfied that there was adultery.

Mr. RYAN: Thank you.

Co-Chairman Senator ROEBUCK: Let us clarify this. You mean that the Church would not approve of the marriage of one of its own members unless it was in accordance with the principles you have described?

Mr. MICHAEL: Yes.

Co-Chairman Senator ROEBUCK: But if someone came before you who was a member of the Church and you did not approve, he was outside your ground of approval, would you refuse to marry him? You have certain legal rights in the matter of marriage. Would you refuse to exercize those rights and marry the people?

Mr. MICHAEL: That is our teaching and practice.

Co-Chairman Senator ROEBUCK: And practice?

Mr. MICHAEL: Yes.

Mr. MCCLEAVE: Other Churches follow it, do they not?

Mr. MICHAEL: Yes.

Co-Chairman Mr. CAMERON: They may go somewhere else and get married. Is that it?

Mr. MICHAEL: Well, this has been the way it has been done in the past. What we try to do now is to take a humane approach and counsel the person. We point out what the teachings and beliefs of the Church are, and say, "What you are planning on, or contemplating doing, is something we cannot participate in. If you wish to do it none the less, the alternative is open to you: in some jurisdictions civil marriage, or marriage by a clergyman who does not feel himself hampered by these convictions that we have. But you will still enjoy our concern and our affection; you may have to be subject to the discipline of the Church if you persist in this", but we try not to be heartless about it. On the other hand, as long as the Church adopts this position it has to be consistent, we have to implement it.

Mr. HONEY: Mr. Chairman, I want to say to Rev. Michael that I think this is a very excellent brief, but I did just want to question you along one line, and that is with reference to your breakdown theory, which you have indicated is something that—and I agree with this—this committee should explore and that all of us should be thinking about.

Would you think from your experience that if we were able to develop this theory there would be an area where we might have a judicial or quasi-judicial process requiring as a condition precedent to going to a court for divorce the submission of the marital problems to a court or combined court and social agency, so that, prior to the marriage deteriorating to a dying or dead position, an attempt was made at a point where it may be in a sick condition to give it some encouragement? It would be a condition precedent to asking for relief that a couple having a sick marriage should be required to consult the court, and maybe the court could work with social and religious agencies in this area. Do you think that is possible?

Mr. MICHAEL: This is something that I think would have to be looked into in terms of its practical implementation. Logically it would seem that if we accept the breakdown thesis it would be foolish not to try to provide some measures for salvage or restoration, rather than merely stand by waiting for it to complete the process of breakdown and then have a court or some judicial body pass the verdict that it has now broken down.

I think the breakdown theory has one very important aspect to it, and that is that some effort be made to assess the degree of marriage disintegration or illness, and to see if it can respond to treatment and effort. I think this would be ideal. Tied in with this we would like to see study given to the idea of even preventing the onset of marriage illness, in terms of preparation and education for it, perhaps in our schools, perhaps through welfare agencies, public and private. But I think counselling and the attempt to save the marriage certainly ought to be a very integral part of the breakdown approach.

Mr. HONEY: And this could be one feature of the court; it could be a judicial process, do you think? Probably in co-operation with social and religious agencies.

Mr. MICHAEL: I do not know how effective the judicial machinery is for helping save marriages. I say this with the greatest respect for our judicial institutions. I am not sure if they lend themselves to this operation, whether it would be better to have it done by a social welfare agency, a community agency, public or private. I think the judicial atmosphere is not the most conducive to examining the health of a marriage and making recommendations as to what will help to save it.

Mr. HONEY: Thank you.

Co-Chairman Senator ROEBUCK: Mr. Baldwin of Peace River, you have a question, have you not?

Mr. BALDWIN: Yes, Mr. Chairman. I wanted to ask a question of Mr. Michael in connection with the specific recommendations he has made in the submission on page 10. I wanted to clarify in my own mind some of the points raised.

Point No. 3 is desertion, and you suggest there:

> If there has been an absence of seven years by one partner to a marriage without any contact the presumption of death that now applies for certain purposes should be extended.

On several occasions I have been called on in practice to secure a presumption of death so that a person could put an affidavit in the application for a marriage licence, so that because of the presumption of death by the court the applicant can say, "I am not married," and thereby does not commit perjury and can apply for a marriage licence and marry. But that does not ease the situation if the party who has been missing for seven years shows up.

I wanted to ask if what you suggest here would have the effect of stripping all the rights of party who has been absent for seven years, so that should that

person return he or she has no more civil rights, has lost all property rights? Is that what is envisaged by your proposal in paragraph 3?

Mr. MICHAEL: We should probably have broken that in two, so that it should have been desertion and then another paragraph dealing with prolonged absence. Our thinking here was that if a party has been absent for that seven-year period—which seems to be the commonly accepted one—if there is a presumption of death for the purpose of remarriage it ought to be an irrevocable presumption, so that you do not then get subsequent problems which only create a more complex situation.

Mr. BALDWIN: So the eventual result would be that there would be a divorce, and if the person turned up after seven years that person would, to all intents and purposes, be divorced?

Mr. MICHAEL: Except that perhaps the procedure to obtain this sort of declaration might be simpler and less elaborate than a suit for dissolution of marriage.

Mr. BALDWIN: The other point was on paragraph 7, "Wilful refusal to consummate". I do not know about the jurisdiction in Alberta, but my recollection is that it has only been possible to secure a decree of nullity on the ground of incapacity consummate the marriage. I can recall in my experience as a lawyer trying on one or two occasions to stretch physical incapacity to consummate the marriage to a mental aversion which could be construed as being physical incapacity.

It may be that in Ontario your jurisdiction is somewhat different, but if not, it would strike me that wilful refusal to consummate is adding to what I understand is the law in some provincial jurisdictions, that nullity decrees can only be granted where you are able to establish incapacity. If I am right in that, then wilful refusal adds somewhat to those grounds. I am not trying to make it difficult. I just want to get these things fixed in my own mind.

Mr. MICHAEL: Our thought in putting this here was that, while it has been recognized in certain jurisdictions as a ground for nullity, we ought to give consideration to it as a ground for divorce, and if there is any doubt as to whether it is sufficient to ground an action for nullity, it certainly ought not to exclude the possibility of an application for dissolution.

Mr. BALDWIN: So wilful refusal to consummate may, in fact, be coterminous with incapacity to consummate?

Mr. MICHAEL: Yes.

Mr. STANBURY: Mr. Chairman, I wondered, as Mr. Baldwin did, whether Mr. Michael might clarify some of the points on page 10. I was interested in the second item, cruelty. You suggest that there should be no specific legislative definition, but then you go on to suggest what should be included in "cruelty". Are you satisfied with the present definition of "cruelty" by the courts?

Mr. MICHAEL: I think that "cruelty" as our courts have had occasion to define it has been in a context of desertion, where one party has felt compelled to leave.

Mr. STANBURY: I think not in all cases.

Mr. MICHAEL: Not in all.

Mr. STANBURY: They can continue to live together.

Mr. MICHAEL: Yes, but the judicial definition of "cruelty" enters that area. In mentioning it in this way our feeling was that if we try to define it too precisely in a statute we will probably shackle or handcuff the courts, and I think our courts in Canada have not shown any disposition to define "cruelty," as they have in certain other more southern jurisdictions.

Mr. MCCLEAVE: It is mixed in with the tourist industry down there.

Mr. STANBURY: I am inclined to agree with you, Mr. Michael. I was just wondering whether you were suggesting that there should be some specific legislative definition of "cruelty", to the extent of including both physical and mental cruelty, or whether you felt the definition by the courts has been sufficient. I would be inclined to think that the development of definition by the courts has been fairly satisfactory in this field, and that there would be some disadvantages to trying to define "cruelty" in legislation.

Mr. MICHAEL: This was our feeling, that to try to define it in a statute would probably not be a desirable approach, that it would be better to leave it for judicial interpretation or definition; but perhaps going just this far, to state that it should not be limited only to physical cruelty. After all, a human being is a total human being, and both the physical and mental aspects of cruelty should be within the range of the courts power' to define.

Mr. STANBURY: This is within the range of the present definitions by all of the courts, I think, in the common law jurisdiction of Canada.

Mr. MICHAEL: Yes, but it has not gone as far as it has in some other jurisdictions.

Mr. STANBURY: You feel that cruelty should extend to both physical and mental aspects, but you are not necessarily suggesting the legislation should say so?

Mr. MICHAEL: I think that if the grounds are extended it ought to be made clear that they are extending it to include physical and mental, but then stop short.

Mr. STANBURY: Of going further?

Mr. MICHAEL: Yes.

Mr. STANBURY: In the case of desertion, I was going to ask, as Mr. Baldwin did, about your intention here. It seems to me that in at least Ontario the deserted partner is allowed to remarry after a declaration of presumption of death. What you are suggesting here is that the first marriage be invalidated, dissolved.

Mr. MICHAEL: Dissolved.

Mr. STANBURY: So I think that perhaps what you said in paragraph 3 is not exactly what you meant.

Mr. MICHAEL: Quite. I would have to plead guilty to that.

Mr. STANBURY: Then in paragraph 7, where you refer to refusal to consummate, is there not some difficulty here in defining the limits of this wilful refusal? Is there not a danger that there might be an aspect of mental instability involved in the wilful refusal, and that you might in fact be creating a ground for divorce which is really temporary insanity, a temporary mental disease? Have you given any thought to the length of term which you consider to be sufficient wilful refusal to constitute a ground for divorce?

Mr. MICHAEL: Yes, this did give us considerable concern, as to its limits and how we would limit it. In mentioning it we felt that it was something that was perhaps worthy of consideration. What kind of limits you have and what kind of evidence would be required to establish it is not, we would agree, a simple question, and certainly not as easy as perhaps some of the others, such as cruelty of incurable insanity. None the less, we feel it ought to be available as a ground, with certain defined limits or characteristics.

Mr. STANBURY: You have not anything to offer in respect of those limits and characteristics at the moment?

Mr. MICHAEL: I think that over a certain period of time would certainly be one sound approach so that you get away from a temporary aberration situation. What we were thinking of was where this has been the case for

extended periods, so that it does not seem by any stretch of the imagination to lend itself to being considered as just a passing, transitory state, or a period of adjustment say.

Mr. STANBURY: When you say "an extended period", do you think in terms of a period of years?

Mr. MICHAEL: I would say three years.

Co-Chairman Senator ROEBUCK: Now, gentlemen, it is time we adjourned.

Co-Chairman Mr. CAMERON: Mr. Chairman, before we adjourn, may I again on behalf of the committee, through you, thank the Rev. Mr. Michael for the brief prepared by the Seventh-day Adventist Church in Canada. A number of members have commented that it is an excellent brief, it has been well presented, it is based on a realistic appraisal of the situation, and, if I may say so, indicates a great deal of Christian charity.

The committee adjourned.

First Session—Twenty-seventh Parliament
1968

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

DIVORCE

No. 9

TUESDAY, OCTOBER 15, 1968

Joint Chairmen
The Honourable A. W. Roebuck
and
Mr. A. J. P. Cameron, M.P.

WITNESS:

Parents Without Partners of Windsor: John P. Welsh, Chairman, The Single Parents Divorce Reform Committee, Parents Without Partners of Windsor.

APPENDIX

5. Brief from The Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1968

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 4

TUESDAY, OCTOBER 25, 1966

Joint Chairmen
The Honourable A. W. Roebuck
and
Mr. A. J. P. Cameron, M.P.

WITNESS:

Parents Without Partners of Windsor: John P. Walsh, Chairman, The Single Parents Divorce Reform Committee, Parents Without Partners of Windsor.

APPENDIX

5. Brief from The Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

24807—1

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

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

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

FOR THE HOUSE OF COMMONS

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

Members of the House of Commons

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
Woolliams—(24).

(Quorum 10)

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 bill 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 diverces *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 Procedings 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, C.P., 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, October 25, 1966.

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

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

For the House of Commons Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Forest, Honey, Mandziuk, McCleave, McQuaid, Peters and Stanbury.

In attendance: Dr. Peter J. King, Special Assistant.

Mr. John P. Walsh, Chairman, The Single Parent Divorce Reform Committee, Parents Without Partners of Windsor, was heard.

Dr. King, the Special Assistant, read into the record, the following statements and brief:

1. Statement from the Board of Evangelism and Social Action of the Presbyterian Church in Canada.
2. Statement from the Salvation Army.
3. Statement from the Mennonite Committee (Ontario).
4. Statement from the Catholic Charities of the Diocese of London, Ontario.
5. Brief from the Synod Executive Committee of the Diocese of Huron, The Anglican Church of Canada.

A brief from The Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada was ordered to be printed as appendix No. 5 to these proceedings.

On motion of Mr. McCleave it was resolved that the Steering Committee be empowered to select authoritative writings both pro and con on the subject of divorce which could be incorporated as appendices to these proceedings.

The Honourable Senator Baird, seconded by Mr. Baldwin, moved that the quorum of the Committee be reduced to seven (7) members.

The question being put on the said motion, the Committee divided as follows: YEAS—5 NAYS—2.

The motion was declared carried in the affirmative.

On motion duly put it was resolved that henceforth, any brief submitted by mail with no request or requirement for personal representation, should form part of the printed proceedings, subject to the discretion of the Special Assistant.

At 5:30 p.m. the Committee adjourned until Tuesday next, November 1, 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, October 25, 1966.

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: Shall we start? What do you think? We now have nine members here. We will have it agreed by the general committee when others arrive. Is there any objection? Very well, that is agreed.

We have a distinguished witness before us today. The gentleman who is before us will represent the Parents Without Partners, Inc. It is an organization in both the United States and Canada. It has some 20,000 members in the United States, and no fewer than five branches of the United States organization in Canada. They are located at London, Bradford, Hamilton, Sarnia, Vancouver and Toronto.

Our visitor comes from Windsor, or thereabouts, and he will tell us much more fully about the organization, but I would like to say something about him personally. To begin with, he is the son of the late Mr. Thomas Edward Walsh, of the Walsh Advertising Company in Toronto, with whom I think nearly all of us were at one time familiar. He was educated at Assumption High School and Assumption College, Windsor, Ontario.

During World War II, he enlisted as a ship's writer in the Royal Canadian Naval Volunteer Reserve. Upon discharge from the service, he worked in the advertising business until 1950, when he left to enter the meat business, and has been in this trade ever since. Mr. Walsh is a graduate of the National School of Meat Cutting, Toledo, Ohio, and a member of the Amalgamated Meat Cutters and Butcher Workmen of North America.

He was chairman of the Western Ontario Naval Reunion, the first naval reunion to be held in Windsor since World War II. He was first president of the Essex Kent Naval Veterans Association, and publicity director. He was president of the St. Vincent de Paul Society, St. Clair Beach, Ontario, 1959-64, and he is a member of the Board of Directors of the Immigration Centre.

Mr. Walsh has been with Parents Without Partners of Windsor since January, 1964. He was chairman of the Publicity Committee, and was chairman of the Single Parents Divorce Reform Committee, which prepared the brief he will be presenting today.

He is presently attending night school at the University of Windsor, where he is taking a certificate course in business administration.

So, ladies and gentlemen, we have a distinguished witness, with a very great deal of experience, and some very special knowledge that he wishes to lay before us. I call on Mr. Walsh.

Mr. John P. Walsh, Chairman, the Single Parents Divorce Reform Committee, Parents Without Partners of Windsor: Thank you, Senator Roebuck. I would like to read our submission to you people.

RECOMMENDATIONS FOR DIVORCE REFORM:

1. Parents Without Partners, Inc., is an international, non-profit, non-sectarian, educational organization devoted to the welfare of single parents and their children. It was incorporated in the State of New York in March, 1958, and now has chapters in nearly every state of the Union and in Canada. Its program and activities are entirely the volunteer work of members of P.W.P., Inc. To be eligible for membership a person must be a parent and single by reason of death, divorce or separation, or unmarried.

2. Windsor chapter of Parents Without Partners is a member of the Metropolitan Detroit chapter No. 126, and the work of its Single Parents Divorce Reform Committee has been directed toward P.W.P. Article (p) of the Constitution II:

> To develop, sponsor and work towards improved legislation on all matters relating to separation, divorce, annulment, custody and welfare of children.

3. The members of the Single Parents Divorce Committee consist of: Chairman, John P. Walsh, P.O. Box 44, Belle River, Ontario, Mrs. Marian Woolley and Mrs. Dolena Roy of Windsor.

At this point I would like to say that Mrs. Marian Woolley is a school teacher, and she teaches a junior auxiliary class in Windsor. Mrs. Roy is a medical secretary, who lived in Windsor and has recently married and is living in Detroit, Michigan. These two are very active in this group, and they have done an awful lot of work—more than I have—on this brief, so I would like to give them full accord.

The CO-CHAIRMAN (*Senator Roebuck*): Give them credit where credit is due.

Mr. WALSH: That is right.

4. The three members of this committee have for the past three years been members of P.W.P., a group composed exclusively of single parents, 90 per cent. of whom are separated or divorced. Because of this association and because of personal experience we feel we are in a position to offer concrete and workable suggestions for divorce reform.

5. We would recommend that immediate steps be taken to change the divorce laws in Canada so as to be based upon the recognizable symptoms of a marriage collapse, and we submit the following to be just and reasonable:

(i) Separation, after two years.
(ii) Desertion, after two years.
(iii) Insanity, after four years (uncured and institutionalized).
(iv) Imprisonment, after four years.
(v) Extreme physical cruelty.

6. We further recommend that the following stipulations be included in Canada's new divorce legislation:

(a) Recognition of divorces granted outside of Canada to Canadian citizens on grounds listed in paragraph 5.
(b) Recognition of the domicile of the plaintiff (whether husband or wife) in filing for divorce, not that of the husband exclusively, and that domicile requirements be not less than one year.
(e) Refusal to allow the petitioning of a divorce until a marriage has lasted three years.

7. We further recommend the setting up of a child support system in which the father be made responsible for the support of his children in cases of separation and desertion. When the father who is absent from the family becomes delinquent in his child support payments, the payments should be deducted from his source of income, in the manner of income tax, and turned over to the proper government agency, who would then pay the mother or guardian of the children directly.

8. We further recommend that a long range plan be instituted to prevent marital disasters, and suggest the following:

(a) That a complete study be made of the reasons for marriage breakdown.

(b) That an educational program be set up in our elementary and secondary school systems, aimed at preparing our youth for the responsibilities of marriage and guiding them toward better mate selection.

(e) That a system of pre-marital counselling be designed under the direction of sociologists and that pre-marital counselling be mandatory to the issuance of a marriage licence.

9. Our immediate consideration today, however, is the urgently required change in our existing divorce regulations. With the adoption of our recommendations in paragraphs 5 and 6 the personal destiny of thousands of Canadians would rightfully be placed in their own hands.

10. It has been our observation that most couples wish above all to preserve and enhance their marital state. We know of no persons who have separated without good and just reason, and then only after honest attempts to live in harmony and many reconciliations. If after living apart for two years a couple have no desire to ever again live together as man and wife, no law can make it so, and no service is rendered mankind to refuse divorce. We therefore recommend the grounds of separation after two years to be just and necessary.

11. In cases of desertion, the deserted spouse should have the right to begin divorce proceedings if the deserting partner has not returned to the family group within two years. However, during this intervening period legal protection should be afforded the deserted spouse, male or female. We urgently request adoption of recommendations in paragraph 7. Dr. Fernando Henrique, sociologist, in his book *Love in Action* says:

> Desertion by either party is another very widespread reason for divorce in simple societies. The effect of desertion is to deprive the wife and children of support without giving the freedom to remarry. Economic security may only be restored by remarriage, so legal dissolution is necessary. Here the advanced society is at one with the savage.

We therefore support desertion as a justifiable ground for divorce in Canada.

12. Those who feel the present divorce laws are adequate and serving the purpose of preserving a stable society are, in fact, judging the marriages of others from limited personal experience. Too much of the commentary on marriage is made by those whose practical knowledge or actual "field training" has been limited to fairly level ground, or by those who have never even donned the "combat uniform", while those who face the facts and the statistics must fight an uphill battle for proper appraisal of the truth.

13. One of the clearest summaries on divorce reform necessity was made by E. D. Leach of West Virginia, who said:

> It does not make any difference how high you make the grounds for divorce, people are going to meet it if they cannot live together by the

laws of nature. You cannot suspend those laws by any act of legislature, and until we come to understand that the main duty, the chief purpose and end of an organization of this kind is to increase the sum total of human happiness in this country, I think we are searching after false gods. If we can do so by increasing the standard of divorce, well and good. If we cannot, we better lower it.

14. The Single Parents Divorce Reform Committee came into being in October, 1964, when the publicity chairman (John Walsh), the programming chairman (Marian Woolley) and the newsletter editor (Dolena Roy) of Windsor Parents Without Partners, supported by the membership, began a campaign for better understanding of divorce requirements. With the writing of this brief, the committee itself ceases to exist, as the original committee members are now ineligible for membership in P.W.P. It is ironic that all three members of the committee have been forced to seek divorces in a country other than Canada in order to remarry. Must Canada remain a country whose divorce laws force its citizens to seek legal relief in another country?

15. We commend the Prime Minister for bringing the matter of divorce before this body, and we are confident that wisdom and justice will prevail and a new divorce law will be passed, aimed at a realistic understanding of the needs of the Canadian citizen.

The CO-CHAIRMAN (*Senator Roebuck*): Very good. Now, I think some members of the committee will have questions to ask in response to what you have said, Mr. Walsh.

Mr. WALSH: That is fine, senator.

Mr. MANDZIUK: I feel that I should get the ball rolling. I would like to ask the witness this. Which of these suggested grounds for divorce, if not all, have been accepted as or are grounds for divorce in states in the United States, and in how many states?

Mr. WALSH: Well, I cannot give you the number of states, but I believe separation is one; desertion I know is one; extreme physical cruelty is another. That is all I know of.

The CO-CHAIRMAN (*Senator Roebuck*): As grounds for divorce?

Mr. WALSH: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): In what states?

Mr. WALSH: In Michigan.

Mr. MANDZIUK: Any other states?

Mr. WALSH: I could not tell you really. I do have them here for a Mexican divorce. Everybody thinks that Mexican divorce is a very easy thing to get, but these are the grounds there: cruelty, abandonment of the conjugal duties after three months, separation over one year, incompatibility of characters, written consent of divorce. Now, that is another one that is a ground for divorce if the two people are agreeable on it in Michigan. I think it takes sixty days to get one.

The CO-CHAIRMAN (*Senator Roebuck*): Have you advocated that for Canada?

Mr. WALSH: I have advocated these right here, senator. Or I should say our group has.

Mr. MANDZIUK: I have other questions, Mr. Chairman, otherwise I would have to get into an argument with the witness and I do not think that is our duty here. We are trying to get your point of view, Mr. Walsh, and then we will make up our own minds. I will pass on for the time being.

Mr. AIKEN: I was taken by several references in this brief, particularly paragraph 6, and also the closing remarks, concerning recognition of divorces

granted outside Canada in Canada, and also recognition of grounds that exist outside Canada within Canada. As a lawyer, it seems to me that these recommendations you have made are impossible of attainment because of international law.

Mr. WALSH: Do you mean recognition of divorces granted outside of Canada?

Mr. AIKEN: Yes.

Mr. WALSH: Well, that is provided they meet the same requirements as are in Canada. In other words, if they get a divorce for desertion, supposing it is changed to two years, or two years separation; provided it is gotten on those grounds.

Mr. AIKEN: But will that not require a retrial of the issue in Ontario, or wherever in Canada they may be?

Mr. WALSH: If they already have a divorce and it has gone through and the other party does not oppose it, then we believe it should be granted. Why should a person have to go all through this again? In Michigan, if the grounds are the same as in another state, then the divorce is recognized.

Mr. AIKEN: A thing that also troubles me about the last part of paragraph 14 is that some of your members have had to go to the United States to get a divorce. I think it is generally accepted that these are not recognized in Canada.

Mr. WALSH: This is true.

Mr. AIKEN: Do you think there is a system by which they could be without a retrial of the issue? What I am getting at is that some court has to determine, if you want finality to the matter, that the divorce was properly granted. If there were proper grounds for which a divorce could be got in this country, then you are no further ahead.

Mr. WALSH: The thing is, we would like to have it changed to this. What reason would there be to spend this money all over again when you have gone out of the country to get one and matched the grounds that there are in this country?

Mr. AIKEN: Suppose for the moment they are grounds that would be accepted in Canada. Then they would not need to leave.

Mr. WALSH: What I am getting at is the people who have already gone out of the country. There are thousands of them. I know there are an awful lot in Montreal. I know of a lawyer in Mexico who has personally taken up a lot of these people's cases. I mean, up to the time of the changing of these laws.

Mr. AIKEN: Like Mr. Mandziuk, I do not want to enter into a discussion, but one thing that strikes me in your brief is that I just do not see how under international law you are going to have this happen. There is certainly no way in which parliament, as far as I know, could amend the recognition of foreign divorces. I just throw that thought out.

Mr. BALDWIN: As a supplementary point to that, Mr. Chairman, is it not correct that in Canada we do recognize a divorce granted in another country provided there has been a proper establishment of domicile in that other country? In other words, if a matrimonial domicile has been established outside Canada and a divorce is then granted in the courts of that jurisdiction, do we not recognize that divorce? This is what is running through my mind. I do not know whether we have anybody here who is competent to give a legal opinion on that. This is my belief as a member of the bar. Have you any knowledge of that?

Mr. WALSH: Provided the person is living in the country at the time he gets a divorce I believe this is so.

Mr. BALDWIN: By "living" you mean he has established domicile?

Mr. WALSH: Yes.

Mr. BALDWIN: In terms which our courts and our laws recognize as being proper domicile, as distinguished from residence.

Senator BAIRD: We do not recognize Mexican divorce.

Mr. WALSH: You do not recognize American divorce either.

Senator BAIRD: But we recognize an American one for purposes of, shall I say, immigration, do not we?

Mr. WALSH: If a person goes to, for example, Detroit to establish residence there for one, if he gets a divorce there and comes back to Canada after a year I do not think it is recognized.

Mr. AIKEN: It is a question of fact in every case. I believe you have to convince the judge that you went there *bona fide* to live rather than *bona fide* to get a divorce.

The CO-CHAIRMAN (*Senator Roebuck*): The intention being to continue to live there.

Mr. AIKEN: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): And therefore to make his home, what we call his domicile, there, which is distinguished from his mere residence there.

Mr. AIKEN: I wonder if I might ask one supplementary question along the same lines. You suggest that we recognize domicile of the plaintiff wife in filing for a divorce rather than the husband exclusively. Could you tell us why your suggestion was on those lines?

Mr. WALSH: Well, we have a case of a girl with six children. The man deserted her. He took one of the boys to choir practice one night six years ago told the boy he would be back to pick him up in an hour or so, and they have been unable to find him until just recently. Then when they did find him, they tried to catch up with him but he disappeared again. In any case of desertion I think that the party who is left behind should have a chance to file, whether it is male or female.

Senator BELISLE: Are these requests you are making based upon the experience of many cases or just one case?

Mr. WALSH: They are based on several experiences.

The CO-CHAIRMAN (*Senator Roebuck*): Does your brief express the opinion of your whole organization, both in the United States and in Canada? Are these the tenets to which you owe allegiance generally in your organization?

Mr. WALSH: This brief expresses the wishes of our organization in Windsor, because I do not think it would matter in Detroit really, they already have divorce laws that are liveable.

Mr. BALDWIN: Dealing with the point Mr. Aiken mentioned and which the senator discussed, the question of paragraph 6 (b), domicile, my recollection is that under our Divorce Jurisdiction Act, 1930, where a wife has been deserted and the husband has left the jurisdiction, she then has the right to establish domicile for the purpose of divorce, provided that domicile is in the jurisdiction from which the desertion took place. Now you propose to extend that so that without the necessity of the plaintiff wife being free to acquire domicile in one jurisdiction from which the husband deserted her and stayed in desertion for two years, if the wife after the desertion should move from, say, Ontario to Alberta—which would be a very good move, I suggest—the wife would acquire domicile in Alberta, which would permit her to petition the courts in Alberta for a divorce. This is your proposal, is it?

Mr. WALSH: What we want is this, that when a wife is left she does not have to run off to Vancouver to file for divorce. If she is left in Ontario she should be able to file after two years.

Senator FERGUSSON: But she can now after two years if she has been deserted in Ontario.

Mr. WALSH: She can?

Senator FERGUSSON: She can under the Divorce Jurisdiction Act in Ontario where she was deserted.

Mr. WALSH: If the husband leaves can she?

Senator FERGUSSON: Yes, even though he has established a domicile elsewhere.

Mr. BALDWIN: That is right.

The CO-CHAIRMAN (*Senator Roebuck*): There are some people who advocate, as Mr. Baldwin has indicated, that she be allowed to establish her own domicile in any province in which she may live. I know of cases where a woman has been deserted in one province and gone home to live with her parents in another province, and her rights to sue for divorce have been confined to the province where she was deserted.

Senator FERGUSSON: Or the province where her husband is domiciled.

The CO-CHAIRMAN (*Senator Roebuck*): Yes, if she still knows where he is.

Senator FERGUSSON: I do not mean I am supporting the Divorce Jurisdiction Act, because I think she should have the right to take her domicile on her own.

Mr. BALDWIN: That is one of the few instances where discrimination exists against women. I think that is what the senator would be saying.

Senator FERGUSSON: Yes, this is true.

The CO-CHAIRMAN (*Senator Roebuck*): Any more questions?

Mr. MANDZIUK: Yes, Mr. Chairman. Taking your brief as a whole, are you more concerned with the welfare of the children than with the welfare of the deserted or aggrieved spouse, in most cases the wife? Is it the children you are concerned about? I mean, you were talking about the woman with six children, with no chance to remarry. I would like to see a chap who would marry a woman with six children.

Mr. WALSH: Maybe you should see this woman.

Mr. MANDZIUK: I have got lots of experience of this sort of thing. I have not practised law for thirty-five years for nothing.

Mr. BALDWIN: It is a complete package deal.

Mr. MANDZIUK: It is a package deal. Provincial jurisdiction covers that. We have welfare agencies. I know we have provisions in each province. We have them in Manitoba, and I know other provinces follow suit. Is it to be release from the marriage bond that you want to see, with people having a kind of wholesale open door policy?

Mr. WALSH: Definitely not.

Mr. MANDZIUK: Or are you worried about the children?

Mr. WALSH: We are worried about the children and the party that is left behind.

Mr. MANDZIUK: That leads me to another question, Mr. Chairman, and it is this. Do you consider marriage just as a civil contract, without realizing that, I would say, 60 per cent, maybe 75 per cent or more, in Canada consider it as a sacrament? It is not a thing that we can toy with and give notice, "I am going to desert my wife for two years and, by jingo, within three years I can remarry again and just keep on going."

Mr. WALSH: I would like to turn that question round and ask you something.

Mr. MANDZIUK: Go ahead.

Mr. WALSH: When do you consider a marriage not a marriage?

Mr. MANDZIUK: When two people cannot get along, sir, when they are incompatible, or whatever it is. I would say in the eyes of the Maker they are still married. I believe the civil authorities should have a right to separate them, but if you have so many grounds which could be used and abused I do not thing the country would go for it.

Mr. WALSH: Well, I do not think so either. We do not want it made easy either, as we have stated here. We have asked for an investigation into marriage failure; this is one thing we have asked for.

Mr. MANDZIUK: I agree with what you have in your brief about educating our students at schools, and I believe something along that line is going on now.

Mr. WALSH: I do not know whether it is or not.

Mr. MANDZIUK: Sex education.

Mr. WALSH: I do not think it is.

Mr. MANDZIUK: Well, I have seen very, very good indications of that on TV lately, that they have done that. If your main concern is with the children, I think that is where it ought to be, because they are the real sufferers. It is not the wife or the husband, whichever one is left behind, that suffers as much as the children.

Mr. WALSH: We realize that.

Mr. MANDZIUK: And that is within provincial jurisdiction. Each province is obliged to look into the matter itself, and we are out of the jurisdiction if we try to legislate something along those lines. I may be wrong, and I know I have some legal lights here on both sides of me.

Senator FERGUSSON: Could I ask something about paragraph 7? You say:

> We further recommend the setting up of a child support system in which the father be made responsible for the support of his children in cases of separation and desertion.

I think in every province we have Deserted Wives' and Children's Maintenance Acts.

Mr. MANDZIUK: Yes.

Senator FERGUSSON: We have reciprocal acts which make it possible to enforce these, even though the father may have gone to another province. What other system could you set up that would be any better? I am in sympathy with it, but I do not see what kind of legislation you could set up that could be any better than we have now, because these acts for deserted wives and children provided that the father should support his children.

The CO-CHAIRMAN (*Senator Roebuck*): We have power to send for a person and put him in gaol, but the weakness of our act is that we have not supplied the authorities with enough money for them to be able to enforce the act. That is our great trouble.

Mr. MANDZIUK: The suggestion in the brief is to have something like income tax deductions, or have an assessment on income tax returns made against the deserting spouse, and that this be turned over to a welfare agency. There seems merit in that, provided the husband is taxable.

Senator FERGUSSON: Many of these husbands would not be paying income tax, would they?

Mr. MANDZIUK: They are the kind of people who separate.

The CO-CHAIRMAN (*Mr. Cameron*): My question, Mr. Walsh, is on paragraph 5, where you mention extreme physical cruelty as a ground, but you do not put any time limit on how long it must continue.

Mr. BALDWIN: Until she is half dead!

The CO-CHAIRMAN (*Mr. Cameron*): In paragraph 6 (c) you say:

> Refusal to allow the petitioning of a divorce until a marriage has lasted three years.

I can think of many reasons why a petition should be launched before the end of a three-year period. You might have a situation in which a counselling service is used, or the exercise of the judge's discretion as to whether or not it was a proper case, but I personally do not see how you can tie them down to an absolute three-year period regardless of anything, that they must remain married. What is the thinking behind that?

Mr. WALSH: The thinking behind that is that during this time there would be counselling going on, and maybe they could solve the problem.

The CO-CHAIRMAN (*Mr. Cameron*): I do not want to argue or debate the matter with you, but my personal feeling is that, notwithstanding counselling or anything else, there may be a situation where it is obvious, right and proper that the divorce petition should be launched and granted in less than three years, depending on the circumstances of each particular case.

The CO-CHAIRMAN (*Senator Roebuck*): We do that now. Gentlemen, cannot we go on? We have a number of things to dispose of. May I call on my co-chairman, Mr. Cameron of the Commons, to express our gratitude for what we have heard.

The CO-CHAIRMAN (*Mr. Cameron*): I am very glad to do that, Mr. Chairman, and to thank you, Mr. Walsh, most sincerely on behalf of the members of the committee for your attendance here today, for your brief, which contains many valuable suggestions for the use of the committee, and for your ease and facility in answering the questions of the members of the committee.

Mr. WALSH: Thank you.

Mr. PETERS: Mr. Chairman, before the witness goes could I ask a question? I should have asked it before. Mr. Walsh, you mentioned that in Mexican divorce there was a stipulation whereby if there was written consent a divorce could be granted. Are you familiar with that section? This, of course, is by consent.

Mr. WALSH: Of both parties.

Mr. PETERS: Are there stipulations as to conditions that must be met in respect to the separation, for allowances and the children?

Mr. WALSH: A Mexican divorce just dissolves the marriage. It does not do anything with respect to settling affairs.

Mr. PETERS: So really there is nothing in it except that there is written consent. Does having written consent involve the people being there? In other words, can divorce be granted *in abstentio*?

Mr. WALSH: One party should be there. A lot of people think it is easy to get, but I do not know. I have heard it is, but I do not think it is too easy to get.

Mr. MANDZIUK: Did they not try it in the Soviet Union, where the parties just came before some official, declared that they were through with each other and it was granted? That has been discontinued, sir. What would happen to our family life if we went loosely around breaking up these marriage ties on nothing more than under the influence of liquor, or something, or they went and signed a consent?

Mr. PETERS: I apologize for my intervention, Mr. Chairman. It was just that I had never heard of this written consent and I was curious to know whether it was only by agreement or whether the parties had to be there.

Mr. WALSH: We do not want to see the family breakdown taken lightly. I think we have laid it down here in our brief that we do not.

Mr. MANDZIUK: I am not accusing you of that at all, sir, but you are opening the doors to all this by broadening out the grounds.

Mr. WALSH: But the doors right now are closed to people, and there is only one ground on which they can get it.

Mr. MANDZIUK: I think most people in Canada are in favour of broadening the grounds, mind you, but not on flimsy grounds.

Mr. WALSH: Well, I do not think the grounds we have suggested are too flimsy. I am just talking about the one that this gentleman wanted to know about.

Senator FERGUSSON: This is not one you suggested. You are just speaking about it.

Mr. WALSH: Yes. He asked a question and I replied to it.

Mr. PETERS: I only asked because I thought perhaps you had some personal or organizational acquaintance with the state of the law in Mexico.

The CO-CHAIRMAN (*Senator Roebuck*): Well, we must go on.

Mr. BREWIN: May I ask a question, Mr. Chairman? Mr. Walsh, have you looked into the suggestion, which apparently was approved by a committee that reported to the Archbishop of Canterbury, which was a radical change, and that is the granting of a divorce, not on the ground of a series of enumerated matrimonial offences, or expanding them, as you suggest, but on a finding by the court that the marriage in fact had broken down, which, of course, might often be due to these causes? Have you looked into that or considered it?

Mr. WALSH: No, I have not.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, witness, for coming here and spending all this time with us, and enlightening us to the extent that you have.

The next thing that I would like to bring before you is that I would like to have you consider the question of our reducing the quorum from ten to, say, seven. I understand from Senator Croll that they have done that in the Joint Committee of the Senate and House of Commons on Consumer Credit. May I have an expression of opinion on that?

Senator BAIRD: I move that.

The CO-CHAIRMAN (*Senator Roebuck*): Senator Baird moves that we reduce the quorum from ten to seven. Is that seconded?

Mr. BALDWIN: I second that.

Mr. PETERS: Mr. Chairman, personally I am not in favour of reducing the quorum. This is a joint quorum and I think ten is not too many. There is a difficulty that we may face because of the timing. I think there is a great deal of interest in this committee, and maybe the attendance could be better than it is, but we are running into a difficulty in having to meet at 3.30, which is a set time. The members of the House are seldom, if ever, able to leave it at 3.30, and most of our committees are hinged on the basis that the committee will not meet until after the Orders of the Day or 3.30, whichever comes first. Maybe it is the time we should be looking at rather than the quorum. Today they are still not past the Orders of the Day in the House of Commons; it is still going on on adjourned motions.

The CO-CHAIRMAN (*Senator Roebuck*): What would you suggest, Mr. Peters?

Mr. MANDZIUK: There is another thing you must consider, senator, and it is this. The Consumer Credit Committee—and some of us are on this one and that, and I would like to be in both places at the same time—will be sitting for the next week or two every day, and twice a day at times, but they will then be through, so that we shall be freer to give our full attention here. I agree with Mr. Peters, I do not like to see the quorum reduced if we can help it.

Senator FERGUSSON: It is the same thing in connection with the Joint Committee on Public Service, which is meeting two and three times a day right now, but that will not last forever.

Mr. MANDZIUK: That is it.

Senator FERGUSSON: There are a number of us on that too.

The CO-CHAIRMAN (*Senator Roebuck*): Then is it the consensus of opinion that we had better leave that for the moment?

The CO-CHAIRMAN (*Mr. Cameron*): Could we meet on Wednesday, Mr. Chairman, rather than Tuesday? On Wednesday we have only half-an-hour for questions, which is one item that takes up a lot of time in the Commons.

Mr. PETERS: It is fairly formal when we have finished Orders of the Day on Wednesday. On the other days I think the senators would say it has been ridiculous, the way our Orders of the Day extend. It does make it pretty difficult for the members to get here until the Orders of the Day are over.

The CO-CHAIRMAN (*Senator Roebuck*): I think the great trouble about changing the day is that we have a program arranged at this time and on this day of the week, which will take us until Christmas. It would mean we would have to ask quite a number of people to change their time, and we might run into a lot of trouble that way.

Mr. PETERS: If I could make a suggestion, it would be that we govern it on the vice-chairman's appearance after Orders of the Day rather than 3.30, and if we do not get a quorum I will withdraw my objection to reducing it. I think we are being asked to reduce it because of a situation over which we have no control.

The CO-CHAIRMAN (*Senator Roebuck*): Quite.

Mr. PETERS: Members who would like to be here are finding it impossible to be here, for reasons over which they have no control.

Mr. BREWIN: Mr. Chairman, could I express a different opinion from that which has just been expressed?

The CO-CHAIRMAN (*Senator Roebuck*): Yes.

Mr. BREWIN: It seems to me that we are getting so many committees now—joint committees, and the Senate has many committees too—that reasonably small quorums will be necessary whether we like it or not, and that to hold out for a large quorum is a mistake. Mr. Peters says that we will find out, but there will always be some reason, with the multiplicity of committees and the business that we have.

I know many committees in the United States Congress, for example—although I hate to quote that as an example—sometimes have a small sub-committee to hear evidence of witnesses and that sort of thing. Now, I do not like that; I think all members of the committee should be invited to attend all the hearings; but I do suggest that what you propose seems to make sense, we shall have to come to it, and I personally would be prepared to support it right now.

The CO-CHAIRMAN (*Senator Roebuck*): Well, we have a motion before us moved by Senator Baird and seconded by Mr. Baldwin, that we reduce the quorum from ten to seven, and of course that both Houses be represented. Let us vote on it. Those in favour of it?—five. Those opposed?—two. Some of you are not voting on it.

Mr. MANDZIUK: I abstain.

The CO-CHAIRMAN (*Senator Roebuck*): What do you think about it?

The CO-CHAIRMAN (*Mr. Cameron*): Well, I will have to get it approved in the House. I realize that we shall have to get out of the House sooner, or the committee will have to function on the basis of waiting until you have a

quorum. I will get here as quickly as possible so that you will have one member of the House of Commons, and if you get some others of us here you might be able to start earlier, but on the question of time you have to consider the exigencies of the House.

Mr. BREWIN: Despite the fact that the motion has been put, may I just say this? These committees are largely examining committees, they are not decision-making committees. You have set up a schedule whereby witnesses can appear with briefs and we have an opportunity to examine them. Some time before the committee completes its deliberations it will have to come to its decision and make recommendations.

I agree with Mr. Brewin, that for attempting our present purpose it is logical to anticipate that we may have to limit ourselves to a smaller quorum so that witnesses will not be held up, so that they can appear and present their briefs. Undoubtedly, later in the day, before our meeting has been completed, we usually end up with a quorum, with an opportunity for those who wish to ask questions to do so, but we are getting into the situation where time is of the essence and we should have an opportunity to start earlier. I understand Mr. Peters views, but it was for those reasons that I seconded and voted for the motion.

The CO-CHAIRMAN (*Senator Roebuck*): We could leave this over and think about it until the next meeting. Would that be satisfactory? I do not like to go on with something on a matter of procedure when we are divided on it.

Mr. BREWIN: Why not? I thought we had passed it.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Walsh. We will consider all you have said.

We have something more on our program. It is only five o'clock and we can put in another half-hour very usefully. I am going to call on our Executive Assistant, Dr. King, to lay before us some matters which he was in hand.

Dr. KING: Mr. Chairman, honourable members, there have been presented to the committee by various bodies and organizations, not actual briefs, but statements which those bodies have made at some time or another on the subject of divorce, and they have asked that they be brought to the attention of the committee. What I would like to do this afternoon, with your leave, is to present a few of these, time permitting. They are from groups which feel they have something to say on the matter.

These are just odd statements which we have not had a chance to mimeograph and send round to you, but they will be printed afterwards, so you will have a chance to consider them later.

The first one of these was received from the Board of Evangelism and Social Action of the Presbyterian Church in Canada. As far as I know, the Presbyterian Church in Canada does not intend to present a brief formally, and at the present date this is all we really have from the Presbyterian Church in Canada, so I would like to read the extract they have sent to us. It reads as follows:

> While it is not the intention of our Board to present a brief, it was decided to forward to you the decision of the 89th General Assembly (1963) of the Presbyterian Church in Canada re the widening of the grounds for divorce, namely:
>
> Whereas the teaching of the Westminster Confession of Faith re Marriage and Divorce (Chapter XXIV, Section VI) 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"; 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".

There is a very brief one from the Salvation Army. Their letter stated:

> The Salvation Army has not made an international statement to date on the subject of divorce, but our Women's Executive in Canada made its own statement, which may be of some help in the study of this matter.

The statement is as follows:

> Statement made by the Women's Executive of the Salvation Army. Territorial Headquarters, Canada, March, 1966: The widening of grounds for divorce to include insanity, cruelty and desertion, as well as adultery. It was generally agreed that there ought to be some relaxation of this law as the present requirement of adultery encourages lower moral standards, and much deception. Several instances were cited regarding insanity, and the resultant hardship to one of the marriage partners, particularly when a family is involved. It was pointed out that the divorce law in Britain already includes these provisions.
>
> Questions were raised concerning the definition of cruelty, length of desertion, degree of insanity, etc., but it was felt that if the law were passed, Acts of Parliament would define the time, aspects, degrees in each case.

There is a further very brief statement from the Mennonite Church in Canada, from the Mennonite Central Committee:

> Whereas marriage is a sacred contract expected to be permanently honoured by both Church and state, and
>
> Whereas the breaking of marriage by any means, legal or illegal, is spiritually, psychologically and economically costly to our society and to the families involved, and
>
> Whereas it has been demonstrated that many marriage difficulties are of a nature that can be corrected by use of professional counselling services,
>
> Therefore it is the conviction of the Mennonites of Ontario that in writing new legislation concerning marriage and divorce in Canada provision should be made to require all married couples before being granted a divorce to give evidence of having first sought the services of competent professional counsellors. Such legislation should spell out the meaning of what constitutes a definition of "competent" and "professional counsellors". These counsellors should attempt to discover bases for preserving the marriage relationship on terms mutually agreeable to the marriage partners and the court.

Mr. PETERS: Maybe even who is going to pay for it.

Dr. KING: There is a very short one from the Catholic Charities of the Diocese of London. This was the statement which I think was originally intended to be presented to the Justice Committee chaired by Mr. Cameron, which has eventually been handed on to us. This is the statement:

> Whereas the Parliament of Canada has referred to a special Justice Committee studying divorce the matter of deliberating upon current proposals for amending existing divorce legislation; and
>
> Whereas there is said to be some indication that consideration is being given for an enlargement of the personnel of the said committee so as to include joint Senate-Commons membership; and

Whereas the committee so established to study the proposed bills on the subject of divorce should be appraised of the concern that family and welfare agencies have for safeguarding the effective strengths of the family as a fundamental unit of a healthy society; and

Whereas the impact of divorce as an erosive factor affecting family life and the early social formation within the family unit of society's upcoming citizens; and

Whereas legislation enactment may presently be contemplated which would tend to widen the grounds for seeking divorce because of allegedly untenable or unendurable circumstances in respect of individual cases; and

Whereas due consideration of the common good may indicate need for a more constructive and progressive manner of dealing with individual distress, without prejudically jeopardizing the public good of society through the erosive effect of family functioning by enlarging the grounds for petitioning a divorce;

Therefore, it was agreed by the Board of Directors of Catholic Charities of the Diocese of London that the following resolution be considered when drafting legislation with respect to divorce in this country:—

That, there be in any amended legislation some built in measures circulated to safeguard the effectiveness and strengths of family life as an important social institution; and

That, to such end any revision of legislation affecting the stability of an existing bond or contract of marriage should provide opportunity, mandatory of law, for prior remedial marriage counselling, the object of which should be the treatment of disruptive factors and the offering of supportive advice calculated to prevent or minimize family breakdown or damage.

On the general subject, which many of these briefs are mentioning, of the provision in legislation of prior remedial counselling before divorce is granted, there is another, slightly longer, statement from the Diocese of Huron, Anglican Church of Canada. These are:

Recommendations to the Government of Canada and the Government of Ontario submitted by the Synod Executive Committee with respect to the enlargement of grounds for divorce in Ontario,

and by implication the country at large.

The CO-CHAIRMAN *(Senator Roebuck)*: It was brought to our attention by the Bishop of Huron.

Dr. KING: Yes, the Rev. George N. Luxton. This is the statement:

In view of the present consideration being given to the possibility of enlarging the grounds for divorce within the Province of Ontario, the Diocesan Synod gave some consideration to the subject and committed the responsibility for our study to a committee headed by the Chancellor of the Diocese, John D. Harrison, Esq., Q.C. This committee met on June 21 in a lengthy session and formulated a report for the Executive Committee, which met on the day following. In turn, the Executive Committee spent three hours discussing and amending the report; now we offer it to the authorities of government for their consideration.

At the General Synod of the Anglican Church of Canada held last year in Vancouver, a new canon on marriage was passed. When this canon is ratified in the same form at a subsequent General Synod, it will permit Anglican clergy, following approval of an application to the

Church authorities, to remarry certain divorced people whose former partner is living. This is a radical departure from the Anglican Church's traditional position. Many Anglicans in the Diocese of Huron have felt that this recent action suggests the need for a careful study of the present grounds. Our study offers certain positive recommendations and notes two areas of discussion wherein we were unable to find any clear and constructive resolutions.

Resolutions as passed by the Synod Executive:

1. Believing that the sanctity of family life is an essential part of the society in which we live, and believing that early assistance to married couples whose marriages are commencing to flounder is most desirable, we recommend that greater emphasis be put upon, and more adequate facilities be provided for, marriage counselling service at the area of time when many marriages are commencing to break up and the parties first make their appearance in the family court. Coupled with this, we recommend that authority be provided in an appropriate fashion to compel a husband or wife, as the case may be, to attend the marriage counselling service upon the application of his or her spouse, or independently upon the order of a family court judge.
2. We recommend that no divorce should be granted unless the judge hearing the case is satisfied that adequate and responsible arrangements have been made for the welfare of any children of the marriage—

and that they italicize

to as great an extent as reasonably possible; and, in this respect, that the court be vested with independent authority, regardless of any claim made by the parties to the divorce action, to make any necessary or appropriate order to ensure that adequate responsible arrangements are provided for the children of the marriage.

3. We recommend that the provisions of the Matrimonial Causes Act, 1950, of England, providing that except in special circumstances no application for a divorce may be made until after three years have passed since the date of the marriage, including the provisions relating to the special leave which may be granted, be adopted.
4. Subject to the foregoing, we recommend that a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent

(a) Has, since the celebration of the marriage, committed adultery; or

(b) Has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition, provided that, upon the hearing of any petition upon this ground the judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties being possible, and shall be vested with the authority to require both the petitioner and the respondent to present themselves for marriage counselling service before proceeding to determine the case;

(c) 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 and, during that period, has been committed to a hospital under the provisions of the Mental Hospitals Act of Ontario or under the provisions of an equivalent act of some other jurisdiction;

(d) By the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

Further Recommendations:

1. We specifically recommend that the provision contained in the Matrimonial Causes Act, 1950, of England, providing for divorce on the ground that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty, be not included among the enlarged grounds for divorce in Ontario. Our recommendation is based upon our considered opinion that the term "cruelty" is impossible to define and could result, particularly in the area of alleged mental cruelty, even though modified to the extent that such mental cruelty must be injurious to health, in the extension of grounds for divorce into an ill-defined and wide open area not acceptable to us as a diocese of the Anglican Church of Canada.
2. The Executive Committee discussed extensively the relationship of imprisonment to divorce, and found themselves unable to offer any widely supported resolution in this area. The changing attitudes of government regarding imprisonment, the emphasis on the early parole, and the rehabilitation of almost all offenders, limits the period of confinement and separation between spouse and family, and thereby enables the marriage and family to survive the traumatic experience. The responsibility of each partner to the other in Christian marriage was emphasized as a major factor working towards the rehabilitation of the criminal, and we believe that it ought to be sustained, and indeed increased, during the period of imprisonment and parole. There was considerable support for the view that there might be grounds for divorce allowed to the partner of an habitual criminal, or a chronic "repeater", after conclusive evidence has been established that the offender has adopted crime as a way of life. The executive felt, however, that at the present time no definitive resolution could be formulated for application within this area of constant change.

Respectfully submitted, George N. Luxton,
Bishop of Huron and Chairman of the Synod Executive. June 24, 1966.

I do have several more, if the members of the committee are not getting exhausted.

The Co-CHAIRMAN (*Senator Roebuck*): No, go ahead.

Dr. KING: There is another one also from the Anglican Church. This is:

A brief presented to the Special Committee of the Senate and the House of Commons on Divorce by the Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia, Anglican Church of Canada.

This is rather a long brief and there is a section in it which simply reproduces part of the canon of the Anglican Church mentioned in the previous brief. It is rather long and, with your leave, I would seek to omit it, because there is no doubt that when the Anglican Church themselves arrive they will present it *in extenso*. If you wish, we could take it as read, and it would be reproduced in the record anyway.

The Co-CHAIRMAN (*Senator Roebuck*): Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

Dr. KING: The brief reads:

> In an age when moral standards are declining and there is a general tendency among many people to ignore the Divine Law in order to seek their own pleasure rather than the pleasure of Almighty God, the Marriage and Family Life Division of the Diocesan Council—

Mr. PETERS: Mr. Chairman, did not we agree just to table it? If we are having the Anglican Church before us, I would suggest we table the whole presentation.

Mr. MCCLEAVE: Print it, not table it.

Mr. PETERS: Print it. This, as I understand, is an advance presentation.

Dr. KING: No. I think it may differ in degree from some of the recommendations made by the previous Anglican Church brief, and that is why I was reading it. What I suggested omitting was the canon which is reproduced here in the text. They go on from there to make recommendations which may or may not be contained in the other formal brief of the Anglican Church. The reason I mention this is because the last one was also from a body of the Anglican Church, and members may detect some slight differences in the recommendations.

Mr. MCCLEAVE: Mr. Chairman, I think that briefs which are sent in but not supported by live witnesses should be printed as part of our proceedings without the necessity of Dr. King having to read them.

The CO-CHAIRMAN (*Senator Roebuck*): Then you move that this brief at least be printed.

Dr. KING: This is actually a formal brief. The others were simply statements which were received and not put in as formal briefs at all.

Mr. STANBURY: Mr. McCleave is suggesting something more basic than that, that perhaps we could establish that any brief sent in rather than presented personally would hereafter be made part of the record of the committee, unless there is some brief which is so extensive that the chairman might recommend us to do otherwise. I think that as a general rule any briefs which are submitted by mail could be made part of the record for our information.

The CO-CHAIRMAN (*Senator Roebuck*): Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

(*See Appendix No. "5"*)

The CO-CHAIRMAN (*Senator Roebuck*): Then we will do that in future without a further resolution.

Mr. MCCLEAVE: Mr. Chairman, could I raise a point of order that is ancillary to the discussion we have just had? It is a suggestion, and I move it in this form:

> That the Steering Committee be empowered to select authoritative writings, both pro and con, on the subject of divorce which could be incorporated in the reports of this honourable committee.

There are some good speeches in both Houses of Parliament, for example, some good articles in the *Canadian Bar Journal* and the like, which if put before us in some convenient form would be useful.

In support of my motion, I would like to make one other point. I am sure a great many members are, like myself, sending copies of our proceedings to students of law, to bar societies, and anybody else interested, and I think we would have a very authoritative document if we added one or two such written items in every committee report we print.

The CO-CHAIRMAN (*Senator Roebuck*): Any comments, gentlemen?

Mr. PETERS: Would that be as an appendix?

Mr. MCCLEAVE: As an appendix, not as part of the regular proceedings. It would be as an appendix, unlike what we have previously decided.

The CO-CHAIRMAN (*Senator Roebuck*): There are some very potent articles that we could make use of in whole or in part.

Mr. PETERS: Being a politician I should say I would second that if I agreed with it, but I will second it anyway.

The CO-CHAIRMAN (*Senator Roebuck*): Then it is moved by Mr. McCleave, seconded by Mr. Peters:

> That the Steering Committee be empowered to select authoritative writings, both pro and con, on the subject of divorce which could be incorporated in the reports of this honourable committee.

All in favour.

Mr. MCCLEAVE: I think I should have added "as an appendix".

The CO-CHAIRMAN (*Senator Roebuck*): Then we will add "as an appendix". Is that agreed?

MEMBERS of the COMMITTEE: Agreed.

The CO-CHAIRMAN (*Senator Roebuck*): Would somebody move that this meeting do now adjourn?

Mr. STANBURY: I so move.

The Committee adjourned.

Appendix "5"

A BRIEF PRESENTED TO THE SPECIAL COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON DIVORCE BY THE MARRIAGE AND FAMILY LIFE DIVISION OF THE DIOCESAN COUNCIL FOR SOCIAL SERVICE OF THE DIOCESE OF NOVA SCOTIA, ANGLICAN CHURCH OF CANADA.

In an age when moral standards are declining and there is a general tendency among many people to ignore the Divine Law in order to seek their own pleasure rather than the pleasure of Almighty God, the Marriage and Family Life Division of the Diocesan Council for Social Service of the Diocese of Nova Scotia feels that it has a solemn duty to defend before this Committee the Christian standard for Marriage or Holy Matrimony since it is the intention of this Comittee to review the matter of divorce with the proposed intention of relaxing the present laws by which this subject is governed in Canada.

The following is a reproduction of Part I of Canon 27A of the General Synod of the Anglican Church of Canada. While this Canon must be ratified by General Synod in 1967 before it becomes effective Canon Law, Part I, which is the Introduction to the Canon is considered to be an excellent statement of the Church's position on Holy Matrimony, as it is based on Holy Scripture:

"1. 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 fulfillment in a community of faithful love. This contract is made in the presence of witnesses and of an authorized minister.

2. The Church affirms in like manner the goodness of the union of man and woman in marriage, this being of God's creation (Gen. 1:27-31). Marriage also is exalted as a sign (Eph. 5:31f) of the redeeming purpose of God to unite all things in Christ (Eph. 1:9f), the purpose made known in the reunion of divided humanity in the Church (Eph. 2:11-16).

3. The Church throughout her history has recognized that not all marriages in human society conform, or are intended to conform, to the standard here described. For this reason, in the exercise of pastoral care as evidence in the earliest documents of the New Testament, the Church has from the beginning made regulations for the support of family life especially among her own members.

4. Aspects of the regulation of marriage in the apostolic Church are recorded in the New Testament. A new standard of reciprocal love between husband and wife was introduced leading towards an understanding of their equality (I Cor. 7:3f, 11:11f, Epr. 5:21-33, cf. Gal. 3:28). In preparation for marriage Christians were directed to seek partners from among their fellow believers (I Cor. 7:39, II Cor. 6:14, cf. I Thess. 4:2-8, R.S.V.). In Christ's Name separated spouses were encouraged to

seek reconciliation (I Cor. 7:10f). In His Name also divorce was forbidden though not without exception (Matt. 5:31ff, Mark 10:2-9, cf. Mal. 2:13-16). In certain circumstances a believer already married to an unbeliever might be declared free from such a marriage bond (I Cor. 7:12-16); in others, and here in the Name of Christ, remarriage during the lifetime of a former spouse was described, with one exception, as an adulterous union (Matt. 19:9, Mark 10:11f, Luke 16:18, cf. Ro. 7:3).

5. From these principles and precedents the Church, living in many cultures and in contact with many different systems of law, has sought in her rites and canons to uphold and maintain the Christian standard of marriage in the societies in which believers dwell. This standard and these rites and canons pertain to the selection of marriage partners, preparation for marriage, the formation of a true marriage bond, the solemnization of marriage, the duties of family life, the reconciliation of alienated spouses, and the dissolution of marriage and its consequences."

From the foregoing text it is obvious that Christian Marriage or Holy Matrimony is a life-long union of one man with one woman to the exclusion of all others, so long as they both shall live. It is also obvious, of course, that we have here been considering the ideal for Holy Matrimony on Scriptural standards. While this ideal is realized in many instances, and we thank God that it is, there are other instances which have been increasing in number since the end of World War II, where the ideal is not realized, and also where it is obvious to the skilled Pastor that no attempt has been made or is being made to achieve this ideal on the part of some couples.

One point which should be clarified by this brief is the attitude of the Anglican Church of Canada towards divorce. The Church does in fact recognize divorce, and it is incorrect to imply that divorce is contrary to Church discipline. We believe that it is essential for the Committee to grasp this point, particularly the way in which divorce is recognized by the Church. There is a legal process, known as divorce, by virtue of the laws of the Dominion of Canada and by the laws of the individual Provinces, whereby the legal contract or aspect of a marriage may be dissolved. Therefore, following the successful completion of a divorce action, a husband and wife no longer bear any legal responsibility to or for one another other than that which may be stipulated by the Court or Judge rendering such a decision. These laws say in effect that a marriage has been validly entered upon and consummated but that now by divorce it no longer exists and the contracting parties are free to negotiate other contracts. While the Church recognized the legality of these processes, and abides by the Court decisions regarding family responsibilities, financial arrangements and property disposition, the Church does not admit the dissolution of the marriage bond itself and still holds that each party is still not free to negotiate a new marriage. In other words, in this last respect, legal divorce is much like legal separation in the eyes of the Church. The Church may make rules governing the discipline of those who are members or who look to the Church for ministrations when they are involved in one or the other. The Church believes a marriage bond to be life-long by nature, apart from the fact that the original vow was specifically stated to be life-long.

This marriage bond is not set aside or dissolved by any process of civil law in the eyes of the Church. Those who seek to do so are unfaithful to the Scriptural standard, and those who seek to contract another marriage during the lifetime of the "previous" partner are guilty of adultery. The Church must take this stand, not only because she is committed to keeping the Divine Law, but also because any newly contracted "marriage" would became an obstacle to Christian forgiveness. Should the guilty or offending partner seek forgiveness and reconcilation with the other partner to an allegedly dissolved marriage

(and here it should be stated in all honesty that it is very difficult in numerous instances to determine just who is the guilty or offending partner and who is the partner against whom the offence has been committed) a subsequent legally contracted marriage would be an insurmountable barrier to the reconciliation of a husband and wife in an atmosphere of Christian love and forgiveness. It cannot be denied however that there are instances where it will be necessary for a husband and wife to continue living apart from one another indefinitely as long as there is no chance of forgiveness or reconciliation.

On the surface such a stand by the Church may at first appear as restrictive and infringing on individual freedom. But the Church makes very few rules, and these are made always in a progressive spirit, in an effort to set a Scriptural standard or to preserve and protect ideals. The Church's rule for marriage is based not only on Holy Scripture, but also on the recognition of the place of the family in society, with a desire to consolidate and solidify the security of the home, and to preserve the sanctity of the home and family as the basic unit of society and as the training place for the young in social obligations and responsibilities.

Moreover, because the laws of our country have grown out of a Christian context, from people who regard the Christian standard with respect, even when not always Christians themselves, we believe that this Committee is obligated to proceed with recommendations for legal revisions, not from the point of view of lowering the standards and weakening the home and family ties to the eventual detriment of our country, but from the point of view of preserving the sociological function of the home and family in society to the degree that is concomitant with personal and individual rights and freedoms. In other words, we believe the Committee should approach its task from the same point of view as the Church.

It is quite obvious that there is a real need for the revision of the laws concerning divorce in Canada, but it is extremely doubtful if any genuine good will come from any widespread relaxation of these laws. On the other hand, laws are concerned mainly with the peace of the community, the protection of individuals, especially minors, the proper handling of money, property etc. In other words, laws can dissolve any or all aspects of the "contract" part of marriage. In this respect it may be that revisions allowing more "causes" for divorce would be good in that they would afford more adequate protection for the deserted spouse and children than they presently have or receive under the maintenance acts etc. of the various Provinces. We would suggest that our Canadian laws might begin with a preamble stating the positive place of the family in the community and the responsibility of all citizens to recognize this. We would suggest that some legal recognition might be given to the Church's vow for life-long marriage. In other words, when a couple are married by the Church, they should be made to understand that there is legal support for the promises they are making, and therefore the law will not permit divorce in their case until the couple have consented to and carried out a programme towards solving the marriage problem conducted by the Church which solemnized their marriage. This would probably force more couples into civil marriage, but it would keep the Clergy and the couple from mouthing the words of a promise there are no sanctions to enforce.

The Church is realistic enough to realize that many people, even many devout members, are not going to realize the Scriptural and sociological ideal for marriage. We realize that there is a great need for an increasing programme by which and through which the Church can minister to these situations more effectively. Easy divorce will not reduce the frequency of these problems but merely add another injurious problem and at the same time by its very nature make a solution irrelevant or impossible. We believe the Committee should explore every possible avenue whereby due processes for solving marriage

problems may be established, such as family courts, counselling services etc. We feel certain that with such encouragement on the part of updated laws, the Church and many voluntary community organizations would rise to the occasion and provide more effective services as well in co-operation with this kind of approach on the part of the State.

The Diocese of Nova Scotia,
Anglican Church of Canada,
The Rev'd., Canon G. F. Arnold,
Clerical Secretary,
5732 College Street,
Halifax, Nova Scotia.

The Rev'd., C. Russell Elliott,
Chairman,
Diocesan Council for Social Service,
St. John's Rectory,
3433 Dutch Village Road,
Halifax, Nova Scotia.

The Rev'd., Richard S. Mowry,
Convenor,
Marriage and Family Life Committee,
Diocese of Nova Scotia,
Christ Church Rectory,
New Ross, Lunenburg County,
Nova Scotia.

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 5

TUESDAY, NOVEMBER 1, 1966

Joint Chairmen
The Honourable A. W. Roebuck
and
Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Canadian Bar Association: Perrault Casgrain, Q.C., President; A. Gordon Cooper, Q.C., Dominion Vice-President; Ronald C. Merriam, Q.C., Secretary.

APPENDICES:

6.—Transcript of the Discussion which took place on September 2, 1966 during the 1966 Annual Meeting of the Canadian Bar Association in Winnipeg, Man. on the subject of Divorce.
7.—Private brief by Richard B. Holden, Barrister & Solicitor, Montreal, Que.
8.—Private brief by Victor Le Rochelle, C.A., Quebec, Que.
9.—Brief by The Single Parents Associated, Toronto, Ont.
10.—Brief by The Magna Carta Club, Vancouver, B.C.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

2450-1

First Session—Twenty-seventh Parliament
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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, 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

Mr. A. J. P. Cameron (*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 10)

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 bill 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 accordingy.

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, November 1, 1966.

Pursuant to adjournement and notice the Special Joint Committee of the Senate and the House of Commons on Divorce met this day at 3.30 p.m.

Present: *For the Senate*: The Honourable Senators Roebuck (*Joint Chairman*), Baird and Fergusson—3.

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

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Canadian Bar Association:

Perrault Casgrain, Q.C., President.

A. Gordon Cooper, Q.C., Dominion Vice-President.

Ronald C. Merriam, Q.C., Secretary.

The transcript of the discussion which took place on September 2, 1966 during the 1966 Annual Meeting of the Canadian Bar Association in Winnipeg, Manitoba on the subject of Divorce was ordered to be printed as appendix no. 6 to these proceedings.

Briefs submitted by the following are printed herewith as Appendices:

7.—Richard B. Holden, Barrister & Solicitor, Montreal, Que.

8.—Victor La Rochelle, C. A., Quebec, Que.

9.—The Single Parents Associated, Toronto, Ont.

10.—The Magna Carta Club, Vancouver, B.C.

At 5.25 p.m. the Committee adjourned until Tuesday next, November 8, 1966 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, November 1, 1966.

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*): I understand that Mr. Brewin has something to say on the question of a quorum. We discussed this question for a few minutes at the last meeting but were far from unanimity and I thought we should let it stand over. Mr. Brewin, do you wish to make your statement now?

Mr. BREWIN: I thought it was a suggestion of your own, Mr. Chairman, that we reduce the quorum to 7. I made a motion to that effect and it passed by a small majority and you, sir, suggested that it be not pressed at that time. I would like to renew the motion as soon as possible because it seems to me unreasonable to keep distinguished witnesses, or even undistinguished witnesses, if we have such, waiting while we try to muster ten persons here.

There are so many other things going on—the House sitting and many other committees meeting—that it is unrealistic to maintain a high quorum, particularly at this stage of the proceedings when we are hearing submissions. Later, when we come to make decisions, it will be desirable to get back to the full quorum so that we shall not have decisions made by a small group; but so long as we hear witnesses we are wasting their time if we do not proceed at once to hear them.

These gentlemen who are going to speak to us have been waiting here for a quarter of an hour now and we could have saved their time as well as our own had we started promptly.

It is only realistic to recognize as a fact of life that there is pressure upon people's time and I would like therefore to have the opportunity to put the motion to the vote again.

The CO-CHAIRMAN (*Senator Roebuck*): We will put it now. Mr. McCleave, have you something to say?

Mr. MCCLEAVE: No, Mr. Chairman, except to say that I second the motion. We have a fantastic number of committees working diligently and it is humanly impossible to expect seven people to waste time when they have other things to attend to. I second the motion.

The CO-CHAIRMAN (*Senator Roebuck*): Have you anything to say on the question, Mr. Co-Chairman Cameron? I see you are leaving the room.

The CO-CHAIRMAN (*Mr. Cameron*): I am going to see if I can get some more members.

Senator FERGUSSON: I voted against the motion on the last occasion, but I understand the argument in favour of it. On the other hand, if we are to have distinguished, or even not so distinguished, witnesses to give us the benefit of their opinions, I suggest that it is hardly reasonable to think that seven out of 36 members are enough to hear those opinions. Moreover, I do not think it is

doing the witnesses a great honour to reduce the quorum to the extent proposed. However, I will not vote against the motion.

The CO-CHAIRMAN (*Senator Roebuck*): I do not think our visitors should be concerned very much about the people who listen to them, because it is the record that is important, and the record of what they say is exceedingly so.

Honourable members will be interested, perhaps, to know that our first thousand copies of the first and second meetings are already exhausted. We shall have to get another thousand copies and it will be necessary to increase the number we print in the future. So that the actual number of those present is not as important as it might be otherwise. Furthermore, the briefs that will be presented to this small group of seven or ten, or whatever it may be, will be studied by that group in private, and it is the information upon which we shall act, and let us hope that the Government will act on our recommendations.

There is something really vital in the reading of these briefs and the argument that goes on among the group of members listening to them.

Now that we have a quorum I will put the motion. It has been moved by Mr. Brewin and seconded by Mr. McCleave that we reduce the quorum from ten, both Houses being represented, to seven, both Houses being represented. Are you ready for the question? I grant that it is due to our visitors that there should be a greater body here to listen to them; I agree with that. But, as Mr. Brewin has said, we must face the facts of life, and since this is one of the facts of life we must accept it and do the best we can with it.

Mr. PETERS: This is a negative attitude. We have twelve committees meeting in the House of Commons today and this is a stupid situation that cannot exist much longer. Every time you reduce the quorum you make it possible for the Government to get away with it for another few weeks.

Mr. STANBURY: That is nonsense. All the evidence is printed, and Mr. Peters should read it carefully.

Mr. PETERS: I will read it.

The CO-CHAIRMAN (*Senator Roebuck*): I might point out that the Joint-Committee on Consumer Prices, which has been sensational and of great popular interest, reduced its quorum to seven because they were embarrassed by the ten.

Are you ready for the question? There are two opposed.

(*The motion was agreed to.*)

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, let us go on with our program for the day. We have three very distinguished visitors before us today representing the Canadian Bar Association. They are the President, the Vice-President, and the permanent fulltime Secretary. I will ask the President to address us; he has a few remarks to make; then the Vice-President will present the brief; and after that I hope we shall have a few words from the Secretary.

First of all I would like to put on the record that the President is Mr. Perrault Casgrain, Q.C., who was born in Quebec City on January 18, 1898. He was educated at Laval University, B.A., LL.L. He is the senior partner of the firm of Casgrain, Casgrain and Crevier. He was Crown Prosecutor, District of Rimouski, 1920-36; created K.C. in 1930; served in the First World War with 1st Canadian Tank Battalion April 1918, transferred to 10th Reserve Battalion Canadian Infantry June 1918; Member of the Legislative Assembly Quebec, 1939-44; Minister without Portfolio, Province of Quebec, 1942-44; member of The Canadian Bar Association since 1920, President 1966-67; President Quebec Rural Bar Association, 1943-44; sometime member Board of Quebec Bar Examiners, Bâtonnier of Lower St. Lawrence Bar and member of Council for Bar of Province of Quebec.

Mr. Casgrain is here with us, and may I ask him to address the committee.

Mr. Perrault Casgrain, Q.C., President, The Canadian Bar Association: Mr. Co-Chairman, I thank you for the kind words with which you have introduced the President of the Canadian Bar Association.

Our Association, as you are aware, is interested in all branches of the law, and mostly in the progress of the law. We have a number of problems arising and we do not reach a decision very rapidly. We have subsections working in the province and these subsections report to the Dominion section.

These sections have each a special branch of the law which they study and which is attended by members of the Bar. We are most cognizant of, and interested in, these various branches of law being studied. The report is made to the Council of the Association, which comprises a great number of lawyers from every province in Canada who discuss the matters to be brought before the Annual Meeting which takes place once a year in a different city in Canada. Thus, people who were not at some section meeting or other, nor at the Council meeting, can attend at the Annual Meeting where they get the benefit of previous discussions and can also express their views and freshen up on various matters with new points of view.

If after the Annual Meeting we are not satisfied that we have had a sufficient majority, or that we have studied any matter as extensively as we should have done, or that we are speaking with one voice, then we postpone further study until another year.

This may not seem very much Twentieth Century or Atomic Age in character, but I am stating it merely as one of the facts of life, to quote an honourable gentleman who used that expression a moment ago, in order to give you an idea of the workings of our organization.

By reason of the number of subjects we have to treat, it is impossible for the President or the Secretary to explain all the conclusions reached and the reasons for those conclusions on each matter that comes before the Canadian Bar Association. This is the reason why, this morning, I was spokesman for the Canadian Bar's point of view on matters that come before the Committee of the House of Commons.

One of our most distinguished members, a gentleman who has been assiduous in the work of the Association, highly respected at the Bar, with wide experience, our Vice-President Mr. Gordon Cooper, Q.C., from Halifax, will present our brief; and I believe he has the right to answer whatever questions you may see fit to ask.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Casgrain. I understand from what you say that the recommendations you make are not hastily arrived at but are the result of mature consideration by the Association. That is the substance of what you have said?

Mr. CASGRAIN: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you. Are there any comments before Mr. Cooper presents the brief?

Mr. MCCLEAVE: In previous years the Bar has talked this problem at general meetings but it has never passed resolutions.

Mr. CASGRAIN: Resolutions have been passed but the matter was left in abeyance for a few years and brought forward again. I do not mean to suggest that we have studied it every year.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, gentlemen. It is now my pleasant duty to introduce Mr. Gordon Cooper to the committee.

Mr. Cooper was born in Saint John, New Brunswick, on December 11, 1908, was educated at King's College School, Windsor, Nova Scotia, Dalhousie University, B. Com. 1931, Rhodes Scholar from Nova Scotia in 1932, Oxford University, B.A. 1934, B.C.L. 1935. He is a partner of McInnes, Cooper and Robertson; Chairman, Board of Governors King's College School; member Rhodes Scholar Committee of Selection for Nova Scotia; read law with Lovett, Macdonald and McInnes; called to the Bar of Nova Scotia 1938; member Nova Scotia Barristers' Society; member of The Canadian Bar Association since 1938, Dominion Vice-President 1966-67.

That is a distinguished career, Mr. Cooper, and no doubt you have many years to add to that outstanding record.

Mr. McCLEAVE: May I say, Mr. Co-Chairman, I believe this gentleman's name is A. Gordon Cooper. Is that correct?

Mr. COOPER: That is correct.

The CO-CHAIRMAN (*Senator Roebuck*): Thank you, for the correction, Mr. McCleave. Ladies and gentlemen, Mr. Cooper.

Mr. A. Gordon Cooper, Q.C., Vice-President, The Canadian Bar Association: Mr. Chairman, I should like first of all to file a copy of the resolution, duly certified by Mr. Merriam, the Secretary, and ask, if this is in accord with your practice, that it be received and filed with the committee.

The CO-CHAIRMAN (*Senator Roebuck*): That will be done, Mr. Cooper. Will you read the brief?

Mr. COOPER: I should first like to read the Resolution. I believe that copies have been circulated, but I should nevertheless like to refresh your memories:

BE IT RESOLVED:

That the grounds for divorce in Canada be:

1. Adultery, sodomy or bestiality, or conviction upon a charge of rape;
2. Cruelty (as defined below);
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 oppresive 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. (*Definition of Cruelty*) 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.

BE IT FURTHER RESOLVED:

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:

(i) 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.

BE IT FURTHER RESOLVED:

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

This resolution was passed by The Canadian Bar Association at the 48th Annual Meeting on September 2, 1966.

In speaking to this resolution I wish first to bring to your attention and to the attention of the members of the committee the fact that the law relating to divorce, with a view to its reform, has been of concern to the Canadian Bar Association ever since the Association was first organized in 1914 and to review briefly resolutions passed and action taken by the Association up to the present year and, secondly, to deal with the events which have taken place in 1966 culminating in the passing of the resolution at the Annual Meeting of the Association in Winnipeg on September 2. That is the resolution which I have just read.

As long ago as 1914 a committee known as the Committee on Administration of Justice and Legal Procedure was named by the Association to consider appropriate subjects and areas of the law for study by the Association, and at the 1916 Annual Meeting the committee presented a report covering a number of matters including the question of divorce. In 1916, as is no doubt well known to the chairman and members of this committee, the Ontario courts had no jurisdiction in divorce, the jurisdiction of the courts of the three Western Provinces was in question and the result was that most divorces obtained in Canada had to be obtained by private Act of Parliament.

I may say by way of an aside that Nova Scotia passed the first divorce Act in 1758, and one of the causes for divorce under that statute was desertion without cause for three years, and in 1761 desertion was taken out of the statute, leaving two grounds, adultery and cruelty, which Nova Scotia has had ever since that time. It is the one jurisdiction in Canada where divorce can be obtained on the ground of cruelty.

The committee of which I have been speaking recommended in 1916, and I quote from the recommendation: "That a Court should be constituted in preference to the present costly and uncertain procedure"—that is, the procedure of getting private Acts of Parliament.

The committee reported further at the 1918 Annual Meeting and included in its report the following recommendation: "That the Parliament of Canada be requested to enact uniform grounds of divorce and the administration of the law be entrusted to Superior Provincial Courts, provided that this shall apply only to such provinces as pass acts putting the law into force."

A resolution in precisely the same language was placed before the meeting and after considerable discussion was adopted. It was re-affirmed in 1919.

Thereafter reports, recommendations and resolutions dealing with much the same subject matter, namely, a general statute setting out the grounds for divorce and conferring jurisdiction for its administration and urging enactment of such a statute came before the Annual Meeting of 1920, 1921 and 1928 and were respectively adopted and passed.

That, perhaps, is the first phase where the Association dealt with divorce. The next phase may be said to begin in 1944, because at the Annual Meeting specific grounds for divorce were set out in a recommendation contained in the report of the section on the administration of civil justice, namely, in addition to such grounds as exist for granting dissolution (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.

The report of the section, including the recommendation as to extended grounds for divorce, was adopted by the Annual Meeting.

Resolutions re-affirming these extended grounds were passed at the 1946 and 1947 Annual Meetings and it appears from the record of the Association that the 1946 resolution had been forwarded by the President to the then Minister of Justice and an acknowledgment was received from the Minister.

In 1951 the Annual Meeting by a narrow margin defeated a resolution extending the grounds for divorce to desertion without cause for at least three years, cruelty and incurable insanity requiring care and treatment for five years, but in 1954 a resolution was introduced again, and was passed, favouring such extensions. After a full debate a copy was forwarded to both the then Prime Minister and the then Minister of Justice. There is a long preamble to the resolution passed in 1954 and it sets out clearly matters of jurisdiction and other matters before the actually operative part of the resolution is reached, but I do not deem it necessary to read into the record the entire resolution.

The Association has therefore on many occasions prior to 1966 considered this question of divorce, which of necessity is somewhat contentious and for many years has been on record with the Government as favouring an extension of the grounds for divorce. That is the first part of what I have to say, speaking to the resolution.

I now turn to the events of 1966. Earlier this year we accepted, very gladly, an invitation to make representations to this committee, and in order to be certain that the views expressed to the committee would represent the current thinking of the Association, this whole subject was again considered.

Three of the provincial branches at their 1966 meetings passed resolutions in favour of extended grounds for divorce, namely, Ontario, British Columbia and New Brunswick.

I am not putting these resolutions before this committee because the Association, as the President has so truly said this afternoon, speaks with one voice, and the one voice of the Association in this matter is the resolution which I have read. The views therefore of the Association are contained in the resolution before you and I should like to refer to the steps preceding the passing of this resolution.

The Civil Justice Section of the Association organized a panel discussion which was held in Winnipeg on August 31, 1966, during the course of the Annual Meeting at which a resolution was presented in much the same terms as the resolution before you.

Those who had organized the panel considered it desirable to point up the discussion and give it impetus by actually introducing before those attending the panel a definite resolution. This panel consisted of Mrs. Dorothy McArton, Executive Director of the Family Bureau of Greater Winnipeg, a private family service agency functioning primarily in marriage counselling, a graduate in social work of the University of Toronto; Father Halpin, Vice-Chancellor of the Roman Catholic Archdiocese of Winnipeg, whose duties include the enforcement and instruction in the marriage laws of his Church within the diocese; Professor Julien Payne, Assistant Professor of Law at the University of Western Ontario and Editor of the most recent revision of *Power's The Law of Divorce in Canada;* and Mr. Douglas Fitch, a practising barister of Calgary. The Chairman of the panel was Mr. E. C. Leslie, Q.C., of Regina, a Past-President of the Association.

The discussion at that meeting was very full. Members of the panel put forward their views very clearly on the whole question of reform of the laws

relating to divorce, and there were many questions and comments from the floor, and amendments to the resolution were proposed. In the end the resolution before the panel was passed.

Following that panel discussion the resolution so passed went forward to the Annual Meeting of members held on September 2. It was there fully debated and subsequently passed with an amendment to the first ground of divorce and an amendment in one other particular.

I should mention that at that Annual Meeting at which the resolution was passed there were approximately 250 members of the Association present. The resolution passed—the Secretary will correct me if I am wrong, but I do not think I am—by a large majority.

I can confidently say, after all the discussion that has taken place, the actions by provincial branches, and so on, that the subject has been thoroughly canvassed by the Association, and this resolution can be put forward with every confidence as representing the considered views of the Association.

I have before me transcripts of the discussion of the Annual Meeting at which the resolution was finally passed. There was a very full debate there despite the fact that there had preceded it the exhaustive discussion in the panel.

I might refer again briefly to the resolution:

BE IT RESOLVED:

That the grounds for divorce in Canada be:

1. Adultery, sodomy or bestiality, or conviction upon a charge of rape.

Some expression of opinion was given to the effect that sodomy or bestiality would come within the definition of cruelty in any event, and that it was unnecessary to set it out specifically. However, it was felt that in the interest of clarity, even if there were some repetition, or an expression of specific grounds which were included in a general ground, nevertheless those specific grounds should be set out in Section 1.

The Co-CHAIRMAN (*Senator Roebuck*): May we ask questions as we go along?

Mr. COOPER: Certainly.

The Co-CHAIRMAN (*Senator Roebuck*): Sodomy and bestiality are included in the causes or grounds for divorce in the act that was passed giving the Courts of Ontario the power of dissolution.

Mr. COOPER: The 1930 act?

The Co-CHAIRMAN (*Senator Roebuck*): Yes; and we have always considered them within the range of our jurisdiction in Parliament. And conviction upon a charge of rape, and adultery: we have always considered these within our jurisdiction.

Mr. COOPER: There was some discussion on the question of conviction upon a charge of rape. I mentioned that the resolution was amended in two particulars when it got to the Annual Meeting. The resolution in the panel discussion concerned adultery, sodomy or bestiality; or conviction upon a charge of rape" now appears. It was thought that the wording should be changed to appear, as it now does in fact appear, "or conviction upon a charge of rape".

The Co-CHAIRMAN (*Senator Roebuck*): I should point out that what I said covered Ontario and perhaps some of the other provinces, perhaps not.

Mr. COOPER: I think I am correct in saying that was also the thought of a good many people present at the meeting.

Mr. PETERS: Suppose a woman is raped and the man is convicted. Does this give her husband the right to divorce on the basis that the rape has established the commission of adultery, notwithstanding that it was involuntary?

Mr. COOPER: What is intended in ground No. 1 by "conviction upon a charge of rape" is conviction of the husband on a charge of rape of somebody other than the spouse.

Mr. PETERS: If you put in "conviction," when it comes into court it becomes a public matter and raises problems and there is apparently no way of protecting a female if she is the injured party.

The CO-CHAIRMAN (*Senator Roebuck*): A woman has never yet been convicted of rape.

Mr. PETERS No; but the man is convicted and the woman is named. Is it adultery then?

Mr. COOPER: I don't know that I get the point.

Mr. WAHN: Would attempted rape, incest and homosexuality be additional grounds?

Mr. COOPER: Not under the heading of No. 1.

Mr. WAHN: I should think that attempted rape would fall into the same classification as rape. If divorce is granted on the ground of rape it should be granted on the ground of attempted rape.

Mr. COOPER: I am not prepared to say that the resolution supported that proposition. I can only go as far as the resolution went—conviction upon a charge of rape.

Mr. STANBURY: Would it not seem reasonable to qualify the ground "conviction upon a charge of rape" by saying, "after the time allotted for appeal"? The conviction might be reversed.

Mr. COOPER: I do not think there would be a practical difficulty if the conviction on the charge of rape were under appeal.

Mr. STANBURY: Have you discussed the question whether or not there should be some qualification?

Mr. COOPER: No.

The CO-CHAIRMAN (*Senator Roebuck*): This says conviction upon a charge. Would that exclude the possibility of a petition supported by all the evidence of rape on the part of the defendant, though the matter has never gone to court and there has been no conviction notwithstanding that there is evidence of the intention?

Mr. COOPER: Under the wording of the first ground, conviction is what would be required where rape is involved.

The CO-CHAIRMAN (*Senator Roebuck*): If a circumstance of that kind had come before the committee when we were hearing cases we would have considered it adultery and granted a divorce.

Mr. COOPER: That might well be with something falling short of rape.

The CO-CHAIRMAN (*Senator Roebuck*): Something falling short of conviction might fall with the term adultery.

Mr. MCCLEAVE: On a point of order: The witness earlier mentioned a transcript of proceedings where they had discussed these grounds. I wonder if the Bar would be kind enough to leave it with the Steering Committee. We were given authority to select certain documents that would be helpful, which could be printed as an appendix. This would be most helpful to us in our deliberations.

The CO-CHAIRMAN (*Senator* Roebuck): Was a record kept?

Mr. COOPER: A record was kept of the panel discussion and we have Minutes of the Annual Meeting at which the Resolution was passed. I defer to the Secretary in this matter but, with respect, I do not think we would want to have printed as part of the record of this committee the names of those who spoke at the meeting of the Association expressing their views.

Mr. CASGRAIN: It was part of the proceedings of the Annual Meeting where the debate took place and I think it can be put at your disposal. The book has not yet been printed but we will furnish an advance copy.

Mr. MCCLEAVE: It is a public document, as I understand. Every year the Bar prints the proceedings, and places and names are mentioned.

Mr. Ronald C. Merriam, Q.C., Secretary, the Canadian Bar Association: We like to keep our counsel, but this question went to the Annual Meeting and the proceedings will appear in due course in the booklet that has been referred to, and if we can be of assistance by taking out that part of the discussion relating to divorce we shall be happy to do so.

Mr. CASGRAIN: We will not wait until the book is printed; we will give it to you at once.

Mr. PETERS: Does this include the panel discussion?

Mr. MERRIAM: No.

Mr. PETERS: It would be interesting.

Mr. MERRIAM: You would not get anything more out of the panel discussion than appeared at the full meeting of 250 members. You will find interesting information there.

(*See Appendix "6"*)

Mr. BREWIN: I wanted to ask Mr. Cooper— if this is the proper time to ask general questions—whether the Bar Association considered the rather interesting suggestions put forward by a committee appointed by the Archbishop of Canterbury recently.

The CO-CHAIRMAN (*Senator Roebuck*): May I ask, Mr. Brewin, that that question be deferred until we reach No. 4?

Mr. BREWIN: Yes.

Mr. COOPER: The next ground is cruelty, the definition of which has been given in the resolution. It was felt that it would be preferable to do this than to leave the matter to the common law to determine what cruelty is.

The CO-CHAIRMAN (*Senator Roebuck*): Will you discuss the definition?

Mr. MCCLEAVE: What was the source of the definition? Was it drawn up by a committee at the time or did it come from a decided case?

Mr. COOPER: I cannot answer that accurately. I understand that it is the definition that is used in some jurisdictions with respect to matters of judicial separation, but I would not like to be held to any particular source because I do not know.

Senator FERGUSSON: Under "cruelty," Mr. Cooper, you mentioned the practice in Nova Scotia. You said that Nova Scotia is the only province in which divorce is granted on the ground of cruelty. Are many divorces granted on that ground in Nova Scotia?

Mr. COOPER: I cannot give statistics but I may say there are more and more as the years go on, whereas fifteen or twenty years ago they were very infrequent. They are increasing but I cannot give you statistics as to actual numbers.

Senator FERGUSSON: On one occasion I asked this question in the Divorce Committee of the Senate and a senator from Nova Scotia investigated and came

back with the information that, though it was in the law, up to that time there had been only one case in which divorce had been granted on that ground.

Mr. COOPER: I don't know how long ago that would be.

The CO-CHAIRMAN (*Senator Roebuck*): Can you answer the specific question whether or not the number of cases has increased in modern times?

Mr. MCCLEAVE: It has. There used to be about two or three a year twenty years ago; now it is several dozen a year.

Mr. PETERS: Is there a tendency in Nova Scotia today towards accepting in the courts cruelty of a nature other than physical? Is there any laxity in the enforcement of the provision with respect to physical cruelty?

Mr. COOPER: I have not had personal experience in the past few years in reported cases, but I have had cases on the ground of cruelty, and I do not wish to express opinions which Mr. McCleave might know are ill-founded. He may have more information on that point than I.

The CO-CHAIRMAN (*Senator Roebuck*): Could you let us know later on whether this definition of cruelty comes from some authoritative source or whether it was drawn by the Bar Association as their own invention?

Mr. COOPER: That information, sir, can be supplied, I am sure.

The CO-CHAIRMAN (*Senator Roebuck*): I have no more questions.

Mr. COOPER: The next ground is desertion without just cause for a period of three years immediately preceding commencement of the proceedings. There was a suggestion that it should be five years; on the other hand it was contended that three years was too long; in the end, however, three years was settled upon as being the appropriate period.

Mr. STANBURY: Would imprisonment for an extended period following conviction in a case other than rape be deemed a ground? I do not see in the resolution anything under which that might fall. My question arises out of the possibility of your placing conviction on a charge of rape above conviction in consequence of some other offence as a reason for the dissolution of marriage.

Mr. COOPER: There was some discussion, but frankly I cannot recall how it went. However, it will appear in the transcript. Perhaps the Secretary can remember where I do not, but I believe a discussion did take place on that point.

Mr. STANBURY: Was there a discussion as to conviction for other offences?

Mr. COOPER: Imprisonment but not a discussion of specific offences.

Mr. STANBURY: You did not include as a ground imprisonment for any particular length of time? Is it intended that that should fall within this ground as desertion without just cause?

Mr. COOPER: I cannot say specifically whether that was intended to fall within this provision.

Mr. STANBURY: Can you say it was not intended?

Mr. COOPER: I believe the Secretary wishes to address himself to this question.

Mr. MERRIAM: My recollection of the discussion surrounding this particular point is this. There are two objections to it, according to the views expressed, one being that it is the sort of thing that conceivably could lend itself to abuse by the wife. One of our eminent judges, who took part in the discussion, raised this very question. He said it would be a simple thing in certain instances for a woman who was looking for a divorce to railroad, or almost to railroad, her husband into a criminal charge.

A second point—and this became a social question—was that if the wife, on her husband's conviction, automatically obtained the right to divorce, it might

make the rehabilitation of that criminal ten times as difficult, in fact almost impossible. For these reasons they felt it would be unwise, certainly at this stage, to recommend that this be an additional ground for divorce.

Mr. BREWIN: I consider the social aspect a very important one. I have great respect for Mr. Stanbury, but surely conviction on a charge of rape is there from the point of view of evidence and not because social policy is involved. The conviction is evidence and on the strength of that evidence the marriage is broken up. It is dangerous to become involved in terms of imprisonment or, for that point of view, to equate murder, for example, with rape.

Mr. STANBURY: I am trying to get information. I suggest that the inclusion of rape is perhaps not the question. I am still concerned about whether or not a term of imprisonment for any time has been considered sufficient to serve as a ground for divorce. If a man has to serve twenty years, is this to be considered a ground for divorce? You have dealt with the question of conviction for rape. Do I take it that imprisonment for any length of time is not *per se* considered a ground for divorce?

Mr. MERRIAM: No.

The CO-CHAIRMAN (*Senator Roebuck*): My information is that imprisonment was one of the causes passed by the Commons in England and thrown out by the Lords on the ground that has been mentioned just now—that it would render rehabilitation more difficult. Furthermore, the time pronounced by the judge in passing sentence is not the final word: the Crown still has the power of pardon, together with ticket of leave.

Mr. WAHN: Should not habitual criminality be a ground for divorce? It would seem to be a logical principle.

Mr. COOPER: That is not one of the grounds set out in the resolution.

The CO-CHAIRMAN (*Senator Roebuck*): Do you know whether habitual criminality was considered?

Mr. COOPER: The question of habitual criminality was not specifically considered, to the best of my recollection.

The CO-CHAIRMAN (*Senator Roebuck*): Mr. Brewin, you had a question to ask. Do you wish to ask it under No. 4?

Mr. BREWIN: Actually, Mr. Chairman, my question relates to something broader than just 4. As I understand it, the gist of the proposal which was put forward by this committee in England, which included many distinguished lawyers, was to substitute for the idea of individual matrimonial offences the concept of factors contributing to the breakdown of the marriage. This broadens the question. For a single act of adultery might well not produce the breakdown of a marriage, and there might still be reasonable hope of rehabilitation; on the other hand, there are many acts such as voluntary separation without any reasonable likelihood of the resumption of cohabitation which would certainly come within the concept of a breakdown of marriage.

In the various suggestions here there is much that is reminiscent of the recommendations of the committee to which I have referred: for example, the requirement about satisfactory arrangements in regard to the children of the marriage, and making condonation and collusion not absolute bars. If in actual fact the marriage has broken down, the court has to determine the question and then the decree is made.

It is a new concept and, I think, an extremely interesting one, and I wonder whether your committee, Mr. Cooper, has been able to direct its mind to that, which is an alternative to the idea of the individual ground and the particular offence. It gets away from the guilty party concept, which is an artificial one. Has your committee given any thought to that?

Mr. COOPER: In the panel discussion to which I have referred there was reference to the marriage-offence basis for divorce as opposed to the marriage-breakdown concept of which Mr. Brewin has spoken. In the end the membership was not prepared to adopt the marriage-breakdown concept, and it may well be that the resolution, when related to these two ideas, is somewhat of a hybrid.

The reference that Mr. Brewin has made to such a marriage is interesting in that an amendment was made to that section of the resolution when the committee got into the General Meeting, having regard to every child of the marriage and to the family.

There may be children in relation to whom the parties stand *in loco parentis,* and it was felt, as it was in England, that such children also should be protected. That, as I see it, is another aspect of the marriage-breakdown as opposed to the mere marriage-offence concept.

I can only say that there two concepts were discussed, and I have mentioned Mr. Fitch as a member of the panel. He particularly dealt with it in the course of the panel discussion.

The social worker Mrs. McArton, who spoke clearly, put the welfare of the children, as would naturally be expected, ahead of the mere act—or perhaps I should say an isolated act—of adultery. There again, perhaps, that smacks of the marriage-breakdown concept rather than the marriage-offence concept.

Mr. CANTIN: On the question of children and family was there any discussion on the panel with a view to reconciling Article 185 of the Quebec Civil Code and this new concept?

Mr. COOPER: No, there was not; Article 185 of the Quebec Civil Code was not referred to. The Secretary has just brought to my attention a passage from a discussion with Professor Payne during the course of the panel dealing with the question of cruelty. For the purpose of the record I will mention it now.

> Professor PAYNE: Could I have one further comment, Mr. Chairman, and I'll try and restrain myself. The point was made from the floor earlier that the definition of cruelty set out in the memorandum is too vague. This definition broadly corresponds to cruelty as defined in Saskatchewan and Alberta for purposes of remedy in cases of judicial separation or alimony. If it is too nebulous in the context of divorce, then presumably it is also too nebulous in the context of judicial separation or alimony. I think it works in the Provinces of Alberta and Saskatchewan, and it can work if it were introduced as a ground for divorce in Canada.

Mr. MACEWAN: May I ask Mr. Cooper a question in regard to ground No. 4, with special reference to the second paragraph, which reads: "the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse". Could you go into that in a little more detail, Mr. Cooper, and indicate what you mean as far as the wife is concerned? Has that any reference to alimony?

Mr. COOPER: I could not go into detail on that without getting into the realm of personal views. I do not recall any specific discussion to which I can point dealing particularly with 4 (ii) as representing the consensus of the Association. I cannot at the moment give you an answer to your question as representing the views of the Association. I do not know whether the President or the Secretary can add to what I have said.

Mr. CASGRAIN: As Mr. Cooper has said, it is difficult for a witness to answer every question you put because, when a witness undertakes to answer a question, he must be careful not to leave the impression that he is speaking for the Association unless he has authority to do so or to present a resolution and explain it. We are always faced with questions with respect to which we have to be careful to distinguish between giving our own opinion and giving the con-

sidered view of the Association. We must be careful in our statements and it is for that reason that Mr. Cooper may seem somewhat diffident at times.

The CO-CHAIRMAN (*Senator Roebuck*): There is no prohibition against giving your personal views and if you make it clear that they are your own views you have avoided any difficulties.

Mr. COOPER: All I can add to what I have already said is that I understand this 4 (ii) comes from the English report, which I believe is the report that has already been referred to as the Archbishop of Canterbury's.

Senator FERGUSSON: On the matter of children, could Mr. Cooper tell us whether the committee gave consideration to the question of establishing as a ground for divorce on the part of the wife the fact that there has been persistent failure by the husband and father to provide for the support of the family?

Mr. COOPER: No. There was no specific consideration given to the advisability of introducing the non-support of children as one of the grounds for divorce.

Mr. MCCLEAVE: I have two questions on section 4. I hold the very strong opinion that in section 4 lies the only hope of cutting out the fabricated divorce case in our courts. Would you agree with me in that assessment?

Mr. COOPER: Expressing a personal view, I would agree with you.

Mr. MCCLEAVE: My second point is this. Since No. 4 seems to be getting rather close to the marriage-breakdown theory that has developed in modern times, did the Asssociation give any thought to a possibly unique type of approach, and that is that both parties should have the right to petition. In other words, we get away from the marriage-fault concept, so that the parties could not go around afterwards saying he divorced her or she divorced him. That would not happen under this type of approach.

Mr. COOPER: That was not specifically considered. There was some discussion, and perhaps some fear expressed, that we might in the end have divorce by consent. But there again I am drawing on my personal recollection. The consensus of the meeting was that we were not prepared to go to the extent of divorce by consent. I believe that is virtually, if not actually, the situation in New York State at the moment, or their latest statute leads to that; but there is no thought here that we wish to go that far.

Mr. STANBURY: I understand Mr. McCleave to be suggesting that petition might be made by both parties, and by the simple fact that petition is made by both parties, consent is given. But consent is not a ground for divorce.

Mr. MCCLEAVE: The ground is the voluntary separation.

Mr. STANBURY: The matter might be put in issue by both parties and an independent arbiter decide whether or not there was ground for dissolution. But that is hardly divorce by consent.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, shall we go on to No. 5?

Mr. COOPER: No. 5 reads: "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." I have no particular comment with respect to ground No. 5.

Mr. MCCLEAVE: Usually a rider has been placed in this type of ground as to institutional care. Did the Bar decide that care and treatment could be other than in an institution?

Mr. COOPER: I do not recall any mention specifically of the word institution or any discussion around it.

Mr. STANBURY: Was any attempt made to distinguish rehabilitation of a patient in a mental institution from treatment of someone in a penal institution?

Mr. COOPER: There was discussion as to the progress being made in the treatment of people in mental institutions, but in the end, after that discussion, this particular provision No. 5 was passed.

Mr. MCCLEAVE: I believe it is a medical fact that 98 per cent of cures occur in the five-year period and after that you can almost give a person up as being incurable.

Mr. COOPER: The sixth ground is wilful refusal to consummate the marriage.

The CO-CHAIRMAN (*Senator Roebuck*): The law has been administering for some years the provision with respect to the inability of one or other of the spouses to consummate the marriage; but wilful refusal to consummate is another matter. There is a leading case in England where two students got married and decided—it was by mutual consent—that they would not consummate the marriage until after their graduation. After graduation they came and asked for an annulment on the ground that the marriage had not been consummated and the Court said: No; that was a voluntary matter.

We have carefully refrained from declaring nullity except when the failure to consummate was due to the inability of one or the other to consummate; not because they wilfully refused to do so.

Mr. PETERS: Under No. 4 there is a time limit of three years immediately preceding the commencement of proceedings. But all, one party has to do is to say, "I am not interested," and it does not need time. This is not wilful refusal. There is no time limit. It could be by agreement.

The CO-CHAIRMAN (*Senator Roebuck*): As long as it is wilful. Was that considered, Mr. Cooper? Was it intended to widen the grounds for nullity?

Mr. COOPER: There was no extended discussion on that particular ground and all I can do is merely to repeat the words "wilful refusal," which as I understand them mean deliberate, intended refusal to consummate.

Mr. STANBURY: As I understand Mr. Peters, he is saying that according to the present wording of the resolution the wilful refusal might be for a week, a month or a year, which could be more serious than separation or desertion for three years, and there seems to be no immediate limit in the definition.

Mr. PETERS: A man might say, "I will not sleep with my wife any more, period" and she might agree: "I won't let you anyway".

The CO-CHAIRMAN (*Senator Roebuck*): We had a case where a man was married and immediately on leaving the church he kissed his wife good-bye and took ship for Europe, and we held it was not wilful but was due rather to the fact that he was crazy. We granted the annulment.

Mr. WAHN: Was declaration of death considered?

Mr. COOPER: It was discussed. It was referred to—let us put it that way—but not included.

Mr. WAHN: Was there any reason for not including it?

Mr. COOPER: I cannot recall the conclusion.

The CO-CHAIRMAN (*Senator Roebuck*): We have considered a number of grounds recommended by the Bar Association. Was alcoholism, habitual drunkenness, considered?

Mr. COOPER: No, except in so far as habitual drunkenness might fall under the definition of cruelty.

The CO-CHAIRMAN (*Senator Roebuck*): They might live apart for a number of years.

Mr. PETERS: Was any consideration given to the matter of domicile?

Mr. COOPER: It was thought, in the rather slight discussion that took place on this point, that this question was one that might very well be left in abeyance for the time being. I think I am safe in saying that the general feeling was that we had gone fairly fully into the extended grounds that have been set out here and did not wish at this point to deal extensively with the question of domicile, and so it was not included.

The CO-CHAIRMAN (*Senator Roebuck*): Are there any further questions arising out of the resolution?

Mr. STANBURY: Was there any reference in this matter to the resolution of 1919 with respect to common grounds in all the provinces?

Mr. COOPER: The constitutional aspects were not discussed, certainly to my knowledge and recollection. Personally, I do not think that there would be difficulty constitutionally in the passage of this legislation. I should think jurisdiction could be given the Superior Courts of the provinces.

Mr. STANBURY: I think the practice has been that Parliament has legislated requesting the provinces, and I notice you did seem to recognize this as constitutional practice, but you are not suggesting that there should be any legislation in this field, which awaits the opting in of the province, or that there is any difficulty constitutionally in simply establishing common grounds across the country unilaterally by the Parliament of Canada?

Mr. COOPER: This is a resolution dealing, not perhaps entirely but almost entirely, with the extension of grounds for divorce, and it is not intended to be a draft statute.

Mr. STANBURY: There was no rejection of any provision such as that contained in the resolution of 1919?

Mr. COOPER: There was no rejection.

The CO-CHAIRMAN (*Senator Roebuck*): There are further matters in your brief, Mr. Cooper. Could you cover them now?

Mr. COOPER: There is this, Mr. Chairman; though I thought I had read it, there is no harm done in reading it again:

> BE IT FURTHER RESOLVED:
>
> 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 16 years that:
>
> (i) Arrangements for the care and upbringing of such child have been made and are satisfactory or are the best that can be divised in the circumstances.

That follows the English legislation and it was thought proper to be included.

The CO-CHAIRMAN (*Senator Roebuck*): It is not the practice of the courts there, as of our courts here, and the Parliamentary Court, just as it is expressed in this resolution?

Mr. COOPER: I cannot answer for all the provinces. All I can say is: it was felt that the interests of the children are very vital to the matter of divorce and therefore any statute that might be passed on divorce should contain such a provision.

The CO-CHAIRMAN (*Senator Roebuck*): In any divorce we have granted in Parliament in many years now we have never overlooked the welfare of the children, and on every occasion we have gone into that phase of the matter.

Mr. COOPER: I am quite aware that there are lawyers here from Ontario who know more about this than I do and they can correct me if I am wrong, but

I believe steps have been taken recently in this province towards this end through the Official Guardian. There was mention in discussion at the Annual Meeting that there was some difficulty with respect to the Official Guardians Office to deal adequately with the subject. But I speak, of course, not from any knowledge at first hand on this point.

The CO-CHAIRMAN (*Senator Roebuck*): I do not think there is much room for argument.

Mr. WAHN: Was any consideration given in the discussion to preventing hasty divorce and providing for reconciliation through marriage counsel?

Mr. COOPER: There was discussion of the point.

Mr. WAHN: There is a provision in England that there shall not be divorce, except under very unusual circumstances, in the first three years of the marriage.

Mr. COOPER: There was discussion of the suggestion that there should be no divorce in the first three years, but that suggested provision was rejected—or, let me say, not adopted.

Mr. WAHN: Was any reason given for the rejection of it? I understand it is in the English statute.

Mr. COOPER: I cannot recall the specific reasons. The general purport of the discussion on that point was that within the three years there might be compelling reasons for divorce: However, I cannot say that I am quoting the exact words of the discussion.

Mr. PETERS: Was there any discussion on the constitutional aspect of whether the changes which it is suggested should be implemented by the Dominion would constitute substantive legislation, with enabling legislation from the provinces. Was there any constitutional argument as to whether this involved rights in respect of ancillary problem—children, property, alimony?

Mr. COOPER: There was no discussion of the constitutionality of such a statute.

The CO-CHAIRMAN *(Senator Roebuck)*: There are two problems that arise out of the question Mr. Peters has asked. In fact, he has asked two questions: one is whether a decree of separation *a mensa et thoro* is included in the words of the British North America Act in connection with marriage and divorce; and the second is whether these matters of alimony, division of property and perhaps some other things are ancillary to divorce. I may inform the committee that I have written to the Attorneys General of both Manitoba and Ontario asking for their advice on this question and I am fairly sure we shall have an exhaustive memorandum from both Attorneys General.

Mr. MCCLEAVE: We hope they agree in their opinions.

The CO-CHAIRMAN *(Senator Roebuck)*: Perhaps that is too much to ask for. Thank you, Mr. Cooper. Now we must hear a word from Mr. Ronald Merriam. Lawyers here will be interested to know that Mr. Merriam practised in the City of Ottawa until 1962 when he became full-time Secretary of the Canadian Bar Association. Mr. Merriam graduated from Queen's University in arts and from Osgoode Hall in law and is a member of the Law Society of Upper Canada. I have pleasure in welcoming him.

Mr. MERRIAM: In view of the fact that Mr. Casgrain and Mr. Cooper have thoroughly covered the subjects that have been discussed, I do not propose to add anything to what they have said. I simply wish to thank the committee for allowing me to be here this afternoon.

Mr. McCLEAVE: Mr. Merriam, you have attended Annual Meetings of the Association over a long period of time. Is it a fair assessment that the attitude of this conservative segment of society is changing rapidly?

Mr. BREWIN: Not as conservative as some might think.

Mr. MERRIAM: There is a noticeable change in its attitude. Certainly the discussion in Winnipeg in the last year was very different and much more sympathetic in its recognition of the almost essential need for an extension of grounds for divorce, or amendments to out laws of divorce.

Mr. CASGRAIN: It is the consensus of members of all provinces that divorce is necessary.

Mr. McCLEAVE: Perhaps I tread on dangerous ground, and if so I apologise to you in advance. Previously there has been some religious feeling mixed in with the opinions held by priests. Is it disappearing?

Mr. CASGRAIN: I think it is true, since the teachings of the Roman Catholic Church are now quite clear that we live in a pluralistic society and no religion can impose its laws on people of other religious creeds.

The CO-CHAIRMAN (*Senator Roebuck*): May I ask my Co-Chairman to express the sentiments of us all.

The CO-CHAIRMAN (*Mr. Cameron*): I am sure Mr. Casgrain, the President of the Canadian Bar Association, Mr. Cooper, the Vice-President, and Mr. Merriam, the Secretary, appreciate the response that their presentation has met with. The applause that marked the close of Mr. Cooper's brief was fully justified.

May I say that the justice and legal affairs Committee of the Commons enjoyed the same privilege of having these distinguished gentlemen appear before them to explain a certain resolution pertinent to a matter which was referred to that committee. We did benefit, and we shall continue to benefit, from their advice, which came to us with the authority with which they spoke.

They have presented their resolution and have given the background of it, and that resolution was carried by the Canadian Bar Association. It gives one a great feeling of confidence to know that when we come to a decision we shall have benefited from the wisdon of men like the President of the Canadian Bar Association, Mr. Casgrain, the Dominion Vice-President, Mr. Cooper, and the Secretary, Mr. Merriam.

On behalf of the committee I wish to express to these three gentlemen our appreciation, and our thanks, for the discharge of what is really a public duty.

The CO-CHAIRMAN (*Senator Roebuck*): I think that concludes our work for this day.

The committee adjourned.

APPENDIX "6"

THE CANADIAN BAR ASSOCIATION

Transcript of the discussion which took place on Friday, September 2nd, 1966 during the 1966 Annual Meeting of the Association in Winnipeg, Manitoba on the subject of Divorce.

Chairman: J. T. Weir, Q.C., LL.D., President of the Canadian Bar Association, 1965-66.

The CHAIRMAN: The second resolution, is on the topic of divorce reform. Again, it needs no mover or seconder and I think it had better be read.

"BE IT RESOLVED that the grounds for divorce in Canada be:

1. Adultery, rape, sodomy and bestiality;

2. Cruelty (as defined below);

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.

Definition of Cruelty

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.

BE IT FURTHER RESOLVED that no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the family who is under the age of sixteen that:

(i) 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, or,

(ii) it is impracticable for the party or parties appearing before the Court to make any such arrangements.

BE IT FURTHER RESOLVED that the defences of condonation and collusion constitute discretionary and not absolute bars to matrimonial relief."

And I'm going to number these for the purpose of discussion: the grounds as 1, the definition of cruelty as 2, the arrangement for the children as 3 and the reference to collusion and condonation as 4, for the purposes of discussion. Now, does anyone wish to speak to the resolution?

From the FLOOR: Mr. President, may I ask a question, please? If my recollection is correct, in Banff in 1957 there was a similar resolution hotly

debated by some very senior and respected members of this Association and I think it may have been passed. I wonder if the chairman of the Civil Justice Section would tell us to what extent this resolution goes beyond the 1957 one.

The CHAIRMAN: I think, actually, the year was '54, that's our recollection.

T. C. WAKELING: The first item that we have here of adultery has of course always been standard and wasn't in that resolution. The reference to cruelty was in that previous resolution but there was no definition given for it and it would therefore probably have been the common law definition of cruelty which I understand has been worked out in some of the cases in such provinces as Ontario. Desertion was included in the 1954 resolution and also included the same period of three years as you see in this resolution. Item 4, under voluntary separation, was not included in The Canadian Bar Association resolution of '54. Item 6 on incurable unsoundness of mind was included—I'm sorry, item 6, wilful refusal, was not included. Going further, there was not included the definition of cruelty nor were the other two items that you see as to arrangements for the children or condonation or collusion included in the previous resolution. It was very short. It simply had a lengthy preamble and then said we think the grounds should be cruelty, desertion, incurable unsoundness of mind—should be extended to those fields.

From the FLOOR: I would like to ask the speaker if there was any reference to rape?

Mr. WAKELING: No, there was not.

From the FLOOR: And now, might I ask the speaker why there's any necessity for that now?

Mr. WAKELING: My only answer is that I understand rape, sodomy and bestiality are now grounds for a wife's petition and I think the answer is that we're just trying to make it abundantly clear, I suppose; there's probably no need to say adultery either—it's grounds now.

The CHAIRMAN: I think the problem, certainly my problem, is I don't know how rape can be committed between husband and wife, unless this is talking about rape of some third party, and I think that's it. It seems to me that's it. Would you qualify what the intention of the resolution is? Are we talking about something between the parties themselves or are you talking about a third party raping the wife and that being a cause for divorce?

Mr. WAKELING: I am not the draftsman of the resolution and, unfortunately, one of the draftsmen has had to leave and the other one is on T.V. at the moment, so that I have that difficulty and when we discussed it at our meeting of the Civil Justice Section, the point was not raised so I can't be too effective on this point.

From the FLOOR: Mr. Chairman, may we be told, please, though, since we weren't at the meeting of the Civil Justice Section, to what extent this was discussed, how many people were at the meeting and the approximate result of the vote which put this forward so that we'll at least have the advantage of knowing how extensively it was discussed and what was the opinion of those who discussed it.

Mr. WAKELING: I'd be very pleased to. As a matter of act, it was my original intention to try to give an outline as to how this arose to this point. I'll be as brief as I can but the Province of Ontario had a sub-committee working on divorce reform over the past few years and resulted in the bringing forth of a resolution at the mid-winter meeting of the Law Society of Upper Canada, which resolution was duly passed and—

The CHAIRMAN: I'm sorry, Mr. Wakeling. For accuracy, it was the provincial Branch, of course.

Mr. WAKELING; i'm sorry, the provincial Branch. It was passed in not just this form but I could go on to tell you later just in what fashion it varies. It appeared desirable that we have a program on this matter and the desirability was principally on the fact that there was the establishment of the Joint Committee of the Senate and House of Commons to go into the matter of divorce reform. When it became known that we intended to have a panel on this, following the discussions that had taken place at the Ontario Branch meeting, it was made known to me that probably it would be best if a resolution arose from this panel discussion because there had not been a voice of The Canadian Bar Association in the form of a resolution since 1954 and the committee had been formed to hear the voices of all organizations that wanted to be heard and it seemed reasonable and natural that we should be one of those. So it was requested of the legal members of this panel—Mr. Douglas Fitch of Calgary and Mr. Julian Payne of London, Ontario—that they draw up a form of resolution which they felt would be reasonably acceptable to the Canadian Bar and which would serve as a focal point for the discussions of those at the panel.

I think it's fair to say that there is a considerable body of opinion which would favor a marriage breakdown concept, which this is not. I think it would be fair to say, however, that most of those who also have considered the marriage breakdown concept are those who are most interested in the subject and have done the most research on it but they feel that it is a little bit far out at the moment in that the Canadian research has probably not reached a point where we could say that The Canadian Bar Association could go in favor of a marriage breakdown concept, and this, therefore, is somewhat of a hybrid; I don't think it represents the true wishes of those members of the panel who brought forward this resolution but they support it in general as being the most forward-looking resolution they felt could probably be properly passed by The Canadian Bar Association.

Now, at the meeting itself I didn't take a count of noses but perhaps there were 50 in attendance. During the discussion which took place, I think while it wasn't discussed point by point (that is there was a social worker, a priest of the Catholic Church and two lawyers on the panel—Mr. Leslie was chairman) it wasn't discussed point by point but was discussed in a very general way. There were a few amendments that came forward. In paragraph 3, under desertion, there was an amendment that it be changed from three to five years. This amendment was defeated; I think it was felt that three years was long enough or should be a reasonable period for desertion but five would perhaps be more of a penalty and an inhibiting factor. There was a second amendment brought forward on paragraph 5 under the heading of incurable unsoundness of mind and they felt that it should be cut off right after the word "mind"; simply "an incurable unsoundness of mind" and it leaves all the other bit of five years and so on out of it, on the basis that science has reached a point that they no longer need five years to know whether there is incurable unsoundness of mind. That was defeated. And I think it's fair to say that some of these were defeated by a fairly narrow margin. There was another amendment to paragraph 5 which suggested that we acknowledge the fact that unsoundness of mind is only one part of a disease factor and we shouldn't separate it as giving it special consideration and that, therefore, anybody who had an incurable disease which incapacitated him or her would be a grounds for divorce by his or her spouse. This was soundly defeated. There was another amendment suggesting that there be no divorce for the first three years. This was following Australia's procedure; this was defeated. And the resolution then put, with all the amendments having been defeated, it was carried virtually unanimously.

Now, the Ontario one does not contain the definition of cruelty—the one passed at the Mid-Winter meeting that I referred to—does not give a definition

of cruelty. It did not contain the last two parts. The one on the bottom of page 1 is one that the social welfare people particularly endorse because they feel that it is the tendency of lawyers and courts to give too little concern to the third party that enters into divorce proceedings; namely, the child. On page 2, the matter of condonation and collusion, it was felt that condonation as it now stands hampers reconciliation and the panel were firmly of the opinion that reconciliation is the positive part of matters pertaining to divorce, which is being overlooked and ignored largely and collusion, because it is not clear in the minds of many what collusion consists of, may also be somewhat of a bar to reconciliation because we're not sure whether some items that are collusion are not also condonation.

This, therefore, I think is the summary of what took place and the general statements that were made at the Civil Justice Section meeting.

SYDNEY PERLMUTTER: With respect to the second page, I was wondering why no reference was made to the third "c"; namely, connivance. Personally, I would prefer to see connivance and collusion remaining absolute bars to the granting of divorce and that, I think, would pretty well take care of the question with respect to rape which was mentioned earlier.

Mr. WAKELING: Well, I think it was felt that connivance should remain an absolute bar. My understanding of it is that the parties simply devise the means to come before the court and these are simply to be made clear that they are discretionary bars so the court will have a right to look into those aspects of it and will not be compelled to throw out something that—a divorce that might otherwise be granted.

The CHAIRMAN: Was it your suggestion that you proposed an amendment to strike "collusion" from it or not?

Mr. PERLMUTTER: Yes. I would so move to that effect.

The CHAIRMAN: Just to take out the words "and collusion" in the last paragraph? Anyone second that amendment?

R. C. BRAY: I second it.

The CHAIRMAN: Thank you, Mr. Bray.

From the FLOOR: May I speak to the amendment?

The CHAIRMAN: Yes, sir.

From the FLOOR: I just wonder why, instead of striking out "collusion", you wouldn't put in "connivance" because I would have thought, if you look at item 4, you could say that there was connivance every time that happened because it looks to me like they agree to live apart for three years.

The CHAIRMAN: I didn't—well, I shouldn't say what I think "connivance" means but do you want to amend it again?

From the FLOOR: No, I was just hopeful that the amendment would be defeated.

The CHAIRMAN: All right, that's fine. The other microphone, please.

JOHN P. PALMER, Q.C.: I think it should be said, Mr. Chairman, that this discussion of divorce is particularly important, with the Joint Committee of the Senate and House of Commons of Canada convening for the first time in many years to consider divorce and I understand that they have asked this Association for a submission as to the grounds for divorce. Is this correct?

The CHAIRMAN: Yes. We've had the regular invitation letter.

Mr. PALMER: And that is why I feel it is most important that this resolution be given every possible thought and consideration if it is going to go forward. I feel, as regards the first ground, that the word "rape" is entirely inappropriate. Does that mean that a wife who has been raped is to be divorced?

The CHAIRMAN: As I understand it, no one is defining the word "rape", not even the chairman of the Section, so we could take an amendment from you now that that be removed.

Mr. PALMER: I go beyond that, Mr. Chairman. The word "sodomy" is a word of ill-defined meaning and having discussed this problem in New Brunswick—I was on a committee there—the wording which we came up with was largely derived from the new New York State statute and ground 1—I would move that this be amended to read as follows: "Any act of normal or deviate sexual intercourse—

The CHAIRMAN: Sorry, could I have your words again?

Any act of what?

Mr. PALMER: "Of normal or deviate sexual intercourse voluntarily participated in by the spouse with another person or with an animal."

The CHAIRMAN: This is in substitution for "Adultery" is it? If I understand your amendment, it's to take out all of item 1 and substitute the words you've suggested and I'm going to read them to see that I've written them down correctly: "Any act of normal or deviate sexual intercourse entered into voluntarily with another person or an animal." Have I got it down correctly?

Mr. PALMER: Yes.

The CHAIRMAN: All right, just a minute, just a minute. We must have order. Do you have a seconder? There is a seconder from New Brunswick, will he give us his name?

FREDERICK S. TAYLOR: My name is Taylor and I come from the same place as Mr. Palmer.

The CHAIRMAN: Mr. Taylor seconds the amendment. Mr. Freeze, did you want to speak?

Ralph St. J. FREEZE, Q.C.: Mr. President, I think when we discussed it in New Brunswick, I think we had two or three extra words there, "with a person other than the spouse".

The CHAIRMAN: All I can say is, Mr. Freeze, if this is passed, I'm going to be fortunate not to be the president who has to explain it to the Minister of Justice.

Mr. FREEZE: As I understand it now, to have normal intercourse with your wife, the way it was stated a moment ago, this would be grounds, and it wasn't clarified. I don't think the words were there to clarify it, "with a person other than the spouse".

Mr. PALMER: I accept Mr. Freeze's change. I haven't got our final wording with me here just now.

Mr. WAKELING: Mr. Chairman, may I just clarify, I think for the sake of those who drafted it, that this was never intended to be the last draft of the legislation on the subject. It's supposed to give in substance what we're trying to suggest be the stand of the Canadian Bar Association and we wouldn't really expect—there might be places throughout this where you would want the final draft to submit to legislation somewhat different.

The CHAIRMAN: I think we appreciate that but I think there is a substantial difference between the acts of adultery, sodomy and bestiality and words like "deviate sexual intercourse" and such. I do suggest the amendment has substance, Mr. Wakeling. It's not just wording, this is not just wording. There is certainly some difference in the principle being stated; therefore I think it has to be put to the meeting. Is there any other comment on the whole matter of the resolution? Yes?

From the FLOOR: I'd like to bring one point up. I think that the discussion of "deviate sexual intercourse" would probably fall into the definition of

cruelty, of any conduct that is grossly insulting and intolerable. I believe that was discussed at the section meeting. I say that for what it's worth.

The CHAIRMAN: Thank you. Yes, Mr. Moore?

E. L. MOORE: The briefest possible comment. I was at the discussion and, as I recall it, that item was passed over as being declaratory in the present law in most provinces of Canada. I think therefore—

The CHAIRMAN: Let me put it this way: I know of no provinces where rape is matrimonial offence.

Mr. MOORE: I agree, Mr. Chairman, but this was the way it was passed.

The CHAIRMAN: I see. Right. Thank you. Yes, Dean Leal?

H. ALLAN LEAL, Q.C., LL.D.: I recognize, Mr. Chairman, that this is a hard act to follow but I'm really here in an effort to get some information on a point raised by Mr. Wakeling. I thought he said, during his able discussion of this resolution by the Civil Justice Section, that they had rejected the principle of marriage breakdown and yet I found it extremely difficult to see how that coincides with item No. 4 in what you, sir, have described as the first part of this resolution. I think it is normally conceded that the dichotomy here is between marital offences or faults as they are sometimes called in matrimonial matters on the one hand and marriage breakdown on the other. I would have thought—and this probably is no more than to tell the outside world that we really do know what we're talking about—I would have thought that item No. 4 deals with marriage breakdown and, if that is to be included, maybe we ought to think about it in those terms because it is a substantial extension of the existing grounds.

The CHAIRMAN: Thank you, Dean Leal.

G. R. D. GOULET: Mr. Chairman, I have a suggestion on how to put this thing into proper form: after the word "Be" in the first line, put "broadened to include" and then delete item No. 1. I think that would solve the problem.

The CHAIRMAN: I'm sorry. Would you mind repeating that? I don't think I was able to follow it.

Mr. GOULET: My suggestion was that the resolution be amended to read: "Be it resolved that the grounds for divorce in Canada be amended to include the following" and then delete "Adultery, rape, sodomy and bestiality" and carry on from there.

The CHAIRMAN: So the key word is "amended".

From the FLOOR: Mr. Chairman, could I suggest that perhaps we view the grounds separately as they are numbered paragraphs right through?

The CHAIRMAN: Well, I have no objection to that but I think I have to let anyone who wishes to speak to the whole matter first deal with it.

A. E. BROTMAN, Q.C.: I am vitally interested in this question and I, just at the present time, wanted to make an appeal to those who are proposing amendments, I serve the right to speak on the main resolution a little later, if you don't mind.

The CHAIRMAN: No, sir, I'm sorry. At the moment, I think I must ask you to take your opportunity to speak on either or both parts. I don't think I can hear anyone twice until we have exhausted the discussion with everyone who wants to speak on it.

Mr. BROTMAN: I'll follow your direction.

A. R. MICAY, Q.C.: May I make a suggestion, Mr. Chairman? It seems obvious to me that what is meant by No. 1 is not suspicion but proof of a conviction of rape.

The CHAIRMAN: All right, well, you can discuss that with the gentleman that's moved the amendment.

Mr. BROTMAN: Mr. Chairman, ladies and gentlemen: I want to point out—I'm a lawyer from Winnipeg, Province of Manitoba—that Manitoba is operating under a divorce law that's older than Confederation. The law in force in Manitoba is the law of 1857, that's nine years older than Confederation, and that there is a strong movement for reform in the divorce law and this is why I am going to speak in favor of the resolution. Directing myself to those moving amendments, I would like to point out to you that there are four or five hundred lawyers in this hall who could give four or five hundred amendments. Now, this has been drafted by the committee that studied it and, if accepted by the Government, the Legislative Counsel of the Government will study it and I think we're going to lose a lot of time and perhaps not make any progress today in a matter vital to thousands of people throughout Canada. The lawyers, as well as parliament, have engaged themselves in debate about the abolition of the death penalty that may apply to four, five or six murderers per annum throughout Canada but here we have a subject affecting thousands of people and it's time that this Association took a stand.

Now, in appealing to these movers, I am doing so with the hope of trying to get something passed here and, therefore, if we're going to lose time in drafting and in asking questions that perhaps most of us should know or the answers to these questions, we lose a lot of time. Now, a friend right behind me pointed out that No. 1 is declaratory of the law. This is not introducing any law. As Mr. Micay just pointed out, it should read: "conviction for rape" but the petitioner would—that is a ground for suing at the present time but the petitioner would have to prove a little more than conviction and therefore this really should read "conviction for rape" though I'm discouraging amendments. The other ones, sodomy and bestiality, I think are right in The Matrimonial Act of 1857, so that we're not passing anything new in No. 1. In No. 1, we're not passing anything new at all. It is declaratory as my friend here has said.

Now, the other new grounds: cruelty, desertion, incurable unsoundness of mind, these grounds have been accepted in England. They've been accepted in Australia. They're in force in the United States and I want to add this, that Canada is the most backward in its legislation relating to law in the whole English-speaking and French-speaking world, the most backward in every part of the British Commonwealth. Therefore, we as an Association should take cognizance of this and support the heads of the Government. I think the Government will want to do something progressive in this and there have been some objections in this Association, perhaps 20 or 25 years ago, to any amendments of the divorce law but I see progress has been made and I'm very much strongly in favor of this progress.

Now, the other part at the bottom there from somebody who wanted to devise a resolution dealing with arrangements regarding the children, this is something absolutely new and, while it looks fine on the surface, still I wouldn't like it to interfere with the other part of the resolution adding the grounds of cruelty and desertion. The committee has studied voluntary separation. This is something new to me but I accept it. Therefore, Mr. Chairman and members, I urge you most strongly to deal on the matter of principle. Are we in principle in favor of extending the grounds for divorce? If we are, we should pass this resolution today and I appeal to my brother lawyers not to get too technical and try and pass on the grounds of divorce and satisfy this crying need for thousands of Canadians.

From the FLOOR: Mr. Chairman, I just want to comment on that. Although Manitoba has a relatively modern statute of 1857 under which it operates, in the Maritime Provinces the statutes date back to about 1790 and, unfortunately, sodomy and bestiality are not grounds in New Brunswick or Nova Scotia.

The CHAIRMAN: Mr. Deschênes, yes.

Jules DESCHÊNES, Q.C.: Coming from Montreal, Mr. Chairman, and accordingly from the Province of Quebec where we have no divorce courts, I might say that I am still more ignorant of these matters than my New Brunswick friends. Dealing, nevertheless, Mr. President, with the principle of the resolution, there are two points I would very much like to make. The first one is that this resolution in certain quarters, and especially in the province where I come from, might appear to raise certain difficult questions. I would like to make it clear, in plain and simple words, that quite irrespective of personal convictions of those members of the Bar who share my religious Roman Catholic convictions, nevertheless it is now our feeling that, in view of the pluralistic state of the society in which we are living, this is no ground for any of us to try and impose upon anyone else convictions which are not shared outside of our Church, and accordingly, I for my part will not register a vote against this resolution because of this particular ground. However, this is my second point, I feel, Mr. President, that paragraph 4 of this resolution, quite irrespective of any question of moral conviction, is—

The CHAIRMAN: Mr. Deschênes, can I interrupt just to say this: because I appreciate that there must be all sorts and shades of opinion in this room about the definition of cruelty, about the voluntary separation aspects, I propose, as the chairman, when we come to vote, to put the resolution before you in the parts that I think represent the shades of opinion, so it is not necessary to have a series of amendments saying "Strike out 3" or something of this kind, just to avoid—

Mr. DESCHÊNES: Will we have a chance of saying why such a paragraph should be struck off, Mr. President?

The CHAIRMAN: I think I'd like you to say that now.

Mr. DESCHÊNES: The reason why I would suggest that paragraph 4 be deleted is that, as I was on the point of saying, I think that this paragraph is bringing us dangerously close to divorce by mutual consent.

FROM THE FLOOR: That's the original No. 4?

Mr. DESCHÊNES: Well I'm speaking about the text which has just been distributed, No. 4 being the one which begins with the words "Voluntary separation of the husband and wife", and I submit respectfully, Mr. President, that whatever our moral convictions are aside from this paragraph and on the balance of the resolution, we should not import into our Canadian law, divorce by consent. I do heartfully share the views expressed by Dean Leal a moment ago and I would, since he has not done so, make it a formal motion that paragraph 4 be deleted.

The CHAIRMAN: Well, as I say, because of the way the resolution will be put, I don't need to receive your formal motion.

Mr. LEAL: Mr. President, a point of order. I was not speaking for or against divorce by consent. I was simply seeking clarification and perhaps Mr. Wakeling would be disposed to answer my question if in fact the committee felt that paragraph 4, as it appears on the sheet that I have and the worthy vice-president from Quebec, is in fact in their view marriage breakdown or, to put it the other way, divorce by consent delayed for three years.

The CHAIRMAN: I don't know whether Mr. Wakeling cares to answer that. I would permit him a second or two to answer it if he cares to.

Mr. WAKELING: I would only say that I mentioned this was a bit of a hybrid. Those who had formed it would perhaps be said to be favoring a marriage breakdown concept. If you take that entirely, you don't have any grounds for divorce, you simply recognize that the marriage has failed and society should no longer require them to live together. We don't think we're at a point where we can endorse that. We think we have taken some parts of that and put it into the

grounds for divorce. We've suggested that, if the family had broken down, that the marriage is broken down and it is not likely to be reconciled and it's carried on for three years, this should be accepted as a grounds for divorce. We think that the Association might be prepared to go that far and we hope they will.

B. M. PAULIN: Mr. Chairman, may I speak to this resolution?

The CHAIRMAN: Yes.

Mr. PAULIN: I wish to speak, sir, to the first paragraph or the first branch of it dealing with the adultery, rape and the other points. It's been suggested by some members that this first branch of the resolution is declaratory of the law and nothing else but I respectfully submit that the law is not the same from one jurisdiction to the next. There are pre-Confederation statues and there are shades of differences and the amendment which has been moved to this first branch of the resolution has not met with the solemnity which the importance of the resolution really deserves. I would move a further amendment in order to clarify the fact that, if this Association does pass this resolution and if it does come before the authorities in Ottawa, that they'll be able to look at it and see what we as an Association mean. I think it would be a mistake to leave it to the judges to say as the cases come before them what these different grounds actually mean and I therefore move, sir, that the first branch of the amendment —of the resolution be amended to read: "Adultery or conviction upon a charge of rape, sodomy or bestiality".

FROM THE FLOOR: Mr. Chairman.

The CHAIRMAN: Yes? Is there a seconder for that?

FROM THE FLOOR: I'll second that.

The CHAIRMAN: Thank you.

E. H. S. PIPER, Q. C.: Mr. Chairman, in view of all the amendments that have been forthcoming on this resolution, would it be possible, sir, that perhaps, the Chairman of the Civil Justice Section and the Resolutions Committee get together and see if, perhaps, this whole subject can be reworded and resubmitted to us tomorrow morning.

The CHAIRMAN: Mr. Piper, that doesn't seem to have found much favor with the meeting. Do you want me to put it to a resolution?

J. F. O'SULLIVAN: Mr. Chairman, I had not intended to speak on this subject but, when Mr. Deschênes expressed his point of view that there ought not to be dissent to the resolution, I feel it necessary to record some dissent.

The CHAIRMAN: I think, in fairness to Mr. Deschênes, I don't think he did suggest there should not be dissent. He suggested there should not be dissent on purely religious grounds because of the feelings of Roman Catholics in respect to divorce.

Mr. O'SULLIVAN: Mr. Chairman, with respect, for well over a hundred years, our society in Canada has respected and safeguarded the institution of Christian marriage and Christian marriage means a union between husband and wife which is indissoluble except, as many Christians believe, on the grounds of adultery. Now, that institution has been protected by our law and the proposal here is to take away from that institution the safeguards of our divorce law. It may be that, in a pluralistic society, we ought to have a personal law according to the various groups in the country and their ideas of what marriage should be but I should think there are many in the country who would deplore the taking away of the safeguards, that parliament and the law now give to this institution, by recognizing a form of marriage insolubility. I regret very much that we should be supporting a resolution to take away the safeguard and substitute for it the safeguarding of a form of marriage which is not Christian marriage, which is a form of marriage that the movers of the resolution think ought to be preferred.

The CHAIRMAN: Thank you. Again, I'll mention the fact to those who are clustered around the doorway, that there are seats in the front which are certainly sufficient to accommodate them.

FROM THE FLOOR: With all due respect to Mr. O'Sullivan, I don't quite understand how a hundred years of a law being in the statute book makes it valid. I also do not see how the passing of a new law will force any man to live differently than his convictions. I don't see why a Christian who believes that there should only be divorce by adultery, on the grounds of adultery rather, will have to go out—I don't see anywhere here where it says that a man will have to go out and get a divorce on a three-year separation. For his own personal life, he can still only seek divorce on the grounds of adultery or, if such convictions drive him, he can eliminate divorce completely from his own personal life. I don't see how a law in the statute book could force everybody in a pluralistic society not to live according to his convictions.

The CHAIRMAN: Thank you.

P. L. BEAUBIEN: Mr. Chairman, I am prompted to rise to my feet in view of the remarks of Mr. O'Sullivan. I think it should be said, for the record, that the Decree of Religious Liberties took the position that it be not for the state to impose—it is not for the state to impose the religious convictions of one church on the rest of society. The Bishops of New York have said that they will not oppose divorce reforms. The Cardinal Archbishop of Boston said exactly the same thing and the Cardinal Archbishop of Montreal said the same thing and I intend to support this resolution.

P. G. FURLONG: I'd like to oppose Mr. Paulin's amendment. I don't think he intends this to go that far but I wouldn't want any suggestion—anyone to take an inference that this Association was suggesting that we would have to have a conviction for rape before that type of adultery could be a ground for divorce. I think adultery is included in rape whether there is a conviction or not.

With respect to the definition of cruelty, I'm not debating the merits of this but I don't know what the definition means. It says, "any conduct that in the opinion of the Court is grossly insulting and intolerable". Personally, I think that is much too broad and too open to very general interpretation. There's no suggestion whether the conduct should extend over a minimum period of time, or whether it has to be on one occasion. I don't know what it means, Mr. Chairman. I'm not opposed to it but I don't know what this cruelty means.

The CHAIRMAN: Thank you.

Mr. PAULIN: A point of order, Mr. Chairman.

The CHAIRMAN: Yes, we can't refuse a point of order. Go ahead.

Mr. PAULIN: With regard to what Mr. Furlong has just said concerning the amendment I proposed to the first branch of the resolution, in my respectful submission, conviction upon a charge of rape, sodomy or bestiality of course would not be upon one's spouse and Mr. President, in my submission, if sodomy or bestiality is practised on a spouse, clearly, in my submission, that is within the definition of cruelty as it now stands in the resolution.

The CHAIRMAN: Well, you're only confusing me, sir. You moved an amendment. Are you withdrawing it or—

Mr. PAULIN: Not at all, sir. I'm just speaking to the point which my friend, Mr. Furlong, raised.

FROM THE FLOOR: Mr. Chairman, I don't do very much domestic relations law but in fact I happen to have procured a divorce which was heard in camera by Chief Justice McRuer in Ontario upon grounds of sodomy by the husband with another male. I suggest that this amendment requiring a conviction, would require that wife to have prosecuted her husband and obtained a conviction?

There's no reason why you shouldn't be able to prove an act of sodomy in a civil action through the courts, the same as you always have.

The CHAIRMAN: Further comment? Are you ready that we should deal with the resolution? Well, this is going to present a problem to the chair and I hope those who feel I am maybe not dividing it in the right places will make their objection known before the vote but it would seem to me that the most direct amendment that we have to face is the one proposed with reference to No. 1 and that is that the document be amended to read: "Be it resolved that the further grounds for divorce in Canada be" and then drop to No. 2 and leave 1 out altogether. Now, that is the amendment I took from—I'm afraid I've forgotten the gentleman's name, in the back of the room, and I think it is the most, on this first branch, the most devastating and therefore I will put it first. I think it changes the whole resolution and therefore has to be put as the first amendment. Now, the question therefore is—. Mr. Lawson?

D. J. LAWSON, Q. C.: Mr. Chairman, I wonder if you could inform the meeting, if this is either defeated or passed, what the next resolution will be to be put before the meeting.

The CHAIRMAN: The next resolution to be put before the meeting, I think, would be that of Mr. Paulin, conviction on a charge of rape, sodomy or bestiality. I think that is the least change in the next section, if that order is satisfactory to you.

FROM THE FLOOR: Mr. Chairman, would you permit an amendment to have No. 1 read "Adultery, proof of a conviction for rape or sodomy and bestiality" because I'm not familiar with any rape that isn't also adultery and I think this just deals with the question.

FROM THE FLOOR: If a woman is raped, she isn't committing adultery.

FROM THE FLOOR: She's not committing rape, either.

FROM THE FLOOR: No, but there would be no one guilty and so proof of a conviction would enable the innocent wife to get a divorce on the basis of the conviction.

The CHAIRMAN: I'll receive that and come to it in due course. Now, the first amendment I'm putting to you is the one that we literally strike out No. 1 and leave the common law to deal with that, or the varying laws of the provinces to deal with that point. Those in favor of the first amendment? Contrary? Carried. My apologies—let the record say "lost".

The second amendment, then, I think may become—it's less than the other one of Mr. Micay's, that is that the first item read: "Adultery, conviction for rape, sodomy and bestiality".

Mr. PAULIN: That is my resolution, Mr. Chairman. An amendment was proposed to it a moment ago. I think it was "Adultery, sodomy or bestiality or conviction for rape". Was that the amendment? I will withdraw my motion in favor of the one that was just made.

The CHAIRMAN: Well, just a minute. Mr Micay, just follow with me. That's just a change in the order of the words. Let's put it clearly: "Adultery, sodomy and bestiality or conviction for rape"?

FROM THE FLOOR: That should be sodomy *or* bestiality or conviction for rape.

The CHAIRMAN: All right. Change the "and" to "or". All right, now are we clear on what we're voting on? This is to make item 1 of the resolution the words just suggested, "Adultery, or sodomy or bestiality or conviction for rape". Those in favor? Contrary? I declare the resolution carried.

Now, in view of that, I think I still have to put a complete alternative set of language which was put forward by the mover from New Brunswick who was going to give me a piece of paper with it on. Have you been able to do that? I

appreciate that this is not as regular as it should be but I think I have to give you the choices because it was put forward at the same time.

FROM THE FLOOR: Unless he wishes to withdraw it.

The CHAIRMAN: Well, I was inviting that but he hasn't seen fit to do so.

Mr. PALMER: I think it's a preferable language. I'm still fighting over what "sodomy" and "bestiality" are. I'm not an expert on them.

The CHAIRMAN: Well, do you want me to put it to the meeting? Yes. Now, in substitution for 1 as it's just been developed, the words: "Adultery"—now will you follow me, Mr. Palmer, because I don't have your note—"Adultery or any act of normal" sorry, it just begins: "Any act of normal or deviate sexual intercourse voluntarily participated in with a person or an animal".

From the FLOOR: "Person other than the spouse".

The CHAIRMAN: "Other than the spouse, or an animal". I'll put the question. Those in favor of that substitution for item 1 as we've enacted it? Contrary? I declare that lost.

I think that deals with all the amendments to No. 1. Now, item 2 I think has to be put in two bases: one, cruelty as we know it, the common law concept of cruelty or, alternatively, cruelty as defined in whole paragraph 2 under the Definition of Cruelty. In view of the fact this comes to us as the resolution first, I'll put that first, that the resolution read: "Cruelty as defined below" with the definition that's before you and then, alternatively, I will put simply the word "cruelty" giving it its common law definition. Those in favour of the drafted definition of cruelty? Contrary? I declare that substituted and I don't think there's any point in putting the second alternative.

The third, "Desertion without just cause for a period of three years immediately preceding commencement of proceedings". So far as I am aware, I have no amendment to this paragraph. Those in favor of item 3? Contrary? I declare item 3 carried.

Item 4, there's no amendment proposed but there is obviously a difference of opinion on this. I put it in its form and the words are the grounds for divorce be "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 resumption of cohabitation, and

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

Those in favor of that fourth ground for divorce? Contrary? I think I better have a count. Would you mind lowering your hands. Would those in favor of that ground please raise their hands and Mr. Hunt, would you act as the teller on the left hand side of the aisle, and Mr. DuMoulin, would you act as the teller on the right hand side of the aisle. The negative, please. I declare the motion carried.

Then, No. 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." Those in favor of putting in No. 5? Contrary? I declare that carried.

Six, "Wilful refusal to consummate the marriage." Those in favor? Contrary. I declare that portion carried.

I don't need to deal with the definition of cruelty. You've already voted on that. I drop down to the paragraph that begins "Be it further resolved" down to the word "arrangements" at the bottom of the page: "Be it further resolved that no decree of divorce shall issue unless and until the Court is satisfied as respects every child of the family who is under the age of sixteen that:

(i) 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, or,

(ii) it is impracticable for the party or parties appearing before the Court to make any such arrangements."

From the FLOOR: Mr. Chairman, before you put that, we're walking into a trap. In England, there is a rule—it appeared in the "All England" about four years ago. Judges have ordered that no more decrees absolute will be given where the solicitor has failed to plead whether or not there are children of the family. I wrote immediately to the solicitor to ask him what he meant by children of a family and I said, "Do you mean in counter-distinction to the children of a marriage?" and he said, "Yes, we find in England there are, say, three children of the marriage and there's the little brother of one of the spouse or a child in whom they have got into the position of being in loco parentis." The judges have found that they have dealt with the custody and maintenance of the little ones who were children of the marriage and didn't know about the little one who was a child of the family within the English meaning and that poor little fellow is left to wait, and the judges of England have said, "If you don't plead, in addition to children of the marriage, what about children of the family, you don't get any decree absolute". So I changed my pleadings and after saying that there are three children of the marriage, I say there are no other children of the family. So, sir, if we try to keep close to the British law, English law, let us be clear. Are we talking about children of the marriage or are we talking about children of the family in the English sense?

The CHAIRMAN: I'm sorry, I don't get your point. Are you suggesting we should amend it to read "child of the marriage" or are you suggesting—

From the FLOOR: I'd like it abundantly clear. I'd like to say "every child of the marriage" and "every child of the family".

The CHAIRMAN: Do you want to put an amendment—let me see if I understand you—so that in the third line it will read: "every child of the marriage and of the family" who is under sixteen?

From the FLOOR: Because, sir, I intend to go to the Government of Alberta and get the Domestic Relations Act amended if I can, to include that. The late Judge Egbert asked me to do it and I have not done it yet.

The CHAIRMAN: Have you a seconder for your amendment? Mr. Osler seconds it. Therefore, the first issue to go before you is whether part 3, beginning "be it further" down to "arrangements", be amended in the third line to read "of the marriage and" so that line will read "every child of the marriage and of the family".

L. P. PIGEON, Q.C,: It should be "or".

From the FLOOR: No, "and".

Mr. PIGEON: Because the children of the marriage are children of the family, so it should be "or".

John H. OSLER, Q.C.: I don't think the meaning can be mistaken if we put them both in. It could be mistaken if we just left it.

The CHAIRMAN: All right. The mover, do you want "and" or "or"? "Of the marriage and of the family" or "Of the marriage or of the family"?

From the FLOOR: And.

The CHAIRMAN: Now, those in favor of the amendment recognizing that then, if the amendment is made, I will put the whole subject as amended or as not amended. Those in favor of adding the words "the marriage and of the

family"? Contrary? I declare the section amended. Now, I'll put the section. I'm not going to read it again. It begins: "Be it further resolved that no decree of divorce" down to the word "arrangements" at the end of sub-part ii. Those—Yes Mr. Diplock?

D. D. DIPLOCK, Q.C.: Mr. President, I recognize that the drafting is not necessarily rigid but I do want to point out that, as it stands, the way I read it, the resolution now says, "Be it further resolved that no decree of divorce shall issue unless" the Court is satisfied that it is impracticable for the parties appearing before the Court to make any such arrangements which I don't think was what the draftsmen intended.

The CHAIRMAN: What did they intend? You tell me.

Mr. DIPLOCK: Probably the intention would be satisfied if the judge of the Court were satisfied that arrangements or proper arrangements for the care and upbringing of such child are satisfactory. I would like to see it just so that that were effective.

The CHAIRMAN: Now, what do you want to do? Do you want to take out ii or do you want to amend sub-ii.

Mr. DIPLOCK: I want to take out ii and adjust the thing by amendment so that, following the word "that" and the colon, we have "satisfactory arrangements for the care and upbringing of such child have been made".

The CHAIRMAN: "Satisfactory arrangements for the care and upbringing of the child have been made."

Mr. DIPLOCK: And that's all. It may be that that's what it says but I don't like resolutions coming forward to this body—

The CHAIRMAN: All right, I think I understand your amendment. That's all I can do. Now, the suggestion is that the whole clause be amended now to strike out all words after the word "made" in the second line of sub-one so that—and I'd better read it all: "Be it further resolved 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 that satisfactory arrangements for the care and upbringing of such child have been made." The motion is to strike out everything after that word "made".

From the FLOOR: Mr. Chairman: I think that instead of striking that out we continue one paragraph, sub-paragraph, "devised in the circumstances unless it be impracticable for the party or parties appearing before the Court to make any such arrangements".

The CHAIRMAN: And then you're just adding the word "unless". I'll take that as a separate amendment.

From the FLOOR: "Unless it be" I think would be the proper wording.

The CHAIRMAN: All right. I'll try that. Do you have a seconder?

From the FLOOR: I was wondering if the maker of that last resolution would be prepared to insert the word "financially" before the word "impracticable".

The CHAIRMAN: I doubt if he is. We haven't got a seconder yet. Is there a seconder for that motion?

From the FLOOR: I second.

The CHAIRMAN: Thank you. All right, now I'll put the first of these two amendments.

From the FLOOR: May I speak to the amendment?

The CHAIRMAN: Yes, you may.

From the FLOOR: Just briefly. Harking back to the session that took place in this room the other day, Professor Payne, who I take it was responsible for

this part, said he obtained this wording which we have before us from the Australian statute and the last part, he explains, contemplates the case where the wife is the petitioner and the husband is either in a position or of a mind that he cannot or will not make arrangements and she is in no position to make them.

From the FLOOR: Mr. President, may I speak against the amendment?

The CHAIRMAN: Yes.

From the FLOOR: It seems clear to me that it may be that arrangements for the care and upbringing of such child cannot be made by other parties or by the parties to the proposed divorce. It merely is a time factor and let's put it on that ground. It also may very well be that it is impracticable for the parties themselves to make such arrangements but this should not be a reason for delaying the divorce. I think the wording here is what they intend and what we all intend, except perhaps the amender.

From the FLOOR: Mr. Chairman, I feel that the amendment is completely inconsistent with divorce on the grounds of insanity where one of the parties is incarcerated perhaps in a cell, or inconsistent with desertion and I move against it.

CHARLES D. GONTHIER: Mr. Chairman, I'd like to support the amendment. I feel that the children have as much, if not more, right to be taken care of as the consorts. They are the prime purposes of the marriage and they have been brought into the world and they are entitled to be cared for, whether it be the fathers themselves who care for them personally or whether they get the assistance of state authorities, yet they have a responsibility and that should be a condition of the divorce. It is up to them or society to provide for these children and, as parents of the children, they have a prime responsibility, if they can't attend to these matters themselves, to see that someone else does.

The CHAIRMAN: Thank you, Mr. Gonthier. Are we ready for the question? And the question is that the clause, part 3 end with the word "made" in the first sub-section. Mr. Diplock's amendment. Those in favor? Contrary? I declare that amendment lost.

The second amendment I don't think was seconded so I don't need to put it.

From the FLOOR: It was.

The CHAIRMAN: Was it seconded? All right, I'm sorry. Then I must put it. The second amendment is that the numbering be taken out of the sub-two clauses and that it read: "are satisfactory and are the best that can be devised in the circumstances unless it be impracticable for the party or parties appearing before the Court to make any such arrangements." Does everybody follow the amendment?

From the FLOOR: No.

The CHAIRMAN: I'm sorry, I'll read it again.

From the FLOOR: I heard it, sir, but I don't understand it.

The CHAIRMAN: The question is, am I putting it to you in the language that it was suggested to me, not whether it appeals to you or not. All right, Mr. Trivett, I think, is entitled to speak.

W. L. S. TRIVETT: Mr. Chairman, does "arrangements" then not come to mean strictly arrangements between the parties, which was not meant by this committee?

The CHAIRMAN: I can't answer that, sir. Are you ready for the question? Those in favor of this amendment to take out the numbering and put in "unless it be" impracticable? Those in favor? Contrary? I declare that amendment lost.

Now, I put the whole section with only one amendment to it and that is the words "the marriage and", therefore going from "Be it further resolved" down to "arrangements".

JOHN H. OSLER, Q.C.: Before you do that. Im afraid I may be very stupid but I'm not satisfied that we are all happy about how it now reads. It seems to me, if you will receive it, it would be a useful amendment to take out the part ii because, whether or not it's impracticable for the parties to do it, somebody has to do it. A divorce should not be permitted if the Court is not satisfied that somebody has made these arrangements.

The CHAIRMAN: All right, Mr. Osler. That's another variation and I'm prepared to put it. This is a further proposed amendment, assuming you have a seconder, I think you have in Mr. Pigeon, that the words—now the section read, beginning with "Be it further resolved that no decree of divorce" down to the word "circumstances" and the words "or", "ii" and all that follow it be struck out. Is that clear? Those in favor of that amendment? Contrary? We'll have to have a count. I'm sorry. Those in favor of the amendment? Would the tellers please count? I must confess I think, since I asked for a count, maybe the lateness of the day has caused some people to change their minds. I'll now declare it carried.

Now, the last clause of this section and there's one amendment to it, that the words "and collusion" be taken out. I'm sorry, Mr. Osler, are you drawing my attention to the fact that the subject matter of page 1 is different from the subject matter of page 2?

Mr. OSLER: No, no, the resolution as amended has not yet been put the way you've been putting the other ones.

The CHAIRMAN: Oh, I'm sorry. Thank you for drawing it to my attention. Therefore, I put number 3—the third part, as amended so that it has the words "the marriage and" in and ends with the word "circumstances". Those in favor of that clause? Contrary? I declare it carried.

Then, turning to page 2 I think I have only one amendment and that was the words "and collusion" come out of the second line so it is "Be it further resolved that the defences of condonation and collusion constitute discretionary and not absolute bars . . ." and you will appreciate, whether you take it out or leave it in, I will still put the whole clause, amended or unamended, to you. Those in favor of taking out the words "and collusion"? Contrary? They remain in.

Then I put the whole clause, "the defences of condonation and collusion". Those in favor of introducing this section of the resolution? Contrary? I declare part 4 carried. That ends the consideration of that item.

APPENDIX "7"

PRIVATE BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by

RICHARD B. HOLDEN, Barrister & Solicitor,
360 St. James Street West,
MONTREAL 1, Quebec.

A. *Procedure:*

It is submitted that the procedure to obtain a parliamentary divorce for residents of Quebec and Newfoundland is overly complicated and too expensive. All of the forms should be shortened and simplified and the filing fee reduced to $100.00. If the respondent cannot be located, service through the newspapers should be permitted. Publication in the Canada Gazette could also be dropped except where personal service cannot be effected.

B. *Grounds:*

The following grounds, if alleged and proved, should be sufficient for the granting of a divorce decree:

(1) Legal separation pursuant to a judgment two years after the date thereof.

(2) Insanity, alcoholism, desertion and/or imprisonment provided it has continued for a period of 2 years.

(3) Adultery.

In connection with paragraph (2) there must be a physical separation of the parties for at least one (1) year.

C. *Alimony and Costs:*

If constitutionally possible, the Federal Commissioner (in his discretion), should have the power to order the payment of alimony and costs against the guilty party. He should also have some authority in the realm of custody where no provincial court of agency has ruled on this matter.

Respectfully submitted.

MONTREAL, this 21st day of June, 1966

APPENDIX "8"

PRIVATE BRIEF TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE

by

VICTOR LA ROCHELLE, L.S.C., C.A., Lic. ès Sc.
535 Grande-Allee East, QUEBEC (4), Que.

Honourable Members of the Committee:

In the following memorandum I will make some suggestions which could concur to the betterment of laws on divorce. I shall divide the present paper into three (3) parts:

(a) My personal experience;

(b) General principles on nullity of marriage and divorce;

(c) Recommendations drawn from (A) with modern or present tendencies;

(d) Exhibits.

(A) *MY PERSONAL EXPERIENCE:*

At the age of 36 on May 2nd 1951 I got married. The spouse had then 21 years of age. I had to earn my studies because my parents, who had fourteen children, were financially poor. The marriage was broken by the spouse 89 days after its origin and *thirty* days after the return of wedding.

That marriage which was forced on me happened too quickly. While I was practicing my profession as a Chartered Accountant and a Licensed Trustee I was overburdened by my work which is particularly important at the end of April and must satisfy the fiscal requirements. My family suggests me to abandon the daughter of a carpenter and to marry the daughter of a lawyer who became Judge some time after the beginning of my frequentations with that lady. For the spouse's family who was without any financial ressources that marriage was a monetary transaction. That girl was in love with another man.

The spouse knew also that I didn't love her at the time of the marriage and that I planned to return to my former friend. The girl tried everything to hasten and conclude the marriage.

Before the engagement the bride's mother hasten to Montreal and bought all the trousseau for her daughter. She fixed the date of the marriage. Seeing my hesitations the family made me known that I would be sued if I broke the engagement :"that would be funny if Victor broke the engagement, we would have to sue him."[1]

Other facts briefly described prove that it was *A Money Transaction* for the bride.

The marriage contract prepared by the father who was a lawyer mentions that the wedding gifts of the two spouses would belong to *"Mademoiselle"* the future bride.

B) The father who had a sick heart insisted to cancel half of his insurance contracts, contrary to the logic and advices of insurance companies.

C) The bride after having obtained jewels for more than $2,200.00, a wedding trip to Europe, at her return to Canada consult often her Doctor Gynecologist to ascertain that she was pregnant and the very day when she knew it definitely I received an action in separation.

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[1] Mentioned at the file of the religious Tribunal as mentioned at the testimony of the mother's spouse. Page 77.

My furniture was seized. It was evaluated at $6,000.00 and was given to her by marriage contract. She insisted however through her lawyer to obtain not the furniture itself but the $5,000 dollar price representing its evaluation.

D) She seized at the issuance date an amount of $5,000.00 which has been given to her by marriage contract.

E) She fought ferociously to obtain a tremendous alimony.

F) Judge Antonio Garneau of Montreal who was, without my knowing, the uncle of her sister's husband determined the alimony at $300.00 monthly before the closing date of the Tribunals in June after having heard my case in camera at the Quebec Justice Court.

I well received an action in separation but she contested the action in nullity of marriage before the Civil Courts. However she claimed the nullity of marriage before the Religious Tribunal. I regularly received a seizure which is publicised in the local papers when the three hundred dollar alimony is not paid on time, alimony unique in amount for the region in Quebec. Alimony fixed by her father's friends.

G) Other judges following rendered judgments in the present legal cause:

(i) the late Judge Alfred Dion who replaced on the bench her father Judge Valmore Bienvenue former deputy of Bellechasse County:

(ii) Judge André Taschereau who confirmed the judgment at $300.00 for the Quebec Court of Appeals:

(iii) Judge Fauteux of the Supreme Court of Canada who forbid me as mentioned in the exhibits to bring as an explanation the *FACT* that Uncle Antonio Garneau had originally fixed the alimony at $300.

(iv) In the action of nullity of marriage Judge Elie Salvas appointed for the Salvas Commission constituted by Honorable Jean Lesage former associate of Valmore Bienvenue refused my action of nullity of marriage.

(v) Judge Robert Taschereau, cousin of André Taschereau, of the Supreme Court of Canada, former deputy of the County of Bellechasse rejected my appeal concerning the actions of separation and of nullity of marriage.

H) Before the Religious Tribunal the bride desired to obtain the nullity of marriage but under the condition of obtaining the maintenance of the alimony and other monetary advantages. She invokes tacitly the two articles of the Civil Code of the Province of Quebec:

(i) Article (163): "the marriage which has been declared "Null" produces however the civil effects either for the spouse or for the children when it is contracted in good faith."

To obtain the advantages of that article she has argumented that I wanted to continue my frequentations after the marriage with my former friend. However she knew that I didn't love her and that she dragged me towards the marriage forcefully.[2]

That marriage took place through cunning methods and hardship on me because I had a good office.[3]

In an appeal to Rome, the Sacred Roman Rota has refused her pretentions to obtain the nullity of marriage.

(ii) Article (164): "if the good faith exists only for one spouse the marriage produces civil effects only for that spouse and the children born from that marriage."

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[2] She declares that fact in a letter which is in my possession. Moreover consult a letter from Lille, May 15th., 1951, which she has brought for in her action in separation.

[3] "My husband (Mrs. Valmore Bienvenue) wanted to know if Victor had a good office." See the religious file, page 77.

After having been refused of the advantages of that article she claims Article (163) because the doctors in their findings have affirmed that at the time of the marriage I was sick. She is the author of that sickness provoked by indignant methods used by herself and by her family.

Here is the conclusion of the finding concerning that file scrutinized by a medical doctor:

> "After having studied with attention all that file I arrived at the conclusion strictly and definitely that we are in front of a consentment obtained from the spouse through violence and abnormal circumstances herein described."

B) *GENERAL PRINCIPLES OF NULLITY OF MARRIAGE AND DIVORCE*

Concerning the marital problem and divorce every member of the present Committee is intimately bound through rational conclusions that are to be found in order to get rid of the slavery from which women has enchained men in the course of centuries. Laws nowadays render the man a slave to his wife and her venal thing. Laws are regularly interpreted against the husband when a marriage contract is contested. "The law considers that marriage is a contract through which the husband voluntarily but irrevocably sells himself to his wife." In brief, the career of a woman very often, for the marriage Institution, is to install herself as a parasite on man. That was the case for my bride who has never worked. She has, however, a robust health. My personal experience has taught me that it is impossible for a husband to submit pleadings that he could win against his wife. The wife could even use the money withdrawn from her husband under the alimony provision to pay for "her little friend expenses."

In a judgment read at the Quebec Court of Justice I have extracted the following stupid remarks where a husband cannot even bring for his defence the reason that could obtain for him a legal separation:

> "In his plea defendant accuses his wife of adultery. Such an accusation by itself could serve as the basis of an action in separation though there was nothing else in the record, I would be inclined to maintain plaintiff's action *for this reason alone.*"

In my humble opinion, we should define the word MARRIAGE if we want to legislate upon its dissolution. The marriage could be defined as follows:

DEFINITION

The gift and acceptance at the time of marriage by two persons of opposite sex of their bodies and souls (because a spiritual union as well as a corporal one should exist). Those two essential elements must intervene in the marital contract.

If one party wants only the monetary financial advantages without giving the loving element, the soul, which constitutes an essential element of the contract, that latter one is only *legalized prostitution.* In that, we are confronted with the Anglo Protestant Theses which is the moral one and the logical one.

It is essential for the Federal State which want to study the Divorce problems or the nullity of marriage to determine if the contract has been validly concluded. If ever we find that at the origin the contract was deficient there would be a motive of nullity superior to any other element of nullity or divorce. That contract which is the most important during a man's life must be made in all serenity and absent of all vices. A horse trader sees his contract cancelled when he has sold a sick horse in a fraudulent manner! What about a fraudulent marital contract?

What are the recent developments taking place in the world for the amendments of the divorce laws?

The following studies are in the making throughout the world:

1. Vatican II has recently affirmed in a decree that two elements are necessary for the constitution of a marriage contract:

(i) The acceptance of the procreation of children;

(ii) The mutual love of the spouses at the time of marriage.

Body and soul must be given. If at the time of marriage there was no mutual love of a spouse there was accordingly no spiritual union and, therefore there could not be any marriage or gift of one self to the other party.

2. The Chambers of Commerce of the Province of Quebec at their last Congress demanded the establishment of "Civil Marriage" and legislation about divorce.

3. The State of New York after 179 years has amended their divorce legislation in adding several new motives including the separation of the spouses after a two year period.

4. The Church of England through a commission directed by the Archbishop of Canterbury has recommended the modification of the laws on divorce.

In a report published after studies extending during a period of two years and a half, the thirteen members comprising religious members, lawyers and sociologists recommended that the *UNIQUE BASIS of Marital Rupture should be the only criterion to grant a divorce.*

"THE WHOLE IDEA OF THE GUILTY PARTY AND THE INNOCENT PARTY SHOULD BE GOT RID OF, BISHOP MORTIMER TOLD A PRESS CONFERENCE BEFORE PUBLICATION OF THE REPORT. THE REAL ISSUE IN EVERY DIVORCE CASE IS IN FACT THE STATE OF A MARRIAGE RELATIONSHIP. THE OFFENSE IS ONLY A SYMPTOM OR AN EXCUSE OR A MEANS OF BRINGING THE MARIAGE BEFORE THE DIVORCE COURT".[4]

5. The Canadian Bar[5] at its Winnipeg Congress has accepted a resolution to modify the laws on divorce. Certain members have even declared that the Canadian legislation on divorce or the legislation either the Franco Canadian or the Anglo Canadian one was the most obsolete in the world. The Bar has suggested to increase the number of motives and, in particular, we should consider as a motive for divorce the separation of spouses during a period of three years.

6. Even at the religious point of view the following authorities have given the opinion that divorce should be granted:

(i) At the Vatican Council II Archbishop Zoghby of Egypt has recommended that the Church grants a nullity to the innocent party;

(ii) Mr. l'Abbé Poisson, P.S.S. suggests that the Catholic Church revise its laws on the nullity of marriage:

"We should easily understand that an ecclesiastical lawyer in frequent contacts since more than 8 years with unhappy couples asking or not a nullity of marriage, appreciates greatly the audacity of a pastor who invites the Church to rethink the concrete implication of the indissolubility of marriage. To restudy the evangelical foundation of that law. To restudy the patristic teachings on the subject, to alleviate the ecclesiastical tribunals of a procedure more juristic than humanistic, of a procedure, the windings of which conduct more often to the maintenance of a disorder than the installation or the restauration of an order broken or contested.[6]

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[4] *The Gazette*, Friday, July 29th., 1966.

[5] M[e] El. A. Brotman de Winnipeg à l'Association du Barreau Canadien au congrès de Winnipeg, *La Presse*, 3 septembre 1966.

[6] *Monde Nouveau*, Volume XXVII, Numéro 3, Mars 1966, Page 83.

(iii) Cardinal Roberts of England declared that thousands of marriages are void and that the Church has not the necessary tribunals to restudy their case.

(C) *RECOMMENDATIONS*

The Federal State has through the Constitution juridiction on divorce matters. It has the right to study and legislate on Divorce. It has therefore the obligation to render justice to citizens in order that their person, their property, be preserved or restored. Because the marriage is also a civil contract all that affects the civil rights is also a matter of the State.

The motive of adultery is not the only logical criterion nor equitable to grant a divorce. The fact of adultery can be an element definitely less important than the causes. The motives often reveal the authentic author of the adultery.

First Recommendation

We must define the marriage in its constitutive and essential elements. How can we dissolve or legislate legally on marriage if we have not defined what is marriage?

Second Recommendation

One of the motives, the surest, to grant a divorce is to determine if the civil contract has been valid, if the contract has been created peacefully and normally, without difficulty, without harshness. Because it is the most important human contract, we should attach to its birth as a civil contract the greatest care.

Third Recommentation

To look for the motive of a divorce is an exercise in futility. One must know if the marriage really exists or not? If the marriage is dead, if the two parties admit the fact, it shouldn't be necessary to consider the "divorce by consent" as reluctant. The admission of the failure of a marriage by the two parties is the best criterion of a divorce. Those are the conclusions of an English Committee and the law of the New York State recently approved by the Legislation.

Fourth Recommendation

I totally agree with the suggestion of the Canadian Bar to consider as a right motive the voluntary separation of the spouses during a period of three years.[7]

Fifth Recommendation

It is impossible for one party to remake his life if one has to continue to be financially hypothecated. When a divorce is granted one must be definitely cleared of monetary obligation; otherwise one is unable to live his life anew. In numerous American States the husband is liberated of all monetary obligations. One must remember often that for a woman marriage is a money matter, a financial mean to be supported by a man which has been fraudulently brought into marriage.

Sixth Recommendation

In the Province of Quebec where there is no divorce courts and where the legal separations are numerous, in order to give justice to the citizens I suggest that the Committee on Divorce obtain a list of judicial separations for the last

[7] *La Presse*, 3 septembre 1966.

three years. In that way he could determine the causes of separation and hardships taking place.

Seventh Recommendation

This one is an incidental recommendation. When the citizens of a country have been jeopardized by a judgment they think unjust and which has been rendered during abnormal circumstances those citizens should be able to refer their case to the Tribunal of the United Nations, an impartial one! The case to restudy the causes for the Nations reciprocally fighting is referred to the Tribunal of Lahaye; such must be the case for an individual.

Eighth Recommendation

I am at your disposition to present before your Committee of legislation on divorce my sundry points of view on the matter of divorce.

GENERAL CONCLUSIONS

The personal case here above described has been one of the most matrimonal contested case in Canada. The bride, a parasite, has fought for the nullity of marriage on the precise condition that it pays. She is in a better state being now separated than she would be if she were obliged to do as other women are doing, working for their family. At the Religious Tribunal the husband should not be deprived:

(a) of defending himself if he desires to, according to Canonical Canon 1655.

(b) That a curator, hypocritical comes forcefully represent the party to deform the facts or present them at its will.

As a bankruptcy law exist to liquidate the financial enterprises unhealthy, there must be a law to destroy and cancel civil marriages effectively dead.

In the Province of Quebec the wife prefers to conserve through the legal separation a perpetual mortgage or bondage on her husband's body. She becomes that way her parasite and assures her subsistance without ever working giving as a justification that her husband has broken her life. "What about the husband's one". He who does not work does not deserve to eat declares St-Paul.

The spouse thirty days after the wedding return destroys a career that took a quarter of a century to build! She receives a comfortable alimony and lives since 15 years in "farniente".

Respectfully submitted,

VICTOR LA ROCHELLE, L.S.C., C.A., LIC. ES SC.

Quebec, September 16, 1966

APPENDIX "9"

BRIEF TO THE SPECIAL
JOINT COMMITTEE OF THE SENATE AND
HOUSE OF COMMONS ON DIVORCE BY
SINGLE PARENTS ASSOCIATED,
P.O. Box 204, Station "T", Toronto 19, Ontario.

SUMMARY

1. Single Parents Associated is an organization devoted to the social service and mutual assistance of single parents and their children. Our central Toronto group is composed of 200 men and women who are divorced, separated or widowed and have children. Most of us are raising our children alone. In the six years since we have been in existence our meetings have also been attended by several thousand other people in the same circumstances.

2. Single Parents Associated is convinced that the present Marriage and Divorce Act is not appropriate to the way Canadians live today. The philosophy of specifying a guilty party is unrealistic. It inhibits possibilities of reconciliation and causes deterioration in the relationship of one or both parents to the children.

3. Single Parents Associated is of the opinion that physical separation for a minimum period of one year should constitute the grounds for divorce; the separation is to be continuous before proceedings can be commenced. There should be an exception in the case of hardships which we have indicated in the body of our Brief, in which case petition should be commenced at discretion of the Court. We suggest the appointment of a marriage counsellor to be under the direction of the Court which would be empowered to attempt reconciliation at any time on request of the Court of by one of the parties. We are also of the opinion that action should be taken in the province of domicile of either husband or wife.

Brief:

4. Single Parents Associated is concerned about the plight of other men and women who are separated and unable to divorce, as well as our own members. Because the Census lists separated people as "Married," it is impossible to be sure how many men and women are living ambiguous lives, neither married nor single. Knowledge of lawyers and social workers indicates that there are hundreds of thousands.

5. The results of this situation are:

(a) personal suffering for individual men, women and their children.
(b) extra-legal arrangements to get divorce which are degrading and expensive.
(c) common law relationships that, because of legal, social and moral pressures, are difficult to maintain and may harm children of the common law union. (See Appendix A.)
(d) disrespect for the law in general, when (b) and (c) are used to circumvent divorce legislation.

6. We recognise that marriage is not only a convenience for a man and woman and their children. It is also a social institution, and must be protected as the basis of our society. We believe that the present divorce legislation fails to do that.

7. Statements from church groups, business, professional and social organizations indicate that Canadians want a change in the present divorce legislation.

8. The law of divorce would continue to 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. But these changes would be made:

9. *Domicile.* Action may be taken in the province of domicile of either husband or wife.

10. *Grounds.* The members of Single Parents Associated are aware, many of them after hard and painful experience, that a marriage that contributes to the development of the husband and wife and their children, and to the society in which they live, derives from the commitment of both husband and wife. Further, that in the society we have now developed, with the ideals of freedom we strive for, no adult has the right to hold another in a relationship he or she does not want.

11. This implies safeguards for the welfare of the children, and against breaking up a marriage because of difficulties that in all marriages may cause temporary dissatisfaction.

12. Members of Single Parents Associated are also aware that the assignation of a "guilty party" is meaningless and often causes deterioration in the relationship of one or both parents to the children, often with tragic consequences for the children. (See Appendix B.)

13. We therefore propose that grounds for divorce be separation (a) that the parties to the divorce have agreed to separate and lived apart for a continuous period of one year. or (b) if there has been no agreement to separate, but one party has deserted the other, and they have continued to live apart, action may be brought by either party after a period of two years.

14. There will be an exception to the time limits in cases of hardship, which will include addiction to alcohol or narcotics, cruelty which causes actual harm or apprehension of physical harm, to the spouse, desertion, sexual offences, and conviction of crime.

15. The possibility of reconciliation should always be held in mind. The Court should adjourn proceedings and appoint a marriage counsellor if there seems to be a reasonable chance of reconciliation. Attempts to reconcile should not jeopardize the final granting of a divorce if they fail.

Appendix A.—Common Law Relationships

An estimated 400,000 Canadians are living in common law relationships as the term is used colloquially. That is, they are living together, often with children, and are accepted in their community as man and wife. This is the basis of our estimate:

(a) Deryk Thomson, Executive Director of Vancouver's Family Service Agency, estimates there are five common law unions for every 95 legal ones. (There are approximately four million marriages in Canada.) He says: "It is very hard to tell the difference between a common law union and a legal one." His estimate is for the population in general, not only for the clients of his agency.

(b) At the Catholic Children's Aid Society, Toronto, 20 per cent of the families currently under the protection department are common law unions.

(c) At the non-denominational Children's Aid Society, Toronto, 25 per cent to 30 per cent of the families are common law unions.

A majority of these people are prevented from marrying because one or both parties is already married to someone else and cannot, under Canadian law, get a divorce.

Appendix B.—A child's attitudes to a missing parent.

A World Health Organization report, "Maternal Care and Mental Health" by John Bowlby, M.A., M.D., 1951, refers to the influence on a child of a parent who, though apparently out of a child's life, is nonetheless recalled and admired. This feeling may be supplanted later by more realistic ones, but the first positive feelings are necessary before a child can develop, identify himself with his own sex, and establish satisfactory relationships with the opposite sex. This is difficult or impossible if one parent has been labelled "guilty," and is continually presented to him as such.

APPENDIX "10"

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

The Magna Carta Club,
P. O. Box 2352,
Vancouver 3, B.C.

Objectives:

The creation of laws and statutes founded on logical, human and just principles for the contracting and dissolution of marriages.

Nature of Group:

A non-profit organization which consists of persons aware of the inequality of justice and the inefficiency of the present laws, and who are imbued with an earnest desire to promote new laws and/or statutes enabling honourable conclusions for all concerned to incompatible and impossible marriages.

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

Sirs:

We have read The Proceedings of the above Committee to date and we have no doubt as to the abilities of the gentlemen who have so far spoken; they are prodigious. However, it is a matter of disappointment to us that the learned gentlemen are discussing the old laws instead of constructively discoursing upon the creation of new ones.

We earnestly hope that the knowledge of the old laws so displayed, will be expertly used in wording and drafting an instrument of the statute along the lines of that outlined below, capable of the enactment of justice for man and woman equally.

1. Divorce

1.1 There should be no recriminations about this, both parties are guilty of an error of judgment, outlook, or adaptability, etc. and who can say which one is more punishable than the other? Each should welcome the opportunity to start again.

1.2 Upon the termination of the union, there should be an equal division of the accumulated material effects of the length of the marriage. Effects prior to marriage and personal effects remain the property of the individual, joint effects can be divided by agreement, or where no agreement can be arrived at, these effects should be sold and the money so obtained divided equally between them. Where one partner can show that by their sole unaided efforts without detriment to the welfare of the other, he or she has provided an article, then, he or she shall be entitled to the article.

1.3 The outcome of divorce is to render all divorced persons, in effect, either widow or widower, and no just claim can be made against a marriage that is dead, so there can be no legal or obligatory payment of alimony or maintenance to a partner by the other after a divorce. Freedom from a marriage partner cannot be achieved if one partner is held captive in law performing a task of no marriage significance.

2. Children

2.1 When there are children by the union, they shall be assigned to the parent most suitable emotionally, for their care and upbringing. The choice

should not automatically go to the mother, if the father with a little housekeeping help, will be the better choice. Whichever parent looks after the children, the other parent shall contribute to the childrens' upkeep commensurate with his or her income until each child is 18 years of age.

2.2 Care should be taken to impress upon the parents that neither shall attempt to influence the children against the other. Should this happen, then the children shall be removed from the care of both parents and arrangements be made for visiting periods at different times for each parent and for the same duration of time.

2.3 Should the child or children show signs of being adversely disturbed by the visits of either or both parents, then the visits shall cease but each parent shall continue to contribute towards the child's or children's upkeep as above.

3. Marriage

3.1 Divorce obviously germinates during marriage and marriage is the outcome of courting manoeuvres and courting is based on the concepts and influence of the parents. Whether they like it or not, generally speaking, the parents are directly involved in this, yet are reticent, or too biased, to help their own children with the facts necessary for a happy marriage.

3.2 It would seem therefore, that it is essential that all coming generations should receive tuition on marriage and sex in the schools, in order to break this chain of events and provide the adolescent child with what it requires to know from nature to develop themselves naturally.

3.3 It should be quite easy to organise classes, if only for the intention of truthfully answering questions and giving no evasive answers. The child will then be able to orientate quite naturally looking forward to, and accepting, marriage with the requirements of his or her partner fully understood. Also, an understanding of diffidence or forwardness as may be manifest in their partners actions will enable them to deal with awkward situations in a natural manner. This should in two, or at the most in three, generations eliminate the factor of ignorance that figures so largely in the breakdown of marriages of this era.

3.4 There have been, and are, a number of eminent observers and thinkers in this world, writing on their observations and thoughts without distorting their findings with preconceived notions of what they ought to be. We think these people, both from the medical and psychological fields will be delighted to contribute their knowledge towards the logical solution of the problem and a great deal of good would result for everyone.

3.5 Having now equipped our adolescent youth with sound knowledge, based on observations and careful marshalling of facts, the next step is the development of the art of selection of a marriage partner.

There will always be a number of doubtful ones, unable to make up their minds on these matters. To overcome this, we certainly think there should be in every community an authority available, outside of the field of tuition, where confidential advice can be sought, methods and procedures explained and all fears overcome, or confirmed and the path of courtship and marriage cleared of superstitious intrusions, without recourse to comedy minded newspaper columnists.

3.6 However, even after this selection procedure, there will be the poor unfortunates whose enjoyment of married life will be reduced and finally eclipsed by a succession of occurrences between themselves and their partner and this will eventually necessitate action to remove them from the influence of the other if they should so wish.

3.7 Marriage after all, is the union of the two bodies and all its parts not of the two souls. A marriage can no longer exist if there is a resistance to union at any time and this resistance can result from a number of things:—

(a) The natural rejection of the partner who violates the contract and has union elsewhere.

(b) Rejection due to fear of violence, cruelty to mind or body.

(c) Rejection because of insanity or history of intermittent insanity.

(d) Rejection caused by the desertion of the other partner.

3.8 We think it should be pointed out, at this stage, that perhaps a suggested time limit of three years be placed on any irregularities to the contract and that if, after this time has elapsed, the erring partner has not been divorced or action for divorce started, by the other refusing to take this action, then this should be sufficient evidence of mental cruelty for the original erring partner to divorce the other. Further, if it can be shown that divorce is immediately necessary to safeguard the well being of one partner from the other, then this should be carried out without delay.

3.9 It will appear too, that continuance of union after the realization of any of these irregularities of normal married life will, in effect, condone the behavior of the erring partner. However, if after a further period of time, say three years, it becomes apparent to the forgiving partner that the erring partner is not changing towards him/her, then a second opportunity should be given to terminate the marriage upon application.

4. *Separation*

4.1 It will be noticed in the foregoing that no mention has been made of "Separation Agreements" or the effects of separation.

4.2 We do not feel that separation as administered at present is anything more than an attempt to placate the religious scruples of the parties and in the future it should be only enacted by the religious bodies for their own needs without any civil, legal, or criminal liabilities.

4.3 Consideration should be given, however, to married couples at present legally separated and provision should be made in a separate law to deal with their predicament. We further think that separation of married couples will in time die out and this Separation Law will fall into disuse and can then be removed from the Statute Book without affecting the Laws of Marriage and Divorce as outlined above.

4.4 It should be evident that either of the persons living apart under legal separation should by virtue of the marriage being dead, be able to apply for a divorce after a period of three years of legal separation and have a divorce granted upon the establishment of the legality and the adherence to the terms of the document by the partner seeking the divorce.

4.5 Where either party may have broken this agreement, the divorce proceedings would be heard under the Marriage and Divorce Law as outlined above.

4.6 This should end the necessity of legal recognition of an anomaly and face saving device known as "Common Law Wives/Husbands" enabling individuals deprived of the joy and happiness of marriage, by the unknown whereabouts of their legal marriage partner, and allow them to enter the state of honourable matrimony with attendant uplift and reestablishment of integrity and character.

5. *Conclusion*

5.1 In conclusion, we realise that all the foregoing is logical, ethical and morally right and just. As men and women we say "Enough. Let's have done with prudery, politics, subterfuge, etc. and put this right".

5.2 We voted you to Parliament as our representatives and we are steadfast in our faith that you will defend us to overcome these antique forces resisting changes and allow the fresh air of logic to blow away this cluttering, restricting, clutching bigotry, fostered and nurtured in an atmosphere of ignorance, narrowmindedness and selfish greed. Let us remove the citizens of Canada from the unenlightened ranks of the world's peoples and place them again where their ancestors had once placed themselves;—in the front ranks of the tolerant enlightened civilizations.

W. J. Biggin-Pound, President
F. Bolster, Vice-President
Mrs. B. Geddes, Secretary
Mrs. H. D. Bolster
Mrs. J. I. McLeod
K. Reiner
Miss Hilary M. Evans
} Committee

September 30, 1966

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 6

TUESDAY, NOVEMBER 8, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESS:

G. R. B. Whitehead, Barrister and Solicitor.

APPENDICES:

11.—Brief by G. R. B. Whitehead, Barrister and Solicitor, Montreal, Que.
12.—Brief by Canadian Federation of University Women, St. Catharines, Ont.
13.—Brief by Alfred J. Wicken, Q.C., Qualicum Beach, B.C.
14.—Brief by The Family Service Association of Edmonton, Alberta.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

24811—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, 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

Mr. A. J. P. Cameron (*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 bill 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."

24811—1½

"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, C.P., 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.

REPORT OF COMMITTEE

Extracts from the Minutes of the Proceedings of the Senate: November 7, 1966:

The Honourable Senator Roebuck, from the Special Joint Committee of the Senate and House of Commons on Divorce, presented their third report as follows:—

MONDAY, November 7th, 1966.

The Special Joint Committee of the Senate and House of Commons on Divorce makes its third Report, as follows:

Your Committee recommends that its quorum be fixed at seven (7) members, provided that both Houses are represented.

All which is respectfully submitted.

A. W. ROEBUCK,
Joint Chairman.

With leave of the Senate,

The Honourable Senator Roebuck moved, seconded by the Honourable Senator Fergusson, that the report be adopted now.

After debate, and—

The question being put on the motion, it was—

Resolved in the affirmative.

J. F. MACNEILL,
Clerk of the Senate.

Extracts from the Votes and Proceedings of the House of Commons: November 8, 1966:

Mr. Cameron (*High Park*), seconded by Mr. Brewin, moved,—That the Third Report of the Special Joint Committee of the Senate and the House of Commons on Divorce, presented to the House on Thursday, November 3, 1966, be concurred in.

After debate thereon, the question being put on the said motion, it was agreed to, on division.

Accordingly, the said Report was concurred in, and is as follows:

Your Committee recommends that seven (7) of its members constitute a quorum, provided that both Houses are represented.

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

MINUTES OF PROCEEDINGS

TUESDAY, November 8, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the 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, Denis, Fergusson, Flynn, Gershaw and Haig—10.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Forest, Mandziuk, McCleave and Otto—10.

In attendance: Dr. Peter J. King, Special Assistant.

The following witness was heard:

G. R. B. Whitehead, *Barrister & Solicitor.*

Briefs submitted by the following are printed herewith as Appendices:

11.- G. R. B. Whitehead, Barrister & Solicitor, Montreal, Que.

12.- Canadian Federation of University Women.

13.- Alfred J. Wickens, Q.C., Qualicum Beach, B.C.

14.- The Family Service Association of Edmonton, Alberta.

At 5.30 p.m. the Committee adjourned until Tuesday next, November 15, at 3.30 p.m.

Attest.

Patrick J. Savoie,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

Tuesday, November 8, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the 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, Denis, Fergusson, Flynn, Gershaw and Haig—10.

For the House of Commons: Messrs. Cameron (High Park) (Joint Chairman), Aiken, Baldwin, Brewin, Cantin, Fairweather, Forest, Mandziuk, McCleave and Otto—10.

In attendance: Dr. Peter J. King, Special Assistant.

The following witness was heard:

G. R. B. Whitehead, Barrister & Solicitor.

Briefs submitted by the following are printed hereewith as Appendices:

11.- G. R. B. Whitehead, Barrister & Solicitor, Montreal, Que.

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13.- Alfred J. Wickens, Q.C., Qualicum Beach, B.C.

14.- The Family Service Association of Edmonton, Alberta.

At 5.30 p.m. the Committee adjourned until Tuesday next, November 15, 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, November 8, 1966.

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 (*High Park*) Co-Chairmen.

Co-Chairman Senator ROEBUCK: Honourable Senators and Members of the House of Commons, Members of the Committee on Divorce, I understand that a resolution was passed in the House of Commons a few minutes ago reducing the quorum to seven. The same resolution has already been passed in the Senate. We have here very many more than the quorum and I suggest that we proceed forthwith.

We have with us, ladies and gentlemen, a very distinguished member of the Bar, both of England and of the Province of Quebec, in the person of Mr. George Robert Beethom Whitehead, and for the sake of the record I wish to put on something of his qualifications for being here, so that you may know who it is that is speaking to you.

Mr. Whitehead was born in Berlin, Germany, on March 22, 1897, the son of Sir James Beethom Whitehead, K.C.M.G., of the British Diplomatic Service, who was then serving at the Berlin Embassy.

Mr. Whitehead accompanied his parents in various foreign countries until at the age of ten he was sent to a boarding school in England. He graduated in law from Oxford University in 1920, although his attendance at Oxford was interrupted by war service in the British Army from 1915 to 1919.

Mr. Whitehead was called to the Bar of England, Lincoln's Inn, in 1921 and practised in the Chancery Division of the High Court of Justice until 1935, concerned with equity and corporation matters. While divorce work was not included, from 1927 onward he received briefs in the Divorce Court because about that time the divorce work had increased to the extent that the regular Divorce Court Bar could not deal with it all. It is a small body of divorce specialists.

In this way, Mr. Whitehead learned divorce law and practice, with the assistance of the regular members of the Divorce Court Bar from 1927 to 1935; and he gained a considerable insight into the problems and practice of the Divorce Court.

In 1935 Mr. Whitehead spent some time in Italy and in 1939, largely because of the war in Ethiopia, he came to Canada, settled in Montreal, and commenced the study of Quebec law.

In March of 1941 Mr. Whitehead accepted a position in the legal branch of the Department of Munitions and Supply at Ottawa where he served until 1946, during which time he became Assistant Director General of the Branch. From 1946 to 1948 he served in the Legal Department of the War Assets Corporation in Montreal, where he became head of the Department.

In 1944 he was admitted to the Quebec Bar and was awarded the M. B. E. on the Canadian list in July 1946.

Mr. Whitehead is still a member in good standing of the Bar of England and of the Bar of Quebec. He has continued to keep his interest in the divorce law of England and has maintained his touch with his old friends of the English Bar, some of whom are now judges. He still has trusteeships in England and I am sure that we will find him quite familiar with both the English law and practice in regard to the subject which this committee is studying.

Honourable Senators and members of the committee, I have sincere pleasure in presenting to you Mr. Whitehead.

Mr. George Robert Beethom Whitehead, M.B.E., B.A. (Oxon.) of the Bar of England (1921) and the Bar of Quebec (1944): Mr. Chairman, ladies and gentlemen, as a new Canadian I should like to say how much I appreciate being asked to address this committee, especially on a matter of so much importance. I will try to stick to things which have been within my professional knowledge, because of course you have many people who will discuss every aspect of this problem with you; but I think it is helpful to consider how they have tried in England to consider the same sort of problems which are being discussed in Canada now. In order to show how that was done, I will start with a brief historical introduction. I will read the brief, omitting one or two paragraphs which I shall summarize. That will save time. They will appear in the printed proceedings.

1. Before 1857 no Court in England had power to grant divorces *a vinculo matrimonii* (enabling either spouse to marry again in the lifetime of the other). The Ecclesiastical Courts of the Church of England had power to grant decrees of (1) nullity (for impotence or consanguinity, or because the supposed marriage had been found to be bigamous), (2) divorce *a mensa et thoro* (now called judicial separation, which did not enable either spouse to marry again in the lifetime of the other), (3) restitution of conjugal rights, which was a decree enjoining a spouse who had deserted the other spouse to return to cohabitation, and (4) a decree of perpetual silence in a case of jactitation of marriage when anyone persistently and falsely alleged marriage with another. Divorce *a vinculo matrimonii* could be obtained only by private Act of Parliament. Such acts were seldom or never passed at the instance of the wife. If the husband wanted one he had first to bring an action for "criminal conversation" (i.e. adultery) in a civil court against the man with whom his wife had committed adultery; and the verdict in that action was treated as conclusive proof of the adultery, so that Parliament did not have to hear the evidence again. This procedure was wasteful of parliamentary time, and the expense led to complaints that there was one law for the rich and another for the poor; so in 1857 Parliament passed the Matrimonial Causes Act of that year, the material parts of which are set out in Appendix 3 to the proceedings of your committee for June 28, 1966. This act set up a civil Divorce Court for the first time, and transferred to it the matrimonial jurisdiction of the Ecclesiastical Courts. It also enabled the new court to grant a divorce *a vinculo matrimonii* to a husband whose wife had committed adultery or to a wife whose husband had committed sodomy, bestiality, rape, incestuous adultery or bigamy with adultery, or who had committed adultery and had also been guilty of cruelty or of desertion without reasonable excuse for two years or upwards. Some years later, on a re-organization of the courts in England, the Divorce Court became, as it still is, a part of the Admiralty, Probate and Divorce Division of the High Court of Justice. No further changes of substance took place until after the 1914-18 war.

2. At the end of the 1914-18 war women were given the parlimentary vote in England, and shortly afterwards the law was changed to allow a wife to divorce her husband on proof of adultery only, without having to prove cruelty

or desertion in addition. After this, no further changes of substance took place until the major reforms of 1937, hereinafter mentioned.

3. The position in England immediately before the reforms of 1937 was thus in most respects similar to the law as it is in Canada today. The principal points of difference were as follows: (a) In England a wife could not divorce her husband on the ground of cruelty alone, but in one of the Canadian provinces (Nova Scotia) she can do so. (b) In England a decree of divorce was in the first instance only a decree nisi, which did not dissolve the marriage. The petitioner could ask for a decree absolute which did dissolve the marriage and enabled the parties to marry again at the end of six months from the pronouncement of the decree nisi, but he or she was not bound to do so; and occasionally a petitioner would refrain from applying for a decree absolute, probably in order to force a financial settlement.

The respondent could not, at that date, apply for a decree nisi to be made absolute; but this has since been altered, and now under Section 7 (2) of the Matrimonial Causes Act, 1965 (hereinafter called "the Act of 1965") the party against whom the decree nisi has been made may apply to have it made absolute if the other party has not made such an application within three months after he or she became entitled to do so. (c) The King's Proctor, an official working under the direction of the Attorney General, could entervene in any case where it was thought advisable to have the case argued on behalf of a public authority. (Originally a proctor was a lawyer who performed the same duties in the Ecclesiastical courts as an attorney did in the Courts of Common Law or a solicitor the Court of Chancery.) A judge could—and he still can—ask for the assistance of counsel on behalf of the King's Proctor in any case in which he suspected collusion, or in an undefended case raising a new point of law which the judge wished to have argued on both sides. The unsuccessful party, or any other person, could ask the King's Proctor to intervene on the ground that there had been collusion, or that for any other reason the whole of the facts had not been before the court, but of course the King's Proctor used his own discretion as to whether or not to accede to such a request. This is still the rule in England, now under Section 6 of the Act of 1965. Though there is no Queen's Proctor in Canada, the Attorney General of Quebec was, in the late Premier Duplessis' time, given power to intervene in nullity cases where collusion was suspected.

The law as to connivance, conduct conducing to adultery, condonation and collusion was in 1937 practically the same in England as it is now in Canada. Connivance is where the petitioner has had the corrupt intention of promoting or encouraging either the initiation or the continuance of the respondent's adultery. It is an absolute bar to divorce. Conduct conducing is where, in the opinion of the court, the petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the respondent's adultery. It is a discretionary bar to divorce, the discretion being that of the judge. Condonation is the conditional forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore between the spouses the *status quo ante*. Collusion is where the initiation of a divorce petition is procured, or its conduct provided for, by agreement or bargain, express or implied, between the parties or their agents. It was formerly an absolute bar to divorce in England, but since 1963 has been only a discretionary bar. (See paragraph 13 below). There has also been a change in the English law as to condonation. (See paragraph 12 below).

The next two paragraphs deal with divorce experience in England between 1920 or thereabouts and 1937. In consequence of people's resorting to hotels and producing "evidence" of adultery, which evidence was, to say the least, doubtful, thereby enabling the wife to get a divorce, it soon became clear that a good many of these so-called hotel divorces were collusive. In the end it became a scandal, and efforts to put a stop to that sort of thing having proved mainly unsuccessful,

Mr. A. P. Herbert, the Member of Parliament for Oxford University, took a hand in the matter.

(*The brief continues:*)

4. The experience of the courts in England between the two wars revealed certain weaknesses in the law of divorce as it then was. By far the greatest difficulty arose from undefended divorces on the ground of the husband's adultery. The change in the law which made this possible coincided with the break-up of many hasty war-time marriages and with the general relaxation of morals which had begun during the 1914-18 war and continued afterwards. Since neither desertion nor cruelty was a ground for divorce, many people whose marriages had broken up on one or other of these grounds were tempted to concoct evidence of adultery which would enable them to get a divorce.

Among many circles of the upper and middle classes it came to be considered that when neither party wished to live with the other again the husband ought, at the wife's request, to provide her with evidence of his adultery which would enable her to obtain a divorce against him, and that it would be uncharitable and ungentlemanly for him to refuse to do so. A custom grew up by which the husband wrote to the wife a letter saying: "Dear, I am given to understand that you desire your freedom. I enclose an hotel bill."—or words to that effect. The wife's solicitors then made inquiries at the hotel from which the bill had come; and at the trial the desk clerk from the hotel produced the hotel register, showing that the husband had occupied a room with a woman, signing the register as husband and wife, and a chambermaid described how she had taken early morning tea to the room and found them in bed together, or one of them in bed and the other partly dressed. This was accepted as sufficient evidence of adultery.

From time to time there was speculation as to whether in a particular case adultery had or had not really taken place; but it seems certain that it usually had, because otherwise the woman whom the husband had taken to the hotel would have been in a position to blackmail him by threatening to disclose the true facts to the King's Proctor and get the divorce decree rescinded before it was made absolute. At one time a question was faintly suggested as to whether or not adultery which had been committed simply to form the foundation for a divorce petition, and for no other purpose, was really within the meaning of the act: but in the case of *Woolf v. Woolf* L. R. 1931, p. 134, one of the judges in the Court of Appeal, without any dissent from his colleagues, said that adultery must be treated as a ground for divorce, whatever the motive for committing it might have been. In these circumstances it soon came to be considered among the generation who had grown up during and since the 1914-18 war that there was no real stigma on a man who had "given" his wife an "hotel divorce," though adultery on a wife's part was still considered disgraceful.

5. Many barristers who were practising in divorce cases at that period had serious misgivings about the system of "hotel divorces." Certain hotels in central London were so commonly resorted to for that purpose that one sometimes found, on arriving at the court and inquiring if one's witnesses were present, that they were engaged before another judge giving similar evidence in another case, and one was left anxiously hoping that the other case would be over before one needed the witnesses for one's own. Further, some floor waiters and chambermaids were giving evidence as mentioned above so frequently that one doubted whether or not they really were sure that the woman whom they had seen in bed on one occasion only, several months before, was not the petitioner whom they had seen for the first time in court that day. I remember one of the regular practitioners in the court telling me (after he had used the same hotel witnesses in three different cases on the same day) that he felt fairly sure that if he and his wife ever wanted to get divorced they could go and spend a night together at

that hotel, and that when the case came up for trial, three or four months later, some hotel witness would cheerfully swear that the woman who had been at the hotel with him was not the petitioner (his wife). The judges must, of course, have been as well able as anybody to see what was going on: and Lord Merrivale, the President of the Admiralty, Probate and Divorce Division, a judge of great experience, who commanded universal respect, tried for some time to insist that the name of the woman who had gone to the hotel with the husband should be supplied to the court, presumably so that the King's Proctor could make inquiries, if thought desirable.

As early as 1928, in the case of *Aylward v. Aylward,* 44 T.L.R. 456, he refused a decree in an hotel adultery case because he was not satisfied that adultery had been committed, at any rate with the woman who had been at the hotel; and he expressed himself in very strong terms about the whole "hotel adultery" system. Eventually he refused a divorce in a case (*Woolf v. Woolf,* cited above) where the husband, who was quite as anxious for a divorce as his wife, had spent two nights at an hotel with a woman whose name he refused to give, and Lord Merrivale, suspecting the case was collusive, was not satisfied that the woman who had been at the hotel had not been a near relative of the husband or someone else with whom he was unlikely to have committed adultery (see page 146 of the Report). The Court of Appeal would not support Lord Merrivale, and said that when a man and a woman who were not husband and wife shared an hotel room the usual inference must be drawn. (This decision was followed in Nova Scotia some years later in *Durrant v. Durrant* (1944) 3 D.L.R. 30, in which the Appellate Court reversed the decision of the trial judge, who had said that he suspected collusion and doubted if adultery had really been committed.)

One has to be prepared to accept the fact that if you are to allow divorce after three years there is always the possibility that where a couple had agreed that they wanted to get rid of each other a case might be brought, usually by the wife, on the ground of desertion; and no-one being in a position to contradict her she would get the divorce by consent.

6. During the 1930s Mr. A. P. Herbert, then Independent Member of Parliament for Oxford University, who was a well-known writer, determined to try to bring about reforms, and he wrote a satirical novel "Holy Deadlock" about an imaginary hotel divorce, which revealed the abuses of the system, of course with some exaggeration, but not very much. This book had a wide circulation and opened the eyes of the general public to what was going on. With its help, and after much consultation with his colleagues in the House of Commons, he was able to bring in and pilot through Parliament the Matrimonial Causes Act, 1937, which extended the grounds both for nullity and for divorce, but prevented divorce petitions from being presented during the first three years of the marriage, except for hardship on the petitioner or exceptional depravity on the part of the respondent. It is significant that one of the reasons for passing the act, stated in the preamble, was "the restoration of due respect for the law". In view of the terms of the Order of Reference to your committee, this memorandum deals only with the grounds for divorce. The new ones added by the act of 1937 were:

(a) Desertion without cause for three years next before the presentation of the divorce petition.
(b) Cruelty.
(c) Incurable insanity.
(d) Presumption of death of the other spouse.

This is not strictly a case of divorce, but rather of dissolution of marriage.

I come now to paragraph 7. It may be observed that an undefended petition

for divorce for desertion may be virtually divorce by consent, because one has only the petitioner's word for it that he or she did not consent to the separation.

7. There is no statutory definition of desertion, and it has been described as not so much a withdrawal from a place as a withdrawal from a state of things. The (British) Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O. London, 1956) suggested the following definition, which seems as good as any: "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." The respondent can defend the petition by showing that he or she had valid cause for leaving, which need not necessarily be sufficient to amount to legal cruelty. In some cases it may even be held that the spouse who has remained in the matrimonial home is the deserter, because he or she deliberately drove the other out. The highwater-mark of these cases is probably *Winnan v. Winnan* L.R. 1949, P. 174, where the wife was found guilty of constructive desertion because she insisted (contrary to her husband's wishes) in keeping a large number of cats in the house, and told her husband that she preferred the cats to him. Now, under Section 1 (2) of the Act of 1965, any one period of not more than three months during which the parties resumed cohabitation with a view to reconciliation is not to be considered as interrupting the three years' desertion.

If the spouses originally parted by mutual consent, without any express agreement as to the duration of the separation, either of them may at any time put an end to the agreement to separate, and the other spouse will then be treated as being in desertion from that time onwards, so that the three years begin to run from the same time. It is otherwise if the separation was under the terms of a valid separation deed, the terms of which have always been observed. The deserting spouse may repent and offer to return to cohabitation during the three year period; and, if the Court considers that the repentance is sincere, it is a good defence.

8. Cruelty is a ground for divorce which in practice is apt to present many difficulties to the court trying the petition. Mental cruelty is included; and even in a country as comparatively homogeneous as England there are different sections of society whose ideas as to what conduct is tolerable and what is not differ considerably. Before 1937, when cruelty without adultery was a ground only for judicial separation, a wife who knew that even if she proved cruelty against her husband she would have to remain married to him was not likely to start proceedings unless his conduct was really hurting her beyond endurance, or at any rate she thought that it was; but it is not at all the same thing when she can hope to get a divorce which will leave her free to marry somebody else, and perhaps she already has in view the man whom she would like to have as her next husband. In such cases there may often be an element similar to what in personal injury cases is known as "compensationitis".

In England, in cases of cruelty, the petitioner has to show injury or apprehended injury to his or her health from the respondent's conduct; but where, as is usually the case, the injury takes the form only of a nervous condition which obviously must be making the petitioner very difficult to live with, there may often be a doubt as to whether the petitioner's nervous condition is due to the respondent's conduct or the respondent's conduct is due to the petitioner's nervous condition. In some cases, and particularly in defended cases where each party is asking for a divorce against the other, they are apt to drag out a long series of old unhappy memories which they hope will have a cumulative effect, beginning with the time the husband forgot the wife's birthday or the time she put him to shame by having one drink too many at his boss' cocktail party, and continuing with many other items of no greater importance, until at the end of the day even an experienced judge may find it hard to decide

whether this is a case of cruelty, which is a ground for divorce, or merely a case of incompatibility of temperament, which is not a ground for any relief at all. Until recent years it had been regarded as settled that cruelty must be shown to have been "aimed at," or intended to hurt, the other spouse or the children of the marriage; but in the cases of *Collins v. Collins* L.R. 1964 A.C. 644 and *Williams v. Williams* L.R. 1964 A.C. 698 the House of Lords held that if the conduct complained of was grave and weighty, and if the injury or apprehended injury to the petitioner's health was shown, there was no need to show an intention to injure or a guilty mind. This is a different approach to the question from that of Canadian law relating to cruelty as a ground for judicial separation. In Quebec, Articles 189 and 190 of the Civil Code do not require injury or apprehended injury to health as an element of cruelty, nor do the relevant statutes of Saskatchewan and Alberta.

This is a material point. Article 189 of the Quebec Civil Code says: Husband and wife may respectively demand the separation on the ground of outrage, ill-usage or grievous insult committed by one toward the other. Article 190 says: 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 or other circumstances of the parties.

In Saskatchewan and Alberta cruelty is not confined in its meaning to conduct that creates a danger to life, limb or health, but includes 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 had been guilty of such conduct.

As we in the common law provinces well know, where decisions of upper courts of original jurisdiction are treated as binding, you are very apt to get cases where the husband has done exactly the same thing that somebody else did years before, which was held to be cruel, and the lawyer, addressing the judge on behalf of the petitioner, will say: The husband in this case has done exactly what Mr. "A" did years ago; that was held to be cruel, and this also must be cruel; therefore the case is proved.

But that does not always follow, because so much depends on the individual parties and on the communities from which they come. People's opinions differ. The Quebec Civil Code says that the grievous nature and sufficiency of the 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. That is what one might call the subjective approach: it is looking to see whether the parties are cruel, and not looking at the course of conduct and the act to see if that is cruel. You have two entirely different things. Sometimes difficulties are created, because a lawyer has to do his best for his client, and if he finds what he considers a parallel case that occurred fifteen years before, in which a particular course of conduct was held to be cruel, he will press it as hard as he can; and although the judge may feel that the two cases are not parallel, he may be reluctant to say, "I am not going to accept the argument that they are on all fours.

It has happened in England that people got divorces on the ground that others had done the same sort of thing before, without sufficient consideration of the circumstances in the case before the court.

I do not want to labour that point, but I should like to give two illustrations to show what I mean. One hundred and fifty years ago, or perhaps a hundred years ago, in England, the husband was the master of the household and the rest of the family had to obey him. Even now in the Anglican marriage service the wife is supposed to say that she will obey.

Among Anglo-Saxon Canadians, however, where husband and wife have been to university, marriage is a partnership, and if the husband now started to

assert authority in the way husbands could have done a hundred or a hundred and fifty years ago, and if he persisted, it would be said that he was cruel.

On the other hand, we have in Canada now many new Canadians coming from other countries, and those who come from southern European countries or Eastern European countries, particularly from the peasant class, still have very much the same ideas that our ancestors had a hundred years ago; the husband and father is the head of the family and the rest, including the wife, owe him obedience; and when he insists on it he is not, according to their ideas, unreasonable. He is only doing what his people have done from time immemorial, what everyone expects him to do; and to find him guilty of cruelty because he was doing what was natural and normal in his circumstances would not be right.

The Quebec approach avoids that, and Saskatchewan and Alberta would be to the same effect. But if you left it as it is, it would be very difficult to prevent a body of Canadian jurisprudence growing up to say what was cruelty and what was not, rather than whether this man was cruel or not.

Anyone who has had considerable practice before divorce courts must have come to realize that even among people of similar background and education opinions differ enormously as to what are acceptable practices in the matter of sexual intercourse between husband and wife and what are not. Some people regard as perversions what others regard as perfectly natural.

If the husband persists, in spite of the wife's protest, in practices which he knows she regards as abhorrent, that might be so inconsiderate as to amount to cruelty. But if the wife has co-operated in any such practice for years and complains only after husband and wife have quarreled on some other subject, it may be doubted whether it was because of cruelty, the real reason being that she was trying to use it for getting a divorce she should not have.

There is considerable danger in allowing a body of jurisprudence to grow up saying, such and such is cruelty. Because something was declared to be cruelty in the case of Mr. and Mrs. "A", it does not follow that it is cruelty in the case of Mr. and Mrs. "B". It is much more obvious to us who have practised in divorce courts than it is to the general public, but it is an important point, when it comes to a question of changing the law and you have to decide whether the approach is to be an objective or a subjective one.

I will return to the written brief, paragraph 9 on page 15:

9. Incurable unsoundness of mind was made a ground for divorce in England by the Act of 1937, if the patient had been continuously under 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 hospital on trial. By an amendment made by the Divorce (Insanity and Desertion) Act, 1958 (now superseded by section 1 (3) of the Act of 1965) any interruption of the period of care and treatment for 28 days or less is to be disregarded for the purpose of determining whether or not such period has been continuous.

That is not the same as leave of absence. The 28-day period applies to the patient who is supposed to be discharged. It also applies to a patient who has escaped from the hospital and is recaptured, and that is not the same as being absent on leave. It was intended to fill the gap.

10. Presumption of death of the other spouse was made a ground for dissolving the marriage under the Act of 1937 (now superseded by Section 14 of the Act of 1965). A petition has to be presented to the court to have it presumed that the other spouse is dead and to have the marriage dissolved. If no other evidence of the death can be found, the fact that for a period of seven years or upwards 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, is evidence that he or she is dead until the contrary is proved. Absence under a separation agreement does not bar the petition, though continued absence from the petitioner where the parties have bound themselves to live apart proves very little. There are rules of court which prescribe the steps which the petitioner must take to try to trace the missing spouse. The decree is in the first instance only a decree nisi, as in a divorce case; and if, after the decree nisi but before it has been made absolute, the other party is found to be alive an intervention can be made and the decree will be rescinded.

Co-Chairman Senator ROEBUCK: What happens to the children, if there are any, in that case?

Mr. WHITEHEAD: The children remain legitimate because the marriage is dissolved, not annulled. It is the same as divorce in that respect.

11. An essential element in the 1937 reforms was the provision that no divorce proceedings could be taken within the first three years of the marriage without special leave. The ground for this was that it was felt that the possibility of getting a divorce for a single act of adultery on the part of the husband was in many cases resulting in young people making insufficient effort to overcome the difficulties of adjustment which are to be expected at the beginning of married life, and in some cases was even leading them to enter on marriage without due consideration, in reliance on being able to get out of it again if they found that they were unsuited to each other. There was a relaxation of this rule during the 1939-45 war. But it was only temporary. The special leave required for presenting a petition in cases of exceptional hardship to the petitioner or exceptional depravity on the part of the respondent has to be obtained from a judge. Applications for such leave are heard in chambers, i.e. in private, and not in open court, so that there is no body of reported cases to show exactly what qualifies as exceptional hardship or exceptional depravity: but such applications are not very numerous, and it is believed that many of them are rejected.

Since I wrote this, further information has been received in Montreal; there is one more volume of reports from England. In the case of *W. v. W.* 1966 2 AER 889 the president held that the fact that the wife was pregnant by another man was not exceptional hardship, because nowadays a child can be legitimated by subsequent marriage even if the mother was married to another man at the time of the birth; and he went on to say that between January 11 and May 16, 1966, 47 applications for leave to present petitions were heard within three years, of which one was dismissed, three were adjourned, and in 43 cases leave was given to proceed.

Since the system was started they have begun to give leave frequently, because 43 out of 47 is a high proportion. At the time the bill was going through Parliament there was great discussion as to what was reasonable for starting proceedings within three years, and during the debates some unusable things came out.

One might mention some examples of exceptional hardship that were given in the parliamentary debates on the 1937 bill. Within a few months of marriage to a woman much younger than himself a man resumed relations with his former mistress; in another case a man married a widow who had a daughter and during the first year he seduced his step-daughter. That is so intolerable that it must be regarded as constituting an exceptional hardship and she should be allowed to take proceedings right away. In another case a man married a woman with money and after getting all she had he proceeded to desert her: that also is regarded as intolerable.

During the last war a man serving in the army found that his wife had gone with another man, and, suspecting that she had a child, he asked for leave to present a petition on the ground that he did not want to be responsible for the

child, as he would be legally if the wife was still married to him when the child was born. The case went to the Court of Appeal and the Court of Appeal would not grant the appeal because he should have brought an action for judicial separation, which he could do without waiting three years. That would eliminate the possibility of a recurrence of this sort of thing. After three years he could turn the judicial separation into a divorce. So at that time, in 1942, they must have been taking a strict view.

Co-Chairman Senator ROEBUCK: Do you think we would be wise in adopting the three-year provision outlined here, as in England?

Mr. WHITEHEAD: That is a very debatable point. In England the three-year provision made it possible to induce those who were opposed to any extension of the grounds of divorce to co-operate in passing the bill—so much so that they put Section 1 right in the forefront of the bill. In Canada there are many people who would not wish to see an extension of the grounds of divorce, and if you put in the three years, as in England, it might produce the same effect here as there. In England it had the effect of preventing the immature from rushing out and marrying again without stopping to see if they could make a go of it. One would have to know conditions in various Canadian provinces to make up one's mind what was the best thing to do about it. But that is what they did in England, and on the whole it seems to have proved beneficial.

Paragraphs 12 and 13 on page 17, deal with condonation and collusion, both of which are technical matters which are of importance to lawyers, particularly collusion. These paragraphs are rather long and are necessarily technical and with the chairman's permission I will ask that they be taken as read and incorporated in the printed proceedings. Those interested in the matter from a technical point of view will have no difficulty seeing what I mean, and those not in the legal profession may find them too technical.

Co-Chairman Senator ROEBUCK: You might say something about it.

Mr. WHITEHEAD: What I should like to say is this. The effect of condonation in the past was to preclude one from subsequent proceedings. But the law was broadened. For in the past no one who had sexual intercourse with his spouse after the offence complained about could say he had not condoned previous misconduct. Now that rule is no longer absolute because, if he resumes cohabitation with a view to reconciliation, that is not regarded as constituting condonation so as to prevent him afterwards asking for divorce if the attempt at reconciliation failed.

The law of collusion is much more difficult, because the way things have always been in England, and still are in Ontario, a lawyer has to be extremely careful, when making arrangements about provision for children, or financial provisions for the family during divorce proceedings, not to go so far as to leave the impression that this is a collusive arrangement whereby one party is in fact guilty of divorce.

Obviously some arrangement must be made; but a lawyer must scrutinize the arrangements to make sure that no person can say they are collusive. The difficulty was so great that eventually it was decided to authorize the lawyer or his client to put before the court the proposed agreement with the other side on various subjects—it might be custody of the children or financial provision—and if the court said it did not disapprove of that, they could sign the agreement and go ahead with the arrangement and there was no question of the divorce being blocked on account of collusion.

If the court said, "You cannot do that, it is not permissible," it was open to the lawyers concerned to say, "We will work out something else," or else they could abandon it altogether. But so long as you tell the court about it in advance and ask approval it is all right. If the court does not approve, all you have to do

is drop it. If the court approves, you can go ahead without fear of being found guilty of collusion.

That has led to satisfactory results. One cannot state how many cases there will be of that kind because they are always heard in chambers. Recently, towards the end of last year, a judge who had heard twelve of these cases or thereabouts gave judgment in open court with a view to giving people some indication of what they should or should not do in the future; and after explaining the really collusive bargain such as buying off a good defence, or promising a large settlement, which is as bad as ever, he indicated that an agreement which is really bona fide and intended to make provision for necessary intermediate matters would be approved of by the court and would not prejudice either side in its contentions, irrespective of whether the case was defended or not.

Co-Chairman Senator ROEBUCK: We have been following these rules for a long time in parliamentary divorce.

Mr. WHITEHEAD: That is most enlightening.

(*The brief continues:*)

12. The law as to condonation in England was amended by the Matrimonial Causes Act, 1963, (now superseded by Section 42 (2) and (3) of the Act of 1965), which provided that adultery or cruelty should not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months with a view to a reconciliation. This act provided also that adultery which has been condoned should not be capable of being revived. Under the law as it was before 1963, a spouse's forgiveness of the other spouse's adultery was conditional on his not committing any further matrimonial offences; and, if he did commit any, (which might be cruelty or desertion as well as renewed adultery) the old cause of complaint was revived.

13. The law as to collusion in England was amended by the Act of 1963 (now superseded by Section 5 (2) of the Act of 1965) by a provision that on application made either before or after the presentation of a petition for divorce the court might take into consideration any agreement or arrangement made or proposed to be made between the parties, and might give such directions in the matter as the court thought fit. The object of this change was to relieve the lawyers for the parties of the difficulty which was continually arising in knowing where to draw the line between a bona fide agreement for the care of the children of the marriage, or for financial provision for the family pending divorce proceedings, on the one hand and collusion on the other hand.

Now, if the court approves the proposed agreement or arrangement it is freed from any taint of collusion. If the court does not approve it, the parties can amend it, or abandon it and work out a new one. This change has apparently proved very beneficial in England; and in *Nash v. Nash* L. R. 1965 p. 266 a judge who had heard in chambers a number of applications for approval of such agreements adjourned them into court for judgment (i.e. he gave judgment in public, so that his words could be reported) and said, in part:

"A collusive bargain is one which by its terms, express or implied, provides for the conduct of the suit in one respect or another. A survey of the cases which have developed and shaped the law as to collusion reveals that it is a concept of great range: within it will be found not only such morally offensive bargains as buying false evidence, buying off a defence believed to be good, bribing a reluctant wife to petition by the offer of generous provision after decree absolute, but also such morally inoffensive bargains as the making of reasonable arrangements for maintenance which include a term touching upon the conduct of the suit.

Collusion is no longer an absolute bar to relief. Collusion which contains no genuine offence will no longer debar the Court from proceeding to decree: but collusion which is a genuine offence remains objectionable, and, so long as it taints a suit, will be treated by the Court as an effective bar to relief."

Then, after describing at some length the criteria by which the court is guided in approving or disapproving such agreements, and dealing separately with each of the ten applications, the judge concluded as follows:

> It will be apparent from the foregoing that since the enactment of the Matrimonial Causes Act, 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g, the procurement of a decree upon a false case or improper pressure by financial bribes or threats upon a spouse to bring a suit or abandon a defence: but a collusive bargain, which represents an honest negotiation between the parties, which is not intended to deceive the court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make a reasonable provision for the parties according to its subject-matter, is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain; their duty, in this context as in every other, is to apply their honest skill to the task in hand. If they do so and then place the results of their labour before the court in a spirit of unreserved candour, they will have lived up to the honourable tradition of their profession in a changing world, and will have discharged their duty to their clients, the court and the public—the public whose overriding interest is that the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution.

14. One further change in the divorce law in England has been made since 1937, viz. that now the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period: but a husband or wife is not compellable in any proceedings to give evidence of the matters aforesaid. This rule is now embodied in Section 43 (1) of the act of 1965. For many years such evidence by either spouse had been excluded by a ruling of the House of Lords in *Russell v. Russell* L.R. 1924 A.C. 687.

15. This memorandum is submitted in the hope that a comparison of the law of England before and after 1937 with the present law in Canada may be of assistance to your committee. The only suggestion which I venture to submit is that your committee might feel able to recommend some relaxation of the rule about collusion in divorce cases, perhaps on lines similar to those of the English legislation of 1963 (now superseded by Section 5 (2) of the Act of 1965) as described in paragraph 13 above. This might present constitutional difficulties in Quebec and Newfoundland, but in the provinces which have divorce courts it probably would be of considerable assistance to lawyers and their clients who have to deal with the incidental arrangements rendered necessary by divorce proceedings.

That is the end of the brief. Subject to any questions you may wish to ask, ladies and gentlemen, that is all I have to say.

Co-Chairman Senator ROEBUCK: Are there any questions?

Mr. OTTO: Mr. Whitehead, I was interested in your comments on the three-year interval.

Mr. WHITEHEAD: I think it is important.

Mr. OTTO: I gathered from your remarks that the reason for that three-year hiatus after marriage, and the emphasis upon it, is really the welfare of any children that may have been born of the marriage. In other words, not much attention is paid to the children, and the object of this is to allow for reconciliation and to impress upon the immature particularly that marriage ought not to be taken too lightly.

Mr. WHITEHEAD: I think it is fair to say so.

Mr. OTTO: It seems to me, however, that there could not have been much emphasis placed upon the children because, as I think you will agree, it is more likely there will be children after the expiry of the three-year interval than before. In the drawing-up of this rule was there any discussion regarding the consequences of it so far as the children are concerned?

Mr. WHITEHEAD: I do not think that was discussed very much at the time, because in England they dealt with the question of the custody of children, and provision for them, in the same Act of Parliament that deals with divorce, because they do not have the constitutional problems we have in the Provinces of Quebec and Newfoundland. But there was not much said in relation to that particular provision. Of course, any children there might be in the first three years would be quite young unless the parents had married after having the children first. When the divorce came the children would be left with the wife.

Mr. OTTO: You are speaking of 1937?

Mr. WHITEHEAD: After 1937.

Mr. OTTO: I take it this was passed in 1937?

Mr. WHITEHEAD: Yes; this was passed in 1937.

Mr. OTTO: By 1937 fairly complete documentation was available as to the effects of divorce upon the children. Was this considered at all when this rule was drawn up and passed? I am speaking not necessarily of the custody of the children; I am also concerned with the psychological consequences to the children as a result of divorce.

Mr. WHITEHEAD: The psychological aspect of divorce as regards the children was not discussed in Parliament at the time. The sociologists were well aware of it, of course, but I do not think it penetrated far into the ranks of parliamentarians or of lawyers, who were much more concerned with the questions of custody and material provision for the children.

Mr. OTTO: In the matter of cruelty, Mr. Whitehead, you asked whether cruelty should be considered objectively or subjectively, and in this connection you referred to new Canadians coming from other parts of the world where different customs prevailed—for example, where the authority of the master of the household, I think you said, was taken for granted and implicit obedience was expected. I gather from your comments that you favour the objective point of view. The question arises in my mind: how far can we go? Let us presume that it was the custom in the country of origin that the husband might beat his wife regularly every Sunday. The question is: When they come to Canada, are you saying that the courts should look upon cruelty entirely objectively, entirely in relation to the previous customs of people, or are we to consider, and should the courts apply, in their definition of cruelty, the measure of standards in Canada?

Mr. WHITEHEAD: It is very difficult to say that you must draw the line absolutely on one side or the other. I think it would be correct to allow the court to make it very largely a question of subjective approach, whether this particular man was cruel to this particular woman, rather than say that such and such an act is necessarily cruel, and therefore, if the husband has acted in that manner the act was cruel and there should be divorce.

Co-Chairman Senator ROEBUCK: That is to say, we should leave it to the courts.

Mr. WHITEHEAD: Yes; but I am quite sure the courts do retain their liberty.

Co-Chairman Senator ROEBUCK: As regards the province of Quebec, Mr. Whitehead, you mentioned an article of the Civil Code which you said was necessary as a precaution. What was the wording?

Mr. WHITEHEAD: It is Article 190: "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 or circumstances of the parties." That is Quebec. I do not think it could be expressed much better than that, if you adopt that approach to the question. Where you have various people coming from various communities, who take entirely different views of things, you must judge by their own standards.

Mr. OTTO: Are you suggesting that no general Canadian standards be set, except the standards of the two people concerned?

Mr. WHITEHEAD: That is probably putting it in an extreme form, but I go a long way in that direction, as they have done in Saskatchewan and Alberta, because they have a diverse population. The shoe will pinch somebody.

Mr. MCCLEAVE: Could I recall two cases which happened in Nova Scotia, and ask the opinion of the witness. Both involved allegations of cruelty. In one, after fifty years or so of marriage, a husband struck his wife—the first time this had happened. In the second, after a few days of marriage, a husband hit his bride. The court decided in the case of the newlyweds that this was a terrible thing because he could be expected to beat her up again and again during the course of the marriage; whereas in the former case, where the husband had smitten his wife just once in fifty years, this was not likely to happen again. In the civilized parts of Canada the inference is that no one set of facts should be allowed to govern another set of facts.

Co-Chairman Senator ROEBUCK: I saw in the newspapers recently a report of a case that was decided in England where a wife was given a divorce because the husband insisted on tickling the soles of her feet, though he knew it made her hysterical.

Mr. WHITEHEAD: I saw that too. That is a rather extreme case and it got the highlight in the newspapers. He had been doing other things too. I thought that was going very far.

Mr. BALDWIN: Referring to page 17 of the brief, I find that by the 1963 act the doctrine of revived matrimonial offences is no longer effective. There is no more revival. Was there a discussion of that particular principle?

Mr. WHITEHEAD: The revival of condoned adultery has been completely abandoned. The forgiveness of the other spouse is now no longer conditional but absolute.

Mr. BALDWIN: Previously, although cruelty and/or desertion were not by themselves grounds for dissolution, an act of cruelty or an act of desertion could have revived the original adultery?

Mr. WHITEHEAD: Yes.

Mr. BALDWIN: Once you establish cruelty or desertion as grounds for dissolution, you do not need to go back to the original adultery. Is that one of the basic reasons for the change?

Mr. WHITEHEAD: It might be. I looked at the act to see whether the preamble gave any reason for the change but I did not see anything about it.

Co-Chairman Senator ROEBUCK: Perhaps we have been going too far. There was a case recently where the parties came together again for the benefit of the

children and later the wife abandoned the husband and children without reasonable cause and that revived the previous marital offence.

Mr. OTTO: In other words, the English law says now that condonation is no longer a defence to adultery in England? We still regard it as a defence.

Mr. MCCLEAVE: It is discretionary, is it not?

Co-Chairman Senator ROEBUCK: Is it discretionary or absolute, Mr. Whitehead?

Mr. WHITEHEAD: Adultery which has been condoned always was a bar to divorce. The difference is that previously it could be revived; but now, once it has been condoned, it is absolute.

Co-Chairman Senator ROEBUCK: It is absolute?

Mr. WHITEHEAD: Yes.

Mr. MCCLEAVE: On another topic, Mr. Whitehead has given us an excellent commentary on the law in England as it was until 1937 and the changes which were brought about in connection with the hotel type of cases. The Herbert law altered that situation, cutting down the number of what I would call, for want of a better expression, rigged chambermaid cases, as was so eloquently set forth this afternoon. Has there been an appreciable reduction of such cases in England?

Mr. WHITEHEAD: I do not think they have been entirely abolished but there has certainly been a reduction, because now it is done by way of desertion.

Mr. MCCLEAVE: Are the Judges, and members of the English Bar to whom you have spoken, happy with the 1937 law?

Mr. WHITEHEAD: Everyone I know there thinks the 1937 law a great improvement on what went on before.

Mr. OTTO: I should like to ask Mr. Whitehead a question in connection with what I might call the processing of divorce cases. Would you say, Mr. Whitehead, that proceeding by way of adultery, apart from the question of collusion, is still the simplest way of going about it rather than going to the trouble of establishing cruelty, except possibly for separation?

Mr. WHITEHEAD: Yes, I would say so.

Co-Chairman Senator ROEBUCK: It is easier to prove adultery than cruelty.

Mr. WHITEHEAD: Yes.

Co-Chairman Senator ROEBUCK: What about desertion? That is easily proved?

Mr. WHITEHEAD: Yes. If the parties are agreed that they want to get rid of each other, at the end of three years they do not remember exactly how they did part. They may remember they had a row or several rows. Their recollections do not seem to be clear.

Mr. OTTO: It is possible collusion has been transferred from adultery to separation.

Mr. WHITEHEAD: I suppose there would be a certain amount of collusion as regards separation, because when there had to be desertion as well as adultery for divorce against the husband, the desertion might be collusive.

Co-Chairman Senator ROEBUCK: Have you further questions?

Mr. OTTO: I have one question in connection with the matter of the proctor. There is a Queen's Proctor under English law?

Mr. WHITEHEAD: Yes.

Mr. OTTO: In Ontario we have a Queen's Proctor in the person of the Attorney General. Has there been any appreciable lessening of collusion in the incidence of "hotel" cases?

Mr. WHITEHEAD: Certainly there has.

Co-Chairman Senator ROEBUCK: In Ontario the Attorney General has appointed someone to look into these matters as Queen's Proctor, but as far as I know we have never appointed anyone to discharge the function on a permanent basis as Queen's Proctor.

Mr. OTTO: The gentleman appointed has looked into three cases, I believe, or at any rate those are the ones that have been publicized. I am wondering how effective the Queen's Proctor has been with respect to collusion.

Mr. MCCLEAVE: In Nova Scotia the judges of the Supreme Court decided to get rid of the proctor system.

Co-Chairman Senator ROEBUCK: Why?

Mr. MCCLEAVE: They felt that to have a Queen's Proctor was simply to use a formula approach. Instead if there is any question or any doubt in their minds they will reserve judgement and ask the Attorney General's Department to intervene. In that sense it might be considered a substitute for the Queen's Proctor system. A number of years back they decided not to have the Queen's Proctor in court at all times for every case.

Co-Chairman Senator ROEBUCK: Do they have the Queen's Proctor in England for every case?

Mr. WHITEHEAD: No. The Queen's Proctor has some sort of deterrent effect because people are afraid that if they do anything stupid the Queen's Proctor will get after them.

Co-Chairman Senator ROEBUCK: Here, if an offence is committed we refer it to the Minister of Justice.

Ladies and gentlemen, have we probed the situation as far as you care to go? Do I take it that it is your wish to adjourn? If so, I should like to express, and so does my co-chairman, our appreciation of the brief that has been presented to us—the care with which it has been prepared and the skill shown in its presentation to us today. It has given us a considerable amount of information with regard to the English law which is very pertinent to the problem that is before us.

Mr. Whitehead, I should like to express the appreciation of all here of the effort that you have made on our behalf. Thank you.

Mr. WHITEHEAD: I appreciate that, Mr. Chairman, and I wish to thank you and the members of your committee for listening to me.

The committee adjourned.

APPENDIX "11"

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

by

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of the Bar of England (1921) and the Bar of Quebec (1944)
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I was called to the Bar of England in 1921 and practised in London until 1935 in the Chancery Division of the High Court of Justice, dealing with equity matters. From 1927 onwards I began to take divorce cases also, because about that time the divorce work had increased so much that the regular Divorce Court Bar, who were a comparatively small group of specialists, could not deal with it all, and solicitors began briefing in divorce cases members of the Bar whose practice was normally in other Divisions of the Court. For this purpose I learned the practice in divorce cases, as it then was, and I was able to see at first hand the problems with which the Divorce Court Bar was having to deal. Paragraphs 1 to 8 inclusive and paragraph 15 of this Memorandum are based on my personal knowledge and experience. Paragraphs 9 to 14 inclusive are based partly on knowledge acquired from reading the Law Reports regularly as they come out and partly on a number of conversations which I had during visits to England with a lifelong friend, recently deceased, who sat for ten years or more after the 1939-45 War as "Divorce Commissioner" in London and in English Provincial cities, taking the place of a High Court Judge and hearing nothing but divorce cases, mostly defended ones.

1. Before 1857 no Court in England had power to grant divorces a vinculo matrimonii (enabling either spouse to marry again in the lifetime of the other). The Ecclesiastical Courts of the Church of England had power to grand decrees of (1) nullity (for impotence or consanguinity, or because the supposed marriage had been found to be bigamous), (2) divorce a mensa et thoro (now called judicial separation, which did not enable either spouse to marry again in the lifetime of the other), (3) restitution of conjugal rights, which was a decree enjoining a spouse who had deserted the other spouse to return to cohabitation, and (4) a decree of perpetual silence in a case of jactitation of marriage when anyone persistently and falsely alleged marriage with another. Divorce a vinculo matrimonii could be obtained only by private Act of Parliament. Such Acts were seldom or never passed at the instance of the wife. If the husband wanted one, he had first to bring an action for "criminal conversation" (i.e. adultery) in a Civil Court against the man with whom his wife had committed adultery; and the verdict in that action was treated as conclusive proof of the adultery, so that Parliament did not have to hear the evidence again. This procedure was wasteful of Parliamentary time, and the expense led to complaints that there was one law for the rich and another for the poor: so in 1857 Parliament passed the Matrimonial Causes Act of that year, the material parts of which are set out in Appendix 3 to the Proceedings of your Committee for June 28, 1966. This Act set up a civil Divorce Court for the first time, and transferred to it the matrimonial jurisdiction of the Ecclesiastical Courts. It also enabled the new Court to grant a divorce a vinculo matrimonii to a husband whose wife had committed adultery or to a wife whose husband had committed sodomy, bestiality, rape, incestuous adultery or bigamy with adultery, or who had committed adultery and had also been guilty of cruelty or of desertion without reasonable excuse for two years or upwards. Some years later, on a reorganization of the Courts in England, the Divorce Court became, as it still is, a part of the Admiralty, Probate and Divorce Division of the High Court of Justice. No further changes of substance took place until after the 1914-18 War.

2. At the end of the 1914-18 War women were given the Parliamentary vote in England, and shortly afterwards the law was changed to allow a wife to divorce her husband on proof of adultery only, without having to prove cruelty or desertion in addition. After this, no further changes of substance took place until the major reforms of 1937, hereinafter mentioned.

3. The position in England immediately before the reforms of 1937 was thus in most respects similar to the law as it is in Canada today. The principal points of difference were as follows:

(*a*) In England a wife could not divorce her husband on the ground of cruelty alone, but in one of the Canadian Provinces (Nova Scotia) she can do so.

(*b*) In England a decree of divorce was in the first instance only a decree nisi, which did not dissolve the marriage. The Petitioner could ask for a decree absolute which did dissolve the marriage and enabled the parties to marry again at the end of six months from the pronouncement of the decree nisi; but he or she was not bound to do so; and occasionally a Petitioner would refrain from applying for a decree absolute, probably in order to force a financial settlement. The Respondent could not, at that date, apply for a decree nisi to be made absolute: but this has since been altered, and now under Section 7 (2) of the Matrimonial Causes Act, 1965 (hereinafter called "the Act of 1965") the party against whom the decree nisi has been made may apply to have it made absolute if the other party has not made such an application within three months after he or she became entitled to do so.

(*c*) The King's Proctor, an official working under the direction of the Attorney-General, could intervene in any case where it was thought advisable to have the case argued on behalf of a public authority. (Originally a Proctor was a lawyer who performed the same duties in the Ecclesiastical courts as an attorney did in the Courts of Common Law or a solicitor in the Court of Chancery.) A Judge could (and he still can) ask for the assistance of counsel on behalf of the King's Proctor in any case in which he suspected collusion, or in an undefended case raising a new point of law which the Judge wished to have argued on both sides. The unsuccessful party, or any other person, could ask the King's Proctor to intervene on the ground that there had been collusion, or that for any other reason the whole of the facts had not been before the Court, but of course the King's Proctor used his own discretion as to whether or not to accede to such a request. This is still the rule in England, now under Section 6 of the Act of 1965. Though there is no Queen's Proctor in Canada, the Attorney-General of Quebec was, in the late Premier Duplessis' time, given power to intervene in nullity cases where collusion was suspected.

The law as to connivance, conduct conducing to adultery, condonation and collusion was in 1937 practically the same in England as it is now in Canada. Connivance is where the Petitioner has had the corrupt intention of promoting or encouraging either the initiation or the continuance of the Respondent's adultery. It is an absolute bar to divorce. Conduct conducing is where, in the opinion of the Court, the Petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the Respondent's adultery. It is a discretionary bar to divorce, the discretion being that of the Judge. Condonation is the conditional forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore between the spouses the status quo ante. Collusion is where the initiation of a divorce petition is procured, or its conduct provided for, by agreement or bargain, express or implied, between the parties or their agents. It was formerly an absolute bar to divorce in England, but since 1963 has been only a discretionary bar; see paragraph 13 below. There has also been a change in the English law as to condonation; see paragraph 12 below.

4. The experience of the Courts in England between the two Wars revealed certain weaknesses in the law of divorce as it then was. By far the greatest difficulty arose from undefended divorces on the ground of the husband's

adultery. The change in the law which made this possible coincided with the break-up of many hasty war-time marriages and with the general relaxation of morals which had begun during the 1914-18 War and continued afterwards. Since neither desertion nor cruelty was a ground for divorce, many people whose marriages had broken up on one or other of these grounds were tempted to concoct evidence of adultery which would enable them to get a divorce. Among many circles of the upper and middle classes it came to be considered that when neither party wished to live with the other again the husband ought, at the wife's request, to provide her with evidence of his adultery which would enable her to obtain a divorce against him, and that it would be uncharitable and ungentlemanly for him to refuse to do so. A custom grew up by which the husband wrote to the wife a letter saying:

"Dear—,

I am given to understand that you desire your freedom. I enclose an hotel bill." or words to that effect. The wife's solicitors then made enquiries at the hotel from which the bill had come; and at the trial the desk clerk from the hotel produced the hotel register, showing that the husband had occupied a room with a woman, signing the register as husband and wife, and a chambermaid described how she had taken early morning tea to the room and found them in bed together, or one of them in bed and the other partly dressed. This was accepted as sufficient evidence of adultery. From time to time there was speculation as to whether in a particular case adultery had or had not really taken place; but it seems certain that it usually had, because otherwise the woman whom the husband had taken to the hotel would have been in a position to blackmail him by threatening to disclose the true facts to the King's Proctor and get the divorce decree rescinded before it was made absolute. At one time a question was faintly suggested as to whether or not adultery which had been committed simply to form the foundation for a divorce petition, and for no other purpose, was really within the meaning of the Act: but in the case of Woolf v. Woolf L.R. 1931, p. 134 one of the Judges in the Court of Appeal, without any dissent from his colleagues, said that adultery must be treated as a ground for divorce, whatever the motive for committing it might have been. In these circumstances it soon came to be considered among the generation who had grown up during and since the 1914-18 War that there was no real stigma on a man who had "given" his wife an "hotel divorce", though adultery on a wife's part was still considered disgraceful.

5. Many barristers who were practising in divorce cases at that period had serious misgivings about the system of hotel divorces. Certain hotels in Central London were so commonly resorted to for that purpose that one sometimes found, on arriving at the Court and enquiring if one's witness were present, that they were engaged before another Judge giving similar evidence in another case, and one was left anxiously hoping that the other case would be over before one needed the witnesses for one's own. Further, some floor waiters and chambermaids were giving evidence as mentioned above so frequently that one doubted whether or not they really were sure that the woman whom they had seen in bed on one occasion only, several months before, was not the Petitioner, whom they had seen for the first time in Court that day. I remember one of the regular practitioners in the Court telling me (after he had used the same hotel witnesses in three different cases on the same day) that he felt fairly sure that if he and his wife ever wanted to get divorced they could go and spend a night together at that hotel, and that when the case came up for trial, three or four months later, some hotel witness would cheerfully swear that the woman who had been at the hotel with him was not the Petitioner (his wife). The Judges must, of course, have been as well able as anybody to see what was going on; and Lord Merrivale, the President of the Admiralty, Probate and Divorce Division, a Judge of

great experience, who commanded universal respect, tried for some time to insist that the name of the woman who had gone to the hotel with the husband should be supplied to the Court, presumably so that the King's Proctor could make enquiries, if thought desirable. As early as 1928, in the case of Aylward v. Aylward, 44 T.L.R. 456, he refused a decree in an "hotel adultery" case because he was not satisfied that adultery had been committed, at any rate with the woman who had been at the hotel; and he expressed himself in very strong terms about the whole "hotel adultery" system. Eventually he refused a divorce in a case (Woolf v. Woolf, cited above) where the husband, who was quite as anxious for a divorce as his wife, had spent two nights at an hotel with a woman those name he refused to give, and Lord Merrivale, suspecting that the case was collusive, was not satisfied that the woman who had been at the hotel had not been a near relative of the husband or someone else with whom he was unlikely to have committed adultery (see page 146 of the Report). The Court of Appeal would not support Lord Merrivale, and said that when a man and a woman who were not husband and wife shared an hotel room the usual inference must be drawn. (This decision was followed in Nova Scotia some years later in Durrant v. Durrant (1944) 3 D. L. R. 30, in which the appellate Court reversed the decision of the trial judge, who had said that he suspected collusion and doubted if adultery had really been committed.)

During the 1930's, Mr. A. P. Herbert, then Independent Member of Parliament for Oxford University, who was a well known writer, determined to try to bring about reforms, and he wrote a satirical novel "Holy Deadlock" about an imaginary hotel divorce, which revealed the abuses of the system, of course with some exaggeration, but not very much. This book had a wide circulation and opened the eyes of the general public to what was going on. With its help, and after much consultation with his colleagues in the House of Commons, he was able to bring in and pilot through Parliament the Matrimonial Causes Act, 1937, which extended the grounds both for nullity and for divorce, but prevented divorce petitions from being presented during the first three years of the marriage, unless special leave was given on account of exceptional hardship on the Petitioner or exceptional depravity on the part of the Respondent. It is significant that one of the reasons for passing the Act, stated in the Preamble, was "the restoration of due respect for the law." In view of the terms of the Order of Reference to your Committee, this memorandum deals only with the grounds for divorce. The news ones added by the Act of 1937 were:

(a) Desertion without cause for three years next before the presentation of the divorce petition.

(b) Cruelty.

(c) Incurable insanity.

(d) Presumption of death of the other spouse. This is not strictly a case of divorce, but rather of dissolution of marriage.

7. There is no statutory definition of desertion, and it has been described as not so much a withdrawal from a place as a withdrawal from a state of things. The (British) Royal Commission on Marriage and Divorce (Cmd. 9678, H.M.S.O. London, 1956) suggested the following definition, which seems as good as any:

"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."

The Respondent can defend the petition by showing that he or she had valid cause for leaving, which need not necessarily be sufficient to amount to legal cruelty. In some cases it may even be held that the spouse who has remained in the matrimonial home is the deserter, because he or she deliberately drove the other out. The high-water-mark of these cases is probably Winnan v. Winnan L.R. 1949, P. 174, where the wife was found guilty of constructive desertion

because she insisted (contrary to her husband's wishes) in keeping a large number of cats in the house, and told her husband that she preferred the cats to him. Now, under Section 1 (2) of the Act of 1965, any one period of not more than three months during which the parties resumed cohabitation with a view to reconciliation is not to be considered as interrupting the three years' desertion.

If the spouses originally parted by mutual consent, without any express agreement as to the duration of the separation, either of them may at any time put an end to the agreement to separate, and the other spouse will then be treated as being in desertion from that time onwards, so that the three years begin to run from the same time. It is otherwise if the separation was under the terms of a valid separation deed, the terms of which have always been observed. The deserting spouse may repent and offer to return to cohabitation during the three-year period; and, if the Court considers that the repentance is sincere, it is a good defence.

8. Cruelty is a ground for divorce which in practice is apt to present many difficulties to the Court trying the Petition. Mental cruelty is included: and even in a country as comparatively homogeneous as England there are different sections of society whose ideas as to what conduct is tolerable and what is not differ considerably. Before 1937, when cruelty without adultery was a ground only for judicial separation, a wife who knew that even if she proved cruelty against her husband she would have to remain married to him was not likely to start proceedings unless his conduct was really hurting her beyond endurance, or at any rate she thought that it was: but it is not at all the same thing when she can hope to get a divorce which will leave her free to marry somebody else, and perhaps she already has in view the man whom she would like to have as her next husband. In such cases there may often be an element similar to what in personal injury cases is known as "compensationitis". In England, in cases of cruelty, the Petitioner has to show injury or apprehended injury to his or her health from the Respondent's conduct; but where, as is usually the case, the injury takes the form only of a nervous condition which obviously must be making the Petitioner very difficult to live with, there may often be a doubt as to whether the Petitioner's nervous condition is due to the Respondent's conduct or the Respondent's conduct is due to the Petitioner's nervous condition. In some cases, and particularly in defended cases where each party is asking for a divorce against the other, they are apt to drag out a long series of old unhappy memories which they hope will have a cumulative effect, beginning with the time the husband forgot the wife's birthday or the time she put him to shame by having one drink too many at his boss' cocktail party, and continuing with many other items of no greater importance, until at the end of the day even an experienced Judge may find it hard to decide whether this is a case of cruelty, which is a ground for divorce, or merely a case of incompatibility of temperament, which is not a ground for any relief at all. Until recent years it had been regarded as settled that cruelty must be shown to have been "aimed at", or intended to hurt, the other spouse or the children of the marriage; but in the cases of Gollins v. Gollins L.R. 1964 A.C. 644 and Williams v. Williams L.R. 1964 A.C. 698 the House of Lords held that if the conduct complained of was grave and weighty, and if the injury or apprehended injury to the Petitioner's health was shown, there was no need to show an intention to injure or a guilty mind. This is a different approach to the question from that of Canadian law relating to cruelty as a ground for judicial separation. In Quebec, Articles 189 and 190 of the Civil Code do not require injury or apprehended injury to health as an element of cruelty, nor do the relevant statutes of Saskatchewan and Alberta.

9. Incurable unsoundness of mind was made a ground for divorce in England by the Act of 1937, if the patient had been continuously under care and treatment for a period of at least five years immediately preceding the presenta-

tion 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 hospital on trial. By an amendment made by the Divorce (Insanity and Desertion) Act, 1958 (now superseded by section 1 (3) of the Act of 1965) any interruption of the period of care and treatment for 28 days or less is to be disregarded for the purpose of determining whether or not such period has been continuous.

10. Presumption of death of the other spouse was made a ground for dissolving the marriage under the Act of 1937 (now superseded by Section 14 of the Act of 1965). A petition has to be presented to the Court to have it presumed that the other spouse is dead and to have the marriage dissolved. If no other evidence of the death can be found, the fact that for a period of seven years or upwards 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 is evidence that he or she is dead until the contrary is proved. Absence under a separation agreement does not bar the Petition, though continued absence from the Petitioner where the parties have bound themselves to live apart proves very little. There are Rules of Court which prescribe the steps which the Petitioner must take to try to trace the missing spouse. The decree is in the first instance only a decree nisi, as in a divorce case; and if, after the decree nisi but before it has been made absolute the other party is found to be alive an intervention can be made and the decree will be rescinded.

11. An essential element in the 1937 reforms was the provision that no divorce proceedings could be taken within the first three years of the marriage without special leave. The ground for this was that it was felt that the possibility of getting a divorce for a single act of adultery on the part of the husband was in many cases resulting in young people making insufficient effort to overcome the difficulties of adjustment which are to be expected at the beginning of married life, and in some cases was even leading them to enter on marriage without due consideration, in reliance on being able to get out of it again if they found that they were unsuited to each other. There was a relaxation of this rule during the 1939-45 War, but it was only temporary. The special leave required for presenting a petition in cases of exceptional hardship to the Petitioner or exceptional depravity on the part of the Respondent has to be obtained from a Judge. Applications for such leave are heard in Chambers, i.e. in private, and not in open Court, so that there is no body of reported cases to show exactly what qualifies as exceptional hardship or exceptional depravity: but such applications are not very numerous, and it is believed that many of them are rejected.

12. The law as to condonation in England was amended by the Matrimonial Causes Act, 1963, (now superseded by Section 42 (2) and (3) of the Act of 1965), which provided that adultery or cruelty should not be deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months with a view to a reconciliation. This Act provided also that adultery which has been condoned should not be capable of being revived. Under the law as it was before 1963, a spouse's forgiveness of the other spouse's adultery was conditional on his not committing any further matrimonial offences; and, if he did commit any, (which might be cruelty or desertion as well as renewed adultery) the old cause of complaint was revived.

13. The law as to collusion in England was amended by the Act of 1963 (now superseded by Section 5 (2) of the Act of 1965) by a provision that on application made either before or after the presentation of a petition for divorce the Court might take into consideration any agreement or arrangement made or proposed to be made between the parties, and might give such directions in the matter as the Court thought fit. The object of this change was to relieve the

lawyers for the parties of the difficulty which was continually arising in knowing where to draw the line between a bona fide agreement for the care of the children of the marriage, or for financial provision for the family pending divorce proceedings, on the one hand and collusion on the other hand. Now if the Court appoves the proposed agreement or arrangement it is freed from any taint of collusion. If the Court does not approve it, the parties can amend it, or abandon it and work out a new one. This change has apparently proved very beneficial in England; and in Nash v. Nash L.R. 1965 p. 266 a Judge who had heard in Chambers a number of applications for approval of such agreements adjourned them into Court for judgment (i.e. he gave judgment in public, so that his words could be reported) and said, in part

"A Collusive bargain is one which by its terms, express or implied, provides for the conduct of the suit in one respect or another. A survey of the cases which have developed and shaped the law as to collusion reveals that it is a concept of great range: within it will be found not only such morally offensive bargains as buying false evidence, buying off a defence believed to be good, bribing a reluctant wife to petition by the offer of generous provision after decree absolute, but also such morally inoffensive bargains as the making of reasonable arrangements for maintenance which include a term touching upon the conduct of the suit. Collusion is no longer an absolute bar to relief. Collusion which contains no genuine offence will no longer debar the Court from proceeding to decree: but collusion which is a genuine offence remains objectionable, and, so long as it taints a suit, will be treated by the Court as an effective bar to relief."

Then, after describing at some length the criteria by which the Court is guided in approving or disapproving such agreements, and dealing separately with each of the ten applications, the Judge concluded as follows:

"It will be apparent from the foregoing that since the enactment of the Matrimonial Causes Act, 1963, it is no longer appropriate to treat all collusion as mischievous or all who negotiate collusive bargains as mischief makers. A collusive bargain, which in the ordinary meaning of the word is corrupt, remains an offence legally and morally, e.g. the procurement of a decree upon a false case or improper pressure by financial bribes or threats upon a spouse to bring a suit or abandon a defence: but a collusive bargain, which represents an honest negotiation between the parties, which is not intended to deceive the Court either by putting forward false evidence or suppressing or withdrawing a good defence and which takes its place in an agreement which is intended to make a reasonable provision for the parties according to its subject-matter, is a perfectly reputable transaction. There is no objection to solicitors and counsel negotiating such a bargain; their duty, in this context as in every other, is to apply their honest skill to the task in hand. If they do so and then place the results of their labour before the Court in a spirit of unreserved candour, they will have lived up to the honourable tradition of their profession in a changing world, and will have discharged their duty to their clients, the Court and the public—the public whose overriding interest is that the institution of marriage should not be undermined by an unworthy and disreputable market in its dissolution."

14. One further change in the divorce law in England has been made since 1937, viz. that now the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period: but a husband or wife is not compellable in any proceedings to give evidence of the matters aforesaid. This rule is now embodied in Section 43 (1) of the Act of 1965. For many years such evidence by either spouse had been excluded by a ruling of the House of Lords in Russell v. Russell L.R. 1924 A.C. 687.

15. This memorandum is submitted in the hope that a comparison of the law of England before and after 1937 with the present law in Canada may be of assistance to your Committee. The only suggestion which I venture to submit is

that your Committee might feel able to recommend some relaxation of the rule about collusion in divorce cases, perhaps on lines similar to those of the English legislation of 1963 (now superseded by Section 5 (2) of the Act of 1965) as described in paragraph 13 above. This might present constitutional difficulties in Quebec and Newfoundland, but in the Provinces which have divorce courts it probably would be of considerable assistance to lawyers and their clients who have to deal with the incidental arrangements rendered necessary by divorce proceedings.

Montreal, October 1966.

APPENDIX "12"

BRIEF

to

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

by

Canadian Federation of University Women
29 Edgedale Rd., St. Catharines, Ont.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

1. Law should reflect the collective sense of justice of the society to which it pertains. In this case the divorce law of Canada, being established in most provinces in 1857 (see *Proceedings* of session one of Joint Committee page 11) is obviously out of date since religious thought and sexual mores are very different today from those of Victorian England.

2. Changes including as grounds for divorce the grounds adopted in England in 1937 would appear to be generally acceptable to many organizations and many sections of society.

3. These changes constitute a minimum. Other grounds for divorce are now being suggested and would seem to warrant study by the Joint Committee.

4. The reform of laws connected with divorce, such as domicile, should also be considered, especially with a view to establishing before the law complete equality of men and women.

1. The Canadian Federation of University Women has a membership of more that 11,000, all of whom are graduates of accredited universities throughout the world now residing in Canada. The Head Office of the Federation is at 29 Edgedale Road, St. Catharines, Ontario. The President is Mrs. M. J. Sabia, and the Executive Secretary Mrs. R.T. Shannon. The Federation is organized on a local, provincial and national basis, with clubs and executive members in all the provinces.

2. The objectives and nature of the Canadian Federation of University Women are outlined in article 2, *Purpose*, of our constitution. This constitution is currently being revised, but the objectives and nature of the group will not be changed. Our purpose is to assist in developing a sound concept of educational values; to arouse and sustain an intelligent interest in public affairs; to encourage an active participation in such affairs by qualified women; to provide an opportunity for effective action; to guard and improve the economic, legal, and professional status of Canadian women; and to facilitate understanding and cooperation among university women, nationally and internationally, irrespective of race, religion or political opinions. The Canadian Federation of University Women actively participates in the work of the International Federation of University Women.

3. The Canadian Federation of University Women is organized in such a way that subjects which come up for discussion at our meetings, particularly at the regional, provincial or national level, have already been thoroughly discussed at the local level by the general membership. At the national level, we have nine standing committees and nine special committees. One of our standing committees studies the status of women and one of our special committees studies legislation affecting women. Our general meeting for all members is held every three years in various parts of Canada. The last one was held in Winnipeg in

August 1964, and our next will be held in Vancouver in 1967. Each year between general meetings (called Triennial Conferences) meetings of the Council, consisting of the executive and delegates from all member clubs, are held. The organizational structure ensures that resolutions presented to a general meeting have been studied by many people for some length of time in order that a sound discussion and an informed vote may result.

4. The proceedings of the first two sessions of the Joint Committee of the Senate and House of Commons on divorce refer to many of the facts and reasons which have made members of the Canadian Federation of University Women study the question of change in the divorce laws. On page 119 of the *Proceedings* of the second session of the Joint Committee Dr. P. M. Ollivier refers to a new approach to the question of divorce which is discussed in an article by Mr. Douglas F. Fitch of Calgary in the Canadian Bar Journal for April 1966. This article called "As grounds for divorce, let's abolish matrimonial offences" introduces the idea of the "breakdown of marriage" in terms which seem valid in today's society. A similar idea is referred to very briefly in an article on the Catholic Church by June Callwood in Maclean's for August 20th 1966 page 34. The reference is to the "sixth century device for dissolving marriages by declaring them spiritually dead". It is not suggested that this concept is accepted by many people but that it is mentioned at all in a "popular" article is significant.

5. The Catholic position on divorce remains unaltered, but this does not necessarily mean that the Catholic church would oppose changes in the divorce law, if such were deemed necessary by the pluralistic society in which we all live. Traditionally all the churches have opposed changes in the divorce laws but there are now signs that they are reconsidering. The recent changes in the divorce laws in New York State were apparently not opposed by the churches. The General Council of the United Church this year passed a recommendation for reform of the divorce law which we believe will be presented directly to this Joint Committee. The report of the committee of the Archbishop of Canterbury reveals a similar tolerant attitude. (Schedule A).

6. During the last few years many organizations and societies have concerned themselves with the social and ethical problems which arise from the present divorce laws. The Canadian Bar Association, so closely linked professionally with these problems, at its last annual meeting passed recommendation advocating changes similar to the ones we advocate below.

7. At the Triennial conference in Winnipeg in 1964, the following resolution was passed:

Laws pertaining to the Dissolution of Marriage

WHEREAS the present sole grounds for divorce in Canada (except in Nova Scotia) is adultery or gross sexual offence;

AND WHEREAS this exclusive emphasis on the sexual relationship is degrading to the marital status;

AND WHEREAS the law of the common-law provinces of Canada relating to divorce is eigher, with minor amendments, the English Divorce and Matrimonial Causes Act of 1857 or legislation similar thereto, and whereas no extension of the grounds for divorce in the common-law provinces has taken place since 1927, when the courts were empowered to grant a decree of divorce to a wife on the grounds of her husband's adultery only, and whereas the law of England relating to divorce has been amended since 1937 to extend grounds for divorce;

AND WHEREAS the laws of Canada dealing with the dissolution of marriage, being outdated and inadequate to our present society, lead to their abuse and to the commission of fraud and perjury in our courts;

AND WHEREAS it is now possible to obtain a decree of dissolution of marriage at any time after marriage is solemnized and whether or not the parties have made any effort to prevent their marriage breaking down;

THEREFORE BE IT RESOLVED that the Canadian Federation of University Women request the Government of Canada:

1. to grant to the courts in such provinces and territories as desire it, power to dissolve marriages upon the following grounds (in addition to the present grounds), these being the grounds adopted in England in 1937 and upheld by the British Commission on Marriage and Divorce 1951-1955:

(a) desertion without cause for at least three years
(b) insanity, not cured after specific treatment for five years
(c) cruelty

2. to restrict the bringing of actions for divorce during the first three years after solemnization of a marriage to cases where the plaintiff has suffered exceptional hardship as a result of the actions of the intended defendant spouse.

This resolution in its final form was presented by the University Women's Club of Victoria, B.C., which first brought the matter up for discussion at the Council meeting in Toronto in 1963. Several other local clubs, including the University Women's Club of Ottawa, presented similar data or resolutions, but agreement was finally reached on the one presented by Victoria. Some of the material supplied by the Victoria Club to the Federation can be produced if necessary.

8. This resolution is very similar to Senator Arthur Roebuck's bill. It is not radical. It is not our intention that a live marriage be dissolved but it is our intention that "we rationalize, not liberalize, our divorce law" (see page 120 *Proceedings* of second session of Joint Committee). Moreover it is urged that these reforms be accompanied by a real effort by all parties in society to ensure that the interests of any children be regarded as primary at the dissolution of a marriage. (Present laws tend to protect the interests of the so-called "innocent party" rather than the interests of children.) These interests include not only economic and physical needs of children but their emotional well-being, including the right of the child to a parent relatively free from unnecessary emotional stress.

9. In the *Proceedings* of session one of the Joint Committee page 12, Mr. E. Russell Hopkins says "the divorce law of Canada, like Canada itself, is in the nature of a mosaic". This is fascinating historically but frustrating in many ways to a society which daily becomes more heterogeneous and mobile. The jurisdiction for divorce is based on the provincial domicile of the husband, which because of present mobility may be in legal doubt. Therefore it is urged that a review of the law of domicile also be undertaken. The right of a married woman to her own domicile, and the granting to the courts of the jurisdiction to hear divorce cases based on the domicile of the wife, would relieve many present inconsistencies in the law of divorce. The question of domicile is still being studied by our Standing Committee on the Status of Women, and no firm or detailed recommendation has yet been made.

10. "The morality of a by-gone age still rules our people today". (Canadian Bar Journal Vol. 9, No. 4, August 1966 page 272). A society disturbed by an apparent increase in the social problems retains a law which contributes to many of those problems. Let us extend our area of human concern to eliminate the anachronism of our divorce law.

October, 1966.

Schedule (A)

Canadian Catholic Conference
Conférence Catholique Canadienne

90 Parent Avenue,
Ottawa 2, Canada,
Telephone: 236-9461

Gordon George, S.J.,
General Secretary.

OTTAWA, August 26, 1966.

Mrs. H.A. Elliott,
Canadian Federation of University Women,
44 Strathcona Crescent,
Kingston, Ontario.

Dear Mrs. Elliott:

Thank you for your enquiry of August 23 about submissions to the Joint Committee on Divorce.

The C.C.C. has not at this time made any decision about presenting a brief and so there is not very much I can tell you.

The Catholic position on divorce (With a right to re-marry) remains unaltered. There seems to be no possibility of a change.

This is not, of course, the same question as that relating to the divorce laws themselves. It does not necessarily follow from the Catholic Church's opposition to divorce as such that a brief from the Bishops of Canada would oppose changes in the divorce law.

I am sorry that I cannot be more helpful, but to say more would be to give you the benefit of a hazardous guess.

Sincerely yours,

Gordon George, s.j.
General Secretary.

The C.C.C. is the Association of the Roman Catholic Cardinals, Archbishops and Bishops of Canada.

Schedule (B)

(Editorial from *The Globe and Mail,* Toronto, of August 2nd 1966.

A MORE TOLERANT ATMOSPHERE
FOR DIVORCE REFORM

A report from London that the Church of England may alter its attitude toward the reform of secular law on divorce is regarded as a favorable sign by those who hope for an early change in Canada's divorce laws.

The shift in Anglican thinking, as expressed in a study prepared by a group of clergy and laymen for the Archbishop of Canterbury, follows by three months the U.S. Roman Catholic Church's apparent decision not to deplore a law drastically widening the grounds for divorce in New York State. Neither church altered its stand that marriage as a sacrament is indissoluble; but their willingness to allow secular divorce on reasonable grounds reflects a new and laudable tolerance.

Will these churches now display the same tolerance in Canada? Senator Arthur Roebuck, who is chairman of the joint Senate-Commons Committee on Divorce, believes at least one of them will. Senator Roebuck's own bill on divorce reform, one of many private bills before his committee, proposes three grounds for divorce: desertion of at least three years, adultery and cruelty. Last April, he confided that his bill had met no opposition from the larger of the two traditionally hostile denominations, the Roman Catholics. This in itself gives hope that many politicians will now feel free to approach this question in its only proper political context: as a social problem of a pluralistic society.

The Church of England study group suggests far more liberal grounds for divorce than does Senator Roebuck. In effect, it accepts almost any grounds for divorce by recognizing only one comprehensive cause: the "breakdown" of marriage. Rather than proceeding from some narrow legalistic infraction such as adultery, divorce would be granted on a court's conclusion that, for any reason at all, a marriage had irreparably failed. Quibbling over partners' relative guilt or innocence would become irrelevant; the only pertinent fact in granting divorce would be the observation that happiness together for two particular people was impossible.

This is a bold and generous concept. Nevertheless, it may entail practical drawbacks.

One immediate problem which the proposal presents is the possibility that divorce litigation will become more complex. The court applying the standard of a "breakdown" in marriage would resemble, say its advocates, a "coroner's inquest—a judicial inquiry—pleadings would need to be considerably expanded." Many divorces are already held up because the courts are clogged and proceedings are cumbersome.

Whatever its difficulties, the Church of England proposal gives Senator Roebuck and his committee one more reason to press the Government to allow divorce a fair and full debate directed to radical reform. The churches seem either to demand reform or decline to oppose it. It is time for Canadian politicians, who often like to lead public opinion by following it, to prove they are no less enlightened.

Schedule (C)

Background Material: Status of Women Committee Study Paper on the Domicile of Married Women.

1. *Domicile and the Individual*

Domicile is the true and permanent home of a person from which he has no present intention of removing and to which he intends to return whenever he is away. The place of domicile determines the civil status of the individual and thus many of his personal rights and obligations. Every child is born with a domicile of origin that is dependent on the domicile of the person upon whom it was then legally dependent. Any person may change his or her domicile simply by choosing another—that is, by deciding that another place will be "home".

2. *Domicile of the Married Woman in Canada*

There is no such thing as domicile at large in Canada. One is domiciled in a particular province. The same is true of other countries where there are separate political jurisdictions as for example in the United States, Australia and the United Kingdom.

In Canada, as elsewhere, single men and women and married men and widows all have the right to establish an independent domicile at will. However, in Canada, on marriage a woman loses her domicile and acquires that of her husband. This fact is a serious impediment in the rights of the married woman since in our legal system the place of domicile determines the jurisdiction of the courts in matrimonial matters and the law of the place of domicile governs the personal status of the individual.

Except in the provinces of Alberta and Quebec, in Canada, the domicile of the wife follows that of the husband as long as a legal marriage subsists. This means that a wife retains her husband's domicile even in the case of a judicial separation or desertion until the dissolution of the marriage. The effect of this rule is to deprive the separated or deserted woman of a domicile if her husband leaves the province in which she resides. In Alberta and Quebec the domicile of the wife follows that of the husband except in the case of a judicial separation, at which time the wife may again establish her independent domicile.

The woman deserted by her husband cannot acquire a separate domicile from his to begin divorce proceedings, even though she was judicially separated from him. (except Alberta and Quebec) However, under the Divorce Jurisdiction Act, RSC 1952, Chapter 84, where a married woman has been deserted by her husband and has been living apart from him for a period of two years and more, she may start divorce proceedings in the province in which they were domiciled before her desertion. This Act doesn't give that wife the right to choose her own domicile—a right enjoyed by all other adult persons. Again, where a husband and wife are separated by mutual consent and the husband may be perfectly willing for his wife to have an independent domicile under the Common Law rules governing domicile she may not have one. The origin of this rule lies in the years when a woman on marriage ceased to be a person in law.

3. *Domicile of the Married Woman in Other Countries*

Domicile of the married woman is the subject matter of a chapter in the United Nations' publication Legal Status of Married Women (1958). Three general categories of domicile for married women have been established.

(a) The domicile of the wife follows that of the husband. This is the rule in Canada except in Alberta and Quebec. Other countries using this rule include Bolivia, China, Egypt, India, Lebanon, New Zealand, Saudi Arabia and the United Kingdom.

(b) The domicile of the wife follows that of the husband except in certain specified cases. This is the rule in Alberta and Quebec. Other coun-

tries using this rule include Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Greece, Haiti, India (legislation covering Christians), Iran, Italy, Pakistan, Peru, Philippines, Switzerland, Italy, Thailand, Turkey, U.S.A., Uruguay and Venezuela.

(c) The domicile of the wife is independent of that of the husband. Marriage does not affect the wife's domicile and therefore on marriage the wife neither loses her own domicile nor acquires that of her husband. Where the wife has the same domicile as her husband, as is the case in the great majority of marriages, the wife is not considered as having taken her husband's domicile but as having the same domicile as he. Examples of countries using this rule are Bulgaria, Czechoslovakia, East Germany, West Germany, Hungary, Japan, Netherlands, Norway, Poland, Sweden and Yugoslavia.

After completing a survey on the rules governing the domicile of married women throughout the world and their effect on women, the Economic and Social Council of the United Nations passed a resolution urging governments to take all necessary measures to ensure the right of a married woman to an independent domicile. The full text of the resolution is included in Appendix A.

4. *Domicile of the Married Woman in the United States*

There is a great variation in the rules governing the domicile of the married woman in the United States. Four states recognize a woman's right to acquire her own domicile for all purposes without limitation, although 42 states and the District of Columbia permit a married woman to acquire an independent domicile for all purposes if she is living apart from her husband for cause; of these only 18 permit a married woman to acquire an independent domicile if she is separated from her husband by mutual consent or if her husband acquiesces to the separation. All states permit a married woman to establish a separate domicile for purposes of instituting divorce proceedings.

In a report issued in October 1963, the Committee on Civil and Political Rights of the President's Commission on the Status of Women reported that the differing rules governing the domicile of married women in the various states created confusion and hardship. It declared the dependent domicile of the married woman to be inconsistent with the concept of equality of men and women and to the idea of a marriage partnership. It recommended that the question of the domicile of married women be studied with a view to liberalizing the existing rules governing it. Since that Report was received, many State Commissions on the Status of Women have made recommendations concerning an independent domicile for married women. (*Report of the Committee on Civil and Political Rights*, The President's Commission on the Status of Women, October 1963, pp. 19-21 and 27.)

5. *Recent Developments in Canada*

In Canada in 1961 the Conference of Commissioners on Uniformity of Legislation in Canada (43rd Annual Meeting) approved a model statute on the law of domicile. This draft statute is intended to supersede the common law rules for determining domicile and does provide for the independent domicile of the married woman.

6. *Recommendation of the Status of Women Committee*

The Committee on the Status of Women recommends that member clubs acquaint themselves with the rules governing domicile in Canada with a view to requesting their provincial governments to pass legislation giving to married women the same rights as to domicile as now are enjoyed by other adult persons.

APPENDIX A

Resolution adopted by the 890th plenary meeting, 3 August, 1955, of the Economic and Social Council, *Concerning the Domicile of Married Women.*
The Economic and Social Council,

Nothing that in the legal systems of many countries the domicile of the wife follows that of her husband; that in these countries the wife, upon marriage, loses her original domicile and acquires that of her husband which she retains until the dissolution of the marriage, even if residing separately,

Believing that such legal systems are incompatible with the principle of equality of spouses during marriage proclaimed in the Universal Declaration of Human Rights, and noting that their application results in particular hardships for married women in countries where domicile determines the jurisdiction of courts in matrimonial matters and where the law of the place of domicile governs the personal status of the individual,

Recommends that Governments take all necessary measures to ensure the right of a married woman to an independent domicile.

APPENDIX B

Draft Model Act to Reform and Codify the Law of Domicile

(Proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, Appendix M, p. 139)

1. This Act may be cited as the Domicile Act.

2. This Act replaces the rules of the common law for determining the domicile of a person.

3. In this Act, unless the context otherwise requires, "mentally incompetent person" means...

4. (1) Every person has a domicile.

(2) No person has more than one domicile at the same time.

(3) The domicile of a person shall be determined under the law of the province.

(4) The domicile of a person continues until he acquires another domicile.

5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.

(2) Unless a contrary intention appears,

(a) a person shall be presumed to intend to reside indefinitely in the state and subdivision where his principal home is situate; and

(b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.

(3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of any international organization.

6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.

7. This Act comes into force on a day to be fixed by the Lieutenant-Governor by his proclamation.

APPENDIX "13"

BRIEF

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

by

Alfred J. Wickens, Q.C.
Barrister, Solicitor, Notary Public (retired), Qualicum Beach, B.C.

BRIEF RE: MARRIAGE AND DIVORCE

The honourable Joint Chairmen and members of the Joint Committee of the Senate and House of Commons:

I wish to express my appreciation of the Joint Chairman Senator Roebuck furnishing me with the requisite information as to the Committee and giving me the opportunity to file this brief.

The memorandum asks me what organization or group I represent. I speak for no organization. The group on whose behalf I speak is that very large group of unfortunate people who while their marriages are a total failure have at present no remedy at law. I have no private fish to fry in presenting this brief as I am no longer practicing, having retired almost 9 years ago.

I am indebted to my long time friend and one time tennis partner Mr. Russell Hopkins and to Dr. P. M. Ollivier, who in their appearance before the Committee covered all the historic ground, the contemplation of which was occasioning me a great deal of concern.

The situation in Canada is a follows:—the Province determines who may marry, who may perform marriage ceremonies, and what constitutes a valid ceremony. After the ceremony the authority to deal with the relationship belongs to the Dominion.

The only court having jurisdiction to deal with a marriage in Canada is that of the husband's domicil or the domicil of the husband in which he deserted the wife. The only exception to this is an action to declare the marriage null and void, which may be brought (a) where the marriage was performed (b) in the domicil.

There are three forms of judgments disposing of a marriage:

1. Decree of divorce
2. Decree of nullity
3. Decree of annulment

The only grounds upon which marriages may be disposed of under those headings are as follows:

Divorce	*Nullity*	*Annulment*
Adultery, including rape and incest	Insanity	Lack of parental or other consent where required
Sodomy	Bigamy	Incapacity due to drunkenness or drugs
Bestiality		Duress
		Impotence

N.B. Where annulment of a marriage is considered, proceedings must be brought promptly by the one whose consent was required as soon as the marriage is known of, by the one who temporarily lacked the capacity or was under duress as soon as lack of capacity is remedied or the duress removed.

Where a marriage is void because of the insanity of either party at the time of the performance of the ceremony a return to sanity after the ceremony does not validate the marriage no matter what the conduct of the party.

One of the members of your committee suggested that a marriage should be dissolved when it has become a complete failure, indicating that in his view this is even more important than adultery. With this view I agree; but unfortunately such a bland ground would lead to a multiplicity of variations in the decisions of the Courts because it would be a matter of individual opinion of the presiding judge as to whether or not a marriage had failed, and unless one specifies in endless detail facts upon which a marriage may legally be assumed to have failed little would be accomplished. In all seriousness I suggest under the three headings above given the following additional grounds for legal remedy:

DIVORCE:

1. Attempted
   (a) Sodomy
   (b) Bestiality
   (c) Adultery
   (d) Rape
   (e) Incest

While a divorce can be obtained on the grounds of (a) (b) (c) (d) and (e), if achieved, should a wife find her husband attempting any one of the offences set out and interfere before the actual commencement of the implementation of the act, she has no remedy at law because the offence was never actually committed. Should she wait until the actual commencement of the implementation of the offence and then interfere, although the offence has been committed she still has no remedy because having had the opportunity to prevent it and failing to take advantage of that opportunity she is held by such failure to have connived at it and where there is connivance there is no remedy. This situation I am sure will shock the consciences of your Committee, but it still is the law.

2. Cruelty, mental or physical (which would include cruelty to the children, and humilating spouse by conduct in company)

3. Neglect, including
   (a) denial of companionship, and
   (b) denial of intercourse

4. Deadly hostility (could be called incompatibility, although that is a bit wide) (See Cranmer Commission report page 8)

5. Refusal to beget or to bear children

6. Frigidness

7. Sterility

8. Conviction of felony

9. Moral degeneracy (including indecent exposure, indecent assault and contributing to juvenile delinquency)

10. Perversion

11. Desertion (which would include refusal or failure to support wife)

12. Homosexual practices

13. Lesbian practices

14. Self abuse inducing impotence

15. Impotence developed after the marriage

16. Post marital insanity

N.B.—In all seriousness I ask you gentlemen of the Committee which of you would desire a continuation of the marriage bonds affecting one of your children involved in any of the listed situations.

In some forty odd years of practice in the matrimonial courts of Canada I have found most or all of the items so listed, as having been the initial cause which induced the indulging in the conduct upon which the divorce action was founded, that conduct being a consequence of the situation which actually wrecked the marriage instead of itself being the wrecker of the marriage.

NULLITY

No change

ANNULMENT

Misrepresentation either by false statements or withholding facts, inducing entering into marriage. I list some items a disclosure of which normally would prevent a marriage:

heredity
insanity in the family
alcoholism
drug addiction
a career of crime
sexual perversion
outright bad character
poor health (such as consumption or cancer or a haemophiliac)
racial origin
religious belief or lack of it
political convictions such as communism
misrepresenting age
misrepresenting financial status, or prospects
previous infection with venereal disease
present infection with venereal disease
present pregnancy not by husband

As to the suggested additional grounds for annulment it has always been a matter of astonishment to me that while misrepresentation, either by concealment or disclosure, of any pertinent fact is ground for cancelling contracts, there is only one contract to which this rule does not apply, and amazingly it is the most important and solemn contract in human existence, namely, the marriage contract. If you are induced to buy anything, living or dead, by fraudulent concealment or misrepresentation you may have your choice, either to repudiate the contract or claim damages for compensation. Not so, however, in connection with a marriage, which ties you hand and foot for life. No matter by what trickery or fraud you are induced to enter into a marriage contract, the moment that contract is entered into you have "had it" and have no recourse at law. It is my firm belief and to me it makes complete sense that the law which compels persons to be honest and frank in their dealings leading to an ordinary contract should much more so require them to be honest and frank in entering into the most solemn, binding and important contract of one's life. Therefore, I urge that your Committee recommend that the law be amended so that a marriage may be annulled at the option of the offended party for any misrepresentation either by false statement, or concealment of any pertinent fact the disclosure of which could have prevented the marriage.

In England today pregnancy by other than the husband, and present venereal disease are a ground for annulment. In Canada, unfortunately, not so, and we had one tragic case of this kind some years ago, when a young Winnipeg lawyer, whose name we won't mention, married a girl and found out right after the ceremony that she was three months pregnant to another man. He brought action to have the marriage annulled and the Judge very reluctantly, as he said, had to dismiss the action, and oddly enough no steps were taken by Parliament to remedy that situation.

Originally in Canada a wife had to follow the husband's domicil, no matter where he went, to get a divorce. It was a result of an action, in which I was Counsel, where a man deserted his wife in Saskatchewan, and went to Chicago to live and there committed acts of adultery, the wife could not sue in Chicago because the law of Illinois required both plaintiff and defendant in a divorce action to be resident in the State when the action was brought. Action was then brought in Saskatchewan and an old English case quoted wherein an English woman, married to a scion of the Greek Royal family in Italy, and whose husband had never lived in England was granted relief by the English courts, the court holding that since the Greek courts had refused to entertain the action and there was no other court which had jurisdiction the English courts would assume jurisdiction and held that the husband was estopped from denying an English domicil.

The presiding Judge, the late Mr. Justice Bigelow, reserved judgment, three months later be granted the decree without reasons or comment and at the next session of Parliament a deserted wife was granted the right to bring an action in the jurisdiction in which the husband was domiciled at the time of desertion.

At first the Act was subject to the interpretation that the wife had to remain continuously in that domicil for two years, but in a revision of the Act that inference was removed; but the wife was still limited and still is limited to the jurisdiction in which she was deserted. In this connection it is suggested that a wife deserted in a Canadian domicil should have the right for the purpose of legal action to acquire a separate Canadian domicil. It could often create a hardship to require a wife to bring action in the domicil of desertion. A normal thing for a deserted wife to do is to return to her parents and very often they are in a separate domicil; or she might even find it necessary to move far away from the domicil of the desertion in order to find lucrative employment; and there appears to be no point gained in making her return to sue in a domicil far removed from the present whereabouts of both herself and her husband.

I notice Dr. Ollivier suggested that any recommendations as to amendments in the grounds for divorce should apply to all Canada, including both Newfoundland and Quebec. With the greatest of respect for the unquestioned standing of Dr. Ollivier I beg to disagree there. I don't think we have any right to force grounds for divorce upon any province (not only Newfoundland and Quebec, which have no divorce courts, but any other Province) that the people of that province don't wish. Therefore, in all seriousness, I would suggest that any recommendation which your committee makes and any legislation which may be founded upon it, should contain a provision that the legislation should apply to such provinces of Canada who by their own legislation so provide. This I might point out would give assurance to Quebec and Newfoundland that no one was attempting to assail any convictions they might have in this field.

While a form of marriage is not within the terms of reference to this committee I suggest to the Committee that they give some attention to this aspect of the question. When a marriage is performed in Canada by a Priest or Minister that ceremony has two facets (1) the religious side which prompts many to contend that marriages are made in Heaven because they are performed in a religious form of ceremony, and (2) the legal or civil contract. It is worth noting that in Roman Catholic France and Roman Catholic Belgium the only

legally recognized marriage is one performed in the office of the Burgomaster. The Church ceremony, no matter how solemn, how binding upon the consciences of the participants, is not recognized by the law of the land at all, so that when a marriage comes before the courts in Belgium and France, there is no involvement with those who hold religious convictions about the indissolubility of a marriage, because the only thing the court is considering is the legal civil ceremony.

Now actually in Canada the legal situation is identically the same. The only authority which the civil courts of Canada have in the field of marriage is over the civil side of the ceremony. If to the contracting parties the ceremony has a religious and sacramental side that is beyond the jurisdiction of the civil courts, and no matter what the judgment of the civil court, the consciences of the parties, if bound at all by the religious aspect of the marriage, remain still bound and not released. To the lay mind this situation is not so clear in Canada, as it is in France and Belgium because there the two ceremonies are separate at the time of performance, not waiting as they do in Canada, to be separated by the decision of a Court of law.

Under the list of causes for divorce I have listed deadly hostility (it is item No. 4). This item is copied from a report made in the year 1552 by a commission of Judges of the Ecclesiastical Courts, presided over by Archbishop Cranmer, Archbishop of Canterbury, appointed by King Henry 8th to investigate the whole body of Ecclesiastic law including marriage. This commission made its report in the reign of Edward 6th under the title "Reformatio Legum Ecclesiasticarum". In the year 1552 it recommended that divorce should be granted to either party, amongst other things, on the grounds of adultery, desertion, protracted absence without tidings, and "deadly hostility". This term "deadly hostility" fits in particularly with the suggestion of your committee member who proposed that complete failure of the marriage should be a ground for dissolving it. "Deadly hostility" is a term which would include practically all the grounds which I have set out, as additional grounds for divorce, because quite obviously if the offended party under any of the situations I have outlined was so upset about it that he or she wanted absolutely nothing more whatever to do with the guilty party, the atmosphere would be one of "deadly hostility".

King Edward 6th approved of the report of the Cranmer Commission. It was read twice in the House of Lords, but the Commons would have no part of it, so nothing was done about it, and it was the canny Scot, seeing the sense of this report, who in the year 1555 made the substance of it the law of Scotland and it remains so to this day, still much in advance of the reforms instigated by Sir A. P. Herbert in the British House of Commons. The record of this Cranmer Commission and its report may be found in a book by Fay "Discoveries in the Statute Book" pages 198 to 200.

Incidentally the poet Milton in 1643 published a tract in which he expressed similar views to that of your Committee member, stating that it was wrong to make adultery the only or even the leading ground for divorce. He contended that incompatibility was a more important reason for divorce; "The forced yoke of loveless marriage" was a crime against the dignity of the adults involved, as well as a perversion of the true purpose of the marital state— the mutual love between spouses.

There are those who make a great to-do about urging that a marriage be kept together for the sake of the children. I have had a great deal of experience in my 40 odd years practising law especially in the field of family relations, and in deepest sincerity I urge that it is an unkindness and the worst possible thing for children, to keep together a home in the atmosphere of dissension, quarrelling and bickering. To subject children at the most sensitive and formative period of their lives to this strained and unhealthy atmosphere is a crime against human nature for which I can find in my heart no hope of forgiveness. In my 40 odd

years of legal practice I have been shocked by the number of times that it has become apparent that juvenile delinquents and young felons, involved in a life of crime or moral degeneracy, have spent the early formative years of their conscious lives in the very kind of home atmosphere that these well meaning but misguided people seek to perpetuate for the "benefit of the children" of unsuited parents.

Any two responsible people whose marriage has gone sour, if their children mean anything to them, will adjust themselves to protect the children from the results of their parents' incompatibility, and will postpone their inevitable separation until the children are on their own. Parents who would not react in this way would do nothing but harm to the children by staying together. Amending our divorce laws so that this second type of parent could be separated and other provision made for the children will not induce the first type of parent who take the welfare of the children into consideration to seek divorce; and may I remark that you would be astonished at the percentage of incompatible parents who don't care tuppence for their children, except as a means of getting back at the other spouse. It is to protect children from this sort of thing amongst other reasons that the law should be amended.

I believe that more attention should be paid to assuring that an unsuitable marriage does not take place than that such a marriage having taken place should be continued.

What could be done about this is a wide field and is particularly difficult because it is a Provincial field but with respect I don't think that should prevent your Committee making some reference to it, should it so wish.

Your co-chairman Senator Roebuck was kind enough to suggest I should not attempt to abbreviate my representation, but I do feel one should keep a presentation of this kind as brief as possible, and if one were to try to anticipate all the questions which could be asked if one were presenting this brief in person and give all the explanations and answers that such questions might require, there would not be paper enough upon which to type it.

Please understand I am not a faddist riding a pet hobby. This is a field of law of which I made an intensive study and in which I had quite uniform success. In fact, I was not only generally regarded as a dependable authority by the Bench and Bar of my own Province, which was Saskatchewan, but my attitude to marriage and the family life was so well known that notwithstanding my well known practice in the divorce courts, it was the custom of the Roman Catholic Priests in Moose Jaw to send their families to me when they had exhausted all their efforts towards reconciliation, knowing that I would do everything possible to bring that family together if there was any hope of keeping it together.

And so that my attitude generally to a person's religious convictions may be known I want to make this unequivocable statement that I consistently and persistently refused to accept instructions to bring action for divorce of a Roman Catholic family unless I was first convinced that a complete break with the Church and their conscientious objections to divorce had occurred; and by this I mean that that was the voluntary position of the client, to which I had not contributed. This observation is not made with any attempt to achieve anything as far as my personal standing is concerned. I have been retired from the practice of law for 9 years, all but, and am living in peaceful retirement so am quite indifferent to popular acclaim or opinion. I simply mention these things in order to convince the Joint Chairmen and Members of this Committee of my complete conviction and sincerity in the presentation of the views contained in this memorandum.

I wish this Committee every success in the arduous task they have undertaken and I fervently hope that they have the courage and breadth of conviction which will enable them to deal with this question sanely and adequately and not

as so many think who seem to be obsessed with the idea that there is an ipso facto merit in keeping two unsuited people tied together on the theory it is good for public morals. What is good for public morals is a healthy and where possible a happy home life. The good Lord is reputed to have said that no man hitches an ox and an ass together. I am very much afraid that that is too often what is attempted in modern day marriage.

It is a completely mistaken view held by many well meaning people that, instead of dealing realistically with the marriage and divorce situation in Canada, one should very jealously resist any attempt to put this on a sound basis—they seem to feel that there is merit in restricting any proposed reform to the most meagre possible form; whereas, Gentlemen, to all thinking people, no matter how pronounced their religious convictions are, it is infinitely more desirable to clean this situation up so that married people may live together in the mutual helpfulness and comfort that the marriage relationship was designed to create and not compel two people, mutually unsuitable, mutually antagonistic, or two people one of whom is thoroughly disgusted, ashamed and disgraced through contact with the other, to continue to be bound together as man and wife.

I believe that by a comprehensive broadening on sensible grounds of the reasons for divorce, and keeping in mind the very sound observation of your Committee member as to "marriage having completely failed" a marked contribution can be made to the moral standard of Canadian people; and it will make quite unnecessary, what now is not infrequently the case, people who are not married to each other living together in what is commonly called "The common law" matrimonial state.

I thank you for your careful perusal and consideration of this brief and do hope you realize that it is filed from a deep personal conviction of the beneficial effect it will have on Canadian home and public life, if the recommendations contained herein are put into effect. And as a parting word may I urge again upon you that these proposals for divorce are not as startling as they appear because of their number. They could all come under the blank observation of "marriages that are wrecked beyond saving".

Dated at Qualicum Beach, British Columbia, this 14th day of October A. D. 1966

Schedule "A"

I read in the Vancouver *Province* a day or two ago, that there had been introduced into the British House of Commons, a Bill to extend the grounds for divorce to include "marriage that had completely broken down"; but, with the usual grudging concession to common sense in such proceedings, providing that the parties to the marriage must have been separated for 5 years before the action could be brought.

Mr. Wahn must get considerable satisfaction about this move since he suggested that the most important ground for dissolving marriages should be "a broken down marriage" to make it brief.

Since this information comes too late to include in the brief, may I use this letter as a forum to which to make a point or two relative to this English move:

Question WHY WAIT 5 YEARS?—Just what is accomplished by this requirement? I set out here a few things so accomplished. Two people finding it completely impossible to associate together any longer, separate. They have been accustomed to the regular and proper satisfaction of those natural urges and desires between sexes. They are supposed to cut off this natural urge for a period of five years. Now it is all right to take a purist stand on this aspect of the situation, and say that a decent person would just take this in his stride. But, we are dealing with ordinary human feelings, desires and urges, and what's the use of trying to deal with them on the lofty plane that "human beings are god-like individuals with none but the highest and purest motives, desires etc." Human beings are human beings, and even the nicest and finest men and women have to deal with the sex urge, which is a noble thing as well as a necessary one if the human race is to reproduce and survive. These people who must live separated and apart for 5 years are supposed to live lives of celibacy and virtue for that period of time. Should the one who becomes the plaintiff in the action for dissolution of the marriage have yielded to this natural urge during the 5 years, with someone other than the spouse, then that must be disclosed to the court, and it is in the discretion of the Judge whether or not to overlook it and grant the divorce. This discretion all too often depends upon many unrelated things, such as the state of the jurist's digestion, or the treatment he received at the hands of his wife the night before; or the court of appeal, the last week. Should the plaintiff fail to disclose this fact, and it should come to the court's attention during the trial or even before decree absolute is granted, either by cross examination at trial, by some nosey busybody writing in about it, or through the activities of the "Queen's Proctor", the practice is then invariably to reject the claim for divorce.

The reason advanced for these delays, not only in the case presently before the British Parliament; but in cases of "desertion, and insanity" can only be that one shouldn't be able to get out from an intolerable marriage even on the ground of "hostility" if one is only using that as an excuse.

Let us compare this with the criminal law. The general principle there followed is "that it is better that 99 guilty should escape than that one innocent should be found guilty". With that rule, no sane person will quarrel. But in the matrimonial law, how different the situation. Exactly the reverse. Briefly stated it obviously is "it is better that a thousand people should be made to suffer inconvenience, and hardship, than that one schemer should be relieved of his marriage contract". With this law, no sensible person will agree for one minute; but, nevertheless it is completely inescapeable, that is the situation.

If both parties agree that the marriage is a complete failure, where is the necessity to make them live separate from each other for 5 years to demonstrate that that is the fact?

Also, what of the "welfare of the children". What good is being done to children of such a marriage to have them live without normal family life for 5

years, and be subject to the stresses and strains of a family in fact separated, and yet in law "one"?

What of the case where to one party the marriage has completely failed, and the other for whatever reasons refuses to agree? The disagreeing party refuses to permit separation, and pursues and annoys the other, pursuing his own vengeful intentions? The only recourse is to bring an action for Judicial separation, which would provide the means to make the dissenting party behave. But what an astonishing situation, you would have a decision of a competent court that the marriage was a failure, and yet that same court couldn't dissolve this "failed" marriage, until a five years demonstration had convinced it of a fact of which they already were convinced, namely the failure of the marriage.

How absurd can we become when approaching this, the most human, and the most important of relationships?

In all other spheres of human existence we spend millions, and go to untold trouble to eliminate troubles and smooth the way so that everything should be pleasant and nice, and we penalize anything or person introducing discord or strife; but in the family relationship we go to even more trouble and expense to prevent the establishment therein of the very situations we spend so much time, money and trouble to bring about in all other spheres. If it weren't so tragic, it would be vastly amusing.

(ALFRED J. WICKENS)

APPENDIX "14"

Brief to the

Special Joint Committee of the Senate and House of Commons on Divorce

By

The Board of Directors and Staff of
The Family Service Association of Edmonton,
400 Tower Building, Edmonton, Alta.

RECOMMENDATIONS FOR CHANGES IN ALBERTA FAMILY COURT STRUCTURE PRESENTED IN THIS BRIEF WERE PREPARED ON THE BASIS OF A STUDY OF EXISTING LAWS AND FACILITIES, COURT RECORDS, AND CONFERENCES WITH MEMBERS OF THE LEGAL, MEDICAL AND SOCIAL PROFESSIONS IN ALBERTA AND OTHER PARTS OF CANADA AND THE UNITED STATES.

Foreword

The Family Service Association of Edmonton was established in 1942 for the primary purpose of strengthening family life in the community through programs of prevention and treatment. Because the Board of Directors of the Association believe that an interest in family law is imbedded in the basic purpose and function of a family service agency, a special continuing committee was set in 1957 to look at existing Alberta court structure and jurisdiction in the light of present-day family needs.

We recognize that social change and reform of laws is never accomplished without public clamor for that change. Within the past year the federal department of justice has reflected public interest in bringing our laws up to date by announcing plans for revision of the Criminal Code.

The need to revise family laws was emphasized in the report of the Vanier Conference on the Canadian Family, June, 1964, which recommended the establishment of proper legal facilities to assist, protect, provide control, and safeguard the wellbeing of Canadian families.

In Alberta, during the past year, public attention to questions of morality, family breakdown, respect for law and authority, has been conspicuous in newspapers, radio, television, the church pulpit and public speaking platform.

It would seem that the time is ripe to consider a full revision to our family laws as a courageous step into the present and the future. Justification for laws cannot be simply that our forefathers shaped them.

We respectfully submit this brief as yet another indication of public concern for the strength and wellbeing of our families.

These Are The Problems We See

Our present approach to family law emphasized punishment rather than prevention or solution of problem. Most cases of families in trouble with the law are principally matters of maladjustment—social matters rather than criminal or legal matters.

Parent, youth and child problems are in reality all one.

Juvenile delinquency and youthful criminality cannot be separated from general family disorders because they are most often related—bound together by cause and effect.

The present family law pattern of dealing separately with each individual—and each specific incident that constitutes a broken law, does more to increase family problems than solve them.

Jurisdictions over family matters and children in trouble are today so scattered that people are shunted from court to court with their problems. As a result it is impossible for the most well-meaning judge to make decisions based on the welfare of the whole family.

In Alberta divorce is dealt with in one court, family maintenance and separation in another. Child custody, adoption, delinquency, neglect, are passed into assorted court levels and judgments are passed with minimum social investigation.

Auxiliary services for case study and counselling for people brought to court attention on domestic issues are at present inadequate and do little to help families find social solutions to their problems that will result in maximum welfare for the family and minimum expense to the public.

Existing federal and provincial legislation lumped as "domestic laws" was designed for the social order of the nineteenth century. This is the twentieth century and the social order has changed in kind and complexity.

Our family laws are ineffective because they are not in focus with the times.

Lawyers, judges, magistrates, receive no special training for handling social problems beyond direct interpretation of the laws. This results in merely processing the law rather than helping those involved.

We are not solving our social problems by filling up our jails.

Members of the legal profession show reluctance to work in the area of "domestic relations" because they are neither trained for, nor inclined to the intensive social investigation required for understanding and dealing with the very complex family problems.

The cumbersome framework of existing family laws makes their work most difficult. This is reflected in results.

We are spending vast sums of public money picking up the pieces of broken families...jailing errant fathers, supporting deserted wives and children, jailing or attempting to rehabilitate youthful criminals without considering the court and legal procedures as one more way to cure the basic sickness *before* rather than *after* members of a family have been separated.

Members of various professions, involved government and private agencies tend to work against rather than with each other in common attempt to find workable solutions to increased divorce, delinquency, desertion, failure to meet family responsibility, illegitimacy and anti-social behaviour.

These Are Recommendations

1. Focus sharply on the need to simplify and unify all family and children matters of law involvement, if possible, under one roof. To be workable it would need a "social arm" and a "legal arm"...working together. This will involve a restructuring of existing family laws into *one* Family Court Act.

2. Revise the concept of law and procedure to emphasize *prevention* of family break-up rather than punishment for individual members.

3. Develop family court auxiliary social services to attempt solutions to social and family problems at a non-court level. This would be workable in our communities by drawing on private agency counsellors and psychiatrists as well as those immediately responsible to a unified Family Court structure.

4. Aim at complete reciprocal agreements with other provinces and countries for payment and enforcement of legal maintenance orders.

5. Increase pre-court investigation in matters of child custody arising out of divorce, separation or neglect.

6. A study should be made, preferably under control of the Law Society of Alberta, to suggest a specific framework for new or updated concepts of unified family law and/or court structure and that such a study through a committee or commission should seek opinions from judges, lawyers, sociologists, psychia-

trists, social workers, businessmen, labour leaders, and other concerned community groups, and should enlist the support of private and government agencies and individuals who have dedicated time, effort, research and financial support to meeting and solving family problems.

Suggested Framework For a Unified Family Court

Policies of the court would be set by "specialist" judges chosen carefully for their capacities of understanding and patience, as well as their legal talent and experience in the field of family welfare.

The approach would differ from regular court procedures in that every attempt would be made at a pre-court level to find out the basic causes of trouble no matter what specific incident lands parent or child in the arms of the law.

Key to this objective would be an intake centre...a screening or diagnostic department. Here, skilled social workers would have exploratory talks with the parties to a family dispute or the individual initially brought to court attention.

Housed within the court building (ideally) would be auxiliary social services to be used as indicated in the preliminary talks...these would include facilities for psychological testing and psychiatric treatment, an alcoholism clinic, marriage counselling, child therapy workers for children showing anti-social behaviour because of the conflict of their parents.

In addition to any immediate help, this investigation would add to as complete a picture as possible if the problem persists to formal court level. Decisions of the court could then be based on thorough investigation and recognition of the needs of the total family involved.

Probation officers would work before, as well as after, official court sentencing...with prevention and treatment the principal considerations.

Representatives of private family and religious agencies would be in direct liaison with the unified court to continue and follow through with the family in the community setting.

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 7

TUESDAY, NOVEMBER 15, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

John H. McDonald, Q.C., Barrister & Solicitor. *The Congress of Canadian Women:* Mrs. Nora Rodd, Brief Chairman; Mrs. Hilda Murray, National Secretary.

APPENDICES:

15.—Brief by John H. McDonald, Q.C., Barrister & Solicitor, Ottawa, Ont.
16.—Brief by The Congress of Canadian Women, Toronto, Ont.
17.—Private brief by Mr. H. M. Salter, Florida, U.S.A.
18.—Statement by the Young Women's Christian Association of Canada, Toronto, Ont.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

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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, 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

Mr. A. J. P. Cameron (*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."

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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, C.P., 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, November 15, 1966.

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

Present: For the Senate: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Denis, Fergusson, Flynn and Gershaw—7.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Brewin, Honey, McCleave, Peters andl Wahn—6.

In attendance: Dr. Peter J. King, Assistant.

The following witnesses were heard:

John H. McDonald, Q.C., *Barrister and Solicitor;*

The Congress of Canadian Women:

Mrs. Nora Rodd, Brief Chairman;
Mrs. Hilda Murray, National Secretary.

Briefs and Statements submitted by the following are printed herewith as Appendices:

15. John H. McDonald, Q.C., Barrister and Solicitor, Ottawa, Ont.
16. The Congress of Canadian Women, Toronto, Ont.
17. Mr. H. M. Salter, Florida, U.S.A.
18. Young Women's Christian Association of Canada, Toronto, Ont.

At 5:10 p.m. the Committee adjourned until Tuesday next, November 22, at 3:30 p.m.

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

OTTAWA, Tuesday, November 15, 1966.

The Special Joint Committee of the Senate and the 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*): Ladies and gentlemen, honourable senators, we have a quorum, and notwithstanding the conditions, which were not very favourable for it, here we are.

May I read a letter that came to me from the gentleman who addressed us on the last occasion, Mr. G. B. R. Whitehead. You remember he gave us a most interesting and very learned dissertation on the English law, and he wrote to me: "This is only to tell you how much I appreciated all your kind hospitality yesterday and the attentive hearing which your committee gave me. It was a new and most interesting experience for me and I shall always remember it."

I thought you would be interested in this acknowledgment of the fact that we did give him a most courteous hearing, as we always do.

We have two distinguished delegations today, and by arrangement between the parties Mr. John Haskell McDonald is the first to address us. Will you come forward, Mr. McDonald.

Mr. McDonald was born in Montreal on July 7, 1913. He was educated in Westmount public and high schools, and McGill, in international law. He has the degrees of B.A. and B.C.L. He was called to the Bar of the Province of Quebec in 1939, and to the Bar of Ontario in 1947. He was appointed Queen's Counsel in 1962.

Mr. McDonald had a long war service, more than I can tell you of, but he was finally discharged with the rank of Commander, having served from 1945 to 1949 on the Active Reserve of the Royal Canadian Navy as Deputy Director of Intelligence.

In 1945, on demobilization, he joined the staff of the late Honourable Brooke Claxton, then Minister of National Health and Welfare, as executive assistant and acted temporarily as chief legal adviser and as Director of Information for the Department of National Health and Welfare and later as legal adviser to the Canadian delegation to the World Health Organization's initial meeting at the United Nations in New York City, and drafted the World Health Organization Charter.

In 1946 Mr. McDonald transferred, with the Honourable Brooke Claxton, to the Department of National Defence and served as executive assistant to the minister and acted temporarily as secretary to the then Defence Council. In 1947 he retired from the Civil Service and returned to the practice of law and was called to the Bar of Ontario.

Mr. McDonald has had considerable experience in the literary world. He was editor of McGill *Daily* during the period 1936, 1937 and 1938 and was the

founding president of the Canadian University Press, and was for some time editor of *The Varsity*, University of Toronto. He was also a contributor to The Harvard *News*, and a number of other journals.

Ladies and gentlemen, I have pleasure in introducing Mr. McDonald.

Mr. John Haskell McDonald Q.C.: May I thank you, sir, for your kind remarks.

Messrs. Chairmen and honourable members: I believe that my brief has been distributed and I understand that some of you have already read it.

Before saying anything I would draw your attention to one error in wording on page 7, paragraph 5; at the bottom of the page, there appears the following:

> "5. *Suggestions and Summary*—(i) 'Mutual Consent' should be recognized as a cause for divorce...'." That should be "ground," not cause. That is the only correction I would suggest in the text.

I noticed, in the invitation to appear here, that the ground rules were very concisely laid down, and brevity I believe is the important consideration. Accordingly I have attempted to summarize the full brief in one sentence, which appears at the top of the first page: "This submission advocates divorce by mutual consent."

That in essence is what I suggest, and I have made considerable reference in the first part of the brief to prior proceedings.

When the committee was announced, I had many ideas which I thought might be brought before it. However, in reading through the reports which you were good enough to send me, from June 28 to July 5, prior to writing my own humble brief, I realized that a good many of the suggestions I had intended to make were already in contemplation and I felt there was no point in going over territory that had been so adequately covered by others more experienced than I.

I was very pleased to see, in the minutes of proceedings of October 18, which I read after my own brief had been put together, that the Deputy Minister gave an excellent summary of the situation as it obtained in Canada. I therefore confined myself to one specific point.

I advocate the possibility of divorce being by mutual consent. No sooner had this brief been filed with the committee than this whole question was aired in the United Kingdom. I have several press clippings, some of which cry horror at the idea, while others are friendly; and perhaps the most interesting article is one I took from the Ottawa *Journal* of November 9 in which the High Court Chief Justice stated, in connection with the question of divorce by mutual consent, that safeguards such as waiting periods, to leave the way open for reconciliation, should be enforced.

In his view the objectives of a good divorce law should include (a) the support of marriages which have a chance of survival and (b) decent burial, with the minimum of embarrassment and bitterness, of those marriages that are undeniably dead. He has expressed my sentiments on this point.

Looking over this field of the committee's investigation, I had occasion in the summer to take cognizance of the divorce laws in Mexico, in Japan, and in New York State, and in this regard I did quite a lot of reading; and through the kindness of various people in Scandinavian Embassies I managed to get hold of the basic divorce laws, or summaries thereto, for Finland, Norway, Sweden and Denmark.

I have tried in my brief to extract the relevant points on the question of divorce by mutual consent and I will not burden you now with a recital of details. My recommendations are summed up briefly in these words: Divorce by mutual consent after a ten-month waiting period.

The reason I hit upon ten months was that it might be wise to provide for children who might appear in the interim.

This divorce would be granted by the appropriate official on the application of the parties themselves. A decree *nisi* would be granted at the time of the application and the decree final at the end of the ten-month period.

In the case of chidren, I suggest that the same official who would grant the divorce would have regard for the economic status of the parties and would come up with a financial settlement and provisions to ensure that the children would be adequately raised and properly brought up, in so far as children can be brought up in the circumstances ensuing from divorce.

There is a third category involved. Where children appear in the interval between the granting of the first decree and the granting of the final decree, I should think that the same rules would obtain for the custody of such child or children; and this arrangement would be finalized in the period between the decree *nisi* and the decree final.

In my brief I set forth the concept that, for some people, marriage is simply a contract; and under basic laws a contract between two parties can be adjusted or resolved if the parties agree.

I fully appreciate that there are in this country other people who have very strong and deep-seated feelings about marriage—religious backgrounds and so on—which preclude any contemplation of the breaking-up of; and in my brief I say, with all due respect to these people: Let us consider putting into the revised law of divorce of this country a provision whereby divorce can be obtained by mutual consent. This would not offend those who have contrary views, and it would allow those who would like to be divorced by mutual consent to obtain divorce.

In reviewing the laws of the Scandinavian countries I find permutations and combinations of the time element involved. I picked ten months out of the air for the reason that I have stated, and I suggest it as a starting point from which we can consider the subject.

That summarizes my brief.

The CO-CHAIRMAN (*Senator Roebuck*): I understand your idea of divorce by consent is not exclusive.

Mr. MCDONALD: Oh, no.

The CO-CHAIRMAN (*Senator Roebuck*): It is in addition to other grounds?

Mr. MCDONALD: Yes; and I have set that forth in the early part of my brief where I explain that such persons as your good self, Dr. Ollivier, Mr. Hopkins and others having absorbed a great deal of history on the subject, I have not tried to reiterate either what has been said or what has been anticipated. What I advocate would be merely one other reason for divorce and would in no way change any suggestions that have been made or any that may be put forward hereafter.

The CO-CHAIRMAN (*Senator Roebuck*): I believe Mr. McCleave has something he wishes to say.

Mr. MCCLEAVE: Yes. On behalf of certain people not here today, for a reason that everyone knows, I would like to apologize to yourself, Senator Roebuck, and your Co-Chairman and the witnesses, and put on the record publicly what I expressed privately. These meetings were drawn up and the agenda arranged some time ago, and we thought it would not be proper to ask for a postponement of the hearing because of the fact that the National Convention of the Conservative Party Association was being held. However, we can promise Mr. McDonald, and the ladies who will follow, that we will read their statements with a great deal of care.

Senator FERGUSSON: If Mr. McDonald is not going to read the brief in detail, I suggest that it be printed as part of the committee's record. I would have spoken to some of the things he has in the brief. So that we shall understand it

thoroughly, I think it ought to be printed as part of the record, and I so recommend.

The CO-CHAIRMAN (*Senator Roebuck*): The submission of the brief to the committee, even if it is not read, takes care of that recommendation *ipso facto*. It will be printed in full. I thought of suggesting to Mr. McDonald that he read the final paragraphs, the recapitulation, that is to say paragraphs 4 and 5, and the conclusion as well.

Mr. MCDONALD: After summarizing as best I could the notes I had on the laws of the four Scandinavian countries, I recapitulate this by saying:

4. Recapitulation

The foregoing recapitulation, in a most general way, of the laws of the four Scandinavian Countries referred to herein would lead the way to a broad suggestion that consideration should be given by this Honourable Joint Committee to the possibility of extending in Canada, insofar as Federal jurisdiction obtains, the concept of divorce by mutual consent. To this end, the following suggestions are put forward for consideration by the Committee, namely:—

5. Suggestions and Summary

(i) "Mutual Consent" should be recognized as a ground for Divorce in cases where there are no children, such divorce by mutual consent to be granted by virtue of a decree nisi upon application by both parties and without formal hearing provided the officer (Judge) concerned is satisfied that the proceedings are in good order and that the decree final should be granted only after a period of ten months if there are no children of the marriage.

(ii) In the case of a divorce by mutual consent in which there are children, then such divorce should be granted only upon the satisfaction of the official concerned that adequate arrangements have been made concerning the welfare of the children—

(iii) In the case of a divorce being granted pursuant to sub-section (i) hereinabove and further in the case of children being born to the parties concerned in the interim between the granting of a decree nisi and a decree final then the terms and conditions governing such children should conform to the general pattern set forth in sub-section (ii) hereinabove.

6. Conclusion

Honourable members, it has been a privilege to appear before the committee and I can only hope that the thoughts I have advanced today may be of some assistance to your deliberations. I firmly believe that there is room in this country for the acceptance of the concept of "Divorce by Consent". I well know that there may be many people in Canada who have very definite views on the so-called "sanctity of marriage," however, there is in my opinion a great segment of the population which regards marriage as a civil contract. This concept is substantiated by The Marriage Act of Ontario (RSO 1960, c. 228, s. 26) which provides for marriage by a Civil Officer. Thus marriage becomes a contract. Furthermore, in my opinion, there is no contract which cannot be resolved by the mutual consent of the contracting parties. I believe that this concept should now be extended and made available in the laws of marriage and divorce in Canada in so far as it is acceptable to those citizens of this country who are prepared to utilize this general thesis.

The CO-CHAIRMAN (*Senator Roebuck*): What happens if a baby appears after ten months?

Senator BAIRD: A late arrival.

The CO-CHAIRMAN (*Senator Roebuck*): It is possible, is it not?

Mr. MCDONALD: I am not a medical man, sir. May I say I have been before the senator in another capacity in other places and I have had some experience with divorce and I appreciate the opportunity that has been afforded me of appearing here today to express my views on the subject I have discussed.

The CO-CHAIRMAN (*Senator Roebuck*): Ladies and gentlemen, have you any questions to ask Mr. McDonald, or any comments to offer?

Mr. WAHN: This presentation by Mr. McDonald has been most helpful. Would he agree that when this committee is considering the question of divorce our first object should be to preserve those marriages that are capable of being preserved?

Mr. MCDONALD: I agree with that, sir, and I have cited the brief report of the findings of the Royal Commissioners in England. Their first concern is that the marriage be reclaimed if at all possible, and in any event the children should be protected. Your approach is a very reasonable one.

Mr. WAHN: Following that line of thought, would you agree, from the consideration you have given the question, that before there should be any divorce it should be mandatory that reconciliation procedures be attempted?

Mr. MCDONALD: I have thought about that very seriously. In Sweden there is a proviso that there must be either legal separation for one year or *de facto* separation for a period of three years before the divorce-by-consent concept comes into play. Perhaps my suggestion might be qualified by saying, there should be legal separation for a period of two years prior to the functioning of the concept. I have an open mind.

Mr. WAHN: Do you feel that professional marriage counsellors or psychiatrists skilled in consultation with people bent on divorce have any useful function? Do you think their services are helpful where marriages appear to have broken down?

Mr. MCDONALD: It depends on the families concerned. I have known some psychiatrists in this field who have been more harmful than helpful. It depends upon the circumstances of the parties. However, there is room for inclusion of the concept, though how you are going to put it into the law I do not know.

Mr. WAHN: Suppose the law provided that before a divorce by mutual consent could be obtained the parties would have to appear before a judge or some responsible person to determine whether it was necessary for them to have marriage counsel: would you see anything objectionable in that?

Mr. MCDONALD: I do not see anything objectionable in it but it would be hard to define the process. One would have to get a certificate to show that he or she had attended before a marriage counsellor; and while there are those who are receptive to suggestions from the clergy and from professional marriage counsellors, there are others whose minds are closed to that sort of thing and say, "Let us get rid of all that".

Mr. WAHN: On the principle that when your car breaks down you take it to a trained mechanic at the garage before deciding to throw it into the dump yard, I was wondering whether the same sort of consideration should be given to marriage contracts—whether the parties should not obtain the benefit of skilled counselling before permitting the divorce to take place.

Mr. MCDONALD: In my experience, sir, and I have handled a great number of divorces from various strata of society, I have found that the more intelligent people are the more tenaciously they hold to the view that they themselves know better than anyone else what they want to do and that it would be wasting their time and money in consulting high-priced psychiatrists. When you are consider-

ing people with minimal means it would be a burden on them, unless there were facilities, as perhaps there are. The church has done much. But very often you think something is patched up because some priest or minister has talked people into going back, and the whole thing starts off again in a year. People are unhappy and live under duress.

Mr. WAHN: Perhaps medicare legislation will deal with the financial problem. I understand that in England, in order to preserve marriages and to avoid hasty divorces, no divorce is permitted save in exceptional circumstances, within the first three years after the marriage.

Mr. MCDONALD: Yes.

Mr. WAHN: It is felt that in the first three years after marriage people experience the greatest difficulty in learning to live with each other and mutually adjust themselves, and that during that period divorce should not be permitted except in obvious cases. What do you think of that as a provision of the law?

Mr. MCDONALD: I would have been sad to see such a provision in effect after the war. That is where I got my feet wet in this divorce work. Many people married in haste and had to repent at leisure. If people had had to wait three years it would have occasioned hardship and brought illegitimate children into existence. I am not unqualifiedly in favour of the suggestion.

Mr. WAHN: Your point leads to the next question. One way of preserving marriage would be to avoid hasty marriage in the first place, of the type you have mentioned. Do you agree with that?

Mr. MCDONALD: Yes.

Mr. WAHN: We know that many such marriages break up. Would you be in favour of some legal provision which would curb hasty marriage and ensure what has been described as a cooling-off period between the securing of the marriage licence and the actual marriage?

Mr. MCDONALD: We have that in effect now in Ontario. The parties have to wait three days; it is practical from the legalistic point of view; but my own experience has been such that, in my opinion, when people are put in such a situation they would go ahead and live together anyway.

Mr. WAHN: In that event they have no problem with divorce.

Mr. MCDONALD: No; but the birth of children would lead to other problems. I acted the other day for people who wanted to get a Mexican divorce, which they did. The State of New York recognizes Mexican divorces and they took a week off and went to Syracuse to get married. The papers did not arrive from Mexico in time and they had the honeymoon and married the second week.

The CO-CHAIRMAN (*Senator Roebuck*): The result preceded the cause.

Mr. WAHN: I assume you practise in the Province of Quebec?

Mr. MCDONALD: Yes, before the Senate Divorce Committee.

Mr. WAHN: Do you feel that the people would accept the principle of divorce by consent?

Mr. MCDONALD: Some of them definitely would not. That is why I phrased the last paragraph of my brief with great care. I have no illusions as to the effect of this proposal in my native province. There are, however, in Quebec many people who are not particularly tied to any church and who would avail themselves of civil marriage if that were possible, and I think those people should be given the option of getting out by mutual consent if they want to.

Mr. WAHN: Thank you, Mr. McDonald.

Mr. BREWIN: Mr. McDonald, you referred to some royal commission. Were you referring to the commission that reported to the Archbishop of Canterbury?

Mr. McDONALD: No. This is a report that was carried in the Ottawa *Journal* on November 9. It was a Canadian Press despatch. I quote a passage:

> "A government-assigned panel of legal experts say the obvious breakdown of marriage should be a ground for divorce. Divorce should be granted after two years of separation if both parties consent, or after five to seven years of separation even if one party objects", says a report of the British Law Commission published today. Safeguards such as waiting periods to leave the way open for reconciliation, and measures to protect children—should be enforced, the Commission says. The objectives of a good divorce law should include (a) the support of marriages which have a chance of survival and (b) the decent burial, with the minimum of embarrassment, humiliation and bitterness, of those that are indubitably dead, the report says."

The commission consisted of five prominent specialists led by High Court Justice Sir Leslie Scarman.

Mr. BREWIN: What I had reference to was a report submitted recently to the Archbishop of Canterbury by a number of distinguished persons, wherein it was suggested that there should be a rephrasing of the whole concept of matrimonial offences in consequence of the breakdown of marriage, into which perhaps both the concept of the Scandinavian countries and your own might fit. I was wondering whether you had had an opportunity to see that report.

Mr. McDONALD: No, I am sorry to say, I have not. I know it exists but I have not seen it.

Senator GERSHAW: This suggestion is a long way from the grounds we have been working on in this committee, and it occurs to me that a question I was about to ask has perhaps been answered, at least in part. Two people might feel they would like to get married but not forever; and in fact people do remain married for a year or so and then have a divorce. If there were divorce by consent, do you think that some people, having that means of dissolution in mind, would get married more readily than they otherwise would?

Mr. McDONALD: They might, yes. Many people know that they can have their marriage dissolved by following the rules laid down, namely, by committing adultery, and many observations could be made on that point; but I am not inclined to dwell on that today. I suggest there would be a great deal less contrived adultery if there were an honest way of getting out of hopeless marriage. There is no question divorce is on the increase. According to the latest published figures from the Dominion Bureau of Statistics, there were 8,941 divorces granted in 1965, so that divorce is here to stay; and if there were a little more flexibility it would be easier on some people who might not wish to avail themselves of the present grounds of divorce.

Senator GERSHAW: Would you include hopeless insanity as a ground of divorce?

Mr. McDONALD: Yes. My proposal does not in any way delimit the other grounds, but I felt it was important to make this particular point.

Senator GERSHAW: It is in addition.

Mr. McDONALD: Yes, it is an additional ground.

Senator FERGUSSON: Can the witness tell us whether this legislation which, I understand, he says is in effect in the Scandinavian countries, is something recent, or has it been the law there for some time?

Mr. McDONALD: Some of it is quite old. I may say that some of my notes are rather sketchy, but I was faced with a translation problem and the Canadian Embassy in Copenhagen was very helpful. The Act in Denmark is Act 276 of the

General Statutes and it goes back many, many years. It has been amended a number of times but I cannot tell you the dates of origin of these Acts.

Senator FERGUSSON: They are not recent ones?

Mr. MCDONALD: No. I started on this course of investigation two years ago, even before this committee was announced, and I found no difficulty getting these laws, and any supplemental questions I asked were readily answered. This information could be obtained from the people I have referred to in my brief, and I am sure that if the secretary of the committee were to write to the gentlemen named who were helpful to me he would get any details that might be required.

The CO-CHAIRMAN (*Senator Roebuck*): Any more questions?

Mr. WAHN: Could Mr. McDonald give the committee some idea of what, on the average, the cost to a person would be of getting either a parliamentary divorce or, in the alternative, a legal divorce in the Province of Ontario.

Mr. MCDONALD: It depends to some extent, as Senator Roebuck knows, on the extent of the investigation that must go on into the adultery; but, assuming that that presents no difficulty, I would say offhand, in round figures, about $1,500.

Mr. WAHN: For both?

Mr. MCDONALD: Yes.

Mr. WAHN: Thank you.

Mr. MCDONALD: Excuse; that must be qualified. People in the Province of Quebec are handicapped by virtue of the fact that they have to travel to Ottawa and spend a night here, and this is an added burden on people from a part of the Province of Quebec that is not adjacent to Ottawa.

Senator BAIRD: Does the amount stated include Senate fees?

Mr. MCDONALD: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): And legal fees?

Mr. MCDONALD: Yes.

The CO-CHAIRMAN (*Senator Roebuck*): And expenditures involved in gathering information?

Mr. MCDONALD: Yes. I am quoting the fees that are current in Ottawa. There may be much higher fees in other parts of the country. I do not know what fees are charged in places like Toronto, but this is a sort of tariff for Montreal divorces being handled here.

Mr. WAHN: Would the same amount, $1,500, be the cost in Ontario in the Ottawa area?

Mr. MCDONALD: I do not do much work in the courts here but that is about the range.

The CO-CHAIRMAN (*Senator Roebuck*): Higher in the ordinary courts than it is in the Parliamentary Court?

Mr. MCDONALD: Yes.

The CO-CHAIRMAN (*Mr. Cameron*): On behalf of the committee I extend our thanks to you, Mr. McDonald, for your most interesting and comprehensive brief. You have introduced a novel thought—not entirely a new thought because some states have put it into practice—and in this connection Mr. Brewin has mentioned the report submitted to the Archbishop of Canterbury which resulted from the study of conditions conducting to the failure of modern marriage. The thought will no doubt spread throughout Canada and will be one more item added to the inventory of the committee when they make up their minds on the subject of enlarging the grounds of divorce. We thank you for coming, Mr. McDonald.

Mr. McDONALD: Thank you, sir, and thank you all, ladies and gentlemen.

The CO-CHAIRMAN (*Senator Roebuck*): Will the next delegation please come forward—Mrs. Nora K. Rodd and Mrs. Hilda Murray. Ladies and gentlemen, I wish to introduce the delegation from The Congress of Canadian Women.

The main work of the Congress of Canadian Women is among women and children, for peace and security of the family and home. It has international ties with various women's organizations and corresponds with many countries in regard to family economics, children's educational opportunities, equality of women, and other matters relating to the family and the political status of women.

May I say that Mrs. Rodd's late husband and I went through law school together. I knew him very well and admired him greatly.

As a young woman Mrs. Rodd taught school in the Province of Ontario where she was born. Later she completed her work for Bachelor of Arts degree at the University of Queens at Kingston, and after that received her Master of Arts in Economics from Wayne University at Detroit.

Along with her husband, the late Roscoe Rodd, Q.C., she was active for many years in church work, and in the Y.M. and Y.W.C.A. and the work for world understanding and peace.

Mrs. Rodd has long been active in work for women and children and the home, and in world movements for peace. In 1951 she was the Canadian member of the Women's Committee of Investigation in Korea, and at the invitation of the women of Korea. Since its founding in 1950, Mrs. Rodd has been a member of the Congress of Canadian Women, and from 1960 to 1962 the National Secretary.

Mrs. Nora K. Rodd, The Congress of Canadian Women: Comrades, Mr. Chairman, Honourable Senators and Members I presume those of you who have seen our brief have probably read it and so I shall begin by reading the summary. It is not a long brief. I understand that time is precious here.

The CO-CHAIRMAN (*Senator Roebuck*): Take your time, Mrs. Rodd, and give us what you think would be of interest to us.

Mrs. RODD: I hope there will be time for Mrs. Murray to speak. She has been active in the work of the organization, having been president for some years. With your permission, I should like to read the summary at the end of the brief.

The CO-CHAIRMAN (*Senator Roebuck*): At what page are you reading?

Mrs. RODD: At page 12.

Summary of Brief

Broken marriages are a social evil, and making divorce more difficult will not remove the cause or causes. The objective is to create such a political atmosphere that men and women can count on building a stable family life. The 1961 census shows 81,000 wives deserted by or separated from their husbands, and more than 15,600 divorced couples in Canada, with many more thousands of homes "prisons of intolerable wretchedness" and with untold suffering and harm to the children. Society must accept responsibility for these broken homes, sometimes for the poor man the care of two wives and two families—until we have found the way to prevent them.

As with Roman Civil law, divorce should be as simple as marriage. Since founded on mutual affection, when that ceases to exist marriage should be dissolved by mutual consent, or if sought by one party only, then grounds shown. It is degrading to base marriage law on the adversary system—to show fault. We must do away forever with the pretence that marriage is but a physical union, and that the main cause of unhap-

piness is adultery. In ceasing to maintain this attitude the government will give leadership in developing a higher sex and marriage morality, neither prudish nor irresponsible, but upholding the finest traditions of our people.

Divorce is of particular concern to women. The United Nations Charter proclaims woman's right to equality, and when society makes this a reality there will be many more happy marriages. Modern society needs both woman's mind and hand—one third of our workers are women, many of them married. Society must remove discrimination in education and training and surround the home with networks of nursery schools and after-school centres so that the modern woman may play this triple role of worker, wife and mother.

No higher duty is laid upon men and women in our society than that of founding a home and rearing healthy and happy children to be high-minded and responsible citizens.

To this end the Congress of Canadian Women recommends:

(a) That one Canadian statute by act of Parliament unify the law on marriage and divorce; that this apply to every province.
(b) That this law instruct that courses of family life be given in high schools, colleges and universities, and in adult study classes throughout the country.
(c) That there be a just marriage contract. That any property owned by either party before marriage, and any received later in the form of gifts, be controlled by that party. All property or wealth earned during the marriage be held by both equally, and subject to equal division in the event of subsequent separation.
(d) That all Canadian citizens have Canada-wide domicile, that of the wife no longer considered of necessity that of her husband.
(e) That at the time of marriage a government statement be issued with the marriage certificate setting forth the rights and duties of each party, and along with this—information on services available to the family, such as legal aid, family court, marriage counselling, children's aid, etc.
(f) Once, however, marriage has broken down, that divorce be available "without blame or recrimination" through the local courts and at a cost within the reach of all, and when provision for the children is assured. That orders for maintenance be placed in the children rather than the wife.
(g) That divorce be available after two years of separation as well as for any one of the following reasons: Incurable mental disease; life imprisonment; desertion; brutality; incompatibility; alcoholism; infidelity or immorality.
(h) That a period of six months before a second marriage be the rule excepting in such special circumstances as the court might find.

And now may I say a few words on the emphasis we place on the social conditions of our times as a consequence of there being so many divorces.

Divorces were very few in Canada before the first world war and after that they increased rapidly, and one thing that has made some women feel they could not tolerate marriages of the sort they had once put up with was the fact that women were earning their own living and so feeling independent. They did not all have to marry in order to live, nor did they all have to stay married in order to be fed.

I submit, ladies and gentlemen, we should consider some of the things our young people are faced with now. They see such dreadful things going on around

them everywhere that they are inclined to say, "So what? To hell with such a civilization! If they don't care any more for us, what do we care? Just live it up!"

We see so much of that sort of thing; and, after all, the young ones are not the ones to blame. I have a few clippings and a little book that many of you know.

Here is a clipping—a few notes by an Anglican minister, by name the Rev. Bernard Reynolds of Vancouver. This was published in 1953. He began by deploring the number of common law marriages that existed; not that these marriages, so-called common law marriages, were not quite often good, but that they were uncertain: the wife has no rights nor have the children. We all know that.

It may be different in some provinces, but a week ago I was talking to the lawyer in charge of this work in the Welfare Department at Toronto, Mr. Rutherford, and he said the position of the wife in that situation is very shaky.

The CO-CHAIRMAN (*Senator Roebuck*): Have you any suggestions to make along that line? We are much impressed with what you say, because frequently these common law marriages are quite successful in a sense: children are born of the marriage and they are brought up well, but they are illegitimate children.

Mrs. RODD: They are considered as having no rights unless the father recognizes them. Unless there is a will they have no rights. It is hard to get relief and help for children and mothers under such circumstances.

Of course, if people could get divorce more readily there would not be so many common law marriages. Some years ago Rabbi Abraham L. Feinberg wrote a fine article in *Maclean's* Magazine. It was published in the June 4, 1960, issue. In this article he tells how from ancient times the Jewish people viewed divorce. They looked upon divorce as something that people had as much right to as marriage. If the marriage did not work, divorce was available to them.

First of all, it was much more easily available for the man and he could put away his wife without much difficulty; but gradually it was recognized that it should work both ways. In the September issue of *Chatelaine* there was a very thoughtful article by one of our women, Nancy Tayler White. I do not know whether this was a pen name; at any rate she is an educated woman who writes on the degrading experience of going through divorce in Canada, and she has gone through it herself.

Nancy White tells how she had to swear to things she did not feel were right; how she had to blame her husband, when she did not feel she should do so, in order to get a divorce. She was subjected to this degrading experience. The article is worth reading. The title is: "How our Divorce Law Degrades Us".

The little book to which I have referred is called *Ultimate Belief*, written by Arthur Clutton-Brock. Shortly after the first world war he saw how Germany had "beehived" us and brought us to a state of war. The Germans, he says, had been taught to believe that their main business was to make their country great, and as he goes along he feels there is something in England that is almost akin to that—the belief, as a philosophy of life, that money making is one of the main things.

He says our people must cultivate a society that will foster a spirit of goodwill, the search for truth and for beauty. He blames the English and our western civilization for neglecting the philosophy of beauty. His view is that we do not get the truth and do not have morality if we fail to honour beauty in life. At the end—and this has much to do with divorce—he says, "an unhappy society makes for unhappy marriages, and a society that young people cannot respect makes for unhappy marriages."

The other day I cut out of the Toronto *Star* an article telling us how cheap they are making prostitution for the soldiers in Viet Nam. This article states that the Army-People Council of South Viet Nam had approved a woman lawyer's

proposal to legalize prostitution and that prostitutes be put in recreation centres. Some soldiers, when they are off duty, get free passes to these places. One of the places mentioned is a 20-room brothel accommodating an average of 100 to 300 soldiers daily. Young women are treated in special hospitals for disease, and a good many of them are diseased, and so on.

Think of our young boys reading that sort of thing in a Canadian newspaper. Think of the feelings of mothers as they contemplate their sons' departure to fight in a foreign country where young women are made prostitutes in that manner. How can young people respect our society when we make money out of war, when Canada makes money out of sending materials to the United States to kill Vietnamese.

I will tell you of an incident that occurred in the experience of one of our women not long ago. A brilliant boy in an Ontario university got a summer job working in a plant in Toronto and he came to one of our women interested in peace and handed her a $10 bill and said: "Please take this. I find that our company is making parts for a plane that will be used in Viet Nam and I want you to use this money to further your work." She replied: "I want you to think about this carefully. You are only a student and you can't afford to give $10. I will take it and we will talk about it later. In the meantime I want you to tell your mother about this."

She saw him the next day and said, "Did you tell your mother and father?" He replied: "I told my mother and she said she thought it was too much." They compromised but this boy would not settle for less than $5.

When I heard about that I wrote to our Prime Minister, because we have no right to put our young people in such a position. That is why we have people in Toronto saying: Don't trust anybody over thirty; we don't like your civilization.

This is what Mr. Clutton-Brock says in effect: The aim of civilization is not to give the few the leisure to exercise their intellectual and aesthetic activities while the many are drudges. We do not believe that only the rich ought to be good while the many do not have the opportunity to want to be good. If we have learned to exercise our own spiritual and aesthetic qualities, and value the exercise of them above all things, the drudgeries of others will become intolerable to us.

That is what we want to leave with you. We want a society in which drudgery, poverty and war will be intolerable to all. Then we shall know how to keep happy marriages happy and help those that are not happy to keep from breaking up.

The CO-CHAIRMAN (*Senator Roebuck*): Shall we have questions now or wait till we have heard Mrs. Murray? Let me introduce Mrs. Murray. For the record, may I say somehing about her, because we have a very distinguished witness before us at the moment.

As a young woman Mrs. Murray left England in 1920 and was married three weeks after landing in Canada, and she has lived with her husband, John, in the same house in Scarborough Township for 46 years. They were both born in Birmingham, England.

Mrs. Murray has served at one time as an elected director on a Rochdale co-operative store in Toronto, as secretary to the local Red Cross and various township organizations. She was elected the first woman councillor in Scarborough in 1948. She ran for deputy reeve and was elected twice in that capacity—the first and only woman to sit in that office.

As representative for her ward, she headed various committees, both in the township and in York County Council, that is, Welfare, Mothers' Allowance Board, and Chairman of the Property Committee, where she assisted in selling several millions of dollars of tax-sale land.

She has been active in work for peace, for women and children, for years. She has served in the capacity as President of the Congress of Canadian Women for about ten years and recently as national secretary *pro tem.*

At several international women's conferences in various parts of the world, she has represented this organization. Mrs. Murray is deeply interested in good government and politics, and studied economics at the University of Toronto extension courses for four years.

Mrs. Murray, we shall be pleased to hear from you.

Mrs. Hilda Murray, The Canadian Congress of Women: Thank you, honourable senator. Ladies and gentlemen, I would like to speak briefly on two points, and the first is that marriage is a contract. Now, a contract is an agreement between two people and the state, and it would seem to me that in ordinary affairs one is not required to go to court and ask for the dissolution of a partnership on the basis that the other partner was a crook or had committed a crime; yet we do ask a married person seeking a divorce to prove that the other party has broken the law, notwithstanding that, as has been said, marriage is a civil contract.

Marriages are not made in heaven but on earth by the mutual wish of two people, and if we view marriage in that light it is degrading to a man or a woman to require proof of adultery or some other social crime.

I believe in and support the principle that divorce should be by mutual consent. I am not very familiar with divorce, though we have had divorces in the family, and I know it gives rise to a feeling of shock and a sense of guilt, of something criminal: people do not like to have it known that a son or a daughter has been divorced. This should not be, and I am sure that this esteemed committee will recommend appropriate regulations.

In England we used to have bans and we waited three weeks, and there is some suggestion that we should wait three weeks before marriage.

I wish to make a strong point about the education of youth. Our young people are living in a world entirely different from the world that we lived in as boys and girls. We knew nothing about sex; we had to wait until we got married. I do not know about men, but women had to await that experience after marriage. But on C.B.C. they explained all the details of the act and of childbirth. This in my view is beside the question, teaching children sex. We are living in a scientific age and young people cannot fail to acquire knowledge of the sort that the youth of my day did not have. I do not think I could read character in a man at the age of 20, nor do I believe that many boys were mature in the sense that young people are today.

I have only one child, a daughter, and two grandsons, and I do not want my grandsons to go around the world, as many young men do today, siring unknown children. I believe our young people are living in a more protected society than we lived in. I was very young when, during the first world war, I used to see Canadian soldiers in street cars in England, Australian soldiers, soldiers from all parts of the Commonwealth, besides English, so many uniforms, and I wondered whether I should ever see a young man in a civilian suit.

That was a harsh world for young women and a harsher one for young men, and a harsh discipline they underwent. Today, with television and radio, particularly television, and the various news media, magazines and so on, the emphasis is all on sex, and no part of it on the responsibility of marriage and parenthood.

I am a very practical person. I do not think I am an idealist—maybe I am; I do not know. But when I was in the Welfare Department and some young girl would come and say, "My husband slammed the door in my face; I'm not going

to live with him; what can I do—can I have welfare?"—in such circumstances I felt like saying, to quote the famous words of the cartoonist Bruce Bairnsfather, "If you can find a better 'ole, go to it." At any rate, when I think of such young women I say to myself, if you can find a better job than your marriage, go to it.

Marriage is a business. I have to be a business woman, I have to pay taxes, and this is a business too; it is something acquired by experience, it is not taught; and I am sure you ladies and gentlemen, and others who are concerned with the problems you are considering, realize that our young people need direction in marriage.

You have to have a licence to drive a car; you have to know the rules and regulations; you learn at your cost that you dare not disobey those rules, and apart from the cost to you, you know that they exist for everybody's good including your own, and if you disregard them and endanger life and property you are dealt with severely and your licence is suspended.

It is different with marriage. No young person is ever asked: Do you think the man you are marrying is suitable for you? Have you some hopes for a happy married life? Is it simply because you feel it is romantic to get married that you are getting married? Ill-considered marriages are the cause of a great deal of misery besides being a tremendous expense to the country.

There are thousands of children in Canada who are thrown upon the rates, without any parents, without any hope of a home, for the most part because of ignorance and a lack of feeling.

I would like to see the committee recommend some course of instruction in character and in the responsibilities that go with marriage, because it is a responsibility. Happy marriages make for the welfare of society, because, for one thing, our taxes go up if we are saddled with a lot of these problems, especially where children are concerned.

We talk about the rights of men and women but never about the rights of unborn children, and this to me is a very serious thing, and I do not believe our college graduates have the faintest idea of what they are doing in fathering or mothering children without careful thought.

After all, people do pay governments to enforce the regulations so that cars shall be driven safely for everyone's sake and order be brought out of chaos and preserved. But we are not getting order out of chaos in family life and I would like to see the Government take a forward step in instructing people in the responsibility of marriage and what it entails. Marriage is not a romance made in heaven; it is a contract.

We see to it that we know what we are doing when we buy a piece of property, but we are doing nothing where young people are concerned. I would like to see this committee make some recommendation. I do not care how brilliant young people are, they need instruction in the responsibilities of marriage. If they were properly instructed I do not think we would have the divorce problems we are faced with now. Thank you.

The Co-CHAIRMAN (*Senator Roebuck*): Thank you, Mrs. Murray. Are there some questions?

Mr. WAHN: I am particularly interested in the recommendation that the minimum age for marriage be 18 years. Was the reason for this recommendation your feeling that marriage is so serious and important a matter that it should not be entered into impetuously and without proper consideration?

Mrs. RODD: Yes, Mr. Wahn. Our committee felt that hasty marriage was not good for the family; it is a contract that should be entered into only after mature thought.

Mr. WAHN: Would The Congress of Canadian Women be in favour of compulsory marriage counselling or advice before marriage?

Mrs. RODD: "Compulsory" is a strong word. We would like to see it taken for granted. We would like to see on the marriage certificate places and names of people whom they could consult at the first hint of difficulty. We would like to see in high schools and colleges some attention paid to the thought that since people are likely to get married sometime they should have some counselling.

Mr. WAHN: At the present time in Ontario it is possible to obtain a marriage licence and marry three days later. Do you think this period of time between the issuance of the licence and the performance of the marriage should be extended to make sure that people do not rush into marriage without due thought?

Mrs. RODD: Either that, or before people apply for the licence they should show that they have taken the course or that they are thoroughly aware of the gravity of what they are doing.

Mr. WAHN: I notice you believe there are some exceptional circumstances in which marriage should be permitted under eighteen, and you mention pregnancy as one such consideration.

Mrs. RODD: I don't believe in forced marriages. My husband used to tell me about things like that happening. Our people do not favour forced marriages for the reason that such marriages are not likely to be happy; but if a court feels that it would make for greater happiness to have a young person under eighteen married because she is expecting a baby we think the court should have the right to endorse it.

Mr. WAHN: That is a little inconsistent with the thought you expressed that marriage should not be entered into without due consideration of the implications of the marriage contract.

Mrs. RODD: I do not think there is inconsistency. The objective is happy marriage, and if a young man and a girl are expecting to be parents I think that is a situation in which the court might waive the 18-year age rule.

Mr. WAHN: I have only one other question. I would ask the witness whether The Congress of Canadian Women would be in favour of a requirement that, barring exceptional circumstances, before divorce is granted there be an interval during which the parties may have an opportunity to get together with a view to reconciliation.

Mr. RODD: Yes. Everything should be done to hold the marriage together if there is any possibility of that being done. We mention in our brief that there should be a period before divorce is granted and they part definitely, and we also discuss marriage counselling and so on.

Mr. WAHN: And in ordinary circumstances remarrying should not be permitted for a period of six months. That is a recommendation?

Mrs. RODD: That gave rise to some controversial discussion because some of us felt it might not be necessary. But one of our young lawyers, who does quite a bit of divorce work, was of the opinion that such a provision was advisable since second marriages could be hasty as well as first.

Mr. HONEY: Am I right in my understanding that The Congress of Canadian Women is a federation of similar organizations having the same objectives, or is this an entity in itself?

Mrs. MURRAY: We have chapters in various cities across the country, and we have affiliations with women's auxiliaries.

Mr. HONEY: In what provinces have you affiliated bodies?

Mrs. MURRAY: We have them in Alberta, Saskatchewan, Manitoba, Quebec and Ontario.

Mr. HONEY: How many members have you?

Mrs. MURRAY: We issue a News Letter to nearly seven hundred people.

Mr. HONEY: Do these members pay a membership fee, Mrs. Murray?

Mrs. MURRAY: Yes, not to us but to the local chapter.

Mr. HONEY: One more question following Mr. Wahn's last line of questioning about marriage counselling. I took it he was referring to marriage counselling after the parties had decided upon a divorce and before steps were actually taken in that direction.

Mrs. MURRAY: I do not think we said that it should be after the divorce was granted.

Mr. HONEY: No; I did not suggest that. But when the couple feel that their only alternative is divorce, at that point when they apply for a divorce to the authority that has jurisdiction, then you would agree that a counselling system should interpose that decision and the granting of the divorce?

Mrs. RODD: We were talking with marriage counsellors as well as lawyers and the thought was that before people reach the decision that they want a divorce they should discuss the position with some close friend, whether minister or lawyer. We feel there is room for a counsellor, before they have officially asked for a divorce, and even perhaps after that and before the divorce is granted.

Mr. HONEY: Did you give thought to a system of counselling which might be under the jurisdiction of the court, or the divorce authority, which would lay it down as a condition precedent to an application for divorce that the parties submit to counselling?

Mrs. RODD: We did not put it that way, but that is not a bad suggestion. The idea is that counselling should be available and should be available to all.

Senator FERGUSSON: I would like to commend the witnesses for their brief. I would suggest that along with the marriage certificate there be issued a statement setting out the rights of the parties, and it is important that they be advised of the services that may be available.

At the end of Recommendation "F", on page 13 of the brief, there appears the following: "That orders for maintenance be placed in the children rather than the wife."

Mrs. RODD: Yes.

Senator FERGUSSON: How do you work that out practically? The children live with the mother, and anyone who has taken care of them and used the money for them will have acted in behalf of the mother?

Mrs. RODD: We got that suggestion from a study of some of the English writers and from the Royal Commission on Divorce in England. There it was brought out that quite often it makes for bitterness on the part of the husband if he feels that the wife is suing for her own benefit and there were some misgivings as to whether in the circumstances the court would be able to decide fairly as between the parties. The lawyer who made the suggestion was a woman. It was felt that bitterness could be avoided if the order were given in the names of the children.

Senator GERSHAW: There is one matter I would mention. A couple come to the doctor for a blood test. He takes the blood, gives a certificate that there has been a test, forwards it to the lab and gets the results back in a week. Does that apply in all the provinces? It does with us.

Mrs. RODD: In connection with marriage?

Senator GERSHAW: Yes.

Mrs. RODD: The question is whether that practice prevails in all provinces. I do not know but I am inclined to doubt it.

Senator GERSHAW: One disease to watch for is syphilis, which is not very common nowadays, though there is always a possibility. It has always seemed to me to be hardly complete to take the blood and give a certificate, because you have to get the result of the examination.

Mrs. RODD: We have not looked into that; it is something we have not discussed.

The CO-CHAIRMAN (*Senator Roebuck*): Have you anything to say, Senator Baird?

Senator BAIRD: I have nothing to say. It was a perfect brief.

The CO-CHAIRMAN (*Mr. Cameron*): Following up what Mr. Honey was saying about counselling services under the jurisdiction of a court and reporting back to the judge, this I should think would apply in the case of a marriage that can be redeemed. Suppose the parties make up their minds that they want a divorce: is the judge to have the authority to refuse the divorce, or is this to be regarded as only one step in obtaining a divorce? Is it to be mandatory or just a trial to see whether a reconciliation can be effected? Is it mandatory that they must make an attempt at reconciliation?

Mrs. RODD: The idea is that they should try everything rather than go on with the divorce.

The CO-CHAIRMAN (*Mr. Cameron*): I suppose that is the answer one would give. It might be difficult to enforce; the judge might say, "I will not give you a divorce".

Mrs. RODD: I would like to think our courts are so reasonable that they would urge that everything possible be done to keep the family together, but not going beyond what is possible.

The CO-CHAIRMAN (*Mr. Cameron*): May I thank Mrs. Rodd and Mrs. Murray for the brief they have presented to us and for the information we have been given. I thank you, ladies, for your excellent presentation.

The committee adjourned.

APPENDIX "15"

Submission to

THE SPECIAL JOINT COMMITTEE

OF THE

SENATE AND HOUSE OF COMMONS

ON

DIVORCE

by

John H. McDonald, Q.C., B.A., B.C.L. (McGill)
P.O. Box 942
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Canada

1 November, 1966.

PREFACE

This submission advocates divorce by Mutual Consent.

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1. *Preamble*

(a) *Status of appearant*

Messrs. Chairman, Honourable Members of the Joint Committee:

Before I make any observations with respect to the question of "Divorce" I would like to state that I appear here in my own capacity as a Member of the Bar of the Province of Quebec and as a Member of the Law Society of Upper Canada and that I do so on my own behalf and that I am representing no organization, association or any party or parties.

(b) *Qualifications*

Having had a number of years experience before the Divorce Committee of the Senate and subsequently, further and perhaps more limited experience, before the Senate Commissioner on Divorce, I felt when your august committee was formed that I might be able to make some contribution towards the consideration of the possible reformation of the laws of divorce in Canada.

(c) *Prior Proceedings*

Having had the opportunity of studying the proceedings of this Special Joint Committee bearing date of 28 June, 1966, and 5 July, 1966, I realized that much of what I had planned to say had already been covered by such eminent Counsel as The Hon. A. W. Roebuck, who for many years has been so helpful to those of us who have appeared as Barristers or Solicitors in divorce proceedings before the Committee of the Senate on Divorce, Mr. E. Russel Hopkins, Senate Law Clerk and Parliamentary Counsel who, in the proceedings of 28 June, 1966, so aptly set forth the constitutional background concerning divorce in Canada, Mr. Justice A. A. M. Walsh, Senate Commissioner, who in the first Hearing of the Special Joint Committee of the Senate so ably outlined his own views on the position played in the newly re-organized Senate divorce procedures from the point of view of the Senate Commissioner. Particularly I would refer to the observations made by Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel of the House of Commons who before the second meeting of the Special Joint Committee of the Senate and the House of Commons on Divorce on 5 July, 1966, so concisely summed up many of the ideas that I would have presumed to have mentioned.

(d) *Scope of observations*

In view of the statements made by the foregoing distinguished lawyers who have had far more experience than I in these matters, I believe it wise to confine myself to one or two points which I have had the opportunity of studying in some detail and which I believe may add to the deliberations of this Special Joint Committee. Basically my submission is that some consideration should be given by the Commitee to the possibility of following the example set by various Scandinavian Countries, whose legislation I have had the opportunity of reviewing, and which I will attempt to summarize briefly in this presentation. In this connection I am particularly indebted to Ake Waddstein, Esq., Chancellor of the Royal Swedish Embassy in Ottawa, Dr. Sakari Nurmi, Charge d'affaire of the Embassy of Finland in Ottawa, the Royal Norwegian Embassy in Ottawa, and Mr. Juhl of the Royal Danish Embassy in Ottawa, all of whom have been most helpful in providing summaries of the laws concerning divorce generally which obtain in their several countries.

2. *Basic Thesis*

There is a great similarity between the Laws governing divorce and the protection of women and children in each of these four Scandinavian Countries. I

believe I can best summarize my views on the way in which divorce in Canada can be simplified and made more practical to the people of Canada by referring to this legislation. These observations would be in addition to the valuable suggestions already offered by the distinguished lawyers who have appeared before this Special Joint Committee and I would propose to add to the inventory of suggestions to be considered by this Committee the concept of "Divorce by Mutual Consent".

3. *Parallel Legislation*

A review of the Laws of the Countries referred to above indicates that they are such as to encompass and illustrate this concept, viz:—

(a) NORWAY

(i) In addition to the grounds of adultery the laws of Norway provide for divorce being available to a spouse whose partner is guilty of certain criminal offences; however, to pinpoint the basic concept that I wish to dwell upon, I would state that divorce is possible in certain circumstances in cases where there has been a one year separation and where there is consent by both parties. However, if only *one* party desires the separation, a "special reason" must be pleaded. This "special reason" may be that the "difficulties" between the parties concerned are so deep that to insist that the marriage continue would be "unreasonable".

Under the Norwegian system either party can seek a divorce if "legal separation" has been in effect for at least two years. However, either party can seek a divorce even if there has been no legal separation if the husband or wife have *lived apart for three years.*

(ii) The procedure in Norway is quite simple, i.e. consultation and negotiation must be tried between the husband and the wife before an officer of the Court responsible for Marriage. In the case of children provision must be made for such children and the responsibility rests on both parties and it is usual that one party or both parties will agree to pay for the maintenance of the said children. It would appear from my study of the procedures involved that this is a matter for mutual agreement between the parties to the divorce and is precedent to their seeking divorce proceedings on the basis of mutual consent.

(b) FINLAND

In addition to the usual grounds for divorce, namely, adultery, venereal disease, attempt on a spouse's life, etc., the basic ground for divorce is that after one year of separated living, and after a decision by the Court that the parties separate, a divorce may be granted by mutual consent or after two years of separated living without a Court's decision. The procedure generally is that separation can be granted by a Court on certain conditions at the request of both spouses together or in certain cases when one spouse has seriously neglected his or her duties as a spouse, i.e. neglect, incompatability, etc.

(c) DENMARK

(i) Inter alia the Divorce Laws of Denmark provide that when marriage partners "owing to deep and permanent disagreement" consider they cannot continue married life agree to separation a divorce will be granted. The basic grounds for separation and eventual divorce are that if *one* marriage partner claims of the other that the other is guilty of gross neglect "in respect of (his) (her) duty to keep the

partner or children or otherwise gross infringement of (his) (her) duties to them, or if owing to deep disagreement, relations between the married partners must be considered as ruined, then judgment can favour separation for each, which ultimately leads to divorce.

(ii) The procedures are much the same as in the case of Norway.

(d) SWEDEN

(i) Swedish Law on divorce is perhaps the broadest of the laws of all the Scandinavian Countries and the grounds for "immediate final divorce" are as follows:—

Three year separation because of incompatability where there has been no decree for legal separation. In this case the procedure is a request *made by mutual application* or by service of a summons by one party which is acknowledged by the other party stating that separation has been due to incompatability.

After two years of desertion, divorce may be granted by request of the deserted party.

When a spouse has been absent for three years under circumstances which may presume death, a divorce may be granted.

(ii) With respect to the Laws of Sweden, it is observed that the children are given considerable protection under the law wherein there must be:—

Agreement concerning alimony, support and custody of the children which must be entered into before a legal separation and divorce are granted.

The spouse adjudged responsible for the divorce is never entitled to alimony and may be required to pay damages if the act which caused the divorce was grossly offensive to the other party.

4. *Recapitulation*

The foregoing recapitulation, in a most general way, of the laws of the four Scandinavian Countries referred to herein would lead the way to a broad suggestion that consideration should be given by this Honourable Joint Committee to the possibility of extending in Canada, insofar as Federal jurisdiction obtains, the concept of divorce by mutual consent. To this end, the following suggestions are put forward for consideration by the Committee, namely:—

5. *Suggestions and Summary*

(i) "Mutual Consent" should be recognized as a cause for Divorce in cases where there are no children, such divorce by mutual consent to be granted by virtue of a decree nisi upon application by both parties and without formal hearing provided the officer (Judge) concerned is satisfied that the proceedings are in good order and that the decree final should be granted only after a period of ten months if there are no children of the marriage.

(ii) In the case of a divorce by mutual consent in which there are children, then such divorce should be granted only upon the satisfaction of the official concerned that adequate arrangements have been made concerning the welfare of the children.

(iii) In the case of a divorce being granted pursuant to sub-section (i) hereinabove and further in the case of children being born to the parties concerned in the interim between the granting of a decree nisi and a decree final then the terms and conditions governing such children should conform to the general pattern set forth in sub-section (ii) hereinabove.

6. *Conclusion*

Honourable Members, it has been a privilege to appear before the Committee and I can only hope that the thoughts I have advanced today may be of some assistance to your deliberations. I firmly believe that there is room in this country for the acceptance of the concept of "Divorce by Consent". I well know that there may be many people in Canada who have very definite views on the so-called "sanctity of marriage", however, there is in my opinion a great segment of the population which regards marriage as a civil contract. This concept is substantiated by The Marriage Act of Ontario (RSO 1960, c. 228, s. 26) which provides for marriage by a Civil Officer. Thus marriage becomes a contract. Furthermore in my opinion there is no contract which cannot be resolved by the mutual consent of the contracting parties. I believe that this concept should now be extended and made available in the laws of marriage and divorce in Canada insofar as it is acceptable to those citizens of this country who are prepared to utilize this general thesis.

Respectfully submitted.

John H. McDonald.

APPENDIX "16"

Submission to

THE SPECIAL JOINT COMMITTEE OF THE SENATE AND

HOUSE OF COMMONS ON DIVORCE

by

THE CONGRESS OF CANADIAN WOMEN

Box 188,

Station E.,

Toronto,

Ontario

June 27, 1966

DIVORCE REFORM FOR CANADA

In order to make the people easy under the meanest circumstances it is requisite that great numbers of them should be ignorant as well as poor.

—Sir John Mandeville, 14th Century, England

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1. Before World War 1 there were few divorces in Canada, not one in a thousand marriages, but since then they have rapidly increased with the preliminary figure for 1963, at 7681, the highest on record.[1]

2. Divorce is a social evil, a disease symptom of a society that is ill. The remedy does not lie in making divorce more difficult but in seeking out the causes and as much as possible in removing them. Dr. Wilder Penfield, neurosurgeon and author, president of the Vanier Family Institute, contends that young people of today have not changed in recent generations; are not different fundamentally, "At heart they all want a successful family life of their own ...but a better way of communication must be found so they will understand that the way to a happy partnership is still the path of patience and self respect, reserve, studies, athletics and good fun during the time of preparation for their own self-support and independance..." However he continues, "Victorian rules of family living are not good enough for today. We must welcome change to bring strength to family relations based on new knowledge of a modern world."[2] He criticizes the mass media that "advertise wrong sex relationships and the desirability of strong drink while spending very little time on the important virtues... "We must draw some conclusions about control of the mass media."[3] In other words, while the family is expected to remain a strong pillar of society that society must recognize its obligations to the home. The old Greeks had a saying—a man owes his parents much, whether for good or ill, but he owes society more.

3. The greatest of all changes in the modern home is the working mother. Modern society needs the work of women's hands and brain power. Women have the same need as men to improve the family financial position, and the same need for satisfying work.

4. In the biography of Marie Curie, her daughter Eve tells how her mother grieved over the lack of education, particularly among women; and used to say that she wanted for all women a happy home life, and work they could enjoy; for love was too stormy a rock to build all one's happiness upon. How many of us know of homes that are happier now because the mother is too working, using her education and training, and bringing to the home her own interesting experiences! But far too many have to work, at unskilled and dull jobs, with far too little reward, and for long hours, and then come home to carry on with another job. Department stores and industry should provide daycare centres for working mothers. "They want women workers because they are cheap labor... How wonderful a mother would feel if she worked in a store in the daytime and could have lunch with her child", says Dr. Benjamin Schlesinger of the School of Social Work of the University of Toronto[4]. More government established nurseries and nursery schools are needed for mothers in offices, schools and hospitals.

5. And what of housing? Toronto Housing Authority head testifies that a mother of six is prepared to give up her children for adoption because of housing shortage; nearly 4,000 families with a total of nearly 9,000 children are in need of low-cost housing; more than 7,000 homes have been demolished in the last ten years in Toronto and replaced mainly by luxury apartments.[5] Director of the

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[1] *Canada Year Book*, 1965.
[2] *Montreal Star*, Mar. 17, 1966.
[3] *Globe and Mail*, June 5, 1965.
[4] and [5] *Globe*, Nov. 23, 1965.

Children's Aid Society reports that one of the chief reasons for admission of children to institutions for the emotionally disturbed, at a cost of up to $24 a day, is that of bad housing, and as slum housing is knocked down, low-rental units are getting fewer and fewer.[6]

6. And unemployment? An Ontario unemployed truck driver is sentenced to four months' hard labor for brutally beating his five-year-old daughter. How can a family be happy when there is financial insecurity, and such families are measured in thousands in our wealthy country. If no work, then at least a living income is a necessity.

7. There is but one cause of divorce—the culmination of the process of marriage disintegration of which specific incidents, serious or trivial, are but the indices of its regressive trend . . . The specific or spasmodic incidents—the legal grounds—symptoms at best, pretexts at worst. Does it require great psychological acumen to see that cases are rare indeed in which a single fact or event destroys a marriage?[7]

J. P. Lichtenberger in
Problems of the Family

8. In a study of the ROYAL COMMISSION ON DIVORCE, published in England in 1956, O. Kahn-Freund, Faculty of Law, University of London, considers divorce as a social evil, outcome of many factors in the social, economic and cultural environment.[7] Not so long ago, he recalls, masses of people never bothered to get married at all, and dissolution did not appear in the divorce courts. He agrees with Lord Walker, Judge of the Court of Session and member of the Commission, who recommended dissolution on breakdown the sole mode of ending the marriage state, and this at the option of either party. This he believes would heighten respect for true marriage, and places emphasis on marriage as a real union for life. And further, that the spirit in which the laws are applied by the courts is more important than any form of words.

9. In THE LAW AND PRACTICE OF DIVORCE IN CANADA, by H. L. Cartwright and E. R. Lovekin, the authors outline the history of marriage and divorce,[8] as it has come down from three sources; the civil law of Rome, the canon law of the medieval church, and the common law of England, the greatest of these, the civil law. The wife in the beginning was merely a chattel bought by the husband, over whom he had the power of life and death—one of his possessions. Under civil law mere living together was sufficient, though it became the custom to acknowledge this in the presence of seven witnesses. This continued in Scotland until recent times. Under Emperor Justinian divorce was as simple as marriage; since founded on mutual affection, when that affection ceased to exist marriage should be dissolved by mutual consent. If only one wanted divorce, grounds had to be shown and the guilty party was punished, even to banishment.

10. This law of the Christian Rome Digest carried on until 534 in England—through the Institutes of Constantine who declared Christianity the state religion in 313 A.D. During the Dark Ages, until 1025, this humane law was almost forgotten. Then the study of civil laws was resumed, and today it has been adopted in almost every nation of the Western World. Even in England, stronghold of common law with its barbarous lists of offences and penalties.[8]

11. The Church, with many of its members judges, was the main channel through which the study of civil law returned. The idea of equity became very strong—"a system of supplemental law founded upon defined rules, recorded

[6] *Ibid.*, Sept. 30, 1965.
[7] *Modern Law Review*, Vol. 19, 1956, pp. 575-590.
[8] *Chapter on History*, pp. 1-7.

precedents and established principles, the judges however, liberally expounding and developing these to meet new exigencies."[8] By the end of the 19th Century the fusion of civil law and equity together prevailed over the common law. Divorce was freely allowed in Saxon times; after the fall of Rome the bishops had great power, and by decretals or canons—some supposed to come from Saint Peter—passed from one bishop to another, legislated for their parishes. This did much to establish the superhuman origin of ecclesiastical power and sanctity of the person and property of bishops. Through canon law the Church asserted power over every phase of man's activity, and this has come down in ceremonies surrounding marriage, baptism and funerals.[7] (At the time of Henry VIII the Church owned one third of England). The Church granted annulments and divorces readily—for adultery or cruelty by either—Henry had a commission set up to reform the divorce law, hoping to liberate it from clerical influence, but he died before this had been accomplished. Divorce flourished until 1601, when the Court of the Star Chamber declared marriage indissoluble.

12. From then until 1857 judicial separation was in the hands of the Ecclesiastical courts, when it became a matter of a bill for divorce before Parliament—practically impossible for women and for the poor.[7] In 1857 under the English Matrimonial Causes Act, the petition was to be heard by three judges, later by the House of Lords, then by single judges. The Law of England was adopted in Canada at different dates. The Ontario Divorce Act of 1930 introduced the English Act of 1857, and amendments of '58, '59, 1860 and 1868, as part of the Ontario Act of 1925 which permits marriage with sister of deceased wife. The jurisdiction in Divorce is restricted to the Federal Government. There is no statute unifying the law of the whole country.[7]

13. In the marriage contract it is generally expected that the husband will provide for wife and children while the wife takes care of the children and the home—the law has not changed despite the changed status of the working wife. In separation and divorce young children are usually left with the mother, and maintenance is as a rule ordered for children under the age of sixteen.[9]

14. "After thirty years of practice, and many thousands of hours spent listening to marital troubles," H. L. Cartwright gives this as his conclusion:
"The manner in which our culture tries to channel the sexual urge is productive of untold misery, most of which is both stupid and unnecessary... Why do we keep the lid on so tight that the repression sometimes explodes in murder? Is there a legitimate reason behind this?... How can we apply 'sacrament' to a civil marriage? Law is made for all, not just for a religious group...
Happiness is an individual thing... There is a basic need of every human being for affection. Our whole legal practice is based on the adversary system of need to show fault on the part of the other. No system could be better designed to push people apart. Always we come back to the individual, and for that reason I have advocated divorce be available to either after two years' separation..."

15. He quotes a judge from New Zealand, where the period of separation is three years, as he gave his opinion to the English Royal Commission on Divorce—that people living apart are married in name only and it is cruel and anti-social, and against the public interest to perpetuate these marriages—and adds, "I respectfully agree."[10]

16. In A CENTURY OF FAMILLY LAW, R. H. Graveson discusses the future of family law in which divorce is no longer a disgrace, but is still a tragedy, "and for the children of the marriage, a capital tragedy—ten percent is a high mortality rate for marriage." The lawyer, he believes, cannot ignore

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[7] *Modern Law Review*, Vol. 19, 1956, pp. 575-590.
[8] *Concise English Dictionary*, 1913 Edition.
[9] Cartwright, above, p. 19.
[10] *Ibid.*, Preface, V-VIII.

considerations of sociology, psychology or economics. "Sexual morality, once the monopoly of middle class respectability, which the rich ignored and the poor cannot afford, has changed . . . A political atmosphere is required . . . in which a planned, personal future is practical and possible." Family life is changing, yet it is, he says, fundamentally an individual matter—what one man and one woman are likely to do in a particular situation.[11]

III

17. A fair and humane divorce law presupposes a just marriage contract. Speaking before the 1960 Commonwealth and Empire Law Conference in Ottawa, Vera Parsons, Q.C., brought out what seemed to her "the basic error in the theory that the contribution of the wife to the undertaking of marriage, by the care she gives her husband, children and the running of the household, has no monetary value."[12] Since marriage does not require that the husband give up his career for several years, is there any answer to this problem, she asked. Yes—the marriage contract. She proposed a contract in which each continues to control any separate property owned before marriage, as well as any that might come to either as a gift . . . and that property acquired by either in any way during the partnership, be considered common property, subject to equal division in the event of subsequent separation.

18. To operate properly, said Professor Ian F. G. Baxter of Osgoode Law School, Toronto, a family needs both income and services, and each is as valuable as the other.[12] The effect on children from broken homes would be far less severe if the parent in whose custody they remained—usually that of the mother—would have some assurance and freedom from worry about such basic matters as rent and food and clothing. The lack of this assurance is the cause of much lasting bitterness as well as a heavy burden on society. The 1961 census records over 81,000 wives deserted or separated from their husbands, and more than 15,600 divorced couples. Many more partners are still trapped in what Dr. Kaspar Naegele, Dean of Arts at the University of British Columbia, calls "prisons of intolerable wretchedness."[12]

19. O. R. McGregor, Department of Sociology of Bedford College, University of London, points to the obligations society must assume when the divorced man on low income cannot maintain two wives, and possibly two families.[13] Such casualties, he maintains, "must be accepted at best as the temporary responsibility of social policy . . . In tackling social problems consciousness of ignorance may be the beginning of wisdom."

IV

20. The churches welcome reform in the laws of marriage and divorce. They too are asking that no longer must adultery be the only reason for divorce, with its "stooping to collusion and fabrication of evidence and to legal perjury", in the words of the Rt. Rev. George Luxton, Bishop of Huron Diocese.[14] He advised that a period before divorce proceedings be given to counselling in an attempt at reconciliation, "Can we not look at the situation realistically . . . Are there not marriages which may be free from adultery yet are no longer viable on other equally serious grounds? When living together in peace is no longer possible. . .then allow a divorce in our courts."

21. In a "Plea to Rationalise Canada's Divorce Law"[15] the Rev Douglas Fitch of Calgary, speaks as a minister of the United Church, "I am concerned to

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[11] *A Century of Family Law*, pp. 411-417.
[12] *Chatelaine Magazine*, Should you have a Marriage Contract, by Molly Gillen.
[13] *Divorce in England*, pp. 199-200.
[14] *Globe and Mail*, Jan. 11, 1966.
[15] *Dead or Alive*, pp. 168-177.

make this point, . . . that the moral and spiritual sides of marriage are incomparably more important that the physical side. . . . In 'marriage breakdown' the state in effect says "no divorce until we are quite certain the marriage has permanently broken down. . ." He advocates a Parliamentary Committee or Royal Commission to enquire into the whole of our marriage and divorce laws, and concludes: "In the battles that lie ahead, the Church must be a fieldpost for reformers, not a citadel of reactionaries."

22. At the recent convention of the Eastern Canada Synod of the Lutheran Church in America, held in Waterloo, Ontario, the Rev. Arthur Horst, commenting on the growing trend toward common law arrangements because of the high cost of divorce, spoke for a reversal of the cost of the marriage licence and divorce proceedings.[16] A resolution that the Church undertake a study of all aspects of marriage and divorce was approved.

23. The Unitarian Church has put before its congregations the main proposals of the eight bills for divorce reform introduced in the House of Commons this year. Discussions were held and resolutions were voted on. The first Unitarian Congregation of Toronto voted 83 per cent in favour of granting a divorce at the request of both parties, and 40 percent at the request of one party (no grounds required).[17] One of the eight bills before the House is that of Senator Arthur Roebuck, patterned on the British system, and neither to that nor the recent law of the New York State, has the Catholic Church raised objections.[18]

24. Both as wives and mothers, divorce is of particular concern to women. Betty Friedan, clinical psychologist and author, says that divorce in America, according to the sociologists, is in almost every instance sought by the husband, even if the wife ostensibly gets it, and that the chief reason seems to be the growing aversion and hostility men have for the feminine millstones hanging around their necks.[19] She blames the narrow life that many home women lead. Speaking in Toronto recently she put it this way:

25. "It takes courage for a woman to leave this hiding place and choose to make her own way—to move on in human evolution . . . As soon as women take the first step in choosing for themselves the kind of life they wish to lead, the nature of this society will change . . . Children will learn earlier to take the responsibility for their own development; will learn to be independent. The husband may have more power in his home—husband and wife free one another from the straitjacket of home life . . . women share the human brain."[19A]

26. This need of a wider life for women was brought out in the DECLARATION of the International Assembly of Women, in Copenhagen in 1960:

27. Women are taking an ever greater part in the creation of material and spiritual values in all countries. They constitute a third of the workers, and their work has become indispensible in the economy of every country . . . women today have their political rights in many countries . . . But all recognized rights are not yet applied. Discrimination still exists in a majority of countries—the real responsibility to reconcile their work outside and their social activities with their family responsibilities . . . Family rights (must be) adapted to the evolution of society . . . knowing their responsibilities, today more than ever, women are aware of the important role which is theirs as citizens, workers and mothers. A new woman is claiming her place in society.[20]

28. The United Nations Charter proclaims her right to equality in all fields of life. When men and women together make this equality a reality there will be

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[16] *Globe and Mail*, June 2, 1966.
[17] *Unitarian Horizons*, June 7, 1966.
[18] *Globe and Mail*, May 2, 1966.
[19] *The Feminine Mystique*, p. 261.
[19A] *Globe and Mail*, Jan. 11, 1966.
[20] *The International Mtg. of Women*, pp. 14-15.

many more happy marriages in Canada. Dr. T. R. Clarke of the University of Alberta, addressing the 99th annual meeting of the Canadian Medical Association in Edmonton June 1966, gives the divorce rate in Alberta as one in every four marriages.[21] Dr. Otta A. Schmidt of the University of Manitoba, read a paper in approval of The New Woman—"New woman has a new look and biological newness." He called on women to establish the code of sexual ethics for our society—"to give the necessary direction for its identification." And as Mme. Therese Casgrain expressed it in discussing Quebec's Civil Code, "Women must decide what they want. If they want protection, let them keep their antiquated law and way of life. If they really want equality then they must stop being little girls and live up to the responsibility."[22]

VI

29. No higher duty is laid upon men and women in our society than that of founding a home together and rearing healthy and happy children to be responsible citizens. To that end the Congress of Canadian Women submits that society should surround the family with every possible safeguard. Among these an established minimum age for marriage, and courses on the family not only in our college and universities, and for adult education classes, but in high schools as well. Could not the marriage certificate be part of a government document including such information as the contract, services available to the family—counselling, Family Courts, Children's Aid Society, and Legal Aid Breakdowns do not come all at once. Counselling can show the strength as well as the weaknesses in a family set-up, says Ethel Ostry of Toronto, experienced social worker and marriage counsellor. "A marriage threatened by divorce may be saved if it has the strength of love."[23]

30. Once the marriage has broken down, however, divorce should be available, after a reasonable time, without blame or recrimination, and at a minimum cost—within the reach of all—and when the custody and care of the children is taken care of. The enforcement of maintenance order is a most important problem. If orders for maintenance of children were made separately, and the right placed not in the wife but in the children, Professor O. M. Stone of the Law School of London School of Economics, maintains, much opposition would be overcome.[7]

31. Would not a period of six months of separation be sufficient before granting a divorce, and three months before marrying again? What is to be gained by prolonging a state of tension and anxiety? By either party, or by the children? The divorce law should be Canada-wide, and likewise domicile. "Since the law of marriage and divorce is within federal jurisdiction, and national in character, there is good reason for holding that domicile should be Canadian," counsels W. Kent Power in THE LAW OF DIVORCE IN CANADA. This is as important for the wife as for the husband. A form of civil marriage should be available to all, and the religious ceremony to all who wish and respect it.

32. The laws of society should meet the needs of the people. When large numbers of citizens are circumventing the laws in order to live in accordance with their best judgement, these laws must be changed.

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[21] *Ottawa Citizen*, June 6, 1966.
[22] *Montreal Star*, Aug. 20, 1965.

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

Summary of Brief: DIVORCE REFORM FOR CANADA submitted by

The Congress of Canadian Women

Broken marriages are a social evil, and making divorce more difficult will not remove the cause or causes. The objective is to create such a political atmosphere that men and women can count on building a stable family life. The 1961 census shows 81,000 wives deserted by or separated from their husbands, and more than 15,600 divorced couples in Canada, with many more thousands of homes "prisons of intolerable wretchedness" and with untold suffering and harm to the children. Society must accept responsibility for these broken homes, sometimes for the poor man the care of two wives and two families—until we have found the way to prevent them.

As with Roman Civil law, divorce should be as simple as marriage. Since founded on mutual affection, when that ceases to exist marriage should be dissolved by mutual consent, or if sought by one party only, then grounds shown. It is degrading to base marriage law on the adversary system—to show fault. We must do away forever with the pretence that marriage is but a physical union, and that the main cause of unhappiness is adultery. In ceasing to maintain this attitude the government will give leadership in developing a higher sex and marriage morality, neither prudish nor irresponsible, but upholding the finest traditions of our people.

Divorce is of particular concern to women. The United Nations Charter proclaims woman's right to equality, and when society makes this a reality there will be many more happy marriages. Modern society needs both woman's mind and hand—one third of our workers are women, many of them married. Society must remove discrimination in education and training and surround the home with networks of nursery schools and after-school centres so that the modern woman may play this triple role.

No higher duty is laid upon men and women in our society than that of founding a home and rearing healthy and happy children to be high-minded and responsible citizens.

To this end the Congress of Canadian Women recommends:

(a) That one Canadian statute by act of Parliament unify the law on marriage and divorce; that this apply to every province.

(b) That this law instruct that courses on Family Life be given in high schools, colleges and universities, and in adult study classes throughout the country.

(c) That there be a just marriage contract. That any property owned by either party before marriage, and any received later in the form of gifts, be controlled by that party. All property or wealth earned during the marriage be held by both equally, and subject to equal division in the event of subsequent separation.

(d) That all Canadian citizens have Canada-wide domicile, that of the wife no longer considered of necessity that of her husband.

(e) That at the time of marriage, a government statement be issued with the marriage certificate setting forth the rights and duties of each party, and along with this—information on services available to the family, such as Legal Aid, Family Court, Marriage Counselling, Children's Aid, etc.

(f) Once however; when marriage has broken down, that divorce be available "without blame or recrimination" through the local courts and at a cost within the reach of all, and when provision for the children is assured. That orders for maintenance be placed in the children rather than the wife.

(g) That divorce be available after two years of separation as well as for any one of the following reasons: Incurable mental disease; life imprisonment; desertion; brutality; incompatibility; alcoholism; infidelity or immorality.

(h) That a period of six months before a second marriage be the rule excepting in such special circumstances as the Court might find.

(i) Marriage and divorce to be available in every province. Marriage ceremony to be either civil or religious at the parties choice. That the minimum age for marriage, excepting in special circumstances, pregnancy among them, be 18 years.

The Congress of Canadian Women, Box 188, Station E., Toronto 4.

The Congress of Canadian Women began to take shape about 1948. Its constitution was adopted in 1950.

The purpose of this organization is to co-ordinate the activities which are of common interest to all Canadian women, to defend their liberty, and the future of their children, the security of their homes and to co-operate with all organizations striving for similar objectives.

To advance the stability and well-being of family life and to secure a high standard of living for all Canadians. In short to protect and promote family health, full development of children, to ensure for them the benefits of modern science and to guarantee all children have the same educational opportunities, and all Canadians shall have security during their working life and old age. To organize Women to play their full part in advancing peace, social progress, democracy.

To prepare and present briefs to the Federal Government of Canada on behalf of Canadian women, dealing with the needs as agreed to in conference or convention.

National Officers: The President, Mrs. Helen Weir, The Secretary, Mrs. Hilda Murray, The Treasurer, Mrs. Mary Dennis.

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The Congress of Canadian Women,
June 27, 1966.

APPENDIX "17"

Private brief

to The

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

by

H. M. Salter, Esq.,

Rt. 4, Box 922,

Brooksville,

Florida, U.S.A.

To the Joint committee on the subject of Divorce.

I have read with interest the proceedings of the committee Bulletin No. 1 and 2.

I would like to add a few comments and suggestions that may be useful information to the committee.

I am at present a permanent resident of the United States but was born in Saskatchewan and lived there for 61 years of my life. I have no axe to grind but perhaps my personal experiences and ideas derived therefrom may be useful to you in alleviating suffering of other Canadians.

I have experienced the death of a wife through the ravages of cancer, and have also had the heart rending experience of losing a wife through divorce proceedings, which was partially contested only for the purpose of obtaining alimony.

This part of my life brings about this brief.

The experience of going through a divorce action regardless of being a defendant, or a plaintiff, is I can assure you one of life's most bitter experiences. It therefore behooves lawmakers to try, if possible, to alleviate this human distress as much as possible, especially is this true in respect to children who are often innocent pawns.

I agree with the general principle that divorce should be granted for a general break-down of the marriage relationship rather than on specific grounds. It is impossible in most cases to assess who is really the party at fault, as one partner may pursue such a course of conduct that drives the other partner into providing the so-called grounds for divorce. This partner is then labelled, be it man or woman, as the *bad* partner.

The conventions of our society then attaches a stigma of shame, to that partner to the marriage, who has been labelled by the court as legally guilty.

The shame and guilt is then passed on to children of this marriage. These children cannot escape from this stigma because one of the parties to the divorce action must be either a father or a mother and must carry a lifetime of stigma.

The court should simply rule that marriage has broken down and the marriage is dissolved. I believe this would alleviate this cruel burden on innocent children.

There is great misconception by Canadians about so-called easy divorce laws and multiplicity of grounds in the United States. I have given considerable study to this subject here.

This could be compared to the many Americans who have a great misconception about Canada in general. There are many here, who think Canada is a land of RCMP officers and snow and ice.

There is no such a thing as an easy divorce—It is a bitter heart rending experience for anyone who is so unfortunate, to be subjugated to it. Except perhaps the racketeer who seeks only large alimony and gets it.

There are not really 40 different grounds for Divorce in United States, really only about eight; namely they are—Adultery, Insanity, Drunkenness, Drug Addiction, Non Support, Imprisonment, Cruelty, Impotence, Desertion. The other grounds are really only subheadings of these general grounds. The press greatly exaggerates how easy it is to get a divorce in the United States.

These so called and publicized easy divorces are rare, and only apply to uncontested cases, usually publishing only part of the story. The marriage has broken down generally in every case I am sure. When a divorce is seriously contested anywhere in the United States, it can be before the courts for long periods ranging up to ten years; this can hardly be called easy.

The uncontested divorces are really *all* by consent of both parties, whether they be in *Canada* or in *United States.*

It is therefore correct to say that nearly all divorces are granted after the parties concerned have reached a prior agreement. It has to be so, I hope nobody is under the delusion we do not already have divorce by consent *in Canada as* they have elsewhere. Please take note of this point—

The marriage relationship has of course been seriously broken prior to divorce action for various causes.

The present system of delineating certain *specific offences* in Canada, and the United States, satisfies the law, but forgets in so doing it is stigmatizing many *innocent* children.

I do not think the committee should neglect to gather all information possible from United States courts on the grounds that American divorces are so-called easy divorces; this is wrong.

I do not uphold the American divorce laws as a model, quite the contrary I think they are outdated as much as our Canadian laws, in terms of Freedom of the individual and christian human relationship.

Canada now has a chance to lead, as they have so often done before in the realm of Freedom to the individual and alleviation of human distress. Dont Muff it.

The subject of alimony should also be included. This has become a racket in both Canada, Britain, and the United States. Ruthless people marry for no other reason than to obtain alimony. It should be abolished as it is in the State of *Pennsylvania* and *Texas*, once the divorce is final, regardless of fault. The spectre of thousands of dollars being granted for alimony in Canada, United States, and Britain, is surely making a mockery of the institution of marriage—This should be abolished.

The welfare of children in case of a divorce is most important. I believe that the courts in most provinces have done a reasonably good job, where they take as a guiding principle, the first consideration is, the welfare of the children concerned.

The exception to this is, that *each party* to a divorce action should be held equally and wholly responsible for the maintenance of the children according to ability to pay.

The division of property or other assets of the parties concerned in a divorce action should be based on the accumulation and contribution during the term of the marriage *only:*

The Woman being given equal credit for time spent in the home.

I again want to emphasize the present system of alimony is and punitive against innocent children of a second allowable marriage.

The criminal who commits an offence is probably given one severe fine or a term in jail.

The husband who commits adultery, which is *not* a crime is assessed a fine *every month* of his life for the rest of his life, which could be 40 or 50 years and amounts to thousands of dollars. This is harsh and surely out of all proportion to the offence committed.

Where is our principle of equality of sexes gone here??

The law should also be changed that compels the husband to always pay the costs of the divorce action, regardless of who brings the action. Some equality of the sexes should be arrived at in this field also.

The present divorce laws in Canada are certainly causing undue hardships in Canada, to many innocent people. I believe they contribute to Murder, suicide,

common law living, and untold Canadians leaving Canada to obtain relief from unjust divorce laws.

There is no doubt the last two causes can be completely eliminated by rational divorce laws. The others at least lessened.

It is my opinion that rational divorce laws will not in the long haul increase divorce in Canada. It is possible at first there will be a backlog of Canadians already in serious matrimonial trouble, when this is cleared up, rational laws will decrease the divorce rate in Canada.

I am sure the *majority of married* Canadians are *not* interested in divorce no matter what kind of divorce laws are passed. It is also correct to say that marriage based on compulsion is foreign to the Canadian way of life, and tends to weaken the institution of marriage. It is also correct to say that Canadians have always responded better to volunteer discipline than to compulsion.

In conclusion I am for rational divorce laws based on the principle of the break down of the marriage relationship and the abolishing of alimony as we now have it, once a final decree of divorce is issued.

Respectfully submitted

H. M. Salter,
Rt. 4, Box 922,
Brooksville, Florida,

APPENDIX "18"

Statement to the

SPECIAL JOINT COMMITTEE

OF THE

SENATE AND HOUSE OF COMMONS

ON

DIVORCE

by

Young Women's Christian Association of Canada

571 Jarvis Street

Toronto 5

Canada

September 8, 1966.

On behalf of the YWCA of Canada, I wish to present to your Committee the following resolution which was passed at the quadrennial Convention of the YWCA of Canada, held in Saskatoon in June 1965:

> WHEREAS, there are recognized injustices arising from the restricted grounds for divorce in Canada, and
>
> WHEREAS, it is recognized that any extension in the grounds for divorce still leaves the matter to individual choice, and
>
> WHEREAS, the YWCA of Canada is concerned about the family in all its facets;

THEREFORE, BE IT RESOLVED: That the YWCA of Canada make representation to the responsible governments requesting that their efforts to reform present divorce legislation be intensified.

We recommend the above resolution for consideration by your Committee and would be glad to present it in an appearance before your Committee if this is your procedure.

Sincerely,

Mrs. E. J. Aplin
Consultant for Public Affairs.

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 8

TUESDAY, NOVEMBER 22, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The United Church of Canada: Rev. J. R. Hord, Secretary of the Board of Evangelism and Social Service; Rev. Frank P. Fidler, Secretary of the Commission on Christian Marriage and Divorce, and of the National Marriage Guidance Council, Associate Secretary of the Board of Christian Education; Rev. R. S. Hosking, Chairman of the Commission on Christian Marriage and Divorce, and Member of the National Marriage Guidance Council; Rev. W. E. Mullen, Director, Pastoral Institute; Mr. Douglas F. Fitch, Barrister, Solicitor and Notary, Member of the Pastoral Institute; Mr. Roy C. Amaron, Advocate, Barrister and Solicitor, Member of the Marriage Guidance Council, Convenor of the Law and Legislation Committee of the Montreal Presbytery and Representative of the Quebec Sherbrooke Presbytery.

APPENDICES:

19.—Brief submitted by the United Church of Canada.

20.—Brief submitted by the Pastoral Institute of the United Church of Canada.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

25118—1

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

FOR THE SENATE

Hon. A. W. Roebuck, 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

Mr. A. J. P. Cameron (*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 bill 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."

25118—1½

"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

TUESDAY, November 22, 1966

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the 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 and Gershaw—6

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Forest, Honey, McCleave, Peters, Ryan and Wahn—9

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The United Church of Canada:

From Toronto: Rev. J. R. Hord, Secretary of the Board of Evangelism and Social Service; Rev. Frank P. Fidler, Secretary of the Commission on Christian Marriage and Divorce, and of the National Marriage Guidance Council, Associate Secretary of the Board of Christian Education; Rev. R. S. Hosking, Chairman of the Commission on Christian Marriage and Divorce, and Member of the National Marriage Guidance Council:

From Calgary: Rev. W. E. Mullen, Director, Pastoral Institute; Mr. Douglas F. Fitch, Barrister, Solicitor & Notary, Member of the Pastoral Institute.

From Montreal: Mr. Roy C. Amaron, Advocate, Barrister Solicitor, Member of the Marriage Guidance Council, Convenor of the Law and Legislation Committee of the Montreal Presbytery and Representative of the Quebec Sherbrooke Presbytery.

Briefs submitted by the following are printed as Appendices:

19. The United Church of Canada.

20. The Pastoral Institute of the United Church of Canada, Calgary, Alberta.

At 6.00 p.m. the Committee adjourned until Tuesday next, November 29, 1966 at 3:30 p.m.

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

OTTAWA, Tuesday, November 22, 1966.

The Special Joint 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 (*High Park*) Co-Chairmen.

The JOINT CHAIRMAN (*Senator Roebuck*): Honourable members of the committee, it is time we commenced; we have a quorum. I notice some of the senators have not brought their copy of the brief with them but we have been kindly supplied at this moment with a number of others and we will have them distributed.

We have a very distinguished delegation to address us today. They are from The United Church of Canada, and the Reverend James Raymond Hord will be the first speaker.

Mr. Hord was born in 1918 at Ilderton, Ontario, in London Township, and received his Bachelor of Arts degree from the University of Western Ontario. His theological training was taken at Emmanuel College, Toronto, where he received the Bachelor of Divinity degree, and at Union Theological Seminary, New York, which granted him the degree of Master of Sacred Theology.

Following ordination in 1942 he served pastoral charges in Saskatchewan Conference and for eleven years was Minister of Lakeview United Church, Regina. Under his leadership Lakeview grew from small beginnings to become one of Western Canada's largest congregations.

While in Regina Mr. Hord was a member of the United Church's Board of Information and Stewardship. In 1959 he accepted a call to the pastorate of Royal York Road United Church, Toronto.

Mr. Hord wrote the Lenten booklet for his denomination in 1961 entitled "The Crises of Life". Mr. Hord was appointed Secretary of the Board of Evangelism and Social Service at the 20th General Council, London, Ontario, and assumed office in 1963. He is secretary of his Church's Christian Faith Committee, Church and International Affairs Committee, and also secretary of the National Religious Advisory Council.

Our first witness is a man of very large experience and erudition and I have pleasure in introducing the Rev. Mr. Hord.

The Reverend J. R. Hord, B.A., D.D., S.T.M., Secretary of the Board of Evangelism and Social Service: Mr. Chairman and members of the committee, on behalf of our committee officially appointed by the United Church, may I make it clear that the gentlemen whom I am about to name—Dr. Fidler, Dr. Hosking, Mr. Boothroyd and Mr. Amaron of Dorval, Quebec—are part of the official committee presenting this brief on behalf of The United Church of Canada which includes official statements of positions passed by the General Council of the United Church.

We have Mr. Roy Amaron and Mr. Douglas Fitch, who will be introduced in detail later, representing the Pastoral Institute of the United Church in Calgary. They have done a great deal of work and I think you will be impressed with the background information they have provided in this brief on behalf of the Pastoral Institute.

If you turn to page 3 of the United Church brief you will see the main recommendations.

First of all, we believe that the divorce laws of Canada should be reformed; and, backing that up, we do not need to reiterate the inadequacies of the present law. We believe that the present divorce law based on the concept of matrimonial offence inflicts severe hardships and quite often deny the decree to those who face marital failure. For a law which regards adultery as the only ground for divorce can be grossly unjust, and certainly does not take into account the findings of the social sciences of psychology and psychiatry, which today uncover deep-seated anxieties, fears and disturbances which make it difficult for one partner to be related to the other.

I would suggest that the act of adultery, which is so built-up in the present law, is often a symptom of an unhealthy marriage rather than the cause. Often a couple are not getting along together because of other deep-seated conditions which lead to the act of adultery, therefore adultery should not be regarded as the only cause of marital failure.

We protest the present divorce law, which really encourages adultery in order to get a divorce. I am giving the background to this argument first. Adultery as a ground of divorce really leads to the falsification of evidence. We are pleading the cause of a large number of couples in Canada who are living common law; and here, I believe, the Christian religion has to accept a great deal of blame for the way we treat couples living common law. In the past we have almost treated them like moral lepers.

The number of such persons is estimated in the Calgary brief as 400,000. Many of these unfortunate people cannot get divorce, or cannot afford one, and so we make a plea for those people living common law. Really the concern of society as well as the concern of the Church should be placed above these social contexts. If our divorce laws were reformed, many of these couples could legitimize their unions and so live happier lives, and this would be much better for the children.

We protest the present law, which tends to favour the rich and discriminate against the poor. If you have money you can likely get a divorce, but there are poor people who cannot afford it when the marriage is broken up.

We criticize the present divorce procedures with their accusatorial posture requiring one partner to charge the other with a matrimonial offense. Quoting from our brief:

> Such procedures aggravate the differences, multiply the bitterness and harden the antagonism of one partner for another.

I come now to the second recommendation, and this is the main point we wish to make today both on behalf of the United Church and on behalf of the Pastoral Institute—and I believe Mr. Amaron, speaking for the Montreal Presbytery and the Quebec-Sherbrooke Presbytery as well, will endorse this. The second recommendation is that the concept of marriage breakdown be substituted for that of marital offence as the basis for granting divorce in Canada: not just one basis but the basis for granting divorce in Canada. Our Board of Evangelism accepted this concept last February 1966. Our General Council accepted it in September last.

We were delighted that the Archbishop of Canterbury's Committee on Divorce Reform endorsed this view in its report "Putting Asunder" published last summer. I hope, Mr. Chairman, your committee will give special attention to this excellent and wonderful report.

It was with some trepidation that our Board suggested this new concept to the General Council. Mr. Fitch had written a searching background article, which appeared in our Board's annual report, titled "Let's Abolish All Grounds for Divorce". This will be found in our report.

We did not expect the concept was sufficiently familiar to command a possible majority vote; but may I say that the General Council of the United Church, with representation from the whole of Canada, every province I believe, passed it almost unanimously. I do not believe there were any negative votes. In fact, there was a sense of relief expressed to us in many quarters when we had finally come through with this concept. In a moment I would like to ask Dr. Fidler to show how the report of our commission on Christian marriage and divorce really led up to this marriage-breakdown concept even though it was not represented as such. It is set forth in our commission's report which Dr. Fidler will speak to you about.

We are urging this concept very strongly. It can be tried in court; as the Archbishop of Canterbury's committee points out, it is a triable issue; but it would be tried by judges who have a particular interest and concern as well as knowledge in this field.

Court procedures can be developed to probe into the background of all marriages that are in difficulty; instead of merely looking at the obvious where adultery or cruelty is apparent, such procedures would go into the deeper history and background of the marriage. We believe that this is the coming thing, that there is, shall we say, a ground swell in Canada towards this concept, and we hope therefore that your committee will adopt this.

The JOINT CHAIRMAN (*Senator Roebuck*): Could that be done by witnesses or would it be necessary to have a special investigation of the marriage situation?

The Rev. Mr. HORD: I would like to have Mr. Fitch speak to that, if you will.

The JOINT CHAIRMAN (*Senator Roebuck*): Not just now, if you don't mind. Mr. Fitch will address us in due season. He will speak later.

The Rev. Mr. HORD: Could he address himself to that situation later?

The JOINT CHAIRMAN (*Senator Roebuck*): Certainly.

The Rev. Mr. HORD: We have listed, especially in the Calgary brief, many of the advantages of this marriage-breakdown concept. I will mention some.

First, there is a compulsory waiting period which would prevent those situations where one of the partners wants a quick divorce in order to marry another woman, or the wife wants to marry another man. In other words, it prevents the so-called quickie-divorces and quickie remarriages. Mr. Amaron and Mr. Fitch will comment on the legal implications of this.

In our official report we are advocating a compulsory attempt at conciliation. I notice the Calgary brief opposes compulsory conciliation and I think we should state that this divergence of view of our official position is not compulsory conciliation but a compulsory attempt at conciliation.

Mr. BALDWIN: Collective bargaining.

The Rev. Mr. HORD: It might preserve some of these marriages if they went to marriage counsellors, clergymen, and so on. Some of these marriages could be saved, or at any rate the proceedings could be held up, if the couple were willing to go to conciliation. That is the second recommendation we are making.

In the third place, our proposal promises relief in those situations where one partner stubbornly refuses to grant a divorce. Sometimes a woman will dig in her heels and say, "I will not divorce that blackguard, that wretch, that stinker", and he has to live common law. We believe that a marriage which has broken down is, as it were, a festering sore in society and affects all concerned.

Our fourth submission in regard to the advantages which in our opinion would result from the adoption of the marriage-breakdown concept is that court procedures such as we suggest would arrange for maintenance and costs and above all proper care and proper provision for the children of the marriage. In our reports we build this up very strongly—that special attention must be given to the custody, care and maintenance of the children, and so on.

The fifth point is that court procedures such as we request would take into account not only present matrimonial offences but all other factors involved in the marriage breakdown.

And the sixth advantage accruing from the marriage-breakdown concept is that, as we hope, the new procedures would eliminate the means test since at present those with money can get a divorce whereas poor people cannot afford it.

We recommend:

1. That the divorce laws of Canada be reformed.
2. That the concept of "marriage breakdown" be substituted for that of "marital offence", as the basis for granting divorce.
3. That new marital court procedures to deal with distressed marriages be established, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society and that these court procedures should provide:
   (i) means whereby either consort could require the other to participate in conciliation procedure with a view to avoiding further legal proceedings.
   (ii) That an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.

I would point out that it is a compulsory attempt at conciliation, and we should always bear in mind that the judge would have discretion in exceptional cases.

   (iii) That no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.
   (iv) That, while conciliation or separation or divorce proceedings are in progress, the court shall have the power and the means to protect the interests and welfare of the children involved.
   (v) That no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

I hope, Mr. Chairman, that members of your committee will comment on this.

4. That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials currently employed in attempting to effect reconciliation.

Of course, we must say that the whole problem of divorce indicates that there is crying need of more extensive preparation for marriage. There is great need of training of young people for marriage. We need to inculcate the responsibilities of family life, mental health, education, and so on, and the Calgary brief eloquently pleads this on pages 12 to 21, wherein it stresses the strengthening of family life.

There is one other point I think I should mention here: Would this new concept lead to a rash of divorces? Would it lead to a rapid increase in divorces in Canada? There would be, of course, an immediate increase because it would

give an opportunity to some couples to get a divorce which they could not obtain under present conditions. But we believe that in the long run there would not be any significant rise in the divorce rate in Canada.

In our proposal the whole emphasis is on saving the marriage if at all possible through conciliation proceedings, avoiding hasty decisions, and so on so that in the long run it would strengthen family life in Canada and clear up the festering situations that exist in various parts of the country.

We offer the marriage-breakdown concept as a positive and healthy one that should be promoted. I wish to thank you, Mr. Chairman and gentlemen of the committee, for your patient hearing.

The JOINT CHAIRMAN (*Senator Roebuck*): That is a very valuable contribution to the subject, Mr. Hord. I am sure it is appreciated by everyone who has heard your submission. We must hurry on because there are many others to be heard. Thank you, Mr. Hord.

May I now call upon the Rev. Frank P. Fidler, Associate Secretary of the Board of Christian Education of The United Church of Canada.

The Rev. Mr. Fidler is a graduate of the University of Manitoba in Engineering, B.Sc. (E.E.), of Emmanuel College (Toronto) Diploma in Theology, and Bachelor of Divinity, University of Toronto Graduate School, courses in Department of Psychiatry.

Mr. Fidler was engaged in boys' work, having been at one time Boys' Work Secretary, Religious Education Council of British Columbia. He was on the Religious Education Council of Canada in 1932 and 1933, and Assistant and Associate Minister of Bloor Street Church, Toronto, 1933-39. He was Minister of Glebe United Church, Ottawa, from 1939 to 1948.

He was Associate Secretary of the Board of Christian Education, The United Church of Canada, 1949. He has had special responsibility for a number of church activities, of which one might mention family life education and work with the Marriage Guidance Council of the United Church.

May I call on Mr. Fidler.

The Reverend Frank P. Fidler, B.Sc., B.D., D.D., Associate Secretary, Board of Christian Education: Mr. Chairman, perhaps it would be useful if I were to take a few moments to outline the way in which our Church has come to a practical and official position with respect to divorce, and the reasons for doing this, or at least some of the reasons.

As long as ten years ago the General Council of our Church, the 17th General Council, established a Commission on Marriage and Divorce. This was done as a result of pressures arising out of the experience of the Ministry of our Church, many ministers having to cope with the fact that hardship was caused by marital stress and strain, the fact being that in most cases—almost every case—the provincial law, and, in the case of divorce that had to be dealt with on a federal basis, the federal law treated adultery as the only ground for divorce, notwithstanding that very often the marriage had in fact broken down.

The marriage bond was no longer of any effect and this created a severe hardship. But the very fact that they were unwilling to produce evidence of adultery showed that adultery was not necessarily part of the breakdown. Experienced ministers were discovering the hardship this was in fact causing and in the result there was a widespread request that the General Council establish a commission to study the whole problem and to give some guidance in terms of the present situation, on the basis of our understanding of the responsibility of the Church and the authority of Scripture in this kind of situation.

The commission which was formed, and actually worked for six years, consisted of a number of persons from every walk of life. The Chairman, Dr.

Hosking, is with us and will be addressing you. He came with an experience of the ministry, having been Judge of the Toronto Family Court, and General Secretary of the National Council of the Y.M.C.A. in Canada.

We have Mr. Roy Amaron from the Province of Quebec, and we had the late Mr. E. S. Livermore, Q.C., who had been a magistrate and a judge. We also had two psychiatrists, social workers, women as well as men, and we drew upon a wide field of experience across the country representing a great variety of services, and we had the advice of members of the legal profession.

We recognized very early that we could not come to any sound judgment about the attitude of our Church towards divorce until we had restudied what its position might be about the nature of marriage and its responsibilities, and the life of the family, the understanding of the family in all of the terms of its responsibility, both towards the members of the family within the family circle and towards the family as a whole considered as a unit of society.

We tried to look at the problem not only from the point of view of social good, that is from the sociologist's point of view, but from the standpoint of the Church seeking a deep understanding of the question of sex, marriage, and so on.

We reported on three successive occasions—Three successive biennial councils—and the first report, which was entitled "Towards More Understanding of Sex and Marriage," laid down our understanding of fundamentals from that point of view in our field.

This report was adopted by the General Council of the Church as the basis of our understanding of the problem we had been studying. On the basis of this point of view the commission proceeded towards the final report, which was at length issued in the form of the book I hold in my hand. Its title is *Marriage Breakdown, Divorce, Remarriage.* I understand each of you has a copy of the book. These copies were distributed in order that you might use them in conjunction with the brief, because we do refer to this brief.

The JOINT CHAIRMAN (*Senator Roebuck*): You will be kind enough to send me a copy? I am sure other members of the committee will read this.

The Rev. Mr. FIDLER: If sufficient copies have not already been distributed we shall be glad to send you additional copies. I understand that they were sent out but they were misdirected.

It might be useful to review for a moment the background of the position which was recommended by the commission and which was accepted as the position of the General Council of our Church, because the study that was made at that time was not merely based upon current evidence supplied through the experience of our own ministry, but we drew upon studies carried out around the world in divorce procedures as they were found in a number of other countries.

At that time we tried to find a summary of the provincial practices with respect to marriage across Canada, but they were not obtainable from any source we could discover, and to our knowledge the first complete summary was that which was prepared under the direction of the late Mr. Livermore.

The JOINT CHAIRMAN (*Senator Roebuck*): I had the honour of appointing Mr. Livermore magistrate in St. Thomas thirty years ago.

The Rev. Mr. FIDLER: We also looked at points of view of other branches of the Christian Church in the United States and Britain, and the Eastern Orthodox Church, and other sources. It was on the basis of studies of this kind, and experiments going on in a number of courts where they were attempting to deal with marriage breakdown taking place in different forms, that we made our findings.

I will not go through all these studies now, but I will say that the present brief has emerged directly from the experience that let up to the action of the

General Council; and four years ago, when this became the position of the United Church of Canada, we felt that we could not well produce what might be an anticlimax. The recommendation at that time was that a royal commission might be set up to study this situation in terms of legal and legislative implications. We are happy to say that this is the way it is being done, and it will be more productive.

If you look through our brief you will notice that following the recommendations we have tried to draw attention to some questions that might be asked as to the reasons why the United Church of Canada presents this brief.

We recognize that it is the primary function of the Church to instruct its members in the Christian ethic of marriage, but we also recognize that even within the Church some ardent and faithful Christians do discover that their marriage, for one reason or another, deteriorates, breaks down; and we have to deal with these situations in the administration of our Church, as other branches of the Christian Church must do in their internal administration.

We believe that the Christian Church has a responsibility to see that compassion and justice are shown to all persons in society, and not only to those within the fold in our own parish.

Where the marriage has broken down irretrievably there ensues a state of things that can be a living hell for husband and wife alike, not to mention the children; so that it becomes necessary to ask what remedial action can be taken.

We do not believe the Church should legislate for persons outside her membership; but since the Christian Church does in fact influence all legislation in one way or another, in that it helps to form opinion, we were led to the position that we had some responsibility in relation to the public. This is the reason we present such a brief as this is.

We outline what we believe to be the serious inadequacies in the present law regarding divorce. I will not go through this. We considered, when our commission was meeting, the extension of the grounds for divorce; and if it was a widespread view then that the marriage-breakdown concept should be the sole ground, we did not feel there was readiness even in church constituencies to accept it as such.

Mr. HONEY: What year was that?

The Rev. Mr. FIDLER: That was in 1962. We do believe, however, that as a result of the use made of this report, and having regard to the position of The United Church of Canada officially, and the fact that this concept of the breakdown of marriage has become familiar to many ministers and lay people in our constituency, it was appropriate, when the 22nd General Council met in September of this year, to declare that we were in a position to give it as our view that the present law, based on the principle of matrimonial offence, was totally inadequate, and to recommend that marriage breakdown itself might be considered as the basis for divorce.

This is the background of the way in which we have come to this position. I think it underlines our conviction that there is a readiness in our constituency and, on an even wider scale, throughout the country to regard this as the basis for divorce.

The JOINT CHAIRMAN (*Senator Roebuck*): Has it been adopted in any other place? They considered it in England; but has it been put into effect?

The Rev. Mr. FIDLER: In the background material from Calgary there are references to sixteen places where this is the basis for divorce.

For example, speaking of the law which has just been promulgated, in Australia at the 1st of January 1961, we find this as one of the fourteen grounds for divorce: Separation for five years, whether the separation was by agreement, decree or otherwise, without any reasonable likelihood of cohabitation being

resumed, provided that—and the conditions are set out. This will be found at page 52 of the background material. It comes under the summary of divorce legislation in other places.

The Rev. Mr. HORD: It is only one ground for divorce in Australia.

Mr. PETERS: When you were discussing this matter in terms of *Marriage Breakdown, Divorce, Remarriage,* was any consideration given to separation from the ecclesiastical point of view?

The Rev. Mr. FIDLER: Yes, we recognized that; and in the first report we did look at marriage as a sort of contract as well as a religious covenant, and this is the way we describe it. But the basis of marriage is a social contract; it is a contract between two people, entered into in the presence of a witness or witnesses, whose status is defined by the state, whether Canada or elsewhere, in which civil marriage is performed.

Mr. PETERS: In the case of remarriage, all churches have experienced a great deal of difficulty in this field in performing what really, in effect, is a civil contract function separate and apart from the Church. The Church is involved in mixed marriages and remarriages and it is involved in original marriages in many cases. Was any consideration given to the separation of the respective roles of the pastor as religious minister and the public functionary who performs the civil marriage? Was it considered advisable that the civil function be performed elsewhere and that the Church perform its rites within the terms of its particular doctrine? Would that eliminate difficulties in respect of remarriages, mixed marriages, and some of the other problems that have been referred to?

The Rev. Mr. FIDLER: We recognize that when a minister officiates at a wedding he acts in two capacities. He has to be licensed by the state and therefore, in that respect, is a representative of the state and functions as a civil officer in that role. But, in addition, the service of the Church is a religious service, and thus offers the blessing of the Church and accepts the vows of the participants as a covenant they make with God. In our view the minister is simply a witness to this act. I think I have stated the two functions which the minister fulfills in officiating.

Mr. PETERS: But did the conference go so far as to make recommendations as to the separation of the two functions?

The Rev. Mr. FIDLER: We did not recommend that.

Mr. PETERS: Has not this been a considerable problem in recent times, and will it not be a greater problem in the future if we broaden the grounds? The fact that, as has been stated, there are 400,000 common-law partners is some indication of the magnitude of the problem. As a matter of fact, this figure is low; the Canadian Bar Association puts it considerably higher. Do you think this is creating a problem that the churches are unable to cope with?

We find that to some extent the same problem exists for the legal profession. They know that what they are doing may not be in keeping with the very high standard of ethics of their profession, but they do it because of the thousands of common-law cases we hear so much about.

The Rev. Mr. FIDLER: Our approach was to recognize that there is a difficulty here for religious as well as civil authorities. But as a Church we came to the clear conclusion that the General Council, recognizing the justification of divorce under certain circumstances, felt that adultery was not the only ground on which it should be granted.

We set up procedures by which a study of each situation would be made on its own merits, in so far as they could be sorted out, with provision for reference to other courts in the Church if there were any doubt as to the status of two people. But there is always difficulty here, and this is where individuals who may be in the position of having to decide whether or not to officiate are in difficulty.

One of the difficulties of the adversary approach to divorce is that this stigmatizes one of the parties as guilty and dismisses the other as innocent. Minister must have an understanding of human nature if they are to function effectively, we cannot approach any difficult case on the easy assumption that everything is strictly either black or white. The black or white theory is impossible.

It is often more likely that the apparently innocent party is, in the sight of God at least, a contributor to the breakdown of the marriage. So that you cannot always assume that there is a clear-cut line of demarcation between parties. No matter how well trained you are, you cannot necessarily feel that your judgment is absolute. For this reason we did attempt to set up procedures.

Mr. PETERS: There must have been raised, in the discussions that took place, the question of the contractual aspects of marriage, involving protection for the ones least able to earn their sustenance if the marriage was terminated before they could do so. The children, unless they are to be wards of society, have to be taken care of, and this can best be done in a legal contract. Do ministers and theologians, involved in the day-to-day activities of their charges, believe that, if we made the changes that are suggested by some, they would be in a position to go much further in this social field in providing the legal requirements, under the Church, that would be necessary for stabilizing what at the present time if a haphazard method of entering into a matrimonial contract without any safeguards or protection?

The Rev. Mr. FIDLER: That was a point very much on our minds and Dr. Hosking will take another point on our brief on recommendations, because this is the concern of us all, not only of the Church but of the public.

We strongly recommend that there should be special courts—and there is experience in other courts in Canada—that would lead to understanding of the kind of procedure that would provide safeguards. We believe that even when the decision is made with respect to a man and woman who have been married, there is not sufficient protection for the children or for the wife. Dr. Hosking will say something further about this. This was one of our concerns.

The Rev. Mr. HORD: I think the position of the United Church of Canada is that possibly some couples should have civil marriages; on the other hand, even though people may have made a mistake—it is very apt to happen where there are quick marriages or wartime marriages—they should have a chance to be remarried if they have learned from this experience, are sorry, and show the spirit of penitence and a desire to do better the next time.

We do not believe that the teachings of our Lord should be interpreted in a materialistic, legalistic, puritanical and narrow way. We should have love in our hearts. Our Lord had compassion on the woman of Samaria. He did not reproach her with having five husbands but helped to give her a new start in life.

We feel that with the marriage-breakdown concept where there are marital courts all aspects of marriage can be looked into, and this would be a much sounder basis for the state, for the minister, and for guidance as a whole to determine the future of a partner who has failed.

Mr. PETERS: Does the Church still maintain its position in regard to the pseudo-social-legalistic role of a dual function in marriage, officiating at a religious union and a civil contractual union, which is a different concept? Does the Church still feel that it wishes to maintain the same type of marriage ritual that it has observed in the past?

The Rev. Mr. HORD: I would say, only if a couple come to us and request our advice or ask for a Christian marriage service.

Senator BELISLE: From the biographical sketch of the Rev. Mr. Fidler I gather that he is a man of very wide experience, and perhaps he would be good

enough to answer this question for me. From his experience would he say that any considerable percentage of those who are living in common-law relations find themselves in trouble in consequence of the loss of their faith or at any rate a diminution of it?

The Rev. Mr. FIDLER: I believe, from the experience of the Church, there are many people who are in trouble because they lack the necessary faith to support them in a crisis; but it is also true, I think, that even among those whose faith is still strong there are some who for one reason or another break down under marital tensions.

In the first pages of our book there is an analysis, from the results of our own observations through our commission and from information derived from authoritative sources in different fields, of pre-marital conditions that tend to the breakdown of marriage in our society, and as well those influences within the union that lead in the same direction—the immaturity of couples, for example. We have described this not simply from the experience of individual members but on the basis of analyses that have been made by psychologists, sociologists, lawyers and others.

The JOINT CHAIRMAN (*Senator Roebuck*): The book that has been referred to is *Marriage Breakdown, Divorce, Remarriage*?

The Rev. Mr. FIDLER: Yes. Many of those who have lost faith lost it, possibly, in a society that makes it necessary for them to go through an expensive divorce procedure, or to provide evidence of adultery where there may not have been adultery until they moved into a common-law relationship; but I do not think I could say in all honesty that we have evidence or statistics to prove that these were less Christian or had less faith than others. We have no evidence of that.

The JOINT CHAIRMAN (*Senator Roebuck*): Can you tell us how you arrive at the 400,000 figure?

The Rev. Mr. FIDLER: This is an estimate, because there are no reliable statistics in this field.

Mr. FITCH: Our informant got its figures from the same source that was given in the brief presented by the Parents Association in their brief. It was an appraisal of all the correspondence of the Family Service Bureau in Toronto and the Catholic Family Service Bureau.

The Rev. Mr. HORD: Dr. Hosking would like to say a word on court procedure.

The JOINT CHAIRMAN (*Senator Roebuck*): May I ask one question before Dr. Fidler gets through. There has been a question of fundamentals. When two people agree in the first place to be married, they appear before representatives of the Crown or a minister and enter into a bond, an agreement, or whatever you call it, and after they have done so the marriage then becomes a condition, which is far more than a contract. That is my understanding of marriage: that it is not a contract, it is not an agreement, it is not a bond; it is a condition which they have brought about by agreement and by the bond they have entered into. What do you say to that theory, Dr. Fidler?

The Rev. Mr. FIDLER: I would agree, and I go so far as to agree with the opinion of an eminent theologian in Switzerland who has given much thought to this problem. The effect of marriage is to give to a man and woman a new wholeness of life, which is more than physical cohabitation but a joining together of person with person in such a way that they become different personalities. It is, as a matter of fact, an experience that makes a new state of life for those who become a part of it. I would agree with that.

The JOINT CHAIRMAN (*Senator Roebuck*): It is more than a contract.

Mr. HONEY: Speaking in a narrower sense than another member of the committee did a few minutes ago when he referred to faith, in the sense of association with the Church, am I correct in supposing that people living in a common-law relation would probably find an embarrassing social stigma attached to that condition and so would not be as closely associated with the religious life as they would if they were living in a recognized union?

The Rev. Mr. FIDLER: Yes. I think it is true that people who are living in common law can scarcely help being cognizant of the fact that this condition does not meet with the same approval that is accorded the married state both by the community and by the Church perhaps. Therefore, they are apt to feel uncomfortable, to feel that they are under the judgment of the Church especially inasmuch as it stands for that, in the community, which is normal and distinct from common-law relations.

This is true in spite of the fact that our whole concern, as Mr. Hord has pointed out, is to understand that our Christian doctrine of marriage has a strong central element of forgiveness. In fact, there is a great deal of humanity in all of us, and in the Church, which finds it difficult to be as forgiving as we should be in our judgments; and for this reason couples who are living common law are apt to feel less comfortable in the Church and perhaps in other circles of society as well.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Fidler, for that learned and reasonable address. Our next witness is a gentleman I have known for many years, and just the reference to Dr. Hosking recalls memories of his predecessor. He was a very able man, and in Dr. Hosking he found an equally able successor.

Dr. Hosking was born in Canada and is a veteran of World War I. He received his B.A. degree at Victoria University as long ago as 1920. You don't look it, Dr. Hosking.

The Rev. Mr. HOSKING: I feel it, sir.

The JOINT CHAIRMAN (*Senator Roebuck*): He received his B.D. degree at Emmanuel College in 1922 and the Honorary Degree of D.A. in 1942. He was Chief Probation Officer of the Toronto Juvenile Court for five years, and that is where I met him first. He was Deputy Judge of Toronto Family Court for nine years, General Secretary of the National Council of YMCA of Canada for twenty years. He retired in 1958.

Dr. Hosking was appointed Chairman of The United Church of Canada Commission on Christian Marriage and Divorce in 1956; appointed Special Assistant to the Marriage Guidance Council of The United Church of Canada in 1962; and is Assistant Minister of Lansing United Church.

Gentlemen, I present a very experienced and distinguished witness—Dr. Hosking.

The Reverend Richard S. Hosking, B.A., B.D., D.D., Chairman of the Commission on Christian Marriage and Divorce: Honourable members, before I begin to discuss my subject may I say that when I was on the Bench the Honourable Senator Roebuck was Attorney General of Ontario. I am happy, sir, to be associated with you again, even for this brief interlude.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Dr. Hosking. By the way, you may stand or sit, as you please. This is informal.

The Rev. Mr. HOSKING: I will sit down because I always gave my sentences sitting down.

The JOINT CHAIRMAN (*Senator Roebuck*): Were they softer that way?

The Rev. Mr. HOSKING: Yes, and the shorter I made them the more popular they were.

The JOINT CHAIRMAN (*Senator Roebuck*): And the less likely to be appealed.

The Rev. Mr. HOSKING: Yes. In fact, there were some stupid individuals who were happy when I did not give a sentence at all.

I am going to be very brief. My background is different from these other gentlemen's: it grows out of the experience of one who was Chief Probation Officer in the City of Toronto, and Deputy Judge of Toronto Family Court, having been also associated with the YMCA. Also, I am an ordained minister, though I have not worked at it professionally.

I would call your attention to the fact that at the turn of this century we had no children's courts; The Juvenile Delinquents Act was passed in 1908. The significant thing then was the introduction of study, diagnosis and treatment in the field of legal discipline.

Instead of regarding children as criminals and determining whether they were guilty, and how much punishment there should be, there was introduced into the principle of legal discipline the idea of study, diagnosis and treatment, and we worked along that line for a number of years. Then in 1929 the first Family Court in the Province of Ontario was created and I had the honour of being appointed judge of the new court.

The second step was taken and the principle of study, diagnosis and treatment was applied to family matters. I can say frankly it was not as successful as in dealing with children, because when you get into problems of husbands and wives, problems of adults, they are much more baffling. They are indeed complex and difficult to deal with. I am being quite truthful. I do not think it was as successful in its application; but I think it was more successful than the old method whereby you tried the husband or the wife, as the case might be, and then asked how much punishment there should be.

We had two trials really. The first was what I would call a strictly legal trial in which the well-proven and tested rules of evidence of British law were applied, and may I say I tried to adhere to them as closely as I could. Usually the husband was tried, occasionally the wife; and if after a properly conducted trial, listening to what the lawyers had to say, I found him guilty, then we proceeded to what I call a social trial, in which there was called in the aid of psychiatrist, psychologist, marriage counsellor, or other helpful person, so that we might begin the process of study, diagnosis and treatment where we entered into the area of the family.

Now, when we were struggling with our commission that produced these reports—and I speak literally and precisely: we struggled for six years—we were groping for this idea of study, diagnosis and treatment in the field of divorce, and we could not arrive at it, though we discussed the matter for two or three months.

We have marriage boards consisting of a lawyer as chairman, psychiatrist, marriage counsellors or what have you, and when a divorce action came up the court would refer it to the marriage board and the marriage board would investigate to ascertain whether the marriage was dead, and if the marriage was dead they simply passed it back and let the court resume its function.

If there were any sparks of life we would recommend some treatment and if we could not come up with the answer we gave it up.

I do not need to tell you gentlemen that marriage is more than a contract; it establishes certain rights and a status and we were not very happy when we failed to find the answer. We could not remove it from the court even in our thinking because of this status and the rights involved; we knew it was a legal problem and there was a place for it. When this marriage-breakdown principle came over the horizon the right way, some of us felt that that was the answer because it puts right into the court itself this study, diagnosis and treatment.

In other words, as I envisaged it, and this is only natural I am sure, you start your legal proceedings looking at the various grounds of divorce—adultery, cruelty, desertion, and so on—and when you have gone so far in this trial you begin to ask yourself: Is this marriage fatally broken, or is it just superficially broken? If it is not irretrievably gone, what can be done to mend it?

If the judge has sufficient evidence based on the grounds—he may not call them grounds but they may be introduced as evidence—he then proceeds to ask: Has there been any attempt at reconciliation? What does the psychiatrist say? Is this marriage really broken.

After hearing this type of evidence, and those who testify in that respect are, I suppose, in the nature of expert witnesses, if the judge comes to the conclusion that the marriage is hopeless he proceeds. If he comes to the conclusion that there is hope, that there is a chance of reconciliation, he can proceed along those lines. That is my conception of what this is.

You may ask: Are you ahead of public opinion? Are you asking us to recommend something that is so far in advance of the public that they do not understand it?

Let me tell you this: I have had my eyes opened as to where the public is in this kind of thinking. I happened to be carrying the ball for the General Council in 1962 at The United Church of Canada when we introduced the question of divorce being justified in certain circumstances. Our Church had never taken a stand on divorce; divorce in the past had always been regarded as sin. The United Church of Canada had never really faced up to it. Ministers were marrying these people, divorcees, some of them—those they thought worthy of marriage. They were conducting the ceremony for them.

To my amazement, in the city of London in the year 1962, approximately 400 commissioners from all across Canada reported that they had not received one vocal objection to the idea of divorce justified on certain grounds. It was staggering to me. In other words, laymen and ministers of the Church were a mile ahead of me in my personal thinking.

The JOINT CHAIRMAN (*Senator Roebuck*): You speak of commissioners? What post do they hold?

The Rev. Mr. HOSKING: We call them commissioners of the General Council, appointed by the local churches.

The JOINT CHAIRMAN (*Senator Roebuck*): They are a sort of delegation?

The Rev. Mr. HOSKING: Yes. The United Church has a fancy for titles for laymen. When it came to the business of marriage breakdown, which was presented to the General Council just in September, again to the amazement of those who were presenting it there was virtually no objection to it.

My purpose in citing this to you is to dispel any thought there may be in your mind that this is so advanced an idea that you would appear to be silly if you recommended it. I do not think it is.

There is one other objection I wish to speak to for a second and I am finished. Have we the staff to handle it? That question was asked at the turn of the century. Can we afford to introduce this idea of study, diagnosis and treatment? We did not have probation officers but we started it and built up a staff. In 1929 we faced the same problem: where were we to get marriage counsellors and other people to handle things? Again we started it and slowly built up the necessary organization.

I suggest with respect that if this step is taken it will not be difficult to find people to do the work. That is the way of progress.

Mr. BREWIN: I would ask Mr. Hosking, apropos of the last remarks he made, how startling or revolutionary he thinks the doctrine he has been discussing might be considered by some people. After so many years' experience in England

of extended grounds of divorce along the line that is sometimes advocated in Canada, and advocated here, and when we reflect that so traditionally conservative a body as a group of lawyers, judges, clergy and theologians reported to the Archbishop of Canterbury in favour of it, I suggest that what we have heard is the expression, not of a superficial or strange thought but one that represents a profound and even conservative approach to this subject.

The Rev. Mr. HOSKING: I would agree with you one hundred percent, Mr. Brewin. I was surprised when I discovered that the report in question was submitted by a committee appointed by the Archbishop of Canterbury.

Mr. BREWIN: The people who were on the committee were very experienced, not the sort of people who would go dashing off in any direction—not that I suggest for a moment that the United Church would do that.

The Rev. Mr. HOSKING: We may dash off into the Anglican Church yet, Mr. Brewin.

Mr. BREWIN: It would be helpful to the Anglican Church if you did.

The JOINT CHAIRMAN (*Senator Roebuck*): There is virtue in compromise. Is it possible to accept this concept without entirely abolishing the present system?

The Rev. Mr. HOSKING: I am sitting here as a witness, but I would hope to high heaven you would not do that, for this reason. This is something fundamental: you are lifting the struggle from the shoulders of husband and wife and looking at the institution known as marriage in a way that removes from it much of the bitterness and sense of failure and hopeless frustration. For heaven's sake, let us take our courage in our two fists and make this step. For I think it is profoundly sound; and, speaking as a religious person, I believe it is the will of God. I honestly do.

I think we should accept the concept of the breakdown of marriage; if we did, it would take a lot of the grief out of marriage.

You can hear your evidence—evidence of adultery, evidence of desertion, and evidence in respect of any of the grounds for divorce. But for heaven's sake let us keep this concept as a higher principle.

Mr. BALDWIN: There is incompatibility between the two doctrines—matrimonial offences, and marriage breakdown. Would you agree that there is incompatibility?

The Rev. Mr. HORD: Mr. Fitch would like to speak to this, Mr. Chairman.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you, Mr. Hosking, for that eloquent address. The next witness is Mr. Roy C. Amaron, learned in the law. He was born in Montreal in 1931, a graduate of McGill University in arts, 1952, and in law, 1955. He was admitted to the Quebec Bar in 1956 and practised for two years before opening an office at Dorval in 1958. He entered partnership with Mr. A. C. S. Stead and was legal advisor for the City of Dorval from 1961 to 1964.

I could go on with many details of his interesting career, but I think I have given enough to show that we have now before us somebody learned in the law and thoroughly experienced in the subject matter which is our particular interest. I have pleasure in presenting Mr. Amaron.

Mr. Roy C. Amaron, Member of the Commission on Christian Marriage and Divorce: Mr. Chairman and members of the committee, I will limit my remarks this time and bow to my confrere Mr. Fitch, who has prepared legally the extensive brief from the Calgary Institute which you have before you. Anything I say would be redundant.

It is not often that one gets an opportunity to talk after a judge, and I dare say Dr. Hosking will have the last word; at any rate I will leave to Mr. Fitch what I would have said concerning the legal aspects of this concept of marriage breakdown.

I am sure many of you recognize—what lawyers have experienced in trying ot explain to their clients—the difficulties that are involved and the farce that goes on when one tries to obtain divorce where the actual act of adultery is difficult to prove for one reason or another.

The divorce system we have now is not one which lends itself to any advancement of the attempt to remedy marriage breakdown as it exists. You cannot hope to reconcile two people who are fighting by pitting them one against the other on opposite sides of the court room, each running the other down.

During the many months we spent discussing this business of marriage breakdown, this matter of marital offence, we have found how difficult it is to solve this problem. As Dr. Hosking has said, however, we believe we are coming up with the answer. To me, to the members of the commission here, and to the members of the Institute from Calgary, the answer must be in some sort ot concept of marriage breakdown.

Use the grounds, if you will, as evidence, but do not simply give us a decision that will recognize marriage breakdown as a fact, but give us the machinery to deal with the situation,—conciliatory proceedings.

How often have you come up against a client who has said: "I will not go to a marriage counsellor or psychiatrist or doctor. My wife doesn't think there is anything wrong with her, I am the one that is supposed to be sick. The fact is, she is."

If we had compulsory conciliatory proceedings as part of the divorce procedure—or perhaps, in Quebec or other areas where you have judicial separation, as part of the separation machinery, at least you would have some opportunity of giving these people the chance of re-evaluating their lives and re-assessing themselves.

Where married people have failed, or where society has failed them, they should be given a chance to rebuild the marriage which they say has broken down. It might still be viable. At any rate, postpone the decision as to whether a marriage breakdown exists until such time as an effort at conciliation has been made. Speaking as a very humble suburban lawyer, I suggest that this is the way the younger generation is thinking. This is what we are asking you to consider, because if you have people coming back to you constantly saying, "This is a stupid situation, the law is an ass"—how long will they have respect for the law.

There may be other answers and I am sure you will hear many, but we as a Church submit this to you, and we speak not only for this commission but for the Montreal Presbytery and the Quebec-Sherbrooke Presbytery, which are the two local courts of the Church in Quebec primarily concerned with pressing the jurisdiction of Parliament for a proper system of divorce.

I say to you that reform is long overdue and I simply submit this as the answer.

Mr. BREWIN: One thing that Mr. Hord said earlier, on which you as a lawyer might give us some assistance, was that the present law was unfair, that it favoured the rich as against the poor, that it was expensive. The other day someone told us $1,500 was the average figure one would have to pay, presumably lawyers and detectives in gathering the necessary evidence in proof of adultery. Have your commission looked into the question, how far you could remove that particular burden by adopting the principle you suggest? You will still have to have a court, as I understand, and an even deeper investigation.

Do you contemplate that an ancillary court qualified to carry out the necessary procedure to look into these matters would be paid for by the community?

Mr. AMARON: That is in effect what we envisage. One of the problems which practitioners in Quebec are faced with is the unrealistically high cost of divorce in that province. The figure you quote is realistic for that province. The usual

cost is probably three times what it is in other provinces, and we can only assume that it is because in other provinces there are local courts to which the parties may address themselves.

Here we are dealing in effect with a pseudo-judicial but in fact legislative process rather than a court process, which is the case in other provinces. To answer your question specifically, the system which would be developed to assist the courts in the social and psychiatric aspects of conciliation and marriage guidance would, I believe, be state-financed, as the system is now where it exists.

It could be that legal costs of divorce would go to some extent to help defray these expensive conciliatory proceedings, and perhaps fees of attorneys would be to some extent reduced to cover the less onerous proceedings and red tape with which we are now faced.

Senator BELISLE: Where does the state pay?

Mr. AMARON: At the present time I refer to the social welfare courts in Quebec where there are paid social workers.

Senator BELISLE: But it has nothing to do with any matrimonial question?

Mr. AMARON: No; but we recommend as part of the divorce system that there be compulsory conciliation and that there be called to the assistance of the court the experience and ability of social workers, ministers, and psychiatrists, and some of these would have to be state-financed.

The Rev. Mr. FIDLER: In this report there are three systems which throw a little light on the practice elsewhere—I am speaking of *Marriage Breakdown, Divorce, Remarriage.* At page 51 some information is given with respect to Australia where the state provides financial assistance to marriage guidance organizations. In Toledo, Ohio, investigations are provided by the court. That will be found at page 53. In Los Angeles, page 54, the court has for a number of years conducted a significant experiment in the field of domestic relations. One consort in a family suffering from marital discord may require the other to appear before a conciliator for marriage counselling, and so on. Provision is made for assistance along this line. There are other experiences reported but this gives the kind of provision that is made.

The JOINT CHAIRMAN (*Senator Roebuck*): There would be one applicant for divorce. Would you place the burden on the applicant to make out a case?

Mr. AMARON: I would refer you to Mr. Fitch in this respect. Unfortunately he was designated the last speaker on the program though he is the one you are most anxious to hear. I defer to him.

With reference to the question Senator Belisle raised, I would say this. I believe one of the results of the conciliation proceedings which are envisaged in this brief would be that a great deal of work now being done by social agencies in the community would have to be taken over as part of the conciliatory proceedings relating to marital problems, because many of these arise directly from marriage, or would fall into the general category they are now falling into. There might be a considerable increase in cases requiring the provision of additional social facilities, but this is something that will come anyway and will be engulfed in the social welfare activities now being carried on.

The JOINT CHAIRMAN (*Senator Roebuck*): Have you given the constitutional question any consideration? Civil rights are in the provinces.

Mr. AMARON: I have given these matters a great deal of thought, Mr. Chairman, and have discussed it with other members of the delegation. In the brief which will be discussed in a moment the constitutional question as such has been, in effect, disregarded in the recommendations for an over-all divorce picture. We recognize the problems you face as a committee in devising legislation which falls within your legislative prerogatives and we hope you will find, on a constitutional basis, the sort of answer that will encompass the main aspects

of this brief and will apply in all provinces, not only in Quebec but in all the other provinces as well, and serve perhaps as a guide and example for similar legislation by the provinces on matters of purely personal civil rights.

The JOINT CHAIRMAN (*Senator Roebuck*): The Reverend Mr. Hosking was a provincial, not a federal officer. I am not so sure how far we could enter into the kind of work he was doing in the juvenile and family courts. What is your opinion?

Mr. AMARON: The final answer is: the legislative power rests with the federal government to legislate on divorce, and if you retained to the federal judge the decision as to whether or not a divorce should be granted, and made it a condition of his decision that certain requirements should be satisfied, for example, conciliation, the care of the children, alimentary support and the various matters we have covered—if you made all this a condition of his decision you would not be legislating in a provincial area. You are saying: Unless these conditions are fulfilled there will not be divorce where we have federal jurisdiction.

Mr. WAHN: I have been reserving a general question until the end of the presentation by the witnesses for The United Church of Canada. Is this the end of that presentation, Mr. Chairman?

The JOINT CHAIRMAN (*Senator Roebuck*): I am told there are two more witnesses. There is Mr. Fitch, and the speaker next on the list after Mr. Amaron is Mr. Mullen.

The Rev. William Edgar Mullen was born in Alberta in 1920 and was on Canadian Army Active Service. In 1950 he obtained his Bachelor of Arts degree at the University of Alberta and from 1950 to 1953 he studied at St. Stephen's Theological College, Edmonton. He was ordained by the United Church of Canada. In 1953-1954 he engaged in graduate studies in theology and psychiatry at Union Theological Seminary, New York, and Rockland State Mental Hospital, Orange, New Jersey.

Mr. MULLEN: Please take the rest as read, Mr. Chairman.

The JOINT CHAIRMAN (*Senator Roebuck*): Not quite. The Rev. Mr. Mullen is a Member of the American Association of Pastoral Counsellors, being a specialist in that field. There is certainly more I could tell you about him, but perhaps I have said enough to make it perfectly clear to you who read the record that you have a witness who knows what he is talking about.

The Reverend William Edgar Mullen, Woodcliff United Church, Calgary: Thank you, Mr. Chairman. I will keep my remarks brief so that you may be able to put your questions to Mr. Fitch.

Our work at the Pastoral Institute comes out of all that these men have been telling you about, the work that this commission has been carrying on for a number of years. My first involvement with this problem was in Alberta in 1959, and for a year in the Alberta Conference of our Church we have been wrestling with it.

In 1959 we presented a resolution which called for three years of separation as a ground along with other marital offences, so you can see how our thinking has shifted under this kind of study that has been going on across the Church.

The Pastoral Institute is one of the specialized approaches to this problem and was a pilot project of our Church, the first one in Canada—we have one in Toronto now and another one is coming in Winnipeg.

The reason I mention this is that one of our programs is that of internship, and this is where we hope that some leadership and judgments of experience and training will be provided for this kind of program we are undertaking.

The main recommendation is that spoken about by the others: that the concept of marriage breakdown replaces the concept of marital offence as the

sole basis for granting divorce in Canada. There are problems created for us as counsellors or pastors, social workers of all kinds, by the present system of law, which we believe the marriage breakdown concept would help to solve.

I mention three of these. Some people are divorced before we can get them into counsel. A quick action for divorce comes out of a drinking party, though the marriage is by no means dead; yet the couple go into court, on the motion of a revengeful spouse or a hurt spouse, and divorce is accomplished before we can bring together the resources in the community that are available to help these people.

Then we have emotionally upset people coming to us wanting a divorce with decree *nisi*; but because they were not psychologically estranged, not emotionally divorced, they were not able to proceed to the final decree: they could not do it. They went into depression entailing other problems. In other words, the marriage was not emotionally or spiritually dead.

Secondly, some people cannot get a divorce and there is no way of helping them to rebuild their lives until they do get the divorce. Sometimes the marriage is unquestionably dead; you cannot even find the spouse; you cannot legally terminate the marriage. On some occasions Mr. Fitch has worked with us, often successfully, in bringing a happy conclusion to years of common-law marriage. I have never yet met a common-law couple, and we meet many of them, who wanted to live that way; they wanted to have it put right.

Not only is common-law marriage a festering sore as Mr. Hord has pointed out, but it affects many other lives when a couple have to go on living in that state.

The marital offence type of law requires one of the parties to look at the other spouse and not at his or her own behaviour. One of the reasons why this brief is so extensive is to tell you something of our experiences with people whom you are not likely to meet, as my colleagues have met them. You have to deal with this problem from the subjective point of view so that you can understand how it is that some people see things and do things that are often quite inconsistent with their real feelings.

We have to find out how people feel, and help to relieve them of these troubled feelings so that they can move back into reconciliation.

The Calgary Presbytery of The United Church of Canada has backed us unanimously in the presentation of this brief, and we hope you will study these new ways of facing the sociological and psychological problems that are involved. Our Church is involved, and so are many other Churches including Roman Catholics, in matters of leadership and training, and we will furnish the necessary support, speaking as Christians in this country, if you can bring about the desired reform.

The JOINT CHAIRMAN (*Senator Roebuck*): Thank you very much, Mr. Mullen, for a most informative address. We have arrived at the last witness, Mr. Douglas Fitch of Calgary. Mr. Fitch was admitted to the Alberta Bar in 1957 and has been in private practice in Calgary. He has been on the Interprofessional Advisory Committee of the Pastoral Institute of The United Church of Canada. Mr. Fitch.

Mr. Douglas Fitch, Interprofessional Advisory Committee, Pastoral Institute of the United Church of Canada: Mr. Chairman and gentlemen, I note from reading previous proceedings of the committee the question of marriage breakdown has come up on several occasions, and a short answer to this question is: It is an approach to the problems that arise in any divorce proceedings. Whenever people reach the stage where they are seeking a divorce there are certain questions that present themselves: Is this a dead marriage? It is a live marriage? Is it a marriage that is dying? Or is it a marriage which with understanding and proper treatment stands a chance of survival?

What we have in mind is a court of inquiry into the reasons leading up to the breakdown and not simply a tribunal to determine whether one member of the union is guilty of a certain type of marital offence such as adultery.

There are many ways in which the legislature could put a marriage breakdown law on the books. Many countries have the marriage breakdown concept as part of the law. Canada, England, Ireland, Spain, Italy are the only countries that do not have some form of the doctrine as part of the divorce law.

In Switzerland and West Germany there is no requirement for a fixed period. If one of the parties takes the matter to court the simple inquiry is: Is this marriage irretrievably broken down? The various grounds fall into a catch-all or basket provision, and if you cannot bring the conduct of a spouse under any of the fourteen headings you can still say to them: "If you stay separated for a certain number of years you automatically receive a divorce."

Those are two extremes, and the second is mechanical at any rate: a simple period of separation and you automatically get a divorce. Now, the spouse gives proof of a matrimonial offence and automatically gets the divorce.

On page 29 or our brief you will find one definition of marriage breakdown which commends itself to the Pastoral Institute. I quote:

> DECREE OF DIVORCE: The court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.
>
> PUBLIC POLICY: Notwithstanding the foregoing, the court may refuse to grant or delay the granting of a decree if in the opinion of the court the granting of the decree would be contrary to public policy.
>
> PARTICULARS OF PUBLIC POLICY: Public policy permitting the refusal or delay of a decree of dissolution includes the following:
>
> (a) that the issue of a decree will prove unduly harsh or oppressive to the respondent.

We have in mind such things as failure to make proper financial arrangements for the spouse.

> (b) that the petitioner has failed to comply with a prior order or is likely to fail to comply with an order of the court concerning:
>
> (i) the maintenance of the respondent or of a child of the parties,
>
> (ii) custody of or access to a child of the parties.

This is the most important part of the definition:

> PROOF OF MARRIAGE BREAKDOWN: Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and apart for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:
>
> (a) one year when the respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or
>
> (b) three years in any other case.

This is the legal definition and it tells the litigants and solicitors what has to be proven. It has to be proven in court, and it is not a matter of the court's turning it over to marriage boards or expert witnesses; it is evidence that must be presented in court.

In the draft Act, which is Schedule A to our brief, we have tried to work out some changes in the law which we think might follow the change in the philosophy on which divorce is granted in respect of matrimonial offences.

I refer you to pages 43 and 44 where, beginning on page 43, you will find a Synopsis of Changes in Procedural and Substantive Law Contained in Draft Act. This contains a summary of recommendations. Not all these are by any means changes that are necessary from the change of matrimonial offence to marriage breakdown. We hope, however, it will be of some guidance in the other aspects of divorce law in Canada in addition to the basis on which divorce is granted.

You will note that in our definition there are two, shall we say, floor levels of evidence which must be presented to the court in every case before divorce is granted. There must be proof either of adultery, or, in the case of cruelty, of the fact that the parties have been separated for at least one year.

At a recent sitting of a divorce court at Calgary, Alberta, 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.

It is a mistaken notion that most divorces take a long time to obtain. Most are granted quickly and it is the exceptional case, the hard case, where at present no relief is obtainable, that comes to notice.

It has been suggested in previous discussions that divorce on the principle of marriage breakdown is a form of divorce by consent. I suggest that in the basis of every divorce there is a large element of consent, and I cannot think of any case in which there is more consent than there is under our present system. The evidence is supplied by the defendant, or the defendant tells the plaintiff where it can be got.

In most cases where the parties are separated adultery does take place in the course of human nature and if they get the consent of the defendant to admit it in court there is no problem. If they have money for a detective they can get it, but the defendant tells them where the evidence is.

Our suggestion is that the marriage breakdown doctrine has less resemblance to divorce by consent than the present system where the defendant seeks to supply evidence and the divorce is granted.

The question has been asked: Is marriage breakdown sufficiently well known in Canada to be feasible at this time? If the form adopted were simply separation for a period of three years after inquiry as to whether the marriage was irretrievably broken down, the answer would be: no, people do not understand that. But in the form in which we have submitted it, the period of separation is only one year where there is either adultery or cruelty.

This is something that lawyers and clients can understand: prove either adultery or cruelty and there is a year of separation. But with the passing of time, I believe the first part of our definition would have more importance, that is, the answer to the question: marriage irretrievable?

At first a judge might say: Prove the act of adultery, and after one year's separation there will be a divorce. Later on, however, the judge might well say: So what? There has been an act of adultery and you can separate for a year; but what have you tried to do about your marriage?

We suggest in our definition that there is a possibility for the matrimonial offence concept to be swallowed by the new concept. The old system would be swallowed by the new one and it would not be necessary to throw out the old system and replace it with an entirely new one.

As the idea of marriage breakdown must be looked at practically in terms of social workers, in the report "Put Asunder" there is a suggestion that each divorce trail would have some resemblance to a coroner's inquest. I do not think

this idea is useful. In many cases, proof of cruelty, together with separation of the parties, would make it obvious that there was no possibility of the marriage being retrieved. It would be only in a small percentage of cases that the court would need to go into a great deal of detail. It would possibly refer the parties to a counsellor.

It would help considerably if a lawyer would tell people: Unless you have been through the counsel process the court may say, "We are not satisfied that there has been a breakdown; why don't you go there now?

It would be a very good thing eventually to have forensic social workers, but I do not believe it is necessary to start with under the form of marriage breakdown that we recommend.

The JOINT CHAIRMAN (*Senator Roebuck*): That is the most practical statement we have had yet.

Mr. WAHN: I recognize the importance of this concept of marriage breakdown and my question is directed to the witness for the purpose of understanding what he means by it. Could you put the question this way? If a married couple have been separated for three years and go to court for a divorce, is that classified as evidence of a marriage breakdown giving entitlement to divorce, or must they go further and satisfy the judge that in addition to being separated for three years there is other evidence which would indicate that the marriage has irretrievably broken down?

Mr. FITCH: That would be to some extent in the discretion of the judge. In some cases he might say, "I am for it". Other judges would be cautious and say: "You have been separated three years. What have you done about your marriage?"

The JOINT CHAIRMAN (*Senator Roebuck*): He would ask, why the separation?

Mr. FITCH: That would be one question.

Mr.WAHN: Would it not be necessary to decide whether you would permit the judge to dissolve the marriage in a case where the parties had been separated for three years, or whether he must go further and satisfy himself that there is no possibility of rehabilitation? Is it conclusive evidence?

Mr. FITCH: Under the definition, no.

Mr. WAHN: Where there would be one year of separation combined with adultery, this again would not be conclusive evidence to the court, and if it is its job to go into the broader question of whether the marriage has in fact irretrievably broken down—

Mr. FITCH: Depending on the circumstances.

Mr. WAHN: If the court actually does its job well and properly and in accordance with the statute, it would not be enough for it to satisfy itself that the parties have been separated for three years in one case or one year in the other, plus sexual offence, but you say the court should go further and make an investigation to see whether in fact the marriage has irretrievably broken down?

Mr. FITCH: If by investigation you mean further questioning in an inquisitorial sense, I would say no.

Mr. WAHN: I suppose the judge would have discretion as to how he could satisfy himself?

Mr. FITCH: Yes.

Mr. WAHN: I take it from your answer that no person would be entitled to divorce merely because he had been separated for a period of three years in one case or, in the other, one year plus the offence?

Mr. FITCH: It should not be automatic or it becomes divorce by consent.

Mr. WAHN: Suppose the judge does his job thoroughly and does not accept *prima facie* evidence, is it not possible a divorce proceeding under these conditions would take longer and conceivably be more expensive than divorce proceedings at the present time?

Mr. FITCH: It certainly could be and certainly should be longer and more expensive than a case requiring the proof of one act of adultery. Where the parties have been separated three years or, as the case may be, one year with cruelty combined, you would not need to go further than extreme cruelty or the fact that the husband has been absent three years and living with someone else. It would be obvious in such a case that you would not need to go further.

Mr. WAHN: Could you tell us what the cost would be of any contested divorce case—the total cost to the parties of any contested divorce case in Alberta at the present time?

Mr. FITCH: I believe it is the lowest in Canada: $300 and disbursements of $25 when only the plaintiff has a lawyer and there is no difficulty obtaining proof of adultery. As a matter of fact, under the Needy Litigants Act in Alberta they turn out needy litigants' certificates whereby the wife gets a divorce for nothing, and practically every lawyer has one in his office. Three hundred dollars is the going rate.

Mr. WAHN: It is conceivable that if you adopted the marriage breakdown theory the cost of divorce could rise?

Mr. FITCH: The cost to some people would go up; but to a woman who has been deserted by her husband and has no money and is living on welfare, that does not apply; she gets the needy litigant's certificate and can get the divorce at no cost to herself. All that would need to be proved would be that the husband had been gone three years.

Mr. WAHN: If there were no separation for three years, or for one year coupled with adultery, are there any other circumstances in which the judge could nevertheless satisfy himself that the marriage had broken down, and grant the divorce?

Mr. FITCH: We have been saying no, because we have gone through all the different grounds for divorce in different jurisdictions and have not found one yet that we thought could be fitted into one of these categories. But we had one difficulty in regard to persons in jail or in mental hospitals. We think that subject to judicial interpretation every case could be fitted into one of these two categories.

Mr. WAHN: On page 29 of your brief you say:

> Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart—

I would suggest there are other circumstances in which the judge might satisfy himself that there was a marriage breakdown even though there was no separation for either one or three years.

Mr. FITCH: I am not a legislative draftsman but, with respect, I think it should have read "may include".

Mr. WAHN: You limit it to those two contingencies?

Mr. BREWIN: I suggest to you that when you say something "shall" include, and so on, and then stipulate certain things, you are clearly indicating those things. There are conceivable cases where it is evident that there is no possibility of a resumption of cohabitation—matters which it does not take a year or two to

determine. The extreme cruelty might be of such a nature that the court in its judgment might say: This is so clearcut that we will not hold this person up for a year.

Mr. FITCH: Yes; but unfortunately cruelty in many cases comes out of the petitioner's imagination and he or she describes it in such a way as to get a divorce. All we have done is to delay the divorce. The question might be asked: "If the cruelty is as bad as you say, why did you not leave long ago?" Unless such a person has walked out for a year, and the trouble is not as bad as he or she thinks it is, what they should be asking for at this point is a judicial separation.

Mr. BREWIN: I prefer your draft to your explanation.

Mr. WAHN: There must be separation for three years before you consider the marriage as broken down. Is it sufficient if the separation is at will, period? If the husband gets fed up and leaves his wife, deserts her and stays away for three years, is this a three-year separation within the meaning of your marriage breakdown provision?

Mr. FITCH: It is in the sense that he has a right to apply to the court. He does not have to prove that he had good reason for getting out, but whether he got the divorce would depend on whether (1) his wife opposed it or (2) it was a matter of public policy. If it were flagrant, if he ran off with another woman without any good reason and his wife opposed it, I should think that under the heading of public policy the divorce would not be granted. No person should have the assurance that if he ran off with a mistress he could be sure that merely by staying away three years he could get a divorce.

Mr. WAHN: Suppose a man runs away, not with a mistress but simply to be free of his wife. He leaves for the sole purpose of living apart from her, and stays away from her for three years. Can he not then apply for a divorce under the marriage breakdown theory even if his wife does not want a divorce but wants to resume cohabitation?

Mr. FITCH: Yes, and usually he would get it; certainly he should. He has done everything he could in terms of maintenance of the children; that is assumed.

Mr. WAHN: Suppose the wife does not want the divorce because of religious views: she feels that divorce is immoral and wrongful. But he has been separated from her for three years and has behaved himself decently; he simply cannot live with the woman, they are incompatible. Under those circumstances, the wife not being guilty of any wrongdoing, would the husband be entitled to a divorce?

Mr. FITCH: Yes.

The JOINT CHAIRMAN (*Senator Roebuck*): Suppose he had not sent support in the interval would he be entitled to the divorce?

Mr. FITCH: That would be up to the court under the heading of public policy. On the question of people who oppose divorce from the other party because of religious convictions, the woman is imposing her religious views on her husband who, in our experience, may or may not be as guilty as herself.

Mr. WAHN: Have you investigated to see whether or not such a woman might feel she was guilty of some moral offence, some wrongdoing, in accepting the fact of the divorce in these circumstances, if divorce were against her religious tenets?

Mr. FITCH: That might be in some cases.

Mr. MCCLEAVE: From a practical point of view, did you ever consult a woman when you came up with this philosophy?

The Rev. Mr. FIDLER: This is one of the places where there is some difference of opinion. The Commission on Marriage and Divorce had a woman on it, and

this is one of the places where we felt it was important to consider the possibility of attempted reconciliation. It could happen that a man has run away or left his wife when a separation would only increase the difference between them; whereas in the present state of things, as Mr. Mullen has pointed out, if they could be brought together it is possible, in fact there is evidence in the brief to support this belief, there could be a reconciliation.

The JOINT CHAIRMAN (*Senator Roebuck*): Suppose the fellow that runs away will not be reconciled?

The Rev. Mr. FIDLER: I am afraid you cannot force a reconciliation.

Mr. MCCLEAVE: Did you consult women?

Mr. MULLEN: Women's groups have spoken on this. There was a lady lawyer, a Catholic, who spoke with us on the panel. They were right behind us at Presbytery level.

Mr. FITCH: I understand that in almost every country in the world one of the first battle cries of women is the liberalization of divorce laws. In most countries marriage breakdown forms part of the law. We have heard about the trap theory of marriage. Once the man enters the trap you have to keep a heavy door against him to hold the marriage together. But that is not marriage in any event; it is a prison; all you do is to prevent him from marrying a second time, and he is one of the 400,000.

Mr. HONEY: I understand Mr. Wahn has not concluded but I wonder if I could ask a supplemental question, which gives me a great deal of concern. The situation has already been described by Mr. Wahn where the man leaves, is supporting his wife and children adequately, so that there is no problem in that regard, but he simply does not wish to live with her. Do I take it from the evidence we have heard today you would suggest that, irrespective of the wishes of the wife, the husband having left her and supported her properly for three years, he would be entitled to divorce. I do not think we have had an answer to the question that has been asked in the case where the wife opposes the divorce because of her religious convictions.

Mr. FITCH: The only way you could prolong that marriage, except as a mere form, would be to enforce the restitution of conjugal rights, and we got away from that years ago. If you are to prevent the guilty husband from remarrying, we create a condition where the parties remain married in form only, and you cannot force them to cohabit. This will give rise to common-law marriages which the law will not countenance. Your question supposes the wife he has left to be innocent of all wrong, but I think it is unrealistic to talk about the innocent spouse except in a small percentage of cases.

The JOINT CHAIRMAN (*Senator Roebuck*): It is possible.

Mr. FITCH: Yes, it is possible. Any law will produce hard cases.

Mr. HONEY: It is the hard cases we are concerned with.

Mr. PETERS: I have been impressed with the last witness, though negatively. He produces a legal argument that is going to be the bane of the other witnesses; he negatives everything they have talked about. Marriage breakdown is a concept. If you tie it in to the legal aspects you negative all that we have heard. The other witnesses I agree with entirely; the last one I disagree with violently. When you get into legalistic terms you are in effect using legal grounds in conjunction with the breakdown theory and they are not compatible.

Mr. MULLEN: Mr. Fitch is completely in agreement with this marriage breakdown idea. Every one of us would be happy if you would just accept the marriage breakdown concept.

Senator BELISLE: I just wish to express my sincere thanks to the delegation. I was very much impressed.

The JOINT CHAIRMAN (*Senator Roebuck*): It has been a wonderful presentation, and I should like to hear from my Joint Chairman.

The JOINT CHAIRMAN (*Mr. Cameron*): First of all, I think we should express to the members of the delegation, in addition to our thanks, the regret that we could not continue for the hours it would take to explore their brief. I know that Mr. Wahn has many more questions he would like to ask, and so has Mr. Brewin, Mr. McCleave and others. We are sorry we are obliged to rise, but it is six o'clock. Gentlemen, we appreciate the very thorough and understanding way you have presented the subject matter. It is not what you would call a new and diffusive thought to all people, but to very many it is. Thank you.

The committee adjourned.

APPENDIX "19"

BRIEF

to

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

by the UNITED CHURCH OF CANADA

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Supplementary exhibit: MARRIAGE BREAKDOWN, DIVORCE, REMARRIAGE, a reprint of the second, and final, report of the Commission on Christian Marriage and Divorce approved by the Twentieth General Council of the United Church of Canada in September 1962, as published by The Board of Christian Education of The United Church of Canada.

1. CONCLUSIONS AND RECOMMENDATIONS

1. Whereas successive General Councils of the United Church of Canada have declared the need of revision of the laws respecting divorce in Canada, and

2. Whereas the Twentieth General Council affirmed that it is in harmony with the spirit of Jesus Christ and the teaching of the New Testament that we should hold in continual tension, both in the church and in the state, these two concerns:

(i) To declare that marriage is intended to be the life-long and complete union of a husband and wife for their mutual partnership, for the procreation of children, and for the fulfillment of parental responsibility, and

(ii) To acknowledge that in some marriages there is such grievous offence or abuse or neglect that the union is in fact destroyed, and

3. Whereas we acknowledge that in spite of the best efforts that may be put forth to prepare persons adequately for marriage, and in spite of the best help that may be offered married couples in marital distress, some partners do fail to achieve or to maintain marriage as an enduring and fruitful union, and

4. Whereas the "hardness of heart" which Jesus recognized as the reason for concession for divorce is expressed in ways other than in illicit sexual relations, and

5. Whereas broken and dead marriages may become festering sores in our society and a threat to the sanctity of marriage, and

6. Whereas social sciences have thrown new light on the causes of marriage failure, and the effects on children of serious friction between parents, and

7. Whereas we believe there are many different factors that may contribute to marital failure, some of which may be remedied or offset by adequate counselling or other therapy even when reconciliation seems improbable, and

8. Whereas the juvenile and family courts have demonstrated the success of calling to their aid the non-legal sciences, and the use of investigation diagnosis and treatment, and

9. Whereas the method of granting divorce by Resolution of the Senate is a misuse of its legislative function and, in addition, is inadequate in that it makes no provision for alimony or custody and welfare of children involved, and

10. Whereas the 22nd General Council of The United Church of Canada expressed the opinions that Canada's divorce laws need to be reformed and not just liberalized, and that the concept of "marriage breakdown" is a more suitable basis for considering grounds of divorce than is the concept of "marital offence", and that three years' separation of the married parties is in general a suitable period from which to establish whether a marriage has in fact broken down permanently.

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11. We recommend:

1. That the Divorce laws of Canada be reformed,
2. That the concept of "marriage breakdown" be substituted for that of "marital offence", as the basis for granting divorce,
3. That new marital court procedures to deal with distressed marriages be established, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society and that these court procedures should provide:
   (i) means whereby either consort could require the other to participate in conciliation procedure with a view to avoiding further legal proceedings.
   (ii) that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.
   (iii) that no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.
   (iv) that, while conciliation or separation or divorce proceedings are in progress, the court shall have the power and the means to protect the interests and welfare of the children involved.
   (v) that no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

4. That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences in addition to lawyers and other court officials currently employed in attempting to effect conciliation.

(These conclusion and recommendations are based upon the actions taken by the Twentieth and Twenty-second General Councils of The United Church of Canada, meeting in 1962 and 1966, respectively.)

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2. INTRODUCTION

12. On behalf of The United Church of Canada, which has responsibility for the pastoral oversight of 20.1 per cent of the Canadian population according to the latest Canada Year Book, we welcome the appointment of this Joint Parliamentary Committee on Divorce.

13. The 20th General Council of The United Church in 1962, acting on the recommendation of a Commission that had studied the matter for six years, called upon the Federal Government to appoint a Royal Commission on Divorce to consider the revision of the divorce laws of Canada.

14. The 22nd General Council, in September 1966, commended Prime Minister Pearson "for inaugurating a study of this nation's divorce laws".

15. The Executive of the General Council authorized the national Marriage Guidance Council of the church to arrange for a presentation of the official views of The United Church of Canada on divorce to this Special Joint Committee of the Senate and House of Commons.

16. The following committee was appointed to prepare and present this Brief:

Rev. R. S. Hosking, B.A., B.D., D.D.—Toronto, Chairman of the Commission on Christian Marriage and Divorce which was appointed by the 17th General Council and reported to the 18th, 19th and 20th General Councils, member of the national Marriage Guidance Council, formerly Judge of the Toronto Family Court and General Secretary of the National Council of the Y.M.C.A. in Canada.

Rev. Frank P. Fidler, B. Sc., B.D., D.D.—Toronto, Secretary of the above Commission and of the national Marriage Guidance Council, Associate Secretary of the Board of Christian Education of The United Church of Canada.

Rev. W. E. Boothroyd, B.A., M.D., C.M.—Toronto, Member of the Commission and Chairman of the national Marriage Guidance Council, Chief of Psychiatry at Sunnybrook Hospital, Associate Professor of Psychiatry, University of Toronto.

Rev. J. R. Hord, B.A., B.D., S.T.M.—Toronto, Secretary of the Board of Evangelism and Social Service.

Mr. Roy C. Amaron—Dorval, P.Q., Member of the Commission, lawyer, convenor of the Law and Legislation Committee of Montreal Presbytery of the United Church of Canada.

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3. REASONS WHY THE UNITED CHURCH OF CANADA PRESENTS THIS BRIEF

17. The question may well be asked: Why does The United Church of Canada present a submission on divorce reform to this Parliamentary Committee?

18. If the Church believes that marriage should be a life-long union, as The United Church does, how can it speak in favour of divorce?

19. The United Church presents a Brief on divorce for the following reasons:

(a) We believe that the Christian Church has a duty to instruct its members in the Christian ethic pertaining to marriage, and through its worship and fellowship to assist them in living up to this ethic. But the Church must also recognize that Christian partners fail in marriage, and after seeking divine and human aid, conclude that they should petition for separation or divorce which will provide release from what seems to them, and to many others in our society, an intolerable situation.

(b) We believe, also, that the Christian Church has a responsibility to see that compassion and justice are shown to all persons in society. Some homes in our society are a "living hell" for husband, wife and children. If the granting of a divorce would relieve this situation and lead to a better arrangement for all concerned, we believe that the Christian Church should not oppose but rather support such action.

(c) We do not believe that the Church should legislate for persons who are outside her membership. Since the Christian Church has, in the past, been influential in securing strict legislation regulating divorce, we believe that the Church, while upholding its views on monagamy 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.

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4. SERIOUS INADEQUACIES IN THE PRESENT LAW REGARDING DIVORCE

20. The Twentieth General Council expressed deep dissatisfaction with the present divorce laws in Canada in which adultery is practically the only ground on which divorce is granted. There are many reasons for this criticism.

21. The present law encourages acts of adultery and falsification of evidence by some partners who seek to obtain the relief of divorce.

22. We question present procedures which require the taking of "adversary action in court", where one partner must accuse the other of a matrimonial offence and prove the defendant's guilt while maintaining his own "innocence" in court. "Such procedures aggravate the differences, multiply the bitterness and harden the antagonism of one partner for another."[1]

23. Present restrictions prevent many unhappy couples, often the most conscientious, those who have not committed adultery and will not falsify evidence, from securing a divorce. Furthermore, broken and dead marriages become festering sores in our society and a threat to the sanctity of marriage.

24. The United Church has also expressed its opposition to the present provisions of granting a divorce by Resolution of the Senate. "It is inappropriate to expect a legislative body to exercise the necessary judicial function required in divorce actions. Moreover, there is no provision for considering the needs and welfare of the children. It is urgent that some better way be developed to deal with those partners whose only present recourse is to seek a private Act of Parliament to dissolve their broken marriage."[2]

[1] See page 14, *Marriage Breakdown, Divorce, Remarriage*, the reprint of action taken by the Twentieth General Council, published by the Board of Christian Education of The United Church of Canada.

[2] *Ibid.*

25. It is a well-known fact that a bad law brings disrespect to the whole legal system and court procedures.

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5. EXTENSION OF GROUNDS FOR DIVORCE

26. The Commission on Christian Marriage and Divorce which reported to the 18th, 19th and 20th General Councils, seriously considered the concept of "breakdown of marriage" as one ground or the sole ground for divorce in Canada. It was not at that time prepared to make a recommendation to the General Council based on this concept. Instead, it recommended that General Council "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."

27. We are now prepared to express the opinion that the present law based on "matrimonial offence" is totally inadequate. A matrimonial offence may indicate the failure of a marriage but certainly need not do so in every case. The doctrine of forgiveness teaches us to forgive each other's sins and weaknesses and seek the grace of God to lead better lives in the future. Many factors other than "matrimonial offence" need to be taken into account in determining failure in marriage. Among those which may contribute are such things as immaturity, personal inadequacies, marked differences in background, inadequate preparation for marriage, and external interference (for example from "in-laws"). There are also many forces and pressures in society, economic, moral and social which threaten family life today.[1]

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6. DIVORCE COURTS

28. The Commission on Marriage and Divorce spent a great deal of time studying alternatives to present court procedures, and the advisability of the setting up of special marital courts. The resolution passed by the Twentieth General Council was as follows:

"It was agreed:

(a) that the General Council request the officials concerned to study the matter of establishing special marital court procedures to deal with distressed marriages, the primary concern of these procedures to be the preservation of marriage and family life, for the welfare of society.

(b) that such court procedures should provide:

(i) means whereby either consort could require the other to participate in conciliation procedures with a view to avoiding further legal proceedings.

(ii) that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.

(iii) that no divorce proceedings be initiated, except by special permission of the court, until three years of marriage have elapsed.

(iv) that, while conciliation and later separation or divorce proceedings are in progress, the court shall have the power and the

[1] See pps. 114 f. *Marriage Breakdown, Divorce, Remarriage.*

means to protect the interests and welfare of the children involved.

(v) that no decree of divorce become absolute until the court, by order, has declared that it is satisfied that proper arrangements have been made for the welfare of the children.

(c) That courts draw upon the skills of ministers, social workers, marriage counsellors, medical doctors, and others trained in the social sciences, in addition to lawyers and other court officials currently employed in attempting to effect conciliation.[1]

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29. While the Commission, in its recommendations in 1962, did not specifically use the term "marriage breakdown" as a definitive basis for divorce, we clearly recognize that it considered those deeper causes of marital failure, which the term now represents as such a basis. It recommended court procedures which would, in fact, take account of this condition as the basis for divorce action.

30. We are of the opinion that before a court authorizes divorce proceedings involving a married couple with children it should be satisfied beyond reasonable doubt that the continuation of the marriage bond would do more harm than good to the parents concerned and their children.

31. Before granting a divorce a court should also establish that the marriage has in fact broken down in the sense there had not been cohabitation for a period of three years or more.

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7. THE CONCEPT OF "MARRIAGE BREAKDOWN" AS THE BASIS FOR DIVORCE IN CANADA

32. At its Annual Meeting in February, 1966, the Board of Evangelism and Social Service of The United Church of Canada considered the advantages of granting divorce on the basis of "marriage breakdown". In the summer of 1966 the Archbishop of Canterbury's Committee set up to study the divorce law of England issued its report "Putting Asunder", with the strong recommendation that "marriage breakdown" be the sole basis for granting divorces in England. We find ourselves in agreement with the Committee's argument:

"We were persuaded that a divorce law founded on the doctrine of breakdown would not only accord better with social realities than the present law does, but would have the merit of showing up divorce for what it is—not a reward for marital virtue on the one side, and a penalty for marital delinquency on the other; but a defeat for both, a failure of the marital "two-in-one ship", in which both its members, however, unequal their responsibility, are inevitably involved together. So we arrived at our primary and fundamental recommendation: that the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of matrimonial offence, as the basis of all divorce."[2]

33. We would like to emphasize three of the significant points which the Archbishop's Committee makes in its report.

(a) "Marriage Breakdown" is a triable issue. Actions and conduct which under the present law constitute matrimonial offences would still be available as evidence for breakdown, even though no longer in themselves grounds for a

[1] See pages 1-4, *Marriage Breakdown, Divorce, Remarriage.*

[2] Quoted from p. 18 PUTTING ASUNDER, the printed report of the Archbishop's Committee, published by London S.P.C.K. 1966.

decree. Other facts now treated as irrelevant could also be taken into account. But procedures would have to be changed. "The court could not be expected to reach true conclusions about the state of matrimonial relationships unless the existing accusatorial procedure were abandoned and something like procedure by inquest substituted for it."[1]

(b) The question was considered: "Would it be fair for a marriage to be dissolved against the will of an unoffending spouse?" The conclusion was that it might not be fair but that it was almost inevitable. Of course, the court could and would in some cases refuse a divorce in the public interest but in most cases it would release partners if they were no longer living together. "To demand that a divorce law shall let no one be hurt is to ask the impossible. The law and the courts are faced with trying to uphold distributive justice in situations which, by their very nature, exclude wholly just situations. If then, as is widely held among responsible people today, the public interest requires as a general rule that 'empty' legal ties should be dissolved and that de facto unions and their issue should be legitimized, that has to put in the scales against the injury an unoffending respondent may suffer through the loss of married status."[2]

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(c) Another question dealt with in the report was: "How would maintenance and costs be assigned?" The Committee agreed that it was very important that after a decision had been made regarding the breakdown of the marriage, the court should then make a judgment regarding maintenance and costs, etc.[3]

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8. THE IMPORTANCE OF CONCILIATION PROCEDURES

34. In our opinion, one of the chief merits of the marriage breakdown concept is that it would prevent quick divorces and allow for conciliation procedures. Many experienced persons express their view that reconciliation procedures should not be made compulsory. However, the court could decide not to hear a case until it was satisfied that the parties had exhausted the resources of conciliation agencies. As The United Church requested in 1962 "Courts could draw upon the skills of ministers, social workers, marriage counsellors, medical doctors and others trained in the social sciences..." We would recommend that public funds be used to provide sufficient marriage guidance, counselling and conciliation agencies to serve the public need.

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9. RESOLUTION OF THE TWENTY-SECOND GENERAL COUNCIL REGARDING DIVORCE REFORM

35. The Twenty-Second General Council of The United Church of Canada, meeting in September 1966, passed the following resolution:

36. Whereas it is apparent that Canada's Divorce Laws require basic moderate reform rather than simple liberalization;

37. Whereas the General Council in 1962 urged 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.

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[1] ibid, p. 19
[2] ibid, p. 21
[3] ibid, p. 23f.

(b) methods of granting divorce other than by Private Acts of Parliament;"

38. Whereas the concept of "marriage breakdown" (a three to five year separation of partners may be regarded as a test of marriage breakdown) is considered by some as a more suitable basis for the purpose of moderate reform than additional grounds based on the concept of "marital offence";

39. Whereas the Prime Minister has recently requested a Parliamentary Committee to study Canada's Divorce Laws:

40. BE IT RESOLVED THAT THIS GENERAL COUNCIL

1. Declare itself in favour of the concept of "Marriage Breakdown" as the basis for divorce in Canada.

2. Commend the Prime Minister for inaugurating a study of this nation's divorce laws and present the official view of the United Church to the Parliamentary Committee.

3. Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work for divorce reform in line with the concept in number 1 above.

4. Remind the people of the church of the need to exercise a ministry of understanding and healing in situations when a marriage breakdown is threatened or takes place.

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10. APPENDIX
VIEWS OF MARRIAGE AND DIVORCE

expressed by

THE UNITED CHURCH OF CANADA

1. *Views of Marriage*

According to a new order for the Solemnization of Marriage proposed for use in The United Church of Canada, "Marriage is a holy state of life, ordained by God that instincts and affections given by him might be fulfilled and perfected in purity and holiness. It was ordained by God that man and woman might have life-long companionship, help and comfort of each other. It was ordained by God that families might grow in goodness and walk in the way that leads to eternal life. It was honoured and sanctioned by Christ, and it is set forth in scripture as a symbol of the union that exists between him and his church."[1]

The Nineteenth General Council adopted the following statements describing a Christian understanding of the nature and intent of marriage.

"A Christian marriage is one in which husband and wife have publicly covenanted together with God, as they know him through Jesus Christ, in wholehearted and sincere devotion to him as well as to each other, to the end that they may live in unity throughout life by the help of his love and grace."[2]

It also affirmed that "in marriage three purposes are fulfilled for the welfare of the individuals concerned and of society:

"PARTNERSHIP of a man and a woman is perfected as they live together so as to enjoy and complement each other in mutual comfort, help and love...

[1] See pages 9 and 10, *An Order for the Solemnization of Marriage*, The United Church of Canada, 1964.

[2] See pages 18f. *Marriage Breakdown, Divorce, Remarriage.*

"PROCREATION continues the creative activity of God and fulfills the spiritual and physical impulses of the sexual nature of a husband and wife in the begetting of children...

"PARENTAL RESPONSIBILITY in best fulfilled, and family life is enriched as both parents share in the care and upbringing of their children as a divine vocation..."[1]

The Christian Church also recognizes the part which the family plays in building a stable social order, and the responsibility of the state in supporting and upholding the well-being of the family[2].

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2. *Scriptural Bases for The United Church's Attitude toward Divorce*

Since the Christian Church has had an important influence in determining the divorce laws in Canada, we believe that it is imperative to review the scriptural bases for the attitude of the Church toward divorce if we are to consider changes in the laws.

Christians refer to scriptural authority in determining matters of belief and ethics. We believe that there is scriptural authority for acknowledging the necessity of divorce in a sinful society while being opposed to the leniency with which divorce is sometimes granted and still affirming that it is the will of God that marriage is meant to be a life-long and indissoluble union.

Many Christians quote Mark 10: 2-12 to back up the so-called "absolutist view" that the Christian Church cannot recognize divorce under any circumstances and must refuse to remarry any person who has a former partner still living. We note, on the one hand, that our Lord reminds the Pharisees who are seeking to test him on the matter of the law about divorce that the Mosaic law permits divorce on account of "your hardness of heart" (that is, "the moral and spiritual obtuseness which rendered them incapable of responding to the demands of God", according to Dr. Matthew Black of St. Andrew's College, Scotland). On the other hand, Jesus affirms: "From the beginning of Creation, 'God made them male and female.' 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one.' So they are no longer two but one. What therefore God has joined together, let no man put asunder."

We are aware of the fact that "the canonical provisions of the Roman Catholic Church and the Anglican Church continue to declare that the marriage bond is absolutely indissoluble ... Both of these communions, however, allow the relief of nullity in a variety of circumstances that somewhat modify the apparent rigidity of this absolutism."[3]

According to Matthew's version of the scriptural incident cited above a very important phrase has been added. It is known as the "exceptive clause". "Jesus said to them, 'For your hardness of heart Moses allowed you to divorce your wives, but from the beginning it was not so. And I say to you: whoever divorces his wife, *except for unchastity,* and marries another, commits adultery." (Matthew 19: 3-9)

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How are we to explain this addition? Matthew, who wrote at a later date than Mark, likely reflected a practical situation in the early church where divorce was recognized in exceptional cases. "It seems to reflect the early

[1] *Ibid.*
[2] *Ibid.*
[3] See pages 21f. and 25, *Marriage Breakdown, Divorce, Remarriage.*

church's recognition under the direction of the Holy Spirit that unfaithfulness can destroy a marriage. Apparently the early church did not interpret and apply the words of Jesus as reported by Mark in a rigidly legalistic and absolutist sense."[1]

In *1st Corinthians 7: 10-11* the Apostle Paul accepted Jesus' teaching on the permanence of marriage. "To the married I give charge, not I but the Lord, that the wife should not separate from her husband (but if she does, let her remain single or else be reconciled to her husband)—and that the husband should not divorce his wife."

However, Paul goes on to grant his consent to divorce in the case of a "mixed marriage" between a Christian and non-Christian. The Christian partner is not to initiate divorce proceedings. But if the non-Christian partner wishes to dissolve the marriage then it may be dissolved. We conclude that Paul describes a further extension of the grounds for divorce by the early church beyond the "exceptive clause" of Matthew.[2]

The Twentieth General Council of The United Church, taking into account these and other scriptural references, affirmed that:

"We believe that it is in harmony with the spirit of Jesus Christ and the teaching of the New Testament that we should hold in continual tension, both in the church and in the state, these two concerns:

(i) To declare that marriage is intended to be the life-long and complete union of a husband and wife for their mutual partnership, for the procreation of children, and for the fulfillment of parental responsibility.

(ii) To acknowledge that in some marriages there is such grievous offence or abuse or neglect that the union is in fact destroyed.

"It follows from the latter that there will be cases where, in the spirit of our Lord, we must admit that it is in the best interests of all the persons involved (including the children and society) that the marriage be dissolved by divorce."[3]

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APPENDIX "20"

BRIEF

to the

SPECIAL JOINT PARLIAMENTARY COMMITTEE

ON DIVORCE

by

THE PASTORAL INSTITUTE

of

THE UNITED CHURCH OF CANADA

131 - 7th Ave. S.W., Calgary, Alberta

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Division II — Some Arguments for "Marriage Breakdown" as the Basis for Divorce and Remarriage

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[1] See pages 21f. and 25, *Marriage Breakdown, Divorce, Remarriage.*

[2] *Ibid.*

[3] See page 26, *Marriage Breakdown, Divorce, Remarriage.*

Appendix B — New Structures Concerning Marriage, The Family and Divorce
1. The Pastoral Institute: A New Pattern of Ministry
2. Family and Group Counselling Programs
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Appendix D — References and Bibliography

THE PASTORAL INSTITUTE

131-7th Avenue S.W., Calgary, Alberta

A MINISTRY OF THE
CHURCHES OF CALGARY
SPONSORED BY THE
UNITED CHURCH OF CANADA

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Purposes

THE PASTORAL INSTITUTE is a new pattern of ministry offered by the church as it seeks to relate helpfully to the needs of people in a rapidly changing society. It is the first attempt of its kind in Canada and was initiated in 1962 in Calgary, Alberta.

It would have been difficult to anticipate what use the church would make of the Sunday School pattern initiated by Robert Rakes in England for the purpose of teaching the three R's to working children. Over the years it has become an integral pattern of ministry. Could it be that the kind of Institute developed by Dr. Paul Popenoe over the last 40 years at the American Institute of Family Relations in Los Angeles also might be a pattern that would open new doors of service for the church? This wondering is what prompted the proposal for an Institute in Alberta in 1958 and again in 1961. The idea caught the imagination of a Committee studying the ministry of Central United Church, Calgary and the Institute was opened as a two year demonstration and pilot project. After a year and a half the Presbytery took responsibility for the next five years.

The ministry of the Institute was designed from the beginning to be more comprehensive in scope and more preventive in the focus of its services than that of the Pastoral Counselling Centres and Services developed in North America since World War II. Counselling is only one of several preventive and rehabilitative services offered by the Institute. In setting up the program in 1962 the aim was to draw together the interdisciplinary skills of Christian leadership, on an ecumenical basis and make them available to the whole community. The plan was to create a pool of the rich resources available, to organize and conserve the use of them for the wider benefit of church and community.

The responses to the Institute have more than justified the demonstration project and its usefulness to church and community. The supplementing and stimulating of agency programs; the participation of professional leaders and other faith groups; the fact that over 40 per cent of those who came had no pastor and no other church affiliation; the fact that only a few came who had been to other agencies first; the referrals from other agencies, physicians, psychiatrists, lawyers, teachers as well as clergy were responses that surprised even the founders.

Historical perspective

The Institute is not just a private community agency but a new way of carrying on the ministry of the church which has gone on as long as the Hebrew Christian tradition. Some believe this care is as old as human existence, going back to the primitive healer with his prayer, incantations and magic. The program is rooted in this religious heritage to extend and to deepen, in our time, the historic ministry of the church. It was founded by a small group of churchmen who are convinced that the intuitions of the biblical faith and the insights of the sciences of human behaviour are important for pastoral care in our rural, urban and secular society. The services of the Institute, in a church setting are available to all who seek them, regardless of the faith group or the lack of one.

The development of the program from the initial planning has been carried on in consultation with the Board of Evangelism and Social Service and The National Marriage Guidance Council of The United Church of Canada. A non-profit organization, the Institute is incorporated in Alberta under the Friendly Societies Act, and has a registered charter and set of bylaws. The program is operated by a Board of Directors responsible to the Calgary Presbytery of The United Church of Canada. Provision is made for other denominations to participate in the policy and programs of the Institute at all levels of work.

Departments and Programs

1. *Family Life Education.* This department has been developed to provide education and group guidance for young people in preparing for marriage as well as married couples seeking ways of successful family living and parenthood. The programs are planned by an Interdisciplinary Interfaith Committee on Family Life Education.

Some specific ones are:

— Conferences for youth on relationships with the other sex.
— Premarital education classes in series of eight weeks.
— Marriage education groups for couples in counselling.
— Family living and parenthood education courses.
— Speakers teams for conferences, workshops, seminars and meetings.
— Press and Radio and TV interviews and programs.
— Remarriage preparation for adults.
— Marriage checkup programs.

2. *Counselling and Consultation.* The programs of this department are designed to provide personal and confidential pastoral counselling, to help persons, couples and families to face and handle problems that are intimate and of the most ultimate concern. Many of these situations involve conflicts in the areas of courtship, marriage, family relations, daily work and religious life. The programs are under the supervision of an Interprofessional Advisory Committee on counselling and public issues. This committee too, is interdenominational and deals with public social issues as well as personal counselling situations. Some programs are:

— Assessments in Family Living
— Premarital Guidance for Young People
— Marriage and Family Counselling
— Personal and Group Counselling
— Marriage Breakdown and Divorce Counselling
— Family Debt Analysis
— Pastoral Consultations and Referrals

3. *Leadership Development.* The programs of the third department are to help develop through Supervised Continuous Pastoral Education, a new richness in pastoral ministry.

There are three objectives:

1. Greater understanding of the persistent human troubles that come to the clergyman, psychiatrist, youth leaders, church visitor, teacher, nurse, lawyer, doctor, psychologist, social worker in the day to day volunteer and professional work of the community.
2. Deeper awareness of the connection that urgent public issues of the world have with the personal troubles that people present to all those at work in the human disciplines.
3. Wider appreciation of the qualities of mind, heart, and spirit that make for better teaching, preaching, and serving by the people of the church.

Programs are designed to assist clergy and other professions to reach the potential of their helpfulness in the ministry of the church to the community. Many have special gifts for helping people in trouble. New opportunities are provided by the Institute to encourage and develop persons for vocation and avocation. The direction of this work is under an Interfaith, Interdisciplinary Supervision Committee.

Key programs are:

— Calgary Winter Seminars on Marriage and Family Education and Counselling.
— Calgary Spring Workshop on Supervised Pastoral Education.
— Banff Summer Seminars in The Theology and Skills of Counselling in the Church Tradition.
— Regional Workshops for Presbyteries, Ministerial Associations.
— Clinical Pastoral Education Programs at Hospitals and other Institutions.
— Counselling of Pastors and their Families.
— Laity Leadership Development Workshops.
— Church Leadership Consultation.

4. *Projected Departments and Programs.* There is encouragement both from the church and the community to expand the existing work, especially in the preventive fields of education and human development. Some of the departments and programs that were projected initially are still in the planning phase, but the first two listed below are approved by the Board and the Presbytery to go ahead.

Some of the projects and programs being studied and planned are:

— Personal Acquaintance Department
— Parish Internship Program
— Research Department
— Group Assessment Units in Family Living

— Family Debt Management Program
— Symposia on Public Issues

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Persons or families are eligible for the services of the Pastoral Institute regardless of race or religion, provided they can benefit from the resources offered. Those whose emotional disturbances indicate need for emergency or intensive psychiatric treatment understandably will need to be referred to the appropriate Specialists. Facilities for the treatment of children's problems have not been developed. However, the Institute staff do assist ministers or families in assessing these problems when they are referred for that purpose. This is proving a valuable service to pastors and families who are unfamiliar with the treatment resources of the Calgary area. The Institute programs to assist parents and families are proving of great value to children in that often the atmosphere of the home is improved.

Cost of Services

The Pastoral Institute, from its inception has been a work of faith, financed almost entirely by the churches and church members. The Calgary Presbytery of The United Church of Canada has underwritten the cost up to $24,000.00 a year for five years. There have been corporation gifts, personal contributions and voluntary memberships from persons and churches of other denominations, as well as costs for testing and registration fees for training and other special programs. Many skilled professional persons are making time available for the teaching, counselling, consulting and planning of the programs. Many others serve on committees and the board. They have given leadership without remuneration as they would teach a Sunday School class or serve on a board of the local church. The Pastoral Institute could not carry out its ministry but for the generosity and devotion of its volunteer leaders.

Financial gifts are deductible for income tax purposes. You may help to extend this work by:

1. Supporting your own congregation's efforts to sustain the Institute.
2. Making direct gifts to the Pastoral Institute.
3. Becoming a member of the Pastoral Institute.

Annual memberships are

Individual	$ 5.00
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THE PASTORAL INSTITUTE
of
THE UNITED CHURCH OF CANADA
13-7th Ave, S.W.
Calgary, Alberta

BRIEF

Submitted on November 22nd, 1966 to the
SPECIAL JOINT PARLIAMENTARY COMMITTEE ON DIVORCE

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MAJOR RECOMMENDATION

1. That the concept of "marriage breakdown" replace the concept of the "matrimonial offence" as the sole basis for the granting of divorce in Canada.

Additional Recommendations

2. That Parliament enact a comprehensive federal "Domestic Proceedings Act" including the many procedural and substantive changes required to make the law appropriate for modern conditions.

3. That "reconciliation procedures" receive statutory recognition, but that they not be compulsory in all cases, or part of the court structure at this time.

4. That the Federal Government make scholarships and bursaries available for graduate studies and training in the field of Marriage and Family Life Education and Counselling, on the basis of merit, including persons employed by religious denominations and private agencies.

5. That public funds be made available at the appropriate governmental level for qualified private agencies and qualified ministers providing:

(a) Family Life Education programs.

(b) Rehabilitative programs such as conjoint family and group counselling, S.O.S. (Help) and P.W.P. (Parents Without Partners), for those involved in marriage breakdown, divorce and remarriage.

(c) Personal Acquaintance and Marriage Introduction Services on a professional and pastoral rather than a commercial basis.

(d) Internship programs on an interdisciplinary, non-denominational basis to train social workers, clergy and those of other "helping" professions to operate these programs and new ones that may be developed to meet the needs of people in a rapidly changing Canadian society.

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INTRODUCTION

The Pastoral Institute

The Pastoral Institute of the United Church of Canada, Calgary, Alberta, is a society incorporated under the *Alberta Societies Act* as a non-profit benevolent institution. The Institute is financed primarily by the Calgary Presbytery of the United Church of Canada, and also receives grants for special purposes from other sources. While the Institute is mainly financed by the United Church of Canada, it is ecumenical in its outlook and receives support from members of various denominations.

The Interprofessional Advisory Committee of the Institute is a multi-disciplinary body including members of the clergy, physicians, psychiatrists, lawyers, social workers and others concerned with various aspects of domestic relations. This brief was prepared by the Committee in consultation with other interested persons, both within and without the Institute.

Policy of this Brief

"Marriage Breakdown" Basis for Divorce the Major Recommendation

The Pastoral Institute considers that the adoption of the concept of "marriage breakdown" and the elimination of the concept of "matrimonial offence" as the sole basis for divorce is by far the most important point for consideration by this Committee. For that reason the main body of our brief is directed to that issue. Nevertheless we consider that there are many other areas of our domestic relations law, both procedural and substantive that require amendment. We have attempted to incorporate into the partial draft "Domestic Proceedings Act" which is Appendix A of this brief, many of these changes that have come to our attention. We respectfully suggest that the work of this Committee will not be complete until a thorough review and revision has been undertaken, and we sincerely hope that the many changes suggested in Appendix A will be of assistance in such a review and revision.

While a reform of divorce law in Canada is urgent, behind that need are complex social issues. New social structures concerning marriage, the family and divorce, also can be developed in society. In Division I and Appendix B, we have tried to assist legislators in their difficult task, with suggestions in both of these areas.

(Translation)

Divorce in Quebec and Newfoundland

We deeply regret that due to the lack of technical and financial facilities we cannot prepare a French edition of this report for the benefit of our French-speaking compatriots. Any law must have the support of the majority of the citizens, otherwise it becomes an unsound law. For this reason and for others, we strongly recommend a reform of the divorce laws in the eight provinces of Canada which already have divorce courts. By the same token, the reforms which we suggest might be unsound for the provinces of Quebec and Newfoundland as they might not have the support of the majority of the inhabitants of those provinces. We have no way of knowing. For the above-mentioned reasons, we suggest that such urgent reforms apply to the eight other provinces only. (Intro. 1)

SOME HISTORICAL BACKGROUND

1. *Discussions in Alberta.*

In Alberta members of the Evangelism and Social Committee of the Alberta Conference of the United Church of Canada have been concerned with this problem for the last decade. The director of the Pastoral Institute has been a member of this committee these 10 years and on numerous occasions has presented papers, brought forward resolutions and made proposals of ways to attack the problem of marriage breakdown, divorce and remarriage.

In 1959 a resolution was approved as follows:

"Be It Resolved That:

(1) We recommend to the Federal Government that to the present grounds for divorce be added—"desertion for a three year period or a legal separation for a three year period.

(2) That we urge the Provinces to enforce existing legislation and to pass new legislation to facilitate the payment of maintenance, alimony and support to married persons living separate and apart."

2. *Conference Approval of the Institute.*

In 1961, the enabling resolution for the establishment of the Pastoral Institute was adopted. Recommendations Re Family Life:

"A. We recommend that the Alberta Conference request the Boards of Christian Education and Evangelism and Social Service to consider making funds available for

(a) Selected ministers to receive scholarships for post-graduate study in Marriage and Family Life Counselling.

(b) To establish one or more Marriage Counselling and Family Life centres in larger population centres of Canada as pilot projects in the functional ministry.

B. We recommend that Pastoral Charges encourage their ministers and lay people to take summer courses in Pastoral Counselling with a view to raising the general effectiveness of the Pastoral Ministry by

(a) Allowing extra time off during the summer season, and,

(b) Providing small scholarships where necessary to make attendance at a recognized Summer School possible."

From the opening of the Pastoral Institute in 1962, Marriage Preparation, Family Life Education, Leadership Development programs have been aimed at prevention of marriage breakdown. Individual divorce counselling, group counselling for separated and divorcing persons and family counselling for parents without partners have been essential parts of the rehabilitation program at the Institute. The needs of troubled people for help to help themselves, and the lack of community concern or social structure to help those in these circumstances have made such programs essential.

At the Institute there has been a continuous concern to get at the public issue, namely, the need to reform Canada's divorce laws. For more than a year, members of the staff, the Interprofessional, the Board of Directors and other concerned community leaders have worked actively to prepare for this presentation, proposing a new basis for Canada's divorce law. They have spoken in churches and clubs, called public and committee meetings and continued to revise and refine points in the light of debate and discussion, over the last year or more.

3. *Board of Evangelism and Social Service, February 1966.*

The work on the divorce issue at the Pastoral Institute during the previous year, provided background for the following resolution which was adopted at the Annual meeting of the Board of Evangelism and Social Service in February 1966, and for the paper by Douglas Fitch "Let's Abolish All Grounds for Divorce" which appears in the Board Report. (Intro. 2) The resolution was approved as follows:

"Canada's Marriage and Divorce Laws

WHEREAS this Board is of the opinion that Canada's divorce laws need basically to be reformed and not just liberalized; and

WHEREAS this Board is of the opinion that moderate reform is essential to bring greater stability to family life and at the same time alleviate unnecessary human suffering; and

WHEREAS this Board is of the opinion that the concept of "marriage breakdown" is a basis more suitable to the purpose of moderate reform than additional grounds based on the concept of "marital offence"; and

WHEREAS this Board is of the opinion that three years' separation of the parties is in general a suitable period from which to establish whether a marriage has in fact broken down permanently; and

WHEREAS this Board is of the opinion that there are many aspects of Canada's marriage and divorce laws that require preparatory to revision:

BE IT RESOLVED THAT THIS BOARD:

(1) Request Prime Minister Lester B. Pearson to appoint a Parliamentary Committee or a Royal Commission to enquire into the whole matter of our marriage and divorce laws.

(2) Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work actively for moderate divorce reform. (Intro. 3)

4. *Alberta Conference Study Brief in June 1966*

A brief on "Marriage Breakdown as a Basis for Divorce" was written at the request of the Standing Committee of Evangelism and Social Service of the United Church of Canada. It was prepared by the Director of the Pastoral Institute for circulation at conference to clergy and lay delegates for their study and the consideration of interested church boards throughout the conference. In the brief, theological, scriptural, historical bases were examined for making divorce on the basis of "Marriage Breakdown" the position of the church.

5. *"Putting Asunder"*

(Intro. 4) Report of the Archbishop of Canterbury was published during the summer. It came just before the meeting of the General Council of the United Church of Canada. Since it also takes the position of "Marriage Breakdown" as the most suitable basis for divorce, it has provided the best of encouragement.

6. *The Meeting of the General Council of the United Church of Canada, Waterloo, Ontario, September 1966*

Out of the years of work by many interested people has come not only the support of the Board of Evangelism and Social Service in Toronto for the position of "Marriage Breakdown". The Reverend J. R. Hord, Secretary of the Board presented the following resolution to the General Council on September 13, 1966 and gained almost unanimous approval by the delegates.

"BE IT RESOLVED THAT THIS GENERAL COUNCIL:

1. Declare itself in favour of the concept of "Marriage Breakdown" as the basis for divorce in Canada.
2. Commend the Prime Minister for inaugurating a study of this nation's divorce laws and present the official view of the United Church to the Parliamentary Committee.
3. Request Conferences, Presbyteries and other concerned groups of citizens in Canada to work for divorce reform in line with the concept in number 1 above.
4. Remind the people of the church of the need to exercise a ministry of understanding and healing in situations when a marriage breakdown is threatened or takes place."

This brief historical overview makes it clear that in 1959 we were thinking of three years of separation as grounds for divorce. But we saw it then as one more to be added to the "Matrimonial Offences" upon which divorce might be obtained. In recent years we have changed our position in the United Church of Canada to the concept of "Marriage Breakdown" as the basis for divorce in Canada.

DIVISION I

DIVORCE AS SEEN BY THE PASTORAL COUNSELLOR

The concern of pastoral counsellors in marriage breakdown, divorce and remarriage, although it may not be explicit is a three fold one.

(1) The theological task is to help troubled people to search for truth and to think in terms of ultimate concerns in life.

(2) The psychological aim is to bring them to new sensitivity and awareness in their relationships with one another.

(3) The sociological undertaking is to enable them to relate to the society in which they find themselves with responsibility and integrity.

These aims are basic for human beings if they are to grow in their capacity to relate to the Creation and their fellow men, learn how to handle crises in life and bring more truly human relationships into the family and society. This kind of concern is essential in society if men and women are to develop the ability, freely and equally, to give themselves to each other, to their families and the nation.

A Major Task

Divorce reform involves a major undertaking which cannot be done by legislation alone. In a pluralistic society such as the Canadian one, the task of creating, in the individual and in the nation at all levels, the desire to tolerate differences in values and relationships in a basic one. This, along with the willingness to try to understand and to respect different points of view and ways of life is essential to a pluralistic society.

Marriage breakdown, divorce and remarriage are of vital concern to the church both in terms of what happens to individuals, and the social order of the nation. The discussion of divorce law in this country arouses strong feelings. This involves risk for the legislator, as for the churchman. Some people hold the view that divorce is contrary to the will of the Creator and to Natural law and must not be permitted. It is seen as a threat, not only to individual fulfillment and family stability, but to the nation and the human race. Others, equally sincere, feel that all societies have permitted divorce and a vow taken at any one moment in time cannot have an absolute binding effect over all other decisions in life.

Implications Reach Far Beyond Canada

The implications of work of this Special Joint Committee on Divorce will reach far beyond the wellbeing of Canada and Canadians. This country is in a position to give the most creative kind of leadership in divorce reform. It is a high privilege to appear before this committee to encourage and support the work of politicians and other legislators in the hope that laws will be drafted and other provisions made which will better serve the people of our time.

PART 1: THEOLOGICAL PERSPECTIVE

The role of the churchman in divorce counselling is one that is not clearly defined. Thus it is important at the outset to see these remarks in the context of a dynamic theological view of creation. The implications of divorce reform reach far beyond the wellbeing of the individual and the stability of the family to the wider social order of the world community. It is our hope that Canada will set a precedent in world responsibility, with fresh and creative legislation, on this complex social problem.

A dynamic view of creation, rather than a static one, is called for if it is to be clear that man is not a finished product but still in the making. Such a dynamic view can be seen in the giants of theology in this century. Only a few can be mentioned.

Some Dynamic Views of Creation

We see in PIERRE TEILHARD DE CHARDIN, the French R. C. JESUIT-SCIENTIST real efforts to assuage modern man's anxiety. He does this by elaborating a guarantee of evolution's success. He sees that process as ultimately

founded upon the physical and dynamic relationship between Christ, Mankind, and the material world.

ALBERT SCHWEITZER will best be remembered for his summing up of theology in the principle of reverence for life: "I am life that wills to live in the midst of life that wills to live." This ethical and spiritual principle, so simply and clearly stated and demonstrated in his own dynamic life of service, has been a source of inspiration and strength to multitudes the world over.

MARTIN BUBER, being JEWISH brought to his work that special sensitivity and awareness of the power of good and evil and especially the tragedy and suffering. Essentially his contribution is a deeply sensitive exploration of the relationship between man and man, and between man and the world. "Between man and man, we meet God." In an age of depersonalization, and in experiences as isolating as marriage breakdown and divorce, Buber has been a force for keeping alive the belief that man as a person may find his fellow-man as a person and in that discovery let loose the healing power of reconciliation and love.

PAUL TILLICH saw theology as a search for meaning in every dynamic relationship of human knowledge and activity. His concern with developing a new understanding of human nature led him to study widely in psychology and the social sciences.

REINHOLD NIEBUHR has made the major theme of his life's work, the nature of man and his political and social life. He has been deeply concerned with the paradox of man's universal humanity on one hand and his petty loyalties on the other. In these facts of life he sees the root of man's inhumanity to man.

JOHN BENNETT in pointing out that one of the themes of Christian Theology which needs great emphasis today is Christian humanism, also makes it clear that the "Death of God" is proclaimed, partly, to make room for man to be himself, to reaffirm a Christian humanism.

KARL BARTH strikes the same note when he chides the church for addressing man as though he were not human. He says that man will rightly defend himself against what he is told. He will not be convicted of sin if he is uncharitably and falsely addressed concerning his humanity. The Creator does not threaten the humanity of mankind.

All this implies, according to PIETER DE JONG, that man will continue to humanize the sexual polarity in human relationships. It also means that in a dynamic creation, society will be changing continuously and divorce laws, like others, will continue to need periodically, to be reviewed.

Freedom to Decide Essential to Morality

In considering divorce reform in Canada, the important thing is to make it possible for men and women to be free to work at the "re-creation" of their lives, when necessary. Those who would be restrictive and legalistic in legislation, imply that man is not morally ready to take responsibility for decisions of such ultimate concern as divorce and remarriage. In our view, men and women must be given the freedom and the dignity to make their own personal decisions, with guiding legislation, in matters of such personal and public concern. Not until then will they grow morally, in the exercise of responsibility to family and society.

Divorce Applies Directly to the Minority

Divorce law does not apply at all to the majority of people in any society. Other solutions are sought, including neurotic suffering because the failure of divorce is not acceptable. Divorce is not easily accepted except by a minority. At

the Pastoral Institute we find practically no evidence of impulsive decisions to seek divorce. In the studies of Cuber and Harroff (I-1) the same was found. In fact the overwhelming impression is the reverse. When divorce comes in most marriages it is "an end of the rope" decision after as many as twenty years of marital dissatisfaction. Most people are not concerned about divorce until it threatens directly their marriage of that of someone close to them. It is put this way: "You just put it off and put it off. By hindsight I have wondered why.

> The state of wanting to and yet not doing it, though, isn't always the hell that it is some of the time. My friends who have been through the mill mostly agree with me—you keep hoping and no one knows what for—"

Marriages tend to drift, even though they are spiritually and emotionally dead, until an "engaging alternative" to the lackluster of the present relationship motivates one party to do something about the problem. Until then the pretense is maintained for public consumption because of the high social price of divorce.

Most Counsellors know how difficult it is for many men and women to face marriage breakdown, to accept failure, even when a marriage has broken down completely. Even the most utilitarian marriages with nothing intrinsic about them, are very stable. (I-2) They are rooted more deeply in human needs than any law can ensure. When two persons emotionally accept that a marriage has broken down, they are spiritually divorced already, and no legal structures can make a marriage for them by making divorce unattainable. And divorce can be made quite unattainable to many people either by costs that are prohibitive, as in the case of the Russians, (I-3) or on the grounds of adultery or collusion, both of which may be unthinkable or unattainable to the parties involved.

It seems to take economic crises to bring the financial and political power elites to awareness of a threat to the stability of national life. But to the churchmen, especially the pastoral counsellor, the economic is not the most basic factor in the dynamics of world creation. In theological terms he must examine continually the various factors involved. It is out of his philosophy of religion that his capacity for sound guidance will come for helping persons to think through in depth, the economical, sociological and psychological factors.

People Turn to Church for Help

The Report of the Joint Commission on Mental Illness and Mental Health in the U.S.A., indicates that more people turn to pastors in times of trouble than to any oher profession. In volume 8 of that report, Richard V. McCann says:

> "In a national study conducted for the Joint Commission on Mental Illness and Health, Gerald Gurin, Joseph Veroff, and Sheila Feld (1960) found that 14 per cent of their 2460 interviewees had gone somewhere for help about emotional or psychological problems at some time in their lives, and 42 per cent of these had gone to the clergy. The rest had gone to social, educational, or mental health agencies, the family physician, or to a psychiatrist or psychologist. The clergy were appealed to more frequently than any other resource for help in time of distress." (I-4)

People turn to pastors and pastoral counsellors especially in times of marriage, divorce and remarriage because these are matters of ultimate concern. We found at the Pastoral Institute in the first two years of operation, that over 40 per cent of the persons who came for help had neither a pastor nor a parish. They still turned to a program that is sponsored by the church for help in times of deepest trouble. Those who believed that only "church people" would go to a church sponsored service for counsel were quite surprised to see what actually happened.

Human Relationships

It may be an oversimplification to say that families today have little patience with attitudes of fear, mistrust and intolerance that curb their individual

freedom to try to make choices that are morally right and socially responsible, for their families and their society. They do despair of static and rigid views of life held by persons and institutions. Any dogmatism, whether by the controlling parent, church court, or government legislation, is seen as an obstacle to progress and out of touch with the real world—a means of perpetuating the kind of strife in the family, community and the nation which leads inevitably to unnecessary suffering and chaos.

Multitudes of young families see more clearly than their elders that any policy on marriage breakdown, divorce and remarriage which is based on fear, mistrust and ignorance of different points of view, must give way to guidelines that issue from faith, trust, and education, if life is to be more human in the family, in the nation and the world. Neither the sexual relationship in a good marriage nor the adulterous one in a threatened marriage, are the only factors. Nor are they even the basic factors. *The dynamics of human relationships are the powerful factors in human life, and these are learned long before marriage ever takes place.* They influence the climate of the whole family, the destiny of nations and the future of the phenomenon of man. Just as the sex relationship in life may reflect, as a barometer, something of the relationships of the marriage, so adultery in marriage breakdown can be no more than a symptom or an evidence that there may be a degree of breakdown. Adultery in itself cannot be taken as evidence that a marriage is completely broken down. The secrecy, the hypocrisy and the pious verbiage both in the courts and the church about this matter only evade life as people know it to be.

PART 2: PSYCHOLOGICAL FACTORS

Dynamic forces are at work in human relationships that either greatly strengthen or diabolically distort the whole outlook of couples depending on whether or not they have mastered the potentials of human relationships for achievements and blessings. The pastor-counsellor-educator in the church and community needs to make it clear that atomic energy and human energy are forces of comparable magnitude in the world. Each can be used for good or for evil or both. Man lived in blissful ignorance of atomic energy for thousands of years. But his awareness of having to relate to other people in all kinds of other relationships, including the sexual, has been there from the very beginning. As for his use of these relationships, almost every adjective in the language is applicable in our time—selfish, devoted; bestial, tender; sordid, beautiful; neurotic, inspiring; violent, gentle; a slave to, a master of. The will to live, and to live well in marriage, is a powerful and dynamic force in life. The moral use of it is a challenge to the human race.

Misuse of Sex for Divorce is Destructive

Whenever a culture has tried to build a morality on the assumption that sex is evil, the results have always included weakness of character and distorted personality. (I-5) The distorted use of the sexual relationship in marriage as a basis for divorce is diabolical. It is a demonic use of one of the precious gifts of life that not only damages the psychic life of individuals, but undermines the moral structure of the nation.

In terms of social structure, it might be argued that Canada's present divorce laws bring incalculable and unjust suffering to people. Church and government must act together to correct this social evil or appear to be more in the role of the "guilty parties" than any individuals involved in divorce actions.

In a paper presented to the National Council of Family Relations meeting in Toronto a year ago, Dr. Steven Demeter, social worker at the North York and Western Family Service Centre put it even more strongly.

> "A husband can abuse his wife physically or mentally for several years, he can desert her, he can be gaoled, sent for life into a mental institution, but the wife cannot divorce him. A wife can put poison in her husband's coffee every morning; she might be locked up for it but he cannot get a divorce. In this country one can choose his domicile, can switch his religion, become an atheist, one can change his job, join any political party but one cannot get a divorce regardless of how much damage is done to the children who are the real victims of an unhappy marriage, and irregardless if one partner is slowly or rapidly driving the other to a nervous breakdown and to the mental hospital."

When divorce laws are written to help people direct their inter-personal relationships to moral objectives—life fulfilling objectives,—then, and only then, will they make for the strength and the integrity that gives stability to family and national life.

It is tragic from the Pastoral Counsellors point of view, when sex for so many, even today, tends to be regarded as evil, rather than as one of creation's gifts. It is equally tragic that a sexual offence such as adultery should be made the grounds for destroying a relationship that could be good in every other way. Rather, such marital offences should be seen as evidence of the need for seeking out proper help in getting at the relationships where the real problems are to be found. A human being's needs for love and a sense of worth are stronger than the physical sexual one. (I-6) When men and women become involved in adulterous relationships, these often are substitutes for relationships of meaning and worth which they are being denied. The Pastoral Counsellor tries to get at these relationships, in terms of the ultimate values and the specific needs of the persons; the needs to be respected and to be related to others. There is no doubt that the misuse of sex has been made to play a major role in both family and world suffering and evil, even by well intentioned religious people. But in considering the history of mankind it cannot be doubted that the most important role that the sexual relationship has played, has been for the world's good. It is urgent that Canada have new divorce laws that reflect the knowledge of human relationship that is available.

Mature Pastoral Counselling Needed

The Pastoral Counsellor, working with families in marriage breakdown, divorce and remarriage needs to be mature in his understanding of marriage relationships and of society's attitudes toward them. This is essential if he is to be helpful in bringing people to an awareness that relationships with other people are complex and difficult to handle. Love at first sight is a moving and compelling experience. As young people say, "We are being swept along by something bigger than we are". But love after 50 years is a blessing for which we might sing the doxology. It is known that physical attraction is by far the most common cause of marriage. But cherishing that attraction through life is far more of a spiritual than a physical achievement. For every couple who do not adjust physically, there are dozens whose minds never meet at all. That is, they never meet in a way that they can carry on intelligent conversation and enjoy companionship, sexual and otherwise, as men and women for a life time. The pastoral counsellor needs to be able to help couples to assess and improve their communication if they are to be able to resolve the conflicts that are inevitable, in ways that bring them closer together rather than cause them to drift into isolation, from one another. Otherwise, they become two lonely strangers under the same roof and marriage breakdown happens even if divorce does not follow.

Complete Fulfillment, an Unrealistic Goal.

One thing should be kept in mind if family life education and marriage counselling are to be realistic. Many married and unmarried people live happy and significant lives without the fullest satisfaction of needs. The problem as seen clearly by Fairchild:

> "Entering marriage with romantic expectations, a couple expects to find in marriage complete fulfillment, a hope the Christian will regard as idolatrous. Modern Americans expect too much of marriage. They make greater demands of it than any other people; they want greater rewards from it psychically and physically. In our depersonalized, lonely society where it is the rare human being who dares to be more than a "part person" in the competitive swirl of activity, we try to get everything out of this one relationship. Satisfactions which, in other cultures, are found in wider family contacts, in work, in religion, and in the community are now expected from husband, wife, and children alone. Thus we make demands upon marriage, but not necessarily the right demands. We have high expectations, but not necessarily reasonable expectations. Consequently, disillusionment and disappointment are almost inevitable and they follow in the wake of idealized romantic love." (I-7)

In the dynamic views of the theologians of today, the Creator has not "created them male and female" without intending that sex should be a powerful force for good. It cannot be overstated, that, to make it the basis for destroying marriage, is evil. Thus, the pastoral counsellor is concerned that "marriage breakdown" be the only basis for dissolving a marriage. Again, adultery may be one evidence that the marriage is in trouble. When divorce is sought it should have to be proven in court whether adultery was casual or indicates that a marriage has broken down. *Adultery may point to the need for counselling and family life education rather than divorce.*

Churchmen who assume that permitting divorce on the basis of adultery is justified, presuming to follow the scriptures, may not have appreciated the depths of motivation that Jesus Christ considered.

> "You have learned that they were told, 'Do not commit adultery'. But what I tell you is this: If a man looks on a woman with a lustful eye, he has already committed adultery with her in his heart." (I-8)

Man is quite capable of using any relationship in an immoral way and thus defeating the purpose of stable marriage. Anyone who is in doubt about the superficiality of this appreciation in Canadian society might spend an afternoon in court to observe the "divorce mill" in action. Thus it is necessary to work with governments who have to legislate for society where multitudes, many of them nominally Christian, do not think biblically or theologically when seeking solutions to problems of marriage breakdown.

Psychological Tests Useful

The use of psychological instruments at the Pastoral Institute provides a more specialized and objective way of assessing marriage breakdown. It can be appreciated more clearly whether emotional and spiritual divorce have occurred or not. The psychological factors have to be taken into account in the courts. The therapeutic principle should be taken into account in drafting legislation, if divorce law reform is to solve some of the present dilemmas.

The problems of money, religion, inlaws, alcohol and sex are not usually the causes of marriage breakdown. Often these are symptoms of psychological failure to establish communication, or of a breakdown of that communication. Psychosomatic ailments, neurotic patterns of behaviour, office affairs, alcoholic reactions and inlaw problems can hardly be considered satisfactory solutions to

poor psychological adjustments in marriage. When these are faced, at the deeper level of interaction, marriages often are better than before the crisis occurred. *Divorce is only one solution to marital problems and should always be considered a last resort;* only available when the marriage is psychologically broken down and spiritually dead. When a marriage is clinically beyond repair it should be dissolved. This is the time when pastoral counselling is urgently needed. It is when dissolving families are carefully counselled by pastors and others, that divorce is less disturbing to parents and children alike.

Psychological Awareness

In the world of today people are more concerned with psychological motives and meanings than in former times. This is more closely related to the pastoral counsellors' concern too. Legislation must be designed to make the family and society more truly human, loving and fulfilling. Before this can be done, careful study needs to be made of motivation. To concentrate on the actions of the "matrimonial offences" as a basis for divorce does not do justice to the research of this century in psychological depth. It is no longer acceptable that so many persons be tempted to commit adultery or perjury, which are neither theologically nor psychologically acceptable to them, in order to get out of a marriage that has broken down. The research in the complex motives of human life has yet to be taken seriously in drafting divorce legislation. The legally "innocent party", many times may be more psychologically guilty than the legally "guilty party".

Adding "Grounds" is not the Answer

The pandora's box of legal grounds for divorce, based upon the "matrimonial offence", in most countries, is evidence of the struggle to do justice to persons whose marriage is in trouble without coming to grips with the "marriage breakdown" as such. The determination of guilt and innocence in matrimonial offence is difficult, if not impossible, even with psychological tests and counselling. But "marriage breakdown" can be established with some certainty without the sinister need to establish blame. The mutual psychological involvement of both spouses in marriage breakdown must be given its due. The Archbishop's report puts it:

> "As for the doctrine of breakdown of marriage, its virtue is that it calls attention, not just to actions, which when taken out of their context in particular marriage relationships can only mislead, but to the marriage relationship itself. If that relationship comes to be considered as a whole, then there will be a prospect of particular actions arising from it being interpreted aright; and if in consequence the depth and complexity of the relationship receive wider recognition, that will not decrease, but rather increase, the seriousness with which marriage is approached." (I-9)

When working with marriage breakdown, the pastoral counsellor will meet two sinister enemies—fear and guilt. These will come out of a breakdown in communication between a couple. The church has done more to destroy marriage than to prevent immorality, or divorce either, in using fears, taboos and guilt in family life education. Our approach is becoming more wholesome and positive but the guilt and shame motivations are still with us. They come out of the home backgrounds of the people who get married and they will be brought into new marriages from those backgrounds regardless of the other factors involved. It is here that the theological perspective of the pastoral counsellor is brought to bear on the psychological factors.

Divorce and Realized Forgiveness

The Creator's love and the pastoral counsellor's compassion for the rehabilitation of those who have failed are indispensable. In the case of marriage

breakdown, compassion should be exercised, help given, and divorce and even remarriage permitted. The prerequisite for remarriage, however, must be "realized forgiveness", says James Emerson in his book, Divorce, the Church and Remarriage. (I-10) This is the awareness of forgiveness, realized in the human relationships involved, to such a degree that a person is free from the guilt he feels and from the traits in himself which contributed to the first marriage failure. Only when personal responsibility for the divorce is understood and accepted, can a second marriage be a blessing. It is this awareness that has led the Pastoral Institute to develop new ways to help divorced persons. (Such as those proposed in Appendix B-2 and 3).

PART 3—SOCIOLOGICAL CONSIDERATIONS

The concern of the church, sociologically, is to see Canadian society undergirded with stable family life based upon responsible freedom and integrity. How is this possible? Sociologists are making it clear that family breakdown, like many other problems is a complex one in character and cannot be solved without some major changes in social structure. It is essential to recognize the magnitude of the task if we are to be able to accept the patchwork and pilot project nature of attempts such as the Pastoral Institute and its new patterns of programming. It is necessary to experiment with new structures and be willing to demonstrate, on a small scale, what might become large scale patterns of approach.

The sociologist helps other professionals and the public, to recognize and understand the damaging experiences of persons who are either going through a divorce; the dehumanizing, and for many, even degrading grounds for divorce in this country; the colossal insult to self respect of persons having to consider collusion or adultery to legally dissolve a marriage that is emotionally and spiritually dead. The sociologist assists the pastoral counsellor, the social worker, the psychologist, the lawyer and others to see the cultural differences, the socio-economic disparities, effects of urbanization and the pressures that these put upon family life. He explains to the legislators and the public the therapeutic principle essential to the court as suggested in Appendix A in proposing "the Domestic Proceeding Court"; interprets the place of Family Life Education and Counselling to the community and the courts; and clarifies the nature of social change in the area of marriage breakdown, divorce and remarriage.

The sociologist knows that it is not just a matter of drafting new divorce laws in this country; but attitudes of whole segments of society need to be appraised and changed. For example, the church has to make clear to the public its position concerning legislation and services for a pluralistic society, which may not be acceptable to the members of the church themselves. The aim is not to try to impose Christian requirements upon those who may not be Christian.

When we talk about the reform of divorce law in Canada we need to be clear about the goal. If we want to reduce the divorce rate it is easy to prohibit divorce or remove it from the majority by costly litigation. By stringent laws that would violate other values it would be relatively easy to ensure stability of the family. Happiness of the family as a goal is probably impossible to achieve in modern urban society. The goal of individual happiness is not entirely acceptable since many people have to be considered in the divorce situation. We want healthy homes for the children of the nation but just how do we get them? The stable home based upon responsible freedom, happiness, integrity, is an acceptable goal but it involves work on many fronts. It means

more than counselling individuals and families to change their attitudes toward one another, important as that might be.

There are many major tasks to be undertaken with vision, knowledge, and above all, planning together on an interfaith, interdisciplinary basis, if the leadership is to be forthcoming.

The main attacks which are being made on the problem are listed by William J. Goode, (I-11) as follows: (1) legal reform; (2) family counselling; (3) individual therapy; (4) clerical advice; (5) family life education; (6) techniques for the prediction of marital happiness.

At the Pastoral Institute several new structural approaches to the whole complex problem are being tested as pilot projects. Some of these are (7) Premarriage and Marriage Assessments both on individual and group basis; (8) Conjoint Family and Group Counselling; (9) Personal Acquaintance and Marriage Introduction Services; (10) Supervised Internship Programs.

Some elaboration of the above approaches to divorce prevention may clarify a few points.

(1) Legal reform is what brings us here and the government is to be commended for undertaking a problem so thorny and complex. The widespread acceptance of the position of the United Church of Canada and the Pastoral Institute we hope will make clear, beyond a doubt, that there is a significant "ground swell" of support for divorce reform—and reform, based on the concept of "Marriage Breakdown" as the sole basis for divorce.

(2) Family counselling is becoming an important part of the training of many professions. Teachers, physicians, lawyers, social workers, clergy of all faiths and many others are taking graduate training under supervision. The training programs of the Pastoral Institute since its opening in 1962 have been oversubscribed with those seeking further training. Internship programs are being planned to give continuous training opportunities in the churches under the supervision of the Institute. But we are hardly "scratching the surface".

(a) The need for trained personnel is great.

(b) Many will not come to counselling agencies and this increases the need for clergy, physicians and others to have better training.

(c) The need to learn from the sociologists how to relate to the lower socio-economic groups is a real one. All groups work best with those of the YAVIS (young, attractive, verbal, intelligent, successful).

(d) While counsellors work with individuals and families, the sociologists must be heard if we are to get at the public issues and social disorders that produce individuals, who cannot build stable family life. The reform of the divorce laws might change some of the structural problems for many families—for example; those living common-law because one or both partners cannot get out of a previous dead marriage.

The awareness at the Pastoral Institute of the public and sociological issues involved, which bring so many troubled persons and families for help, led to the preparation of this brief. The dilemmas and suffering of an estimated 400,000 Canadians living common-law and many more who haven't come to that,—yet, require that these public issues be faced and dealt with according to the knowledge which social scientists provide.

(3) Individual counselling and psychotherapy is only a partial answer for many people. Many divorced are not pathological, or emotionally unstable in any clinical sense, even though they cannot relate to a particular marriage partner. Many spouses are disillusioned to discover that the therapist had little effect on a problem that involved the whole family, or the whole community.

(4) The clergy have the same problem in their pastoral counselling and do not have the same authoritative role today as they once had. Although those who seek the pastoral counsellor usually are well motivated and desire to change attitudes, it seems to be symptomatic of our age that many do not follow through on programs of individual or group counselling long enough to benefit. Distractions are everywhere in our affluent society and the sociologist along with the mass media are needed if the public is to have an awareness of resources and how to use them.

(5) Family Life Education is a burgeoning field and at least recognizes that the problem lies in the socialization process, in the childhood period. New processes must be introduced if new kinds of persons are to emerge. Too often the programs touch only the high school students as our Sex Education Seminar at the Pastoral Institute did in the beginning. But as programs develop, it is our experience that in these programs we tend to move both ways from the teenage group which causes most concern, that is, to programs for parents and younger children. Family Life Education is a community responsibility and should involve home, church, school and other groups. It should be directed at influencing attitudes, relationships and goals in life rather than mainly the mind and body.

(6) When the psychological factors are taken seriously by churchmen and pshychological testing is used at the pastoral counselling level, significant guidance can be given in predicting sound marriage as well as marriage breakdown. The Pastoral Institute files bear out that it has been possible to predict excellent marriages and to anticipate trouble ahead. Couples have returned after a few months, sometimes several years after marriage, to express their appreciation for the help they received in preparing for sound marriage. Others have returned to seek further help in avoiding marriage breakdown.

But there are a number of problems which require thorough researching if marriage prediction is to be taken seriously and make its potential contribution. That research may be undertaken some day at the Institute.

(7) Premarriage and Marriage Assessments.

The Personal Data Kits developed by the Pastoral Institute for the purpose of assessing engagement and marriage strengths have been based on 25 years of research and development of suitable Temperament Analyses at the American Institute of Family Relations in Los Angeles. We have drawn upon 10 years of similar scientific work with other assessment instruments at the Bradley Centre in Columbus, Georgia. Considerable use also is made of inventories, checklists and analyses developed by Family Life Publications, Durham, North Carolina.

The Personal Data Kits used at the Pastoral Institute have been developed especially for the parish clergymen, family physicians and social workers. Most of the procedures used have been tested over the years in regular pastorates. Many rural and urban churchmen of various faiths, trained in the seminars conducted by the Pastoral Institute each year, make use of these kits. They find them helpful in assessing the communication and soundness of engaged couples doing into marriage, to evaluate the strengths of a marriage and to indicate the breakdown of marriage. (See Appendix B. 1)

(8) Conjoint Family and Group Education and Counselling.

Family counselling by the conjoint method, that is by seeing all the members of the family at one time in the same room, is an innovation that was ignored until Nathan Ackerman (I-12) in New York, Dr. Murray Boiven at the National Institute of Mental Health, Bethesda, Md. and Dr. Donald D. Jackson. (I-13) Director, Mental Research Institute, Palo Alto, California and others tried it.

Conjoint family counselling does not consist of one person and one counsellor but takes the approach that the person's condition is not unique in his family

but is symptomatic of underlying family distress. Failure in family communication can be largely responsible for conflicts in the areas of money, religion, inlaws, sex, alcohol and in the handling of children. Families with good communication tend to handle all these areas of life effectively.

At the Pastoral Institute a large part of the long term counselling is carried out in groups. For practical reasons, "open groups" have been chosen for most of the group work. There are advantages to this approach, in that counsellors time goes further, many persons respond quicker and they can leave without disrupting the group or reducing it to an ineffective number. (See Appendix B. 2).

(9) A Personal Acquaintance and Marriage Introduction Service on a National basis and under the auspices of the church is being planned and proposed by the Pastoral Institute. Sociological research has provided some useful guidelines for this new kind of social structure. (I-14) It is anticipated that it will effect some necessary changes in Canadian society. We have been encouraged to feel that many persons would trust a pastoral non profit approach in such delicate and personal matters when they would not trust a business or agency approach. More and better marriages (I-15) can be brought about if this challenge is undertaken by the churches. The clergy know who many of the single, divorced and widowed persons are who will never meet a suitable partner without the acceptance of what may seem to many as an unorthodox way of meeting a partner. The churchmen of Canada can do more about this problem than anyone else and we plan to go ahead with it immediately. (See Appendix B. 3).

(10) Supervised Internship Programs on an interdisciplinary, interfaith basis are being developed by the Pastoral Institute. Pastors, Educators, Counsellors and others will be given various kinds of opportunity for supervised training. The goal is to prepare clergy and laity to use their lives with more maturity. This would come out of supervised experience and training while working with the real life situations and at the public issues involved. (See Appendix B. 4).

In short, the sociologists help us to see that divorce is a social problem more than an individual one. The divorced person bears an unjust burden of isolation at the hands of an uncaring society that hasn't faced up to its responsibilities. Some basic factors have to be recognized and faced if the ten approaches suggested above are to be effective. Some of these are:

(1) Grounds for divorce and other precipitants. What brings the final decision to seek divorce? There are any number of symptoms: adultery, drunkenness, desertion, non support, incompatibility, immaturity. These and many more are consequences of deeper and sociological processes. "Marriage Breakdown" as the sole basis of divorce, we believe, would precipitate divorces on a basis of more integrity.

(2) Marital Discord: What forces in society contribute to the breakdown of marriage? There are many: confusion of male and female and parental roles in the home, false expectations of marriage, credit buying and other socio-economic forms of insecurity, dating patterns in the community, lack of responsible family life, sex education, different cultural and religious backgrounds, work opportunities for mothers with small children. Most of these are on the increase in urban society and make urgent the focus on preventive, educational approaches.

(3) Ways of solving Discord: Why do some see divorce as a solution and others wouldn't consider it? It is claimed that there is less stigma on divorce. But it may be that divorced persons in an urban society can more easily avoid those who do not approve. The greater possibility of happy marriage and remarriage are important factors to be concentrated upon as we work at the total divorce problem.

The increased opportunities for divorced persons to maintain themselves and to get free of the spouse is more real today. The basis of divorce itself is the factor that concerns all of us because of its importance as a force that will contribute to divorce. It is not possible to know how much "Marriage Breakdown" as the basis of divorce would improve the divorce rate, but we are confident that the risk should be taken and adjustment made as results become clear.

The great task before all of us is to make a concerted attack upon the basic problems of marital discord and easy divorce. All of the above described approaches, and any new ones that can be established, will be needed, because, these distresses are woven deeply into the fabric of the national life. A basic change in divorce law would help to focus efforts for the conserted, and cooperative undertakings proposed in this brief.

PART 4: COMMUNITY ORGANIZATION FOR DIVORCE PREVENTION

In summary, divorce from the point of view of the pastoral consellor is a complex problem of the community and society as a whole. The individual caught in the problem can be expected to bear only his personal responsibility in marriage breakdown and divorce. This needs to be balanced with the acceptance of a great deal more responsibility and concern by the community.

The churchmen's role in marriage breakdown, divorce and remarriage needs to be defined further, in terms of providing leadership and prospective, not only to his congreation, but as one of the team of community leaders.

The clergyman's participation is essential, but, if he is to be trusted, he should not be overly eager. When dealing with matters of such emotional involvement and suffering for many people, as marriage breakdown, the confidence of the community and its leaders has to be won. Move carefully and plan well for a comprehensive approach to the whole problem. Work with the leaders of the community so that they understand and accept the aims and the methods of approach. Some of these suggested steps might lead to a more positive outcome and more action than in the past.

(1) *Establish a Leadership Group.*

Try from the beginning to establish a leadership group of as many elements in the community as possible. It is important to help people recognize that divorce is a community problem, not just an individual or family failure. Each one in his own role in the community has a contribution to make. There should be school administrators, teachers, parents, clergy of all faiths, medical and other family helping professions, the communications media and others that may be known in the particular local communities to be interested.

(2) *In a series of meetings, explore the problem.*

Consider such questions as: What is causing marriage breakdown in our society? How can we understand the plight of those whose marriages have broken down? How can we help to meet their needs in church and community? How can we build a preventive program that will help to build more sound family life in this country? What exactly do we want family life education to accomplish? When should information about sexuality of man and sex education and family planning be brought into the programs and how? Who in this community can give leadership and perspective to the program that will lead us to the goals that we want? How can they be trained and be prepared for responsibility? How do we interpret to the community what we are trying to do in family life education, in family counselling, in marriage introduction, in leadership training.

(3) *Provide the leadership groups with study materials.*

The literature should be the kind that will expend their knowledge and understanding of the theological, psychological, sociological, the morea and socio-economic issues of marriage breakdown, divorce and remarriage. Provide a solid ground work for continuing discussions on the basis of the strengths and the stabiliites of family life.

(4) *Involve the young people in the dialogue and the planning.*

Find out what it is that they want, what their needs and questions are; how they see their responsibilities in the days ahead. Involve each age group in planning for the group next younger than themselves in any educational programs.

(5) *Involve the Adults.*

Make sure that any effort to educate the young about responsible human relationships are matched by the efforts to the same with the adult population.

(6) *Family Life Education is a continuing process.*

It should be kept clear that the community cannot settle for a one-time stand, on an issue as complex as family breakdown and divorce. The goal—adults capable of using their humanity and their sexuality in mature and responsible ways—cannot be reached by a few lectures or speeches, but only by a continuing thoughtful approach at every level by all responsible persons and agencies in the community.

(7) *The Moral Issues are not new.*

Churchmen should realize and help others in the community to do so, that the moral issues which underlie divorce are no different from those concerning any other relationships in life. The whole community can be challenged and inspired to join in clarifying how people of all ages, races, religious at all economic levels can relate to each other creatively and nonexploitative in the many relationships of day to day living. Open discussion of these moral issues can go on in the homes, schools and the churches each within the special pattern of belief of it own communion.

(8) *The Need for Leaders.*

The big question that keeps most people from acting is—"Where can we find the persons trained and highly skilled in this type of educating and counselling?" And the answer of many who have been in the communities is, "You have them right there with you". As discussions and dialogue develop they will identify themselves. One way or another people with background wisdom, skill, ability to communicate comfortably and openly with young people and with troubled people, will come forward. They are already there. They may be the physicain, the home economist, family life educator, the nurse, guidance counsellor, physical educator, psychiatrist, social worker, youth worker, clergyman, elder, deacon, home and school person in the community. It remains for local representatives of the ministerial, medical, teachers, social workers associations to identify persons who might give leadership, to give them the supported opportunity to do so, and to help them to grow in that responsibility.

(9) *Community Workshops.*

The next step in bringing this about may be a series of community-wide training workshops for those who deal directly with family life education programs or work with those who are caught in the troubles in marriage breakdown, divorce and remarriage. As knowledge and experience grow, the leadership will grow too. It will broaden its outlook and want to share its findings and recommendations with others.

(10) *The Key is Community Willingness and Undertsanding.*

Remember that no preventive family life education program; no counselling program, for those caught in the suffering of marriage breakdown, divorce and remarriage will grow any faster, nor be any more successful than its own community's willingness and ability to understand and support it. One of the most important contributions churchmen can make, as community leaders, in these areas, is to foster this kind of community willingness, understanding and action.

DIVISION II

SOME ARGUMENTS FOR "MARRIAGE BREAKDOWN" AS THE SOLE BASIS FOR DIVORCE

PART I: INTRODUCTON

The difficulties that Canada's divorce laws place in the paths of both marriage reconciliation and marriage dissolution where each is required have often been discussed at the Pastoral Institute, particularly in our Interprofessional Advisory Committee. The Alberta Conference of the United Church of Canada first went on record in favour of a form of "marriage breakdown" as long ago as 1959. One member of our I.P.A.C. spoke publicly on the matter in August 1963 and again in December 1965. By far the most authoritative and persuasive discussion of "marriage breakdown" is contained in "Putting Asunder", the report published in July 1966 of a group appointed by the Archbishop of Canterbury to recommend any appropriate changes in the divorce law of the United Kingdom. That report unequivocally endorses "marriage breakdown" as the sole basis for divorce. We respectfully concur with their recommendation.

PART 2: THE BASES FOR DIVORCE

"Only Four Bases in the World: Unilateral Declaration, Fault, Consent and Marriage Breakdown"

There are only four bases for divorce in the world, unilateral declaration, fault, consent and marriage breakdown. (II-1)

Unilateral divorce is the system in parts of the world such as Islamic countries where the husband has the power to divorce his wife generally without cause.

The concept of "fault", or "matrimonial offence", or "grounds" as it is sometimes called, chiefly adultery, cruelty and desertion, has been the only basis for divorce throughout most of Western Civilization until the present century when it is gradually being eroded by the concept known as "marriage breakdown".

"Fault, "consent", and "marriage breakdown" are each considered in detail in this brief. It is conceded, however, that these categories are not mutually exclusive; matriomonial offences such as adultery and cruelty are evidence that a marriage may be breaking down. And all bases contain an element of "divorce by consent", indeed, most divorces in Canada in substance are "consent divorces", although the form of the "matrimonial offence" is retained. And even in jurisdictions where particular matrimonial offences provide the only basis for relief, the courts have tended to interpret offences such as cruelty and desertion so as to make them under-cover substitutes for a general provision envisaging culpable destruction of the marriage.

PART 3: "DIVORCE BY CONSENT"

"A Red Herring"

Society has a vital stake in maximizing the number of life-long happy unions among its members, and "divorce by consent" is thought by most people

seriously to impede 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 1956 report of the *United Kingdom Royal Commission on Marriage and Divorce* (*The Morton Report*), 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." (II-2)

In the United States of America, one-quarter of all marriages end in divorce, mostly by "disguised divorce by consent". (II-3) There is a tendency among persons who reject a sacramental view of marriage to go to the opposite extreme and favour easy divorce. Strong reasons in terms of human welfare can be advanced for rejecting easy divorce.

"Putting Asunder"

"Putting Asunder" is the Report of a group of fourteen members of the clergy, the English Bench and Bar, and others concerned with marriage counselling and related fields, appointed by the Archbishop of Canterbury.

> "in the hope of discovering whether a new kind of law of divorce might be devised such as would be free from the most unsatisfactory features of the present English law and yet would not weaken the status of marriage in the community." (II-4)

After an 18 month study, the Group in July 1966 recommended "marriage breakdown" as the sole basis for divorce and against "divorce by consent" as follows:

> "The fatal defect of the consensual principal is not that it requires both parties to agree in wanting divorce (that spouses do agree on this not infrequently is a fact a realistic law needs to take into account), but that it subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community's interest in the stability of marriage. Moreover, if the covenant that initiates marriage is to be revocable by mutual consent, its intention cannot meaningfully be called "lifelong": provision for divorce can be reconciled with a lifelong intention only if divorce is subject to an authority that is independent of the will of the parties. Therefore we must emphatically reject divorce by mutual consent. Dissolution of marriage ought always to require a real exercise of judgment by the court, acting on the community's behalf." (II-5)

"But It Can't Be Eliminated"

Having stated the foregoing, it must be candidly admitted that no divorce law can entirely eliminate "divorce by consent" and the sooner this fact is recognized the better. In most cases that come to court, both parties want the marriage dissolved, and both are doing and refraining from doing all in their power to obtain the dissolution. Adultery and cruelty are magic keys which quickly unlock the door to freedom from the marriage. Proof of adultery or cruelty is obtained in most cases with the co-operation and consent of both parties.

"Canada Already Has Divorce by Consent"

A Canadian divorce, which may be based upon proof of a single isolated act of adultery, and is in the overwhelming number of cases unopposed, is in substance if not in form, a "divorce by consent". Adultery probably occurs in most cases when the spouses are separated for any substantial length of time, for, as stated by Judge Swift, the parties are placed

"in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings." (II-6)

Production of the evidence of the adultery, not the adultery itself, is usually the problem that cannot be solved without the consent of the adulterer. It is not unlawful for the spouse who is in fact guilty of adultery to furnish the other spouse with evidence of such adultery or to agree to facilitate the obtaining of evidence of such adultery. (II-7) "Consent" in obtaining the evidence of the adultery is thus the key to the obtaining of the divorce and the matrimonial offence is only incidental.

PART 4: THE QUICKIE DIVORCE-QUICKIE REMARRIAGE

"The Real Threat"

The "Quickie Divorce-Quickie Remarriage" is the real threat to the stability of family life, not "divorce by consent". As pointed out in the Registrar-General's Statistical Review of England and Wales for 1952,

"the bulk of divorce proceedings are instituted with a definite intention of subsequent, immediate remarriage." (II-8)

The best self test for a spouse considering divorce to ask is this:

"Is this marriage so bad that I would prefer no marriage for a substantial length of time, in its stead?"

If persons were unable to get a "Quickie Divorce-Quickie Remarriage", we believe many people would try to make their marriage work to avoid going through a period of "no marriage". Only by eliminating adultery and rejecting broadly defined cruelty and other grounds used for the "Quickie Divorce-Quickie Remarriage" can this practice be eliminated and family life stabilized.

As stated by Dr. Richard Foregger, St. Joseph's Hospital, Milwaukee, Wisconsin:

"If legislatures are willing to prohibit remarriage after divorce for a year, then they certainly should (as a preventive measure) be willing to prohibit divorce actions for a year while one or the other partner is undergoing therapy in the hope of saving the marriage." (II-9)

PART 5: CRITICISMS OF ADULTERY (ESPECIALLY A SINGLE ISOLATED ACT AS A BASIS FOR DIVORCE

"Seldom the Real Cause"

Lord Chancellor Birkhenhead, House of Lords, 1920

"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 . . ." II-10)

Sir A. P. Herbert

"Is ten minutes of adultery worse than three years of desertion or a lifetime of cruelty?" (II-11)

Father James Roberts, "The B.C. Catholic, 1966"

"...the moral offense (which may have been a single, unpremeditated lapse) is used vindictively as a punishment meriting divorce. Adultery is the axe that splits the marriage asunder. The United Church thinks this is unfair to the complexity of the marriage relationship and that consequently divorce based on such grounds alone is a social evil." (II-12)

Dr. Richard Foregger, St. Joseph's Hospital, Milwaukee, Wisconsin, 1966

" ..the third person making the triangle generally is the result of the previous marital discord and tension—not the cause of it..." (II-13)

"Time" Magazine, February 11, 1966

"...the whole U.S. approach begins with a disastrous premise. Instead of recognizing that both parties are almost always partly to blame, U.S. law demands verified proof of "fault" by one partner—and only one. The insistence seems almost sadistic: the "innocent" party must prove his or her mate "guilty" of offences for which divorce is the punishment. The result is that the typical U.S. divorce trial is a farce that totally abdicates society's interest in salvaging marriage whenever possible."

The Pastoral Institute

The single, isolated act of adultery proven in court is merely the key that unlocks the door to freedom. Dr. Kinsey told us 17 years ago that half of all married men commit adultery, and later surveys indicate the percentage is probably even greater. It is not hard to prove adultery if both parties want it to be proved. But if the defendant chooses to defend the action, it is often difficult to prove adultery. The anomalous result is adultery used as a means to obtain a "Quickie Divorce-Quickie Remarriage" by consent, and where there is no consent, adultery can seldom be proven and no relief is available to the injured party.

PART 5: DANGER OF MULTIPLYING "MATRIMONIAL OFFENCES" OR "GROUNDS"

"Pandora's Box"

As shown by the various private bills introduced in the Twenty-Seventh Parliament, each reformer along conventional lines of matrimonial offence offers a different list of "matrimonial offences". More than 47 "grounds" have received the approbation of legislators in the various United States of America including the following:

"public defamation of the other"
"indignities"
"incompatibility"
"the joining of a religious sect believing cohabitation unlawful"

Parliament should not open this Pandora's Box of "grounds" or "marital offences" for as the years go on there will always be pressure to add new and flimsier marital offences or grounds to the list. We should not debase this vital institution by permitting the instant dissolution of one marriage for trivial reasons and the instant contracting of another. Genuine marital offences such as repeated adultery, extreme cruelty and desertion are valid reasons for relief from an existing marriage and as such are valid bases for judicial separation and for determining questions of alimony, custody and matrimonial property. But adultery and cruelty when used as bases for the dissolution of marriage which is the common objective of both spouses in most divorce cases are nothing more than vehicles for "Quickie Divorces-Quickie Remarriages" by consent. "Desertion" on the other hand is close to "marriage breakdown" with the addition of an element of "fault" that is frequently fictional, but "desertion" is unnecessary when "marriage breakdown" is the basis for divorce.

PART 7: "MARRIAGE BREAKDOWN"—WHAT IS IT?

"Marriage Breakdown" is a basis for divorce that adopts the policy that a marriage which has irretrievably broken down in fact should be dissolved in law.

Conversely a marriage should not be dissolved in law until it is clearly demonstrated that in fact it has irretrievably broken down. In most jurisdictions a period of separation between the parties is the primary proof that the marriage has irretrievably broken down. *"Putting Asunder"* recommends proof of the breakdown to include three years of separation and in addition

> "Actions and conduct which under the present law constitute matrimonial offences, though no longer in themselves and by themselves grounds for a decree, would still be available as evidence of breakdown; in addition the court would be enabled to take other facts into account which at present are treated as irrelevant." (II-15)

One definition of "marriage breakdown" which commends itself to the Pastoral Institute is as follows:

Decree of Divorce. The Court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.

Public Policy. Notwithstanding the foregoing, the Court may refuse to grant or delay the granting of a decree if in the opinion of the Court the granting of the decree would be contrary to public policy.

Particulars of Public Policy. Public policy permitting the refusal or delay of a decree of dissolution includes the following:

(a) that the issue of a decree will prove unduly harsh or oppressive to the Respondent.

(b) that the Petitioner has failed to comply with a prior order or is likely to fail to comply with an Order of the court concerning:

(i) the maintenance of the Respondent or of a child of the parties,

(ii) custody of or access to a child of the parties.

Proof of Marriage Breakdown. Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and apart for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:

(a) one year when the Respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or

(b) three years in any other case.

"Society, Through the Court, Should Decide Who Should Have the Right to Remarry"

Under the "matrimonial offence" system of divorce, the so-called "innocent spouse" is the sole judge who decides whether the so-called "guilty party" can ever remarry. Conversely, apart from the lucky "innocent spouse" who obtains proof of the adultery of his or her "guilty spouse" without the co-operation of that "guilty spouse", the "guilty spouse" is the judge who decides whether the "innocent spouse" can ever remarry. The "guilty spouse" does this by concealing his or her misconduct and refusing to volunteer evidence of such misconduct.

While the "ground of separation" form of "marriage breakdown" put before this Committee by the Canadian Bar Association is a distinct improvement over the "matrimonial offence" concept, nevertheless it is the least attractive form of "marriage breakdown". If the period of separation of the parties is the sole criterion for determining the irretrievable breakdown of the marriage, the party

chiefly responsible for the breakdown would know with certainty that he or she would eventually gain the right to remarry. It is true that that right would not be gained for some years, but it shares the defect of the "matrimonial offence" in that the parties, not society, make the ultimate decision. If the matrimonial offence or the period of separation is proven, the court has no choice but to grant the decree.

Under the form of "marriage breakdown" we advocate, society through the court would make the ultimate decision as to whether to grant the decree and the right to remarry. In most cases such right to remarry should eventually be granted because it is in the best interests of society for the parties to a broken home to try to rebuild new family lives. Society has a vital interest in the stability of family life, and society should assert that interest by giving to its representative, the Court, and not to the parties only, the final decision.

PART 8: PRESENT EXTENT OF "MARRIAGE BREAKDOWN" AS A BASIS FOR DIVORCE

"Marriage Breakdown" in one form or another is part of the divorce law of:

Australia (5 years)
Austria (3 years)
Belgium (3 years)
Bulgaria (no fixed period)
China (no fixed period)
Czechoslovakia (no fixed period)
Denmark (1 1/2—2 1/2 years)
France (3 years)
Germany (Western) (3 years)
Greece (no fixed period)
Hungary (no fixed period)
Netherlands (5 years)
New Zealand (3 years)
Norway (1—2 years)
Poland (no fixed period)
Portugal (10 years)
Russia (no fixed period)
Sweden (3 years)
Switzerland (no fixed period)
United States (24 states) (1, 2, 3, 5 or 10 years depending on state)
Yugoslavia (no fixed period)

(II-16)

The philosophy behind "marriage breakdown" is found in English law in the unanimous judgment of the House of Lords expressed by the Lord Chancellor, Viscount Simon in *Blunt vs. Blunt*:

> "The interest of the community at large, 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 policy to insist on the maintenance of a union which has utterly broken down".
>
> (1943) A.C. 517

It is reflected in these questions which are part of the standard evidence in divorce cases in Alberta and in other jurisdictions:

"Have you forgiven his/her adultery?"

"Would you take him/her back?"

Other examples are referred to in *Power on Divorce*. (II-17)

In "Putting Asunder", the group expresses the opinion that "In practice...the law is...feeling its way towards the doctrine of the breakdown of marriage". (See page 39 of this brief for full quotation)

PART 9: ADVANTAGES OF "MARRIAGE BREAKDOWN" AS THE SOLE BASIS FOR DIVORCE

Two Major Purposes:

"Eliminate the Quickie Divorce-Quickie Remarriage"

and

"Give Eventual Relief to All Situations of Hardship"

It is a mistaken notion that most divorces take a long time to obtain. Most are granted quickly and it is the exceptional case, the hard case, where at present no relief is obtainable, that comes to notice. At a recent sitting of a divorce court at Calgary, Alberta, of the 45 cases tried, in 80% the parties had been separated less than 3 years, in 58% less than 1 year, in 24% less than 3 months, and 11% of the cases, a month or less. Marriage breakdown would eventually permit all marriages to be dissolved where no reconciliation had been accomplished, and at the same time would delay this mass of "Quickie Divorces" now granted before time, sober second thoughts, and marriage counselling can intervene. The quickie divorce attracts one of the sharpest criticisms of the law and lawers from priests, ministers, rabbis, social workers and others engaged in marriage counselling. Under our system of "instant divorce" following one isolated act of adultery, the parties in an undefended action can be divorced before the counsellor has had time to try to save the marriage.

ADDITIONAL ADVANTAGES OF MARRIAGE BREAKDOWN AS THE BASIS FOR DIVORCE

"Relief for the Non-Perjurer and Non-Adulterer"

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.

"Eliminate the Fiction of the "Guilty Party"

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 that their virtue and their spouse's vice have been proven, whereas the "fault" in fact may be more or less equal.

"Let the Court Hear Full Argument on Property and Maintenance"

In many cases, questions of alimony and property are settled before the parties get to court, either by a wife anxious for a divorce waiving alimony she should rightly receive because the evidence of adultery is available for an uncontested divorce but not for a contested case, or by a husband anxious for a divorce making a crippling property settlement in favour of a spouse who would not otherwise consent to bring the action. Under marriage breakdown, after the lapse of the statutory period, the right to dissolution of the marriage is virtually incontestable. The parties can negotiate a property settlement on more or less equal terms or failing agreement, the court can hear the full evidence and argument.

"Stop the Vengeful and Vindictive Spouse"

Vindictive spouses are stopped 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". (Romans 12:19 RSV) Society, through the court, not the so-called "innocent spouse", should make the final decision as to whether the so-called "guilty spouse" should eventually have the right to remarry.

"Covers All The Situations"

Under marriage breakdown, divorce is available in all cases in which the experience of time has shown that the marriage is permanently broken down. It is unnecessary to have any other basis for divorce.

"Eliminate the Means Test"

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.

"Slow Down Teen-age Remarriage"

The delay necessitated by "marriage breakdown" makes second ill-advised marriages by teen-agers virtually impossible.

"Stop Encouraging Adultery"

Spouses are no longer encouraged to commit adultery to provide grounds. As Lord Walker states in the Report previously referred to,

> "It is not, I think, doubtful that people do commit adultery—solely in the expectation that divorce will follow...." (II-18)

"Reduce the Confusion for Children"

In "Children of Divorce", psychiatrist J. Louise Despert illustrates in the story of Mary and other emotionally disturbed children the effect of divorce and particularly the "Quickie Divorce-Quickie Remarriage".

Dr. Despert notes that

> "Mary was not quite three years old when her mother divorced and remarried within a few weeks."

The second divorce came when Mary was five and one-half:

> "In the very last months of the school year, when Mary had actually become able to sleep several times during nap and had shown other promising signs, there was a second drastic change at home. (Her mother's) second marriage was even shorter-lived than her first. Again there was a divorce and again a quick remarriage..." (II-19)

After each such quick divorce and remarriage, Mary's illness deepened. There were of course many factors involved, but Mary's mother's quick decisions were among them. Under "marriage breakdown", the Quickie Divorce-Quickie Remarriage would be abolished, and children as well as their parents would be given time to adjust to the rupture of old relationships before new ones are thrust upon them.

"Let People Keep Their Religious Convictions"

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 of the spouse with no such conviction and eventually "give" a divorce. Under marriage breakdown, the spouse without such convictions would take the legal proceedings and the other spouse would

not re-marry even though legally entitled to do so. Under the present law, the party against whom no matrimonial offence is provable, who is often just as responsible for the breakdown of the marriage, can impose his or her religious convictions on a spouse of a different faith. It should also be noted that members of most churches are sometimes permitted by their churches to sue for divorce. Only if the member of the church remarried would he or she break canon law. (II-20)

PART 10: RESPONSES TO SOME POSSIBLE CRITICISMS OF "MARRIAGE BREAKDOWN"

Is "Marriage Breakdown" Really "Divorce by Consent"?—No

While we believe for reasons stated above that our prime concern should be with the "Quickie Divorce-Quickie Remarriage" and not "divorce by consent" as such, we respectfully concur with the opinion of the Archbishop of Canterbury's Group in "Putting Asunder" concerning the sharp difference between "marriage breakdown" and "divorce by consent":

> "...the essential characteristic of divorce by consent is that marriage is treated as a private contract of partnership, terminable at the joint will of the parties themselves without any effective intervention by the community. The doctrine of breakdown on the contrary, at any rate in the form we have been considering, requires that it shall be the court that decides whether a marriage ought to be dissolved or not. In principle therefore it is irreconcilable with divorce by consent. If it were made the basis of the divorce law, the agreement of the parties in wanting divorce would not be a bar, and might even count in favour of a decree; but in no case would such agreement suffice of itself to effect divorce. It would always be necessary for the court to try the issue of breakdown according to the evidence; and the court, if not satisfied that the marriage had in fact broken down irreparably, would have a duty to refuse a decree despite the express agreement of the parties. As for the particular instance cited (separation by agreement with a view to obtaining divorce) it is no doubt true that, if breakdown were to be incorporated into the law in the shape of a determinate "ground of separation", with the length of separation required duly stated, consenting parties would be able to arrange a divorce in much the same way as some now arrange desertion. But that would not show divorce by consent to be inherent in the principle of breakdown any more than current malpractice shows it to be inherent in the principle of the matrimonial offence. Moreover an *arranged separation* would not necessarily be incompatible with the genuine breakdown of the marriage in question, whereas arranged desertion is incompatible with a genuine matrimonial offnce. So if any anyone thinks there is an argument here for the superiority of the principle of the matrimonial offence over the principle of breakdown, he is greatly deceived." (II-21)

Substituting "volunteered evidence of adultery" for "arranged separation", the above remarks apply with equal force to Canada.

Is "Marriage Breakdown" A Triable Issue?—Yes

Again we respectfully adopt the conclusion of "Putting Asunder":

> "The evidence we have received suggests that judges would be reluctant to be put in the position of having to make predictions about the future of marriages. But in fact a judgement of breakdown does not require any greater measure of prediction than (for instance) the judgement that the proved conduct of a spouse would, if continued, cause injury to the health of the other spouse. In both cases it is a present probability that has to be assessed. We are assured that, having con-

sidered the history of a marriage, the reasons alleged for its failure (together with, in contested cases, the arguments put forward on the other side), and the efforts which have been made—or not made—to achieve reconciliation, a court should find it possible to determine the probability of the joint life being revived. Indeed this is precisely what a judge is required by the existing law to decide if asked to admit a petition during the first three years of a marriage. Moreover, it could hardly be more difficult to decide whether there was a prospect of reconciliation than it now is to decide which, if either, of the parties is guilty of desertion, when the decision depends, as it so often does, on the skill of their tactical manoeuvres." (II-22)

Innocent Spouses Would be Divorced Against Their Will—
There Are No Innocent Spouses in Broken Homes

In broken homes, there are no innocent persons, there are only relative degrees of fault. These relative degrees of fault can be taken into account in deciding the question of alimony, custody and settlement of the matrimonial property. Once the marriage has permanently broken down, its dissolution in law does nothing more than declare what is the fact of the situation. Theologically each person has his own interpretation. But the purpose of positive law is to describe the real relationships existing between the parties. The dissolution of the marriage in law takes away nothing from the so-called innocent party which that party has not already lost in the permanent breakdown of the marriage.

People Would Marry Lightly—They Do Now

The knowledge that divorce would always be eventually possible theoretically might encourage persons to marry lightly. But we believe that few more would enter marriage lightly than the number that do now, simply because they knew that three years after its end, a new marriage might be contracted without the consent of the previous spouse. The present law providing for "Quickie Divorce-Quickie Remarriage" does more to encourage ill-considered marriage than would the eventual and delayed relief provided by marriage breakdown.

Adultery Among Those Waiting—No More Than Now

We believe that many people would respect society's judgment and refrain from sexual relationships until society permits them to remarry, provided that the period was not too long and they were reasonably certain that the right to remarry would eventually be granted. Others would be satisfied only by a law that destroyed the concept of marriage as a life-long union. The institution of marriage is not strengthened by making legal a union that is formed by one sudden whim and dissolved by another.

Easily Proved by Perjury—Not at Easily as Adultery or Cruelty

Some say marriage breakdown could be too easily abused by perjured evidence. As stated by C. P. Harvey, Q.C., a prominent English lawyer,

> "a valid marriage... is the only condition precedent to divorce that cannot be circumvented somehow". (II-23)

The length of separation of the parties is more readily verified by independent evidence than is an alleged act of adultery or cruelty committed in private.

The Divorce Rate Would Rocket: Speculation
"Putting Asunder"

"The system we propose would enable some who cannot get divorces under the existing law, except by resorting to questionable expedients, to get them

legally, and others who cannot get divorces at present because their spouses are unco-operative to get them against the will of those spouses. At first, therefore, one would expect a rise in the number of decrees made. On the other hand, there are probably divorces obtained under the present system, on the superficial ground of some matrimonial offence, which would not have been obtainable if breakdown had had to be proved. Again, the existence of the bar of delay where matrimonial offences are concerned may encourage some who feel dissatisfied with their marriages to act immediately, while they have a ground to petition on, whereas under the system recommended the need to show breakdown might rather encourage them to wait. Unfortunately the Australian statistics cannot help us here, both because the "ground of separation" has not been long enough available for a definite pattern to appear, and also because in Australia that ground is merely added on to the list of matrimonial offences. Consequently it seems to be anyone's guess whether or not the number of divorce decrees would increase in the long run. In our opinion, however, the bare arithmetic of the matter is not of prime importance. What matters most is that, if there are to be divorces, they should be granted in cases where the spouses have decisively failed to solve the problems of their relationship in any other way, and not in cases where a matrimonial offence alone—of which the significance may be peripheral—had been proved." (II-24)

The Hon. Mr. Justice Scarman

Justice of the Probate, Divorce and Admiralty Division, High Court of Justice
Chairman, Law Commission

"So far as I have been able to discover, Australian experience since the introduction of separation as a ground for divorce shows that there has been no startling increase in the numbers of divorce. There was a rush of cases to relieve the suffering of many years during which divorce had been available in some States on much more restricted grounds, but once the rush had been met the newly available ground did not make any very great difference: significantly the old established grounds of desertion and adultery continue to be used." (II-25)

The Pastoral Institute

It is impossible to correlate divorce rates solely with the ease of divorce. There are too many other variables such as the mobility of the society, its age and traditions, and the presence or absence of stress factors such as war and depression. England for example has a divorce rate roughly comparable with the Netherlands where unopposed divorces are usually granted without evidence being heard. (II-26) But it is the "marriage failure rate" not the "divorce rate" that should concern us. "Marriage breakdown" we believe would lower the "marriage failure rate" by giving adequate time for counselling and reconciliation, and that is one of its chief virtues.

PART 11: PUBLISHED COMMENTS FAVORING MARRIAGE BREAKDOWN"

Calgary Herald, July 26, 1945

". . . the most interesting aspect of the New Zealand law (is that) a divorce may be granted to a couple who have been legally separated for more than three years. That seems like a sensible law. It doesn't make divorce too easy. Neither does it make divorce too difficult. It simply provides for divorce where the marriage has been clearly proven a failure."

Wolfgang Friedmann, "Law in a Changing Society", 1959

"one possible compromise between these conflicting considerations would appear to be a right for either spouse to be able to obtain a divorce on the ground

that she or he had lived apart from the other spouse for a specific period. After several years of continuous separation, it may fairly be surmised that the matrimonial community is beyond repair. The alternative to the legal dissolution of marriage after a separation for a number of years is not a restoration of the marriage bond, but maintenance of the fiction of a marriage by a legal tie, which will drive one or the other or both spouses to sexual and other relations with outsiders, clandestinely or under a social stigma, rather than openly. The law in such cases does not serve the sanctity of the marriage, but it preserves sanctimonious righteousness which will, in fact, increase adultery, fornication, and personal bitterness." (II-27)

"Time" Magazine, February 11, 1966

"The most sensible solution would be a system that readily grants divorce only after skilled clinicians confirm that a marriage is beyond repair. In many cases, divorce might be harder to get; in all, it would be far more humane."

"Putting Asunder", 1966

"In practice, then, the law is moving away from basing divorce on a finding concerning the delinquency of one of the parties towards basing it on a finding concerning the state of the marriage relationship and the demands of distributive justice. In other words, it is feeling its way towards the doctrine of the breakdown of marriage. In our opinion this is a move away from superficiality towards a serious attempt to deal justly both with the complexities of the matrimonial relationship itself and with the interests of other persons upon whom the conduct of the spouses may have impinged. The social context of the family is thus recognized. We therefore recommend that the process be completed as soon as possible by openly substituting the principle of breakdown for the principle of the matrimonial offence." (II-28)

Honourable Mr. Justice Scarman, 1966

"Where the ordinary man criticizes the law is in its exclusive reliance on the doctrine of the matrimonial offence. He asks, reasonably enough, why should divorce be available only if a matrimonial offence can be proved. Here I think he puts his finger on the nerve of the problem. In Australia and New Zealand the matrimonial offence has been retained but there has been added divorce upon the ground of separation irrespective of the responsibility for the separation. This is really divorce for irretrievable breakdown, the breakdown being presumed to occur from the fact of separation of a defined duration—in Australia five years, in New Zealand seven years. Very recently some Private Members have introduced a Bill—a direct succession to previous gallant attempts—to enable a further marriage to be contracted by either spouse when separation has persisted for five years... I think that we could well follow the Australian and New Zealand precedent and support the idea behind the Private Members' Bill, and that if we did so the ordinary man's objection to the substantive law of divorce would be largely met." (II-29)

PART 12: INADVISABILITY OF A SEPARATION AGREEMENT OR JUDICIAL SEPARATION AS A CONDITION PRECEDENT TO A DIVORCE UNDER "MARRIAGE BREAKDOWN"

In some jurisdictions a separation agreement or a judicial separation must be obtained at the beginning of the period of separation in order to obtain the divorce after the period of separation has run. One of the chief merits of "marriage breakdown" is that it can make judicial proceedings unnecessary during the time of stress and uncertainty immediately following the separation

of the parties. If judicial proceedings are necessary to settle custody, maintenance and property, they must be available in judicial separation or other proceedings, but no good purpose would be served by compelling the parties to enter into legal proceedings which are otherwise unnecessary as a condition precedent to a possible divorce action years hence. So far as possible at the time of separation the parties should be with their minister, social worker, psychiatrist and marriage counsellor, not instructing their solicitor to institute unnecessary litigation.

PART 13: CONCLUSION CONCERNING "MARRIAGE BREAKDOWN"

"Canada Can Lead"

New York State has recently enacted marriage breakdown as part of its new divorce law. At a time that consideration was being given to dropping the marriage breakdown provision of the bill to ensure passage of some of the other reforms, *Life Magazine* commented:

> "If this happens, New York State will have made it only into the 19th Century, not the 20th, and will have lost its chance to draft a model for the rest of the country." (II-30)

New York State has since enacted marriage breakdown, but it has also opened wider the "Pandora's Box" of matrimonial offences. New York State has thereby made it into the early 20th Century, and the opportunity remains for Canada to draft a model for other nations to follow, and for the welfare and betterment of all its citizens. "Putting Asunder" noted that the English law, the Herbert Act, based on "matrimonial offence",

> "as it stands is unsatisfactory, all the judges and lawyers who gave us evidence agreed, however much they disagreed concerning the remedies to be applied . . . As a piece of social mechanism the present system has not only cut loose from its moral and juridical foundations: it is, quite simply, inept. " (II-31)

For too many years Canada has been a market-place for obsolescent English statutes. At a time that the 1937 Herbert Act is under such severe attack in England, it is inconceivable that Canada should adopt the same when a better basis, marriage breakdown, is available.

Respectfully submitted,
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APPENDIX A

A PARTIAL DRAFT "DOMESTIC PROCEEDINGS ACT"

Introduction

Policy of This Draft Act: Constitutional Questions Omitted

In this draft act, The Pastoral Institute has attempted to follow a "functional" approach, i.e., to deal with the problems of divorce law in particular and domestic proceedings in general in the manner best suited to the nature of the problems and without reference to the division of legislative powers between Parliament and the Provincial Legislatures as set out in sections 91 and 92 and elsewhere in the British North America Act. Possibly all sections of this Act are within the powers of Parliament particularly under heading 26 "Marriage and Divorce" of section 91. Possibly provincial enactments of parts are required. Possibly a constitutional reference to the Supreme Court of Canada is required. See *Power on Divorce, passim*, concerning the constitutional questions involved. But undoubtedly major revision of many aspects of our domestic relations law is required.

Synopsis of
Changes in Procedural and Substantive Law Contained in Draft Act

1. A new Court to be known as the "Domestic Proceedings Court" to be established by act of Parliament having jurisdiction over all aspects of domestic proceedings in those provinces whose courts now have jurisdiction to grant decrees of divorce. (Section 3).

2. The Domestic Proceedings Court to be divided into a High Court Division having a plenary jurisdiction over domestic proceedings and a Family Court Division having a limited jurisdiction similar to existing Family Courts. (Section 3).

3. Supreme Court and County Court judges initially to be judges of the High Court Division, similar to the jurisdiction Supreme Court judges have in the Bankruptcy Court. Family Courts where they now exist to continue their function supplemented by magistrates and juvenile court judges in areas in which Family Courts have not yet been established. (Section 4).

4. Married women to have a separate domicile to give them access to the Court where they permanently reside. (Section 5).

5. Reconciliation procedures to be recognized as an important part of domestic proceedings but not as part of the court structure at least at this time. (Sections 6 and 7).

6. Separation agreements to be enforceable or variable by court order. (Section 11).

7. Decrees of judicial separation to be convertible into decrees of divorce when lapse of time and other evidence shows the marriage has irretrievably broken down. (Section 18).

8. Voidable marriages to be dissolved instead of retroactively decreed to be a nullity. (Section 20).

9. Decree of presumption of death to include a decree of dissolution of marriage. (Section 21).

10. Traditional period of seven years for presumption of death from the days of sailing ships to be shortened to three years in line with modern communication. (Section 21).

11. No final decree to be granted unless adequate arrangements for children and maintenance have been made. (Section 23).

12. Children to have separate representative in proceedings when the Court deems the same to be advisable. (Sections 27 and 28).

13. Summary Maintenance Order to be granted by Family Court Division based on assessment of need not "fault". (Section 30).

14. Authority for court to order lump-sum maintenance settlements and to dispose of other matrimonial property. (Sections 31 and 35).

15. Privilege with respect to questions concerning any adultery of the witness to be abolished where proof of that adultery would be material to the decision of the case. (Section 38).

16. Foreign divorce decrees to be recognized on the basis of reciprocity. (Section 39).

17. Actions for alienation of affection and similar actions supposedly protecting a husband's proprietary rights in his wife to be abolished. (Section 40).

18. Delay in bringing or prosecuting an action to be abolished as a discretionary bar. (Section 41).

19. Connivance, collusion and condonation to be discretionary not absolute bars. (Section 42).

A PARTIAL DRAFT "DOMESTIC PROCEEDINGS ACT"

1. This Act may be cited as the "Domestic Proceedings Act".

Comment: New. "Domestic" has a broader meaning than "Matrimonial". "Proceedings" from New Zealand Act is preferred to the word "Causes" used in the English and Australian Acts since the idea of a "lis" which is suggested by the word "cause" is less suitable to domestic proceedings than is the case in such other branches of the law as torts and contracts.

2. *Interpretation.*

In this Act, unless the context otherwise requires—

(1) "Child" includes any child, legitimate, illegitimate or adopted, of both spouses, or any child, legitimate, illegitimate or adopted of one spouse who has been accepted as one of the family by the other spouse.

(2) "Court" means the Domestic Proceedings Court.

(3) "Furniture" includes household appliances and effects; and also includes furniture and household appliances and effects that are subject to a security interest vested in a third party.

(4) "Matrimonial home" means any dwelling (including a leasehold premise) being used exclusively or principally as a home by one or both of the parties to a marriage in respect of which a decree of judicial separation, divorce, nullity, or dissolution of marriage is or has been granted, in any case where:

(a) either or both of the parties or the personal representative of one of them—

(i) owns the dwelling; or

(ii) owns a specified share of any estate or interest in the land on which the dwelling is situated and by reason of reciprocal agreements with the owners of the other shares is entitled to the exclusive occupation of the dwelling; or

(iii) holds shares in a company which owns any estate or interest in the land in which the dwelling is situated, and by reason of holding those shares, is entitled to the exclusive occupation of the dwelling; and

(b) either or both of the parties owned the dwelling or the specified share in land or held shares as the case may be, at the date of the petition.

Comment on SS. (3) and (4): Cf. N.Z.M.P.A. 1963 S.55. (New Zealand Matrimonial Proceedings Act, 1963, No. 71)
Relate to sections 34 & 35.

(5) "Minister" means the Solicitor-General or such other member of the Cabinet as may be charged with the administration of this Act.

(6) "Superintendent of Child Welfare" means any public official designated under any provincial statute to enquire into or represent children involved in any proceeding under this Act.

Comment: New. Relates to section 28.

3. *Constitution of Court:*

(a) There is hereby constituted a court of record to be called "The Domestic Proceedings Court".

(b) The Court shall have jurisdiction with respect to any of the causes hereinafter referred to save and except causes in respect of which both of the parties are domiciled in Quebec, Newfoundland or any other province in which this Act has not been proclaimed in force.

(c) The Court shall have exclusive jurisdiction both civil and criminal in all cases in which parties adverse in interest are or were married to each other and in all cases relating to:

(1) Restitution of Conjugal Rights
(2) Separation
(3) Divorce
(4) Nullity
(5) Presumption of Death and Dissolution of Marriage
(6) Custody
(7) Adoption
(8) Affiliation
(9) Wardship
(10) Maintenance and Alimony
(11) Consent to Marriage
(12) School attendance
(13) Crimes in which the party injured or one of the parties injured is or was married to the accused or one of the accused

but nothing herein contained shall be deemed to include jurisdiction relating to the administration of estates other than that provided in sections 22 and 31.

(d) The Court shall be composed of two divisions to be known as the High Court Division and the Family Court Division.

(e) The Family Court Division shall have jurisdiction only with respect to such of the above matters as the Governor-General in Council may from time to time decide.

(f) All proceedings in the Domestic Proceedings Court shall be held in open court unless in the opinion of the presiding judge the interests of justice require that the proceedings be held in camera.

4. *Judges of the Court*

(a) *High Court Division.* All judges whose Letters Patent appoint them to the High Court Division of the Domestic Proceedings Court whether or not they are appointed to any other court and all judges of the Supreme and County Court of the provinces in which the Domestic Proceedings Court has jurisdiction appointed prior to the coming into force of this Act shall be ex officio judges of the High Court Division of the Domestic Proceedings Court.

(b) *Family Court Division.* All judges whose Letters Patent appoint them to the Family Court Division of the Domestic Proceedings Court whether or not they are appointed to any other court and all magistrates, provincial family court and juvenile court judges of the Provinces in which the Domestic Proceedings Court has jurisdiction appointed prior to the coming into force of this Act shall be *ex-offiico* judges of the Family Court Division of the Domestic Proceedings Act.

Comment on ss. 3 & 4. The Domestic Proceedings Court is intended to bring into one forum all aspects of domestic proceedings. Mr. Justice Scarman states his reasons for favoring establishment of a separate Family Division of the Supreme Court as follows:

> "Yet decentralization and devolution of the administration of justice are necessary. I would hope in the context of divorce law that one might see the problem being met somewhat along these lines—family courts established at regional centres, presided over by lawyers having at least the status of County Court judges, and making use in some, if not all, cases of lay justices as members of the court: they should be selected from those experienced in juvenile and matrimonial work. The nearest existing analogy to the family court would be the composition of quarter sessions. The work of these family courts should be controlled on points of law either by a Family Division of the High Court or by a Family Division of the Court of Appeal." (A-1)

Quentin Edwards an English barrister, in an appendix to "Putting Asunder", states as follows:

> "The possibilities of reforming the Probate, Divorce and Admiralty Division have been widely canvassed in recent years. It has been suggested that its three limbs should be severed, probate jurisdiction being assigned to the Chancery Division, admiralty to the Commercial Court, which is part of the Queen's Bench Division, and matrimonial to a court on a new model. Possible reforms of the circuit system of assize have also been much discussed, and definite proposals to enlarge the jurisdiction of county courts to include certain matrimonial causes have been made by the Lord Chancellor. If changes on this magnitude are to be made, and if the substantive law is to be altered on the lines indicated in the body of this report, serious consideration might well be given to establishing an entirely new system of courts. These could exercise not only the matrimonial jurisdiction of the present Divorce Division, but also jurisdiction in all other personal and domestic matters—in short, the whole of what has come to be called "family law'." (A-2)

No substantial change would be needed to establish a Domestic Proceedings Court along the foregoing lines. Transitionally the justices, judges, magistrates, family court and juvenile court judges of our existing courts would exercise jurisdiction substantially the same as that now exercised by them, with the exception that county court judges would have their jurisdiction increased to be comparable to that now possessed by English and British Columbia County

Court Judges as Divorce Commissioners and local judges of the Supreme Court respectively. (A-3) No substantial increase in the number of judges required is anticipated; the number of divorce cases which would be brought to trial under "marriage breakdown" by persons who are now permanently denied relief would be counterbalanced by the mass of "Quickie Divorces" now racing through our courts whose flow would be inhibited. Effective reconciliation procedures would also offset the costs if additional courts were necessary by the savings to society in the welfare and other costs incurred by broken homes. The Domestic Proceedings Court would be similar to the present Bankruptcy Court which uses the clerks of the Supreme Court and other personnel in most parts of Canada.

There is no lack of judges in Canada today with the legal training and temperament required to adjudicate the vexing and exasperating issues before a Domestic Proceedings Court. Training in the behavioural sciences is however virtually non-existent among the members of the legal profession, understandably inasmuch as the need for such training has never been demonstrated in the ways in which a specialized Domestic Proceedings Court could make apparent.

In the June 28, 1966 proceedings of this Committee, Mr. Justice A. A. M. Walsh, Senate Commissioner, in discussing transfer of Quebec and Newfoundland divorce jurisdiction from the Senate to the Exchequer Court reflected the opinion of many members of the bench and bar towards domestic proceedings:

> "That system would have various advantages. One is that there would be a variety of judges who could hear these cases. It might be necessary to appoint additional judges but they would rotate on it and one person would not be left doing nothing but divorce work for his life, as it might be at present. I personally feel not only that it is not an assignment one would want to continue for life but that it is not good for any judge to hear just one type of case. After three, four or five years, inevitably he will become somewhat stale at it and a fresh approach would be better. I think it is more desirable that there should be three, four, five or six different judges contributing to the jurisprudence on the matter and hearing the cases, than that one or two judges should do nothing else indefinitely."

We respectfully disagree with Mr. Justice Walsh's views on specialization. To a greater extent than any other branch of the law, domestic proceedings require not only sound legal training but the insights that can be provided by the behavioural sciences. Only by adopting the specialization urged by Mr. Justice Scarman can we develop such courts as the Family Court of Toledo, Ohio, in which Judge Paul Alexander presided. (A-4)

A separate Domestic Proceedings Court would also in time modify the "accusatorial system" into the "investigative system" more appropriate in domestic proceedings. In most lawsuits the court is adjusting rights between the parties each of whom may be counted on to put forward their own best case under the accusatorial system. In domestic proceeedings the court must also take into account the interest of society in the preservation of the family (A-5)

5. *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.

(2) For the purposes of this Act, the domicile of any personal shall be determined in accordance with the law of Canada.

Comment: N.Z.M.P.A. 1963 S.3.

"All Persons Permanently Resident in Canada Should Have Access to Canadian Domestic Courts"

The concept that the domicile of a married woman is the domicile of her husband is a vestigial remnant of the idea that a married woman is some sort of "property" of her husband. The creation of a separate domicile for husband and wife is in line with the notion of the quality of the sexes, and is one means of making Canadian courts available to all persons permanently resident in Canada. As stated by Mr. Justice Scarman,

> "It was a misfortune when in *Le Mesurier v. Le Mesurier* divorce jurisdiction was held to be based upon the domicile of the husband. The principle has denied relief to countless unhappy women. Its inequities have led to a number of concessions which are today to be found in section 40 of the Matrimonial Causes Act, 1966". (A-6)

The niceties of legal theory, assuming any are involved, should give way to the welfare of countless unhappy Canadian women.

PART I

Reconciliataion Procedures

6. *Marriages of Less Than Three Years*

(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.

(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.

(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.

7. *Reconciliation Adjournments*

(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 agency or 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.

(2) If, after more than three months from the date of adjournment under this section, one of the parties requests a resumption of the hearing, it shall proceed.

(3) No evidence of any information received or anything said or admission made to anyone pursuant to proceedings under subsection (1) of this section shall be admissible in any court or before any person or body acting judicially.

(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.

Comment: Cf. Mr. Wahn's Bill C-58 ss. 4 & 5 & U.K.M.C.A. 1965 S.2 (United Kingdom Matrimonial Causes Act, 1965, Chapter 72)

"Reconciliation Should Be Part of Our Procedures in Domestic Disputes but Should Not be Compulsory in All Cases or Part of the Court Structure at This Time."

Compulsory counselling as a condition precedent to the bringing of a divorce action is not advisable because:

(i) There must be some motivation to seek counselling to give any substantial possibility of reconciliation.

(ii) One to three years delay required by Section 17 of this Act before divorce can be obtained gives substantial opportunity to seek counselling before there is a divorce.

(iii) There are at present insufficient personnel and facilities in Canada to do competently all of the counselling which compulsory provisions would require. The principle of reconciliation would be discredited by the inadequate treatment many persons would have to receive.

(iv) Where there are such features as long-term desertion or incurable insanity, counselling would in most cases be of no avail.

(v) Greater experience in the field is needed before a decision is made as to whether reconciliation procedures should be:
(A) private or voluntary,
(B) organized but independent of the court,
(C) directly connected with the court, or,
(D) a combination of the above (A-7)

(vi) Part of the evidence proving the irretrievable breakdown required by section 17 would usually be evidence that marriage counselling had been tried and failed. Parties would thus be encouraged to seek counselling and some marriages might be saved in the process. In a sense this may be called compulsion.

PART II—Restitution of Conjugal Rights

8. *Decree.*

If one party to a marriage refuses to cohabit with the other party, the court may in its discretion, give a judgment for restitution of conjugal rights.

9. *No attachment.*

No such judgment shall be enforced by attachment.

10. *Non-compliance with Decree.*

If the Respondent fails to comply with the judgment of the court for restitution of conjugal rights within three months of the granting of the decree, the defendant shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a decree of judicial separation may be granted in the same proceedings upon notice to the Respondent although the period of two years mentioned in section 12 has not elapsed.

Comment: Cf. Alberta D.R.A. ss. 3, 4 & 5 and U.K.M.C.A. 1965 s. 13 (Alberta Domestic Relations Act, Revised Statutes of Alberta, 1955 Chapter 89).

PART III—Separation

11. *Enforcement of Separation Agreement.*

(1) The Court may on application by either of the parties or on behalf of a child of the parties, enforce, rescind, alter or vary any provision of a separation agreement entered into between husband and wife.

(2) Proceedings under this section shall so far as possible be in a summary manner.

Comment: Cf. U.K.M.C.A. 1965 ss. 23, 24 & 25. Separation agreements have the advantages of economy and celerity to settle the terms of a short or a long-term separation. They have the disadvantage of difficult enforcement, which would be rectified by this section.

12. *Judicial Separation*

(1) A judgment of judicial separation may be obtained from the Court either by a husband or by a wife if his wife or her husband, as the case may be, has since the celebration of marriage been guilty of

(a) adultery,

(b) cruelty,

(c) desertion

(i) for two years or upwards without reasonable cause, or

(ii) constituted by the fact of the wife or husband, as the case may be, having failed to comply with a judgment for restitution of conjugal rights, or

(d) sodomy or bestiality, or an attempt to commit either of these offences.

Comment: Cf. Alberta D.R.A. s. 7 and U.K.M.C.A. 1965 s. 12.

13. *Effect of Judicial Separation.*

After a judgment of judicial separation has been granted

(a) neither the husband nor wife is under any duty of cohabitation, and

(b) the wife shall, during the continuance of the separation, be considered as a *femme sole* for the purposes of contracts and wrongs and injuries and suing and being sued in a civil proceeding, and for all other purposes, and shall be reckoned as *sui juris* and as an independent person for all purposes.

14. *Property on Intestacy.*

After a judgment of judicial separation, the property of a spouse in the event of his or her dying intestate during the continuance of the separation devolves as the property would have done if the spouse had been then dead.

15. *Liability of Husband*

(1) After a judgment of judicial separation and during the continuance of the separation, the husband is not liable in respect of any engagement or contract his wife has entered or enters into, or for a wrongful act or omission by her, or for any costs she incurs in any action.

(2) Notwithstanding sub-section (1), where in or after a decree of judicial separation, alimony has been decreed or ordered to be paid to the wife, and it is not duly paid by the husband, he is liable for necessaries supplied for her use.

Comment: on Ss. 13, 14 & 15: Cf. Alberta D.R.A. ss. 11, 12 & 13

PART IV—Divorce

16.

(1) *Decree of Divorce.* The Court shall upon a petition by one of the parties to the marriage, decree dissolution whenever the marriage has irretrievably broken down.

(2) *Public Policy.* Notwithstanding the foregoing, the Court may refuse to grant or delay the granting of a decree if in the opinion of the Court the granting of the decree would be contrary to public policy.

(3) *Particulars of Public Policy.* Public policy permitting the refusal or delay of a decree of dissolution includes the following:

(a) that the issue of a decree will prove unduly harsh or oppressive to the Respondent.

(b) that the Petitioner has failed to comply with a prior order or is likely to fail to comply with an Order of the court concerning:

(i) the maintenance of the Respondent or of a child of the parties.

(ii) custody of or access to a child of the parties.

17. *Proof of Marriage Breakdown.*

Irretrievable breakdown of the marriage shall be proven by evidence that there is no reasonable possibility of a resumption of cohabitation and shall include evidence that the parties are in fact living separately and apart and have lived separately and part for a continuous period (except for periods of cohabitation of not more than two months each that have reconciliation as a prime purpose) immediately preceding the date of the granting of the decree, such period to be either:

(a) one year when the Respondent has been guilty of adultery, extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or

(b) three years in any other case.

18. *Divorce in Judicial Separation Proceedings.*

Where a decree of judicial separation has been granted, and application may be made in that action for a decree of divorce in absolute form at the expiration of at least three months from the date of entry of the decree of judicial separation and at the expiration of:

(a) at least one year from the physical separation of the parties, by the Petitioner in any case in which the Respondent is adjudged to be guilty of extreme cruelty, sodomy, bestiality, or an attempt to commit sodomy or bestiality, or

(b) at least three years from the physical separation of the parties, by the Petitioner or the Respondent in any other case or in any case mentioned in subsection (a) in which the Petitioner has not previously applied.

Comment: Duplication of proceedings is eliminated. (A-8)

PART V—Nullity and Dissolution of Voidable Marriage

19. *Jurisdiction in Nullity.*

A petition for a decree of nullity of a void marriage or for Dissolution of a Voidable Marriage, whether the marriage is governed by Canadian 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 Canada at the time of the filing of the petition; or

(b) Where the purported marriage was solemnized in Canada.

Comment: Cf. N.Z.M.P.A. 1963 s. 6.

20. *Grounds for Annulment.*

(1) The Court may decree nullity of marriage upon the ground that the marriage is void.

(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 or otherwise incapable of understanding the nature of the marriage contract; or

(e) either of the parties is not of marriageable age under the law.

(3) *Jurisdiction in Voidable Marriage.* A marriage, not being a marriage that is void, may be dissolved when the Court is satisfied that an incapacity to consummate the marriage existed at the time of the marriage and also 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 decreee of dissolution of marriage shall not be made on petitioner's ground where the Court is of the opinion that by reason of the petitioner's knowledge of the incapacity at the time of 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; or

(b) either party to the marriage is

(i) of unsound mind;

(ii) a mental defective; or

(c) either party to the marriage suffering from a venereal disease in a communicable form; or

(d) that the Respondent was, at the time of the marriage, pregnant by some man other than the Petitioner, or, that some woman other than the Petitioner was, at the time of the marriage, pregnant by the Respondent,

Except that a decree of dissolution of marriage shall not be made by virtue of sub-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.

Comment: Cf. Mr. Peters Bill C-19, s. 6 & 8 and N.Z.P.A. 1963 s. 18. "Attacks of insanity or epilepsy" from the U.K.M.C.A. 1965 s 9 included in Bill C-19 are omitted. These illnesses are no greater reasons for a dissolution of marriage than are attacks of tuberculosis or rheumatic fever, and are out of keeping with modern medical knowledge. Section 20 (3) (d) is taken from Section 18 (2) (d) of the New Zealand Act in preference to Section 8 (3) (d) of Bill C-19 to give equality between the sexes. Voidable marriages should be dissolved as in the New Zealand legislation and as suggested by Mr. Justice Scarman to avoid the difficulties that arise with retroactive annulment of voidable marriages. (A-9)

PART VI—Presumption of Death

21. *Decree of Presumption of Death and Dissolution of Marriage*

(1) Any married person domiciled in Canada may present a petition to the Court alleging that reasonable grounds exist for supposing that the other party to the marriage is dead and praying to have it presumed that the other party is dead and to have the marriage dissolved.

(2) The Court, on being satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of marriage.

(3) In any such proceedings, the fact that for a period of three years or upward the other party to the marriage has been continually absent from the Petitioner, and that nothing has happened within that time to give the Petitioner reason to believe that the other party was then living, shall be evidence that he is dead in the absence of proof to the contrary.

(4) Unless the context otherwise requires, provisions of this Act and of any other enactment, so far as they are applicable with any necessary modifications, shall apply to a Petition and a decree under this section as they apply to a Petition for a divorce and a decree of divorce respectively.

Comment: Cf. U.K.M.C.A. 1965 s. 14 and N.Z.M.P.A. 1963 s. 19. Such marriages should be dissolved to avoid the anomaly of the absent spouse returning. Three years instead of the traditional seven years is in keeping with modern communication and with the period of separation required to create a rebuttable presumption of marriage breakdown.

PART VII—Custody and Maintenance of Children

22. *Custody and Support Agreement or Order*

(1) Where parents are not living together, they may enter into a written agreement with regard to the custody, control, education and support of and access to the children of the marriage.

(2) If the parents fail to reach an Agreement on the matters mentioned in sub-section (1), either parent may apply to the Court by notice of motion for its decision.

(3) Upon such application the Court may make such order as it sees fit.

(4) The Court may alter, vary or discharge the Order on the application of either parent, or after the death of either parent on the application of a lawfully appointed guardian.

(5) The Court may by order provide for the maintenance of the infant by payment by the father or by the mother, or out of an estate to which the infant is entitled, of such sums from time to time as the Court deems reasonable, having regard to the pecuniary circumstances of the father or of the mother, or to the value of the estate to which the infant is entitled.

(6) The Court may on application by either of the parties or on behalf of a child the subject of any such order, enforce, rescind, alter or vary any provision of any such custody agreement entered into between a husband and wife or any order under this section.

(7) Proceedings under this section shall so far as possible be in a summary manner.

Comment: Cf. Alberta D.R.A. ss. 48 & 49.

23. *Arrangements for Welfare of Children.*

No final decree of judicial separation, divorce, nullity or dissolution of marriage shall be made unless the Court is satisfied that:

(a) arrangements have been made for the custody, maintenance, and welfare of every child of the marriage under the age of eighteen years (or in special circumstances of or over the age of eighteen years) and that those arrangements are satisfactory, or are the best that can be devised; or

(b) it is impractical for the party or parties appearing before the Court to make any such arrangement; or,

(c) there are special circumstances justifying the making of a final decree, notwithstanding that the Court is not satisfied that any such arrangements have been made,

Provided that the Court shall, in every case where it makes a final decree pursuant to the provisions of this paragraph, first obtain 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.

Comment: Cf. U.K.M.A.C. 1965 s. 33 and N.Z.M.P.A. 1963 s. 49.

24. *Custody of Children*

(1) In any proceedings for restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, the Court may from time to time, before or by or after the final decree, make such order (whether an interim order or a permanent order) as it thinks just with respect to the custody and education of any children of the marriage under the age of 18 years (or in exceptional cases of or over the age of 18 years.)

(2) The Court may from time to time discharge, vary or extend any order made pursuant to sub-section (1) of this section.

(3) Any order may be made under sub-section (1) of this section, and any such order may be varied or extended, notwithstanding that the Court has refused to make a decree or to give any other relief sought.

(4) Unless otherwise specified in the order, an order for custody in respect of a child under the age of 18 years shall expire when the child attains the age of 18 years, provided that an order for custody, or a variation or an extension of an order for custody, having effect after the child who is the subject of the order has attained the age of 18 years shall be made only in exceptional cases.

Comment: Cf. U.K.M.C.A. 1965 s. 34 and N.Z.M.P.A. 1963 s. 51.

25. *Maintenance of Children*

(1) In any proceeding for restitution of conjugal rights, judicial separation, divorce, nullity, or dissolution of marriage, the Court may from time to time before or by or after the final decree, make such order (whether an interim

order or a permanent order) as it thinks just with respect to the maintenance by either party to the marriage of any child of the marriage

(a) who is under the age of 18 years at the date of the making of the order; or

(b) who is or over that age at that date, in any case where it appears to the Court that the child is engaged in a course of full-time education or training or is because of physical or mental disability incapable of earning a living and that it is expedient that payments toward the maintenance of the child should be made.

(2) The Court may at any time, if it thinks fit, upon the application of either party to the marriage, or of any person having custody of the child in respect of whom an order under this section is made, or of the personal representative of a party against whom the order is made, extend, vary or cancel any order made under sub-section (1) of this section. Any order extending any such order may be made under this sub-section, notwithstanding that the order has expired.

(3) Any order may be made under sub-section (1) of this section, and any such order may be varied or extended, notwithstanding that the Court has refused to make a decree or to give any other relief sought.

(4) Subject to the provisions of sub-section (5) of this section, any permanent order for maintenance made under sub-section (1) of this section and any extension thereof shall be for such term as the Court specifies.

(5) No order made under sub-section (1) of this section in respect of a child under the age of 18 years at the date of the making of the order, and no extension of any such order, shall have effect after the child attains the age of 18 years, unless the Court so directs in any case where it appears to the Court that, after attaining the age of 18 years, the child will be engaged in a course of full-time education or training or will be because of physical or mental disability incapable of earning a living and that is it expedient that payments toward the maintenance of the child continue to be made after the child attains the age of 18 years.

(6) Any order made under this section shall, unless the Court specifies otherwise in the order or in any variation or extension thereof, bind the personal representative of the party against whom it is made.

(7) Any order made under this section having effect in respect of a child of or over the age of 16 years, and any variation or extension of any such order, may be subject to such conditions as the Court thinks fit.

Comment: Cf. N.Z.M.P.A. 1963 s. 52 and U.K.M.C.A. 1965 s. 1934.

26. *Settlement of Property on Children*

(1) The Court may, if it thinks fit, on making any decree of restitution of conjugal rights, judicial separation, divorce, nullity, or dissolution of marriage, order a settlement to be made to the satisfaction of the Court of the property of the husband or wife or any part of such property for the benefit of the children of the parties or any of them.

(2) The Court may make such other orders and give such directions as may be necessary or desirable to give effect to any order made under sub-section (1) of this section.

Comment: Cr. N.Z.M.P.A. 1963 s. 53

27. *Representation of Children in Proceedings*

(1) In any proceedings under this Act, the Court may direct that any children of the marriage be represented by counsel if it is of the opinion that such a course is expedient.

(2) The Court may make such order as it thinks fit as to the payment by any party to the proceedings of the solicitor and client costs of any such counsel.

Comment: Cf. N.Z.M.P.A. 1963 s. 54

28. *Intervention of Superintendent of Child Welfare*

(1) In any proceedings the Court may if it thinks fit refer any matter to or request a report concerning any matter from the Superintendent of Child Welfare concerning the custody, maintenance or welfare of any child of the marriage or of either of the parties.

(2) A copy of any such report shall be given by the Clerk of the Court to counsel appearing for the Petitioner and the Respondent, or if either party is not represented by Counsel, to that party.

(3) The Petitioner or Respondent may tender evidence on any matter referred to in any such report.

(4) In any proceedings under this Act, the Superintendent of Child Welfare or a party duly authorized by him shall, at the request of the Court, appear to assist the Court with respect to any matter relating to the custody, maintenance and welfare of any child of the parties or either of them.

Comment: Cf. N.Z.M.P.A. 1963 s. 50

Part VIII—Maintenance

29. *Summary Maintenance Order*

(1) Whenever a husband or father has failed to make adequate provision for his wife or child or children, regardless of whether the spouses are living apart, a judge of the Family Court Division may grant an order for maintenance of the wife and children of the marriage or void marriage upon the basis of need and without enquiry as to "fault".

(2) Such order may be terminated by an order of a judge of either the High Court Division or of the Family Court Division.

Comment: New. While issues of "fault" and therefore of ultimate liability for maintenance should be tried by the High Court Division, nevertheless there is a need for a summary procedure with a saving of time and expense that can be adequately dealt with in the lower court. In many cases the making of a Summary Maintenance Order can avoid the necessity and expense of judicial separation proceedings. Some provincial statutes permit the making of similar magistrate and family court orders usually with a finding of "fault" that is necessarily based on very limited evidence. Mr. Justice Scarman advocates legislation "enabling either spouse to apply to the Court for financial relief without having to prove wilful neglect or a right to matrimonial relief other than financial support." We respectfully agree. (A-10)

30. *Order for Maintenance*

(1) The Court may, if it thinks fit, at any time make an order for interim maintenance and costs for the wife and on or at any time after the making of any decree of restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, order the husband and his personal representative to pay to the wife for any term not exceeding her life such periodical sum for her maintenance and support as the Court thinks reasonable, provided that no such order shall be made if the wife has married again.

(2) Subject to any agreement by the parties to the contrary, any order under this section, and any order under section (32) of this act extending or varying any such order, shall cease to have effect if the wife marries again.

31. *Payment of Capital Sum*

(1) In addition to or instead of making any order under this part of this Act, the Court may, if it thinks fit, on or at any time after any decree of divorce,

(a) order the husband or his personal representative to pay to the wife such capital sum as the Court thinks fit;

(b) order a settlement to be made to the satisfaction of the Court of the property of the husband or of the husband's estate, or any part thereof, for the benefit of the wife.

(2) An order under this section for the payment of a capital sum may provide that the sum shall be payable at a future date specified in the order, or shall be paid by such instalments specified in the order as the Court thinks fit.

Comment on Ss. 29 & 30. Cf. U.K.M.C.A. 1965 ss. 15-22 and N.Z.M.P.A. 1963 ss. 39-41.

"The Courts Should Have Authority to Award Capital Sums in Lieu of Periodic Alimony Payments"

It is in the best interests of the parties and of society that where possible financial arrangements between the parties which are the cause of much strife be terminated by a final settlement along with the other aspects of the dead marriage. At the same time, the court should have authority to make an all-inclusive disposition of such things as the matrimonial home and furniture, as provided in section 35.

32. *Variation of Maintenance Order*

Upon it being made to appear

(a) that the means of either the husband or the wife have increased or decreased, or

(b) that either party has been guilty of misconduct, or being divorced, has married again, the Court may from time to time vary or modify such order either by altering the times of payment or by increasing or decreasing the amount, or may temporarily suspend the order as to the whole or any part of the monies so ordered to be paid and may again revive the order wholly or in part of suspend or rescind the order for payment of any capital sum or portion of a capital sum which has not been paid at the date of application, as the Court thinks fit.

Comment: Cf. Alberta D.R.A. s. 26.

33. *Enforcement of Maintenance Order*

(1) Maintenance orders for the benefit of a wife or former wife or the children of the parties may be enforced in any manner now provided for enforcement of a civil debt or as provided in the Alimony Orders Enforcement Act.

(2) Where a spouse has made default in payment of any alimony or maintenance ordered to be paid, the Court may make an order requiring the spouse's employer to deduct a stated amount each month from such spouse's salary and remit the same to the Clerk of the Court or such other party as the Court may direct, or the Court may require such amount to be deducted and paid to the Department of National Revenue together with such employee's income tax deducted at source.

Comment: Preserves the existing enforcement system and adds a continuing type of garnishee similar to that provided in section 120 of the Income Tax Act and in addition adopts Mr. Justice Scarman's suggestion that such payments be

made through the Income Tax Department. Such a procedure would cause no additional burden on employers who must make remittances to the Department in any event. (A-11)

PART IX—Matrimonial Home

34. *Notice to Third Parties.*

No order shall be made under this part of this Act with respect to any furniture or matrimonial home in which any party other than the parties to the action has any interest other than an interest by way of security, without notice to such other party.

Comment: Cf. N.Z.M.P.A. 1963 s. 56

35. *Possession and Vesting Orders.*

The Court may at any time make an interim order for the possession of the furniture and of the matrimonial home or either of them and on making a decree of restitution of conjugal rights, judicial separation, divorce, nullity or dissolution of marriage, the Court may vest ownership of the furniture and the matrimonial home in either party, partly in each party, or in the parites as tenants in common, or may order the same sold and the proceeds disposed of as the Court thinks fit,

Provided that nothing contained in such order shall affect the rights of a third party having an interest as a creditor therein.

Comment: Cf. N.Z.M.P.A. 1963 ss. 57, 58 and 59.

PART X—Appellate Jurisdiction and Appeals from the Domestic Proceedings Court

36. *Appeals from the Family Court Division.*

(1) An appeal shall lie from any judgment or order of the Family Court Division to the High Court Division.

(2) Such appeals shall be heard by way of trial de novo by a single judge of the High Court Division in either civil or criminal appeals.

37. *Appeals from the High Court Division.*

An appeal shall lie from any judgment or order of the High Court Division to the Court of Appeal of the Province or Territory designated to hear appeals from the superior courts of first instance for the province in which the proceeding is commenced.

Comment: on ss. 36 and 37. Appeal provisions are substantially the same as those that now exist in some provinces.

PART XI—Miscellaneous

38. *Evidence as to Adultery*

(1) A witness in proceedings under this Act, whether he is a party or not, may be asked, and is bound to answer, a question the answer to which may show, or tend to show, adultery by or with the witness where proof of that adultery would be material to the decision of the case.

Comment: Cf. U.K.M.C.A. 1965 s. 43 and N.Z.M.P.A. 1963 s. 69. Evidence of a witness' own adultery when relevant should be compellable evidence like other evidence in civil proceedings. The present privilege does nothing to protect the sanctity of marriage; it is a cloak covering immoral behaviour and has given rise to our system of "disguised divorce by consent".

39. *Recognition of Foreign Decrees*

(1) The validity of any decree or order or legislative enactment with respect to any matter dealt with under this Act (whether before or after commencement of this Act) by a Court or legislature of any other jurisdiction shall, by virtue of this section, be recognized in all Canadian courts, if:

(a) one or both of the parties were domiciled in that jurisdiction at the time of such decree, order or enactment; or

(b) such decree, order or enactment would be recognized in the jursidiction in which one or both of the parties were domiciled at the time of such decree, order or enactment; or

(c) the foreign decree or order is substantially similar to a decree or order that any Canadian court would have been entitled to make under this Act in substantially similar or reciprocal circumstances.

Comment: New. Cf. N.Z.M.P.A. 1963, s. 82 (A-12)

40. *Abolition of Actions for Criminal Conversation, Enticement, Alienation of Affection and Loss of Consortium.*

Actions for criminal conversation, enticement, alienation of affection and loss of consortium are hereby abolished.

Comment: New—These actions originally reflected the theory that husbands had property rights in their wives. They are now rarely prosecuted and are used chiefly as a means of harassment. (A-13)

41. *Delay.*

Delay in bringing or prosecution of any proceedings under this Act shall not be a bar thereto.

Comment: New. The discretionary bar of delay, which should not be confused with condonation, penalizes the party who does not rush to litigation or is slow to give up hope that his or her marriage can still be salvaged.

42. *Condonation, Collusion and Connivance Discretionary Bars.*

The Court may in its discretion dismiss any petition if the petitioner has condoned any matrimonial offence complained of or has been guilty of collusion or connivance.

Comment: Cf. U.K.M.C.A. 1965 S. 42 and N.Z.M.P.A. 1963 S. 31 Attempts at reconciliation may in law be condonation, collusion or connivance. These bars should be discretionary not absolute, to be exercised by the court chiefly when there has been an attempt to thwart the course of justice. Collusion is now a discretionary bar in the United Kingdom and New Zealand.

43. *Coming Into Force of this Act.*

This Act or any part thereof shall come into force on dates fixed by proclamation and notwithstanding the provisions of section 3 (b) may be proclaimed in force in part only of Canada.

APPENDIX B

NEW STRUCTURES CONCERNING MARRIAGE, THE FAMILY AND DIVORCE

1. *The Pastoral Institute: A New Pattern of Ministry.*

Some Methods of Assessing Marriage and its Breakdown

The church needs to be concerned for the psychological and pastoral factors involved in marriage breakdown, divorce and remarriage. Countless occasions for educating those planning for marriage as well as those who were caught in the tragedy of marriage breakdown present themselves to the clergy and lay leaders of the church, if they are sensitive and approachable. This kind of pastoral work is both a duty and a privilege that should be given top priority.

The methods used at the Pastoral Institute, in assessing marriage breakdown, may seem more appropriate for the specialized ministry of pastoral counselling than for the pastor of a parish. However this is not so. The instruments used for gathering data, evaluating personality and assessing temperament, have been researched as to their effectiveness and validity, both for the persons seeking help, and the various professions using them. Research and training in marriage and family life education, marriage counselling and the training of churchmen in pastoral counselling with these approaches, has been going on for years. (B-1)

(a) *Personal Data Kits.* These kits developed at the Pastoral Institute in Calgary work well for the parish pastors. Rural and urban churchmen of many faiths, who are trained in these methods in the seminars conducted by the Pastoral Institute each year in Calgary and Banff are making use of these kits. They find them helpful in assessing the communication and soundness of engaged couples going into marriage, to evaluate the strengths of a marriage or to indicate the breakdown of marriage. A minister in southern Alberta wrote to the Institute:

> "After a week away from the summer seminar at Banff, my appreciation to you and thereby to the whole school is greater than it was the day we adjourned. I had a profitable and wonderful experience there. You are to be thanked a thousand times....I learned so much about myself and about people and about resources which are available as we confront the counselling perplexities."

The psychological instruments contained in these Personal Data Kits can aid physicians, social workers, and others as well as clergymen in making a rapid assessment of the situations bearing on marriage breakdown and other family problems. Research has shown that with these kits, as much data often can be gathered with a half an hour of the professional or volunteer worker's time, as could be obtained in 5 to 6 hours of interviewing. Significant clues as to the outcome regularly come to light in the first session with a couple. What this means in terms of valuable time and costs involved to the churchmen, the professional or volunteer worker can be appreciated.

A brief description of these Personal Data Kits may clarify how they are used to evaluate the resources and strengths of an engaged couple, and to assess the need for counselling in the case of marriage breakdown, divorce and remarriage.

The Personal Data Kit is *not* a series of psychological tests, nor is it the equivalent of a psychiatric examination but it does get at psychological and psychiatric factors. It was not designated to subject the individual making it, to a penetrating exploration of his inner secrets and complexes. The kit *is* on the other hand, a set of forms which permit and assist an individual to write

comprehensively about himself and thus provide his counsellor very useful information in the way that he would like it expressed. The Personal Data Kits which we use at the Pastoral Institute are made up according to the person or the couple's needs and contain appropriate selections from the following list of instruments.

1. An identifying Information Sheet;
2. A Taylor-Jonhnson Temperament Analysis;
3. A Cornell Index;
4. A Mooney Problem Check List;
5. An Information Check List;
6. A Biographical Review;
7. The "X" or "Y" Forms of the Sex Knowledge Inventory;
8. The Religious Attitude Inquiry;
9. A Dating Problems Checklist;
10. A Courtship Analysis;
11. Marriage Prediction Schedules;
12. Marriage Role Expectation Inventory.

Not all of these instruments are used in each case. They are chosen, and the kit is made up according to the troubles that are presented by the individual or couple, or the circumstances of the marriage plans.

It is unrealistic for us as churchmen or any others in society to talk about stable family life or marriage breakdown, divorce or remarriage without coming to terms with the psychological factors involved in marriage relationships. If this is so, then what about the content of the counsellor-educators, discussions and presentations on these matters?

A team approach is basic to the whole task of family life education and counselling as it is undertaken at the Pastoral Institute. This has a great deal to do with the kind of content and presentations that are made. One such program is the marriage education. The classes meet from 8:00 to 10:00 p.m. every Monday night of the year except holiday Mondays. The groups run in revolving series of eight nights with different professions giving leadership on various topics. Physicians, bankers, lawyers, clergy and others, with presentations and group interaction, cover the following topics:

Successful Marriage
Standing Up to Family Influence
Managing Family Finances
Companionship, Recreation and Social Activities
Masculine and Feminine Roles
Psychological Factors of Temperament
Sexual Factors in Love Fulfillment
Spiritual Values and Family Goals

The Family Life Education programs led by ministers and doctors working with the Pastoral Institute attract hundreds of young people at a time. A few of the hundreds of responses will indicate how methods of these new patterns of ministry get to people.

> "This seminar has given me a clearer insight into the church's feeling toward sex and has given me a more pleasant outlook towards love, marriage and interpersonal relationships. It has been an excellent seminar and I believe it has helped most, if not all the people here, to understand more completely the wonders of love and marriage."

Parents and youth leaders are brought together for similar seminars. Comments like this are received regularly after these programs:

> "This seminar has shown me that the church is willing and anxious to take up the challenge of helping us bring up our teenagers to be responsible citizens in society and happy and well adjusted individuals in their own right. I believe that this is a much needed approach to the problems our young people and their parents face in this modern accelerated age. It is heartening to know that the church is trying to keep up with the changes in our society, in active participation, and not merely giving it lip service. Teenagers must be confused by the complex demands on them and sometimes they pay much more attention to an informed, interested outsider than they do to their own parents and community leaders."

The relationships of human sexuality cause great anxiety in society today and the doctor-minister teams at the Institute have been able to help families in this basic way. Dr. William Masters of the Masters-Johnson team in St. Louis put it accurately when he said:

> "Aside from the instinct for self-preservation, there's nothing that affects every man, woman and child in the world to a greater degree than basic sexuality." (B-2)

Their research and writing of "Human Sexual Response" (B-3) have provided more sound data than has ever been available before, for clergy and others who are asked to give family life leadership. Teams are always used at the Institute and they are backed up responsibly by the Interprofessional, Interfaith Advisory Committee and the Board of Directors.

(b) *The Quality of Family Life.* The quality of family life education that goes on in the home, the church and the community is a most urgent matter. Psychological, moral and religious characteristics are emphasized as the essence of the nature of life. Physical aspects are managed, as any others, according to the understanding, the meaning and worth of persons. Somehow we are coming across to our youth in our day with the feeling that sex and sin are synonymous. Similarly, we are coming across to people in our society that sex is the chief sin by which they can break up a marriage rather than solve any problems that have led to unhappiness.

Family life education, family counselling are ways of providing more responsibly for an infinite variety—a never ending wealth of resources where persons want to make life a new adventure. Marital adjustment is not a fact that is achieved in one day like paying off the mortgage. It is an on-going process that is inexhaustible in its potential for new and enhancing experience. Young people should be learning before they ever start to plan their own marriages and their own family lives, that research makes it clear that if there were only ten factors involved in our expression of love and affection for one another (there are many more than that) there would be 3,628,800 (B-4) different possible permutations of ways in which we could arrange new and interesting rewards for our partners. That means that we could have a new dividend of love for each day of the first 10,000 years of our marriage. I think you will agree that most people are hardly "hitting on one cylinder". With such blessings in life, what difference would the children's depravity make even if it were total?

(c) *Relationships the Deciding Factors.* It is important to make clear that relationships are the deciding factors in whether there will be an intrinsic, utilitarian or a broken marriage. (B-5) The report of the Archbishop of Canterbury supports the experience at the Institute.

> "From the psychological point of view the mutual interaction between husband and wife in marriage constitutes by far the most impor-

tant of all adult human relationships. In recent years it has been depth psychology that has thrown most light on it." (B-6)

On the following page, the Taylor-Johnson Temperament Analysis (B-7) profiles illustrate how one of the instruments in the Personal Data Kits can show the relationships in marriage and marriage breakdown. They are used as a physician uses X-rays to provide evidence of a condition at the time.

Profile A indicates favorable communication, understanding and acceptance of the husband by the wife. To grant a "quickie divorce", without counselling, even in the case of the adultery may be quite unjustified.

Profile B indicates a breakdown of communication, understanding and acceptance of the wife by the husband. To not be able to obtain a divorce on the basis of "marriage breakdown", and be granted release from an emotionally and spiritually dead marriage would be tragic, if no adultery were ever involved.

The use of these instruments selected for our Personal Data Kits provides a more specialized and objective way of assessing marriage breakdown and whether emotional and spiritual divorce has occurred or not. The psychological factors need to be taken into account in the courts and in drafting legislation if divorce law reform is to solve the present dilemmas.

The problems of money, religion, in-laws, alcohol and sex are not usually the causes of marriage breakdown but often are evidence of a failure to establish communication, or a breakdown of that communication, as illustrated in these profiles. Psychosomatic ailments, neurotic pattern of behavior, office affairs and alcoholic reactions can hardly be considered satisfactory solutions to poor marital relationships. When they are faced at the deeper level of interaction in relationships, marriages often are better than before the crisis occurred.

Divorce is only one solution to marital problems and should always be considered a last resort, only available when the marriage is psychologically broken and theologically dead. A marriage that is clinically beyond repair, should be dissolved. When the break comes is the time when families need pastoral support, guidance and counselling. Families that are carefully counselled by pastors and others, find divorce less disturbing to parents and children alike, than the "cold war" of a dead marriage. A mother of two children, whose marriage ended in divorce after counselling at the Pastoral Institute left Calgary to teach school in another city. Her letter to the Institute speaks for many.

> "If I ever manage to recapture that quality that life previously held for me, you will have been a gigantic stepping stone toward its achievement. You wielded a powerful influence on me; replacing bleak despair with hope, resentment with sympathy, and exuding the faith that despite all, God still is in all. I accepted your kindness, understanding, and help, with full knowledge that I must return to circulation as generously of these qualities as I have so generously received. I hope the memory of recent events remains poignant enough for me to discharge my part of the bargain. If all is not to have been indeed in vain, my life must need be a far shinier example, and when our paths cross again, the need for crutches no longer existent. I gratefully thank you, and may God's richest blessings encompass you, as well they must".

In the world of today people are more concerned with psychological motives and meanings than in former times. This is more closely related to the theologians and the pastor's concern too. Legislation must be designed to make the family and society more truly human, loving and fulfilling. Before this can be done, careful study must be made to consider motivation. When divorce is based on the actions of the "matrimonial offences", due consideration is not given to the

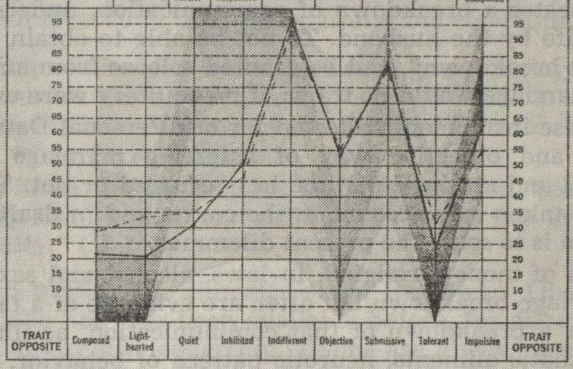
Husband — Profile A
Criss Cross — Good Communication

TAYLOR-JOHNSON TEMPERAMENT ANALYSIS PROFILE

Experimental Profile Revision of 1966

These answers describe Doe, John Age 45 Sex M
as of 6-9-66 (date) Single Married X Divorced Widowed Counselor WEM
Answers made by: Self, or Jane Doe School U of A Grade Occupation Civil Engineer
who is a: husband, wife, father, mother, son, daughter, brother, sister, or ____ of the person described.

	A	B	C	D	E	F	G	H	I	
Mids										
Raw score	4 6	2 4	23 22	29 30	29 28	10 11	31 29	5 5	28 28	Raw score
Percentile	12 20	21 33	31 32	51 46	97 93	53 58	93 81	24 32	69 55	Percentile
TRAIT	Nervous	Depressive	Active-Social	Expressive-Responsive	Sympathetic	Subjective	Dominant	Hostile	Self-disciplined	TRAIT
TRAIT OPPOSITE	Composed	Light-hearted	Quiet	Inhibited	Indifferent	Objective	Submissive	Tolerant	Impulsive	TRAIT OPPOSITE



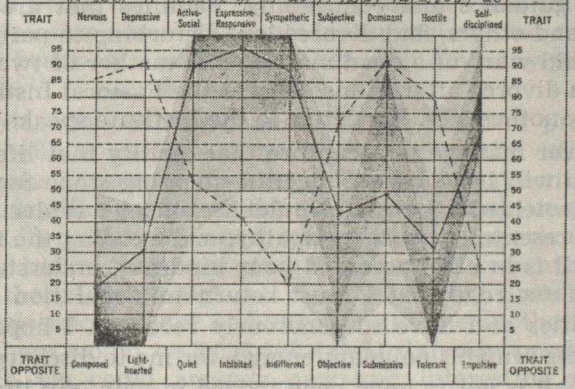
Wife — Profile B
Criss-Cross — Poor Communication

TAYLOR-JOHNSON TEMPERAMENT ANALYSIS PROFILE

Experimental Profile Revision of 1966

These answers describe Brown Susan Age 40 Sex F
as of 7-8-66 (date) Single Married X Divorced Widowed Counselor W.E.M
Answers made by: Self, or Jim Brown School High School Grade 11 Occupation Housewife
who is a: husband, wife, father, mother, son, daughter, brother, sister, or ____ of the person described.

	A	B	C	D	E	F	G	H	I	
Mids										
Raw score	1 20	4 23	31 27	38 29	35 25	8 15	22 32	5 18	30 30	Raw score
Percentile	18 86	31 91	70 53	96 41	85 20	43 72	49 92	24 80	67 26	Percentile
TRAIT	Nervous	Depressive	Active-Social	Expressive-Responsive	Sympathetic	Subjective	Dominant	Hostile	Self-disciplined	TRAIT
TRAIT OPPOSITE	Composed	Light-hearted	Quiet	Inhibited	Indifferent	Objective	Submissive	Tolerant	Impulsive	TRAIT OPPOSITE



Excellent — Acceptable — Improvement desirable — Improvement urgent

DEFINITIONS

TRAITS

Nervous — Tense, high-strung, apprehensive.
Depressive — Pessimistic, discouraged, dejected.
Active-Social — Energetic, enthusiastic, socially involved.
Expressive-Responsive — Spontaneous, affectionate, demonstrative
Sympathetic — Kind, understanding, compassionate.
Subjective — Self-centered, emotional, illogical.
Dominant — Confident, assertive, competitive.
Hostile — Critical, argumentative, punitive.
Self-disciplined — Organized, methodical, persevering.

OPPOSITES

Composed — Calm, relaxed, tranquil.
Light-hearted — Happy, cheerful, optimistic.
Quiet — Placid, socially inactive, lethargic.
Inhibited — Restrained, unresponsive, repressed.
Indifferent — Thoughtless, unsympathetic, insensitive.
Objective — Fair-minded, reasonable, logical.
Submissive — Passive, compliant, dependent
Tolerant — Accepting, patient, humane.
Impulsive — Disorganized, uncontrolled, changeable.

Note: Important decisions should not be made on the basis of this profile without confirmation of these results by other means.

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research of this century in psychological depth. That is to say nothing about the people involved. Let Nancy Taylor White speak for them:

> "I'm now a divorcee. There are as many different causes of divorce as there are divorced men and women. But I am convinced that the great majority of us share one thing, and that is an abhorrence of the way by which a marriage is dissolved in this country. It is, I firmly believe, an example of the grossest kind of immorality."

The common people of Canada know better than that. Continually they ask,

> "Why should many persons be driven to commit adultery or perjury when neither is emotionally or morally acceptable to them, in order to get out of a marriage that has broken down? Is it not because research in the complex motives of human life has yet to be taken seriously in drafting divorce legislation?"

The legally "innocent party", many times is more psychologically guilty than the legally "guilty party". From the evidence of the marriage counselling program at the Pastoral Institute and many other centres, the psychological dynamics needed to be taken seriously by the legal profession, the clergy, and other professions. The use of the Personal Data Kits is a way of trying to do that at the Institute.

The Pastoral Institute pattern of ministry can be set up in any population centre even on a voluntary basis. It should always be set up on an inter-faith, inter-disciplinary basis and grants might be considered from public funds since the program is open to the total community. This pattern of ministry is in no sense a duplication of service or in competition with others but a way of supplementing in a rich variety of resources, both for education and for counselling, that can be made available in a community.

2. *Conjoint Family and Group Counselling*

(a) *Conjoint Family Counselling* is a method of seeing all members of the family at one time in the same room. The theory points to the importance of seeing all members of the family to understand a child's emotional disturbances.

The Taylor-Johnson (criss-cross) Temperament Analysis is a useful device in getting a clearer picture of the role relationships in a family. In a family of four, for example, where the children are teenagers, sixteen relationships can be shown. Father completes a T-JTA on himself, his wife and each of the young people. The other three members complete theirs in the same way. Family communication can be assessed, the distress often can be pinpointed and education and counselling set up according to their needs.

The conjoint method has advantages. With this approach it is possible to strengthen new behavior, to prevent one member from being chosen as the "scapegoat" to reflect a family disorder, to help the family to maintain integrity and change behavior that has become destructive.

(b) *Group Counselling* is another extended form of individual counselling. But there are both qualitative and quantitative differences. This method more approximates many life situations and universalizes individual problems. It grew out of the economic need for counselling services during World War II and counsellors' dissatisfaction with the individual approach.

The church has always moved on such small groups as "the church in thy house". (B-8) The group sometimes represents the substitute family for those with no close ties. The use of men and women as co-leaders in the groups adds further to the family feeling and participants even compete to gain the counsellor's attention, as often seen in the family.

The group permits social experiment in a controlled situation and self-evaluation and understanding come easier. In the search for relationships marital partners will be able to listen to other members when they no longer hear their spouse, and gain understanding of how they upset one another. The inherent provision for successful social interaction with people in supervised circumstance makes it possible for many to reverse failure patterns in their relationships at home and at work.

The group method is not a substitute for individual and conjoint family counselling but provides more than an adjunct to these. Groups provide a helpful way of "tapering off" or "launching" persons back into the full give and take of life in the community.

At the Pastoral Institute these methods have been in use for about three years. For practical reasons we use "open groups". Those who are ready leave the group one by one and new ones are added in the same way. These groups perpetuate themselves, and one group of "Married-Singles" or "Formerly Marrieds" is in its third year of weekly meetings. Other groups have been running for a term of months. Open groups have the advantae of persons coming in and leaving when ready without disrupting the whole group or reducing it to a small number of participants.

The groups meet each Wednesday from 8:00 to 10:00 p.m. and vary in size from ten to twenty members. Group leaders meet prior to meeting each week to evaluate the functioning of the groups and to make necessary decisions as required.

Those caught in marriage breakdown and divorce have benefitted most from the groups at the Institute. They are well motivated because of their circumstances and follow through the best on a long term program of rehabilitation. Some have resisted the group suggestion at first.

> "It took us weeks to get up nerve enough to ask for counselling. We don't believe in advertising our problems. You don't think we'd discuss our private lives with a bunch of strangers."

Yet often persons come to feel emotionally secure enough in the group to bring up things they wouldn't tell the counsellor at first. One person put it this way:

> "I can discuss everything in the group. I feel that I am among friends."

Little consideration is given to the persons' social status, economic standards, religious affiliation or lack of it, age, or length of marriage. Scattering persons, as the Lord does, has not seemed to create any problems. Even persons bordering on psychotic reaction, those with neurotic and antisocial behavior and others with marginal problems seem to do no noticeable harm to one another. Many functioned noticeably better and were terminated, and others are able to remain outside of the hospital and keep functioning with new hope.

3. *Personal Acquaintance and Marriage Introduction Service*

(a) *The Need for New Social Structure*

The rate of divorce in Canada indicates that people are not realistic in the personal and social criteria by which they choose their mates. A new scientific, pastoral strucure, to assist in better mate selection is a social need in Canada.

Such a program should combine some elements of the approach of the Eastern cultures, where families chose the partners, and the individual, romantic freedom of the western ways, if it is to be a more sound approach.

An organized service based on a revolutionary plan, and sponsored on a national basis by the church is being initiated by the Pastoral Institute. With the

participation of the clergy and the congregations, men and women can have a better than average chance for happy marriage, with responsible freedom of choice, in spite of the suspicions and misconceptions that surround such unorthodox methods.

The are many reasons for this poignant social need. (B-9) The search for suitable mates so often is fruitless in small communities where the choice is limited. The diversity of races and religions is becoming a large factor with increased travel and other forms of communication. The over emphasis upon complete fulfilment as a goal in marriage, puts heavy responsibility on marriage, that requires more carefully matched partners. The imbalance caused by the industrial distribution and mobility of male and female population adds to the difficulty of men being where the women are. Since propinquity is still the chief factor in marriage, new ways are needed to bring people together.

The rise of large urban population centers and the psycho-socio-economic needs to strengthen the family, also add to the complexity of the problem. Gone are the days when everyone knew everyone else in the community, and every married female was a cupid for her friends. The choice is well put by one who writes,

> "It's between which I fear most: meeting a stranger or not meeting anyone."

"I learned to keep my eyes open wherever I am," a 37-year-old woman says.

> "I now have no prejudice against any avenue of meeting. I even met a very fine man on a subway platform one time. You have a number of disappointments that way, and sometimes I am even frightened, but I feel I must take every chance. You never know when or where you'll meet someone."

The formerly-marrieds (F.M.'s) find it difficult to meet suitable mates and recognize the need to resort to unorthodox approaches.

> "The search for new partners is a free-for-all in which divorced people seldom hesitate to use the unconventional methods." (B-10)

It is important to provide more sound social methods for the single, divorced and widowed persons to get together. Scientific advances have decreased the distance between places and increased the distance between people. Anyone who can enjoy the services of Air Canada should be able to appreciate Personal Acquaintance and Marriage Introduction Services. They will help unmarried, marriageable Canadians to get together, against almost unsuperable odds, and without loss of self-respect, privacy and dignity.

(b) *Types of Services*

There are four types of services in America, all categorically dubbed "lonely hearts clubs". They are listed by Los Angeles sociologist, Karl Miles Wallace. (B-11)

1. Correspondence clubs.
2. Personal Contact clubs.
3. Social clubs.
4. Clubs which offer a combination of the services
4. Clubs which offer a combination of the services of the above three types.

(c) *Need for Church Sponsorship*

It is very difficult to conduct an introduction service profitably and reputably in our society. Dr. Paul Popenoe, Director of the American Institute of Family Relations in Los Angeles, in 1959 indicated to the director of the Pastoral

Institute in Calgary that the church should move into this field. He suggested that the church initiate such a service in Canada, on a national basis, with a major denomination assuming the initial responsibility. At first when it was mentioned to the courts of the church, it seemed almost necessary to remind delegates that this was not a "lonely hearts" joke. But now churchmen are more sensitive to the growing magnitude of the social problem involved and many feel that the time has come for the project to be launched. The Calgary Presbytery in 1962 approved the Pastoral Institute with this planned as one of its future projects.

The high mortality rate of commercial introduction services is a great concern to scientists like Dr. Popenoe and Dr. Wallace. The clubs cannot stay solvent long enough to gain the confidence of society. The latter writes,

> "Of 211 correspondence clubs in 1950, when I wrote for circulars, only 31 were going concerns when I checked them again in 1953. This is a normal mortality rate; seventy-five per cent fail within four months of their inception." (B-12)

It is obvious what this does to persons who sought the services that went broke.

The church has the confidence of society in matters of marriage and the family. The Pastoral Institute, as a new church structure, operated on a non-profit basis, and in cooperation with many faith groups, has flexibility, support and professional consultation to initiate such a project.

(d) *The Goal*

The goal of the Pastoral Institute to bring persons together for acquaintance, and possibly marriage, is four fold:

(i) *Compatibility in Personality.* Persons applying for membership will be required to complete a Personal Data Kit with instruments designed to assess temperament, sociability, conformity to social standards, attitudes toward sex, money and religion, and so forth.

(ii) *Contemporary in Age.* It will take some time to build up a large enough membership to provide a wide selection of potential partners. This is where the pastors who know the marriageable persons in the church and community; the unmarried, the divorced and the widowed persons can make a contribution in helping to introduce these persons to the service if it would be useful to them. A large membership is essential to have the range of age groups to ensure selection on this basis as well as personality.

(iii) *Comparable Cultural Background.* The cultural background of members will be assessed according to personal tastes and interests as well as occupation, education, socio-economic status, racial and religious origins.

(iv) *Confidential Protection.* Sound marriage rather than exciting adventure will be the emphasis. Screening by the use of Personal Data Kits will discourage most of the exploitive trouble markers. The fees will be on a small registration and larger marriage deposit basis. The registration for introductions will cover a set period of time and the deposit of the marriage fee for successful applicants will be held in trust. If the time lapses without a mate, the deposit would be refunded with interest and if marriage follows it would go to the Pastoral Institute. The fee structure along with the careful selection of members on the basis of Personal Data Kits should give good protection against exploitation of members.

(e) *Who Will be Served?*

Dr. Wallace in his research, was quite unprepared for the kind of people who joined his service. It was not "the poor, the inept and the uneducated" as myth would have it. There were more men than women, more in middle and upper-socio-economic levels of society, and a few neurotics. The less gregarious and shy persons responded well and the conventional type of persons, rather than the eccentric, made use of the service. (B-13)

(f) *A National Correspondence Service.*

There are many advantages to the correspondence type of service being the main one. Although the others mentioned above can be combined with it where Pastoral Institutes or other professional and volunteer resources are available.

Most people are individualistic, proud and sensitive enough to prefer the dignity of anonymity, as well as freedom from a "welfare" atmosphere, and that of volunteer do-gooders and church workers. They are looking for dates and mates rather than therapy which most of them do not need. Where they want help they would be free to seek it through their pastor or other resources he might suggest.

The self-consciousness and embarrassment of having to go to gatherings of others and be looked over, holds little attraction to most of the people who will respond readily from the privacy of their own homes. They can be reached through literature distributed through their churches, and advertising in national church and other publications.

The correspondence services also will recruit from the entire nation. Letters provide the opportunity to speak forthrightly, early in the exchanges, even using pseudonyms, if preferred. This way the courtships are briefer, ranging from one to nineteen months. (B-14)

(g) *The Divorce Problem is Reduced.*

The marriage rate was about 11 per cent of the members in Dr. Wallace's program. (B-15)

> "The record appears to be a very model of stability. But—were the brides and grooms of P.A.S. happy?
>
> Three-fourths of those who returned our surveys emphatically answered, yes. As far as we could determine, about one P.A.S. marriage in twelve ended in divorce courts. As we have seen, the figure for the nation is approximately one in four."

It is the sociologists undertaking to make us aware of existing knowledge and of the need of new social structures. The church has a responsibility along with others in society to implement that information in the ways that are most important.

4. *A Pastor-Educator-Counsellor Internship Program*

The Leadership Development Department of the Pastoral Institute has initiated a number of programs of continuous education for pastors and others. All of them have been over subscribed in terms of the numbers that could be handled efficiently.

The next proposed community demonstration project is an Internship program.

(a) Proposed steps to be taken for an Internship Program for clergy and laity of all faiths.

(i) Establish an interfaith, interdisciplinary supervision committee representing the university, the helping professions and broad faith groups.

(ii) Provide the committee and the interns, continuously, with life situations, the unresolved social and public issues behind the troubles people bring, along with education and experience in dealing with them through workshops, seminars, evaluations, symposia, conferences, films and literature.

(iii) Involve leaders of many areas of the community; young people, parents, leaders of industry, government, professions etc., in continuous search, discussion and planning for leadership relevent to the challenges of today.

(iv) Plan for Internship Training on supervised, Interfaith, Interdisciplinary basis as a continuing process. The goal is to send out clergy and laity, capable of using their lives in more mature, fruitful and responsible ways. The method is to assume much of the academic and to go beyond it in providing growing experience in relating that background to the real issues upon which life is won or lost.

(v) Increase the awareness that the life situations, which confront the clergy and laity of the church and community are no different than those that underly any other relationships or responsibilities in life. The whole community can be more effectively challenged inspired and helped to relate to each other, creatively and non-exploitatively, in the many relationships of day to day living in the family, community and world.

(vi) Identify through these steps the resource persons of the church and community. Most of those needed are already there. They need only to be involved and freshly equipped. They are the physicians, executives, homemakers, nurses, teachers, students, laborers, clergy, recreation leaders "Y" workers etc.

(vii) Enlist the support of professional associations through a small, qualified group consisting of competent staff directors, consultants, and professional volunteers. As knowledge and experience grow in a progressive community, the leadership and the demands for that leadership, everywhere will grow too. These demands upon the Institute from Calgary and other communities across Canada are beyond present resources.

(b) Facilities Available.

(i) Large churches of several denominations in the community have shown their willingness to accommodate the programs of the Pastoral Institute by providing offices, conference rooms, lecture halls, chapels, group counselling and meeting rooms. So far this has been on a rent free basis.

(ii) Highly skilled professional persons have continuously made their time available on a weekly basis for leadership, supervision, typing etc. without remuneration. This kind of commitment to a well thought out and planned program can be counted on.

(c) Planned Methods of Procedure

(i) Carry out the developing demonstration projects of the Institute until 1970 when complete reports and evaluation would be carried out under outside and objective leadership.

(ii) Enlist more staff that is available and qualified to work with the university, the other helping professions in the community, and the theological colleges of participating churches.

(iii) Provide much more opportunity for trainees on an Internship basis in various programs of special training experience using the particular resources of this community.

(iv) Establish a Scholarship Fund to assist clergy and laity to take advantage of the Internship opportunities.

(d) Background of this Proposal

The Pastoral Institute represents many years of training, experience, planning and demonstration on the part of the directors, staff and professional volunteers of the Presbytery area. It carries the complete endorsation of the Calgary Presbytery of the United Church of Canada, and from 1962 to 1969, financial support up to $24,000. a year.

The first proposals for the Pastoral Institute were made to the Edmonton Presbytery of the United Church of Canada in 1958, to the Alberta Conference and the Calgary Presbytery in 1961. The Institute was approved by the Calgary Presbytery as a demonstration project in November 1961 and established July 1, 1962. It was the first Institute of its kind in Canada. One has opened now in Toronto. In Winnipeg, Vancouver, Edmonton and Windsor, similar institutes are being considered, to work also, on an interfaith basis.

As these Institutes develop and work together, new social structures, such as those proposed in this brief, and others not yet anticipated, will appear and help to meet these special needs of Canadians.

APPENDIX C

"THE MYTH OF THE MULTIPLE DIVORCEE"

A common argument against "broader" divorce laws is based on the belief that if divorce is made too easy, the community will cease to think that marriage is intended to be a life-long union, and that the "multiple divorcee" who treats marriage as a series of temporary affairs will become the rule. Some statistics from the 1960 United States, which in most states has wide-open easy divorce by consent, challenge this assumption. In "This U.S.A.", the authors, one of whom is the former Director, U.S. Bureau of the Census, comment as follows:

> "Actually the divorce rate today (9.2 per 1000 married females annually) is no higher than it was twenty years ago, substantially lower than it was after World War II (17.9 in 1946), and mildly lower than in 1950 (10.3).
>
> "Divorce has somehow managed to become the moral-values bogeyman of our time, and it is readily pointed to as proof of a decaying society. And yet, divorce is one of the humane civilized legal tools of mankind and is recognized as such by feminist movements in developing nations the world over. Its purpose, for any who may have forgotten, is to allow a woman or a man a new choice of a marriage partner if the original choice was so inappropriate as to make life miserable. Divorce might be promiscuous or immoral if repeated again and again by the same people, involved, as it were, in a martial round robin—somewhat like the alleged behavior of certain sun-glassed citizens of the west coast. But that is not the case—as is indicated by this statistic: of all divorcees, 97 per cent of the men and 96 per cent of the women have been divorced only once. Typically, they either marry again and stay married—or they do not marry again.
>
> "This pattern of one-divorce-only seems to express these psychological truths: (1) Those who are mismated and feel that they can make a go of another marriage, actually do make a go of another marriage. (2) Those who themselves feel that they cannot live happily in the marriage situation try marriage once, fail at it, but never try again. Which seems to suggest that divorce is working best not for those who marry promiscuously but for those who have made a mistake and are not inclined to repeat it. It is a more useful act than its publicity portrays.
>
> "Although the divorce rate is down marginally in the decade between the 1960 and 1950 censuses, it has been high (relative to earlier years) for the past thirty or so years. This fact—coupled with the incidence of never remarried divorcees, the increase in elderly persons and the decline of spinsterhood—has substantially raised the percentage of our "currently divorced" population. As determined by the Decennial Census, in 1940 the percentage of those currently divorced in relation to the total adult population was 1.4 per cent. In 1960, that figure was 2.5 per cent, representing not a high divorce rate today, but a cumulatively high rate over a period of several decades." (C-1)

The fact that few people in the population of the United States avail themselves of the opportunity for "easy divorce" on more than one occasion is reassuring. It indicates that the scandalous and well-publicized antics of a few are not indicative of life even in a society whose laws have unlimited potential for mass divorce.

On the other hand, these figures do not mean that Canada should adopt "American-style divorce by consent". The multiple divorcee is not as great a

problem as most people think, but a 1 in 4 failure rate for first marriages is unacceptably high. Quite apart from the effect upon children involved, the parties to a divorce never escape unhurt. Often the ones who show the least apparent damage are most seriously affected, for they have built emotional barriers that may make it difficult to relate to others and to succeed in a future marriage. Sometimes they are still capable of passion but incapable of love.

We recognize of course that it is the "marriage failure rate" not the "divorce rate" that primarily concerns us. Even in the Uniteed States there are more people living separate from their spouses than there are divorced people. (C-2) But we doubt whether in all the divorces in the United States the marriages had irretrievably broken down. As stated by Dr. Forreger in a previous quotation:

> ". . . legislatures . . . should (as a preventive measure) be willing to prohibit divorce actions for a year while one or the other partner is undergoing therapy in the hope of saving the marriage." (C-3)

APPENDIX D

REFERENCES AND BIBLIOGRAPHY

REFERENCES

Introduction

Intro. 1—Divorce in Quebec and Newfoundland. We regret that we do not have the resources available to provide a French language edition of this brief for the convenience of our French speaking fellow countrymen. Any law must have a consensus of support among the citizens of the community or else it becomes a bad law. For that reason alone, and also for several other reasons, we strongly favour divorce reform in the eight provinces of Canada which now have divorce courts. By the same token, the reform we advocate might be a bad law in Quebec and Newfoundland because it did not have a consensus of support among the citizens of those communities. We do not know. For these reasons, we urge our arguments for reform only with respect to eight provinces.

Intro. 2—"Dead or Alive", p. 168. Also Alberta Conference Report 1959, p. 20 and 1961, p. 22.

Intro. 3—"Dead or Alive", centre pages VII and VIII.

Intro. 4—"Putting Asunder", p. 33 ff.

Division I

I-1 "The Significant Americans", p. 89 ff.

1-2 Ibid. p. 106 f and 132 f.

I-3 "Sourcebook in Marriage and the Family", p. 446 f.

I-4 "The Churches and Mental Health", p. 69.

I-5 "Let Your Husband Be a Man and Your Wife a Woman", p. 13.

I-6 "Reality Therapy", p. 9.

I-7 "Christians in Families", p. 39.

I-8 Matthew 5:27-28. (NEB) "Toward a Christian Understanding of Marriage, Marriage Breakdown and Divorce", pp. 18-35.

I-9 "Putting Asunder", p. 145.

I-10 "Divorce, the Church and Remarriage", p. 49 ff.

I-11 "Sourcebook in Marriage and the Family", p. 450 ff.

I-12 "The Psychodynamics of Family Life" Introduction.

I-13 "Modern Medicine of Canada", Vol. 20, Number 11, November 1965, p. 69.

I-14 "Men, Women and Marriage", Section on Marriage Introduction Services.

I-15 "Love is More Than Luck", p. 15 ff.

Division II

II-1 *Encyclopedia Brittanica,* 1965, Vol. 7, p. 513 ff.

II-2 "Morton Report", p. 340.

II-3 Wattenberg & Scammon, p. 36.

II-4 "Putting Asunder", p. vii.

II-5 "Putting Asunder", p. 34.

II-6 Quoted in *Payne,* "Working Paper on Judicial Separation", 1. 28.

II-7 "Power on Divorce", p. 81.

II-8 p. 39 ff. Quoted in *Friedmann,* p. 184.

II-9 *Vancouver Sun,* May 21, 1966.

II-10 *Life of Lord Chancellor Birkenhead,* p. 349.

II-11 *Calgary Herald.*

II-12 Reprinted in *Vancouver Sun,* May 26, 1966.

II-13 *Vancouver Sun,* May 21, 1966.

II-14 *Mackay,* p. 67.

II-15 "Putting Asunder", p. 18-19.

II-16 "Morton Report", p. 380, *Feifer,* and *Gayn.* New York State adopted "marriage breakdown" in 1966. A longer period is required in some of these jurisdictions when there is no prior judicial separation or separation agreement. See page 40 of this brief for argument against such a condition precedent.

II-17 pp. 24-41.

II-18 "Morton Report", p. 340.

II-19 pp. 151-185, esp. p. 168 and p. 178.

II-20 *Roberts.*

II-21 "Putting Asunder", pp. 41-2.

II-22 "Putting Asunder", pp. 44-5.

II-23 Quoted in *Friedmann,* p. 180.

II-24 "Putting Asunder", p. 43-4.

II-25 *Scarman,* "Family Law", p. 15.

II-26 "Morton Report", p. 381.

II-27 p. 186.

II-28 "Putting Asunder", p. 37.

II-29 *Scarman,* "Family Law", pp. 15-16.

II-30 February 11, 1966, p. 4.

II-31 "Putting Asunder", p. 32. In his presidential address to the 1966 Annual Meeting of the Canadian Bar Association, J. T. Weir, Q.C., Ll. D., stated: "Canada has been the heir of England with the rest of the Commonwealth of the finest traditions for the administration of justice in the world. . . we all stood—and still stand—in awe of the English way: in fact, so much so, that we tend to make a change in our law only after England has done so. This fear of newness, of only following the English lead, is still with us, as is disclosed in dozens of examples in the proceedings of this Association. On so many occasions when this Association has advised change, that change (if it came at all) came only because England did it first." (Address printed in the Canadian Bar Journal, October, 1966).

Appendix A

A-1 *Scarman,* "Family Law", pp. 10-11.

A-2 "Putting Asunder", p. 136.

A-3 *Scarman,* "Family Law", p. 3.

A-4 *Despert,* p. 233.

A-5 *Scarman,* "Family Law", pp. 6-7.

A-6 *Scarman,* "Family Law", p. 12. *Le Mesurier v. Le Mesurier* (1895) A.C. 517.

A-7 *Foster, passim.*

A-8 *Payne,* "Working Paper on Judicial Separation", pp. 17, 72-74.

A-9 *Scarman,* "Family Law", p. 13.

A-10 *Scarman,* "Family Law", p. 20.

A-11 *Scarman,* "Family Law", p. 19.

A-12 cf. *Travers v. Holley* (1953), p. 246.

A-13 *Payne,* "Working Paper on Tortious Invasion of the Right of Marital Consortium" and *Eleventh Report of the Law Reform Committee* (Loss of services, etc.), Cmd. 2017 (1963).

Appendix B

B-1 (a) *Family Life,* p. 3, publication of American Institute of Family Relations.

"The Johnson Temperament Analysis which the Institute has used for a quarter of a century and which it has shared with many thousands of counsellors in North America will not be available in its present form after the end of this year. It was developed by Dr. Roswell H. Johnson, for 25 years Director of the Department of Counselling at the Institute, and measured eight important traits... A revised form has been developed by Robert M. Taylor, a former associate director of the American Institute of Family Relations, Department of Counselling, with the cooperation of Dr. Johnson. Beginning January 1, 1967, those who want to use the test may order it from: Psychological Publications Inc., 5300 Hollywood Blvd., Los Angeles 90027.

They will find no difficulty making the change since the new Taylor-Johnson Temperament Analysis has the same general form as the older test.

...The test was carefully standardized at the University of Denver and elsewhere. A.I.F.R. psychologists believe it is an improvement which will continue to enjoy the popularity of its predecessor but be even more useful."

(b) *Training Ministers for Mental Health Work* by David S. Shapiro, Ph.D., The Reverend Richard N. Robertson and Leonard T. Maholick, M.D., Journal of Pastoral Care. Vol. XVI, No. 3, Fall 1962, pp. 149-156. This paper is a report of observations of workshops for clergymen conducted by the Bradley Center Inc., a private, non profit psychiatric facility in Columbus, Georgia where research in methods of assessing mental health has been going on for more than 10 years. Address of the Bradley Center Inc., 1327 Warren Williams Road, Columbus, Georgia, 31901.

(c) *Opening Doors for Troubled People* by David S. Shapiro, Ph. D. and Leonard T. Maholick, M.D., is a more detailed report of the successful outcome of their efforts to devise, simple, ingenious, time-saving techniques for conducting mental health assessments with the use of Data Kits by practitioners in all the helping professions.

B-2 a. "Two Sex Researchers on the Firing Line", Masters & Johnson, Life, June 24, 1966, p. 51.

b. "A Defense of Love and Morality", Masters & Johnson, McCalls, November 1966, p. 102.

B-3 "Human Sexual Response", Masters and Johnson.

B-4 "Let Your Husband be a Man and Your Wife a Woman", p. 14.

B-5 "The Significant Americans", p. 106 and p. 132.

B-6 "Putting Asunder", p. 140.

B-7 "Taylor-Johnson Temperament Analysis Manual", Psychological Publications, Inc., Los Angeles.

B (p. 76) "The Degrading Way I Had to get My Divorce", Nancy Taylor White, Chatelaine, September 1966, p. 29.

B-8 "Laity: The Church in the House". Bulletin of the World Council of Churches, April 1957, p. 5 (Romans 16:5; II Corinthians 16:19; Colossians 4:15; Philemon 2.)

B-9 "Love is More than Luck", p. 23 f.

B-10 "Strange Courtship Customs of the Formerly Married". McCalls, September 1966, p. 94.

B-11 "Love is More than Luck", p. 33.

B-12 Ibid., p. 98.

B-13 Ibid., p. 138 f.

B-14 Ibid., p. 177.

B-15 Ibid., p. 185.

Appendix C

C-1 From "This U.S.A.", by Ben J. Wattenberg, in collaboration with Richard M. Scammon, p. 36. Copyright 1965 by Ben J. Wattenberg. Reprinted by permission of Doubleday & Company, Inc.

C-2 *Despert,* p. 125.

C-3 See page 26 of this brief for fuller quotation.

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First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 9

TUESDAY, NOVEMBER 29, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

James C. MacDonald and Lee K. Ferrier, *Barristers & Solicitors. The Canadian Committee on the Status of Women:* Mrs. W. H. Gilleland, Chairman; Mrs. J. F. Flaherty, Press Secretary; Mrs. R. S. W. Campbell, Secretary.

APPENDICES:

21.—Brief submitted by The Canadian Committee on the Status of Women, Don Mills, Ont.

22.—Brief submitted by James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors, Toronto, Ont.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

25120—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, 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

Mr. A. J. P. Cameron (*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."

25120—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 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, C.P., 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, November 29, 1966.

Pursuant to adjournment and notice the Special Joint Committee of the Senate and the 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, Denis, Fergusson, Flynn and Gershaw—9

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Fairweather, Mandziuk, McCleave and Ryan—6

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors.

The Canadian Committee on the Status of Women:

Mrs. W. H. Gilleland, Chairman,

Mrs. J. Flaherty, Press Secretary,

Mrs. R. S. W. Campbell, Secretary.

Briefs submitted by the following are printed as Appendices:

21.—The Canadian Committee on the Status of Women.

22.—MacDonald & Ferrier, Barristers & Solicitors, Toronto, Ontario.

At 6:03 p.m. the Committee adjourned until Tuesday next, December 6, 1966 at 3:30 p.m.

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

OTTAWA, Tuesday, November 29, 1966

The Special Joint Committee of the Senate and the 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 and members of the House of Commons, we are ready to commence. I see a fairly full quorum for which I thank the members who are here.

We have some very fine and distinguished witnesses before us today but before I call on them I would like to read a letter I have received from the Attorney General of Ontario, the Hon. A. W. Wishart. I will omit the first paragraph.

> I now inform you that immediately upon receipt of your letter I referred it to senior officials in my Department, in order that the information and views which you request might be collated and prepared for presentation to your committee. This matter is in progress and I should shortly be able to furnish you with the material, which I trust will be helpful to your Committee in its deliberations.
>
> I appreciate your kind invitation to appear before the Committee. It may be possible for me to do so and I shall discuss this matter with you when I am in touch with you again in the near future.

I replied saying we would welcome his personal appearance, and I hope he will deal very fully with the series of questions regarding which, I indicated to him, we would like information and opinions.

Now, honourable senators and members of the House of Commons, we have representatives from the Canadian Committee on the Status of Women. One of these ladies, I believe, lives in Ottawa, and the others are from Toronto.

I understand that the first speaker will be Mrs. W. H. Gilleland, and I would like to identify her for the purposes of the record largely, but also that we may all know something about the positions she has occupied in the past.

Mrs. W. H. Gilleland, Chairman of the Committee, has the degree of M.A. (Queen's) in History and English, specializing in Canadian Constitutional History, and has been a teacher in these subjects. Sometime in 1960 she was appointed member of the Historical and Advisory Committee of the National Capital Commission. She has been President of the University Women's Club of Ottawa, 1950-52, Founder President of Elizabeth Fry Society of Ottawa, Vice President of Canadian Penal Association. She was a member of the Board of Governors, Canadian Welfare, term 1958-60. She has been a member of Speakers' Bureau, Canadian Committee on the Status of Women, and currently chairman of that organization.

Members of the committee, I give you Mrs. Gilleland.

Mrs. W. H. Gilleland, Chairman, Canadian Committee on the Status of Women: Honourable chairman and members of the Special Joint Committee of the Senate and House of Commons, I thank you very much for this opportunity of speaking to our brief, and particularly I wish to say how much I appreciate your having made available to us your proceedings up to a couple of weeks ago, which gave us a most comprehensive account of the divorce law of Canada, including the Quebec law, and the British law as of 1965, as outlined by Mr. G. B. R. Whitehead in the most recent copy of the proceedings which I have.

We find it most encouraging, since we sent in our submission quite a while ago, to find that the climate of public opinion seems to be very liberal, well in advance of what was expected of it: Indeed, public opinion is often puzzlingly surprising.

We are encouraged to find that some of the ideas we thought were rather daring as well as original are in fact neither. We had felt that the law in Canada regarding condonation and collusion was rather ridiculous, and then we learned from Mr. Whitehead's submission that the British law of 1965 is making some sense out of these two terms.

We are going to speak to some of the points of our brief, and the members of our committee will speak respectively on one topic or another.

To my immediate right is Mrs. J. Flaherty of Ottawa, who is currently President of Elizabeth Fry Society of Ottawa and has been associated with the National Executive of both the National Council of Women and the Canadian Federation of University Women. The next member of our group here is Mrs. Campbell of Toronto, who is so surrounded by law in her house—by her husband and by her brother, called to the Supreme Court of Manitoba a week ago today—that she should have absorbed some ideas after the particular kind of life she has led.

Since we represent the Canadian Committee on the Status of Women, we are obligated to spend most of our time speaking from the point of view of women; but this does not mean that we as women, possessed of husbands, are not well aware of the other side of the story.

We are however strongly of the opinion that, whatever the husband suffers, under the present divorce law there are peculiar aspects of the system which are discriminatory as far as women are concerned, and discriminatory in a way that we find exceedingly unfair, since in our opinion it violates the principle of the marriage partnership, which is that each suffers with the other, or benefits as the case may be.

Under the divorce law, however, the status that is accorded the wife by her husband and by society is voided by the qualification of domicile for a woman suing for divorce.

I will ask Mrs. Flaherty to speak to the point we make in paragraph 2, beginning at the bottom of the page. My colleagues have asked me, Mr. Chairman, to find out whether, since we are speaking to some points only, the brief should be read into the record.

Co-Chairman Senator ROEBUCK: It is not a long brief. There are some briefs that are presented which cannot be read for the reason that time does not permit. Read what you think will be of interest to us.

Mrs. J. Frank Flaherty, Elizabeth Fry Society, Ottawa: Paragraph 2 reads:

> 2. To date our major submissions have concerned the rights of women in various fields of taxation. However, the correspondence received from a large number of individuals across the country on the subject of taxes revealed discrimination and injustices in the law on divorce. As an example, under the Divorce Jurisdiction Act (R.S.C. 1952 c.

84) a married woman who has been deserted by, and has been living separate and apart from her husband for a period of two years or more, may sue for divorce only in the province in which, immediately prior to such desertion, her husband was domiciled regardless of where the wife is now domiciled. We recognize that this rule is an improvement over the previous one which required the wife to sue for divorce only in the province in which the husband was domiciled at the time of the petition. Nevertheless, the present statute may still impose hardship on the wife.

Such a married woman who has been deserted is presumably independent, supporting herself and a number of children in a new environment, free from the painful associations of her married life. She may be living far from her home and yet if she is to bring suit for divorce she must sue in the province in which her husband was domiciled at the time of the desertion.

Now, Canadians are a mobile nation, and a woman should not be tied down in the matter of domicile but should be able to sue for divorce, whatever the grounds, where she herself is living.

The universal declaration of human rights establishes the principle of the equality of spouses. A couple may have been living in the Maritimes and the husband deserts his wife and ends up in Vancouver. If she wishes to bring suit for divorce she must file her petition in the Maritimes, and this creates a heavy financial burden which she cannot assume. She might not be able to make the necessary arrangements for an indefinite period. The husband's domicile moves with him, no matter how mobile he may be.

We repeat that the law should recognize, as domicile for the purpose of filing suit for divorce, the place in which the wife now makes her home.

Mrs. GILLELAND: I refer you now, Mr. Chairman and members of the committee, to the bottom of page 3, the paragraph dealing with background, under the heading "Religion". This has reference to those whose religious principles are against divorce in any form.

BACKGROUND

RELIGION

4. We submit that many of the aspects of the present divorce law are based on the rural Christian ethic of an agricultural society which is not generally valid in today's predominantly urban, secular, industrialized society. Increasing numbers of people now take the view that governments should not legislate morality. Whether or not this view is valid, we believe that those whose religious principles are against divorce in any form should no longer be able to impose restrictions on the personal lives of those whose principles differ in this respect. This is particularly true in a pluralistic democracy where there are many different systems of morality.

In this respect we are greatly impressed by the brief submitted by the Seventh Day Adventist Church, whose representative substantiated in that submission this particular point of view that we are expressing here. His submission seems to us a particularly effective one in view of the fact that his liberal views were in no way, in his opinion, in conflict with the views of his Church, which is absolutely against divorce.

Paragraphs 5 and 6 go together, and there are some points here that I would ask Mrs. Campbell to discuss.

Co-Chairman Senator ROEBUCK: Please read them.

Mrs. Dorothy Campbell, The Canadian Committee on the Status of Women:

CHANGING MORES

5. Marriage is a complex association of personal, social and legal factors. On the personal side, marriage at its best provides love, both spiritual and sexual, economic advantages to both parties, and status. Society's basic interest in the preservation of marriage is the very preservation of society itself through the bearing and rearing of children and the transmission of the culture of the society. One of the most important aspects of our society's culture is its institution of law. It is imperative that we recognize the necessary relationship between law and social change. Therefore, the legislation which may be passed as the result of your committee's work must not only remedy the deficiencies of the present divorce law, but make the remedy fit into a society in which the roles of husband and wife are greatly changing, one in which the traditional religious and moral patterns of thought are frequently rejected, and in which the concept of marriage "until death do us part" is no longer universally held.

WIFES CHANGING ROLE

6. Already, a wife's role has changed greatly. Our grandmothers had a limited education, married early, bore a greater number of children, raised them by tireless labour, and usually died early. They believed, and society insisted, that marriage was for life and for the main purpose of raising children. Today, women have more education, more employment opportunities, fewer children, more leisure, and a longer life span. Therefore, the divorce law based on the agricultural society of our grandmothers is not only an anomaly but a cruelty to many modern women.

As we say in these paragraphs, the role of the wife today is vastly different from that of her grandmother, who was regarded as a chattel, whose opinions were regarded as unimportant, if she was allowed to have opinions.

Today young people come to marriage having had equal freedom and equal opportunities to be educated, and marriage is contracted and solemnized as a partnership. Partnership equality of marriage is recognized by society, by the Church, by business but not by the law.

It used to be that a girl was given a liberal education and stayed in her father's home until she married, when she went to the home of her husband. Today, with much more education, married women are in the labour force, in the business world, and they have a great deal of responsibility. Today, when a woman marries she enters into a personal and social partnership. She does not expect to be demoted in status; she expects to be treated in fact, by the law, as she is treated by her husband.

The name of our organization, the Canadian Committee on the Status of Women, would indicate our bias. We are concerned with the status of women as they are regarded by the law, and that status ought to be the status of equality in the partnership of marriage.

The partnership of marriage should be recognized and women should have equal opportunities in the filing of suit for divorce; but the law does not recognize the equality of the partnership of marriage. The anomaly is that the real status of women today bears no relation to the status of women when these laws were made.

The content of the laws made today should recognize the status of women as it exists in fact, so that women should not be penalized or held in less regard by the law than is the other partner of the marriage.

Mrs. GILLELAND: I would like to make a comment. As I turned to my file not more than thirty minutes ago I came across a copy of the *Debates of the Senate* March 24, 1964. The speaker was Senator Fergusson, and in the course of her remarks she had this to say, which is apropos of the subject we are discussing this afternoon:

> On the other hand, when the rights of married women to an independent domicile was discussed, I had little to say because, as you know married women in Canada are not entitled to an independent domicile. There is an exception under the provisions of the Divorce Jurisdiction Act of 1930 which permits a woman who has been deserted by her husband for two years to bring a divorce action against him in the province where she was deserted, even though he may no longer be domiciled in that province.

In other words, in the matter of domicile, women do not have equal rights with men.

The next paragraphs are 7 and 8:

RECOMMENDATIONS

> 7. Although it is apparent to most people in our society that our divorce laws are outmoded, the basis for reforming them is still not easily arrived at. Should we retain the traditional matrimonial offences such as adultery, cruelty, desertion? Or should we use the argument expressed by Mr. Douglas F. Fitch in his article "As grounds for Divorce, Let's Abolish Matrimonial Offences" (*Canadian Bar Journal*, April 1966) where he advocates permanent marriage breakdown as a criterion for granting divorce? Perhaps a combination of the two would more aptly reflect public opinion.
>
> 8. This Committee believes that the traditional matrimonial offences always brand one marriage partner as the guilty party, although in most cases it is certain that both partners have contributed to the marriage breakdown. Yet, it is easier to judge the evidence of a matrimonial offence than it is to determine when a permanent marriage breakdown has occurred. We recognize the difficulty of defining with precision the division between a permanent marriage breakdown and divorce by mutual consent. Indeed we do not support the extreme view of divorce by mutual consent. For this reason, we recommend that more research should be carried out in order to identify criteria which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred.

We are not making any comment on 7 and 8. We are going to do something upside-down and begin with the last five lines: "For this reason, we recommend that more research should be carried out in order to identify criteria which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred." Mrs. Flaherty will identify the resources we think are available.

Mrs. FLAHERTY: We have evidence in judicial separation; secondly we have the records of various welfare and family services; thirdly we have the records of family courts and student research for statistical purposes.

Mrs. GILLELAND: There are three sources that can amplify the statement we make in the last sentence in paragraph 8. Mrs. Campbell will deal with the first part of paragraph 8, which deals with the matter of the guilty party in divorce.

Mrs. CAMPBELL: Our committee believes that although in most cases it is certain that both parties do contribute to the marriage breakdown, yet it is easier to judge the evidence of a matrimonial offence than it is to determine when the breakdown has occurred.

It is our view that the undesirable features of the current law of divorce, which must be proven by adultery, should not be carried over into the new law. The most undesirable feature, we think, is the necessity of naming the innocent party.

The present law not only assesses the guilt of one party, but fails utterly in accurately assessing that guilt. In fact, each divorce fails in this way because not even the wisdom of Solomon could cope with the difficulties involved. Moreover, establishment of the guilt has no constructive value. This runs counter to the ethics of society and is damaging to husband, wife and children.

It is our wish to eliminate guilt as a criterion for the granting of divorce. If we consider the breakdown of marriage as grounds for divorce, and put into proper perspective the ways of establishing proof of breakdown, then we find that adultery is not necessarily proof of the breakdown of marriage.

In some cases it is possible for marriage to survive infidelity; in other cases it is not; but it matters not whether the evidence indicates a simple or a multiple offence, since the social mores will help to establish the force of the proof on the ground of infidelity.

Adultery may be a proper proof of the breakdown of a marriage, but it should not be essential to attach guilt to the other marriage partner, because divorce granted by reason of the breakdown of the marriage, whatever the proof may be, is divorce granted on the proper ground.

Our law at the moment creates the necessity for, and presupposes, a guilty party, a party guilty of adultery. If there is no party guilty of adultery, then in effect one party is often faced with the need to assume guilt in order to solve the problem.

The necessity of this guilt attaching to divorce creates a stigma which goes with the divorced party and seriously affects the future life of that person. So far as the man is concerned, the stigma of divorce could, under certain conditions, jeopardize his career; and for the woman divorce has always carried with it the stigma of failure: she has been unsuccessful as a woman and a person; and this stigma can not only influence the attitude of others towards her, but affect her own esteem for herself.

At best a divorce is going to bring painful feelings of guilt to each party, but it adds unnecessary injury to the assessment of guilt declared by the court. Divorce is rarely easy for children to accept. That it can cause feelings of rejection, blame and loss when one parent is named as the guilty party is an unnecessary cruelty to the children; and a child may continue for years to blame one parent for everything that goes wrong, when he does not understand the situation.

Mrs. GILLELAND: Several people have been pointing out to us in the last few days—since our submission has been kicking around our house—that the wife, who is the person adjudged the non-guilty party in the court, the husband being usually the guilty one in cases of adultery, finds that, though technically she is innocent, this fact does not altogether relieve her of a sense of guilt on her own part, but rather tends to increase it. For the wife knows full well that she is no paragon of virtue: nobody is, man or woman.

I am sure it must be distressful to a woman to have it said that her husband is to blame for everything, and to leave the impression that she is altogether innocent. This court guilt, this legal guilt, increases the sense of personal guilt which the wife feels, and more so when her husband has assumed the guilt of adultery for divorce purposes.

We come to paragraph 9.

9. We are greatly concerned that the recommendations from your committee should be very flexible in any definition of the term "perma-

nent marriage breakdown". What must be taken into consideration is the point of tolerance of the particular individual when she believes her marriage to be past reparation because of a situation—any situation —which is really intolerable to her, and not the court's concept of what the individual ought to tolerate.

Our idea that tolerance is a variable is supported by Mr. Whitehead on page 58, paragraph 8, where he refers to the sort of thing that one group in the community can tolerate as opposed to other groups. He says that ideas as to what conduct is tolerable and what is not differ considerably; and he goes on to give examples, particularly of the southern European father who is master in the house and whose family's acceptance of his conduct would be normal for them, at least up to a point.

That point, however, can be extended too far, because the children are moving into Canadian society faster than he is, or his wife may be getting acquainted with Canadian culture more readily; and so in the particular example that Mr. Whitehead gave there is a limit, and therefore it would be in order for the wife to sue for divorce when the husband's conduct became intolerable.

Mr. Whitehead was showing that there are differences, in the toleration of cruelty or of other insufferable behaviour, as between groups; and this we feel is a substantiation of our ideas of the tolerance that must be accorded to individuals. It is like the threshold of pain, which is suffered by individuals in different degrees.

Next is paragraph 10.

10. To what degree the interpretation of the concept of the permanent marriage breakdown, as grounds for divorce, should be defined, and the degree to which it should be left to the courts, we do not know. The thing we fear is narrowness of definition in the first case and narrowness of interpretation in the second.

We do believe that the breakdown of the marriage partnership is the best measuring stick we have found for establishing grounds for divorce. But we do not know, I may add, how to associate with this the other grounds we have set out in paragraph 3, including incest, drunkenness, and criminal records of certain kinds.

We do not know how that fits in, or can be made to fit in properly, with the major grounds of whether or not the marriage is actually broken down. But we do not think we need to know, and it is not our job to know; that has to be decided by those who are learned in the law.

Co-Chairman Senator ROEBUCK: You would leave it to the judge?

Mrs. GILLELAND: I think so, Mr. Chairman; nor would we undertake to propose a definition of any legal point. Now we said at the beginning we thought that the law respecting collusion and condonation was silly, and we discuss this in paragraph 11.

ANCILLARY PROBLEMS

11. In addition to the basic question of grounds for divorce, there are many ancillary problems, for example:

(a) Collusion and Condonation: The present laws would seem to demand blameless conduct on the part of the wife if she hopes to win a divorce. Even more absurd is the implicit condemnation of the wife who is aware of adultery on the part of her husband and "condones" it in a practical effort to re-establish a good marital relationship; and there is further absurd condemnation for the wife who "has been guilty of unreasonable delay in presenting or prosecuting" action for

divorce. How, other than by condoning and/or by delaying, could a wife try to save the marriage and avoid the pain of family breakup. Of course, this also applies to the husband. We believe that it should not be considered collusion if the husband and wife make reasonable arrangements before the hearing of the suit, about financial provision for one spouse, guardianship of the children, and division of personal and real property. The law of collusion should only apply where the parties conspire to put forward a false case, or to withold a just defence, or where one party uses the divorce courts to bribe the other party.

(b) Domicile: We submit that divorce law should take into account the mobility of twentieth century Canadian society. For example, many men are transferred to branch offices, workmen are relocated to high employment areas, service men are transferred to new posts. A woman should not be tied down to her husband's domicile, but should be able to institute proceedings of divorce in the jurisdiction where she has been residing.

(c) Uniformity: We believe that the grounds for divorce should be uniform throughout Canada; that is, if Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce; and that the rules governing divorce should be the same for all Canadians, men and women, in all provinces.

(d) Maintenance and Alimony: We recognize that this question may not be within the Federal Government's jurisdiction, as there is some doubt as to whether or not it can be considered ancillary to the right to grant divorce or whether it comes under the province's right of "property and civil rights". We submit that it is inseparable from divorce, and that your committee should make some recommendations to clarify the situation.

(e) Guardianship of Children: Adequate provision should be made for the welfare of the children of the marriage.

(f) Cost of Divorce: The cost of divorce should be reduced by simplified divorce proceedings, and by the greater use of legal aid.

There is reference in the foregoing to bribery. Now there may be differences of opinion as to what constitutes a bribe, and Mr. Whitehead dealt with this point also. He pointed out that in the British law on desertion, which requires a three-year period, they have instituted a maximum of three months for cohabitation.

As far as we understand the present situation, if that were adopted it would postpone the whole divorce proceeding, and up to this point at any rate it has not been considered seriously previous to the sitting of this committee. It has never been considered seriously as a way of preventing divorce; because, if you are going to consider the rehabilitation of the marriage, if the parties are to contemplate restoration and the rebuilding of the marriage, it is idle to think that this could be accomplished without a resumption of all the habits of married life—not merely being there and having meals but also sexual intercourse.

It seems to us therefore that the suggestion Mr. Whitehead made in discussing the British law is a very sensible one if the idea is to encourage the parties to get together and avoid a divorce.

Co-Chairman Senator ROEBUCK: You are advocating a delay of some kind?

Mrs. GILLELAND: No. We are advocating that in the case of desertion we should adopt the English 1965 plan of making it possible for those who wish to

use this maximum period of three months to do so, without further extending the three-year period required in respect of desertion.

Co-Chairman Senator ROEBUCK: The English law provides that in cases of desertion if the parties come together for a period of three months, as a sort of trial reconciliation, that time shall not be deducted from the period of desertion when later on one party pleads there has been desertion for a certain length of time. That time is excluded because it was spent in an effort to re-establish themselves.

Mrs. GILLELAND: This is the very thing we think would be useful in Canadian law if desertion is established as a ground for divorce. It would be useful in preventing the kind of divorce that is sought in a hurry. It might help if the parties had an opportunity to take advantage of this interlude.

Co-Chairman Senator ROEBUCK: We will bear that in mind.

Mrs. GILLELAND: There is one other thing and it is apropos of this idea. The scholarly brief presented by the United Church of Canada is one for which we have great admiration, although we saw it only last evening. The fact that that large and powerful body has made the kind of submission it did is bound to influence Canadian opinion.

There are, however, two points on which we would have to say we could not agree. The first occurs on page 8, paragraph 28 of their brief, where they say they would like to have established special marital court procedures to deal with distressed marriages, the primary concern being the preservation of marriage and family life for the welfare of society. For this purpose they say that court procedure should make certain provisions, and they make five suggestions.

We wish we could agree with the first two. The first is means whereby either consort could require the other to participate in conciliatory procedures with a view to avoiding further legal proceedings. In our experience with Elizabeth Fry work, dealing with a multitude of people having marital problems, we are led to the conclusion that you would often fail. We do not see how you could require it. I do not think you could make it compulsory.

Co-Chairman Senator ROEBUCK: You could make it a requirement for the applicant for divorce to attend on a conciliation procedure as a pre-condition of his being heard.

Mrs. GILLELAND: That is true, but I doubt very much whether it would have a beneficial result. In some cases it might, while in others you would not gain anything. However, if you gained anything in a sufficient number of cases it would be worth while. It would not always be of value, but that does not say it would not be advisable for those who would profit by it.

The second point is that an attempt at conciliation be compulsory as a requisite to the obtaining of a separation or divorce.

We are doubtful of the value of this, having had experience with psychiatric services through the Elizabeth Fry Society. When you feel that a girl needs psychiatric service, the first thing needful is that she should have your confidence and you should have hers. Then you delicately persuade her to go to the psychiatrist and you go with her the first day. But to tell her outright "You have to go" is to waste your breath.

We feel that the present law, much as we have condemned it, has one reasonable feature—a time span of six months between the decree nisi and the decree absolute. We are opposed to a delay of three or five years before remarriage can take place as being a frightful infringement of human rights and an indignity to any person, man or woman, whatever sins he or she has committed that have brought about the breakup of marriage and the process of the divorce court.

Co-Chairman Senator ROEBUCK: A long delay invites a common-law union.

Mrs. GILLELAND: Yes; and common-law unions are too common by far now. We should get the best divorce law drawn up now. The cost may result in the continuance of the common-law setups for those who cannot meet that cost, so that the less complicated it is, the better. What law is there that is not complicated? But the less costly the procedures, the more democratic will be the law that we come up with. We cannot be totally democratic, and even the law cannot be perfect.

In conclusion, we suggest that the public in general seems to be ready to accept a radical change in our divorce law. We recognize public acceptance, and this kind of acceptance does not exist for the current law.

If there is radical change, there may not be general enthusiasm for it; but there is evidence of a new kind of tolerance for a difference of opinion, and a marked unwillingness of people to impose upon others the limitations they impose on themselves in the matter of divorce.

We believe there is a solid conviction that the law is archaic and must be revised to meet the needs of the twentieth century. Once upon a time a little girl asked me: How does law begin?

Co-Chairman Senator ROEBUCK: Were you able to answer?

Mrs. GILLELAND: No, I was not. But we discussed it and the decision we came to was that it began in the minds of people.

Co-Chairman Senator ROEBUCK: Does that conclude your brief?

Mrs. GILLELAND: Yes.

Co-Chairman Senator ROEBUCK: Do the other ladies speak to us, or have you given us your message?

Mrs. FLAHERTY: One thing we are concerned with, Mr. Chairman, is No. 7 of the summary of conclusions and recommendations, and that is that the grounds for divorce should be uniform throughout Canada. If Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce, and the rules should be the same for all Canadians, men and women, in all the provinces.

Co-Chairman Senator ROEBUCK: Thank you for that suggestion. Mrs. Campbell, have you a final word?

Mrs. CAMPBELL: As regards maintenance and alimony, we recognize that this question may not be in the federal Government's jurisdiction as there is some doubt whether or not it can be considered ancillary to the right to grant divorce, or whether it comes under property and civil rights in the provinces. We are submitting it is inseparable from divorce, and the committee should make some recommendations to clarify the situation.

Mrs. FLAHERTY: We are concerned also with the cost of divorce which should be reduced by simplified divorce proceedings and the greater use of legal aid.

Co-Chairman Senator ROEBUCK: Does legal aid in the provinces extend to divorce?

Mrs. FLAHERTY: The provinces at the moment are reviewing the legal aid provisions and it may be that divorce will in some cases be eligible for legal aid. It is up to the provinces to make the decision and we hope they will consider divorce among the things needing assistance.

Co-Chairman Senator ROEBUCK: Perhaps some members of the committee would like to ask questions.

Senator BELISLE: From your vast experience, Mrs. Gilleland, would you express an opinion as to what is the real evil causing so many divorces? Is it lack of preparation for marriage? Is it, to use a word that is so often heard, a too

liberal social life? Is it a decline in faith on the part of either of the parties. What is it, in your opinion? What is the greatest evil of all?

Mrs. GILLELAND: I have seen and dealt with women in a great many broken marriages in my association with Elizabeth Fry, because some marital problem led them eventually to jail as well as the divorce court. Their criminal offences are different from men's. Many of them have lived in the midst of incest and habitual drunkenness on the part of the husband, and they are involved in it too, but I cannot think of any single common denominator that applies to hundreds of women that I have dealt with.

Senator BELISLE: I am speaking of those over twenty-one.

Mrs. GILLELAND: I certainly would say those would be contributing factors.

Senator BURCHILL: What about the mother working in a highly industrialized job? Many of these people did not have the advantages of such homes as many others come out of, and that may have something to do with it.

Mrs. GILLELAND: Many of the mothers we have encountered in social work find themselves in jail because their husbands had deserted them. I cannot think of an exception to that rule, so my experience is limited to wives who had to work from the sheer necessity of getting bread, butter and milk.

Mrs. FLAHERTY: This would be a good field for research. This kind of thing could be found in the records in regard to judicial separation. Many times does the request for judicial separation occur where both husband and wife are members of the labour force, and in many cases we find the wife actually putting forward more of an effort to be a wife than the husband is in trying to play his part, because she is not taking her responsibility as a matter of course. She is trying to hold on to two jobs, whereas many women can stay at home and play bridge. The woman in the labour force works harder at being a mother and home-maker than the one who can take a job or leave it alone.

Mrs. GILLELAND: And she is subject to the criticism of the next-door neighbour who is not going to work.

Senator GERSHAW: Do you think drug addiction and alcoholism are big factors?

Mrs. GILLELAND: Yes.

Senator GERSHAW: It is a big factor?

Mrs. GILLELAND: Yes. In Ottawa we do not have much drug addiction, but alcoholism is a No. 1 killer. I think it is the thing that comes closest to being the common denominator.

Mrs. FLAHERTY: And this is where tolerance of the individual comes in. Some women could tolerate for years an habitual drunkard or alcoholic, whereas there are some women who could not tolerate him for six months. It seems therefore that degree of tolerance is a factor in determining whether a marriage will break down or not.

Mrs. GILLELAND: A girl I knew well told me—she did not put it this way—that she was now on the way to becoming an alcoholic; and she did become an alcoholic. She said that when her husband deserted her the thing that really burned her up was the fact, not that he took everything out of the house, but that "everything" included her sewing machine. She was very good in jail, and under favourable conditions I do not see how she could have helped being a good home-maker. But she was not salvaged.

Mr. AIKEN: Would you say that, since various people have different degrees of tolerance to cruelty, the definition of cruelty, if we were going to include it, should be taken to the point where it would be a question of fact for the court to determine what was cruelty to that particular woman in a given case?

Mrs. GILLELAND: That is exactly it.

Mrs. FLAHERTY: We have made that point in the brief, and that is why we stress that marriage breakdown should be a ground for divorce. To some, what I would consider to be cruel might not be cruel, whereas if you had the principle of permanent marriage breakdown, where each party had reached the end of his or her tolerance and there was no hope of saving the marriage, and there was absolutely nothing left to save, it could be considered that the marriage had broken down irretrievably. There are certainly differences between women from the point of view of what one can stand and another cannot.

Mrs. GILLELAND: There is another point in relation to tolerance which we were discussing yesterday. To please her husband a woman will tolerate some particular peculiarity for a long time, then suddenly comes the cut-off, though it does not necessarily lead to divorce.

Co-Chairman Senator ROEBUCK: The last straw that breaks the camel's back.

Mrs. GILLELAND: Yes. My husband is a prompt person and I am prompt, so that there is no problem in my being ready when he is ready to go somewhere. One day however, not many years ago after fifteen or twenty years of married life, I was not ready and he was quite surprised, though I must say not angry. But suppose you carried this into a serious area: what would you find? I saw that somebody brought up the question of the approach to the marital act. Now what one party will find acceptable another will not, and is something I would like to apply to that kind of serious incident.

There is a point where one will say: We won't have that sort of thing any longer. She has been going along with it and maybe she is not angry, but she is tired of that particular thing, and persistence in it might lead to divorce.

Senator FERGUSSON: Do you consider lack of education, or lack of money or the inability to handle money properly, as being among the causes of the breakup of marriages?

Mrs. GILLELAND: Yes. The misuse of credit can have bad results too. A woman can become depressed from overspending, and if the husband takes a so-called moonlight job to meet the situation they are not likely to have the necessary time for communication. Quite apart from the money, I think this can be exceedingly damaging to communication between the partners. If you have no time you cannot talk.

Co-Chairman Senator ROEBUCK: I believe that Mr. McCleave would like to ask a question.

Mr. MCCLEAVE: I would like to put a very practical example to the ladies. This involves a marriage where there are three children. The husband suddenly leaves the home and is gone for a long time. During his absence he does not support either his wife or his three children, and any effort made to get him to support the children is unsuccessful. At the end of three years he returns, announces that he has read about the marriage breakdown theory, and says he is going to go and see a lawyer and get a divorce. He will sue her. Now what?

Co-Chairman Senator ROEBUCK: Would you give him the divorce?

Mr. MCCLEAVE: This woman has tried to keep the family together, to maintain a respectable home, and this bum, if I can so dignify him, comes and says, "I want to end it; this marriage has broken down".

Senator ASELTINE: Would she not be well rid of him?

Mrs. FLAHERTY: If she wished, she would be able to sue him on grounds of desertion, if desertion were a ground of divorce.

Mrs. GILLELAND: Are you asking whether I would give a divorce on the grounds of marriage breakdown?

Mr. McCLEAVE: On the ground stated in the petition, that the marriage has broken down.

Mrs. GILLELAND: I would rather have her petition, if I had a choice.

Mr. McCLEAVE: No. We had this question presented to us by a group of church people who had thought the problem over carefully and we drove them into this corner—and they were prepared to do away with the adversary system.

Mrs. GILLELAND: How would he know the marriage was broken down?

Co-Chairman Senator ROEBUCK: He knew that because he had broken it up.

Mr. McCLEAVE: I put the problem of the marriage breakdown theory in its most extreme form, I grant that.

Mrs. FLAHERTY: By that time we would have established rules for marriage breakdown and it would have to be proved.

Co-Chairman Senator ROEBUCK: He proved it when he broke it down himself. He says: "I will not live with this woman again. I want a divorce. She does not want a divorce but I want it. The marriage is broken down."

Mrs. GILLELAND: Why doesn't she want it?

Mr. McCLEAVE: She is a respectable woman and has tried to put a proper façade on life and keep up a respectable home.

Mrs. GILLELAND: And if he takes proceedings on the ground of marriage breakdown is that a smear on her, in her opinion?

Mr. McCLEAVE: Madam, I don't know, because we have not passed a marriage breakdown law in Canada that I know of.

Mrs. GILLELAND: What would be her point of view? Does she consider divorce a smear on her respectable façade?

Mr. McCLEAVE: I would think so.

Mrs. FLAHERTY: Our idea of marriage breakdown is that both parties would have to be convinced that the marriage had broken down, and in the example that Mr. McCleave has given us it is the husband who thinks it is at an end. But if the wife is willing to take the man back the marriage is not broken down.

Mr. McCLEAVE: That is not quite so, madam. The group of church people who came here had thought this question through carefully and the argument was that even if one party wished to continue the marriage, the marriage had broken down because the other partner no longer wished it. I wanted to put it to you in the spirit of devil's advocate but also because women are the traditional guardians of morality, and I wished to see your reaction.

There is another question. One program on Sunday night brought out the financial needs involved in divorce and the necessity for broader grounds of divorce. Many people's lives were wrecked because they did not have money to seek their remedies. Your own brief says this is an obvious need and I fully agree; but how are we to achieve it? Divorce is costing $300 to $1,000, and one lawyer in Montreal charges that as a minimum. He makes a fat living, earning as much in a few days as members of the Senate earn in a year. But what can we do to provide cheaper divorces in Canada?

Mrs. GILLELAND: I don't know anything about law. I do not know how to make the proceedings shorter or how to ascertain the grounds more quickly.

Mrs. FLAHERTY: I would think that if the grounds were made less complicated the expenses of witnesses and that kind of thing would be cut down; and if legal aid were available to the person seeking divorce this would reduce the cost.

Mrs. GILLELAND: I thought some time back, Mr. Chairman, that this could be achieved by marriage breakdown. When I read the reports of the first two or three proceedings I began to think there was going to be the same old require-

ment of proof via whatever the method might be outside of adultery, and desertion might not be so hard to prove.

Mr. McCLEAVE: Marriage breakdown might be so difficult that you might have people sitting around all day blaming each other. In one American state legal aid is extended to matrimonial cases, but I think that for the most part legal aid tries to get away from it. To me it is compellingly a financial question.

Co-Chairman Senator ROEBUCK: We must go on, but before you leave, ladies, I want to be clear on what your answer was to Mr. McCleave's question. We have to pass upon it, and it is a serious matter. Do you say that in marriage breakdown application must be made and consent given by both parties, or would you allow the court to act on the application of either party, the guilty one included?

Mrs. GILLELAND: I would give that woman the divorce. There are many times when you could not get the consent of both parties because somebody is constitutionally "ornery".

Co-Chairman Senator ROEBUCK: That is the answer of all three of you?

Mrs. FLAHERTY: I would say the court should be the one to determine whether marriage breakdown has occurred.

Co-Chairman Senator ROEBUCK: I want to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: On behalf of the committee I wish to thank Mrs. Gilleland, Mrs. Campbell and Mrs. Flaherty, a good Irish name, and congratulate them on what they have accomplished in the presentation of the brief we have heard this afternoon, speaking for the Canadian Committee on the Status of Women. It was a well organized and well thought out document, and I assure you, ladies, we are all particularly impressed by the answers you gave when questioned by various members of the committee. On behalf of the committee, through you, Senator Roebuck, I would express appreciation to these ladies.

Co-Chairman Senator ROEBUCK: We have two more witnesses to hear. The first is Mr. Lee K. Ferrier, who is a member of the Ontario Bar and belongs to the Advocates' Society, the Canadian Bar Association, the York County Law Association, and the Lawyers' Club. Mr. Ferrier graduated from McMaster University with a Bachelor of Arts degree in 1959, and from the University of Ottawa with an LL.B. degree in 1962. He articled with Gordon W. Ford, Q.C., in Toronto, attended the Bar Admission Course at Osgoode, and was called to the Bar in April, 1964. He then continued in association with Mr. Ford, and was joined in practice by Mr. MacDonald under the name of Ford, MacDonald and Ferrier. In July of 1965 he became a partner in MacDonald and Ferrier. He is the contributing editor on the subject of "Infants and Children" now being compiled for the new edition of the Canadian Abridgement. Mr. Ferrier.

Mr. Lee K. Ferrier: Thank you, Mr. Chairman. Our plan was to have Mr. MacDonald speak to the committee at the conclusion of which we would both answer any questions you might wish to ask.

Co-Chairman Senator ROEBUCK: For the record, let me tell you who Mr. MacDonald is. Mr. James C. MacDonald was raised in Vancouver and graduated from the University of British Columbia in 1957. He articled with Messrs. Clark, Wilson & Company in Vancouver, and was called to the British Columbia Bar in October, 1958. He continued in practice with this firm until 1963, when he became associated with Mr. Ford in Toronto. He was called to the Ontario Bar in February, 1964, practised in association with Ford, MacDonald and Ferrier, and is now a partner in MacDonald and Ferrier. He is Chairman of the Ontario Subcommittee on Family Law in the Canadian Bar Association, is writing a

Master's thesis for the Osgoode Law School on "Matrimonial Desertion and Cruelty," and is the contributing editor for the new Canadian Abridgement on the subject of "Husband and Wife," and "Divorce and Matrimonial Causes".

So Mr. MacDonald is very competent to give us advice on what we should do at the present time. Mr. MacDonald is also an instructor in the subject of Family Law for the Bar Admission Course of the Law Society of Upper Canada, at Osgoode hall.

Mr. James C. MacDonald: Messrs. Chairmen, honourable senators and members of the House of Commons, members of the committee: Mr. Ferrier and I are appearing as individuals and not as representatives of any organization, and that we should be here in our private capacity is a privilege we appreciate. It is hoped that the extension of this privilege will not prove wasteful, and that our printed briefs will be of some assistance to you in reporting to your respective houses.

In this presentation I intend to summarize the printed brief and to make a few short supplementary comments on our second recommendation. The recommendations consist of a general and a particular plea for consideration by Parliament of the theory of Breakdown of Marriage. They are set out on the front page of our brief, and I will read them in a moment. However, before I do, I wish to make one small but important amendment. The word "desertion" at the end of the fourth line in the clause appearing in the second paragraph should be deleted and the word "conduct" put in its place. The recommendations now read:

1. That the Special Joint Committee of the Senate and House of Commons on Divorce give priority in its deliberations to the theory of breakdown of marriage and cause inquiry to be made into the desirability and feasibility of amending the law of divorce in Canada to provide that no marriage shall be dissolved unless it is shown to the satisfaction of a court of competent jurisdiction that the marriage has irretrievably broken down.

2. That in considering the implementation of the theory of breakdown of marriage the said joint committee give attention to the desirability and feasibility of recommending to Parliament that the following be enacted as the sole ground for divorce in Canada:

> An application for dissolution of marriage may be made to the court by either spouse if at the date of the application the spouses are living separately by reason of their mutual consent or the conduct of one of them, and the court shall pronounce a decree dissolving the marriage upon such separation being established provided that
>
> (i) from time to time or continuously within the three years immediately preceding the date of the application the spouses have lived separately as aforesaid for a total period of not less than two years; and,
>
> (ii) there is no reasonable likelihood of a resumption of cohabitation; and,
>
> (iii) the making of the decree will not prove unduly harsh or oppressive to the other spouse or to any child of either spouse.

We will deal with the theory first, and then comment on our specific recommendation. The basis for our present law of divorce is the doctrine of matrimonial offence defined in paragraph 4 of our brief. This reads:

4. Under a system of divorce based on matrimonial offence such as we have in our present law, certain acts are held to be fundamentally incompatible with the undertakings entered into by the parties to the marriage. The commission by a spouse of one of these specified acts gives the other spouse the option to have the marriage terminated.

A definition of what is meant by breakdown of marriage is found in paragraph 5, which reads:

5. The doctrine of breakdown of marriage would prescribe that a divorce is granted only where the marriage has broken down. The definition of breakdown is contained in the answer to the question, "Does the evidence before the court reveal such failure in the matrimonial relationship or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual support?" (Report to His Grace the Archbishop of Canterbury, entitled *Putting Asunder*, S.P.C.K., 1966, prepared by a group under the chairmanship of R. C. Mortimer, D.D., par. 55).

Reference to the two theories and some commentary on the theory of matrimonial offence are found in paragraphs 11 to 23 of our brief.

USE OF THEORIES OF OFFENCE AND BREAKDOWN

11. The doctrines of matrimonial offence and breakdown were viewed by Lord Hodson as posing alternate choices. Speaking in a debate in the House of Lords he stated,

> There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

12. Other reformers have considered these theories as not necessarily presenting an either/or proposition and have suggested that they be combined in one divorce system. Adopting this suggestion we now have three possible foundations upon which Parliament can legislate for divorce:

1. Matrimonial offence;
2. Matrimonial offence and breakdown in some combination, and
3. Breakdown.

RETENTION OF MATRIMONIAL OFFENCE THEORY

13. Some of the arguments in favour of retaining the doctrine of matrimonial offence will now be considered. One of the arguments put forward by those who support the doctrine is that it provides a clear and intelligible principle for determining whether or not a marriage should be dissolved. We submit this argument is sound only so long as the grounds can be clearly defined and, more importantly, applied with certainty in any given circumstances. Difficulty soon becomes apparent in this area when such notions as desertion and cruelty are considered. These may be defined with ease, but their application in many cases is subject to the greatest doubt.

14. Another submission sometimes made in support of the doctrine is that it promotes marital security in the sense both spouses know that if their conduct avoids certain offences, the marriage will be secure from dissolution. So long as the grounds can be clearly and intelligibly defined, this may in fact be the case. But even so it is highly doubtful that the law should encourage "secure" marriages at the expense of permitting the partners to believe anything short of a matrimonial offence is fairly within the ambit of normal married life.

15. It is also argued that the doctrine of matrimonial offence is satisfactory because it provides relief where something has been done by a spouse which cuts at the root of the marriage. In answer to this proposition it is submitted that experience shows that the commission of a matrimonial offence in itself does not necessarily prevent the marriage from being, or becoming, a desirable life-long partnership.

16. Adherents of the matrimonial offence system have argued that it operates to deter illicit unions because in that system only an "innocent" spouse can

sue. A spouse who leaves his or her partner to live with a paramour runs the risk that the union can never be regularized because of the refusal of the other spouse to exercise his exclusive right to have the marriage dissolved. But we must ask ourselves, does withholding the blessing of the law really discourage illicit unions?

17. Another argument advanced is that the matrimonial offence system is satisfactory because of its adaptability to the changing views of society. As society redefines what constitutes a grave matrimonial wrong, so may the law evolve, by constituting further "acts" as "offences". A criticism of this argument is that it involves legislation for hard cases, and prevents the application of any consistent principle. Such an approach leads to anomaly, and anomaly is always difficult to justify in the law. If a divorce law is based on relief for hard cases, what limits the choice of case? Why give relief to this hard case and not to that one?

OBJECTIONS TO MATRIMONIAL OFFENCE THEORY

18. Some of the objections to the doctrine of matrimonial offence have been suggested in dealing with the arguments just presented in its favour. Further objections were mentioned before the Morton Commission and were acted upon by the Mortimer Group. The first of these objections is that a marriage may in fact be broken down irretrievably even though no matrimonial offence has occurred. The converse of this, is that it permits divorce in some cases where the marriage might otherwise be salvaged. The commission of a single act of adultery entitles the innocent spouse to a divorce even though in spite of this misconduct, the marriage may be a good one.

19. The system of matrimonial offences most often treats of the symptoms of marital difficulty and not the causes. This means that divorce is given for the wrong reasons, and without the actual state of the marriage being considered.

20. A system of matrimonial offences rewards a spouse (e.g. a defendant who wants a divorce) for immoral conduct. Further, it penalizes the spouse who refuses on moral grounds to commit a matrimonial offence or perjury.

21. The doctrine makes divorce easy.

22. The doctrine does not encourage reconciliation, but in fact discourages it. Spouses are often ill-advised to attempt reconciliation because in so doing they may condone offences and forever lose their right to divorce.

23. Relief based on matrimonial offence leads to a false evaluation of marriage as an institution, and brings it into disrepute. It implies that any act however reprehensible which falls short of being a matrimonial offence is not "wrong". It has also been said, and we respectfully agree, that the concentration of judicial attention on offences, evokes a false sense of values, by giving importance to acts, the significance of which varies widely with each marriage. Conversely, importance is not given to acts which may well be the cause of marital difficulty. This false standard of marriage and misplaced emphasis has put divorce out of touch with the public's needs. The public today would say that in reality and from a moral standpoint, an offence does not make a case for dissolution. What does, is the failure of the relationship between the spouses.

Mr. McCLEAVE: I don't think you should use the word defendant there.

Mr. MACDONALD: Yes, I think so. Is there an objection to it?

Mr. McCLEAVE: No, but I thought divorce was based actually on a petition.

Mr. MACDONALD: Not in Ontario. In Ontario the person who brings a divorce action is the plaintiff and the person named is named as defendant, and the person named with him or her is also called a defendant.

Co-Chairman Senator ROEBUCK: It is an ordinary writ.

Senator FERGUSSON: It is not like that in the Maritime Provinces.

Mr. MACDONALD: No. Here, defendant is interchangeable with "respondent".

Senator ASELTINE: In Saskatchewan they are named as defendant—and in Alberta, British Columbia and Manitoba.

Mr. MACDONALD: I am no longer reading from the brief but going back to the commentary. I will return to the brief in a moment. To comment on the possibility of having breakdown introduced into the law as one ground, we would refer to the last part of paragraph 27 of the brief and read selected parts to paragraph 39.

In its convention at Winnipeg this summer the Canadian Bar Association on the 2nd of September, passed a resolution which recommended that the law of divorce be changed by extending the grounds to occupy the same position enjoyed in England, and to go beyond it by adding one other ground and the following:

> 4. Voluntary separation of the husband and wife for a period of three years 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 undully harsh or oppressive to the defendant spouse.

28. Separation is not a matrimonial offence, and is based on the breakdown principle. It is not a matrimonial offence because the separation contemplated is a voluntary separation by mutual consent. There is no conduct which one can blame against the other. There is no guilty or innocent party. Both might be guilty or both might be innocent, and either of them may take the initiative in bringing the divorce action.

29. Support for the position taken by the Bar Association can be found in the views of some of the members who sat on the Morton Commission (1951-55). Nine of the nineteen members were in favour of introducing a similar ground into the law of England. They disagreed among themselves (5:4) only on whether the marriage should be dissolved in such a situation despite the opposition by an unoffending spouse. All nine would go as far as adding the following as a ground for dissolution:

> An application for dissolution of marriage may be made to the court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the court shall pronounce a decree dissolving the marriage where this ground is established, provided that the other spouse does not object.

30. Four of these nine members advocated a wider proposal which would, in some circumstances, permit divorce despite the objection of the unoffending respondent. This would be accomplished by retaining the suggested wording of the main clause and changing the proviso to read:

> ...provided that, if the other spouse objects to the dissolution, the applicant must first satisfy the court that the separation was in part due to unreasonable conduct of the other spouse.

31. Lord Walker, one of the commissioners, was in favour of the breakdown doctrine, but not in either of these forms. He approved of its application only if it were made the sole basis for divorce. He defined a broken marriage (and thus the "breakdown" situation), as one where the facts and circumstances affecting 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. Con-

forming to this definition he held the view that no marriage ought to be dissolved where there is hope of reconciliation. This end could be achieved only by using the breakdown principle. His opposition to introducing the principle as a ground in a system of matrimonial offences appears to rest upon the arguments:

1. That marriage cannot be said to be broken down merely because the spouses have consented to lead separate lives, and

2. That divorce, in order to preserve the institution of marriage as a life-long union, should proceed from one general principle.

32. Where the parties are living apart it cannot be said that the marriage has broken down until the prospects of reconciliation are explored. Whether reconciliation is possible would depend on the reasons for the separation and if reconciliation has not been attempted, the reasons why. A long period of separation is evidence of breakdown deserving of great weight, but is not conclusive proof, or is not satisfactory proof.

33. Lord Walker's other objection appears to be that the principle of offence and the principle of breakdown are two mutually inconsistent logical systems. In practice when you use them together you are really legislating from the point of view of relieving individual cases of hardship and then going back to justify this relief on whichever of the two theories seems to fit. To re-establish the institution of marriage in its true significance as a life-long cohabitation in the home for the family, you must proceed from a general principle and not from individual cases. You apply one principle or the other, and do it consistently. If you proceed from thinking in terms of matrimonial offence you apply that doctrine in all its rigor without watering it down with categories which do not have the ingredients of an offence. Similarly, if you start with breakdown you are premising your solution on a particular meaning of marriage, and must act accordingly. You are saying that marriage means actual (or where there is a separation, "probable") cohabitation for life and your legislation is arrived at by protecting this definition. If the marriage is an "empty tie" it is dissolved. If it is not, then it is maintained. If there is doubt, then the parties are encouraged to seek counselling and the proceedings are adjourned until the results are known.

Co-Chairman Senator ROEBUCK: That is what you advocate?

Mr. MACDONALD: We advocate part of this. This printed brief goes on to quote Lord Walker. I will not take time to read the quotation, although I think it is doing him an injustice not to read it.

I would like to go on to 12 and start reading from paragraph 35:

35. In paragraph 69 of its report the Mortimer Group summarizes the reasons why breakdown must not be introduced into the law as a "ground". The reasons are:

(a) The mutual incompatibility of the two principles would be glaringly obvious;

(b) The superficiality inseparable from verbally formulated "grounds" would tend to render the principle of breakdown inoperative, and;

(c) The addition of a new "ground" embodying the principle of breakdown would make divorce easier to get without really improving the law.

36. In explaining the incompatibility of the two principles the group stated:

The existing law is almost entirely based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been committed by the other spouse. If then there were inserted into this law an additional clause enabling a guilty spouse to petition successfully against the will of an innocent, the whole context would proclaim the addition unjust. (page 57)

37. The second reason stated by the Mortimer Group follows from the approach that offences as we know them are often at best merely "symptoms" or "sequels" to breakdown and not the cause of breakdown. On this point the group said:

> One of our reasons for recommending the principle of breakdown is that it would enable the courts to get to grips with the realities of the matrimonial relationship instead of having to concentrate on superficialities. But if the principle were introduced into the law in the shape of yet another verbally formulated "ground" (such as the Australian "ground of separation"), the advantage hoped for would be lost. There would inevitably be a tendency simply to measure the circumstances revealed by the evidence against the verbal formula, and, if they appeared to fit it and no bar applied, to grant a decree without any genuine trial of the issue of breakdown. In other words, it is likely that the attitudes and procedures appropriate to the trial of matrimonial-offence cases would be extended to cases turning on the new "ground". There is some evidence of this in Sir Stanley Burbury's comments on the Australian law. Our own view is that trial of the issue of breakdown would require new attitudes and procedures, and that it is highly unlikely that these would be duly developed by the Courts if the principle of breakdown did not pervade the whole divorce law. It may be added that the mere addition of a new "ground" would do nothing to remedy the particular aspect of superficiality noted by Sir Garfield Barwick, namely, the artificial definition, which is implicit in the verbal formulation of "grounds", of "the area of conduct which will remain innocent in a matrimonial sense". If on the other hand the whole law were to be based on the doctrine of breakdown, this artificial delimitation would disappear. (page 58)

38. The third reason mentioned is that embodying breakdown as a ground would make divorce too easy;

> Introduction of the principle of breakdown in the form of a new verbally formulated "ground" would not reform the law: it would simply make the existing law open-ended and provide a last resort for petitioners who found they could not succeed on any other "ground"... The implicit advice of a mixed divorce law to people wanting to rid themselves of marriage might well become, "When no other ground offers, try breakdown of marriage". (page 59)

39. The conclusion of the group on this point is stated as follows:

> In our opinion, therefore, the principle of breakdown ought on no account to be introduced into the existing law in the form of an additional "ground". Failing the complete substitution of principle which we recommend, it would be better to keep the law based firmly on the matrimonial offence, and to consider how its administration could be improved, than to inject into it a small but virulent dose of incompatible principle. (pages 59-60)

To work out the application of the breakdown principle requires a new procedural approach. Simply put, the approach is to depart somewhat from the accusatorial method of determining facts which is part of our adversary system and adopt some of the procedures familiar to a judicial inquiry. Some aspects of this change are considered in paragraphs 40 to 48 of our brief. We do not intend to read them all at this time, but do wish to call your attention particularly to paragraphs 44, 47 and 48.

44. It is recognized that it would be unpalatable to turn judges into inquisitors. To appraise the court of the relevant facts it must then in some cases

at least, have assistance. One idea is to employ "forensic social workers" as officers of the court.

> The officers could, when required to do so, verify attempts at reconciliation, test the reliability of assertions made to the court, and investigate any other matters on which the court wished to be informed, and could report on the circumstances of children of the family. They might also supervise the working of arrangements made for custody and maintenance. (page 70)

47. It might be argued that the procedural change is so radical that it would upset the whole of our court system. The advocates of breakdown do not underestimate the effect of this change. The Mortimer Group recognized "that reform of the courts and their procedure is apt to be a much lengthier undertaking than amendment of the substantive law...". However, it is submitted that the change is not as radical as it might first seem. We mention elsewhere in our brief that today, everytime there is a suspicion of collusion or connivance an inquiry of sorts is held. In Ontario this through the "forensic" offices of the Queen's Proctor may be quite extensive. Another instance where the courts in matrimonial causes often conduct an investigation more in the nature of an inquiry than that of a disinterested judicial officer presiding over a contest, in where it is necessary to consider whether the court's discretion should be exercised in favour of a Plaintiff who has also committed a matrimonial offence. It is interesting to note that in conducting this inquiry one of the main questions to be determined is whether the marriage has broken down. To use a recent example Mr. Justice Tucker of the Saskatchewan Queen's Bench appeared to have no difficulty in making a finding on this question. In *Deptuc v. Deptuc* (1966), 56 D.L.R. (2d) 634, he held that a decree should be granted dissolving the marriage because it had hopelessly broken down, and that to maintain it would be against public policy, the interest of the parties, and the child of the marriage. That the Courts can where necessary conduct an inquiry is again illustrated in *Spoor v. Spoor* (1966) 3 All. E.R. 120 in the Probate Divorce and Admiralty Division before the Registrar. In this case it was held that proceedings under Sec. 17 of Married Women's Property Act 1882 were in the nature of an inquiry into a claim, and were not an adjudication on a cause of action. In the recent Canadian case of *Re Bailey* (1966) 6 D.L.R. (2d) 140 in the British Columbia Supreme Court before Mr. Justice Ruttan, it was held that the case could not be decided in terms of onus of proof because the matter before the Court was initiated by the administrator of the estate and the proceeding was not a trial. It was an inquiry by the Court to determine which of the heirs was entitled to succeed. It was not a contest between parties. These examples show that a Court proceeding need not necessarily be a contest such as comes to mind when we think of the adversary system.

48. The idea of "forensic social workers", should not seem too unusual—at least to Ontario lawyers. They are quite familiar with this sort of officer every time there is a divorce with children of the marriage under the age of sixteen. In these situations, an investigation is made and a report filed with the Court on behalf of the Official Guardian. An example of this sort of worker outside the area of matrimonial law is the probation officer who makes the pre-sentence report given to the Court in a criminal case.

Closely allied with the question of procedure is the notion that breakdown may in fact be a question which by its very nature is incapable of being tried. On this point we would like to read paragraph 59.

TRIABLE ISSUE

59. The objection is sometimes made that the question of whether or not a marriage has broken down is a question which does not present the Court with

an issue capable of being tried. It is admitted that to explore the question adequately the procedure of the Court should be enlarged in the way dealt with above. But, the objectors will claim, the Court is still faced with deciding something which is impossible to determine. It is submitted that this is not so. Sometimes no doubt, the question will be a very difficult one, but most times not. On this point, it might be helpful to look at a concept in the law which we already have, and which in some respects brings with it the same difficulties. We bring to mind the concept of negligence which now pervades our law. Does this concept not on occasion present a question which is "impossible", to try? But we get along with it, and do so with a feeling that justice is being done. Turning back to matrimonial law, we submit the question is no more difficult than deciding in a cruelty case whether the defendant spouse will continue a course of violent, or dangerous conduct; and whether if continued, the other spouse would suffer permanent injury. It is further submitted that breakdown is no more difficult of trial than making a decision in the following situation. A husband and wife have been quarrelling continuously for two years. The husband finally leaves. The wife then sues for alimony on the basis of desertion. The husband offers to return and the wife refuses to receive him back. In the action the Court is put in a position where it must decide, (1) whether the offer to return is genuine, (2) if genuine, whether the wife has just cause for refusing the offer, and (3) whether the wife (in Ontario, at least) by her conduct has disentitled herself to alimony on the basis that she could not sue for restitution of conjugal rights.

As a footnote we might add that the question of breakdown is surely more easily tried than the question arising in a custody case. Here the courts grapple with deciding which of at least two homes best suits the welfare of the child. Often we are tempted to say that deciding such a matter is impossible. But never, after a moment's reflection, do we suggest that the decision should be avoided because of this difficulty. We agree that the question of what is best for the welfare of the child presents the relevant issue to the courts. The public would be indignant if we went back to saying that the question should be decided according to some arbitrary and rigid rule of law which said that the father, or, perhaps, the mother had an absolute right to the child, and the other parent had none; or according to an arbitrary standard of conduct which held, for example, that proof of adultery automatically declared the defaulting parent unfit. The public conscience says, "No", to simplifying the treatment of custody, and demands that we put the right question regardless of its difficulty.

Co-Chairman Senator ROEBUCK: In the interest of the children?

Mr. MACDONALD: Yes. Two criticisms of the breakdown hypothesis are frequently raised. The first concerns whether or not breakdown is a doorway to divorce by consent; and the second concerns whether it is fair and just to allow divorce at the instance of the spouse who caused the failure, particularly where the other spouse is blameless and objects to the divorce.

In our view the answer to the first is that in a system based on breakdown there would be no more divorce by consent than there is under the alternate system of offences. Some form of consent may be present in both systems, but in both systems something more than consent is required.

In the system of offences the requirement is proof of a bona fide offence which, if properly brought before the courts, is not vitiated by consent. An example of this is where the husband, say, is living in adultery and invites his wife to sue him for divorce. Upon her acceptance of this invitation he agrees to facilitate proof of her case. This is a legal arrangement and one which on any ordinary interpretation contains elements of consent. The consensual part lies in the fact that both parties want the divorce. The further requirement is the offence.

This is an objective fact and, what is most important, we note it must be established not merely to the satisfaction of the parties, but to the public at large through the courts.

In the same way breakdown may involve consent, but when it does the consent in itself will not be sufficient. The objective fact of separation and a positive finding that it is permanent will also be necessary.

Reference to these points, which I will not take time to read, is found in paragraphs 50 to 52 of our brief. The other objective which we mentioned a moment ago is answered in paragraphs 53 to 56.

AGAINST WILL OF UNOFFENDING SPOUSE

53. One of the points dealt with by the Mortimer Group was the objection that the breakdown theory would permit divorce at the suit of a culpable party against the will of an unoffending spouse. In order to see this objection in its proper context one must pre-suppose that all substance has gone out of the marriage—there is no longer any married life—and the spouses are left with only its legal form. It is the spouse who is morally in the wrong who initiates the Court proceedings to dissolve the tie. The other spouse has at all times led a praise-worthy life and out of strong feelings of what is right opposes the proceedings. Should the marriage be dissolved? These imaginary but possible circumstances give rise to three considerations:

1. Deprivation of status;
2. The result that a person may "take advantage of his own wrong", and;
3. Economic deprivation.

54. We have referred firstly to the deprivation of marriage status. One of the premises of the breakdown theory is that it is not in the public interest to maintain an empty marriage tie, and its proponents generally advocate that where this finding is arrived at after a thorough Court investigation the marriage should be dissolved despite the scruples of the respondent. There will always be hurt to the family where there is divorce no matter what system is employed; all hurt to spouses or children cannot be avoided. To refuse divorce because of individual hurt must be balanced against the desirability of dissolving marriages which do not exist in life. However, there is also another public interest to serve and that is the public sense of justice or the prevention of a general feeling of outrage. In some cases to dissolve a marriage against the wishes of a praise-worthy spouse would be to ignore this interest. Therefore, it is necessary, in the view of the Mortimer Group, to allow the Court a discretion to refuse a divorce where the Plaintiff has acted with gross misconduct. To do otherwise would shake the public confidence in the administration of justice and cast doubt on society's concern for the institution of marriage.

55. The maxim which prescribes that a person cannot take advantage of his own wrong is really a meaningless question when posed within the terms of reference of the breakdown theory. A spouse who commences an action to have the marriage dissolved is asking for a declaration that the marriage is finished. The spouse is not asking for a judgment on relative conduct of the spouses, but for the Court's opinion on whether or not there is any hope for the marriage; and if not, that the marriage be declared dead. The situation is somewhat analogous to nullity suits where the only question is the validity of marriage and where no conduct on the part of the Plaintiff can act as a bar. If the marriage is a nullity the good or bad conduct of the Plaintiff has no relevance. The Courts simply are not concerned with him. They are concerned with the marriage. In the same sense in a breakdown situation (except with respect to the right to exercise the discretion mentioned above), the Courts are not concerned with the rightness or

wrongness of the Plaintiff's conduct or either party's; they are only concerned with the life or death of the marriage. The Court's judgment is a judgment on the marriage and as in a nullity suit, a judgment against the marriage does not carry with it an evaluation of good or bad conduct. A party does not leave the court room thinking he or she is "guilty", or "innocent".

56. Whether or not justice has been done depends on whether or not members of the family unit have unfairly suffered economic deprivation. Divorce in the circumstances we are imagining is not unjust provided the applicant spouse has not acted with gross misconduct and the unoffending respondent and the children are not worse off economically. The Court would be empowered and required to make a full inquiry into how dissolution of the marriage would affect the family members financially. To meet the requirements of justice the Mortimer Group states the Courts should have the power, not only to make orders for maintenance against either spouse, but also to award members of the family shares in pension benefits, insurance, and other emoluments that are now part of our financial life. It, of course, would also have the power to withhold any decree of dissolution until provision has been made for the dependent spouse and children. To simplify this process it might be practicable to introduce through the legislature some form of community of property.

The second of our recommendations set out on the front page of our brief suggests a way in which the principle of breakdown of marriage could be, and in our respectful submission should be, made the law in Canada. Before commenting briefly on some of the characteristics of this specific recommendation, I wish to mention what, in our view, is the most valid challenge to an acceptance of any proposal based on the breakdown principle.

It goes back to the procedure. Mr. Justice Scarman speaking to an English audience in the address referred to in paragraph 8 of the printed brief, stated the problem this way.

> If one accepts that divorce should not be available by administrative process, there is a danger that one will move to the extreme opposite view that every family life which has broken down should be subjected to full investigation, that the court must, in the interest of justice to the spouses and society, carry out a complete post mortem. Put simply, there are just not enough lawyers in our community to give effect to such counsel of perfection. Complaints of expense and delay are common enough already. A full inquisitorial attack on every married life brought before the court in divorce proceedings would add immeasurably to both and would, in the end, bring into disrepute this very thing it wishes to preserve, namely, divorce by judicial process.

The newspaper editorial annexed as Schedule "B" to the proceedings of this committee on the 8th November commented on the Mortimer Report and had this to say:

> This is a bold and generous concept. Nevertheless, it may entail practical drawbacks. One immediate problem which the proposal presents is the possibility that divorce litigation will become more complex. The court applying the standard of a "breakdown" in marriage would resemble, say its advocates, a "coroner's inquest—a judicial inquiry—pleadings would need to be considerably expanded". Many divorces are already held up because the courts are clogged and proceedings are cumbersome."

The possibility of an increase in expense, and of further delay, gives us much concern. But such consequence must be measured, first of all in terms of how much expense, and how much delay we are talking about. The consequences must be evaluated in terms of what the public wants our judicial process to do.

We believe the public wants the judicial process to preserve and protect family life by, among other things, preventing unnecessary divorce. We are also optimistic that when the extent of the probable expense and delay is known, it will be seen as no more than a fair price for the desirable objectives attained.

Let me now turn to our specific recommendation. Of prime importance is the feature that the ground we have set out is intended to work as the sole and exclusive ground for divorce. It is not to be merely another item in a list of grounds. If this recommendation is adopted, there would be no divorce unless facts of the case met the conditions specified in the recommendation.

In passing we might also point out that the use of the word "application" is deliberate. This description was chosen instead of any such word as "petition," "suit," "action," or "proceeding," because of the wish to avoid connotations of guilt or innocence which are usually associated with "petitioner," "respondent," "co-respondent," "plaintiff," "defendant," and "co-defendant".

The application can be made by either spouse where a separation of the specified type has occurred. This means that the spouse who has caused the separation, or is morally in the wrong, has the same right to bring the application as the blameless spouse.

You will notice that one of the conditions of granting dissolution is that at the date of the application, and for a period of two years before it, the spouses must be "living separately by reason of their mutual consent or the conduct of one of them". The separation which we have in mind is that which is brought about by the actions of one or both of the spouses. It is not meant to include the case where there is separation by compulsion.

A compulsory separation would be one brought about by some external command or necessity, such as, for instance, a spouse in the armed forces going overseas under orders of his superior; or a more unfortunate spouse taking treatment for chronic illness in a hospital; or serving a prison sentence. This sort of case, where the separation is not primarily due to the actions of one or both of the parties, would not fulfil the specified requirements. However, it would be possible for a compulsory separation to turn into the kind required if, by forming the *animus deserendi*, one of the spouses brought about a state of desertion. The separation would no longer be due to external command, or necessity, but would be caused by this action or conduct of the spouses.

An act of madness which drives the other spouse away, and makes continued cohabitation dangerous or "intolerable" would qualify as conduct bringing about the required kind of separation. The husband's act of chasing his wife with a butcher knife would not be excused on the ground of insanity. Insane or not, it is his conduct which ends the cohabitation. It is not his madness.

But take another case where instead of sudden violence there is a gradual deterioration of mind while undergoing treatment in an institution. The required kind of separation would not occur in this case until the other spouse decided he or she had had enough; and the period of separation would not start to run until this moment in time when the *animus deserendi* is thus formulated.

The period of two years need not be continuous. It may be made up of several lapses occurring within the three years immediately prior to the date of the application. This provision is made to encourage the spouses to actively seek a reconciliation. It is designed so that a spouse living away from his or her partner and going through the agony of deciding the future can try again without jeopardizing, or seriously delaying, the alternative of divorce—should resort to this remedy finally become necessary.

Our specific recommendation also lays down the condition that before dissolving the marriage the court must find there is no reasonable likelihood of a resumption of cohabitation. This is to say that the court must find the marriage

has irretrievably broken down. The fact of separation by itself does not establish the breakdown, and any presumption that it does, we have seen from the brief, is contrary to all the theory stands for.

The events and happenings leading up to the separation, the attempts at reconciliation, and the present attitudes of both spouses, to a continuation of the marriage must also be reviewed and assessed. Only then would the court be in a position to decide whether the marriage had broken down.

The last condition is that the making of a decree will not be "unduly harsh or oppressive to the other spouse or to any child of either spouse". You will note that this phrase is wide enough to cover not only children of the marriage, but step-children whose security might also be affected.

It is expected that where the court has made the finding discussed so far, it will be satisfied that the family life has come to a permanent end. In such cases, it is submitted, there would seldom be material upon which the court could proceed to find the dissolution of the marriage harsh or oppressive to anyone. The individual loss of marital status would in many cases be welcomed as a freedom to enter at some future time into a better marriage. In other cases, where further marriage is not planned, loss of the status must be accepted as being a concession to the public interest which demands the severing of an empty tie.

However, it would be harsh or oppressive to spouse or children if the disappearance of the marriage took with it some economic right which would otherwise be enjoyed. This would be one of the few times when the courts would refuse the decree. Unless the economic right of the dependent spouse and the children could be protected in some other way, it is submitted that it would be a proper exercise of the given discretion to refuse a divorce decree. Another time when the decree might be refused on the ground of its being harsh or oppressive not to do so, is when the applicant has behaved with gross misconduct.

No discussion of divorce can be near complete without some reference to the lesser remedies and incidental relief of judicial separation, alimony, and maintenance. No attempt will be made in this submission to suggest what should be the law in this area. It is a large problem raising not only questions of how to achieve much needed reform, but also the additional thorny question of whether competence to legislate in this field belongs to Parliament or to the provincial Legislatures.

We have planned not to go into these remedies, but we do wish to make a distinction of some importance which relates to them. Since 1857, when divorce as we know it was first enacted in England, we have thought of the basis of divorce, and the basis of the lesser remedies, in the same conceptual terms.

All along, the offence theory has been used to support both sets of remedy. There is no obvious necessity for having them rest on the same premises, and when the premise of divorce is changed to breakdown there is much good reason for thinking of our remedies in different ways.

The remedies of judicial separation, alimony and maintenance can still be decided, and probably should be decided, at least in part, on the basis of the matrimonial offence theory. In fact, the tests of breakdown are not suitable for deciding the right to live separate from, and the right to be maintained by, the other spouse. The matrimonial offence is still the appropriate basis for this relief, although there should be some important modifications, particularly with respect to the making of financial provision.

The Mortimer group have the opinion that such provision should be based only in part on conduct, with other considerations being the financial needs of the dependant and his or her means. Presumably these last considerations would be relevant to the question of liability, and not just quantum or amount, as they are now.

We cannot digress further into this, but must return to the subject of our brief. In making our proposal that breakdown should be the sole basis for divorce, we recognize that such a step is in advance of what has been done in other parts of the Commonwealth and in the United States. These countries whose laws we generally respect and look to for precedent have not ventured so far. Is there any reason why Canada should go on alone? One point to bear in mind is that Canada is closer to the fork in the road, and has only a few steps back to 1857, when divorce was first predicated on offence theory. The other countries have journeyed on, by multiplying grounds, and may now find themselves committed in this direction and too far away to return to the junction. They may want to go back but cannot. This should make us extremely wary of following the same route.

The press reports on a general dissatisfaction with a list of grounds, which we see coming from the United States and England, substantiate the need for caution.

The other aspect is that the possibility of a more desirable alternative has only recently become a part of public awareness. Until now we had not fully realized that this alternative way to reform did in fact exist. It is a way which is attractive. It dispenses with the fiction of fault and bears the stamp of honesty. It recognizes the reality of divorce and at the same time pays respectful homage to the reality of marriage. It produces a good defensible reason for dissolving what we all regard as something which should be indissoluble. How can this be done with decency except by enacting that a marriage will be dissolved only when it ceases, by accepted standards, to be a marriage?

Thank you, Messrs. Chairmen, and members of the committee.

Co-Chairman Senator ROEBUCK: Mr. McCleave, have you got a question in your mind?

Mr. MCCLEAVE: It has been answered in different ways—yes, no, or maybe—depending on whether there was undue harshness to the children. Do I anticipate a variety of answers, Mr. MacDonald?

Mr. MACDONALD: In general the answer would be: Yes, the marriage will be resolved, but we do recognize the case of, say, where a husband engineers a breakdown deliberately for the purpose of using that breakdown for a divorce. Suppose a husband finds out about the breakdown principle. He goes home, blackens his wife's eye, assaults her brutally, leaves her, and he does this just so that he can divorce her. We say there should be discretion in the court to prevent that.

Mr. MCCLEAVE: What about desertion by the husband? That is a common thing and in a certain sense it is just as deliberate as blackening her eye, except that the deliberation extends over a longer period of time.

Mr. MACDONALD: Yes. Then you can deduce from that situation that there is no hope that the two spouses will get together again, that there is no hope of cohabitation, that the marriage has disappeared completely; and if the husband had made financial provision for his family—

Mr. MCCLEAVE: This one I am thinking of had not made such provision.

Mr. MACDONALD: I am sorry, I did not hear that.

Mr. MCCLEAVE: In the example I have given, he had done nothing decent since he left his wife.

Mr. FERRIER: Then the dissolution will not be granted until he does.

Mr. MACDONALD: If the court could order him to make financial provision for his family the marriage would be dissolved, because the marriage in those circumstances serves no purpose whatsoever.

Senator FLYNN: In what legal system has this breakdown theory been experimented with?

Mr. MACDONALD: The answer to that is that there is no legal system that implies breakdown in its pure sense. The Mortimer group does make reference to Hungary as being closest to their conception of marriage breakdown as the sole basis for divorce.

Senator FLYNN: It would be quite an innovation, would it not?

Mr. MACDONALD: It would be a radical change, yes.

Co-Chairman Senator ROEBUCK: We have seen some philanderers who had a peculiar fascination for women and had one wife after the other. I am wondering whether, if marriage breakdown, depending on desertion for a specified length of time, were adopted, you might not have some chap having a series of wives. He might marry one, desert her for a certain length of time, then divorce her and get another. You might have someone who had as many wives as—

Mr. FERRIER: Solomon?

Co-Chairman Senator ROEBUCK: Well, it would depend on the length of time required.

Mr. MACDONALD: I would respectfully point out, Mr. Chairman, that the present law serves the philanderer better than this law would. Under the present law, the wife would have no interest in keeping him tied to her. It is unlikely she would take the position: "As a good citizen of this country I must protect other women from marrying this man and therefore I will not divorce him". What happens when she discovers he is not a good husband? She gets evidence of adultery and sues him and thus enables him immediately to marry again. It would take about two years.

Co-Chairman Senator ROEBUCK: I am afraid we shall have to adjourn. It is six o'clock. I should like to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: It is not necessary to say much except to thank both Mr. MacDonald and Mr. Ferrier heartily for their presentation today. We shall have an opportunity to read the record. The presentation has been made in a lucid and comprehensive manner and we thank both these gentlemen.

The committee adjourned.

APPENDIX "21"

SUBMISSION

of the

CANADIAN COMMITTEE ON THE STATUS OF WOMEN

to the

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

November 29, 1966

Summary of Conclusions and Recommendations:

1. Canada's present divorce law bears little relation to the greatly changed roles of wife, husband and family.

2. Permanent breakdown of a marriage should be the criterion for grounds for divorce.

3. In judging whether or not a complete marriage breakdown has occurred and taking into account the overall situation, specific matrimonial offences may be considered by the Court as contributing causes: adultery, desertion, cruelty, unnatural sexual offences, sodomy and bestiality, impotence, frigidity, incest, insanity, incarceration, habitual drunkenness and drug addiction.

Any one or any combination of these offences could contribute to proof of the permanent breakdown of a marriage.

4. The proof of the breakdown should be judged at least as much on the tolerance of the Petitioner as on the Court's concept of what the individual should be expected to tolerate.

5. Permanent marriage breakdown does not necessarily imply a "guilty" party and divorce should not require that one of the marriage partners be so named.

6. A wife should be able to institute divorce proceedings in the jurisdiction where she is residing. Otherwise, the law of domicile remains discriminatory.

7. Grounds for divorce should be uniform throughout Canada.

8. Divorce should not be dependent upon the financial resources of the Petitioner.

Identification

TAXATION

1. The Canadian Committee on the Status of Women was established in 1953 under the Chairmanship of the late Mrs. G. D. Finlayson of Ottawa. Attention was first concentrated on making husbands and wives aware of the disabilities which widows suffered under the old Dominion Succession Duty Act. To accomplish this, the Committee compiled basic information which was widely distributed in the belief that an informed public opinion would compel governments to amend existing outmoded legislation. The overwhelming response to this educational material from indivdual women across Canada and from national organizations, both women's and men's, encouraged us to take further steps: we made a number of written and oral submissions to the Federal Government urging changes in the succession duty legislation; in 1958 we were invited to make a submission to the Senate Committee on Banking and Commerce; in 1963 we presented a brief to the Royal Commission on Taxation; and

on various occasions we have had opportunities to argue our views before the Ministers of Finance and National Revenue. We have recently participated in the preparation and submission of material regarding the establishment of a Royal Commission on the Status of Women in Canada, and in the National Consultation on Human Rights sponsored by the Canadian Citizenship Council.

DIVORCE

2. To date our major submissions have concerned the rights of women in various fields of taxation. However, the correspondence received from a large number of individuals across the country on the subject of taxes revealed discrimination and injustices in the law on divorce. As an example under the Divorce Jurisdiction Act (R.S.C. 1952 c.84) a married woman who has been deserted by and has been living separate and apart from her husband for a period of two years or more may sue for divorce only in the province in which, immediately prior to such desertion, her husband was domiciled, regardless of where the wife is now domiciled. We recognze that this rule is an improvement over the previous one which required the wife to sue for divorce only in the province in which the husband was domiciled at the time of the petition. Nevertheless, the present statute may still impose hardship on the wife.

3. Other indications of hardship from divorce laws came to light because three of our members were, for many years, involved, through the Elizabeth Fry Society, with women prisoners. The most frequent cause of their troubles with the law could be traced to marital problems. We found that, on economic grounds, divorce was a solution which never entered the prisoner's mind, though "common-law relationships" occurred fairly frequently. Further, even if a divorce could have been financed, in a situation where the marriage breakdown was complete, grounds which seemed logical to us were not legally valid. There is a whole world of men and women hidden away in our sub culture whose problems seldom reach the eyes of legislators and whose needs include simple inexpensive divorce.

Background

RELIGION

4. We submit that many of the aspects of the present divorce law are based on the rural Christian ethic of an agricultural society which is not generally valid in today's predominantly urban, secular, industrialized society. Increasing numbers of people now take the view that governments should not legislate morality. Whether or not this view is valid, we believe that those whose religious principles are against divorce in any form should no longer be able to impose restrictions on the personal lives of those whose principles differ in this respect. This is particularly true in a pluralistic democracy where there are many different systems of morality.

CHANGING MORES

5. Marriage is a complex association of personal, social and legal factors. On the personal side, marriage at its best provides love, both spiritual and sexual, economic advantages to both parties, and status. Society's basic interest in the preservation of marriage is the very preservation of society itself through the bearing and rearing of childen and the transmission of the culture of the society. One of the most important aspects of our society's culture is its institution of law. It is imperative that we recognize the necessary relationship between law and social change. Therefore, the legislation which may be passed as the result of your Committee's work must not only remedy the deficiencies of the present divorce law, but make the remedy fit into a society in which the roles of husband and wife are greatly changing, one in which the traditional religious

and moral patterns of thought are frequently rejected, and in which the concept of marriage "until death do us part" is no longer universally held.

WIFE'S CHANGING ROLE

6. Already, a wife's role has changed greatly. Our grandmothers had a limited education, married early, bore a greater number of children, raised them by tireless labour, and usually died early. They believed, and society insisted, that marriage was for life and for the main purpose of raising children. Today, women have more education, more employment opportunities, fewer children, more leisure, and a longer life span. Therefore, a divorce law based on the agricultural society of our grandmothers is not only an anomaly but a cruelty to many modern women.

Recommendations

7. Although it is apparent to most people in our society that our divorce laws are outmoded, the basis for reforming them is still not easily arrived at. Should we retain the traditional matrimonial offences such as adultery, cruelty, desertion? Or should we use the argument expressed by Mr. Douglas F. Fitch in his article "As Grounds For Divorce, Let's Abolish Matrimonial Offences" (Canadian Bar Journal, April 1966) where he advocates permanent marriage breakdown as a criterion for granting divorce? Perhaps a combination of the two would more aptly reflect public opinion.

8. This Committee believes that the traditional matrimonial offences always brand one marriage partner as the guilty party, although in most cases it is certain that both partners have contributed to the marriage breakdown. Yet, it is easier to judge the evidence of a matrimonial offence than it is to determine when a permanent marriage breakdown has occurred. We recognize the difficulty of defining with precision the division between a permanent marriage breakdown and divorce by mutual consent. Indeed, we do not support the extreme view of divorce by mutual consent. For this reason, we recommend that more research should be carried out in order to identify which could be used as a basis for determining when, in fact, a permanent marriage breakdown has occurred.

9. We are greatly concerned that the recommendations from your Committee should be very flexible in any definition of the term "permanent marriage breakdown". What must be taken into consideration is the point of tolerance of the particular individual when she believes her marriage to be past reparation because of a situation—any situation—which is really intorerable to her, and not the Court's concept of what the individual ought to tolerate.

10. To what degree the interpretation of the concept of the permanent marriage breakdown, as grounds for divorce, should be defined, and the degree to which it should be left to the courts, we do not know. The thing we fear is narrowness of definition in the first case and narrowness of interpretation in the second.

ANCILLARY PROBLEMS

11. In addition to the basic question of grounds for divorce, there are many ancillary problems, for example:

(a) *Collusion and Condonation*: The present laws would seem to demand blameless conduct on the part of the wife if she hopes to win a divorce. Even more absurd is the implicit condemnation of the wife who is aware of adultery on the part of her husband and "condones" it in a practical effort to re-establish a good marital relationship; and there is further absurd condemnation for the wife who "has been guilty of unreasonable delay in presenting or prosecuting" action for

divorce. How, other than by condoning and/or by delaying, could a wife try to save the marriage and avoid the pain of family breakup. Of course, this also applies to the husband. We believe that it should not be considered collusion if the husband and wife make reasonable arrangements before the hearing of the suit, about financial provision for one spouse, guardianship of the children, and division of personal and real property. The law of collusion should only apply where the parties conspire to put forward a false case, or to withhold a just defence, or where one party uses the divorce courts to bribe the other party.

(b) *Domicile:* We submit that divorce law should take into account the mobility of twentieth century Canadian society. For example, many men are transferred to branch offices, workmen are relocated to high employment areas, servicemen are transferred to new posts. A woman should not be tied down to her husband's domicile, but should be able to institute proceedings of divorce in the jurisdiction where she has been residing.

(c) *Uniformity*: We believe that the grounds for divorce should be uniform throughout Canada; that is, if Parliament continues to grant divorce, the grounds should be the same for parliamentary and non-parliamentary divorce; and that the rules governing divorce should be the same for all Canadians, men and women, in all provinces.

(d) *Maintenance and Alimony*: We recognize that this question may not be within the Federal Government's jurisdiction, as there is some doubt as to whether or not it can be considered ancillary to the right to grant divorce or whether it comes under the province's rights of "property and civil rights". We submit that it is inseparable from divorce, and that your Committee should make some recommendations to clarify the situation.

(e) *Guardianship of Children*: Adequate provision should be made for the welfare of the children of the marriage.

(f) *Cost of Divorce*: The cost of divorce should be reduced by simplified divorce proceedings, and by the greater use of legal aid.

Respectfully submitted on behalf of:

THE CANADIAN COMMITTEE ON THE STATUS OF WOMEN

(Sgd.) "Mary R. Gilleland"

Mrs. W. H. Gilleland, Chairman,
701 Don Mills Road, Apt. 1004,
Don Mills, Ontario.

APPENDIX "22"

BRIEF

SUBMITTED TO THE SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS ON DIVORCE.

by James C. MacDonald and Lee K. Ferrier, Barristers & Solicitors,

100 Adelaide Street West, Toronto 1, Ontario.

Recommendations

1. That the Special Joint Committee of the Senate and House of Commons on Divorce give priority in its deliberations to the theory of Breakdown of Marriage and cause inquiry to be made into the desirability and feasibility of amending the law of divorce in Canada to provide that no marriage shall be dissolved unless it is shown to the satisfaction of a Court of competent jurisdiction that the marriage has irretrievably broken down.

2. That in considering the implementation of the theory of Breakdown of Marriage the said Joint Committee give attention to the desirability and feasibility of recommending to Parliament that the following be enacted as the sole ground for divorce in Canada:

> An application for dissolution of marriage may be made to the Court by either spouse if at the date of the application the spouses are living separately by reason of their mutual consent or the conduct of one of them, and the Court shall pronounce a decree dissolving the marriage upon such separation being established provided that
>
> (i) from time to time or continuously within the three years immediately preceding the date of the application the spouses have lived separately as aforesaid for a total period of not less than two years; and,
>
> (ii) there is no reasonable likelihood of a resumption of cohabitation; and,
>
> (iii) the making of the decree will not prove unduly harsh or oppressive to the other spouse or to any child of either spouse.

These recommendations and the following brief offered in support of them are respectfully submitted this 29th day of November, 1966, by James C. MacDonald, and Lee K. Ferrier, Barristers & Solicitors, 100 Adelaide Street West, Toronto 1, Ontario.

Breakdown of Marriage

1. Society believes in marriage as a "union for life", or "the life-long cohabitation in the home for the family", but accepts the need for divorce. There are four possible bases for divorce: unilateral declaration, divorce by consent, the doctrine of matrimonial offense, and the doctrine of breakdown of marriage.

Definitions:

2. A theory of divorce based on unilateral declaration provides simply that either party to the marriage may terminate the legal bond by so declaring. Certain procedural requirements are usually attached, for example, the filing in a public office of certain documents, and the obtaining of the signature of a named official. Upon such declaration being made, and the procedural requirements being complied with, the marriage no longer exists at law. There has been no intervening examination by the state of the facts giving rise to the necessity for the divorce.

3. Divorce on consent is achieved in the same manner as divorce by unilateral declaration, except that both parties to the marriage must consent to its dissolution. There is no examination into the conduct of the parties or the marriage. Any investigation which is ordered is simply directed to determining that the consent has not been gained by coercion or duress.

4. Under a system of divorce based on matrimonial offence such as we have in our present law, certain acts are held to be fundamentally incompatible with the undertakings entered into by the parties to the marriage. The commission by a spouse of one of these specified acts gives the other spouse the option to have the marriage terminated.

5. The doctrine of breakdown of marriage would prescribe that a divorce is granted only where the marriage has broken down. The definition of breakdown is contained in the answer to the question, "Does the evidence before the Court reveal such failure in the matrimonial relationship or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual support?" (Report to the Archbishop of Canterbury, S.P.C.K., 1966, prepared by a group under the chairmanship of R.C. Mortimer, D.D., par. 55).

Objections to Unilateral Divorce:

6. Divorce by unilateral declaration can be dismissed out of hand as not presenting a real possibility in Canada.

Objections to Divorce by Consent:

7. Divorce by consent cannot be dealt with so easily. Henry L. Cartwright in the preface to the third edition of the text, The Law and Practice of Divorce in Canada, (1962), argues forcefully in its favour. "The late W. Kent Power, Q.C., was one who took the view that marriage is a contract like any other that should be dissoluble upon the agreement of the parties." (Douglas F. Fitch, Let's Abolish Matrimonial Offences, 9 C.B.J. 78 at 81 (note 13)). This article also refers to the view of Sir Jocelyn Simon, President of the Probate, Divorce and Admiralty Division of the English High Court of Justice, which was expressed in September, 1965. His Lordship was of the opinion that divorce by consent should be allowed, but its application restricted to couples without infant children.

8. The main objection to granting divorce on this basis is that marriage is reduced to a private contract from which the interest of the community is excluded. The community in this system has no function—it has no part to play in the termination of the legal bond, other than to administer the procedural requirements to give the dissolution recognition in law. That the community has some greater function to be exercised through its judiciary is approved by Mr. Justice Scarman in a public lecture given at the University of Bristol in March, 1966:

> I would think that anyone who reflects upon the problem, and who accepts the objectives of the law to which I have earlier referred, would conclude that divorce by judicial process, should not be abolished but strengthened. Society's interest in the preservation of family life and, when it is fragmented by breakdown, in the binding up of the wounds inflicted upon spouses and children, requires that the tie of marriage should be lawfully dissolved only when these interests are properly safeguarded. Spouses, their judgment distorted by marital unhappiness, cannot, however good their intentions, be relied upon to put first the objectives that society must seek to achieve in its regulation of family life. It might, however, be said that society's interest could be adequately, and far more cheaply, safeguarded by divorce being made the subject of administrative, not

judicial decision—for example, available in some sort of register office on application of one spouse in certain defined circumstances, or upon the filing of a consent. The objection, as I see it, to divorce by administrative process, is that there could be no assurance either to the public that its interests were being safeguarded or to the spouses that justice was being done in their case. Spouses are not always agreed in wanting divorce, yet often the relief should be available notwithstanding the opposition of one. And when spouses are agreed, their agreemnt is no guarantee that the interests of society will be observed. Justice to the spouses and to the interests of society requires, I suggest, that divorce be available only by judicial decision so that all may appreciate that the various conflicting interests that are bound to arise and need adjusting are being properly and responsibly assessed and met.

9. Another objection to divorce by consent is succinctly stated by Lord Walker: "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." (Report of Royal Commission on Marriage and Divorce, 1951-55, (Cmd. 9678), under chairmanship of Lord Morton, page 340).

10. We submit that the majority of Canadians would agree that the state has some interest in maintaining the institution of marriage, and that they would react, in the company of Lord Walker, against divorce by consent.

Use of Theories of Offence and Breakdown:

11. The remaining doctrines of matrimonial offence and breakdown were viewed by Lord Hodson as posing alternate choices. Speaking in a debate before the House of Lords he stated,

> There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

12. Other reformers have considered these theories as not necessarily presenting an either/or proposition and have suggested that they be combined in one divorce system. With this suggestion we now have three possible foundations upon which Parliament can legislate for divorce:

1. Matrimonial offence;
2. Matrimonial offence and breakdown in some combination, and;
3. Breakdown.

Retention of Matrimonial Offence Theory:

13. Some of the arguments in favour of retaining the doctrine of matrimonal offence will now be considered. One of the arguments put forward by those who support the doctrine is that it provides a clear and intelligible principle for determining whether or not a marriage should be dissolved. We submit this argument is sound only so long as the grounds can be clearly defined and, more importantly, applied with certainty in any given circumstances. Difficulty soon becomes apparent in this area when such notions as desertion and cruelty are considered. These may be defined with ease, but their application in many cases is subject to the greatest doubt.

14. Another submission sometimes made in support of the doctrine is that it promotes marital security in the sense both spouses know that if their conduct avoids certain offences, the marriage will be secure from dissolution. So long as the grounds can be clearly and intelligibly defined, this may in fact be the case. But it is highly doubtful that it is desirable to have the law encourage "secure" marriages at the expense of permitting the partners to believe anything short of a matrimonial offence is fairly within the ambit of normal married life.

15. It is also argued that the doctrine of matrimonial offence is satisfactory because it provides relief where something has been done by a spouse which cuts at the root of the marriage. It is submitted that the commission of a matrimonial offence in itself does not necessarily prevent the marriage from being or becoming a desirable life-long partnership.

16. Adherents of the matrimonial offence system have argued that it operates to deter illicit unions because in that system only an "innocent" spouse can sue. A spouse who leaves his or her partner to live with a paramour runs the risk that the union can never be regularized because of the refusal of the other spouse to exercise his exclusive right to have the marriage dissolved. But we must ask ourselves, does withholding the blessing of the law really discourage illicit unions?

17. Another argument advanced is that the matrimonial offence system is satisfactory because of its adaptability to the changing views of society. As society redefines what constitutes a grave matrimonial wrong, so may the law evolve, by constituting further "acts" as "offences". This necessarily involves legislation for hard cases, and prevents the application of any consistent principle. This leads to anomaly, and anomaly is always difficult to justify in the law. If a divorce law is based on relief for hard cases, what limits the choice of case? Why give relief to this hard case and not to that one?

Objections to Matrimonial Offence Theory:

18. Some of the objections to the doctrine of matrimonial offence have been suggested in dealing with the arguments just presented in its favour. Further objections were mentioned before the Morton Commission and were acted upon by the Mortimer Group. The first of these objections is that a marriage may in fact be broken down irretrievably even though no matrimonial offence has occurred. The converse of this, is that it permits divorce in some cases where the marriage might otherwise be salvaged. The commission of a single act of adultery entitles the innocent spouse to a divorce even though the marriage may be a good one.

19. The system of matrimonial offences most often treats of the symptoms of marital difficulty and not the causes. This means that divorce is given for the wrong reasons, and without the actual state of the marriage being considered.

20. A system of matrimonial offences rewards a spouse (who wants a divorce) for immoral conduct. Further, it penalizes the spouse who refuses on moral grounds to commit a matrimonial offence or perjury.

21. The doctrine makes divorce easy.

22. The doctrine does not encourage reconciliation, but in fact discourages it. Spouses are often ill-advised to attempt reconciliation because in so doing they may condone offences and forever lose their right to divorce.

23. Relief based on matrimonial offence leads to a false evaluation of marriage as an institution, and brings it into disrepute. It implies that any act however reprehensible which falls short of being a matrimonial offence is not "wrong". It has also been said that the concentration of judicial attention on offences, evokes a false sense of values, and gives importance to acts, the significance of which varies widely with each marriage. Conversely it does not give importance to acts which are not recognized as offences, but may well be the cause of difficulty in the marriage. In reality and from a moral standpoint, an offence does not make a case for dissolution. What does, is the failure of the relationship between the spouses.

Adding Breakdown as an Additional Ground:

24. Can these inadequacies in the matrimonial offence system be corrected by adding breakdown as a ground within the system? The next few pages of this brief will deal with the answer to this question.

25. In present day England the grounds for divorce are adultery (and rape, sodomy, and bestiality), cruelty, desertion, and insanity. Of these grounds all those down to the last one are offences. They are species of behaviour which can be analyzed as having elements of wrongful intent and fault (or blameworthiness) roughly analogous to *mens rea* and the criminal act found in the other side of the law. It is meaningful when talking of this behaviour to say of the responsible person that he is "guilty" of something. The other party not having consented to being inflicted with this behaviour is correctly, when we speak in these terms, called "innocent". This form of thinking and these labels are appropriate to a system of offences. But when we are faced with insanity our thinking becomes confused and our terminology less apt. We ask ourselves of the insane spouse: Where is his wrongful intent? Where is his blameworthiness? How, in short, can we say he is "guilty" of anything? His behaviour has none of the ingredients of an offence. A divorce because of this behaviour only becomes understandable when we look at it in the light of being something which totally frustrates the marriage relationship, or makes continued cohabitation impossible. But this is far different from saying that what has happened is that someone has committed an offence, and that this offence justifies him being divorced at the suit of some "wronged" party.

26. Insanity as a reason for granting a divorce must be supported on something other than the matrimonial offence doctrine. Its incorporation in a list of grounds would seem to be a working example of a system which combines an alien principle with the doctrine of matrimonial offence. As such, is it not an argument in favour of the submission that the principle of breakdown can be successfully incorporated into the system of matrimonial offences? A professor of law at Columbia University, Monrad G. Paulsen, although he might not use this example as an argument would probably hold that a combination, and a successful one, is possible. Criticizing the Mortimer Group's Report in an article which appeared in the New Society on the 4th of August, 1966, under the title Divorce Canterbury Style, he states:

> The Mortimer Group vigorously rejects the idea that 'breakdown' should be added to the list of grounds for divorce, principally for the reason that, in the group's view, the principle of matrimonial offences and the principle of breakdown are mutually inconsistent and the incompatibility, the report asserts, would be 'glaringly obvious' creating an unfortunate anomaly. This point is persuasive only if the state chooses one principle as the exclusive one and then adds grounds which are justified on the other principle. But why should an exclusive choice be made? One principle can serve the case of the spouse who has suffered serious offence. The other can serve those spouses in respect of whom no glaring misconduct can be identified, and those who seek divorce against the will of a relatively innocent partner. The legal system frequently chooses different principles to dispose of distinguishable situations.

27. Before attempting to put forward some of the rebuttal arguments against Professor Paulsen's "so what" indictment let's go back to insanity. It might be said about insanity that we are not talking of breakdown of the marriage except in an incidental sense. What we are really talking about is the loss of the person (or personality, if you like). This loss might be compared to death and it is recognized that death of one of the spouses terminates the marriage relationship. Insanity then might be said to be more analogous to the

death of one of the participants than to the death of the relationship created between them. It is only the latter "death" which is contemplated in the breakdown theory; so perhaps we cannot say that in England the matrimonial offence system already has a ground for divorce based on breakdown. What, we then ask ourselves, would be a genuine example of the incorporation of a breakdown principle? The best example is the one closest at hand. In its convention at Winnipeg this summer the Canadian Bar Association on the 2nd of September, passed a resolution which recommended that the law of divorce be changed by extending the grounds to occupy the same position enjoyed in England, and to go beyond it by adding one other ground and the following:

> 4. Voluntary separation of the husband and wife for a period of three years 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.

28. Separation is not a matrimonial offence, and is based on the breakdown principle. It is not a matrimonial offence because the separation contemplated is a voluntary separation by mutual consent. There is no conduct which one can blame against the other. There is no guilty or innocent party. Both might be guilty or both might be innocent, and either of them may take the initiative in bringing the divorce action.

29. Support for the position taken by the Bar Association can be found in the views of some of the members who sat on the Morton Commission (1951-55). Nine of the nineteen members were in favour of introducing a similar ground into the law of England. They disagreed among themselves (5:4) only on whether the marriage should be dissolved in such a situation despite the opposition by an unoffending spouse. All nine would go as far as adding the following as a ground for dissolution:

> An application for dissolution of marriage may be made to the Court by either spouse on the ground that the spouses have lived separately for a period of not less than seven years immediately preceding the application, and the Court shall pronounce a decree dissolving the marriage where this ground is established, provided that the other spouse does not object.

30. Four of these nine members advocated a wider proposal which would, in some circumstances, permit divorce despite the objection of the unoffending respondent. This would be accomplished by retaining the suggested wording of the main clause and changing the proviso to read:

> . . .provided that if the other spouse objects to the dissolution, the applicant must first satisfy the Court that the separation was in part due to unreasonable conduct of the other spouse.

31. Lord Walker, one of the Commissioners, was in favour of the breakdown doctrine, but not in either of these forms. He approved of its application only if it were made the sole basis for divorce. He defined a broken marriage (and thus the "breakdown" situation), as one where the facts and circumstances affecting 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. Conforming to this definition he held the view that no marriage ought to be dissolved where there is hope of reconciliation. This end could be achieved only by using

the breakdown principle. His opposition to introducing the principle as a ground in a system of matrimonial offences appears to rest upon the arguments:

1. That marriage cannot be said to be broken down merely because the spouses have consented to lead separate lives, and;

2. That divorce, in order to preserve the institution of marriage as a life-long union, should proceed from one general principle.

32. Where the parties are living apart it cannot be said that the marriage has broken down until the prospects of reconciliation are explored. Whether reconciliation is possible would depend on the reasons for the separation and if reconciliation has not been attempted, the reasons why. A long period of separation is evidence of breakdown deserving of great weight, but is not conclusive proof.

33. Lord Walker's other objection appears to be that the principle of offence and the principle of breakdown are two mutually inconsistent logical systems. In practice when you use them together you are really legislating from the point of view of relieving individual cases of hardship and then going back to justify this relief on whichever of the two theories seems to fit. To re-establish the institution of marriage in its true significance as a life-long cohabitation in the home for the family, you must proceed from a general principle and not from individual cases. You apply one principle or the other, and do it consistently. If you proceed from thinking in terms of matrimonial offence you apply that doctrine in all its rigor without watering it down with categories which do not have the ingredients of an offence. Similarly, if you start with breakdown you are premising your solution on a particular meaning of marriage, and must act accordingly. You are saying that marriage means actual (or where there is a separation, "probable") cohabitation for life and your legislation is arrived at by protecting this definition. If the marriage is an "empty tie" it is dissolved. If it is not, then it is maintained. If there is doubt then the parties are encouraged to seek counselling and the proceedings are adjourned until the results are known: Letting Lord Walker speak for himself we hear these views expressed as follows:

> The doctrine of the matrimonial offence allows divorce only at the option of the party innocent of the offences against the party guilty of the offence, whereas the principle of dissolution on breakdown of marriage would allow dissolution at the option of either party. Whether the option is with one party as at present, or is given to both parties, it is possible to figure hard cases that might arise but these (divorce by consent apart) are inherent in any attempted solution of the problem of dissolving an indissoluble union. The commission of a matrimonial offence is often the symptom or sequel of a marriage which had broken down for quite other reasons; and in such cases the party morally responsible for the breakdown is sometimes, under the existing law, permitted to masquerade as the legally innocent party. I do not, however, think the problem can usefully be considered from the point of view of hardship to individuals. Divorce, differing from judicial separation, is a matter in which the public interest ought to be regarded as paramount. In relation to divorce the Memorandum submitted on behalf of the Church of England, in its first paragraph, lays emphasis on the importance of proceeding from some general principle as to the significance of marriage in itself, and as a social institution. I accept that as being the proper principle to follow. 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 increasing harm to the community and

injury to the ideal of marriage. The simplest and I think the best solution is that the law—which will not enforce cohabitation—should favour the dissolution of broken marriages at the suit of either party.

My view accordingly is that the doctrine of the matrimonial offence ought to be abandoned as the basis for divorce and replaced by a provision that marriage should be indissoluble unless, having lived apart for not less than three years, either party shews that the marriage has broken down in the sense I have endeavoured to define...However, should that view not be adopted the need for some principle—even though, as I think, it is not the best principle—requires that the doctrine of matrimonial offence should be adhered to as closely as may be, and without the new grounds of divorce proposed by some of the members...(Morton Commission, page 341)

34. The proposed new grounds which Lord Walker did not wish to see added were the grounds of "separation" suggested by the nine members mentioned above. In paragraphs 23 and 24 of their report the Mortimer Group states:

23. We very soon decided that it would not be an improvement, but the reverse to introduce the principle of breakdown of marriage into the existing law in the shape of an additional ground for divorce; and our objections to any such compromise multiplied and hardened as the time went on. In our opinion it is a very good thing indeed that the Bills which proposed a "ground of separation" failed to reach the statute book.

24. Having rejected the addition of new grounds to the existing law, we saw we should have to face a choice of principle. It seemed to us that Lord Hodson had been undeniably right when he said in the debate already mentioned:

> There are only two theories alive on this problem—namely, are we going to act on the matrimonial offence, or are we going to act on the breakdown of marriage theory? That is the fight.

Lord Walker had posed the same alternatives, we noted, at the time of the Morton Commission. He said in his minority statement that either the matrimonial offence ought to be abandoned and the principle of breakdown be substituted, or else the principle of the matrimonial offence ought to be maintained as strictly as possible, without the addition of grounds inconsistent with it. We agreed that this was the choice that had to be made.

35. Later on in its report (paragraph 69) the Mortimer Group summarizes the reasons why breakdown must not be introduced into the law as a "ground". The reasons are:

(a) The mutual incompatibility of the two principles would be glaringly obvious;
(b) The superficiality inseparable from verbally formulated "grounds" would tend to render the principle of breakdown inoperative, and;
(c) The addition of a new "ground" embodying the principle of breakdown would make divorce easier to get without really improving the law.

36. In explaining the incompatibility of the two principles the Group stated:

The existing law is almost entirely based on the assumption that divorce ought to be seen as just relief for an innocent spouse against whom an offence has been committed by the other spouse. If then there were inserted into this law an additional clause enabling a guilty spouse to petition successfully against the will of an innocent, the whole context would proclaim the addition unjust. (page 57)

37. The second reason stated by the Mortimer Group follows from the approach that offences as we know them are often at best merely "symptoms" or "sequels" to breakdown and not the cause of breakdown. On this point the Group said:

> One of our reasons for recommending the principle of breakdown is that it would enable the Courts to get to grips with the realities of the matrimonial relationship instead of having to concentrate on superficialities. But if the principle were introduced into the law in the shape of yet another verbally formulated "ground" (such as the Australian "ground of separation"), the advantage hoped for would be lost. There would inevitably be a tendency simply to measure the circumstances revealed by the evidence against the verbal formula, and, if they appeared to fit it and no bar applied, to grant a decree without any genuine trial of the issue of breakdown. In other words, it is likely that the attitudes and procedures appropriate to the trial of matrimonial-offence cases would be extended to cases turning on the new "ground". There is some evidence of this in Sir Stanley Burbury's comments on the Australian law. Our own view is that trial of the issue of breakdown would require new attitudes and procedures, and that it is highly unlikely that these would be duly developed by the Courts if the principle of breakdown did not pervade the whole divorce law. It may be added that the mere addition of a new "ground" would do nothing to remedy the particular aspect of superficiality noted by Sir Garfield Barwick, namely, the artificial definition, which is implicit in the verbal formulation of "grounds", of "the area of conduct which will remain innocent in a matrimonial sense". If on the other hand the whole law were to be based on the doctrine of breakdown, this artificial delimitation would disappear. (page 58)

38. The third reason mentioned is that embodying breakdown as a ground would make divorce too easy;

> Introduction of the principle of breakdown in the form of a new verbally formulated "ground" would not reform the law: it would simply make the existing law open-ended and provide a last resort for petitioners who found they could not succeed on any other "ground"... The implicit advice of a mixed divorce law to people wanting to rid themselves of marriage might well become, "When no other ground offers, try breakdown of marriage". (page 59)

39. The conclusion of the group on this point is stated as follows:

> In our opinion, therefore, the principle of breakdown ought on no account to be introduced into the existing law in the form of an additional "ground". Failing the complete substitution of principle which we recommend, it would be better to keep the law based firmly on the matrimonial offence, and to consider how its administration could be improved, than to inject into it a small but virulent dose of incompatible principle. (pages 59-60)

New Procedures:

40. In explaining its second objection to mixing the doctrines of offence and breakdown the Mortimer Group states that the "trial of the issue of breakdown would require new attitudes and procedures...". The question of breakdown cannot be tried without some departure from the adversary system of determining facts. One of the reasons necessitating a departure is that the parties although they may have become adversaries in life, many times are not adversaries in Court. The "dispute" that they (or one of them by legitimate arrangement) bring into Court is a question both of them want decided in the same way. The information given to the Court in evidence is "selected" to accomplish their

joint objective. The whole of the facts may not be heard. The Court really has no contest to referee, and often is only concerned with whether the Court itself is being deceived. The hearing becomes an inquiry by the Court into the conduct of both parties to determine whether the recipe has been followed without employing the deceits of collusion or connivance. It might be interesting to speculate on who are the adversaries in this situation or whether there are any at all. Without following the course of this digression let us simply say that there are no adversaries because there is no lis inter-parties. What is going on is simply an inquiry conducted by the Court into determining whether or not a certain state of things exists. An inquiry approach is what the Mortimer Group recommends in place of the adversary system for trying the issue of breakdown. This recommendation, the report makes clear, is required by necessity. The changes in substantive law

> must be regarded as conditional upon certain procedural changes; for we believe that to alter the law while leaving the method of its administration just as it now is would be to make divorce easier to obtain without any compensating advantages. What is essential is to render the procedure of the Court appropriate to making inquiry into the condition of the marriage instead of to determining the guilt or innocence of a person against whom the commission of an offence has been alleged. Under a law based on breakdown the trial of a divorce case would become in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the "death" of a marriage relationship. It would have to be made possible for the Court, therefore, the inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events, and circumstances, alleged to have destroyed the marriage, into the truth of statements made (especially in contested cases), and into all matters bearing upon the determination of public interest. (page 67)

41. To give the Courts some of the necessary information the pleadings would be expanded to

> cover the salient features of the history of the marriage in question, the reasons alleged for its failure, any attempts made to achieve reconciliation, and all arrangements proposed for the care of any children, for the disposal of property, and for maintenance in general. (page 68)

42. The Court would have the power to require the attendance of both parties on occasion to give evidence about their marriage. The respondent who wanted to remain passive and take no part in the proceedings might be required to file some sort of statement informing the Court of his attitude to the matters pleaded in the petition.

> Sometimes it would have to be a full pleading in answer to the petition, sometimes not. It would in no case have the character of a cross-petition as that is understood under the present law, because decrees made on the basis of breakdown would never be "in favour" of one party or the other. (page 69)

43. All questions arising between the parties should be disposed of in one proceeding.

> We suggest that the petition and any reply made by the respondent should cover everything the parties wished to raise at any stage of the proceedings, including matters of property, maintenance, and the future of any children of the marriage. (page 69)

44. It is recognized that it would be unpalatable to turn Judges into inquisitors. To appraise the Court of the relevant facts it must then in some cases at least, have assistance. One idea is to employ "forensic social workers" as officers of the Court.

> The officers could, when required to do so, verify attempts at reconciliation, test the reliability of assertions made to the Court, and investigate any other matters on which the Court wished to be informed, and could report on the circumstances of children of the family. They might also supervise the working of arrangements made for custody and maintenance. (page 70)

45. This change of procedure is extremely important. Only with this new approach to the problem can the Court be expected to satisfy itself that "there is no reasonable likelihood of a resumption of cohabitation". It is impossible to answer this question in terms of the adversary system, because in many cases the Court could not rely solely on the parties to bring forward all relevant evidence and would have to be prepared to introduce evidence on its own motion.

46. Probably in the short space allowed for this paper the best way to illustrate the difficulty is with the following example. Suppose the changes recommended by the Canadian Bar Association were made law and separation without likelihood of a return to cohabitation were made an additional ground. Suppose further that you are retained by an intended Plaintiff whose spouse has been away the required time, and you also have instructions of an offence of adultery, but for reasons pertaining to difficulties of proof you do not wish to rely soley on this latter ground. To be safe you make use of the two possible grounds offered to you and plead them in the alternative. Now imagine the trial. In order to correctly apply the law to the two grounds the Court proceedings might go something like this. You lead your evidence on the adultery and the best you can do is tender the Plaintiff's evidence of an admission, and show some weak corroboration. The Judge is undecided and wishes to reserve, but wants to hear the rest of the case. You then proceed, and your friend representing the defendant spouse suddenly realizes that the defence has been taken out of his hands by the Judge giving instructions to subpoena his client. Your friend voices his surprise and is told that the Judge is no longer merely an umpire, but has some of the powers analogous to a Commissioner under the Public Inquiries Act; and in order to be satisfied that there is no likelihood of a resumption of cohabitation, His Lordship wants to hear from the mouth of the defendant what attitude he takes to the marriage. In this situation we would have the Court at one moment adjudicating a contest, and in the next being an active participant in an inquiry. No rules would be clear—an impossible situation.

47. It might be argued that the procedural change is so radical that it would upset the whole of our Court system. The advocates of breakdown do not underestimate the effect of this change. The Mortimer Group recognized "that reform of the Courts and their procedure is apt to be a much lengthier undertaking than amendment of the substantive law. . .". However, it is submitted that the change is not as radical as it might first seem. As already mentioned everytime there is a suspicion of collusion or connivance an inquiry of sorts is held. In Ontario this inquriy through the "forensic" offices of the Queen's Proctor may be quite extensive. Another instance where the Courts in matrimonial causes often conduct an investigation more in the nature of an inquiry than that of a disinterested judicial officer presiding over a contest, is where it is necessary to consider whether the Court's discretion should be exercised in favour of a Plaintiff who has also committed a matrimonial offence. It is interesting to note that in conducting this inquiry one of the main questions to be determined is

whether the marriage has broken down. To use a recent example Tucker, J., of the Saskatchewan Queen's Bench appeared to have no difficulty in making a finding on this question. In Deptuc v. Deptuc (1966) 56 D.L.R. (2d) 634, he held that a decree should be granted dissolving the marriage because it had hopelessly broken down, and that to maintain it would be against public policy, the interest of the parties, and the child. That the Courts can where necessary conduct an inquiry is again illustrated in Spoor v. Spoor (1966) 3 All. E.R. 120 in the Probate Divorce and Admiralty Division before the Registrar. In this case it was held that proceedings under Sec. 17 of the Married Women's Property Act 1882 were in the nature of an inquiry into a claim, and were not an adjudication on a cause of action. In the recent Canadian case of Re Bailey (1966) 6 D.L.R. (2) 140 in the British Columbia Supreme Court before Ruttan, J., it was held that the case could not be decided in terms of onus of proof because the matter before the Court was initiated by the administrator of the estate and the proceeding was not a trial. It was an inquiry by the Court to determine which of the heirs was entitled to succeed. It was not a contest between parties. These examples show that a Court proceeding need not necessarily be a contest such as comes to mind when we think of the adversary system.

48. The idea of "forensic social workers", should not seem too unusual—at least to Ontario lawyers. They are quite familiar with this sort of officer every time there is a divorce with children of the marriage under the age of sixteen. In these situations, an investigation is made and a report filed with the Court on behalf of the Official Guardian. An example of this sort of worker outside the area of matrimonial law is the probation officer who makes the pre-sentence report given to the Court in a criminal case.

Breakdown as the Sole Basis for Divorce:

49. The last alternative to be discussed is the suggestion that the doctrine of breakdown be substituted comprehensively in place of the matrimonial offence as the sole basis for divorce. This, as we have seen, is the recommendation made by the Mortimer Group.

Many of the aspects of the breakdown principle have already been referred to in this paper; it is perhaps best now to consider the main objections to the doctrine.

Is Not Divorce by Consent:

50. One of the major objections raised is that breakdown entails divorce by consent. This is clearly not so because the state is not a mere bystander, but through the Courts, exerts its part in the determination of whether or not the marriage is still a viable relationship. If the marriage is found to be an "empty tie" after due inquiry by the Courts, the state "approves" of the termination of the legal bond.

51. It may be said that in reality, parties may obtain a divorce on consent under the breakdown doctrine by simply agreeing to separate for a few years, such separation to be followed by the commencement of a suit for divorce by one of the parties. It is to be noted, however, that under the breakdown theory, this in itself will not be sufficient to obtain a divorce. The applicant will still be required to show that there is no reasonable probability of the parties ever resuming cohabitation as husband and wife. Adultery, cruelty, desertion, separation of the spouses, the wishes of the parties to terminate the marriage, all will be evidence tending to show breakdown, but in themselves may not necessarily result in breakdown being proven. The court will always want to know what attempts if any have been made toward reconciliation, how each party feels about the possibility of reconciliation, what factors contributed to the breakdown, and whether or not the factors can be eliminated to the advantage of the union.

52. It would be possible under breakdown to arrive at a "consensual arrangement" leading to divorce—but no more so than at present where the Defendant legally supplies and admits particulars of adultery.

Against Will of Unoffending Spouse:

53. One of the points dealt with by the Mortimer Group was the objection that the breakdown theory would permit divorce at the suit of a culpable party against the will of an unoffending spouse. In order to see this objection in its proper context one must pre-suppose that all substance has gone out of the marriage—there is no longer any married life—and the spouses are left with only its legal form. It is the spouse who is morally in the wrong who initiates the Court proceedings to dissolve the tie. The other spouse has at all times lead a praiseworthy life and out of strong feelings of what is right opposes the proceedings. Should the marriage be dissolved? These imaginary but possible circumstances give rise to three considerations:

1. Deprivation of status;
2. The result that a person may "take advantage of his own wrong", and;
3. Economic deprivation.

54. We have referred firstly to the deprivation of marriage status. One of the premises of the breakdown theory is that it is not in the public interest to maintain an empty marriage tie, and its proponents generally advocate that where this finding is arrived at after a thorough Court investigation the marriage should be dissolved despite the scruples of the respondent. There will always be hurt to the family where there is divorce no matter what system is employed; all hurt to spouses or children cannot be avoided. To refuse divorce because of individual hurt must be balanced against the desirability of dissolving marriages which do not exist in life. However, there is also another public interest to serve and that is the public sense of justice or the prevention of a general feeling of outrage. In some cases to dissolve a marriage against the wishes of a praiseworthy spouse would be to ignore this interest. Therefore, it is necessary, in the view of the Mortimer Group, to allow the Court a discretion to refuse a divorce where the Plaintiff has acted with gross misconduct. To do otherwise would shake the public confidence in the administration of justice and cast doubt on society's concern for the institution of marriage.

55. The maxim which prescribes that a person cannot take advantage of his own wrong is really a meaningless question when asked within the terms of reference of the breakdown theory. A spouse who commences an action to have the marriage dissolved is asking for a delcaration that the marriage is finished. The spouse is not asking for a judgment on relative conduct of the spouses, but for the Court's opinion on whether or not there is any hope for the marriage; and if not, that the marriage be declared dead. The situation is somewhat analogous to nullity suits where the only question is the validity of marriage and where no conduct on the part of the Plaintiff can act as a bar. If the marriage is a nullity the good or bad conduct of the Plaintiff has no relevance. The Courts simply are not concerned with him. They are concerned with the marriage. In the same sense in a breakdown situation (except with respect to the right to exercise the discretion mentioned above), the Courts are not concerned with the rightness or wrongness of the Plaintiff's conduct; they are only concerned with the life or death of the marriage. The Court's judgment is a judgment on the marriage and as in a nullity suit a judgment against the marriage does not carry with it an evaluation of good or bad conduct. A party does not leave the court room thinking he or she is "guilty", or "innocent".

56. Whether or not justice has been done depends on whether or not members of the family unit have unfairly suffered economic deprivation. Divorce in the circumstances we are imagining is not unjust provided the unoffending respondent and the children are not worse off economically. The Court would be empowered and required to make a full inquiry into how dissolution of the marriage would affect the family members financially. To meet the requirements of justice the Court would have the power, not only to make orders for maintenance against either spouse, but also to award members of the family shares in pension benefits, insurance, and other emoluments that are now part of our financial life. It, of course, would also have the power to withhold any decree of dissolution until provision has been made for the dependent spouse and children. To simplify this process it might be practicable to introduce through the legislature some form of community of property.

Is Not Easy Divorce:

57. A further objection is that breakdown would make divorce too easy. There may or may not be an increase in the number of divorces per unit of population; of this we can make no prediction. However, what we can be assured of is that on the basis of breakdown there would likely be fewer potentially good marriages dissolved than under a system where the possibility of reconciliation is not explored.

Threat to Marital Security:

58. It has also been suggested that breakdown would threaten the "security of wives and mothers". It is said that under breakdown a spouse would never know whether he was secure in his marriage. Spouses could no longer be certain that provided their conduct fell short of the defined limits (offences) their marriage would be indissoluble. On the other hand it can be said that 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 would mean an ultimate break. (Fitch, 9 C.B.J. at 87.)

Triable Issue:

59. The objection is sometimes made that the question of whether or nor a marriage has broken down is a question which does not present the Court with an issue capable of being tried. It is admitted that to explore the question adequately the procedure of the Court should be enlarged in the way dealt with above. But, the objectors will claim, the Court is still faced with deciding something which is impossible to determine. It is submitted that this is not so. Sometimes no doubt, the question will be a very difficult one, but most times not. On this point, it might be helpful to look at a concept in the law which we already have, and which in some respects brings with it the same difficulties. We bring to mind the concept of negligence which pervades our law. Does this concept not on occasion present a question which is "impossible", to try? But we get along with it, and do so with a feeling that justice is being done. Coming back to matrimonial law we submit the question is no more difficult than deciding in a cruelty case whether the defendant spouse will continue a course of violent, or dangerous conduct; and whether if continued, the other spouse would suffer permanent injury. It is further submitted that breakdown is no more difficult of trial than making a decision in the following situation. A husband and wife have been quarrelling continuously for two years. The husband finally leaves. The wife then sues for alimony on the basis of desertion. The husband offers to return and the wife refuses to receive him. In the action the Court is put in a position where it must decide, (1) whether the offer to return is genuine, (2)

if genuine, whether the wife has just cause for refusing the offer, and (3) whether the wife (in Ontario, at least) by her conduct has disentitled herself to alimony on the basis that she could not sue for restitution of conjugal rights.

Recommendation:

60. The suggestion that divorce be based on the breakdown of marriage rather than on any matrimonial offence is deserving of the highest consideration. We recommend that the Joint Parliamentary Committee on Divorce be encouraged to give the suggestion priority in its deliberations.

Respectfully submitted,

James C. MacDonald,
Lee K. Ferrier.

November 29, 1966

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 10

TUESDAY, DECEMBER 6, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Catholic Women's League of Canada: Mrs. H. T. Donihee, National President; Miss Catherine Toal, Past National President; Mrs. G. J. Connolley, Diocesan President; Mrs. Roland Taylor, Past Diocesan President; Francis G. Carter, Esq., Solicitor for the League.

Canadian Mental Health Association: Gowan T. Guest, Lawyer, National President; John D. Griffin, M.D., General Director.

APPENDICES:

23.—Brief submitted by The Canadian Mental Health Association.
24.—Brief submitted by The Family Service Association of Metropolitan Toronto.
25.—Brief submitted by The Benchers of the Law Society of British Columbia.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

25307—1

MEMBERS OF THE

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON DIVORCE

FOR THE SENATE

Hon. A. W. Roebuck, Joint Chairman

The Honourable Senators

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

FOR THE HOUSE OF COMMONS

Mr. A. J. P. Cameron (*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."

25307—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, Madziuk, 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 Comittee, 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, December 6, 1966.

Pursuant to adjourment 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, Fergusson and Gershaw—5.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Aiken, MacEwan, McCleave and Peters—5.

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Catholic Women's League of Canada:

Mrs. H. T. Donihee, National President;

Miss Catherine Toal, Past National President;

Mrs. G. J. Connolley, Diocesan President;

Mrs. Roland Taylor, Past Diocesan President;

Francis G. Carter, Esq., Solicitor for the League.

Canadian Mental Health Association:

Gowan T. Guest, Lawyer, National President;

John D. Griffin, m.d., General Director;

Briefs submitted by the following are printed as Appendices:

23. The Canadian Mental Health Association.

24. The Family Service Association of Metropolitan Toronto.

25. The Benchers of the Law Society of British Columbia.

At 5.30 p.m. the Committee adjourned until Tuesday next, December 13, 1966 at 3.30 p.m.

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

OTTAWA, Tuesday, December 6, 1966.

The Special Joint Committee of the Senate and the 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 and members of the House of Commons, we can come to order; we have a quorum.

There are one or two small items I would like to bring up in advance. We shall be hearing two very distinguished delegations who have come to advise us in this matter that is under consideration; but before I introduce them I would like to put on record part of a very nice letter we have received from Messrs. MacDonald and Ferrier who addressed us on the last occasion. They say, "We also wish to use this opportunity to thank you very much for the courtesy extended to us...". They add that their visit to Ottawa was a most enjoyable occasion.

There is also a letter from the Reverend Mr. J. R. Hord, who spoke to us at some length. He says, "I wish to thank you for your personal hospitality, and so on, and concludes: "With every good wish for continued success in the sessions of your committee and anticipating significant reform in this field..."

I wish to put on the record a telegram from the Women's Liberal Federation of Manitoba. It is addressed to:

> Joint Committee of Senate and House of Commons on Divorce Ottawa. We respectfully submit the following resolution that was first submitted to and passed at the annual meeting of the Women's Liberal Federation of Manitoba and later submitted to and passed at the open convention of the Manitoba Liberal Party: "Be it resolved that the Liberal Party of Manitoba recommend that the Canadian Divorce laws be amended to include as grounds for divorce "A" incurable insanity "B" persistent cruelty "C" desertion of three years "D" separation for three years and be amended to grant jurisdiction for divorce to the courts of the province where either spouse resides. Kay Schroeder President Women's Liberal Federation of Manitoba.

I replied to the wire:

> Please accept my thanks for this information. The Joint Committee of both Houses studying the question of divorce is very pleased indeed to have this expression of views from the Liberal Women of Manitoba, and to note that the Liberal Men of Manitoba in an open convention agree with the women.

Honourable senators and members of the House of Commons, we have two delegations, as I have said. We have the Canadian Mental Health Association, and we have the Catholic Women's League of Canada. If you would allow me to

do so I intend to call on the Catholic Women's League first, chiefly for the reason that their brief is a short one and, I may add, an excellent one, for I have read it, and because two of the ladies have reasons, which I need not mention, for wishing to be through at the earliest moment.

There are five ladies here: Mrs. H. T. Donihee, Cornwall, Ontario; Miss Catherine Toal; Mrs. G. J. Connolley and Mrs. Roland Taylor, both of Ottawa; and we have Mr. Francis G. Carter, whom I shall introduce shortly.

And now I will ask Mrs. Donihee to present the brief on behalf of The Catholic Women's League of Canada.

Mrs. H. T. Donihee, The Catholic Women's League of Canada: Mr. Chairman and honourable senators and members of the House of Commons, on behalf of the Catholic Women's League of Canada I wish to tell you how much we appreciate the privilege you have accorded us of presenting to your committee our views concerning this very important subject of divorce. With your permission, I would now like to read the brief.

1. The Catholic Women's League of Canada incorporated by Federal Charter on December 12th, 1923 consists of some 160,000 members across Canada.

2. Among their objects the League seeks the betterment of social action, the stimulation of effort in all lines of women's work and gives unremitting support to the formation of enlightened public opinion. Politically, The Catholic Women's League of Canada is non-partisan.

3. The League, therefore, was highly interested in the Order of Reference directing "That the Senate do unite with the House of Commons in the appointment of a Special Joint Committee of both Houses of Parliament and to enquire into and to 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," and at its 46th Annual National Convention held at Hamilton, Ontario, instructed its executive to make a submission to the joint committee on its behalf.

4. In the year 1911 the total population of Canada of those 15 years of age and older was 4,830,093 and of that number 4,426 persons were classified as divorced. In the year 1961 the total population of Canada of those 15 years of age and older had less than tripled standing at 12,046,325 but the number of divorced persons had increased more than eleven-fold standing at 52,592. In the year 1963 alone some 7,681 divorces were granted in Canada[1].

5. On the basis of the above statistics, therefore, there can be no doubt that divorce is on the increase in Canada reflecting a breakdown in the family life of many thousands of Canadians.

6. The British North America Act, 1867 (30-31 Victoria Chapter 3, Section 91 Heading 26) vests the Parliament of Canada with exclusive legislative authority in respect of marriage and divorce. It is submitted that divorce cannot be considered distinct from marriage as of necessity any marriage must antedate a divorce, and a divorce is a civil termination of a marriage. It is essential, therefore, that before dealing with divorce the nature of marriage itself must be considered.

7. In the view of the members of the Catholic Women's League of Canada marriage is both a contract by which a man and a woman freely and mutually grant to one another and accept from one another the exclusive and permanent rights to those bodily acts which could lead to the generation of children, and a state of permanent conjugal union brought into being by mutual consent.

8. We further believe that when a valid marriage contract is entered into between two baptized persons such contract is automatically a sacrament and may not be terminated or altered by any human power.

9. Therefore, while we believe that Parliament is established to pass laws for the common good we do not concede that Parliament has any power to pass on the morality or immorality of divorce itself.

10. The fact that Parliament has passed laws legalizing divorce and may conceivably pass laws enlarging the grounds for divorce will not alter our belief that a valid marriage cannot be dissolved.

11. On the other hand it must not be assumed from our stand on this matter that we are unaware of the fact that while marriages may be made in heaven they must be lived out on earth and that the parties to a marriage are human, not divine.

12. We are fully aware that many marriages are, in truth, nothing less than a hell on earth, because of the adultery, the drunkeness, the insanity, the criminality, the bestial conduct or the cruelty of one spouse or the other. We are not unaware of the heartbreak, the trauma, and the mental and sometimes physical agony suffered by the innocent party and by the children of a marriage where one or more of the conditions we have listed above exists.

13. We would also emphasize that while we have our beliefs in the matter of marriage, we do not wish to impose those beliefs on the entire Canadian society through the medium of civil law. While we would resist any attempt of the legislators of this country to pass laws which would prevent us from freely expressing our belief and acting in accordance with that belief, at the same time we would not deny that same consideration for other members of the Canadian society who do not hold the same opinion as we do on this question, providing always that the common good is uppermost.

14. The Declaration on Religious Freedom approved by the Second Vatican Council on December 7th, 1965 includes the following declaration "This Vatican Synod declares that the human person has a right to religious freedom. This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power in such wise that in matters religious no one is to be forced to act in a manner contrary to his own beliefs. Nor is anyone to be restrained from acting in accordance with his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits"[2].

15. Having regard to the foregoing while we do not believe in divorce ourselves we cannot expect the laws of this country to be used in such a manner as to prevent those who, unlike ourselves, do not believe that marriage is monogamous and indissoluble, from acting in accordance with their own religious convictions.

16. Therefore, while we do not put forward any suggestions in favour of widening the grounds for divorce we would make certain positive recommendations with reference to marriage itself.

17. Firstly, we would urge that some uniform code pertaining to marriage and divorce be in effect throughout Canada. In this regard we would urge that legislation permitting the Courts of the provinces which at the moment do not have the power to grant a judicial separation to be given such power. We understand that the courts of New Brunswick, Nova Scotia, Newfoundland possess the power to grant a judicial separation but that the courts of other provinces such as that of Ontario do not have this jurisdiction.[3] We would feel, therefore, that this remedy should be available to those who do not believe that the civil courts have power to grant a divorce *a vinculo matrimonii* but who because of unhappy conditions existing in their homes desire the civil protection and effects which would flow from a judicial separation (divorce *a mensa et thoro*). We would further urge this step because the welfare of the children of such an unhappy marriage would appear to have a better chance of being

properly considered if a judicial separation were obtained than it has under a separation agreement and certainly where there is no separation agreement by reason of the refusal of one of the parties to such an unhappy marriage to enter into a voluntary separation agreement.

18. Secondly, we would urge that if consideration is being given to making the civil termination of marriage easier, that the preservation of the whole idea of marriage and of family life would better be fostered by making the contracting of marriage itself more difficult. We would, therefore, feel that before any marriage licence is issued that couples contemplating marriage be required to afford themselves of some counselling service which would acquaint them of the legal, social, biological, financial and other aspects of marriage.

19. Thirdly, we would feel that, in the interests of giving any marriage a fair chance, no application for a divorce be entertained by the courts unless and until at least three years and preferably five years have passed from the date of the marriage and unless it is shown that both spouses have attended a marriage counselling clinic in a sincere effort to reconcile their differences before the trial of the divorce action. We would suggest that such marriage clinics be set up as an adjunct of the courts in much the same manner as the Office of the Official Guardian or of the Public Trustee functions in certain provinces.

20. Fourthly, we would recommend that all questions relating to family life such as marriage, judicial separation and divorce be handled by a special section of either the County or Supreme Court in each province, in order that the judge might be able to give proper consideration to each case brought before him and not be subjected to pressure to dispose of matrimonial causes as a matter of routine, sandwiching such cases in between damage actions and negligence cases, as happens in many localities at the present time. We feel that the continuance of family life has sufficiently far-reaching social implications to merit more than a cursory examination and routine inspection. It should be the duty of the judge to do his utmost to effect a reconciliation between the parties if at all possible and to grant a divorce only if all hope of reconciliation has gone.

21. Fifthly, we would strongly suggest that no divorce be granted unless and until adequate and continuing provisions are made for the welfare of the children of such broken marriage and that it be impressed on both spouses that each has the continuing responsibility of contributing in one way or another towards the welfare of such children.

22. Finally, we would earnestly submit that if this joint committee should consider widening the grounds of divorce to include what is commonly known as "cruelty" that every effort be made to so define cruelty that the abuses which have crept into the granting of divorce decrees under this heading in other jurisdictions cannot occur. In the event that it is found that the term "cruelty" cannot be precisely defined we would suggest that it not be included as an enlarged ground for divorce.

REFERENCES

1. Historical Statistics of Canada, Cambridge, Universal Press Toronto: The MacMillan Co. of Canada Limited 1965, page 17 Table A60-74 and the Canada Year Book 1965 Page 176 Table 13 and Page 263 Table 30.
2. The Documents of Vatican II, Herder and Herder, New York, 1966 Page 678-679.
3. See Hounsell vs. Hounsell (1949) 23 Maritime Provinces Reports 59 (Newfoundland).
   See also Power on Divorce, pages 162-164 and Reid vs. Aull (1914) 32 Ontario Law Reports Page 68.

Co-Chairman Senator ROEBUCK: Before we call on the speakers to answer questions I would like to introduce to you, ladies and gentlemen, Mr. Francis Gerard Carter. I suggest that such questions as you intend to ask be directed to him, although I am sure the speaker who has just sat down is capable of answering any question you might wish to put to her.

Mr. Carter was born in St. John's, Newfoundland, on October 14, 1922, and studied at Osgoode Hall Law School. He was called to the Bar of Ontario in 1950 and has practised law in London, Ontario, since that date. He was created Knight Commander of the Order of St. Silvester by Pope John XXIII in 1962 for services to Church and community.

He is the author of a book entitled *Judicial Decisions on Denominational Schools*. He is a Past-President of Ontario Separate School Trustees Association and a former Chairman of the London Separate School Board. He is Director of the Canadian Catholic Educational Association, 2nd Vice-President of the Association of Catholic High Schools of Ontario, and Chairman of the Diocese of London High School Boards.

Mr. Carter is solicitor for Roman Catholic Episcopal Corporation for the Diocese of London. He has been active in education law and has appeared as counsel before the Supreme Court of Canada and the Ontario Court of Appeal, and appeared before the Hall Commission on matters relating to education. He is a trustee of Middlesex Law Association.

In view of what I have read, I think I am justified in saying that I am introducing now a very well-informed gentleman, a barrister, and a valued citizen of this province. I give you Mr. Carter.

Mr. Francis Gerard Carter (For the Catholic Women's League of Canada): Thank you for that kind introduction, Senator Roebuck. I will take a few moments to enlarge on this brief, but before doing so I would like to say how glad I am to see Senator Baird of Newfoundland—my birthplace—as a member of this committee. Senator Baird was well acquainted with my father, who was City Solicitor for St. John's, Newfoundland.

Ladies and gentlemen, this brief is an attempt to do two things, the first being to put forward the position of the Catholic religion, as understood by the Catholic Women's League of Canada, on divorce. That position is that, even if the divorce laws of Canada are changed, that fact will not alter their opinion as to the indissolubility of a valid marriage.

Having said that, they go on to say that they do not wish to force their religious convictions on the entire Canadian community, because that would be an attempt to take advantage of civil law to further the opinion or conviction of a certain segment of the community. All they ask is that, in considering the question of enlarged grounds for divorce, the common good of the entire Canadian community be uppermost.

Now I want to touch on some of the recommendations, as to why they have been made. The first recommendation is actually double-barreled. It contains the request that there be some uniform code across the country and not the hodge-podge we have at the moment.

In Nova Scotia adultery is still a crime; it is not in Ontario, although it is not considered normal conduct.

As to the request for a judicial separation—I am using "judicial separation" as distinct from separation agreement—I am a lawyer, and those among you who are lawyers well know what frustrations and waste of time are involved in the preparation of separation agreements. You know what it entails. We go through long interviews with the parties concerned and at the last moment, after you have or think you have everything down, either husband or wife says, "I will not sign it," and there is a certain amount of work gone out of the window, completely.

Let us say you are acting for the wife. You then go to the Family Court and try to get an order for maintenance, and then go to the County Court to get an order for custody, or you go to the Supreme Court for an order for partition of property, or go and get an order for alimony, if the grounds are there. There are five or six different remedies, all of which have to be taken separately.

What is envisaged here is that there are large portions of this population who do not believe in divorce *a vinculo matrimonii.*

Senator ASELTINE: They apply for divorce just the same. I was Chairman of the Standing Committee on Divorce in the Senate for ten years or more. I heard four thousand cases, and in one-third of them the people involved were of the Roman Catholic faith. How do you reconcile that with your brief and with what you are saying now?

Mr. CARTER: The reason these people apply for divorce is merely to get the civil protection which a civil divorce gives. That is one reason. The other reason would be that these parties might well have got a decree of annulment in their Church, but that decree of annulment has no civil effect in Canada and therefore it is necessary to buttress a decree of annulment with civil divorce in order that they may legally remarry. I do not know whether I have made it clear.

Senator ASELTINE: It doesn't register with me.

Mr. CARTER: This is where we agree to differ, Senator Aseltine. But there are many people who are taken into the courts as defendants, or many people who are plaintiffs, apart from many who appear before you, who do not wish to go to court. Now if there were a provision whereby, for lesser offences than adultery, a judicial decree of separation could be obtained, it would do away with all this waste of time and would mean that in one application to the court the entire matter of custody, division of property, and so on, could be handled at one time.

May I now discuss the second recommendation.

Mr. PETERS: May I ask Mr. Carter a question, Mr. Chairman?

Co-Chairman Senator ROEBUCK: At this point it is for Mr. Carter to say.

Mr. CARTER: I have no objection.

Mr. PETERS: According to my understanding of your presentation, you are bringing together the various Acts now used in the civil law to provide relief from matrimonial difficulties so that it may not be divorce. Why do you use this as a religious argument whereas other countries, where the population is predominantly, in fact totally, Catholic do not make this kind of legal request but go much further and establish the legal ground for divorce. Why is a difference made in this case for legal separation whereas in Italy and some other countries they have much the same type of divorce as we have?

Mr. CARTER: The reason is that, in many Latin countries, although the people may nominally be classified as Catholic many of them, in actual fact, have not been inside a church for years. They are not adherents of any religion and therefore there has to be provided for these people some recourse to a court which would give them relief.

By the same token, however, as has been pointed out in the brief, the remedy of judicial separation does exist in Nova Scotia as well as in other parts of Canada, but it does not exist in Ontario. If we are to have a uniform code it should go one way or the other; and if you give it to those who have not got it, make it sufficiently embracing so that the court could dispose of all matters in the one action.

Mr. PETERS: Is it your opinion that the Marriage and Divorce Act of 1930 would be capable of creating this type of separation facility in the provinces by federal enactment?

Mr. CARTER: We are right back to the question as to when the English Act was introduced into the various provinces, and of course that is what gives certain provinces jurisdiction while others have not. I certainly feel it is within the jurisdiction of the Parliament of Canada, insofar as the British North America Act gives exclusive jurisdiction over marriage and divorce, to give this jurisdiction, certainly to a federal court.

It is suggested that marriage be made more difficult. I would like to state a paradox here. In many provinces it is much more difficult to obtain a driver's licence than it is to obtain a marriage licence.

Before you obtain a driver's licence you have to take a written test to determine that you know the rules of the road. I am not going to go so far as to suggest that a practical test be given, because this would suggest trial marriages, and that is out of my jurisdiction.

Mr. MCCLEAVE: There is a program that will televise it if you do.

Mr. CARTER: Pursuing the analogy, if you do not keep the rules of the road in the use of your motor vehicles you start losing points, and when you have accumulated a sufficient number of points you lose your licence. Now, when you lose your licence the authorities do not allow you to go and buy another car and start all over again; but in marriage, although you lose your licence for a breach of the rules of the road, as it were, there is nevertheless provision whereby you can go and get another car.

Co-Chairman Senator ROEBUCK: If you can afford it.

Mr. CARTER: Yes, if you can afford it; and some people have a different car every two or three years. So that divorce can be used, in a manner of speaking, by some people as nothing more than legalized polygamy seriatim.

Senator ASELTINE: A new model, so to speak.

Mr. CARTER: I did not hear that.

Co-Chairman Senator ROEBUCK: Senator Aseltine said, a new model.

Senator ASELTINE: So to speak.

Mr. CARTER: I understand that California law does require pre-marital counselling. I am sure the lawyers amongst you are well aware that in many cases in court, divorce hearings are treated as something for the judge to do when he has maybe half an hour or an hour to spare in between other cases, or when the jury is out on a civil case trying to reach a verdict. He has a few moments and they put two or three on the list.

There is one point I would emphasize and this is something I feel very strongly. I have read some of the previous reports of your committee and I have seen statements made by people presenting cases to you to the effect that everyone knows that these cases are rigged; that there is perjury; that there is collusion, and what have you.

I have been trying to determine who the "everyone" is, because to my mind as a practising solicitor—and I do know our ranks are not perfect by any means—this is a slap in the face to the judges and to the practising Bar of every province in this country; because most of the solicitors I know, if parties came to them suggesting in any way, shape or form that they had rigged a divorce case, would have such people sent out of the office with the statement "I am sorry, I cannot take this case". I just wish to get that on the record.

Co-Chairman Senator ROEBUCK: And as Benchers of the Law Society, if facts of that kind came to our attention we would throw them out of the profession without hesitation.

Senator FERGUSSON: In regard to the hearing of these cases, so far as my province is concerned, such cases are not heard by some judge who sandwiches them in between civil matters. There is a special Divorce Court with a special judge assigned to the hearing of divorce cases. I have sat in and listened to them

and it is my opinion that these cases get more attention than they would under any other system.

Mr. CARTER: I say, if it is going to be done, for heaven's sake let it be done properly. If you widen the grounds of divorce you might as well throw the whole thing out the window unless it is done properly. It is just making it ridiculous for this committee to be sitting week after week talking about widening the grounds if, should they be widened, the administration will be no better than it is suggested it is at the present time.

Co-Chairman Senator ROEBUCK: That does not apply to the Parliamentary Divorce Committee?

Mr. CARTER: No.

Mr. PETERS: The witness mentioned the operation of the divorce courts and it would not be fair for him to say that he is unaware of the fact that certain lawyers specialize in this particular field; and the majority of lawyers, who are well aware of what the situation is, will not handle divorces. I am quite sure the witness does not handle many divorce cases in Ontario, but other members of his profession do and this suggestion which has been made is based on the fact of conviction for perjury in a number of cases. This is the reason Bar Associations have been so vocal in the last ten years to have this type of reform made, as they were doing things they did not question too deeply, because they are not unaware that if they did they would not be able to handle them and would not provide the relief which they believe is justified.

Mr. CARTER: I do not think that follows, because it would be saying that lawyers who specialize in marriage problems are connivers and what have you, and I know many highly respected lawyers who specialize in this type of work who would certainly have no part in a collusive case. I am not saying there are not some; what I am saying is that if that "some" did come to the attention of the Law Society they would not be around very long.

I am not so naive as to think that these things do not go on; but if someone came to my office and said that he wanted to get a divorce from his wife and would provide certain false evidence, that he would do so and so, I would tell him where he could go. But if in the course of doing so I told him what was wrong with what he was suggesting, and, armed with this knowledge which he had gained in my office, he went to another lawyer's office and concealed from him the fact that the case was rigged, and the second lawyer acted in good faith, the responsibility is with that client.

The question of cruelty is, I think, a very important one because unless this can be defined more precisely than it is at present you will have cases where divorces are granted because the husband's breakfast toast was not toasted on both sides. There will be grounds of incompatibility because he reads the newspaper at breakfast.

Mr. MCCLEAVE: That is a rather flamboyant statement. Have you read the English cases of cruelty? You are really referring to incompatibility cases from American jurisdiction. Read the English cases on cruelty.

Mr. CARTER: I had a discussion with Professor Julien Payne, who is located in London, and they have attempted to define cruelty in the English cases. There is no question at all on that matter specifically when they go into mental cruelty. But even though they have done their utmost to come up with a fair definition, the judicial mind is such that there is going to be a wide pendulum. Some judges will give an extremely narrow definition, even having regard to the English cases; others will take a much wider view.

I am not suggesting there is an answer; perhaps there is a logical answer: you will find this in every sphere of law. All we ask is that every attempt be

made to tie down the precise definition of cruelty so that we shall not have abuses such as we have heard of, particularly from south of the border.

Mr. McCLEAVE: You are mixing incompatability cases with cruelty.

Mr. CARTER: I am well aware of the distinction between incompatibility and cruelty.

Mr. McCLEAVE: Your English professor friend did not tell you there were cases in England where they threw red pepper at the breakfast table?

Mr. CARTER: Oh, no.

Mr. McCLEAVE: Good.

Co-Chairman Senator ROEBUCK: One judge in England said that while cruelty was difficult to define, it was not difficult to recognize it when you saw it.

Mr. CARTER: The closest you can come to a definition is: Anything which is liable to put the offended party in jeopardy with reference to physical or mental health. Beyond that, I do not know how far you can go. Every individual is different, and the nature of the act that will have the effect contemplated in this definition will not necessarily be the same in one case as in another.

Mr. Chairman, I must thank you for the opportunity of speaking for the delegation.

Co-Chairman Senator ROEBUCK: Are there any other questions? I would like to hear from my Co-Chairman.

Co-Chairman Mr. CAMERON: I want to ask one question before I say anything else, and that is in reference to the brief here, where it is advocated that the law which exists in certain provinces be extended to all the provinces in regard to judicial separation. I can see that that would tie in with the brief because you may deal with the preservation of the sanctity and permanence of marriage, and yet give a woman the remedies of living a separate life and having financial protection for herself and family. If you go a step further and say there be a uniform law throughout the country in the matter of divorce, it must be administered by all the provinces.

Mr. CARTER: I think that is implicit, Mr. Chairman, in the first recommendation, which appears in paragraph 17.

Co-Chairman Senator ROEBUCK: There are certain provinces which do not want divorce. They might be willing to grant separation. What is your answer to that particular problem?

Mr. CARTER: I come from one of those provinces. Here again I think it is a question of the common good. This is a question of federal and not provincial jurisdiction, and if certain provinces could object, while their objections must be given due weight, in the final analysis it is the common good that must be the paramount consideration in reaching the decision.

Co-Chairman Mr. CAMERON: Thank you Mr. Carter for your presentation.

Co-Chairman Senator ROEBUCK: Before you leave, Mr. Carter, there is something which I think ought to be on the record. Can you tell us something more about the Cotholic Women's League? You come from the Province of Ontario, and so I believe does the lady who spoke first. Perhaps you could give us some idea of the League and its purposes.

Mr. CARTER: I think Mrs. Donihee is much better informed than I am in that respect. I do not hold membership in the League.

Co-Chairman Senator ROEBUCK: Will you tell us about the League, Mrs. Donihee?

Mrs. DONIHEE: The Catholic Women's League has 163,000 members and we are organized on four levels: parish, diocesan, provincial and national. We are

also international, being an affiliated part of the World Union of Catholic Women's Organizations.

Co-Chairman Senator ROEBUCK: Have you members in all provinces?

Mrs. DONIHEE: We have members in all provinces except Newfoundland, which is not yet organized. The other provinces are organized.

Co-Chairman Senator ROEBUCK: I presume your greatest representation would be in the large provinces such as Ontario and Quebec?

Mr. DONIHEE: Yes. In the Province of Ontario we have 75,000 members, and about 163,000 across Canada, so that the greater part of the membership is in Ontario.

Co-Chairman Senator ROEBUCK: But you are represented in the province of Quebec?

Mrs. DONIHEE: Oh, yes. We are represented in the Province of Quebec and in the prairies, in fact in all the provinces.

Co-Chairman Senator ROEBUCK: Every one of them?

Mr. DONIHEE: Yes, every one except Newfoundland.

Mr. PETERS: Could I ask Mr. Carter a question with reference to paragraph 18, mainly because of his background in the educational field. We have heard much about marriage breakdown and I think most members of the committee are impressed with the upset this makes in the community, and the fact that marriage itself is performed by the Church in a pseudo-civil service capacity. I gather that part of the problem of education in connection with marriage is that it is not extensive enough. The witness drew a parallel between the granting of licences to the drivers of motor vehicles and the granting of marriage licences. In the first case, he said, people were given driving lessons and had to pass certain tests; in the second case the granting of licences had no such conditions attached.

Is it his suggestion that some system of education with reference to marriage be introduced into the high schools so that students may learn about marriage, not in a religius context but in a civil contractural context? In other words, there are obligations that fit into the role that the clergy are now performing in the civil field, and the fact that many of the people who are being married by the Church and by the civil authorities are not in a position to receive instruction, or do not apply for instruction, suggests a reason for incorporating into the educational system some form of instruction for marriage. Is that what the witness is proposing?

Mr. CARTER: Either that it be part of the educational system or that such service be performed by specially qualified social workers. I would think that in the ordinary Church marriage, regardless of denomination, where the parties go to minister or priest or rabbi, a certain minimum of instruction is given prior to marriage, particularly where banns are published and there is an interval between the publishing of the banns and the performance of the marriage.

In a civil marriage performed by a magistrate, for example, I do not think the average magistrate would take it on himself to advise anyone. The suggestion is, therefore, that there be set up a social department through which, when people go for a marriage licence, they can be referred to some welfare agency in the community where they are given two or three lectures on the responsibility of marriage. After they have taken this they come back and get the licence.

Mr. PETERS: Do you suggest that this be extended into the school system? I have not heard of this before and I think it is an excellent suggestion. I was thinking of the parallel between driving instruction and instruction for marriage, separating the theological from the civil aspects of the marriage contract.

Mr. CARTER: We are talking about the formalities of marriage and the substance. Certainly, whether it is going to be done through the schools or

through welfare or social agencies, there has to be consultation with the provinces, because once you get into the question of education you are in the provincial realm of authority.

Speaking for myself personally, and so far as the members of the League are concerned, I believe it would make absolutely no difference to them where pre-marital instruction was given, so long as the opportunity for such instruction was afforded and proof given to the person issuing the marriage licence that the instruction had been received.

Senator FERGUSSON: Mr. Carter referred to California. I do not know how far he has gone into that. How is it done in California? Does the government provide the counselling service to people who apply for licences?

Mr. CARTER: I have not gone into that matter personally. What little knowledge I have I was told by a social worker who had come from California. I was informed that in California such pre-marital instruction is given as a prelude to the marriage.

Senator ASELTINE: In every case?

Mr. CARTER: That I do not know, sir. He indicated it was a matter of form similar to the blood test that is made in some places.

Mr. AIKEN: I am interested in the fourth recommendation, which appears on page 5 of the brief, concerning the courts that might handle divorce. At one time there was the Probate, Divorce and Admiralty Division of the High Court, which in fact did have the special duty which it is now being suggested should be assigned to a similar type of court to be established. I do not know the history of it but I assume that for convenience only the courts were consolidated into the Supreme Court of each province. Are you suggesting that there be a divorce branch of the Supreme Court of each province?

Mr. CARTER: I am suggesting something in the nature of the present Surrogate Court. The blending of probate, divorce and admiralty was abandoned by reason of malfunctioning. But if a court similar to the Surrogate Court were set up, which would be exclusively matrimonial, this might give better service to the entire community, in my opinion.

Mr. AIKEN: May I refer to another matter that is not in the brief. Have you any idea of the role that the family courts might play? I am not suggesting that they could grant divorce, but is there any role that family courts could play? They are people who are acting day by day in an effort to solve family problems and are not restricted, as we are told the Supreme Court must necessarily restrict itself, to an hour or so in the intervals between other cases.

At least the Family Court, when a case comes before it, spends a considerable amount of time hearing witnesses. Can you think of any function it could perform similar to that discharged by a Master of the Supreme Court when he hears references, which would enable the Family Court to inquire into all phases of the marital problem before the granting of a divorce?

Mr. CARTER: If I understand you correctly, Mr. Aiken, I think the Family Court could do a very good job, but the Family Court has not got the power. It can deal with a very limited situation, and, even limited as that situation is, when it comes to enforcing its judgment you discover how circumscribed are the powers of the Family Court.

Mr. AIKEN: What I am suggesting is this. The Family Court could be used in the case where, when a divorce action was brought into the Supreme Court, that court could refer to the Family Court certain matters requiring investigation and inquiry, and the Family Court could report back something in the nature of the report made in guardianship.

Mr. CARTER: I think there is merit in the suggestion but I have not studied the matter sufficiently to go into it. All I am suggesting is that there be some

form a court, the *modus operandi* of which must be a matter of trial and error before you come up with something that works.

Mr. AIKEN: Do you feel that a court that does only divorce work would be preferable to the system of putting divorce in the regular docket?

Mr. CARTER: It would be far preferable; and I think it would be far preferable also if it were not called a court. Then we would get away from the stigma that it was something wrong that was being taken into a court. I think it would be better if such an institution were called a commission, or by any other name that avoided the stigma of wrongdoing attached to it.

Co-Chairman Senator ROEBUCK: Thank you, Mr. Carter. Could we have a word from Mrs. Donihee?

Mrs. DONIHEE: Referring to marriage counselling services, I may say that a great deal of this has been done not only under our own Church auspices and with the support of our own organization, but such work is being carried on by the co-operation of church groups, where a course of six weeks is provided, with one lecture a week on preparation for marriage, and all those contemplating marriage endeavour to take the course. Many of the young people in our own city have expressed appreciation of the course and indicated how much they have learned from it. They realize the responsibility that marriage imposes upon anyone.

Heretofore people who had never had an opportunity to attend such lectures would not have realized, at any rate to the same extent, as those who have followed these lectures have done, the responsibilities of married life.

This is one field in which those of us who are associated with community projects can help to establish courses for marriage preparation, and try to get as many denominations as possible in the community interested in inducing young people to attend their courses.

We as Catholic women feel that the greatest hope lies in instilling into young people a full sense of responsibility when they get married. In that way marriage will be much more lasting.

Co-Chairman Senator ROEBUCK: Miss Toal is Past National President of the Catholic Women's League of Canada. Do you wish to say anything, Miss Toal?

Miss TOAL: I don't think there is anything I can add to what has been said, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Mrs. Taylor?

Mrs. TAYLOR: I think it has all been covered. I don't think I could add anything. Thank you, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Mrs. Connolley? Have you anything to say?

Mrs. CONNOLLEY: No, Mr. Chairman; thank you.

Co-Chairman Mr. CAMERON: May I, on behalf of the committee, thank Mrs. Donihee, Miss Toal, Mrs. Connolley and Mrs. Taylor for having appeared before the committee. Mrs. Donihee has presented an excellent brief on behalf of the Catholic Women's League. It was a concise, succinct statement of their views on the subject matter that we are considering.

Mr. Carter explained the brief and was ready with answers to the questions which were addressed to him and I can assure the delegation that the information they have given us will be of valuable assistance. On behalf of the committee I would like to express our sincere appreciation.

Co-Chairman Senator ROEBUCK: We have a second delegation, which is making a submission on behalf of the Canadian Mental Health Association. Would you gentlemen please come forward.

May I introduce the first speaker, Mr. Gowan T. Guest. Mr. Guest is National President of the Canadian Mental Health Association, educated at the University of Toronto (B.A.) and at Osgoode Hall, and at the University of

British Columbia where he received the degree of LL.B. He is a partner in the law firm of Robson, Alexander and Guest of Vancouver. Mr. Guest has been called to the Bars of British Columbia, the Yukon Territory and Ontario.

Mr. Guest was first elected a director of the British Columbia Division of the Canadian Mental Health Association in 1957, and elected to the National Board of Directors of the Association in 1960. In 1962 he became the Chairman of the Constitution Committee of the Canadian Mental Health Association. In 1965 he became Vice-President, and in 1966 became the National President of the Association. Mr. Guest was Executive Assistant to the Prime Minister of Canada from 1958 to 1960.

And so once again we have a very well informed witness before us. I give you Mr. Guest.

Mr. Gowan T. Guest, National President of the Canadian Mental Health Association: Messrs. Chairmen and honourable senators and members of the House of Commons, I think I would find it easier to do, as concisely as I would like to do, the task before me if I chose not to read the brief which has been submitted but simply to comment on it.

SENATOR: We have already read it.

Mr. GUEST: I wish to tell you what the brief is getting at and to direct your attention to its application.

The Association is very large by the standards of voluntary health associations. Our auditors certify to some 33,000 paid-up members, but over 300,000 people are involved, because in most areas we work through the Community Chest, and our auditors do not get in touch with the members of any organization of that kind, which is a lay group and not a medical or a professional group, so that it is impossible to reach any sort of consensus.

We direct your attention to this fact in the appendix to the brief, and I would reiterate that while the view of majority of the members of our Association, as we have considered the matter, is reflected in the opinions of their representatives, our Executive Committee are clearly in favour of amending the divorce law so that legal action may proceed on a more rational basis than is possible under existing legislation.

There is still a significant minority group which is firmly dedicated to the principle that a marriage once solemnized is unbreakable, and the Association recognizes and respects the views of this minority. Accordingly, rather than come before you to attempt to suggest to you what should be the grounds for divorce in Canada, or even amendments to statutes as they exist, we wanted to present to you the point of view which arises from the scientific and professional experience of our advisers and as interpreted by the lay feelings and involvement of our members.

We do not presume to recommend provisions of a new law relating to divorce. At this point I must tell you frankly as president that when the brief that has been submitted to you first found its way to my hands in its final form I considered it a masterpiece of words chasing each other across the paper, discussing the issue in a way that would make it impossible to be quoted for or against any specific question.

Having that in mind, I then asked myself: Why did it come out in this manner? The answer is that the subject matter to which we wish to direct your attention is not black or white; and the difficulty is that in the field of mental illness there has been so much progress in such a little time that answers are not today as clear as people once thought they were.

I refer specifically to page 5, which in many ways is the heart of our submission, and with your permission I will paraphrase it.

It is commonly believed that patients, once they enter a hospital, rarely if ever improve enough to leave it. This is no longer true.

Senator FERGUSSON: May I ask the witness where he is reading from?

Mr. GUEST: I am paraphrasing page 5 of the substance of the brief. I was not reading directly but looking at the third line on page 5, which is the paragraph numbered 8: "It is still commonly believed that such patients rarely, if ever, improve enough to leave the hospital." I am trying to fill in what is stated in the four previous pages. It is no longer true, if it ever was, that this is the situation. Most patients make recovery and leave mental hospitals.

Many patients make remarkable recovery as a result of new therapeutic programs even after several years of hospital treatment, and even if they have not recovered completely, modern treatment programs in many parts of Canada provide for their care and rehabilitation in the community, in a foster home, or a boarding home, if not in their own homes.

It is becoming increasingly difficult therefore, even for a highly qualified specialist in psychiatry, to certify that a person suffering from mental illness is incurable, and that he will never be able to live at home in the community again.

In this connection, the term "chronic unsoundness of mind," which appears in most of the highly responsible and well thought out submissions we have seen, troubles us. It no longer has much medical meaning, and my friend Dr. Griffin, who has specialized in this field, can pursue that when he answers your questions.

It follows that changing the law to allow a divorce on such a ground might encounter great difficulties including the embarrassment of a person designated as having chronic unsoundness of mind who recovers completely. It is just as logical to name any disabling disease as a ground for divorce. There is no longer, in view of modern knowledge, any reason to consider mental illness as a peculiar disease distinct from other sources of illness.

That is the essence of the submission that is being made to you and which I recognize may stagger you, coming from an organization of our kind—that we have doubts about the suggestion that chronic unsoundness of mind is a valid ground for divorce. By way of illustrating that, your questions may elicit useful information.

I as a member of the Canadian Bar Association and its council was interested in the submission they made to you, and I take their submission to you partly as an example. I am speaking of the submission which came to you on November 1 in which reference was made to incurable unsoundness of mind.

Senator ASELTINE: As a ground.

Mr. GUEST: Yes. If you were to follow our reasoning, your first step would be to substitute "illness" for "unsoundness of mind," and you would be asked then to consider: Is an incurable illness, where the afflicted spouse has been continuously under care and treatment for a period of five years, a fair and proper ground on which to grant divorce? Bear in mind that, as an integral part of almost every, if not every, marriage contract or ceremony performed in Canada, the vow includes such words as for better or for worse, in sickness or in health.

If you do not subscribe to our proposition that mental illness should not be singled out as something unique, then suppose you were talking about a man with a chronic heart condition, or a man with Parkinson's affliction, or suppose you were talking about any numbers of incurable illnesses, the question is: Is incurable illness really a ground for divorce? Is it not rather that it is the consequence of this illness which is the breakdown of the marriage in terms that have been put to you, or the fact that the marriage is no longer a living institution?

Taking again, the immediately preceding ground in their submission to you: the separation of the husband and wife for a period of three years immediately preceding the commencement of proceedings, provided the court is satisfied that there is no likelihood of the resumption of cohabitation and the issue of the decree will not prove unduly harsh or oppressive to the defendant spouse. If that were adopted as a ground for divorce, then the so-called classic case "of which everyone knows," is covered—that is, the case of the poor woman whose husband has been in a mental hospital for years, and will stay there forever. We wonder how many cases of that kind there are—certainly some—but that classic case is covered; for that marriage is dissolved, not because the husband is mentally ill but because there has been separation for an extended period of time, where there is no likelihood of the resumption of cohabitation and the issue of the decree will not prove unduly harsh or oppressive to the defendant spouse.

That is what our brief tries to bring to your attention and we want it on the record of the committee for your consideration. Our basic submission is that there is no reason why mental illness should be singled out as an illness different from any other illness, and frankly we think that people who over the years have presented arguments concerning divorce, on the basis of unsoundness of mind, did not really ponder that argument in the light of modern psychiatric knowledge.

Having said that, I think our purpose would be best served by saying that we are prepared to answer any questions you would like to put to us. Doctor Griffin is our trained specialist. You have his curriculum, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Yes, and I will read it. I believe Mr. Peters has a question already formulated.

Mr. PETERS: In the bill that I contemplated some time ago mental illness is treated under the clause dealing with desertion. There are two forms of desertion, voluntary and involuntary. A person who has been in an institution for a period of time has involuntarily deserted the marriage partnership. Would you agree to that proposition? Would you accept the suggestion that he had involuntarily deserted, whether the desertion was permanent or temporary. If the person met the requirements of desertion in the terms of involuntary desertion, would this be in keeping with the suggestion you are now making?

Mr. GUEST: I would sooner not see that, sir, because of my inability to reconcile it, on ethical grounds, with the promise contained in the words "in sickness or in health". When there exists the unhappy social situation you are putting forward there, where there has been what you refer to as involuntary desertion—and it is not a matter of a period of time—I would rather see the dissolution permitted on the proviso that the court is satisfied there is no reasonable likelihood of a resumption of the state of matrimony and that the defendant spouse would not be unduly oppressed.

I think that qualification should be maintained because of the pressures and difficulties of the breakdown and collapse of the marriage. One spouse might say: Well, he is sick, and a sick person is unable to fend for himself—and so the responsibilities which exist between spouses are overlooked. I would be somewhat afraid, the way you worded it.

Mr. PETERS: Do you not say, using your criteria, you would need to have a medical statement. I am thinking of Ontario, where, under the clause in respect of disabling illnesses, you have total and permanent desertion. I agree with you that it is almost impossible, when you put a person in a mental institution, to have a doctor give you a "guestimation" as to whether the mental state of that person on admission is permanent. Are you not getting into a situation where the medical profession will be actually unable, not only unwilling but unable, to advise the court in such a manner as to convey any meaning at all?

Mr. GUEST: I do not think so. I can imagine the medical profession would be unhappy about it, and I can well imagine also it would not like to make a decision; but I think it is possible for evidence to be presented by which an experienced judge would be able to say whether or not there was reasonable likelihood that the marriage would ever be resumed, and that would be a finding of the court around which jurisprudence would grow up.

I can see a divorce being granted even if it were likely that the patient would come out of the hospital. There are to my knowledge cases where—whether I could get all my psychiatrist friends to agree or not—I could get a consensus of a jury, and of many judges, I think, to the effect that, as a result of their experience, while the patient might not remain in hospital for the rest of his life, that person was nonetheless a different personality.

I know of cases where the wife has said frankly: This is not the same man I married and never will be. And there you have a situation where cohabitation will never be resumed. So the doctor does not have to tell you that such a person, by reason of his mental illness, is likely to stay in hospital forever; all he has to say is that he will be there a very long time. In other words, he has undergone permanent personality changes of a very drastic nature.

If and when he comes out he will be a different man, and the wife says: I know that kind of "different man because I lived with him two years before he went into the hospital and I will not live with him again. It would be evidence that you had a permanent collapse to deal with.

Mr. PETERS: You now have people in mental institutions for a period, and I am sure all lawyers are aware of at least one case where the husband has been in an institution for twenty years and the wife has established a common-law marriage. One of the duties this committee is charged with is to recommend a means of eliminating this informal marital state known as common-law marriage. This is a type of situation that happens many times, where perhaps the wife suffered brain damage during childbirth and the father has lived with another woman for many years and raised children. If the wife came back, where would she fit in? This particular case has existed close to twenty years.

Mr. GUEST: My answer to that, sir, is that you have stated a set of facts in which there has been separation of the parties for three years or more and it is obvious there will be no resumption of cohabitation. The evidence is the fact that the husband has taken a new wife, in fact if not in law, so that he will not resume cohabitation with the first wife, and it can also be said that it is not unduly harsh or oppressive to the defendant spouse, that is the woman in the hospital, because she is not aware of the reality of the world. The solution of that situation is that the problem is not really just that the first wife is mentally ill.

Mr. PETERS: I wonder if we could hear from Dr. Griffin?

Co-Chairman Senator ROEBUCK: I will call on Dr. Griffin, but for the record I would like to state who he is. Dr. Griffin—M.D., M.A., D.P.M.—is a psychiatrist and is General Director of the Canadian Mental Health Association He graduated in medicine from the University of Toronto in 1932 and took post-graduate work in the United States and England. Dr. Griffin joined the Canadian Mental Health Association in 1936 as assistant to the founder, Dr. C. M. Hincks. He became General Director of the Association in 1952.

Dr. Griffin is a former lecturer at the University of Toronto in mental health aspects of education and social work. During the war he was Consultant Psychiatrist to the Canadian Army at Ottawa.

Ladies and gentlemen, Dr. Griffin.

Doctor John D. Griffin, M.D., M.A., D.P.M., General Director of the Canadian Mental Health Association: Messrs Chairmen, honourable senators and members

of the House of Commons: I think my best contribution here can also be made in answering questions

Those of you who have read the brief will see that in addition to the central problem to which we call attention, namely, the difficulties in arriving at a diagnosis of chronic unsoundness of mind, there are the difficulties that ensue when divorce is based on that idea alone. In addition to that, we have mentioned several things that have to do with mental health aspects of marriage, separation and divorce, and one of the things we have been aware of is the importance of the problem of children in a family where the marriage is in jeopardy.

Most of us concede that the family, intact, is essential and is certainly the best possible social environment for the production of healthy, normal children. This is obvious. What happens when this family is threatened with breakdown? What about the children?

We are aware of many parents who have been counselled to stay together through thick and thin, at least until the children have grown up, and they do just that: they live together in a state of hostility and frustration which creates a most unfortunate climate for the children to grow up in.

We are drawing attention to the fact that it is an open question: Which does more harm in such a situation, to keep such parents together willynilly when they both want to break away from each other, or to allow a separation or divorce to take place?

I have known many familes where the children were vastly relieved and the mental health of the whole family vastly improved when divorce, or separation at least, has taken place, which is contrary to what some people believe.

We have made some comments with reference to the business of professional marriage counselling and the problems of marriage breakdown. This was referred to extensively in the previous brief from the Catholic Women's League, and it is not my intention at this stage to discuss it further except to make one point if I may.

I think all of us, especially those of us who are professionally trained in one of the mental health professions, are agreed that it would be ideal if marriage partners who are applying for divorce could be persuaded, or even required by law to do so, to go through the process of conciliation with the help of marriage guidance counselling, so that only when this failed would the divorce proceed.

Our point is this: that nowhere in Canada is there a satisfactory marriage guidance counsel service so well organized that courts dealing with this kind of human relationship would be adequately serviced and staffed. There are simply not enough professional people in Canada to do the job—psychiatrists, psychologists and clergymen with a special inclination in this field.

It is therefore only wishful thinking when you suggest that professional counselling be made available automatically before divorce is granted.

May I refer in passing to the New York divorce law. This, like the California law, makes provision for such conciliation procedure before divorce is allowed, and although the New York law is only a year old they have run into the sort of professional difficulty I am talking about, with the result that almost anybody who happened to be lurking around has been appointed to do this kind of work as marriage conciliator—often a political hack. Some of these people have been professionals in their time—a doctor or a lawyer—but they know nothing about marriage counselling, about the subtle psychological and emotional factors that lead to marriage breakdown. A professional marriage guidance worker must be able so to counsel the two persons concerned that they will view themselves and each other in proper perspective and come to appreciate what they have been doing over the years.

This is an important and exacting type of therapy, and no casual intervention will be helpful. So true is this that in New York State a great many of the religious and legal personnel concerned with the problem of divorce are now expressing discontent with the new law, even though, as I have said, it is only a year old.

One fact I would bring to your attention is that the situation we are in at the present time is such that there are only two centres in Canada, that are training professional marriage guidance personnel, and they both happen to be in Montreal. One is a French centre and the other English, and they are training a few people each year to do this special work.

We also make passing reference in the brief to preventive work in the field of marriage to prevent marriage breakdown, and this bears upon the point made by your last delegation, the Catholic Women's League, in which the importance of property and education was emphasized.

The Canadian Mental Health Association would emphasize the importance of education in the schools, particularly in high school. We are quite aware of, and I am greatly interested in the present trend throughout the country as manifested in Ontario where very recently a course in family life education has been introduced in high school, down to 7 and 8, which is junior high school. It is an attempt to introduce gradually, carefully, sensitively and intelligently a system of preparing children to understand themselves and their growth, the way they have grown and have come into the world, so that when they get to high school age and later leave high school and begin to think of marriage they will have a better understanding of themselves than our young people seem to have.

Co-Chairman Senator ROEBUCK: Did you see the C.B.C. show about three weeks ago in which they attempted to discuss this question?

Dr. GRIFFIN: I did not see that, Mr. Chairman, but I had a full report on it and it was a most unfortunate presentation for various reasons I could go into. The first objection that I personally had to it was that the children collected to view that picture represented a very wide age-range. Some of the children were far too young to be included in the group, while others were beyond the age of a class of that kind.

We know from what went on in the studio that the presentation and discussion were badly handled by interviewers of the C.B.C. type but not by professionally trained teachers, and that makes all the difference in the world. I deplore that kind of thing, almost an exploitation of the education program.

Co-Chairman Senator ROEBUCK: Tell me, is it necessary to be vulgar in explaining sex and marriage and that sort of thing?

Dr. GRIFFIN: Certainly it is not.

Co-Chairman Senator ROEBUCK: I saw the show in question and thought it extremely vulgar—unnecessarily so.

Dr. GRIFFIN: This may have set back family life education, including sex education, a great many months, perhaps years. I took part personally in an exercise in family life education in 1946 in Toronto right after the war. It was almost exactly the same as the recent program and we organized and trained teachers and prepared excellent films, and we were all set to go when suddenly one or two members of the board got uneasy and raised a public fuss and immediately everything was cancelled, so that it has taken twenty years to get back to the point where we were at that time. We are therefore anxious about this. We do not want anything like the C.B.C. program. That was completely negative and destructive.

Co-Chairman Senator ROEBUCK: You have told us about the lack of trained staff to do the job you have in mind. What positive suggestion could you make to us now?

Dr. GRIFFIN: The suggestion I have to make is that the government, either federal or provincial, make it possible to develop and train centres for marriage guidance counselling within the university centres. This work could well be within the department of psychiatry, or it could be a co-operative effort between the departments of psychiatry, social work and pyschology. In some universities they are coming together in what is called the health service centre. The University of British Columbia is a good example which we are all interested in.

Here they are breaking through the barriers between professional groups and working together to train people.

Co-Chairman Senator ROEBUCK: It is not necessary that trained personnel along this line be medical doctors?

Dr. GRIFFIN: No, that is true; but any such person should be someone who is professionally trained in terms of the business of helping people in this field. I have already attempted at an earlier committee meeting today to point out that sometimes an intelligent and sensitive layman is of great help to a distressed mentally disordered person. We see this demonstrated all the time in the volunteer work of our Association.

In one very important general hospital, in the out-patient clinic our psychiatrists are training a group of volunteers to carry on the therapy with people whom they diagnose, and the volunteers are doing a splendid job.

Co-Chairman Senator ROEBUCK: If we did establish such centres, have we the personnel who could act as teachers?

Dr. GRIFFIN: The personnel do exist; I can give an example. For some years we have been endeavouring in Toronto to train teachers to be more sensitive about mental health needs of children in their classes. We have a small group coming in from all over the country to take one academic year of being a teacher—not to make quasi-psychiatrists of them but better teachers. We have four or five such teachers each year. This class could be forty or fifty.

Co-Chairman Senator ROEBUCK: Where is that?

Dr. GRIFFIN: At the University of Toronto, Institute of Child Study.

Co-Chairman Senator ROEBUCK: Is that the only one in Canada?

Dr. GRIFFIN: The only one of its kind I know of. Graduate schools of education are beginning to see the importance of training teachers in the mental health field and I am glad to say that in the Ontario College of Education they have established a post-graduate department and in large part their interest is to train teachers this way. If we can establish it across the country our work will have been done, but it has taken a long time.

Co-Chairman Mr. CAMERON: These people will be paid by the province?

Dr. GRIFFIN: Yes.

Mr. AIKEN: Eventually, I suppose, we may have to consider the terminology to be used if we are to regard mental illness as a ground for divorce. You commented, and so did Mr. Guest, as others have done off and on, on the different phrases used such as unsoundness of mind, chronic mental illness, incurable insanity, which is a term often used, and so on. Can you help the committee to define the type of phraseology that would be most acceptable to psychitarists so that they could use that language in declaring that this person was or was not in the condition denoted by the particular term adopted?

Dr. GRIFFIN: Mental disability is what the psychiatrist prefers, which could be of any degree you wished to specify.

Mr. AIKEN: You would make the term mental disability the central theme, and from that the committee would have to decide where one would use the word chronic, and so on?

Dr. GRIFFIN: Something of that kind. Take the example that was mentioned by one member of the committee—the woman who suffered brain damage as a result of childbirth.

Mr. PETERS: My medical terminology may not be right.

Dr. GRIFFIN: This is what we were referring to when we pointed out that there are many types of illnesses that can create disability, and disability referring to personality change. Parkinson's, as Mr. Guest has indicated, is one—multiple sclerosis is another—where you can have a gradual deterioration. It does not seem to be mental illness, but is illness relating to the central nervous system, resulting in personality changes—and a person does change sometimes in an unhappy way. It is a terrible tragedy to see one spouse with this condition. If you say mental illness you will have divorce but not multiple sclerosis or Parkinson's. Even chronic arthritis is associated with personality changes and it is manifestly unfair to point out one mental illness without indicating that there are many other illnesses that can lead to complete breakdown.

Mr. PETERS: Would not the term "involuntary desertion" cover those cases?

Dr. GRIFFIN: I see the logic of your point but I do not like "desertion" because it raises a question of semantics.

Senator GERSHAW: Does not mental illness stand out as being a little different from ordinary cases of sickness, because of the violence, or the criminal act, which the mentally disturbed patient might commit? Should it not for that reason have special mention in relation to divorce, as distinguished from similar illnesses?

Dr. GRIFFIN: May I answer this way. It might be supposed that the public appreciation of what mental illness, unsoundness of mind or insanity is would be as clear as anything, but that is simply not true. The number of people who are curiously disturbed in that sense of the term is very small and they can be brought under control quickly; and the number of people mentally ill, who are also criminals, is, as far as we can determine, no greater in proportion than the number of people who are not mentally ill but become criminals.

This is simply not generally understood or accepted by the public. People somehow associate crime and mental illness. It is not true that a large number of mentally ill people are also terribly criminal or depraved or dangerous. The assertion is not supported by the facts.

Senator ASELTINE: I would like to ask Mr. Guest a question. I take it, Mr. Guest, it is the opinion of your association that "chronic unsoundness of mind" or "incurable insanity" should not be included as a ground for divorce in anything this committee may recommend, but that separation bringing about the final breakdown of marriage by reason of chronic unsoundness of mind or incurable insanity should be included as a ground of divorce.

Mr. GUEST: I could answer that question with a simple yes but I fear the trap—not that I suggest you laid the trap, but I fear the trap that I would be accused of saying that our association does not think that chronic unsoundness of mind resulting in the total breakdown and end of marriage is justification for divorce.

Senator ASELTINE: By the separation of the parties. Can I put it that way?

Mr. GUEST: We would be unhappy if this committee recommended, aside from desertion, cruelty and other traditional grounds as in other countries, dissolution on the basis of chronic unsoundness of mind. We would be disturbed by that, but we do not think that would be used very much in practice. We would far sooner see the committee specify in its recommendations the real ground for divorce, which is the consequence of chronic illness, whether it be mental illness or anything else, chronic incurable illness which puts an end to the marriage. I

wish I could have answered your question with a simple yes, but I had to put it this way.

Senator ASELTINE: I do not know how you would describe in legal language a condition of that kind.

Mr. GUEST: I would direct your attention to ground No. 4 recommended by the Canadian Bar Association, taking out the word "voluntary," that is, the first word: in other words, divorce can be granted by reason of the separation of husband and wife for a period of three to five years—they say three years —immediately preceding the commencement of proceedings provided that the court shall be satisfied that there is no reasonable likelihood of a resumption of cohabitation, and the issue of a decree will not prove unduly harsh or oppressive to the defendant spouse.

Senator ASELTINE: That is probably the answer to my question.

Co-Chairman Senator ROEBUCK: It leaves out the words mental or physical disability?

Mr. GUEST: Yes, sir, it does.

Co-Chairman Senator ROEBUCK: It allows dissolution of marriage whenever the breakdown of the marriage takes place for a certain length of time. I did not so understand your submission to us. I understand you are ready to allow the breakdown of marriage as a ground for divorce when it is the result of mental or physical disability?

Mr. GUEST: Bringing about separation.

Co-Chairman Senator ROEBUCK: Yes, bringing about separation but with due regard to whether cohabitation may ever be expected in the future, and having regard to whether the dissolution of the marriage would be unduly harsh to the other spouse?

Mr. GUEST: That is correct. In our submission we confine ourselves to what we consider to be our field, mental illness. I answered the honourable Senator Aseltine's question by going beyond that into the whole field of the breakdown of marriage.

Co-Chairman Senator ROEBUCK: Yes.

Mr. GUEST: We can say that from the work we have done in our Association we feel that the majority of our members would support the position that incurable illness leading to the breakdown of marriage, with the assurance that no resumption of cohabitation is likely, and that there is protection against unduly harsh treatment of the other spouse, as a ground should be allowed. All our members would support such a ground.

Senator ASELTINE: Thank you.

Co-Chairman Senator ROEBUCK: That was very well expressed.

Senator ASELTINE: May I say, Mr. Chairman, I for one appreciate the fact that these gentlemen have come and given us this lucid explanation of what in their opinion we should recommend. It has been a real pleasure to listen to them.

Co-Chairman Senator ROEBUCK: I always call on my Co-Chairman, who sits quietly while I am too prominent, I am afraid.

Co-Chairman Mr. CAMERON: I have only this to say: I cannot express better than Senator Aseltine has done the feelings of the committee with regard to the two distinguished gentlemen who have spoken to us today. They are learned gentlemen and they have given us a valuable presentation, and I think we are very fortunate indeed to have men of their calibre and knowledge appear before us. We are greatly indebted to them.

The committee adjourned.

APPENDIX "23"

A Submission to the

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

from the

CANADIAN MENTAL HEALTH ASSOCIATION NATIONAL OFFICE

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DECEMBER 6, 1966

SUMMARY AND CONCLUSIONS

(i) The Canadian Mental Health Association is deeply concerned with the mental health aspects of marital breakdown, separation and divorce. These should be carefully considered before new legislation on divorce is drafted. The Association has attempted to summarize in this brief a few of the pertinent facts about mental health and mental illness, as they relate to marriage breakdown, and to the children of a family threatened with breakdown. It hopes that this information will provide a useful background for the Special Joint Committee.

(ii) Without attempting to recommend a clause by clause revision of the present divorce law, the CMHA has outlined some of the important facts and principles emerging from clinical studies in the fields of psychiatry, psychology, and the social sciences. These should be kept in mind in considering the cause, cure and prevention of marriage breakdown and the impact of such breakdown on children in the family.

(iii) In particular the CMHA has emphasized the quite significant difficulties surrounding the designation of a patient as one suffering from "chronic unsoundness of mind", a condition which has been frequently suggested as a logical ground for divorce.

(iv) The CMHA has also referred to the impact of minor mental and emotional disorders which are now recognized as being very prevalent in our population today. Such minor disorders create tensions which often lead to family breakdown. Conversely marital incompatibility and personality conflict, even when not caused by

mental or emotional disease, can be an important factor in the development in one partner, or both, of disabling illness of this type.

(v) The CMHA has indicated that it is an open question whether a complete break in the family, such as that following separation or divorce, is more damaging to young children than the situation where the parents continue to live together in a state of conflict, hostility and tension.

(vi) Finally, the CMHA has discussed the question of conciliation procedures, marriage counselling services and family life education as preventive and curative measures in threatened family breakdown. The importance of properly trained personnel and the establishment of sound standards for such services has been emphasized.

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Appendix B The Officers, Members of the National Board and the National Scientific Planning Council.

INTRODUCTION

1. The Canadian Mental Health Association is a national voluntary organization concerned with mental health and mental illness. It is representative of both professional groups and lay citizens. It is dedicated to the promotion and protection of good mental health for all Canadians and the development of exemplary treatment services for the mentally ill. Its structure and program are briefly outlined in Appendices A and B.

2. This submission was prepared in response to an invitation extended by the Special Joint Committee of the Senate and the House of Commons on Divorce. It represents a point of view arising from scientific and professional experience in the fields of mental health and mental illness. The CMHA does not presume at this point to recommend the provisions of a new law relating to divorce. It is concerned chiefly in bringing to the Special Joint Committee a summary of the more pertinent knowledge in the field of family relationships, marital breakdown and mental health. It hopes the Committee will find this information pertinent when it considers the need for amending the divorce laws of this country.

3. In assembling the material for this submission, the CMHA was guided by the views of its scientific advisers which in turn were firmly rooted in clinical experience and research. In addition, the recent scientific literature and research reports were reviewed including studies from Britain, the United States and Canada. The submission further reflects the fact that CMHA, although non-denominational, is guided in its work by humanitarian and ethical values, as well as scientific and medical goals.

MARRIAGE BREAKDOWN AND MENTAL ILLNESSES

4. The CMHA assumes that personal emotional and social maturity is an aspect of personal mental health. In this connection it views the breakdown of a marriage as an indication of a failure to maintain healthy, responsible and mature human relationships. This does not mean that a breakdown in marriage indicates that one or both partners is mentally ill, although this possibility must be considered (see below). But it certainly does represent a problem from the

mental health point of view because of the unhappy and stressful reactions resulting in the partners concerned, and the threat it represents to the security, health and happiness of the children.

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5. Mental and emotional disorders sufficiently serious to cause recognizable disability occur far more frequently than is commonly supposed. Careful prevalence studies reveal the fact that those suffering from complete mental breakdown (psychosis) may represent as much as 3% of the population, while those with minor and partial mental disability (neurosis) may amount to 20% or even 30%. Although modern medicine now recognizes that these disorders are true illnesses, it should be realized that they are different from physical illnesses in that the total personality of the patient is involved, and that most commonly the symptoms involve deviations in emotional and social behaviour. It is often very difficult therefore to appreciate that the behaviour of mentally ill people is, for example, characterized by irritability, aggressiveness, hostility, suspicion or by apathy and disinterest and may be symptomatic of an illness and not just a pattern of behaviour which can be altered at will by the person involved. One cannot escape the fact that many marriages are strained to the breaking point by one of the partners becoming mentally ill (neurotic) in this way. Frequently

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both partners seem to be involved to some degree, and each feels the other should see a psychiatrist.

6. The reverse situation also occurs. People who are incompatible and who have learned through the years of struggle and conflict to hate each other (as well as to despise themselves) create such continued tension that it can and frequently does affect adversely the mental health of one or both partners. In susceptible individuals this can become a substantial cause of mental breakdown (mental illness of a minor or even major type). Thus a vicious circle is created.

7. *Mental illness now can be treated successfully in the vast majority of cases,* if the condition is diagnosed early and appropriate treatment measures are begun immediately. One of the major difficulties is that a person involved in such an illness is often reluctant or downright resistant to accept the fact of the illness and the need for treatment. Part of the problem here may well be the social stigma that still surrounds the concept of mental illness and psychiatric treatment.

8. With reference to people who are suffering from a major mental illness involving a complete break with reality (psychosis), psychiatric treatment

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usually involves admission to a psychiatric or mental hospital or clinic where their medical, psychological and social programs can be supervised day by day. It is still commonly believed that such patients rarely, if ever, improve enough to leave the hospital. This is certainly no longer true. Many such patients have made truly remarkable recoveries as a result of the new therapeutic programs, even after several years of hospital treatment. Even if they have not recovered completely, modern treatment programs in many parts of Canada, provide for their care and rehabilitation in the community—in a foster home, or boarding home, if not their own homes. And psychiatric skill, knowledge and drugs are improving all the time. It is becoming increasingly difficult therefore, even for a highly qualified specialist in psychiatry to certify that a person suffering from mental illness is incurable, and that he will never be able to live at home in the community again.

9. In this connection, the term "chronic unsoundness of mind", which occurs so frequently in the Private Members Bills concerning divorce presently before Parliament, and in many of the Submissions made before this Committee, no longer has much medical meaning. It would follow that changing the Law to allow a divorce on such a ground might encounter great difficulties including the

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embarrassment of a person designated as having "chronic unsoundness of mind", who recovers quite completely. Furthermore, the Association protests that by singling out one kind of illness (or even two or three if we include chronic alcoholism and drug addiction) as grounds for divorce, it would represent unfair discrimination against persons who, through no fault of their own, are suffering from such disorders. It would be as logical to name other grossly disabling and chronic diseases as grounds for divorce, including such disorders as multiple sclerosis, cerebral hemorrhage, or even severe disabling arthritis. Such illnesses, in addition to being frequently incapacitating, are also very often associated with difficult personality disorders.

10. It is freely conceded, on the other hand, that a person who has a severe personality disturbance resulting from a disabling physical or mental disease can create a situation in the family causing hardship and even damage to the health of the spouse and children. Frequently such patients must be cared for outside the home (in nursing homes, hospitals or institutions, for example, and in effect a marital separation exists. It would appear to be more rational and less

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discriminatory therefore to suggest that a ground for divorce might be the complete and final breakdown of a marriage associated with a prolonged separation over a number of years where there has been severe personality changes associated with any disease. This would be preferable to the designation of "chronic unsoundness of mind" as if it were a specific disease entity giving ground for divorce.

Marriage Breakdown and the Effect on Children

11. The CMHA is impressed by the substantial research evidence which indicates the importance for children of a home and family atmosphere characterized by stability, security and consistent affection and which is relatively free from either over indulgence or neglect. It is vital for the well being and healthy development of the infant and child that he have a mother (or a mother substitute) who can consistently provide him with tender loving care. A father contributes significantly to the security feelings of both mother and child. Children raised without this kind of environmental experience are very prone to develop quite serious social and psychological disturbances of behaviour. The CMHA deems that it is now a proven fact that such a desirable emotional and social setting for child rearing is best provided by the family in which both

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parents are present, and where there is emotional harmony, warmth and devotion. Any home where these emotional conditions are even modestly represented is preferable to no home (e.g. institutional care). No child therefore should be removed from the care of his parents, without very serious and careful assessment of the possible consequences for all concerned.

12. The CMHA has reviewed scientific studies which indicate that the negative effect on children of an unhappy marriage where parents continue to live together "for the sake of the children" is as bad, or worse than the effect created by a complete separation or divorce. There is a tendency for such parents

to feel trapped, to develop heightened feelings of hostility towards each other and to involve the children in their conflicts and to exploit them by appealing to them for support, testimony and sympathy. Such a situation denies the opportunity for the children to identify with even one parent as a good model—an important experience for the healthy maturation of all children.

13. Children are remarkably perceptive to emotional tension in the home. There is evidence that when there has been unhappiness, mutual hostility and a

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breakdown in communication between the parents, a legal separation or divorce is actually anticipated with some relief by the children. In such cases a divorce and the subsequent adjustment is not particularly traumatic for the children. Nevertheless it is true that a complete family with reasonably healthy relationship between the parents provides a decidedly better mental health milieu than when the family is broken by any means (death, desertion, separation or divorce).

PROFESSIONAL MARRIAGE COUNSELLING

14. With increasing knowledge about the conscious and unconscious factors that create marital problems and family tensions, there has developed a growing number of people trained in one of the so called "helping professions" (psychicians, psychologists, social workers, clergymen and certain lawyers, for example) who have become particularly interested and have become reasonably expert in helping people who have marital problems. Such "marriage counsellors" are able to recognize the kinds of difficulties which may be at the root of the problem, but of which the clients themselves may be quite unaware. Thus the basic problem may indeed be an emotional or mental disturbance of one or other of the

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partners. Or it may relate to differences in cultural background, social attitudes and aspirations in the two partners. It may reflect differences in religious views and moral values, or it may be related to the difficulty in fulfilling adequately the many different roles which modern society today expects of young married couples. Whatever the basic difficulty, the professional "helper" or "conciliator" is prepared to try to help the partners understand their problem and plan a program to rehabilitate the marriage.

15. The CMHA has studied with interest and concern the recently revised divorce legislation in New York State, which provides for a compulsory conciliation procedure, prior to the divorce being granted. It would appear that this device (recommended in some of the private member bills on divorce now before Parliament) is not working well, for the simple reason that no adequate provision is made in the law to establish a full time conciliator or counselling facility appropriately staffed with properly trained professionals. While CMHA solidly supports the importance and work of properly qualified marriage counsellors, it is obvious that in Canada this type of professional person is still scarce. As is the

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case with professional mental health workers, we have all too few psychiatrists, psychologists, and social workers. The work is far too delicate to leave in the hands of some politically appointed, unqualified professional person as has happened apparently all too frequently in certain courts in New York State. If a conciliation procedure is contemplated in connection with divorce procedures in Canada there must be adequate time and money provided to develop the staff required. So far neither the federal government nor the provincial governments, in the opinion of CMHA, have indicated sufficient interest and determination in providing such staff even for the vital mental health services.

16. A professional service which conceivably would be combined with, or made part of, the court conciliation procedure, if such is established, is a facility for conducting a thorough assessment of the relationships between two partners of a marriage and their children. It is obvious from what has been said above that the impact of emotional tension and conflict is very serious from the point of view of the mental (and even physical) health of young children. The provision of adequate professional services to protect the children in cases of separa-

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tion or divorce would be obviously essential. The comments on the shortage of professionally qualified personnel made above, become even more pertinent in this connection.

17. The Canadian Mental Health Association knows of only two institutions in Canada specially organized for the training of marriage counsellors—both of them in Montreal.* In addition to training such professional counsellors these centres are actively engaged in working with couples who are facing a possible break in marriage, and are conducting and supervising courses in premarital education for young people. Many clergymen of all denominations are interested in such courses and are doing helpful work in counselling but few have had extensive training in this particular field. In addition family case work agencies (welfare organizations) are becoming increasingly involved in working with families where there is a threat of breakdown. There is a need for establishing professional standards as well as training programs for professional people working in this difficult and sensitive area.

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An Emphasis On Preventing Marriage Breakdown

18. The CMHA is committed to the development of preventive programs where such are possible. It is logical that efforts in this direction should have at least equal importance in the planning and thinking of the Special Joint Committee. It is the view of the Association that a preventive program must begin long before a marriage gets into trouble. This means that the program must be directed to parents, newly married couples, couples about to get married, adolescents, and even school children. In a submission of this kind the details of such a program cannot be delineated in detail.

19. Obviously to develop in people the capacity to choose a mate wisely and then to achieve a stable and happy marriage, may require a change in our system of formal and informal education—a change which recognizes that man, despite all his academic education, remains a barbarian until he knows more about himself. We need to modify gradually our educational process so as to give every human being from an early age a deeper insight into himself, his personality needs and his relationships with others. In Canada many provinces are now introducing courses on family relationships which include an opportunity to

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understand the biological, as well as the social and psychological problems of development, growth and reproduction. Some schools are beginning these courses at the 7th and 8th grade, at a time when children are, on the average, proceeding into puberty. Such developments are long overdue, and if carried out intelligently, observed objectively and evaluated and improved consistently, there is every reason to hope that they can contribute to the stability of family life and the diminution of the desire for separation and divorce.

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* 1. The Marriage Counselling Centre of Montreal, 3696 Peel Street, Montreal 2, P.Q.
2. Centre de Cousultation Matrimoniale, 3826 rue St. Hubert, Montreal 24, P.Q.

APPENDIX A

Submission of the Canadian Mental Health Association to the Special Joint Committee of the Senate and House of Commons on DIVORCE

The Canadian Mental Health Association Facts Relating to Personnel, Objectives and Nature of the Organization

This Association is a voluntary society of citizens concerned with the mental health of Canadians and the care and treatment of mentally ill citizens. It is incorporated under Letters Patent of Canada dated December 1, 1926 and operated as a Committee prior to that time. It functions through ten provincial divisions and 159 local branches, making up those divisions. The current membership in the Association is estimated to be approximately 100,000.

Some of its members are engaged professionally in the mental health field. Most are not. It meets annually in ordinary circumstances on a national and provincial basis. Most of its branches meet six or more times a year and their committees and special project groups meet and function continuously in almost all parts of Canada.

The Association concerns itself in four general fields; research, social action, volunteer services to the mentally ill and public education. This brief is authorized by a majority of its National Executive Committee comprising its principal officers elected at large and one representative of each provincial division. By its constitution the Executive Committee carries the authority of its whole National Board of Directors which meets twice annually in January and June. The decision to submit a brief was taken by the whole Board. The detail of the brief was considered and approved by the Executive Committee.

It should be noted that, while the majority of the members of the association as reflected in the opinions of their representatives on the Executive Committee are in favour of amending the divorce law in Canada so that consideration and legal action may proceed on a more rational basis than is possible now under existing legislation, there is a minority group which is firmly dedicated to the principle that a marriage once solemnized is unbreakable. The association recognizes and respects the views of this minority group within its membership.

On the other hand, this minority group, while unable to accept any recommendations relating to the subject of divorce, wish to associate themselves with those portions of the brief that relate to the work of conciliation and the care and protection of children.

APPENDIX B

Officers of the Association

President:	*Mr. Gowan T. Guest, Vancouver, B.C.
Vice Presidents:	*Mr. Jean-Paul W. Ostiguy, Montreal, P.Q. *Mr. J. F. O'Sullivan, Winnipeg, Man.
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*Mr. Fred Wansbrough, Toronto, Ont.
Dr. William Wigle, Ottawa, Ont.
Dr. Keith Yonge, Edmonton, Alta. (ex officio)

*Member National Executive Committee

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Dr. John Spencer, Toronto, Ont.
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Dr. J. A. Tuck, Toronto, Ont.
Dr. Allan Roeher, Toronto, Ont.
Dr. Rita Lidenfield, Toronto, Ont.
Dr. Keith Armstrong, Toronto, Ont.
Dr. David A. Stinson, Toronto, Ont.
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Dr. Helen Mussallem, Ottawa, Ont.
Mr. W. T. McGrath, Ottawa, Ont.
Dr. J. D. Griffin, Toronto, Ont.—Secretary

CMHA Submission to JOINT COMMITTEE ON DIVORCE.

ERRATA

Page 3, para 5 of INTRODUCTION, line 17.

The sentence beginning; "It is often very difficult . . ." *should read:*

"It is often very difficult therefore to appreciate that the behaviour of mentally ill people, as for example, characterized by irritability, aggressiveness, hostility, suspicion or by apathy and disinterest, may be symptomatic of the illness and not just a pattern of behaviour which can be altered at will by the person involved."

APPENDIX "24"

BRIEF

to

SPECIAL JOINT COMMITTEE

OF THE

SENATE AND HOUSE OF COMMONS

ON

DIVORCE

Submitted by

FAMILY SERVICE ASSOCIATION OF METROPOLITAN TORONTO

22 Wellesley Street East
Toronto 5, Ontario

SUMMARY—MAIN CONCLUSIONS AND RECOMMENDATIONS

1. The Family Service Association of Metropolitan Toronto concludes both from a special survey and from its general experience that:

(i) Except in a few cases, proven uncondoned adultery is not the major cause of serious marriage breakdown.

(ii) Extramarital sexual behaviour in general is probably more often a symptom of marriage breakdown than its cause.

(iii) Present divorce legislation is often an obstacle to the establishment of healthier family life, for at least the two following reasons: (a) it prevents the dissolution of marriage on grounds which may be as detrimental to the good of society as adultery, if not more so, and (b) the cost of the proceedings is too great for persons of limited means.

2. The Association recommends to the Committee that:

(i) Serious attention be given to proposals for the establishment of marriage breakdown as a ground for divorce, in addition to the establishment of any particular matrimonial offences which other research might justify.

(ii) Steps be taken to make sure that divorce be available to those whose inability to afford it is their only obstacle in initiating the proceedings.

(iii) Marriage counselling be made available to petitioners for divorce, and be made mandatory when appropriate.

TEXT OF SUBMISSION

3. The Family Service Association of Metropolitan Toronto is a non-profit family service agency whose purpose is, and has been since its inception in 1914, to strengthen family life and prevent family breakdown. It is the largest family service agency in Canada.

The Association operates under Provincial Charter, and has a Board of Directors composed of 27 men and women. Its staff (administrative and casework) includes 50 social workers, who have their Master of Social Work degree.

In 1965 the agency's counselling services were used by 6,210 families through 20,347 personal interviews.

In addition to its counselling, an integral part of its services to the community is a holiday program at Bolton Camp for mothers and children from low income families, and, at Illahee Lodge in Cobourg, a holiday program for elderly people, and children with special health needs.

FSA is a member agency of the United Appeal. In 1965 its operating budget was $709,351.

4. The Family Service Association has long been concerned by the degree of hardship imposed on many of its clients who have been unable legally to terminate marriages that have broken down without reasonable hope of restoration. These clients have no acceptable way to establish a healthier family life for themselves and their children. Their lives are often needlessly complicated by the ambiguous character of their rights with respect to children, property and personal relationships. In other cases the existing law tends to encourage couples remaining together in a mutually and socially destructive union. The Association therefore supports a comprehensive review of divorce legislation, and is grateful for the opportunity to contribute relevant data and experience.

5. For this submission the Association has made a survey of all clients receiving counselling service as of November 1, 1966. Social workers completed questionnaires on all clients whose marriages had broken down beyond reasonable hope of restoration. A marriage was considered to be broken down in this sense in any of the following circumstances:

(a) The client had obtained a divorce and had not remarried.

(b) The client had been separated for at least two years.

(c) The client had established a "common law" union.

Each social worker was asked to report selected data and to give his professional opinion as to both the primary causes and the precipitating factors which led to the breakdown. In addition, each social worker was asked for an opinion as to why separated clients had not obtained a divorce. From a total case load of 1283 families, reports were received on 125 broken marriages. Twenty-seven of these could not be used as the social worker judged he did not have enough information to give a professional opinion. The findings concern the remaining 98 cases. FSA believes these are a representative sample of clients in these circumstances.

6. The survey shows that marital breakdown is not necessarily related to extramarital sexual behaviour. In two-thirds of the cases (65), extramarital sexual behaviour was judged to be neither a cause nor a precipitating factor in the breakdown of the marriage. In the remaining 33 cases, in which extramarital sexual behaviour was a factor, it was seen as a cause of breakdown in 17 cases only. In most of these it was one cause among several others. In the remaining 16 cases, it was judged to be a precipitating factor only.

We conclude, therefore, that extramarital sexual behaviour (behaviour which is not wholly confined to adultery) is a significant factor in less than a third of broken marriages.

7. The survey also shows that most clients, whose marriages had broken down without hope of restoration, were not able to obtain a divorce either because of existing legal requirements, or because of economic difficulties, or both. There were 83 clients with broken marriages who had not obtained divorce. Four had divorces pending, and there were 8 in which the social worker could not make a judgment. Seventy-one clients were unable to obtain a divorce. In the social workers' judgment, 46 were unable to obtain a divorce either because of legal or economic restrictions or both. Of the 25 remaining cases, 18 clients were judged not to want a divorce. Other reasons were given in 7 cases. Legal and economic difficulties would have constituted an obstacle to divorce in some of these 25 cases also.

We conclude, therefore, that many persons whose marriages are broken beyond reasonable hope of restoration are in fact prevented from attempting to establish a healthier family life by the circumstances of present divorce procedures.

8. The survey also indicates that persons whose marriages are breaking down, frequently do not receive any marriage counselling. Only 46 of the 98 clients were known to have received counselling from any professional person or agency in the year prior to the breakdown. The quality and amount of the counselling they did receive appeared to be inadequate in many cases.

We conclude, therefore, that many persons in severe marital trouble either fail to seek marriage counselling or find it unavailable.

9. It is the judgment of FSA staff that matrimonial offences of a sexual nature are more often the result than the cause of marriage breakdown. The same may prove to be true of other matrimonial offences (e.g. cruelty, etc.) which are sometimes proposed as further grounds for divorce. Furthermore, legally offensive behaviour is not unknown in many marriages that do not break down, including some relatively stable marriages. To allege such behaviour as a ground for divorce may encourage the dissolution of some marriages which might otherwise be restored, especially when the only requirement is that one spouse prove that he or she has been legally offended. The present legislation can also prevent the dissolution of a broken marriage when the offended spouse, for extraneous and sometimes petty reasons, refuses to sue for divorce. We therefore submit that to broaden present legislation merely by adding to the number of matrimonial offences will not alone be a realistic way of protecting human dignity, or of contributing to healthier family life.

10. We believe that adequate divorce legislation should permit legal dissolution of marriages that have broken down beyond reasonable hope of restoration. We respectfully submit that present legislation fails signally in this respect. Many persons with broken marriages, but capable of re-establishing family life, cannot obtain divorce because there has been no proven and uncondoned adultery. Also the right of many others to obtain divorce rests on the sometimes capricious judgment of an estranged spouse, or on financial ability to afford the cost of the proceedings.

We also believe that adequate divorce legislation should ensure the provision of marriage counselling service, and should require that an effort be made to use it when there is reasonable hope that the marriage might be restored. We also respectfully submit that present divorce procedure often tends to discourage efforts at reconciliation.

November 24, 1966.

APPENDIX "25"

Brief to the

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

Submitted by

The Benchers of the Law Society of British Columbia

NOTES FOR BRIEF ON DIVORCE REFORM

Social Implications of Divorce Reform

1. The institution of marriage as established in Western society is of fundamental importance and social forces which operate to weaken or break down the institution present a grave danger. Nevertheless it must be recognized that these forces exist and cannot be eliminated. Therefore the concept of divorce must also be accepted. Divorce in one form or another and for one ground or another has been recognized for centuries, but in our country and until recent times in Great Britain, with a few minor exceptions, the only ground for divorce has been adultery or a combination of adultery and cruelty.

2. Since marriage is of such importance in our society, all laws relating thereto should have as their social object the preservation and strengthening of marriage as an institution. Even our divorce laws, while making possible the dissolution of individual marriages, should be designed to protect the institution of marriage as much as possible.

3. This object has probably accounted for the very restricted grounds for divorce heretofore allowed and the very limited and sometimes artificial rules of practice and law which have grown up in our system of jurisprudence on this subject. However, it is the opinion of many that this approach attempting to block divorce and in many cases making it impossible of attainment, when the whole basis of a marriage has been destroyed, has operated to weaken rather than preserve the institution of marriage. Further, it has tended to drive many members of the legal profession away from practice in the divorce courts since the consideration of matrimonial problems from a legal point of view is considered an unpleasant form of practice.

4. The present divorce laws have been self-defeating of their purpose in the following respects:

(a) By making divorce hard or even impossible to obtain even in extreme cases of cruelty, desertion or the insanity of one of the parties. They have encouraged the aggrieved party to form irregular unions with others outside the marriage relationship, creating the many problems that result from illegitimacy and thus creating an unlawful and socially undesirable substitute for marriage rather than supporting it.

(b) For the reasons stated in sub-paragraph (a) hereof, the divorce laws have encouraged bigamous marriages and thus encouraged people in the commission of crime.

(c) They have led people either to the commission of adultery where it would not otherwise occur or to the fabrication of evidence of adultery to enable parties to procure a divorce, leading to the commission of perjury, and the perpetuation of other frauds upon the Court.

(d) They have by depriving an aggrieved spouse of an effective legal remedy also from a practical point of view deprived children of the marriage of any really effective right against an erring parent and

made the law relating to the support of children by their parents in many cases ineffective.

(e) They have made any solution of many serious matrimonial problems impossible in many cases and have tended to drive legal practitioners away from this field of practice to the injury of the aggrieved parties, frequently infants who require effective legal assistance.

(f) They have tended to degrade the whole institution of marriage since they recognize only a special sexual offence as a ground for dissolution of marriage, disregarding many other more significant grounds and adopting the view that the only important ingredient in a marriage in the sexual one.

(g) They have tended, because of the difficulty in obtaining a divorce, to perpetuate in some cases unions which ought to have been dissolved for the benefit of the parties to the unions and often, and which is more important, for the benefit of the offspring.

The result of these factors has been that divorce laws have not served a useful social purpose insofar as the preservation of the institution of marriage is concerned. They have not protected or supported it but insofar as they have had any effect, they have probably weakened it.

5. In addition to the above, the law has made divorce expensive, so expensive that sometimes people have been deprived of any effective remedy. The cost of getting evidence which by its nature must be sought out and is rarely readily available, is frequently great and beyond the means of many people, particularly women. The alternative, that is, falsified or collusive evidence, often the only practical alternative to the person seeking relief, is surely unacceptable by any standard but is nevertheless encouraged by the laws as they stand at the moment.

6. It is clear and has long been recognized that the present divorce laws do not meet the need of modern society and have not done so for many years. With the growing complexity of society and the increasing pressures under which people live, it cannot be denied that our divorce laws, unless reformed, will become even less adequate for our present social needs.

Legal Aspects of Reform

Constitutional:

1. It appears to be well settled law that the power to legislate on substantive divorce law resides in the Federal Parliament and the Provincial Legislature is precluded from altering the grounds for divorce which existed in the Province before Confederation (Attorney-General for British Columbia vs McKenzie (1965) S.C.R. 490, per Ritchie, J. at 496). It also appears doubtful, although the judgments are not consistent on this point, if the Federal Government may delegate such powers.

2. It also seems clear that for a variety of local reasons which need not be examined here that all provinces would not agree to any particular reform and some might not agree to any form of reform at all, so that a Federal Act passed to have application all across Canada would probably be a political impossibility and if such an enactment were required, there is little likelihood of effective divorce reform.

3. It is, however, submitted that the Federal Parliament could enact legislation covering divorce law which would provide that such legislation would come

into effect only in those provinces which, by an act of the Provincial Legislature, adopted the Federal Act. This would not, in our view, constitute a delegation of power provided that the provinces would be bound to accept the Federal Act as passed without any power of amendment. Any power in a province to amend or to select parts of the Federal Act and reject others would, in our opinion, constitute a delegation of powers and raise constitutional issues which can readily be avoided by simply passing permissive legislation of the kind described.

Content of Federal Act:

1. We suggest that there are at least two possible, practical approaches which could be adopted by the Federal Parliament with a view to getting some reform and possibly keeping controversy and its attendant delays to a minimum.

(a) The adoption of the grounds for divorce set out in the English Matrimonial Causes Act of 1965.

(b) The adoption of the grounds for divorce set forth in the resolution of the Canadian Bar Association, passed at the Annual Meeting of the Canadian Bar Association on the 2nd day of September, 1966.

2. As to the English Act, it is not suggested that there is any special virtue in adopting English law and practice merely because it is English, nor is it suggested that the English Act is a model of divorce legislation. Certainly it has been the subject of criticism by many writers in England. From the lawyer's point of view, however, this course would have certain distinct advantages in that a body of jurisprudence has grown up in the decided cases under the English Act and good text books have been written upon the Act and the law which has grown up around it. We would therefore have a base from which to work and eventually develop our Canadian law upon the subject. Furthermore, it might well eliminate a good deal of detailed argument as to the content of any Federal Act by the simple acceptance of the existing English Act. It is well known that there will be many pressures upon the legislature when any divorce code is discussed, religious, social and regional influences will be exerted to the full, and it would probably be easier to gain acceptance of an established code of divorce law than to open the whole field for discussion, as would be required if the Federal Legislature endeavoured, as it were, to build from the ground.

3. As to the acceptance of the Canadian Bar Association proposals, it can be said in their favour that they have the advantage of being the product of a large and responsible body in the Canadian community and therefore claim already the support of a substantial segment of our population. Furthermore, they result from the experience of Canadians dealing with actual Canadian conditions and are probably more suitable for this reason and probably more aceptable to Canadians who are willing to support the proposition that our divorce laws require amendment.

It therefore appears that despite the advantages of simply taking the English Act, as mentioned above, the wise and practical step would be to endeavour to base any new Federal enactment on the subject of divorce on the resolution of the Canadian Bar Association. It may well be that this could lead to greater controversy, but in the long run will probably produce a better result.

4. The English Act provides the following grounds for divorce:

(a) Adultery by either spouse;

(b) Desertion without cause for at least three years immediately prior to the presentation of the petition by either spouse;

(c) Cruelty by either spouse;

(d) Incurable insanity of either spouse for at least five years prior to the presentation of the petition, and

(e) For a wife—proof that since the celebration of the marriage the husband has been guilty of rape, sodomy or bestiality.

Section 2 of the English Act restricts the right to petition for divorce in the first three years of the marriage, but gives the Court the power to shorten this period upon certain grounds.

5. The resolution of the Canadian Bar Association is set out hereunder:

"BE IT RESOLVED:

That the grounds for divorce in Canada be:

1. Adultery, sodomy or bestiality, or conviction upon a charge of rape;
2. Cruelty (as defined below);
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.

Definition of Cruelty

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.

BE IT FURTHER RESOLVED:

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:

(i) arrangement for the care and upbringing of such child has been made and are satisfactory or are the best that can be devised in the circumstances.

BE IT FURTHER RESOLVED:

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

6. It will be seen that the Canadian Bar Association proposals extend the grounds beyond those permitted in England, the principal extensions being found in Paragraphs 4 and 6 of the resolution.

7. The principle of divorce without proof of fault as set out in Paragraph 4 of the Canadian Bar Association resolution may be somewhat startling on first consideration. The suggestion in Paragraph 4 is a bold one, and may give offence and it may be open to the objection that a Canadian Legislature would not pass such an enactment. However, there is nothing new in this proposal and it has been adopted both in New Zealand and Australia. The results have not been catastrophic in either jurisdiction and in our view, the principle could be adopted here with the safeguards set out in the resolution. In Volume 29, No. 5 of the Modern Law Review, at p. 478, appears an article entitled "The Development of Divorce Law in Australia". The article is written by Selby, J., Judge in Divorce, Supreme Court of New South Wales, and deals at some length with the experience in Australia in this field. The Commonwealth Matrimonial Causes Act of 1959 in Australia came into effect in Australia on February 1st of 1961. It included a provision similar to that recommended in the Canadian Bar Association resolution. Figures appearing in the article, at page 476, show that in the year 1961, 350 divorces were granted on the separation basis, rising to 1,272 in 1962, 1,495 in 1963, 1,687 in 1964 and 747 in the first six months of 1965. These figures reveal, as one would expect, a substantial increase in divorce on the basis of voluntary separation for the first four and a half years of the operation of the Act in Australia, and at page 488, figures are produced which show that there has been a steady though not spectacular rise in the number of petitions filed for divorce since 1960. In the year 1960, 8,187 petitions were filed in Australia, in the year 1965, 10,935 were filed.

It is too early to form any firm judgment on the Australian experience, but it is submitted that the Canadian experience in the field of divorce has not been satisfactory and almost any change can be considered a change for the better. It may be that a broadening of the grounds for divorce will increase the number of divorces which are sought and obtained through the Courts in each year. However, it is submitted that it is better that the law provide machinery for the legal dissolution of marriages when the entire basis for the marriage has disappeared than attempt to artificially perpetuate an unhappy marriage and thereby cause the undesirable results referred to above.

7. *Jurisdiction*:

Jurisdiction to hear divorce causes has heretofore been based upon domicile. This has not been true in all jurisdictions in the United States of America, but with that exception, domicile has been the test to establish jurisdiction in the Court to hear divorce causes.

This fact has led frequently to hardship. A deserted wife whose domicile follows that of her husband may well find that she must bring her action in a foreign jurisdiction with all of the consequent expense and difficulty. Even for men, problems can arise where actual residence even for long periods of time does not in law coincide with domicile. To make domicile the only test would appear at first blush to be somewhat artificial. However, so many other legal relationships depend upon domicile that it is felt that any change in the law on this point would require careful and serious consideration which would go beyond the scope of this submission. Therefore no change is recommended on this heading at the present time but it is submitted that this whole subject should be carefully examined with a view to possible future amendment to our divorce laws.

It is true that the Divorce Jurisdiction Act enables a wife to commence proceedings in the Court of the area in which she resides if she has been deserted

for a period of two years. It is submitted that the two year delay before the wife can bring proceedings is unjustified. The legislature has recognized this departure from the otherwise inflexible rule of domicile and it is submitted that the two year waiting period in the case of an aggrieved and deserted wife is artificial and not supportable in principle. To this extent, then, it is submitted that the law should be changed and a deserted wife should be able to bring her proceedings in the Court of her residence at the time of the desertion once desertion can be established and should not be compelled to wait out a period of two years for this purpose.

22nd November, 1966.

First Session—Twenty-seventh Parliament
1966

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

DIVORCE

No. 11

TUESDAY, DECEMBER 13, 1966

Joint Chairmen

The Honourable A. W. Roebuck

and

Mr. A. J. P. Cameron, M.P.

WITNESSES:

The Baptist Federation of Canada: The Reverend Dr. Edgar J. Bailey, President; The Reverend Fred Bullen, General Secretary.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1966

25309—1

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

FOR THE SENATE

Hon. A. W. Roebuck, 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

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

Members of the House of Commons

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Brewin	Honey	Peters
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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 Houses 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 Specail 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 bill 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 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, December 13, 1966.

Pursuant to adjournment and notice, the Special Joint Committee of the Senate and the 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, Denis, Fergusson, and Gershaw—8

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Brewin, Forest, Mandziuk, McCleave, McQuaid, Peters and Wahn—8

In attendance: Dr. Peter J. King, Special Assistant.

The following witnesses were heard:

The Baptist Federation of Canada:

The Reverend Dr. Edgar J. Bailey, President; The Reverend Fred Bullen, General Secretary.

At 5.05 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

OTTAWA, Tuesday, December 13, 1966.

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 members, we have a distinguished delegation before us today from the Baptist Federation of Canada. We have two representatives, the Rev. Bailey and the Rev. Bullen. I will introduce the Rev. Bailey first, and for the record let me say that he has been the Minister of Kingsway Baptist Church, Toronto, from 1962 to the present time. He has had a long and distinguished career. He was born—and this is interesting—in Wales and he migrated to Canada as a farm immigrant in 1928—which puts him on a common basis with some of the rest of us—after seven years in the mines of Wales and three years in steel works. He graduated as a B.A. from Brandon College in 1933, a B.Th. at McMaster University in 1936, an M.A. from Yale University in 1948, and a D.D. McMaster University in 1960.

He has served in the Tabernacle Baptist Church of Winnipeg, the First Baptist Church of Edmonton, and Westmount Baptist Church of Montreal. He has held the presidency of the Baptist Federation of Canada from 1964 to 1966, and he was President of the Baptist Union of Western Canada from 1952 to 1954.

He has made many speeches all across Canada, and has been referred to in *Saturday Night* as being one of Canada's seven outstanding preachers. We do not expect you to do any preaching today, Mr. Bailey, but I have much pleasure in introducing you to this committee. Ladies and gentlemen, I give you the Rev. Bailey.

The Reverend Dr. Edgar J. Bailey, President, Baptist Federation of Canada: Thank you, Mr. Chairman. May I read into the record a brief introductory statement? You have the brief before you, and then we can look at the brief together and submit to your questioning, because I know you are tremendously interested in the subject.

It is my privilege to have the opportunity of addressing this Special Joint Committee on Divorce, and to present a brief on the subject under discussion. The purpose of our coming is to support the committee in its task and to share views that may be of help in preparing new legislation on this important subject.

May I first of all say that we come as representative and responsible members of the Baptist Federation of Canada rather than the instructed delegates of that body. The Baptist Federation of Canada is a consultative body, not administrative, and represents three administrative bodies; the Baptist Union of

Western Canada, the Baptist Convention of Ontario and Quebec and the United Baptist Convention of the Atlantic provinces.

It is exceedingly difficult to consult the various social action committees of these conventions, except over very lengthy periods, to secure material for a prepared brief.

The best that can be done is to consult with the records to see what has been expressed on resolutions, and to seek to interpret these statements and to reflect conferences and other means of gathering together expressions of opinion. This we have tried to do in a relatively short time, which included the summer months since the invitation to appear before this committee was received.

In keeping with the foregoing, I wish at this time to read into the record the appropriate resolutions and to file the Year Books so that you may have the material before you. There are two aspects here, the primary one having to do with marriage and the second one having to do with divorce.

Co-Chairman Senator ROEBUCK: Have you other copies?

Dr. BAILEY: Just the two Year Books that I will file with you as supporting documents. We could have sent you supplementary documents in addition if you wished, but these are the only copies that I have to file with you.

Co-Chairman Senator ROEBUCK: You have not more copies that you could give to each member?

Dr. BAILEY: No; they were not available.

Resolution concerning Christian marriage and sexual morality. This is what raised the question.

> We deeply regret that loose talk about the "new morality" has given countless young people today the false impression that there are no enduring moral principles in the realm of sexual morality and that the wisdom of the past as well as the clear teaching of our Lord can be ignored with impunity or without serious damage to true happiness and the proper respect for the human person, whether man, woman or child.
>
> Nevertheless, we Baptists recognize that the separation of Church and State in modern societies means that civil law, concerned with the whole community and with persons of many different religious persuasions or in some cases none at all, cannot forcibly impose the Christian ideal of marriage. Christian marriage cannot be created and sustained by legal action alone. Nor do we believe that our Lord, where marriage breaks down and all attempts at reconciliation have failed, would deny to men and women the opportunity to start afresh and seek the re-establishment of an enduring family life. We do not believe that failure in marriage is the only sin for which there is no forgiveness or that the church should refuse its help and ministrations to those who have been divorced.
>
> The decision as to whether a divorced person should be remarried in church has among us usually been left to the discretion of the minister in consultation with the deacons and with the approval of the local church.
>
> It must be clearly stated again that the Christian ideal of marriage and the self-discipline which it requires does not rest upon any depreciation of the sexual life as in itself evil or unworthy. Marriage in both its physical and spiritual aspects was blessed by our Lord both by His presence and His words. It is also used in the New Testament as the type of the mystical relationship between Christ and His Church.

There is a word here about the limitation of families which is not necessary or pertinent to this discussion so I will continue.

This Baptist Convention of Ontario and Quebec wishes to reaffirm its conviction:

(a) That Jesus clearly enunciated the principle of monogamous marriage as expressing the true relationship which should bind together man and woman according to the divine intention in creation.

(b) That this view of marriage is binding upon all Christians and that persons should only be married with Christian vows where the minister who performs such a marriage is convinced of the sincerity of those who wish to take these vows and who earnestly seek the grace of God in fulfilling the ideal of Christian Marriage.

Then this final passage, which relates again to divorce:

(d) Finally, we affirm against the importance of the pastoral and educational responsibilities of the church in preparing young people for Christian marriage. The Church should be primarily concerned, not only to heal broken marriages, but to provide the spiritual foundations in which alone an enduring relationship can be based. It is our conviction that no more potent witness for Christ can be given in the modern world than through a family life where human love is transfigured and blessed by the living Lord Himself.

Co-Chairman Senator ROEBUCK: Would you please state what that resolution is again, who passed it and when?

Dr. BAILEY: It was passed by the Baptist Convention of Ontario and Quebec at their annual convention; it is related to the Year Book 1964-65, and is found on page CVII. I file this with you. This is on marriage.

Co-Chairman Senator ROEBUCK: That is representative of the thought of Ontario and Quebec. What about the other provinces?

Dr. BAILEY: We should be glad to give you a little more on that after reading in one specific resolution on divorce, if I may.

Co-Chairman Senator ROEBUCK: Yes.

Dr. BAILEY: This is from the 1965-66 Year Book, the annual meeting, and it is found on page C-32. It is specifically devoted to divorce. It is the same convention, the Baptist Convention of Ontario and Quebec. Perhaps I should read the whole thing.

Whereas we recognize that by law, divorce in Ontario is granted only on grounds of adultery, and that this has contributed to the increasing number of so-called 'Common Law' marriages in case of some and the use of perjury in the case of others;

Therefore be it resolved:

(a) That the Baptist Convention of Ontario and Quebec in affirming its stand on religious liberty and the dignity and value of man, encourage our Premiers and legislators to initiate discussion with the Federal Government and to study a broader basis for divorce laws.

(b) That before any divorce proceedings are considered, the principle of conciliation be made an integral part of the legislation.

May I say that the man who drafted this resolution, Dr. Clayton Kitchen, feels very strongly that the principle of conciliation should be included. I take issue with him here, and would be glad to discuss this at a later time, concerning the principle of conciliation being made mandatory.

There is also a statement from the Baptist Union of Western Canada, which represents an intention rather than a carried out act, if I may read it. It is from the Baptist Union of Western Canada Year Book, 1961, and I was only able to

secure this from a reference library, but it can be made available by writing. It is at page E-82.

Marriage and Divorce:

> Because of the increasing divorce rate in Canada: Be it resolved that our Ministers do their utmost to counsel couples preparing for marriage, and to help them assume responsibility for marriage and family life.
>
> Whereas legislation respecting divorce is vested in the federal Parliament; and whereas the existing divorce law generally applicable in Canada limits the grounds of divorce to adultery;
>
> And whereas experience has shown that the existing legislation has resulted in grave injustices to many innocent married persons and children of the marriage;
>
> Be it resolved that we request the Christian Social Action Committee of the Union to seriously study this issue, and encourage the churches to do so, with a view to preparing a brief to the federal Government for consideration at next year's Convention.

This is simply to express their concern; they were never able to carry out the intention that is resolved here.

I have also gone through the records of the United Baptist Convention of the Atlantic provinces and they have not anything on record that clearly indicates where they stand on this matter, but at conventions and meetings with the ministers and others they have expressed real concern about the Government taking action.

Co-Chairman Senator ROEBUCK: Would we be justified in assuming that the other provinces would agree with the statements contained in the Year Books of the two greater provinces?

Dr. BAILEY: I would have to say that Baptists are an exceedingly independent group, and while you would receive a good deal of approbation, you would also receive some criticism of the points of view that are expressed here.

Co-Chairman Senator ROEBUCK: So we could not take it holus bolus?

Dr. BAILEY: Holus bolus, no. I express this in continuation. The United Baptist Convention of the Atlantic provinces has no record of any publicly expressed opinions, but conversation with clergy and laity alike indicates that they share a general concern, but are generally more conservative in their theological outlook on this subject. They are less likely to move easily beyond what many believe is the biblical basis of divorce, namely adultery, while expressing concern over the unfortunate victims of broken marriages. The concern here is just as great, but the remedy is not as easily seen.

To sum up, there is substantial agreement in central Canada and in the west, and to a lesser degree in the Atlantic provinces, with the views expressed in the brief. The genius of the Baptist church is to be found in the willingness of its people to share in decision making without requiring that large committees and boards must first of all present definite findings. The doctrines of the separation of church and state and that of local church governments militates against what might be called church statements, and against the church being a pressure group for our favourite point of view in a social situation. Responsible leaders are expected to make their views known and to accept the consequences of the views expressed. In an organizationally-minded world this method is not easily accepted by those who prefer the bloc approach to every subject.

With this brief introduction, Mr. Chairman, we are ready to answer your questions and to deal with the brief that is already in your hands.

Co-Chairman Senator ROEBUCK: I would suggest, Dr. Bailey, that you read the brief.

Dr. BAILEY: Would you like me to read the brief?

Co-Chairman Senator ROEBUCK: It is not very long.

Dr. BAILEY: Not the introduction, you do not need the introduction?

Co-Chairman Senator ROEBUCK: Use your own judgment in regard to that, as to how much you read or what you read.

Dr. BAILEY: Well, it is fairly short and I will read the whole thing.

Co-Chairman Senator ROEBUCK: I think so. We have plenty of time. You are the only delegation before us today, so take your time.

Dr. BAILEY: The Baptist Federation of Canada is affiliated with the Baptist World Alliance that represents 50 million members and adherents in 111 countries. By the way, Mr. Bullen and I happen to be on the Baptist World Alliance Executive, so we are very much a part of that body. There are some 200,000 members and adherents in 1,211 churches in Canada. The headquarters of the Baptist Federation is located in Brantford, Ontario, and the Rev. Fred Bullen is the general secretary.

Canadian Baptists have three mission fields: India, Bolivia and Angola, with 149 active and 55 retired doctors, nurses, teachers and ministers. In India alone there are 649 full-time Indian and Canadian workers.

The Baptist Federation of Canada is an active partner in the Canadian Council of Churches and in other inter-faith activities.

Baptists favour co-operation between church and state on matters of mutual concern but the separation of church and state as a general principle.

Canadian Baptists share the concern of Parliament in matters relating to both marriage and divorce and want to support the joint committee in the task it is undertaking.

Baptists believe that the greatest contribution that can be made by the Christian church is to be found in the willingness of its individual members to be involved at all levels of community life as Christians and citizens. Leadership of both the Conservative and N.D.P. parties in Ottawa is in the hands of dedicated Baptists. We believe churches ought not to be political pressure groups, but to be the conscience of the state and to be willing to share in the tasks of thinking through contemplated changes of law in areas affecting the general well-being of all Canadians.

The church has often stood in the way of change in matters like that of divorce because of its deep concern with the moral implications of such changes. We sympathize with our brethren who feel that divorce is ever and always wrong and ought not to be tolerated, but at the same time believe that modifications are necessary at the present time. We therefore urge this joint committee to be bold and imaginative in contemplated changes, recognizing that parliamentary debate will likely modify any legislation to conform to the will of the majority.

This brief is presented by the Rev. Dr. Edgar J. Bailey, minister of Kingsway Baptist Church, Toronto, and the Rev. Fred Bullen, president and general secretary respectively of the Baptist Federation of Canada. The brief has been prepared in response to an invitation by the committee for public bodies to appear before it and present their views.

The Baptist churches of Canada have been clear in their attitudes for many years on divorce by declaring that good marriages are the best answer to the divorce courts. By instruction, counselling, preaching and teaching on the

importance of marriage and family life they have sought to hold high the Christian ideals. At the same time, they have permitted divorced people to re-marry, and, where convinced of the good intent of those involved, have performed the marriages in accordance with the will of the local church. They have at the same time not forbidden the full practice of their faith to those so re-married or divorced.

Divorce is the result of marriage failures, and, as in all other areas of life, those who have failed should be given another chance to live a normal, happy and useful life. Marriage is commended and commanded by both the church and society, and while divorce is permitted, it must not be condoned as a way of life. It is these views of a general nature that guide the proposals to be made to this special joint committee.

Proposals—and here we are getting to the meat of the thing:

1. That the term "dissolution of marriage" be substituted for that of "divorce" in all future legislation. Divorce is used to describe a matrimonial offence involving a guilty and an innocent party and carries social stigma for both the parents and the children of such marriages. These terms are no longer valid in the modern context involving the breakdown of marriages rather than criminal intent or context.

2. The purpose of the legislation shall be to rationalize rather than to liberalize the law with regard to the dissolution of marriages. Easy divorce is not the intent of modern public concern nor the will of the churches who have expressed opinions in favour of a modernizing of present legislation.

3. That dissolution of marriages be recognized as a legislative function of the Parliament of Canada, and therefore the act should be mandatory in every province. It is to be remembered that support of the family involved is a provincial matter and therefore precaution is needed to protect the children. The filing of an affidavit of intent acknowledging responsibility can be a preliminary to the granting of any decree. Copies of these papers in the hands of both parties can be evidence in any criminal or civil action.

4. That both marriage and divorce be withdrawn from the mainly ecclesiastical areas they now occupy and recognition be given to the secular interests of modern society. The Christian church no longer has the right to force its views on a pluralistic society.

5. The processes of nullity should be retained as performing a useful function.

Grounds for Divorce:

This area is the most difficult to delineate because of the need to be specific and to avoid legal loopholes that will vitiate the intent of all concerned.

1. Adultery.

2. Desertion, to include disappearance, wilful separation, failure to provide when able to do so, but not to include incarceration or absence due to war or business. The proven period to be not less than five years and to include corroborated evidence.

3. Insanity, where treatment over a period of five years has failed to bring evidence of recovery and where the patient is certified as being of incurably unsound mind. Extreme alcoholism and drug addiction should be classed as a form of insanity.

4. Breakdown of marriage.

Legal cruelty, where actions of a repeated and continuous physical nature endanger health and are so certified by a medical practitioner.

Habitual criminals, where long and repeated imprisonments indicate the inability of the prisoner to assume the role of parent, husband or wife because of repeated offences.

Permanent breakdown of marriage, where the court has no reasonable ground to believe that a reconciliation is possible, where the parties have not lived together for a period of seven years, or where a legal separation has existed for a seven-year period.

Shall we go on with the addenda?

Co-Chairman Senator ROEBUCK: Yes, go right ahead. This is very interesting.

Dr. BAILEY: Legal Costs: The prohibitive cost of the dissolution of marriage is an incentive to common-law relationship and other asocial practices. This lucrative area of jurisprudence has been sacrosanct up to the present so that there is, in effect, one law for the rich and another for the poor. To make any positive contribution in this area is to risk offending large sections of public opinion, including the legal profession, the politicians who see this as a "hot potato" and the churches who resent any state interference with their sacred rites. It is right and proper, therefore, that a churchman should rush in where angels fear to tread and risk, if necessary, public opprobrium in starting a new train of thought, if not procedure.

Here is a very radical suggestion, I believe. Dissolution of marriages should be permissible under administrative law:

1. Uncontested divorces could be processed more adequately under administrative law, with less cost to all concerned, than under judicial law.

2. Processes involved should closely follow those employed in the instituting of marriages.

(a) Applications for a licence to dissolve the marriage be processed by an issuer of licences;

(b) Appearances of both parties with witnesses before an administrative officer;

(c) Signing of a declaration of intent and a statutory form of legal separation to the satisfaction of both parties. This to be registered as are marriages;

(d) A preliminary interview with the parties involved for discussion of reconciliation shall be regarded as advisable but not mandatory. Such interviews to be with an administrative officer or his designees (e.g. marital tribunal, social worker, clergyman and lawyer);

(e) Seven years to be the period of voluntary and legal separation;

(f) The decree shall be made final by an officer of the law on production of enabling documents and a further signing of a voluntary act of consent. Publication shall then be made of the said decree to avoid fraud and collusion, and after thirty days the dissolution shall be in irrevocable effect;

(g) Parties under age shall require the parents' consent as in the marriage;

(h) The legal costs involved in these procedures shall be published either as a guide or as set fees for all concerned.

Agenda II:

Provincial Responsibility—and I think this is important, at least it is from my point of view:

The question of divorce be referred back to the provinces and that Parliament pass enabling legislation to remove the matter concerned from the federal

area. This action would force the provinces to set up the necessary legislation to conform with the will and practice of its people and remove the present embarrassment to Parliament caused by its being in effect a divorce court as well as a legislative body. Marriages are handled by the provinces. Why not their dissolution also? If they have the power to institute marriages, why not accept the responsibility when marriages break down? The care of the families involved in marriage breakdown is already in the hands of the provinces. While some provinces may wish to avoid this responsibility, most provinces would welcome this method of dealing with a difficult problem. The B.N.A. Act appears to make possible this course of procedure.

Mr. Chairman, there are three sections: the first, modifying, if you like, the present act; the second, new procedures; the third, an opinion regarding perhaps a change of the seat of veto.

Co-Chairman Senator ROEBUCK: Why do you say the British North America Act appears to make possible this course of procedure?

Dr. BAILEY: I understand that it is possible for the federal Government to legislate out of a particular area, as it has done in other areas, by simply giving the provinces permission to do this kind of thing. The provinces have marriage. Why not the dissolution of marriage?

Co-Chairman Senator ROEBUCK: Mr. McCleave, what do you say to the British North America Act?

Mr. MCCLEAVE: Well, Mr. Chairman, probably the witness does not know that we had asked for an opinion earlier on from the Department of Justice regarding certain ancillary issues, but to us very important issues, dealing with maintenance and the care of the children. Do you regard this as an absolute necessity, sir, or if we can work it so that we can give the proper protection under federal legislation to these questions of maintenance and care of children, would you be happy to see us vested with the entire authority?

Dr. BAILEY: Yes, from my point of view I believe this is a way out of a dilemma that appears to be confronting Parliament. There would have to be a divorce court. By giving it back to the provinces, I am afraid some of the provinces would not accept this responsibility, and for the time being it seems perhaps wise to leave it in the federal area. This is why I put it as a second addendum.

Mr. MCCLEAVE: So you were not dealing with the moral or constitutional issue?

Dr. BAILEY: No.

Mr. MCCLEAVE: But with what you imagine to be a legal difficulty?

Dr. BAILEY: That is right, yes.

Mr. MCCLEAVE: If I may have just one other question, Mr. Chairman.

Co-Chairman Senator ROEBUCK: Go ahead.

Mr. MCCLEAVE: The brief has mentioned cruelty as being confined only to physical acts, but courts in England, and also in Nova Scotia, have broadened it much beyond that, so frequently you hear psychiatric evidence that a form of behaviour is actually threatening the sanity of one of the spouses of the marriage and relief has been granted on that ground.

Dr. BAILEY: I would agreed with this interpretation. My feeling is that the simple addition of mental cruelty opens the door so wide that it is almost impossible. For instance, a man may not like the way his wife burns his toast in the morning, or forgets to draw the proper water, or to prepare his underwear;

all these kinds of things can be regarded as mental cruelty. In order to close that gap I suggest that doctors can give necessary certificates that indicate that cruelty is involved, and where mental cruelty and physical cruelty are clearly akin to one another.

Mr. McCLEAVE: May I suggest, sir, that your ideas about mental cruelty are really derived from American practice.

Dr. BAILEY: Correct.

Mr. McCLEAVE: Not from English or Nova Scotian.

Dr. BAILEY: Correct.

Mr. McCLEAVE: I do not think any doctor in Nova Scotia that I am aware of would recommend that a person has beeen driven out of his or her mind because the loved one to the marriage has been burning the toast or doing something of that nature. It is a problem we have met before, but I think the difference between incompatibility and mental cruelty can be defined in the courts, and has been defined successfully both in the United Kingdom and in Nova Scotia.

Senator DENIS: Did you say that marriage and dissolution of marriage come under the jurisdiction of the provinces?

Dr. BAILEY: Marriage comes under the jurisdiction of the provinces.

Senator DENIS: And consequently you contend that dissolution of marriage should also be under the jurisdiction of the provinces?

Dr. BAILEY: It would seem to me to be a wise way of dealing with a very difficult situation.

Senator DENIS: At the present time the provinces have different grounds for the dissolution of marriage. Supposing the federal Government kept completely out of the question of marriage and the dissolution of marriage, leaving it to the provinces to decide for themselves the grounds upon which there could be a dissolution, do not you think that would be a better way of settling this divorce problem? If each province was free to decide on giving these unfortunate people a divorce and the right to re-marry, and also decide on the care of the children, do you not think that would be more appropriate and in accordance with the will of the provinces?

Dr. BAILEY: It is my feeling that it would be best left to the provinces, but in view of circumstances that apply in Canada perhaps there is wisdom in leaving it with the federal Government for the time being.

Co-Chairman Senator ROEBUCK: You appreciate, Dr. Bailey, do you not, that marriage is within the jurisdiction of the Dominion, and it is only the celebration of marriage that is within the jurisdiction of the provinces?

Dr. BAILEY: Yes.

Senator DENIS: Oh yes, but that could be arranged with a new confederation, or new institution if you like. If these questions are related it would be much better to leave it completely to the provinces to legislate on the matter. If a couple in Quebec want a divorce they cannot get one because there is no divorce law there, so they would have to move to one of the other provinces; if cruelty was the ground, they could not get a divorce in Ontario because it is not a ground there and they would have to go to Nova Scotia. In provinces with no divorce laws there might be pressure from the people to introduce legislation, and each province could decide its own grounds; it may be they would have to be resident in the province five or seven years. If each province had the right the Senate would be freed from examining the matter. This seems to be a funny

matter to be discussing in Ottawa for one or two provinces alone. If Newfoundland, with no divorce law, were free to legislate on the matter the people of Newfoundland, if against divorce, could leave the situation as they want it. What do you think of my suggestion?

Dr. BAILEY: This is inherent in what I have suggested, that if there are provinces that do not wish to enter into any terms of divorce and deprive their people of what seems to be a right, then public opinion eventually would begin to make its voice heard and say, "We must have action", and the legislative body would be forced to produce legislation necessary to provide for divorce.

Senator DENIS: Those in the provinces with no divorce law can still get a divorce by applying here, but it is very expensive and a waste of time for legislators and courts alike; we have judges and three or five senators; there is an administrative body to look after that. I do not want to be explicit, but most of the cases that come to Ottawa are pre-arranged. The lawyers are very well known, they are expert, they know how to make enquiries, how to find fault with the husband or wife. It is a tricky way to get divorce in provinces where there is no divorce law.

Senator GERSHAW: Only a small percentage are made up cases. The great majority are genuine cases, and very, very sad cases too.

Senator DENIS: What I mean is that even in provinces where there is no divorce law people can still get a divorce by applying to Ottawa.

Mr. MANDZIUK: Or live in a common-law marriage in provinces where they cannot get a divorce. Is not that a fact?

Senator DENIS: You can find fault in provinces where there is a divorce law. You have common-law marriages in Ontario.

Mr. MANDZIUK: Mr. Chairman, do I misunderstand the witness? How far would he delegate the jurisdiction of the federal Parliament to the provinces? Would he delegate the matter of grounds for divorce and have each province have jurisdiction to establish its own grounds?

Co-Chairman Senator ROEBUCK: In the way they do in the United States?

Mr. MANDZIUK: Well, I am just wondering.

Dr. BAILEY: We would have to apply this to a practical case. Let us take the Province of Ontario—and this can be representative of Manitoba or any other province. They themselves are able, and I think willing, to deal with this question but are precluded from doing so at the present time due to the federal act. If it could be turned over to them, I know it means a differentiation between the provinces, but at least it is one way out of a very human dilemma. A number of provinces want to do it, I believe, and are willing to do it, but at the present time they are precluded.

Mr. MANDZIUK: What provinces have given any indication of wanting to do this, officially I mean? Unless we get something official this is just a matter of one man's opinion. Do not you think that would create ten different sets or grounds of divorce for ten provinces, ten sovereign states? Do you think that would help us as a united nation?

Dr. BAILEY: I do not think it would help us as a united nation, but I think it would help us to begin to move out of a very real dilemma that we are facing at the present time, when we are failing to deal with the matter adequately across Canada because of these divisions.

Co-Chairman Senator ROEBUCK: Of course, we have not got going yet.

Dr. BAILEY: No, this is true.

The Reverend R. Fred Bullen, General Secretary, Baptist Federation of Canada: May I speak to this?

Mr. MANDZIUK: I do not want to introduce a speech, like Senator Denis, but I have a further question or so to ask the witness.

Co-Chairman Senator ROEBUCK: Mr. Bullen has a word to insert here.

Mr. BULLEN: Mr. Chairman, I think it would be most unfortunate to the concept of Christian unity, which everyone in this room holds very dear, to encourage, even in the confines of this committee, the possibility of a variety of grounds for the dissolution of marriage in the provinces. Even to have two such grounds is one too many. Certainly speaking for Canadian Baptists, and in my unique office as their general secretary, where I am labouring most earnestly to build an understanding and a confidence of each other across the country—which indeed, sir, I do not hold as something distinct from the members of the Senate or the Commons—I think that a common national legislation would be needed, but the administration of this might be left in the hands of the provinces. I think there should certainly be national leadership given in this particular case in all aspects of the decision.

Co-Chairman Senator ROEBUCK: We should lay down the general rules?

Mr. BULLEN: That is right.

Senator DENIS: That may be as a guide line, but I suggest that a representative of each province should be called here to tell the members how they feel about divorce.

Co-Chairman Senator ROEBUCK: Senator Denis, may I say to you that we have invited the Attorneys-General of all the provinces, an invitation has gone to every one of them, and the provinces of Ontario and Manitoba have signified their intention to appear before us; the Province of Alberta will send a memorandum; so we are not in default in that respect.

Senator DENIS: I am not saying that, but if some provinces have declined I think it would be a good thing to know which provinces have declined to appear.

Co-Chairman Senator ROEBUCK: Now Senator Fergusson has asked for the floor.

Mr. MANDZIUK: I am not through, Mr. Chairman. Senator Denis keeps insisting on breaking in on me.

Senator DENIS: I must be permitted to ask a supplementary question.

Mr. MANDZIUK: The witness said that re-marriage in church of a divorced person is left entirely to the congregation. Does that not create discord right in the congregation? There are always people with pros and cons. It puts the minister in an embarrassing position, does it not? My question is: Why does not the church take a definite stand?

Dr. BAILEY: For marriage or for divorce, or against divorce?

Mr. MANDZIUK: Most churches are in favour. My church is in favour of marrying divorced people right in church with no questions asked.

Dr. BAILEY: This is left to the discretion of the minister and the church concerned because of the necessity we feel for consultation on all marriages, including those being re-married, before we marry anybody. We have them in for consultation, and sometimes we will refuse marriage and ask them to go elsewhere if we feel that their grounds for marriage are not sound and wise from their own discussion.

For instance, a girl may come in, she is pregnant, the family are with her and say, "This girl must be married, and we have brought the boy", so it is a shotgun marriage. We do not have to perform that kind of marriage; we can advise against that marriage; if our own conscience tells us that it is not a good marriage we ask them to seek someone else's services, and we are quite within our rights to do so according to our own church. It is the matter of consultation and preparation for marriage that seems to us to be important.

You have raised a very important question, though, about the re-marriage of divorced people. It is interesting to note that the current issue of *Life*, of December 16, says that in the United States two out of three pepole who are divorced re-marry, and nine-tenths of those who re-marry stay married. This a very interesting editorial comment, which indicates that re-marriage after divorce is not necessarily a failure.

Mr. MANDZIUK: I have just one more question, Mr. Chairman. I know there are other members who wish to ask questions.

Co-Chairman Senator ROEBUCK: That is all right. Pardon me if I was wrong just now.

Mr. MANDZIUK: No, you were not, sir.

Co-Chairman Senator ROEBUCK: Well, go ahead, please.

Mr. MANDZIUK: You set out a long list of things which you recommend as grounds for divorce. Now, sir, is that the view of your church or is that your personal view as a result of discussion but never going on record?

Dr. BAILEY: As I have already indicated, we have had a good deal of consultation back and forth, but our church is very much opposed to the idea of making church statements of a very wide and strong kind with regard to this, that or the other.

Mr. MANDZIUK: Does not the witness realize that he is weakening his case—

Dr. BAILEY: I certainly do say—

Mr. MANDZIUK: —when he says he dissociates himself from the representations he is making? I would like to know what 200,000 Baptists in Canada think.

Dr. BAILEY: We would love to tell you!

Mr. BULLEN: We would like to know also what the total membership of almost any other church thinks.

Mr. MANDZIUK: But they do not object to the leadership speaking in their name. You do not speak in that way, you see, and that is the only reason I brought this question up.

Mr. BULLEN: The other side too, Mr. Chairman, is that most of us in our Baptist work recognize that the Baptist churches of the world have grown up on the basis of local autonomy and local legislation, and we attempt to develop the role of the individual rather than to legislate from the top down. It is very difficult, unless you have a questionnaire—

Mr. MANDZIUK: You would rather have Parliament pull your chestnuts out of the fire. Is that right?

Mr. BULLEN: We realize this, and we also recognize your perspicacity in spotting our weakness, which we think is a great strength of Baptists.

Mr. MANDZIUK: Maybe it is a strength, sir.

Co-Chairman Senator ROEBUCK: I would like to hear from Senator Fergusson, but when she is through I would like, if you will permit me, to call on Mr. Bullen for what he has to say to us, and then go on with the questioning, if that is satisfactory.

Senator FERGUSSON: Mine is a very small question, Mr. Chairman. Some of the witnesses who have appeared before us have argued that divorce should be granted when a marriage has broken down, when the marriage is dead. Amongst the grounds that they would consider as evidence that a marriage had broken down would be a person having been put in gaol for a long time. I notice that under "Desertion" you exclude incarceration.

Dr. BAILEY: We refer to habitual criminals.

Senator FERGUSSON: You do not think incarceration is a ground on which divorce should be granted. I just wonder why. Would not you feel that a marriage had really come to an end if someone was incarcerated for 20 or 30 years?

Dr. BAILEY: I referred to habitual criminals, where long and repeated imprisonments indicate the inability of the prisoner to assume the role of parent, husband or wife because of repeated offences. I believe that habitual criminals should be in that category. I wanted to be quite sure that incarceration in a general way was not the reason.

Senator FERGUSSON: I see. If it is long and repeated you feel it is a ground?

Dr. BAILEY: Yes, that is right.

Senator FERGUSSON: Thank you. I did not understand that.

Co-Chairman Senator ROEBUCK: Are you taking the position the English have?

Dr. BAILEY: About the question of the breakdown of the marriage?

Co-Chairman Senator ROEBUCK: No, about incarceration. The Commons in England passed the bill in, I guess it was, 1957, making a long sentence a ground for divorce. The Lords threw it out on two grounds, as I understand it: first, that the Crown has the right of pardon, so that you cannot be sure a long sentence will be a long sentence; secondly, the rehabilitation of the prisoner is seriously interfered with when his home relations are cancelled while he is in gaol. They did that, and it leaves with us a very serious question when we come to consider that particular ground.

Senator FERGUSSON: Mr. Chairman, I may say I am rather a devil's advocate, because actually I agree with the British.

Dr. BAILEY: I said "long and repeated".

Senator FERGUSSON: I wanted to bring out the point.

Mr. MANDZIUK: I agree with the senator.

Co-Chairman Senator ROEBUCK: Let me introduce the Rev. R. Fred Bullen, B.A., B.D. He is the general secretary of the Baptist Federation of Canada. He was born in Plymouth, England, and, like his confrere, migrated with his parents to Canada in 1924.

He was educated and received his B.A. at McMaster University, specializing in social service, and his B.D. at McMaster University.

He was ordained a Baptist minister in 1941. He is at the present time the general secretary-treasurer of the Baptist Federation of Canada, since January 1, 1960. He has been a member of the Baptist World Alliance Executive since 1960. He has been a member of the Baptist World Alliance World Relief Committee

since 1960, a member of the Canadian Council of Churches Executive since that date, and president of the Ministerial Societies. Rev. Bullen, we would like to hear from you at this point.

Mr. BULLEN: Mr. Chairman, if I may accept your previous invitation I will remain seated. I am delighted to be here, and my function primarily is to uphold my president in his presentation. Some of you may recall that in the Old Testament there were two men, Aaron and Hur, who held up the arms of Moses, and as long as they did so things went well. That is really my main function here.

When I was a boy I helped to win the high schools debating teams for a specific year, and the subject of the debate on which I helped to win the coveted award was, "resolved that the Canadian Senate should be abolishet."

Mr. MANDZIUK: You are still waiting.

Mr. BULLEN: I have lived long enough to regret it, and to benefit from this meeting with the senior member, the chairman of this committee. I want personally to express our appreciation that, in spite of some difficulties, you have persisted in holding this meeting at an hour convenient to us, and I want it to be recorded that we value that.

My only other comment is simply to say that some of the things which I anticipated saying have already been mentioned in some of the questions regarding the diversity of views. In this connection, may I say that, while other church denominations do have specific boards of social service to which is given the right and privilege to speak for their church, what we have already said regarding a slight reluctance in some areas of Canada to agree with a statement, prepared either by the president, or the Baptist Federation of Canada, or by a group in some other denomination, what is true of Baptists is true also, I think, of other churches too. The same pockets of conservative thinking, or a reluctance to give credence to statements by a person or group, is felt just as much. I find this in my association, and I think this is something that ought to be recorded, and therefore that truth, and keeping that truth in mind, ought not to detract from the validity or the value of the statements which we have placed before you.

The second thing I would like to say is that as Christians we are concerned with the breakdown of marriages, the increasing number of them, and anything which destroys what we believe to be the basic unit of the solidarity of society is of grievous concern to the churches of Canada. I want to assure this committee that in the prayers of many Baptists, and I am sure of other churchmen, the work of this committee will be remembered during the long months when tortuous thoughts and conferences will be held. If there is anything further that we can do to help the understanding of the work which you are trying to do for all of us we will be glad to do so.

I would like to add one third thing, and that is that for my own part I would have liked to see more emphasis upon conciliation than Dr. Bailey has included, and I am opening the door to comment on his statement that it ought not to be mandatory. I realize that mandatory conciliation is probably no conciliation at all, but I would like to see in any legislation opportunities presented for long and perceptive discussion in order to maintain marriage.

I am distressed that many marriages are dissolved because a person sees someone else that they feel a little more attracted to. Quite often the second marriage begins while the first marriage is still intact, and the attraction of someone outside of the marriage relationship is quite often the initial cause for the breakdown of a marriage.

Co-Chairman Senator ROEBUCK: Could you give any advice to wives how to make the attractions at home sufficient to offset those from outside?

Mr. BULLEN: Sir, if I had lived as long as the esteemed chairman of this committee I perhaps would be bold enough to make some suggestions. I can only commend the successful actions of my own spouse and commend her own activities to other women across the country. This, of course, would be presumption on my part.

None the less, I do have a concrete suggestion. While I am aware that many breakdowns in marriage occur among church people, I am certain of this, that as a nation we dare no longer simply pretend to be a Christian country without the active participation of persons being related to their church or to their synagogue in a way which commends their faith to their neighbours.

I believe that happiness and long marriages come only when both parties discover that marriage is not simply the continuance of two persons, but these two literally become one. If this is true, then the discovery of that is a lifelong proposition, and there is increased joy in its fulfilment. I believe that Jesus Christ and the Mosaic laws have given to people of Judao-Christian traditions the true basis by which they may have a higher esteem of each other, and in finding that therefore find the greatest and highest esteem for themselves.

Co-Chairman Senator ROEBUCK: Rev. Bullen, would you mind carrying forward a little further what you said with regard to conciliation? You have said that mandatory conciliation is useless. There comes to my mind the old saying that a man convinced against his will is of the same opinion still. Will you tell us what thoughts you have as to what we can do, remembering that we have a divided jurisdiction between the Dominion and the provinces? What can we do in a practical way to improve our conciliatory processes?

Mr. BULLEN: I know of one thing. I know that our Roman Catholic friends have set up in certain communities institutions, which are called by two or three different names. I know that the priests in charge of these have reported singular success, because people facing the dissolution of marriage in its early stages quite often are willing to go to a person of objective and trained talents to discuss their problem with them.

Co-Chairman Senator ROEBUCK: Is there anything we can do to assist in that?

Mr. MANDZIUK: You mean, Mr. Chairman, how we can incorporate this into our recommendations? Is that what you have in mind?

Co-Chairman Senator ROEBUCK: That is what I have in mind.

Mr. MANDZIUK: We are here to listen, not to argue.

Co-Chairman Senator ROEBUCK: You are perfectly right.

Mr. MANDZIUK: That is a good point, sir.

Co-Chairman Senator ROEBUCK: What can we recommend? That is what I am after.

Dr. BAILEY: May I speak to that, Mr. Chairman, going back to what I indicated earlier, that I am against mandatory conciliation. While in Britain this year I took the opportunity to seek out the sponsoring M.P., Mr. Leo Apse, the Member for Pontypool, who brought in the Matrimonial Causes Act, 1963, in which he added the phrase "breakdown of marriage" as an additional ground for divorce. At that time the church leaders in England called this a dangerous principle, but as a result of the passing of that act the Archbishop of Canterbury set up a committee which reported under the phrase "putting asunder", in which they suggested that we should abolish what I have called, and they have

called, matrimonial offences, that we should establish the breakdown of marriages as such completely.

Co-Chairman Senator ROEBUCK: May I ask at that point, have you read the report of the Lord Chancellor?

Dr. BAILEY: Yes; I was just going to refer to that. Sir Leslie Scarman, chairman of the Law Commissioners, said that this would put an impossible load on the over-burdened courts, and Mr. Leo Apse agrees that it would be impossible to supply the counsellors, adjudicators and procedures adequate to cover this phrase "mandatory conciliation", so it would block off almost all divorce if it were mandatory.

In order to make possible conciliation, I have suggested that we should delimit what conciliation is, to some extent, and establish procedures, which I have indicated here in this second addendum, having to do with how marriages should be dealt with under administrative law, and there is a section in that which indicates a method of procedure for dealing with this question; and then of course, more place for civil marriage should be established.

We really have not answered your question as to how we can make adequate procedures more available for conciliation. My only feeling here is that constantly they should be directed, if possible, back to their own clergymen. May I say that we do a good deal of work at conciliation at the present time, and I think reasonably successful work. I can count a number of cases over the years where people have been re-united. I spoke to a couple last night who were exceedingly happy, who had a break down of their marriage, when two children were involved, and they have a third one now.

I think that social workers can do a great deal in this area. I am sure that doctors and lawyers, too, do a great deal of work at conciliation, where people are able to go to them fairly freely and talk out the questions which bother them.

To write it into any act seems exceedingly difficult, except to make possible procedures for conciliation under what I have suggested is administrative law.

Co-Chairman Senator ROEBUCK: We could include a pious hope, I suppose, in our report.

Dr. BAILEY: Yes.

Co-Chairman Senator ROEBUCK: That is about as far as we can get though, I guess. Now the Rev. Bullen is open for any questions on the brief.

Senator BURCHILL: On Sunday night I saw the program "Sunday Night", which has been the cause of quite a lot of controversy in the last couple of weeks, and the statement was then made that every fourth marriage in the United States ended in divorce while every tenth marriage in Canada ended in divorce. I do not know whether those figures are correct or not, but that statement was made on television. Suppose it is correct. We all know that divorce is increasing very much; those of us who have been on this committee have some idea of the increase; there has been a very, very serious increase. When you say we should rationalize the offences that divorce can be procured for, what is your guess—and it can only be a guess—as to the effect on the increase such a change in the law would bring about? A statement was made here lately that there would be a tremendous increase. Do you agree with that?

Dr. BAILEY: We would have to accept the fact that there would be an increase in the incidence of divorce, but I think one must balance against that the ability of people to live as persons outside of the little hell that has been created by the conditions that bring about divorce. I think these people have a right to life and should not be condemned utterly to remain in the hell that is often created by some of these grounds that are set forth for divorce.

Mr. McCLEAVE: You do not think we confuse the fact that the divorce rate only partly reflects the amount of marriage breakdown?

Mr. MANDZIUK: Mr. Chairman, either one of the gentlemen could probably answer this. I was interested in this suggestion that the dissolution of marriage should be permissible under administrative law. Apparently, to hold this recommendation up the costs of divorce proceedings seem to be the basis. I trust that you are aware that the Province of Manitoba has taken a lead, and that both petitioners and respondents who cannot afford to either pursue or defend divorce actions are going to have the costs paid by the province, in consultation with the bar association, and I think that will go through. What I am interested in is, what do you mean by "administrative law"? Taking it out of judicial hands altogether? You apply, you would have a licence and you could have your friends sitting on this commission?

Dr. BAILEY: This is an exceedingly good question. First of all, I think your own E. Russell Hopkins read into the record the fact that it has been recognized over the years that there is one law for the rich and one for the poor when it comes to divorce. In those early days he read the case by Justice Maule, who indicated that it was somewhere about $5,000 in those olden days for divorce. In your own records again, through Mr. John H. McDonald, Q.C., the cost of divorce was assessed at about $1,500 as a minimum in Ontario.

Co-Chairman Senator ROEBUCK: The price was a little bit high.

Mr. MANDZIUK: May I say, not for the record but for your information, in Manitoba the cost of divorce is $500, $600 to $700 at the top. I know the further you go east, those who come to the Senate, it is not the Senate who charge them but the gentlemen of the bar; it is very little, and yet their fees are pretty stiff; I understand that.

Dr. BAILEY: This was an answer to pay by time instead of by money. I am using my experience as a minister. This is the method by which you get married. Is not therefore the reverse of the procedure the method by which you can dissolve the marriage, so long as it is not just mutual consent but the consent of a community, the legal profession and everything else which comes under administrative law? This is exactly the process used to get married. Why not reverse the process to unmarry?

Co-Chairman Senator ROEBUCK: You would not leave it to the preacher, would you?

Dr. BAILEY: Certainly not.

Mr. BULLEN: Mr. Chairman, my colleague being a pastor of a church still, perhaps the problem lies in the fact that they do not charge for marriage. If they paid for marriage maybe they would want to keep it!

Co-Chairman Senator ROEBUCK: We do not charge for dissolution of marriage whenever it comes to our attention that the parties are poor. Time and time again we remit the fees, sometimes down to $10.

Mr. MANDZIUK: I think the Soviets, in the U.S.S.R., had that method to start with. Now they are establishing divorce courts and making divorce more difficult to get than by going to a registrar's office and signing in. You are going to open the door to more dissolutions or divorces if you put this recommendation in.

Dr. BAILEY: This is far from being that, because if it is only by mutual consent—and that is what it was in the example quoted—you just apply for a marriage and you get it, you apply for divorce and you get it. But look at the conditions here.

Mr. MANDZIUK: You do not know whether the application for divorce is going to be contested or not until you file your petition. There is to be mutual agreement that my spouse is not going to contest the thing, so I am going to go to a commission, a bunch of friends, get it out of the courts, lawyers and everything else, and publicly make dissolution a lot easier. That is what I am worried about, sir.

Dr. BAILEY: I do not think it makes it easier. It makes it fairly long, and there are procedures that must be gone through that are set out by law. I do not think it makes it easier.

Mr. MANDZIUK: Would these be legal men, legally trained people?

Dr. BAILEY: Yes, administrative officers of the law.

Co-Chairman Senator ROEBUCK: How would that improve, say, what we are doing here? We have judicial officers who do nothing but hear these cases, and they are skilled in knowing whether it is true or not, and how much is required to prove the very things that you have set out as the grounds upon which we can act.

Mr. MANDZIUK: It would not be half as competent, Mr. Chairman, because the suggestion here is that the marital tribunal could be social worker, clergyman or a lawyer.

Dr. BAILEY: And a lawyer.

Mr. McCLEAVE: It would be much less expensive, would not it?

Dr. BAILEY: Much less expensive.

Mr. McCLEAVE: This is the point you are trying to get at?

Dr. BAILEY: This is the point.

Mr. McCLEAVE: That is why I referred to the fact that we must not confuse divorce rates with the realities of breakdown, of people going off and living with others in a so-called common-law relationship. I think that if we have studied the statistics at all, it will be seen that where legal aid prevails, as it does in certain provinces—I think perhaps in Manitoba, though I am not sure—there has been an increase of over 70 per cent. In the divorce rate, which does not prove that there is more marriage breakdown there; it simply proves that the people did not have the money before that to afford divorce costing anywhere from $500 to $2,000. I think you have put your finger on something. I do not think you have got the right formula for it, but I think you are on the right track.

Dr. BAILEY: I am quite willing to accept this thinking, I hope creative thinking.

Mr. MANDZIUK: I quite understand.

Dr. BAILEY: I am trying to get at a principle here. I am sure that you gentlemen are much more competent than I am; I am a layman in this respect, but I am tremendously concerned about the problems involved and I want to share any interested creative thought.

Mr. MANDZIUK: What you are saying is a pretty broad statement, that it should be a social worker, clergyman, or a practising lawyer who is going to work for nothing.

Co-Chairman Senator ROEBUCK: Mr. Forest, have you got a suggestion or question? You have been very silent so far.

Mr. McCLEAVE: Mr. Chairman, since I started to raise this, could I ask the witness this? I have not thought my way completely through it, but—

Co-Chairman Senator ROEBUCK: Before you do that, do you mind my saying—as I left it too long on another occasion and by the time I had made the announcement some of the members had gone—that we are going to hold a Steering Committee meeting after this is over. Will those members of the Steering Committee please keep their seats when we adjourn.

Mr. MCCLEAVE: The point I was trying to make was that there may be some middle ground where an administrative tribunal has the couple before it, obtains a certain amount of information, and then may decide to send before a judicial tribunal, a judge, one specific issue or two specific issues in the marriage that should be tried, such as the issue whether adultery has in fact been committed or whether a certain amount of maintenance should be paid in the case of dissolution. This is what I am suggesting so that you may be able to cut down the costs drastically, and yet always have the judicial hand where the judicial hand should be imposed.

Dr. BAILEY: Right.

Co-Chairman Senator ROEBUCK: May I ask a question. I see you say on page two:

> both marriage and divorce be withdrawn from the mainly ecclesisatical areas they now occupy, and recognition be given to the secular interests of modern society.

Do you mean that marriage, for instance, is to be taken out of the hands of the ecclesiastical representatives who now control it very largely? What do you mean by this sentence?

Dr. BAILEY: I believe that Christian marriage should be reserved for Christian people, that Jewish marriage should be reserved for Jewish people, and people may elect not to be married, and should move very easily into the civil marriages rather than feeling that there is some social stigma because they are not married in church, when quite often they are not necessarily Christian people involved. I think Christian marriage should be for Christian people, Jewish marriage for Jewish people, Buddhist for Buddhists and so on. We ought not to try to force our Christian rules and regulations upon those who dwell mainly in secular society.

Co-Chairman Senator ROEBUCK: That is to say, we should have secular marriage for those who wish it?

Dr. BAILEY: That is right.

Co-Chairman Senator ROEBUCK: Have we not got that at the present time?

Mr. MANDZIUK: Yes.

Dr. BAILEY: We do have it in point of fact, but so often I think clergymen, churches, are guilty of performing marriages because they feel that they are officers of the law and therefore must do it because someone brings a licence to them. I think this should be moved out into a wider ground.

Co-Chairman Mr. CAMERON (*High Park*): So a magistrate could do it.

Co-Chairman Senator ROEBUCK: Now may I hear from my co-chairman, who has been very silent up to date.

Co-Chairman Mr. CAMERON (*High Park*): Oh, I have a lot of questions, but I am not going to ask them.

Co-Chairman Senator ROEBUCK: Go ahead and ask them, please.

Co-Chairman Mr. CAMERON (*High Park*): No, not now.

Co-Chairman Senator ROEBUCK: Well, it is five o'clock and we must adjourn in the course of the next five or ten minutes.

Mr. McCLEAVE: If the co-chairman is not going to ask any questions I would like to ask one. What, in your experience, has been the effect of the machinery that you have to go through for divorce, where you have to prove your partner guilty of adultery, where you have to bring proof rather than the supposition, under the formula that we use now? What effect has this had on creating the situation you referred to, of very unhappy relationships, with, I presume, a connotation for society in that it is not advantageous? Also, there is the fact that some people have decided to do something about this, and there has been the establishment of, so the Bar Association considers, 500,000 common-law partners, which I presume means 250,000 relationships. What effect have you observed this has created?

Dr. BAILEY: The common-law relationship or the failure to obtain divorce?

Mr. McCLEAVE: You mentioned the failure to obtain divorce and the fact that it is detrimental to society. With regard to the other aspect, where they make their own arrangements, what does the church do about this?

Dr. BAILEY: Where they live in a common law relationship?

Mr. McCLEAVE: Yes.

Dr. BAILEY: We take no official position on this. We do not outlaw them. We feel that their relationship is before God and before men. They accept responsibilities, they are human beings in need of ministration and we take them on their human value, we do not sit in judgment upon their course of conduct.

Mr. McCLEAVE: We are concerned in a legislative sense with the role of society and the relationship that divorce and marriage has to our social structure. This must play quite an important part in that social structure. I am wondering whether from your point of view it had some apparent effect.

Mr. BULLEN: I would like to answer that, Mr. Chairman, if I may. We are hardly competent to answer, simply because when persons live in a common-law relationship they almost invariably withdraw from church groups. If, for example, they have been active in church work in some official capacity, they immediately withdraw from that. I am not sure whether this is out of a sense of personal conscience or out of respect for those with whom they have been working; it could be both.

Co-Chairman Senator ROEBUCK: But it is a good reason why we should do what we can to bring those relationships to an end.

Mr. BULLEN: With the absenting of themselves from church, I think the average minister will call on such people, and perhaps they will discuss their problem frankly. The church exists, not simply for saints, but for people who are striving to be saints, no matter what their marital situation and therefore they would be welcome in the church. Immediately we say that we have to recognize that the church is not simply a self-propagating society in which it is an introverted group. It is anxious to promote its doctrines. The teachings of the New Testament, particularly, call men to repentance and to a change of mind, to a change of behaviour. Consequently, if the church is true to its proclamation, even from the sermons, without any personal interviews, persons who are living in common-law invariably feel themselves faced with a conflict of philosophies and they have to do something about it. If their desire to live in common-law is greater than their respect for the proclamation of the church, then they are going more consistently to withdraw from the church, and this we regret very much.

Mr. PETERS: What does this do about the children as far as the relationship of our religion to the issue of common-law relationship is concerned?

Mr. BULLEN: I know many families in which children are living with parents who are dwelling in common-law. The children find a home within the Sunday school and within mid-week activities until the time when they are able to understand, because of childish gossip, the kind of situation in which their parents are living, and quite often the children are more embarrassed than their parents are and will withdraw from the society where they know that this is not the most desirable form of behaviour. I think this is a lamentable fact, because this is true mental cruelty, this is something which is imposed upon children without their asking, without their being involved in it.

Co-Chairman Senator ROEBUCK: Nor are they responsible in any way.

Mr. BULLEN: They may grow up with a very serious complex in society.

Dr. BAILEY: I wonder if I might relate one incident that has troubled me over the years. A lawyer called me one evening about nine o'clock. He said, "Mr. Bailey, would you marry a couple for me tonight?" I said, "Well, it is a little unusual, but come up and let us see what we can do." They were 73 years of age; they had children and grandchildren, and were bordering on having great grandchildren. Then they told me the story. The man had originally been married to a lady who was mental and had been in the hospital. This couple had established a common-law relationship, which went on, and they produced their children and had grandchildren. The original wife died but the same situation continued. They had been living with this grief all over the years, heartbroken that their children might find out. So at the, if you like, midnight hour almost we performed this quiet little wedding, and I doubt whether the children have ever heard what happened. This, I think, is the true ministration of the church, when we try to correct the situations that society has brought into being.

Co-Chairman Senator ROEBUCK: I can tell the same story in our own laws. Now it is time we adjourned, but I should like to hear from my co-chairman.

Co-Chairman Mr. CAMERON (*High Park*): Mr. Chairman, what I want to do is to thank the Rev. Dr. Bailey and the Rev. Bullen for their appearance here today, for the very interesting brief they have presented, and for the quite obvious concern they have with the subject-matter we are considering. I noted with some degree of pleasure, Dr. Bailey, that you are the pastor of Kingsway Baptist Church, which is in an area very familiar to me. I think we have had a very interesting and beneficial discussion, and on behalf of the committee, through you, Mr. Chairman, I would like to thank both of these very distinguished gentlemen for the presentation today.

First Session—Twenty-seventh Parliament
1966-67

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

No. 12

TUESDAY, JANUARY 31, 1967

Joint Chairmen

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

and

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

WITNESSES:

The Ontario Law Reform Commission: The Honourable James C. McRuer, LL.D., Vice-Chairman. *The National Council of Women of Canada:* Mrs. F. E. Underhill, Chairman of Laws; Mrs. Margaret E. MacLellan, Vice-President.

APPENDICES:

26.—Statement by E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada.
27.—Brief by the National Council of Women of Canada.
28.—Brief by Ray A. Graves, Esq., Saskatoon, Sask.

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

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OTTAWA, 1967

25311—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".

25311—1½

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 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, January 31, 1967.

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

Present: *For the Senate*: The Honourable Senators Roebuck (*Joint Chairman*), Baird, Belisle, Burchill, Fergusson and Gershaw—6.

For the House of Commons: Messrs: Cameron (*High Park*) (*Joint Chairman*), Aiken, Baldwin, Brewin, Cantin, Fairweather, Honey, Mandziuk, McCleave, McQuaid, Otto, Stanbury and Wahn—13.

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

The following Witnesses were heard:

The Ontario Law Reform Commission: The Honourable James C. McRuer, LL.D., Vice-Chairman.

The National Council of Women of Canada: Mrs. F. E. Underhill, Chairman of Laws; Mrs. Margaret E. MacLellan, Vice-President.

Briefs and statement submitted by the following are printed as Appendices:

26. Statement by E. A. Driedger, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada.
27. Brief by the National Council of Women of Canada.
28. Brief by Ray A. Graves, Esq.

At 5.45 p.m. the Committee adjourned until Tuesday next, February 7, 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, January 31, 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: Ladies and gentlemen, we have two really wonderful delegations today, the National Council of Women and the former Chief Justice of the Province of Ontario.

Perhaps the best compliment I could pay to the National Council of Women is one provided me by my own secretary. I was reading their brief and said, "This is a magnificent brief." She answered, "These women of the National Council are no slouches." In the vernacular I think that is perhaps the best compliment I could convey to them.

Our first witness, ladies and gentlemen, is the former Chief Justice of the Province of Ontario, now retired. I may say that the vigorous thought which he evidenced during his many years on the bench has left a permanent mark on the jurisprudence of his province and of Canada at large. So, too, while in private life, his public service and his contribution to the welfare of his fellow citizens is of outstanding merit and lasting benefit.

I must put on the record some of the facts. He was born in Oxford County—I do not mind telling you his age, although I will refrain from doing that when the ladies arrive—on August 23, 1890. He was educated at the University of Toronto and Osgoode Hall Law School.

He was called to the Bar of Ontario in 1914 and created a King's Counsel in 1929. He practised law in the City of Toronto for thirty years until his appointment to the bench. He is a member of the Bars of British Columbia and Alberta. He was a Bencher of the Law Society of Upper Canada from 1936 to 1944 and served as Chairman of the Legal Education Committee. He was Assistant Crown Attorney for the City of Toronto and County of York for several years, from 1921 to 1925, and he resumed practice in that year. He was a lecturer at Osgoode Hall Law School from 1930 to 1935 in criminal procedure. He was appointed to the Court of Appeal of Ontario in 1944, and was made Chief Justice of the High Court of Justice for the Province of Ontario in December, 1945. He retired from that position on June 30, 1964.

He was a member of the royal commission appointed to investigate the penal system of Canada in 1937, and is joint author of the report of that commission. I think all our senators here and probably most of our Members of Parliament will remember that report and its impact upon the people of our country. He has been active in the Canadian Bar Association for many years, and was elected President in August, 1946, for the year 1946-47. He is an honorary member of the American Bar Association. In 1954 he was appointed chairman of a royal commission to study the criminal law relating to criminal sexual psycopaths, and also of a royal commission to enquire into the law of insanity as a defence in criminal cases. He was chairman of the Canadian Corrections Association in 1956-57.

He is the author of *The Evolution of the Judicial Process,* which he published in 1957, which consisted of a series of lectures given by him in 1956 at the University of Saskatchewan. He is also author of *The Trial of Jesus,* published in 1964.

He was honoured by Laval University with the degree of LL.D. in 1947, by the University of Toronto in 1962 and by Osgoode Hall Law School in 1964.

He was appointed by the Government of Ontario on May 21, 1964, as a commissioner under the designation "Inquiry into Civil Rights," and I understand that he is still holding that position and interested in civil rights. In June, 1964, under the Ontario Law Reform Commission Act, 1964, he was appointed a member and Chairman of the Ontario Law Reform Commission, which position he held until July 1, 1966, and from that date he continued as a member and vice-chairman of the commission.

Well, honourable senators and members of the house, that is a very impressive statement which I have read. I may add to it that in his long experience on the bench he has come in contact with the administration of the law of divorce in a way that perhaps most of our witnesses and ourselves have not enjoyed. So I give you the Honourable J. C. McRuer, former Chief Justice of the Province of Ontario.

The Honourable James C. McRuer, former Chief Justice, province of Ontario: Mr. Chairman, honourable senators, honourable members of the House of Commons, ladies and gentlemen, I have not come here today to offer you any advice about what should be the grounds of divorce, but I want to discuss with the committee the problems, as I see them, of procedure and administration, which are very, very important.

I have presided at a great many divorce trials, and I may say that it was not a privilege I enjoyed, to use the chairman's language. It was very frustrating, and I want to bring the committee to a sense of the frustration and the importance of a divorce case, I do not care whether it is a non-contested case or a contested one. The most difficult and frustrating ones are the non-contested cases.

The divorce is the termination of the family unit, it is the break up of the family. Where there are no children, or no dependent children, it does not worry one so very much; the parties have decided to break up and the marriage is at an end; they are mature people, that is their business. But when there are children

there is something happening over their heads and there is no one there to protect them or to protect their interests.

Very often the parents are quarrelling over the children. Coupled with the divorce case you have the claim for custody and the claim for maintenance —maintenance of the children, and very often maybe maintenance of the wife. Too often it seemed to me that the children were pawns on the chessboard. The wife would say, "Well, give me so much maintenance and you can have the children," or the husband would say, "If you don't claim maintenance I'll let you have the children." I have repeatedly had cases before me where there has been no claim for maintenance, the husband going free, making no contribution to the children, with no one to speak on the children's behalf. These are the things that concern me very much in considering what should be the disposition of the difficulties that arise in divorce cases.

You are at once confronted with a constitutional problem. Constitutionally the province is responsible for the law of custody and the law of maintenance, the dominion for the dissolution of a marriage. In Ontario, some years ago I felt so anxious about this situation for the children that I discussed it with the Attorney General, and he accepted my suggestion that the Official Guardian should come into the picture on behalf of the children. We now have a system there—not a very good system, but it is something anyway—so that whenever there is a divorce action and there are dependent children, the Official Guardian must be notified and given a copy of the pleadings. He makes an investigation, which he carries out through the children's aid societies all over the province, and they make a report which goes in the papers and goes to the court. You have this Official Guardian's report, which is in the nature of *prima facie* evidence; anyone who wishes to dispute it may have it disputed, and the person making the report can be asked to come to the court for cross-examination. In all my experience that was never done, that a dispute with regard to the report was filed.

There is another step. According to the present law, jurisdiction in regard to divorce is in the superior courts, in the Supreme Court of Ontario. Jurisdiction in regard to custody may be with the surrogate court, which is the county court judge, the Supreme Court judge, or it may be that a family court judge can make an order for custody. So you have that division of authority over children, and orders for maintenance may be made in the Supreme Court, in the surrogate court or in the family court.

I always felt awfully helpless in deciding a question of custody as a Supreme Court judge. I was very remote. I would go to Welland, and I would probably not be back in Welland again for five, six or seven years. It is the same with other judges. We go on circuit, we go in and hear a case and we feel that we are not at the bottom of it at all, but we make an order for custody. We will say the children are young and you feel the mother is the one to have custody; but the father is a decent chap, he is a school teacher and could be a very good influence on the children, have access to them, take them out at the weekends, take them away skating and skiing, that sort of thing, all the things a father can do that a mother cannot do very well, and you make the order. Then before you are out of town they start quarrelling about it. You try to specify hours, which is so

difficult; you say the father can have the children on Saturday from nine o'clock in the morning until half-past six at night—these kinds of orders that you pull out of the hat, not knowing too much about the exact circumstances of the family; you get it in a casual way.

I will give you an example that I have had which brings home what I mean. I was sitting in Welland and a girl brought an action for divorce. She had married when she was 17, she had four children, and I think she was then about 25. There were three little boys and a little girl. Her husband was a first-class rotter. There was evidence that he was entertaining criminals at the house. What was going on at that house I will never know, but there was a lot of evidence which indicated that it was a hang-out for undesirable people. The little girl and the three little boys had a sort of dormitory in an unfinished attic, the husband had a woman whom he lived with downstairs, and the goings-on there were very unhealthy for children. The poor girl worked in Kresges and had a single room, and you could not make an order for custody there which would be a realistic one; she could not take the children. She said she thought she could manage with the little girl with some help.

There was a division in religion; the husband was a purported Protestant, she was a Catholic, so I sent for the Catholic Children's Aid and the Protestant Children's Aid and asked the officers to come in. They came in and discussed the case with me and I said, "What I am going to do is this. I am going to allow the wife to have the little girl. She cannot do anything for the little boys; I am going to leave them in the custody of the father, but I am going to put a condition to it that the house be inspected once a month by the children's aid societies to see what is going on there, and then they can report to me when I am sitting in Hamilton", as the most convenient place, "in about three months' time." Well, there I was handicapped; the children's aid people could not come to me; but they had made a report when I got to Hamilton. In the meantime the husband had sent all the children off to Nova Scotia. But that was a good thing for them, because the children's aid people followed it up and found they were living with a sister of his in very much better circumstances than they had been living before, and the children's aid people recommended the home.

What I am getting at is this. If you are going to maintain the interest of the children and the wife, if she requires maintenance, the solution of these domestic problems is a continuing solution; the divorce is not the solution by any means, it is only a step to what might be a better circumstance sometimes. I think it is imperative that there should be a concurrent jurisdiction on the county and district courts in Ontario. That is one thing that I think is very necessary, because in a case like the one I mentioned and other uncontested case—most of the cases are uncontested anyway—there may be the question of access by one parent and access being denied, and if you have to go back to a Supreme Court motion in Toronto it will cost you $100 or $150.

I think the county court judge could very well be one, if he is a good county court judge, who would take a bit of interest in the children, and if there is a complaint he can have them come in and iron the thing out. He can say, "Now look, you have to allow these children to go with their father as I ordered", or if

the father is falling down on the maintenance he can say, "Why aren't you paying up?"

It is a social problem. So very often the father, who should be maintaining the children and should be looking after them, just divests himself of the responsibility and then they become a welfare problem. I think an element of supervision is necessary in a great many of the cases. Now, I did that in other cases. I remember one case in which I came to the conclusion that neither of the parties should have custody of the children; they were both really bad characters, so I sent for the children's aid, asked them to come in, which they did. I said, "The father is claiming custody of the children. The order I am going to make is, I will give him custody of the children provided he consents that they be made wards of the children's aid," the children's aid officer said, "I have got good homes I can place those children in right now," and that is what I did.

If you leave the act as it is now, you have the sole jurisdiction in the Supreme Court judge, who must hear the case. You have a Supreme Court judge sitting hearing these non-contested cases, you are taking the whole time of one judge, all his sitting time during a year in Toronto. That is one judge alone hearing non-contested cases, where it is a pure formality: they come in, prove the services, the witness goes in the witness-box and proves the marriage, then they read from an examination for discovery in which the man says, "Yes, I am living with the other woman. I am living with her and I have got two children by her" and so on, decree nisi and off it goes.

Why should the plaintiff in cases of that sort be put to the costs of a Supreme Court trial, which are very considerable, when it should be, I think, disposed of by the county court judge? If county court judges are not good enough to try those kinds of cases I do not know how they are good enough to try people who may be sentenced to gaol for life, and I think it is just about as simple as that.

I would like to see in the first place a dominion act, in that it would be necessary for the dominion legislation to confer concurrent jurisdiction on the superior court and on the county courts as far as Ontario is concerned. When you get to Quebec you do not have county courts, you only have the superior court there. In British Columbia they have been able to do this by provincial legislation. But I doubt very much if that could be done in Ontario, because the majority of the courts hinge around the history of the local judges of the Supreme Court, county court judges who are local judges of the Supreme Court. Mr. Justice Judson's judgement would probably go the whole way and Ontario could do it, but I think it is very dangerous. I think it ought to be done clearly by legislation of the dominion government, because twenty years from now the point might be raised that the divorce was not valid because the court did not have the jurisdiction in a case where inheritance or something of that sort was involved; you have to be very, very sure of your ground.

I think there is an area which the province could probably be allowed to come in. They have their own rules now which govern the procedure, but what I am thinking of is this: could the jurisdiction be delegated to the provinces so that they could make their own procedures for tying the welfare of the children in with the divorce, so that you could have the children as a first charge in being

looked after? They are the ones that I am anxious about, and they are being neglected now; there is no question about that. I presided over many, many cases when I felt that the children were not being sufficiently safeguarded by our procedure and by the jurisdiction that we exercize.

I think, Mr. Chairman, that is all that I want to bring to the attention of the committee.

Co-Chairman Senator ROEBUCK: Might I seek the privilege of asking one or two questions that must be in the minds of all the rest of us here. Custody, maintenance, alimony and that sort of thing are, I think, within provincial legislation, are they not? Perhaps that is the explanation of what they did in British Columbia. But divorce is certainly not, and your suggestion is that we amend the act of 1930 which conferred jurisdiction with regard to the dissolution of marriage and annulment on the courts of Ontario and make it apply *mutatis mutandis* to the other provinces. That is your suggestion, is it?

Hon. Mr. MCRUER: No, I am not concerned about the other provinces at all. I am concerned about Ontario. At the present time it is not a jurisdiction on the courts of Ontario, it is on the Supreme Court of Ontario. I think it should be a jurisdiction that is conferred on the Supreme Court and the country courts of Ontario, concurrent jurisdiction, so that if someone commences an action in the county court which the other party wishes to have tried in the Supreme Court there could be an application to move it into the Supreme Court. That might happen, and they should not be denied their right to be tried in the Supreme Court if they want to be there, but let them have their actions in the county court and get them tried on the county court scale, and not have to wait for six months until the Supreme Court sits there, when if some witness cannot be there at the time it goes for another six months. Those things have actually happened in cases I have presided over.

Co-Chairman Senator ROEBUCK: The question of judicial separation is before us. We are informed that decisions have been given in the Province of Ontario that our act of 1930 did not confer upon the Supreme Court of Ontario the right to try judicial separation, but conferred only the right to try dissolution of marriage and annulment. Have you found any difficulty in that regard?

Hon. Mr. MCRUER: Well, I have not had any difficulty because I have never had anything to do with any case where they even discussed judicial separation, so I have no experience of that, I could not help you at all.

Mr. BREWIN: Perhaps I might preface my remarks by saying that with regard to the Province of Ontario I entirely agree that it would be better if county courts had jurisdiction. I was wondering if Mr. McRuer thought it would be possible for a federal act to provide that, whatever may be the grounds of divorce, the court could refrain from granting the divorce in its own discretion if it were not satisfied that adequate provision had ben made for the custody and maintenance of the children of the marriage.

The details might have been worked out in some provincial law or provincial court, but as far as granting divorce is concerned, could there be any doubt as to the jurisdiction of the Parliament of Canada to say that at least a discretionary condition of granting the divorce is that the children of the

marriage be looked after as well as the circumstances of the parties permit? I doubt if there could be any doubt as to the constitutional right to do so. Is it not inseparable really from the concept of dissolving a marriage that there be some power to make sure that the families are properly look after? They would not be attempting to set out all the details, as to what was done, which might be left to provincial law, but it would at least give the court the right in a defended or undefended case to say to the parties—generally in undefended cases there is the consent of the parties, both wanting a divorce—"Ah yes, but before you get it you have to deal with this question of your children, who is looking after them and how."

Hon. Mr. McRUER: Mr. Brewin, my view is that we should strive for that. Just how it is done within the constitutional limitations I do not know, but I think it is highly desirable that we get the philosophy that this is not just a divorce where there are children; this is a dissolution of a family and you have to look at the whole problem of dissolving the family and seeing that the children are protected.

Mr. BREWIN: I wonder whether I could get your constitutional opinion on this. Marriage and divorce were given by section 91 to the Parliament of Canada, and the historical fact is that the English divorce act of, I think, 1857 was the law of England at that time, and indeed applied I imagine in some parts of Canada. Included in this statute was the right for the court dissolving the marriage to deal with these problems of custody and maintenance. Does it not almost follow that if it is not strictly divorce, it is surely at least ancillary to the jurisdiction of divorce?

Hon. Mr. McRUER: All I can say is that I did not come to give any opinions on constitutional law, but I would be very pleased if that was the case, because I think it is intolerable that the important things are divided by constitutional divisions. I would not be prepared to offer any opinion. You present a very interesting thesis, but I do not know what the answer is.

Mr. BREWIN: I was hoping to get your authority in support of it possibly.

Hon. Mr. McRUER: I think there may be two ways. One is, if there is not the constitutional power, then by agreement with the province you can solve it, either by a delegation to the province to work it out or through some agreed form of complementary legislation. I think it would be a very happy thing if they could get together on an agreed form of complementary legislation, and certainly not leave it so that the family as a unit in the legislative scheme is not considered at all.

Co-Chairman Senator ROEBUCK: May I point out to the members that tomorrow or the next day you will receive copies of an opinion given us by Mr. Driedger, the Deputy Minister of Justice, that those things which are ancillary to divorce are within our jurisdiction. You may remember that Mr. Ollivier told us that for thirty years the dominion parliament dealt with matters of custody, maintenance, alimony and so on in their judgments where they passed bills divorcing people, and after thirty years they just stopped, so far as he knew for no particular reason—we may assume because the courts of the provinces undertook that work. So you will very soon have a good deal of information on that point.

In addition to that, may I advise everybody that the Attorneys General of both Manitoba and Ontario will be before us in due season, towards the end of February.

Are there any other questions?

Mr. McCLEAVE: Mr. McRuer, in Nova Scotia recently, I think by act of the legislature, the county courts outside Halifax, where the Supreme Court justices reside, were given the jurisdiction to try divorce cases, so you may find that the remedy is a legislative one in the province.

Hon. Mr. McRUER: Nova Scotia is under a different situation from the Province of Ontario.

Mr. McCLEAVE: Perhaps that is so because of certain pre-confederation statutes. The question I wanted to ask is not directly related to what you have been talking about this afternoon. We have been introduced to the theory of marriage breakdown in a number of the briefs that have been presented to us, and there has been a suggestion in the study commission by the Archbishop of Canterbury, and I think from other sources as well, that we replace the adversary system of trying the issues in the courts by—I had better not use the word "inquisition" because it might be misunderstood—by an inquest type of system in which marriage breakdown is examined by, say, a committee, not only of judges but social workers as well. It seemed to me that it may open up a real can of worms if we tried to follow that suggestion in the new Canadian law that we hope to have. I wondered if you from your vast experience in dealing with these cases in the courts would like to comment on this suggestion, which I think really derives from the ancient Roman civil law.

Hon. Mr. McRUER: I would approach it in this way. With all the rights that are dissolved upon the dissolution of a marriage there are a great many ramifications. In addition to the fact that the marriage no longer exists and these people are entitled to go their own ways and get married again if they wish, there are property rights, rights of inheritance and many things, so that I cannot see how you could satisfactorily take them out of the judicial system.

You can talk about marriage counsellors and a committee, but I feel that we do not know enough, when we are granting a divorce, about what is really at the bottom of this. After all, there would only be the cases that had to go that way that would go to the courts. I mean by that that there is no chance of reconciliation and so on. A judge from, I think, California, certainly one of the states, spoke to the Canadian Bar Association in British Columbia a few years ago on his method of trying to bring about reconciliations, which he claimed to be quite successful. I do not know enough about it, but I feel that not enough is known when the case gets into court, and that was the reason we had the investigation by the Official Guardian. I would be very loth to take it out of the judicial process, Mr. McCleave. I cannot see my way through that as being an improvement. I think we had better try to improve the judicial process, and I think it can be improved a great deal.

Mr. McCLEAVE: Could I ask a supplementary question to that then, Mr. Chairman? I agree with you, Mr. McRuer, in your assessment of this view of the inquest, but is there a possibility of some ground where triable issues only could

be presented to the judge for his decision, and other matters, say the formal matter of proof of the marriage, if it is not in dispute, could be assessed in some other way, to take a burden off the courts? I am quite positive that if we alter our law we shall throw a tremendous burden on the courts, at least in the initial years until it can be worked out.

Hon. Mr. McRUER: Yes, there might be in non-contested cases some more expeditious way of handling that. But, after all, in experience the proof of the marriage does not usually take five minutes; they have the marriage certificate or the certificate of registration of the marriage. We have now got a very good system of registering. Where you get marriages from other countries and so on it is more difficult. I would hesitate to get any pro forma proof, or say, "Let that go to the registrar" or something like that.

Mr. McCLEAVE: This is what I thought, that several registrars could deal with such issues as marriage, birth dates of children, and factors that might clearly indicate if there was a problem of domicile or not.

Hon. Mr. McRUER: You may have a point there, having in mind that there will be a great increase in the volume of work, they could file all this with the registrar in setting their case down; they would file the proof of marriage and so on, which would be rather procedural, then the registrar could make a report that he has satisfied himself on that, and if anybody questioned that, the report could be available to the parties.

Mr. McCLEAVE: It could be a triable issue.

Co-Chairman Senator ROEBUCK: If we gave the county court concurrent jurisdiction, would not that pretty well take care of the exigency Mr. McCleave is thinking about?

Hon. Mr. McRUER: I think Mr. McCleave has a point. Even in the county court they are busy. I think it is merely procedural and that it would be done by rules; all this would be filed with the registrar beforehand and then they just come up; it would all be in order before it gets to the judge.

Co-Chairman Senator ROEBUCK: That is what happens in this parliamentary divorce of ours.

Mr. AIKEN: My question is almost supplementary to the one Mr. McCleave has been asking. I think he asked whether Mr. McRuer would see any real objection to a system of reference by the Supreme Court judge of individual questions to a county court judge or family court, with particular reference to custody and plans for the children, or the question of marriage breakdown and the possibility of reconciliation, and this could be reported back at the time of the judgment absolute. Would you see any objection to such a reference, in somewhat the same manner as the reference to a master in other civil proceedings?

Hon. Mr. McRUER: I was rather hoping that if the jurisdiction was exercized by the county court judge, who would be the person to whom it would be referred, it could all be worked out by him pretty well. He is generally the master to whom references are made and it would accomplish that in one bite. After all, if you have a reference it is a delay. The Supreme Court judge refers a

case to the master, but he has no control over the master, as to when he will get on with it and when he will get it back. Sometimes these references go on, they make appointments and so on. I would hope it could be dealt with more directly, Mr. Aiken.

Mr. AIKEN: This would apply as well to the family court, would it, the question of custody? Would you think that preferable?

Hon. Mr. MCRUER: I think the county court judge is the best man to handle a custody case, because he can be nearer the people. Family courts do not often handle the question of custody; they do deal with maintenance. I would want to discuss that with people who know a little bit more it, family court judges and so on.

Mr. AIKEN: The reason I raise it is that the family courts do a good deal of work in close cooperation with the children's aid societies, welfare agencies and so forth on a somewhat informal basis, somewhat along the lines of the Official Guardian's report. I think you have answered my question, sir. You feel that it would be better that the whole jurisdiction should go to the county court rather than make it a split effort between an original jurisdiction and a reference?

Hon. Mr. MCRUER: Oh, yes.

Mr. OTTO: Mr. McRuer, I was happy to hear you say that what we are discussing is not only the dissolution of a marriage but the dissolution of a family unit. In your comments about children, I take it you are concerned, not only with the material welfare of the children, but also with the whole problem of psychological adjustment?

Hon. Mr. MCRUER: Oh yes, and that is very important, Mr. Otto, because as long as the family dispute goes on, with these quarrels about access and everything else, it is upsetting the children, it leaves marks on them for life.

Mr. OTTO: From your long experience on the bench could you comment on the likelihood of the children of a divorced marriage being able to form a satisfactory family unit if they were left parted from the divorced parent early in life?

Hon. Mr. MCRUER: You mean the best part of the family unit? I think there are many cases where the parties are divorced and then in a dignified way say, "Now we will work out the best thing for the children", and they are allowed to go on holidays and come back, they work away, they want them to maintain their relationship with the mother and with the father. I think that is to be encouraged very much. But when there is remarriage, that is a different thing.

Mr. OTTO: The reason I ask that is because most of our witnesses and most of the briefs presented have dealt with the parties to the marriage, but we have not had that much on the family unit. I recall reading a report of the Welfare Council, published in about 1953 or 1954, which stated that the children of divorced parents have only one chance in seventeen of forming a successful marriage.

Hon. Mr. MCRUER: You mean after they are married?

Mr. OTTO: Yes. More startling than that, it was stated that if the parents had been divorced and one of the grandparents had been divorced the chances dropped to one in thirty-three. The question I have in mind is whether, given the

identical facts in the case of a marriage, you would recommend a different opinion or different solution to a marriage with children compared to a marriage without children.

Hon. Mr. McRUER: I would say only this, that I could envisage some supervision of the welfare of the children after the marriage has been dissolved, so as to minimize the distress that arises out of it; but I do not think in law you can draw a division very much.

Co-Chairman Senator ROEBUCK: I have not heard at all from our various senators, if they have any questions.

Mr. FAIRWEATHER: If senators have any questions I am delighted that they should be asked, but if not I would say that I am interested in the question of domicile. As one who represents an area in the small Province of New Brunswick, where in a good many cases the husband leaves for Ontario or other parts, it has always seemed to me not only cruel but unjustifiable that the domicile follows the husband, no matter whether the reason is that the marriage—that is the fiction we base on it—had been dissolved in every way but judicially.

Hon. Mr. McRUER: Mr. Fairweather, you have raised a very, very important point. I have had to refuse divorces brought in Ontario because of the domicile of the husband. You enquire, "Well, why did he go there?" He may go to Jamaica. I think one of them went to Nova Scotia. He was in the army; he had been here and he was moved. Then you ask, "Has he abandoned the domicile or is he going to come back, or has he just moved because the army found it convenient to move him? Had he been sent to Ontario just for the convenience of the army?" You refuse the divorce and the poor woman would have to walk down to Nova Scotia to recommence her case.

Mr. McCLEAVE: Our rates are cheaper in Nova Scotia.

Mr. McRUER: They will catch on, do not worry.

Mr. STANBURY: Following along the same line, do you think it reasonable that the requirement of domicile be that the court which will have jurisdiction will be the court in the province where the couple separated? It has been suggested that if at the time of the separation the couple lived in New Brunswick, then the courts of New Brunswick should have jurisdiction to grant dissolution of that marriage, regardless of where the parties lived at the time of the commencement of the action. Do you feel that that is a reasonable solution to the domicile problem?

Hon. Mr. McRUER: I would not feel that that was a real solution of it, Mr. Stanbury. Take, for example, a woman from Ontario who marries in Ontario, the couple go to New Brunswick to live, they cannot get along and she has to go back to her parents in Ontario.

Co-Chairman Senator ROEBUCK: Or British Columbia.

Hon. Mr. McRUER: Or British Columbia. The only way she could get a divorce would be to go back to New Brunswick. I think there has to be a better solution than this. It may be that they separated in London, England.

Mr. STANBURY: Your preference then would be that the court in the jurisdiction where the wife has her present domicile should have jurisdiction?

Hon. Mr. McRUER: I think it can be dealt with on residence.

Co-Chairman Senator ROEBUCK: Sure.

Mr. McCLEAVE: Yes.

Hon. Mr. McRUER: Just leave this domicile question out of it, because domicile is a tricky thing, and a very important thing, since you get into other aspects of domicile. I would think it could be dealt with on residence.

Mr. STANBURY: I am encouraged by that. You are suggesting that the residence of either the husband or the wife could establish the jurisdiction of the courts in that way?

Hon. Mr. McRUER: I would think so. You see, we ran into this difficulty with the war brides; Canadian soldiers married girls in England, came back here and there were a lot of difficulties that arose. It may be that the court would have to have some discretion, I do not know. But I think you have got to break this knot of domicile anyway, because too much hardship arises out of it.

Senator FERGUSSON: I understand the point the witness makes regarding residence being the easier way of handling this matter, but is there any reason why a woman, whether she is married or not, cannot establish her own domicile in the same way as a man can whether he is married or not?

Hon. Mr. McRUER: You bring up a question on which probably the dominion has not jurisdiction generally. I may say that the Law Reform Commission is at present engaged in a very exhaustive study in Ontario of family law, and they will be coming out with some discussion of the matter of domicile, as to the right of a woman to establish her own domicile and so on.

Senator FERGUSSON: There are some very distinguished people who disagree on whether the federal or provincial government legislature has the right to deal with this matter; I mean, it is not absolutely decided.

Hon. Mr. McRUER: No.

Co-Chairman Senator ROEBUCK: We have already done so, have we not?

Hon. Mr. McRUER: I think for some aspects certainly the province could deal with domicile, on wills and things of that sort.

Co-Chairman Senator ROEBUCK: Now we must draw to a close. Mr. Baldwin intimated that he had a question, and I think we will have to say that is the last. I want to hear from my co-chairman before we adjourn this portion of our afternoon's work.

Mr. BALDWIN: I would like to finish up on this question of domicile by asking Mr. McRuer if it would be feasible at all, having in mind what might be in the brief from Mr. Driedger which the senator told us about, to consider whether a national domicile rather than a provincial domicile might not be the answer?

Hon. Mr. McRUER: I think that would require a lot of examination if you are going to have it for all purposes, because domicile comes up with respect to capacity to enter into a contract, it comes up with wills and it comes up with status, as to whether children are legitimate or illegitimate. There are so many different aspects of it that I would certainly not be competent even to give an opinion on it.

Mr. BALDWIN: Might I ask one more question?

Co-Chairman Senator ROEBUCK: Go ahead, Mr. Baldwin.

Mr. BALDWIN: Having in mind Mr. McRuer's vast experience, drawing upon it as a jurist, would he like to venture an opinion on a collateral issue, namely the necessity which presently exists in many jurisdictions of the effects of having to negative condonation, collusion and connivance? In your view, Mr. McRuer, do you think that these add materially? Are they an essential part of the process of dissolution of marriage?

Hon. Mr. MCRUER: I will tell you, Mr. Baldwin, in trying the cases I always thought they were sort of pro forma questions; you knew there was nearly always collusion, unless the case was defended, and a great deal of connivance. There are ways of colluding, and I will tell you a story, if I may.

Co-Chairman Senator ROEBUCK: Go ahead.

Hon. Mr. MCRUER: We had a very colourful character before our bar at one time by the name of George Walsh who handled a lot of matrimonial cases. A wife and husband had come into his office, told him the facts and so on, and then the husband pulled some money out of his pocket to pay the fee. Mr. Walsh said, "Oh no, I cannot take that. That would be collusion. Go away." Next day the wife came in with the money, so that was not collusion. He told that story himself.

Mr. OTTO: I wonder if I might put a very short question on this very matter?

Co-Chairman Senator ROEBUCK: That will be the last question then.

Mr. OTTO: Mr. McRuer, we heard evidence from an experienced English barrister to the effect that even although the law of England since 1947 has allowed divorce on many grounds, today about 90 per cent are granted on the ground of adultery, even though it is a fact that there was not adultery. Taking into consideration the proof the courts would have to have and the length of time it would take to decide a case on cruelty, alcoholism and all these other grounds, and the very brief time it takes to decide it on the ground of adultery, do you think there would be substantially less collusion if a new law were passed, or do you think most of the divorces would still be on the ground of adultery, even though we may suspect no adultery was committed?

Hon. Mr. MCRUER: Well, I do not know, I am sure. In my latter years on the bench I had very few of these motel or bedroom cases; in most of the cases they had been living together for three or four years. It may be that they did not choose to bring suspicious cases before me but waited for another judge! If the marriage has broken up and there has been cruelty, separation and so on, you might as well terminate it in as dignified a way as possible, I think, and not drive them to the bedroom. It seems to me that this idea of an offence is repulsive now. It would get away from the matrimonial offence, the old ecclesiastical idea of a matrimonial offence, and get to a dissolution of the marriage. It is better psychology and better for the children.

Co-Chairman Senator ROEBUCK: I would like to state for the record that our statistics show that more than 50 per cent of the cases tried in these parliamentary divorces are common-law propositions, where they are living together as man and wife, although without the benefit of clergy, and that when you examine it carefully there are not more than 5 per cent of the cases where any

substantial suspicion might exist as to that kind of collusion. I say that because I think it is due to our courts not to over-estimate or exaggerate the fraud that goes on, to some extent of course, in these divorce trials.

Now I would like to hear from my co-chairman, Mr. Cameron.

Co-Chairman Mr. CAMERON: Mr. Chairman and members of the committee, it is my pleasure and honour to extend, through you, Mr. Chairman, our thanks to Mr. McRuer for appearing here today and giving us the benefit of the many years he spent as Chief Justice of the Supreme Court of Ontario.

He is very, very interested in the problems that we are dealing with. He comes here as a volunteer witness because he believes sincerely in the ideas and thinking that he has accumulated over the years, with particular reference, of course, to the concurrent jurisdiction of the county courts, the care, custody and maintenance of the children.

I am sure we will all benefit very much from what he has told us and from his experience, and on behalf of the committee, through you, Mr. Chairman, I would like to thank Mr. McRuer most sincerely for being here with us today.

Co-Chairman Senator ROEBUCK: We have another delegation, as I have already intimated, from a very important institution in our country, the National Council of Women. We have before us two members who are representative of that association, and in view of the type of presentation which they propose to make—they are making it as a team—may I take the liberty of introducing them both at once.

First I would like to introduce Mrs. Underhill, Beth Lorraine Rowlin Underhill. She is Chairman of the Laws Committee of the National Council of Women. She comes from London, Ontario, and she is a third generation Canadian. I welcome her on that ground alone; I am a fourth generation Canadian. She is a member of the First St. Andrews United Church in London, Ontario.

She was educated at Havergal College, Jarvis Street, Toronto—so was my wife—Loretto Abbey, University College and Osgoode Hall in 1937, and called to the Bar of the Province of Ontario on September 19, 1940.

She was married to Mr. Frederick E. Underhill on July 24, 1937, and they have five children, which I think is important.

She is a partner with her husband in the law firm of Underhill & Underhill of London. She is a member of the Middlesex Bar Association, the Canadian Bar Association, the Ontario Women's Law Association and the London Women's Lawyers Association.

There was a time when the profession of the law was a special preserve of the male of the species and of the well-to-do. That time is fortunately passed and today we lawyers are pleased to learn from our sisters at the bar.

There are many associations to which she belongs, but the three that I think are worth mentioning are: the London Council of Women, in which she is Chairman of Laws; the Ontario Provincial Council of Women, and the National Council of Women of Canada, in which she is also Chairman of Laws.

The other lady whom I would like to introduce is Miss Margaret E. MacLellan. She holds a B.A. Honours Degree in Philosophy, English and History from the University of Toronto. She is a former combines investigation officer in the Federal Department of Justice at Ottawa.

She is Vice President of the National Council of Women of Canada, being elected in June, 1964; a representative of the Joint Planning Committee C.A.A.E.; alternative representative to the Technical and Vocational Training National Advisory Committee, Department of Manpower; Immediate Past President of the Canadian Federation of University Women, having served on the national executive continuously since 1950; a member of the Nominating Committee for the 1966-67 triennium; a member of the International Committee of the Legal and Economic Status of Women of the International Federation of University Women, elected in 1959; a member of the Canadian delegation to the Third Commonwealth Conference on Education, held in Ottawa in 1964; a member of the Women's Advisory Committee to the Canadian Highways Safety Council; member of the Women's Advisory Committee of Expo-67; member of the Committee for the Equality of Women in Canada—we are interested in that; actively interested in the corrections field; a founding member, 1951, and later President, of the Elizabeth Fry Society of Ottawa, now serving on the board of directors and Chairman of the Research and Public Action Committee of the Elizabeth Fry Society at Ottawa; former Chairman of the Ontario Council of Elizabeth Fry Societies; member of the National Excutive Committee of the Canadian Corrections Association, 1961-64; accredited representative of the International Federation of University Women to the second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in London, England, in August, 1960; she attended the International Criminological Conference at The Hague in 1960 and Montreal in 1965; she has visited women's prisons in Canada, the United States and Europe.

I think I may say, as I said before, we have before us on this occasion two very experienced women, and we will listen with a very great deal of interest to what they have to tell us.

Senator FERGUSSON: Mr. Chairman, may I suggest that even before the witnesses speak to their brief they might give the committee some idea of the number of women the National Council of Women represents?

Co-Chairman Senator ROEBUCK: Yes. Mrs. Underhill, will you answer that question?

Mrs. F. E. Underhill, Chairman, Laws Committee, National Council of Women of Canada: Thank you, Mr. Chairman and members of the committee. The National Cuoncil of Women is, in effect, the forum of women throughout Canada, established 74 years ago by Lady Aberdeen. There are 55 local councils of women and seven provincial councils of women, as well as 20 nationally federated organizations. The Council of Women comprises in excess of 700,000 women and persons.

The appendix at the back of the brief details the list of organizations comprising the Council of Women.

The purpose of the Council of Women basically is, very broadly, the betterment of our Canadian way of life. Our chairmen prepare briefs which are studied throughout Canada, comments are made upon them and public opinion is so formed. It is as a result of this public opinion that the resolutions are formed and brought to the local, provincial and federal level.

The council is deeply concerned with the environment of every citizen in order that equal opportunity be provided for his education and his economic and social development. We are deeply concerned about the laws of divorce, and have been for some time. Is not that right?

Miss Margaret E. MacLellan, Vice President, national Council of Women of Canada: That is certainly true. May I just add a little footnote to the history? Our distinguished founder of the National Council of Women of Canada, Lady Aberdeen, was instrumental in organizing, not only the National Council of Women of Canada but the International Council of Women. I happened to be down in the archives a few weeks ago going through some papers of the council when I came across a letter written by Lady Aberdeen, in which she said that she was studying a resolution concerning divorce, which dealt particularly with the question of domicile and the effects upon children. She had referred it to a judge and lawyer, and she was deeply concerned about it. The date of that letter was April 30, 1895. So you can see that the National Council of Women of Canada has been interested in the question of divorce over a long period of years. As a matter of fact, there has been very little change in our divorce laws for over 100 years in Canada, as you are well aware by this time.

Mrs. UNDERHILL: I might add that for the last ten years a study has been made throughout Canada, through the more than 1,400 groups, on the various aspects of divorce, and we have come to some conclusions. Basically they are these. Our present divorce laws encourage perjury; they foster common-law relationships; they cause untold suffering to children, to society, and unnecessary expense to women and to your pockets, the public purse. Our divorce laws do not recognize the dignity of women, and they are not in the public interest. Our divorce laws are unjust, they are antiquated and, what is much more important, they are not worthy of our Canada.

Basically it would seem most logical if there are grounds for divorce the reasons for divorce should be the same. Well, they are not. The ground for divorce in most of our provinces, as you know, is adultery, and the reason for divorce is the breakdown of marriage. This can be aggravated by lack of communication between the husband and wife, cruelty, incompatibility, alcohol, money arguments, sex practices, and we are at a loss to understand why in a young country our government is not completely honest and does not recognize the fact that the grounds for divorce that it provides have little, if anything whatsoever, to do with the true basic reason of the breakdown of a marriage.

Miss MACLELLAN: I think that points up tht reason why there is a very great need for more research into the whole problem, so that we can establish bases on which the question of whether or not there has been a complete marriage breakdown may be determined.

Mrs. UNDERHILL: We feel very strongly that many aspects that go into the breakdown of marriage should be studied. It is in the public interest that the sanctity and importance of marriage be maintained and that it be protected. Our society revolves round it, but if a marriage is dead—and there is nother more dead than a dead marriage, except perhaps a dead romance—then certainly it should be terminated.

In order to terminate a marriage today, as you know, many resort to perpury. Surely a law that encourages perjury—which means lack of respect for the law, which can be again engendered in our children, because they are not blind—is not good legislation. We ought to do away with our present form of legislation.

Miss MACLELLAN: We are now dealing with paragraph 9, on page 2 of our brief, where we discuss the question of the economic aspects of divorce. As we say, a law is unjust when the wealthy can afford the relief offered by legislation and the poor cannot. To be specific, the cost of divorce is beyond the purse of many persons who have the grounds for divorce. As a consequence, the lack of money required to institute the legal process to obtain a divorce has caused many couples to live common-law. The cost of divorce, we maintain, should be within the reach of all seeking divorce; however, to accomplish this there is a possibility that a new divorce court structure will have to be initiated. Our conclusion there is that surely release from a dead marriage should be available to all regardless of their purse.

Mrs. UNDERHILL: If I may comment on that, speaking not as an expert but possibly somebody who reads the divorce bible *Power,* in 1858 the Matrimonial Causes Act was passed, which was well before the enactment of the British North America Act, but at that time divorce in its every aspect was in the department of the federal government, and certain aspects of divorce now are in the area of the federal government.

That being so, the federal government has done very little over the last hundred years to make changes. However, it is in their power, and were the federal government to amend or legislate on divorce jurisdiction—as in the bankruptcy act in which they have set up bankruptcy courts—why could not the federal government have divorce courts arising out of their own legislation? I am well aware of the fact that this is very contrary to what we have at the present moment, but if it can be done with bankruptcy courts why cannot we do the same in the area of divorce? I submit that it is well worth some consideration.

Miss MACLELLAN: We are now commenting on paragraphs 10, 11 and 12, on page 3, where we deal with the question of common-law marriage and the effect it has upon the children, because, after all, it is the children who suffer. More important, living in common-law engenders lack of respect for the law and the marriage state. Our conclusion there is that surely legislation which belittles respect for the marriage state and the law requires amending.

The combined effect upon children of an unhappy marriage and unjust and antiquated divorce legislation cannot be denied. The psychological effect upon the child caused by the impact of quarrelling, lack of communication, insecurity, inability on the part of the parents to obtain a divorce and living common-law shows itself in failing marks at school, need for more child psychologists, emotionally disturbed child centres, increased staff for child protection agencies, detention homes and juvenile courts, as well as untold heart-break. This in turn is reflected in increased cost to the taxpayers, who must pay for these added facilities. Society as a whole suffers because our moral standards have slipped.

Surely it is in the public interest to amend a law which causes undue suffering to children, unnecessary burdens on the taxpayer and resultant moral decline.

In paragraph 12 we do deal with the question of domicile, but since we deal more specifically with it in our recommendations I will pass over that for the time being and just take a look at our conclusion on page 4. Surely a law that encourages perjury, fosters common-law relationships, causes untold suffering to children, to society, unnecessary expense to women and to the public purse and does not recognise the dignity of women, is not in the public interest. Such a law is unjust, antiquated and not worthy of Canada.

Mrs. UNDERHILL: We some recommendations which are the result of study. The first recommendation is that we regret that due to the structure of the British North America Act it is impossible to have unanimity on every area of marriage and divorce.

One of the matters of concern is the age at which a person is allowed to marry. There are two types of medicine, preventive medicine and curative medicine. Now, divorce is not a disease; it is a symptom of a disease, and we can prevent a divorce if we start at the other end of it and have mature young people marry. Marriage is not for immature persons. As you know, every province has a different age at which they allow young people to marry with and without the consent of their parents. It is our submission that a the next provincial-federal meeting the subject of the age at which young people be allowed to marry should be brought up and discussed; not only that, but that some conclusion be reached, which we hope would be the same age.

The Council of Women put in the age of 21 years. We submit that the minimum age for marriage without consent of parent should be 21. Perhaps you would look around at some of our young people. As a mother of five I can tell you what the moods of the 16s are. The 18 year-old is pretty well all wilderness, the 19 year-old falls in love several times, the 21 year-old is beginning to get her head screwed on; by the time they are 24 they are mature and see our point of view as well as their own.

Marriage is a contract that extends to the next generation; it is not for children, and accordingly this very unrealistic figure, which many people will say is old-fashioned and ridiculous, we have put in because it is a talking point. If we had put in 18 years of age people would have said, "Oh yes, that is very interesting" and not gotten round to it. But in a provincial-federal discussion, with a recommendation of 21 years of age they will seriously consider the fact of maturity, and perhaps set a younger age, but it is our submission that across Canada there should be an age set for marriage at which people are mature.

Miss MACLELLAN: If I could just add a comment concerning the minimum age for marriage with the consent of the parents, to us the fact that child marriage is condoned in Canada in several of the provinces is a shocking state of affairs. As you probably know, in five provinces in Canada the minimum age for marriage for a girl, even without proof of pregnancy, is 12. Now, no mother, and I think no father, can really believe that a child of 12 is mature enough to take on all the responsibilities of marriage. Surely there is a better solution than that.

I am digressing a bit, but I think this point is important. This is another factor which prevents Canada from signing and ratifying the United Nations

convention on the minimum age of marriage, age of consent and registration. We would, therefore, particularly like to see the minimum age of marriage made uniform throughout all the provinces. I think this question has been referred to the Committee on Uniformity of Legislation. This in itself would go a long way to eliminate the causes that lead to divorce, because it is a well known fact that a great proportion of teenage marriages end fairly quickly in divorce. This, Mr. Chairman, is a factor that we would particularly want to stress.

Co-Chairman Senator ROEBUCK: Have you any statistics in connection with it?

Miss MACLELLAN: I have seen statistics but I have not any here to quote, and having formerly been a statistician I do not like to do any guesswork on it.

Mrs. UNDERHILL: We are of the opinion that we need some preventive medicine on the subject of divorce, and this is one area where we can start.

Miss MACLELLAN: On page 5, in paragraph 15 we point out that the present law of domicile as it pertains to divorce causes hardship, expense and loss of dignity. You will be familiar with the definition of domicile as spelled out in paragraph 16.

In paragraph 17 we draw your attention to the Divorce Jurisdiction Act, RSC, 1952, Chapter 54, which states:

> A woman who has been deserted by and has been living apart from her husband for a period of two years and is still living apart from him may sue her husband for divorce in the province of their matrimonial domicile.

The hardship caused by this has been dealt with earlier this afternoon, and it was a very fitting prelude to our recommendation (a) in paragraph 18. We recommend:

> Amendment to the Divorce Jurisdiction Act to allow petition for divorce to be filed in the province in which the husband and wife were resident at the time of their separation rather than filing the writ in the place where the husband is domiciled.

We point out that this recommendation would require only a very slight amendment to the Divorce Jurisdiction Act, and it would alleviate the present unsatisfactory situation. It is not a solution; it is merely a stop-gap.

Co-Chairman Senator ROEBUCK: May I ask here, would it not be better to give to the wife the same rights as are possessed by the husband, rather than making her go to where the separation took place although she may reside many, many miles away from there?

Miss MACLELLAN: We agree with you, and Mrs. Underhill is going to deal with that point.

Mrs. UNDERHILL: We concur completely. We do think a little bit of surgery is necessary. This was a stop-gap. We concur with your conclusion. We believe, sir, that every person ought to have their own domicile.

As you know, in 1961, before the Uniformity of Legislation Committee, the matter of domicile was discussed and agreement was reached. In that agreement it was stated that every person should have their own domicile—and, of course, a woman is a person. Presupposing a woman did have her own domicile, then she could sue for divorce in the place where she was.

Co-Chairman Senator ROEBUCK: You are referring to domicile for divorce purposes, are you not?

Mrs. UNDERHILL: Yes, I am.

Co-Chairman Senator ROEBUCK: We have no jurisdiction beyond divorce. We could not give domicile, or even recommend it as far as this committee is concerned, for all purposes.

Mrs. UNDERHILL: This is for divorce purposes. We would also like a recommendation from you that the model draft uniform domicile act be reconsidered.

Co-Chairman Senator ROEBUCK: Your model draft?

Mrs. UNDERHILL: No, not our model draft.

Miss MACLELLAN: The model draft proposed by the Commission on Uniformity of Legislation.

Mrs. UNDERHILL: The 43rd Council in 1961. They produced this draft, that every person would have their own domicile, the domicile of a person would be that of their province. We would like two things. First, as far as divorce is concerned we would like a woman to have equal rights with her husband with respect to domicile; secondly, we would like the committee to recommend that tis matter be discussed at the federal-provincial conference.

Senator FERGUSSON: Mr. Chairman, may I ask if the witnesses have a copy of that draft?

Mrs. UNDERHILL: Yes, I have it with me.

Senator FERGUSSON: Could you distribute it?

Mrs. UNDERHILL: I have not got copies to distribute, but I have a copy of it with me.

Co-Chairman Senator ROEBUCK: We can put it in the record.

Senator FERGUSSON: As a matter of fact, I have plenty of copies to distribute if you would like to have them, although they are a little marked.

Mrs. UNDERHILL: I have a copy.

Co-Chairman Senator ROEBUCK: It will go in the record.

Mrs. UNDERHILL: The grounds for divorce in Canada recognize only the physical aspect of marriage and completely distort the sexual relationship by making it a basis of divorce. It seems to us that marriage is basically the complete union of a man and a woman intellectually, emotionally and physically, so that they are stronger together as a unit than either one of them is alone. Surely this is much more than a sexual matter. It involves the intellect, it involves the mind, it involves activities.

The ground of adultery for divorce completely degrades a marriage. There are many reasons for marriage breakdown. It would be dreadful to be married to somebody who was unclean, uncouth, cruel, insane, who had deserted you and you had no idea where he was, and yet there is no adultery and so you have a marriage.

Accordingly, we would like our governement, first to recognize the reasons for a marriage and from those reasons devise grounds for divorce. Usually, if you want to achieve anything you put a nail on the wall to hang your hat on, and the National Council of Women has made some suggestions regarding the amendment of our divorce laws.

Miss MACLELLAN: The amendment that we submit for your consideration is a resolution adopted at the annual meeting of the Council of Women in June, 1966. You will find it at the bottom of page 7. Our recommendation is that:

> The Government of Canada amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty, and desertion as well as adultery, these amendments to be accepted by each province at its own option.

The amendment of the Matrimonial Causes Act, which is a federal statute, includes grounds of divorce. As we have pointed out in paragraph 21, while some of the provinces will not entertain any amendment to the present grounds for divorce within its borders, we would hope that in time there could be uniformity of divorce legislation throughout Canada, and that any changes made in the legislation could be acceptable to each province at its own option.

Co-Chairman Senator ROEBUCK: That is what you would like?

Miss MACLELLAN: Yes, that is what we would like. We submit that this amendment of the Matrimonial Causes Act Act would be a simple and effective way of putting into effect these amendments that we propose, which is the recommendation that we make.

Mrs. UNDERHILL: As far as that recommendation is concerned, we thought very seriously about which statute could be amended and which would be acceptable. The federal government could draw up a statute, as it did in 1952.

Co-Chairman Senator ROEBUCK: The Divorce Jurisdiction Act?

Mrs. UNDERHILL: The Divorce Jurisdiction Act. However, if this old statute, which was strictly federal, were amended, then we would be dealing with that alone, we could put in the option clause, which they could take or not. In other words, it would be a federal—

Co-Chairman Senator ROEBUCK: We are going to accept what responsibility we have. I cannot speak for all the other members of my committee, of course, but we are not going to take any half-way measures. I think I can say that on behalf of the committee.

Mr. MCCLEAVE: Hear, hear.

Mrs. UNDERHILL: Good, good.

Co-Chairman Senator ROEBUCK: We will have the courage to take what steps ought to be taken on our own, with our courage in our hands.

Mr. MCCLEAVE: And maybe our lives! May we ask questions now?

Mrs. UNDERHILL: Please do.

Co-Chairman Senator ROEBUCK: The brief is finished.

Mr. MCCLEAVE: I have three questions. I see that the theme of provincial option runs through quite a number of the resolutions in your addendum. Presumably the addendum will be printed as part of the proceedings, as an appendix.

Co-Chairman Senator ROEBUCK: Yes, certainly.

Mr. MCCLEAVE: Was this because of difficulty from any particular delegation at your National Council meetings? That is, did the group from one province say that they would prefer to have it on a provincial option basis rather than have one law covering all Canadians?

Mrs. UNDERHILL: We have no council in Quebec, but we do have the Montreal Council, which makes presentations to the Quebec Government. They are very aware of the influence of thinking in that province, and we were of the opinion, because they are wilful and strong, that it was virtually impossible to get a resolution through our National Council without the option in it, which would allow some province to opt out if it so wished.

Mr. MCCLEAVE: The thought just struck me, Mrs. Underhill, that there may be a great deal of juggling around and a new field of perjury opened up in connection with the law of domicile if they found they could not get a divorce in one province and had to invent a residence or the like in another province to bring an action. This is one of the great difficulties I see in breaking it down province by province.

Mrs. UNDERHILL: May I counter that, sir, if I may?

Mr. MCCLEAVE: Yes, certainly.

Mrs. UNDERHILL: I entirely concur that there may be perjury. On the other hand, I firmly believe that we are all, men, women and children, Canadian persons and are entitled to our own domicile. The domicile of origin—I am digressing but I will come right back to it—can work hardship in many cases, and I think it preferable that each person has his own domicile. I do not mean take a chance on perjury. Let us not. On the other hand, that might happen to be a by-product.

Mr. MCCLEAVE: Would you extend this concept of domicile to the English war bride or to somebody who has come to Canada from abroad? If your recommendation were taken at its full face value their domicile would be England, France, Italy or some other country, not necessarily Canada.

Mrs. UNDERHILL: In our family, our son Frank married an Israeli girl, a Yemeni girl. Speaking quite frankly, she is an individual and a person. Presupposing she left my son and returned home, I think she would be entitled to her own domicile. She is a person; they are equal people. Yes.

Mr. MCCLEAVE: You mean she would be entitled to launch the action in some other land?

Mrs. UNDERHILL: I am not quite up on Israeli law. I was trying to equate it with something in my own family. Yes, I think that would be my thought.

Mr. MCCLEAVE: My other question is this. You have suggested three extra grounds in your brief, and no doubt these have all been discussed by your National Council. Other grounds have been suggested to us besides those specifically mentioned by your council, such as drunkenness, drug addiction and criminality. You do not object to these other grounds, or would you say that those you mention are the only extra three that should be considered?

Mrs. UNDERHILL: These are the three extras that have been passed on by resolution of our council, and accordingly we are presently bound by those. I am certain that that would not be the feeling of the individual council women, because the breakdown of marriage can be caused by many irritating habits; you can spread that very broadly.

Miss MACLELLAN: If I could add to that, I would think that is negative thinking, or it would be negative thinking on the part of our members if any of us objected strongly to the widening of those grounds. These are just specified ones that met with approval when this was drafted. By the time it gets up to the

National Council it has been down to the local councils for probably a year or more and I would say our thinking has broadened in the meantime.

I think I can speak, certainly for myself and Mrs. Underhill, and probably for the majority of our members, in saying that the complete marriage breakdown seems a reasonable overall umbrella, if you like, and that that should be the basic criterion for divorce. But these matrimonial offences, spelled out with whatever degree of detail you would want—although I hope they would not be too many or too limiting—in any revised legislation could be, and may very well be, contributing causes to the complete breakdown, either individually or a combination of them.

Mr. McCLEAVE: Put another way then, you did not consider those grounds and reject them?

Mrs. UNDERHILL: No.

Miss MACLELLAN: No, they were not considered.

Mr. OTTO: Mr. Chairman, ladies, I put it to you that practically speaking we now have divorce with consent of both parties. That is to say, although the grounds for divorce are adultery, I think any practising solicitor will tell you that it is almost impossible to get a divorce on those grounds on circumstantial evidence if the case is well defended. In the case you mentioned, of a common-law relationship, surely the other party knows that the spouse is living in common-law, but there is no action to dissolve the marriage, so there are other reasons.

What I am saying is that for all practical purposes today, not necessarily with collusion—because if Dr. Kinsey is right just about every North American male and female has grounds for divorce, if admitted—what you really have to do is divorce with more or less mutual consent. I think your suggestion was—and do not think for a moment that I am not in favour of reform; I am in favour of great reform in this respect—that in the case where the marriage has broken up one of the parties should be entitled to get a divorce more or less on the ground that they are no longer married.

Co-Chairman Senator ROEBUCK: *De facto.*

Mr. OTTO: Or are you suggesting that the divorce be limited? Upon evidence of other than criminality, which is self-evident, say alcoholism or cruelty and so on you would have a great deal of expense, just as much expense as in other cases, and the burden of proving it by evidence would be just as difficult if defended. In your remarks about the bankruptcy court are you suggesting a sort of administrative process by which one party can unilaterally present certain facts and say, "On this basis I am entitled to a divorce without proof"?

Mrs. UNDERHILL: First, my thought is to have a divorce court set-up as opposed to the procedure now. Divorces can clutter up the courts. For example, in London there were fifty on the list at the last assizes. There is a sufficient volume of them that it might be advisable and expeditious, as well as more efficient, to put them into a court of their own and let the Supreme Court judges get on with the business that their ability fits them for. That is the first reason.

Secondly, let us come down to the point of divorce by consent. I think you made a statement about every couple and I too will make a statement about every couple. I have never known a marriage that was born in heaven. You can

get married, and I know that it takes three or five years to get a workable combination. In other words, you work towards unanimity; it does not come, it is mutual understanding.

Mr. OTTO: I have no argument with that. In fact, you have made a very pertinent point.

Mrs. UNDERHILL: Bearing that in mind, if you have, as you put it, divorce by consent, there will be those who are not willing to push through the initial barriers, although admittedly sometimes the initial barriers cannot be pushed through. If the couple have not made a genuine effort, they should not be divorced. Therefore there must be some other criterion than the fact that they both say, "Come on, we've had enough of this."

Mr. OTTO: In other words, unilaterally one should be able to say this rather than mutual consent?

Miss MACLELLAN: It should not require mutual consent? Is that what you are suggesting?

Mr. OTTO: I am saying that at present, to obtain a divorce on the grounds of adultery one party says to the other, "Let's get a divorce. I'll provide you with the grounds." This is mutual consent.

Miss MACLELLAN: Yes, and that is bringing in the element of a guilty party too.

Mr. OTTO: Yes. Let us say it was a case of cruelty. The easiest way would be for one party to say, "Let's get divorced. I will give you grounds of cruelty." But if one party does not agree, then he or she will defend cruelty, which will become common-law equity, which will be very difficult to prove.

Mrs. UNDERHILL: We would certainly preserve the plaintiff-defendant system.

Mr. OTTO: You are just changing the technique of getting divorce rather than the substance of it?

Mrs. UNDERHILL: I would think you change the technique, but I am not too sure. Again, one should not speak unless one is certain. There comes a point when both parties are of the opinion that a marriage is completely unworkable, in which case perhaps the marriage should be open to scrutiny too.

You have the world to work with and a world of ideas submitted by other people. I know it must be unilateral. There are some cases in which divorce by consent is worthy of consideration after scrutiny.

Co-Chairman Senator ROEBUCK: Are there any other questions?

Mr. OTTO: Mr. Chairman, I had not quite finished, because this is a very profound subject that the ladies have mentioned. I believe you said that marriage was a contract, and I think this is the substance of your whole presentation.

Mrs. UNDERHILL: It is.

Mr. OTTO: I heartily agree. There is one item that disturbed me. You set the age limit for marriage as the age of maturity. Now, Alexander was 20 or 21 when he conquered the world. How old was William Pitt when he was Prime Minister?

Co-Chairman Senator ROEBUCK: Twenty-three, was not he?

Mr. OTTO: How would you define the age of maturity? Would you arbitrarily say 21?

Mrs. UNDERHILL: I believe that a person is more likely to be mature at 21 than at 17 or 18. There are those who are not mature at 35, but they are a minority.

Miss MACLELLAN: We specify in our brief that that should be the minimum age for marriage without consent.

Mrs. UNDERHILL: Yes. It is a talking point.

Mr. OTTO: I can think of persons who should not be allowed to marry with consent at the age of 45 because they do not reach the age of maturity. I do not know where you would put the limit on that. You say—and this is what you are standing by—that there is a greater likelihood of young people being mature at the age of 21 than at the age of 17 or 18?

Mrs. UNDERHILL: Yes.

Mr. OTTO: Surely you must give some credence to the whole philosophy of life today, that as times change—and they can change very rapidly as education standards and experience change—young people can be very mature. I will put it to you in this way. In some parts of the world today, India and elsewhere, children get very mature at the age of 14 or 15.

Mrs. UNDERHILL: But we are living in Canada, sir.

Mr. OTTO: Again, our whole situation may change. You may not always have our young people in Yorkville and elsewhere beating bongo drums. This is a fact. Are you suggesting that we arbitrarily set an age limit despite all the circumstances presently with us?

Mrs. UNDERHILL: Mr. Otto, you are doing precisely what we want the provinces to do when they come together to discuss it. From that will come an age which is far sager than anything we could suggest, but which would be likely to be more realistic than the 12, 14, 15 and 16 years old that they have at the moment.

Mr. OTTO: I am trying very hard to go through with the argument to George Orwell who wrote *1984*.

Co-Chairman Senator ROEBUCK: Our time is running out. Does anybody else wish to ask any questions?

Mr. BALDWIN: I have just a couple of questions. One or two of my colleagues here were ungallant enough to suggest that when a person got to the age of complete intellectual maturity he might not want to get married! With regard to the first point Mr. Otto was discussing with Mrs. Underhill, I assume the position Mrs. Underhill is taking is that each marriage licence should not come with a perforated rain check attached.

Mrs. UNDERHILL: That is right, sir.

Mr. BALDWIN: I want to deal with the question of domicile for a minute. You were here when I raised the question of national domicile with Mr. McRuer. I did this deliberately, because this goes back to one of the points you made, the objection of some of your people from some of the provinces to widen the grounds for divorce.

We know—and it is a matter of fact—that the governments of certain provinces have seen fit not to invest the courts with the power to grant dissolution of marriage. They cannot, of course, interfere with the grounds which the federal government have the right to say shall be those on which a decree is granted.

I have raised this question of national jurisdiction because I suggest this is a way in which you can avoid the question of domicile through perjury. If there is a national domicile, if it is feasible for the federal government to say that for the purposes of marriage domicile shall consist of the residence of either party in any part of Canada, this would permit people from any province in Canada to get a divorce so long as they establish what would be construed as residence in any other province. Does this have any appeal? Have you given this any thought?

Mr. OTTO: Domicile is only an issue for the commencement of the action.

Mr. BALDWIN: Domicile is only internal so far as provincial considerations are concerned. This is my point, and this is why I raised it with Mr. McRuer.

Mrs. UNDERHILL: Your point is that as far as divorce is concerned domicile shall be construed to be that of Canada?

Mr. BALDWIN: That is right.

Mrs. UNDERHILL: Bearing in mind that domicile has an effect on numerous other aspects of our life, while what you suggest would be excellent as far as divorce is concerned, I think it would be better to have a conclave and have them all lined up.

Mr. BALDWIN: I premise this enquiry, Mrs. Underhill, on the belief that when we receive from Mr. Driedger, the Deputy Minister of Justice, the brief which he previously indicated he would present, and which the chairman said will be presented, it might go to the extent of pointing out that there is ancillary to the granting of divorce in Canada the right to deal with questions of maintenance, alimony and custody of children, in which case, of course, some of your doubts might be answered, if his brief does go that far.

Co-Chairman Senator ROEBUCK: Now I think it is time that we closed. We have had a wonderful presentation, and I want to call on my co-chairman for a word or two to close the meeting.

Co-Chairman Mr. CAMERON: Mr. Chairman and members of the committee, I think you would expect me to extend our thanks to Mrs. Underhill and Miss MacLellan for their wonderful team effort today. They assisted each other and co-operated together, and they have put their case across in a very dramatic fashion. We will study your brief, ladies, we will read in the minutes of proceedings what you have said, and I can assure you that it will bear good fruit in the future. Thank you very much.

The committee adjourned.

APPENDIX "26"

Office of The Deputy Minister of Justice and Deputy Attorney General of Canada

DEPARTMENT OF JUSTICE

Ottawa 4, December 28, 1966.

Dear Senator Roebuck:

In your letter of October 20 you asked for my views on two additional points as follows:

(a) whether Parliament has jurisdiction with regard to judicial separation, and

(b) whether Parliament has jurisdiction with respect to alimony, custody and maintenance and division of property of divorced persons and their families.

I have now given some consideration to these problems and am able to put my views before you. I should like to state at the outset, however, that the views hereinafter expressed are not in any sense to be regarded as the views of the Government or any member thereof. They are merely my own personal opinions which I offer for such assistance as it may be to your Committee.

Before dealing with your questions I think it is important to bear in mind the fundamental nature of marriage and divorce from a legal point of view. A marriage creates a new legal status between the parties thereto. At the moment of marriage new rights and obligations between the parties thereto arise, and at the same time a pre-existing right is extinguished. Thus, there arise the obligation to support and the right to consortium; at the same time, the pre-existing right to marry is lost. These are some of the essential legal characteristics of a marriage; without them, the marriage status would not exist.

A divorce *a vinculo matrimonii* also changes the legal status of the parties; it destroys the legal status created by the marriage and restores the parties to the status they had before the marriage. At the moment the divorce takes place, the rights and obligations inherent in the marriage cease and the parties are thereafter free to re-marry.

Coming now to your first question, you may recall that I did touch upon this when I appeared before your Committee. I said at that time that having regard to the nature of a decree of judicial separation it was reasonable to conclude that Parliament's jurisdiction extended to both divorce *a vinculo matrimonii* and judicial separation. I might now add to that observation that a judicial separation is in reality a divorce without the right to re-marry. The legal status created by the marriage has been extinguished, but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored. I would therefore consider that the expression "marriage and divorce" includes judicial separation, because the latter deals with the legal status of married persons and

the effect of a judicial decree on that status. Putting it another way, one might say that the greater includes the less; if Parliament can say that pre-existing rights are fully restored, it can also say that they are only partially restored.

Dealing now with your second question, as I have indicated, jurisdiction to make laws in relation to "divorce" is in essence jurisdiction to make laws for the alteration of the legal status created by the marriage; the jurisdiction therefore extends to the abolition of the rights and obligations created by the marriage and the restoration of pre-existing rights. As I have already indicated, I think it must follow that these rights and obligations can be terminated in whole or in part.

It is the husband's duty to maintain the wife. If the marriage is dissolved, that obligation normally ceases because the relationship of husband and wife no longer exists. For the reasons I have indicated, I think that Parliament is competent to define the extent to which a dissolution of marriage alters the rights and obligations inherent in the marriage and therefore could provide for a continuation of the obligation to support. The remarks of Lord Atkin in *Hyman v. H.* (1929) A.C. 601, would support this line of argument. He there said at pp. 628-9:

> "The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court... When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears."

This view is also supported by the remarks of Crocket, J. in *McLennan v. McLennan* (1940) S.C.R. 335, and by the British Columbia Court of Appeal in *Rousseau v. Rousseau* (1920) 3 W.W.R. 384.

The same reasoning would apply to maintenance and custody of children. During marriage the husband is under a duty to maintain and provide for the education of the children of the marriage, and the husband and wife have joint custody. These are rights and obligations that arise out of the marriage relationship. A divorce, which terminates the marriage relationship, obviously interferes with these rights and obligations, and in my opinion Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued. In the *Reference re Adoption Act* (1938) S.C.R. 398, the Supreme Court of Canada upheld provincial legislation, but at page 402 Chief Justice Duff left the door open to federal legislation when he said that

> "We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject of Marriage and Divorce."

The Division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in

their own names, etc., may well stand on a different footing. These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to their legal status as married persons. They could vary from time to time and from jurisdiction to jurisdiction and a particular rule is not necessary or essential to constitute a marriage.

The provinces of course have jurisdiction over property and civil rights. Since Parliament has exclusive jurisdiction over marriage and divorce, it would seem to be clear that the provinces could not define the status of marriage or divorced persons and therefore could not prescribe the rights and obligations constituting a marriage or the extent to which the rights and obligations created by the marriage shall be abrogated or continued by a divorce. However, generally speaking, their jurisdiction over property and civil rights would include the matters mentioned in the preceding paragraph as well as the welfare of the people of the province. The provinces could therefore make provision for the support of its residents, whether they be single, married, divorced, children or adults. Provincial legislation dealing with property and civil rights, and not being legislation *qua* marriage or divorce, would no doubt be valid. If, however, any particular provincial law should clash with a federal law, then, under the normal rule, the latter would prevail.

I was also asked by the Special Assistant of your Committee to clarify the comment I made when I appeared before the Committee to the effect that at the time that Prince Edward Island was established there was no divorce law because the Divorce and Matrimonial Causes Act of England was not enacted until 1857. What I had in mind, of course, was that the English Divorce and Matrimonial Causes Act did not become the law of Prince Edward Island because the Act was passed after Prince Edward Island established its own legislature in 1773. Between 1773 and the year 1883, when Prince Edward Island enacted its own Divorce Act, the law of Nova Scotia would have applied because Prince Edward Island was originally part of Nova Scotia. However, I believe there was in Prince Edward Island no court with divorce jurisdiction between 1773 and 1883, so that the substantive law of divorce that was carried forward into Prince Edward Island had no practical effect. As I indicated earlier, rules of procedure were not promulgated in Prince Edward Island until 1945 so that between 1883 and 1945 the Prince Edward Island divorce law was not in practice being applied.

I hope that the foregoing clarifies all of the additional points that have been raised. If I can be of any further assistance to your Committee, please let me know and I shall do my best to accommodate you.

Yours truly,
(Sgd.) E. A. Driedger.
Deputy Minister.

The Honourable A. W. Roebuck,
The Senate,
Ottawa, Ontario.

APPENDIX "27"

BRIEF

for presentation to the

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

ON

DIVORCE

by

THE NATIONAL COUNCIL OF WOMEN OF CANADA

190 Lisgar Street,
Ottawa 4, Ontario.

December, 1966.

INTRODUCTION

1. The National Council of Women of Canada, which has the privilege of presenting this submission, comprises fifty-five (55) Local Councils of Women, seven (7) Provincial Councils of Women (consisting of more than 1800 federated societies) and 20 nationally organized societies in Federation.

2. Now in its 74th year, the Council was founded in 1893 by Lady Aberdeen, wife of the Governor-General of Canada, and incorporated by Statute of Parliament of Canada in 1914.

3. The object of the Council as stated in the Act of Incorporation is to serve the highest good of the family and of the state; in order to further its objects, the Council functions through 13 Standing Committees, namely: Arts & Letters, Economics, Education, Films, Health, Housing & Community Planning, International Affairs, Laws, Migration & Citizenship, Public Safety, Radio & Television, Social Welfare and Trades & Professions. The policy of the Council is based on resolutions adopted at the annual meetings following several months of study and discussion by the federated organizations.

4. It will be of interest that every aspect of divorce has been the subject of study, discussion, resolution and action by The National Council of Women since 1895, and in 1963 at the annual meeting in Banff, the National Council of Women passed the following resolution that:

> "The National Council of Women of Canada request the Federal Government to establish a Royal Commission forthwith to enquire into and report on the laws of Canada affecting the dissolution of marriage."

This resolution was presented to the Prime Minister of Canada and Members of the Cabinet in February 1964. It is encouraging that a Special Committee of the Senate and House of Commons has been empowered to make a study of Canadian divorce legislation. This presentation is submitted in the hope that the information contained herein will assist the Committee in its consideration of the matter.

PREAMBLE

5. The National Council of Women of Canada is concerned with improving the environment of every citizen in order that equal opportunity is provided for his educational, economic, social and cultural development—without regard to race, creed, or sex.

6. The divorce laws of Canada are unjust. They are also harsh and hypocritical. They promote perjury. It is a fact that, if a law is unjust, it will be either broken or barely tolerated. In either case, unnecessary and incalculable suffering will result.

7. It is a fact that, the *grounds* for divorce in Canada and the *reason* for seeking divorce in Canada are not the same. The ground for divorce (except for certain provinces) is adultery; the reason for divorce is the complete breakdown of the marriage, which may be aggravated by problems of communication between husband and wife, religion, incompatibility, money, alcohol, cruelty and sex. We are at a loss to understand why the grounds allowed by our Government for the dissolution of marriage and the reason for the dissolution of that marriage are at complete variance.

> *Surely a law that gives relief to a dead marriage should base the grounds for divorce on reality.*

8. Legal marriage is the basis of our society. It is in the public interest that the sanctify and importance of the marriage relationship be maintained and protected. When a marriage is dead, it is logical that the parties will seek to terminate it, in spite of the fact that the grounds for divorce required by the government may not exist. In order to be freed of the marriage contract, frequently one party to the marriage must perjure himself.

> *Surely a law that encourages perjury is not good legislation.*

9. A law is unjust when the wealthy can afford the relief offered by legislation and the poor cannot. To be specific, the cost of divorce is beyond the purse of many persons who have the grounds for divorce. As a consequence, the lack of money required to institute the legal process to obtain a divorce has caused many couples to live common-law. The cost of divorce should be within the reach of all seeking divorce; however, to accomplish this, there is a possibility that a new divorce court structure will have to be initiated.

> *Surely release from a dead marriage should be available to all regardless of their purse.*

10. A law is unjust when it encourages persons to live common-law. The children suffer; they live in an illegal state and the social and psychological effects thereof, as well as the basic insecurity caused thereby, influence every aspect of their life. More important, lack of respect for the law and the marriage state may be engendered and developed.

> *Surely legislation which belittles respect for the marriage state and the law requires amending.*

11. The combined effect upon children of an unhappy marriage and unjust and antiquated divorce legislation can not be denied. The psychological effect upon the child caused by the impact of quarrelling, lack of communication,

insecurity, inability on the part of the parents to otbain a divorce and living common-law shows itself in failing marks at school, need for more child psychologists, emotionally disturbed child centres, increased staff for child protection agencies, detention homes and juvenile courts, as well as untold heart break. This is reflected in increased cost to the tax payers, who must pay for these added facilities. Society as a whole suffers because our moral standards have slipped.

Surely it is in the public interest to amend a law which causes undue suffering to children, unnecessary burdens on the tax payer and resultant moral decline.

12. While in certain instances interpretation of the word "persons" may vary, the Privy Council on October 18, 1929 decided that women were "persons" for the purpose of appointment to the Senate. However, every person in Canada should be entitled to his or her own domicile; the law discriminates against the married woman. She is not a person having her own domicile; the domicile of the married women is that of her husband. This causes great inconvenience, because if a wife wishes to sue her husband for divorce it must be done in the province in which he is domiciled (the exception to this is the Divorce Jurisdiction Act. 1930, c. 15, s. 11. See Addendum 2). The husband may establish a domicile in another province and this becomes the domicile of the wife and only there can he be sued for divorce. This inconvenience and financial burden to the wife is unnecessary. The lack of recognition by the government that each party to a marriage is a person and, therefore, should have his or her own domicile, is unjustifiable and results in loss of dignity in the status of married women.

Surely a law that encourages perjury, fosters common-law relationships, causes untold suffering to children, to society, and unnecessary expense to women and to the public purse, does not recognize the dignity of women is not in the public interest. Such a law is unjust, antiquated and not worthy of Canada.

RECOMMENDATIONS

13. I. Throughout Canada Society is based on the institution of marriage. It would be logical to have uniformity of marriage laws; however, the British North America Act (Section 91) granted to each provincial government the right to legislate on the solemnization of marriage in its province, and to the federal government (Section 92) the right to legislate on certain other aspects of marriage. Therefore, complete uniformity of legislation is unlikely.

14. The breakdown of marriage may be due to persons entering into marriage at too young an age. While provincial statutes vary as to the age a person may marry within its boundary, generally speaking, the provincial statutes prohibit (except under certain circumstances as when necessary to prevent illegitimacy of offspring) the issuing of a licence to marry or the solemnization of marriage where either party is under a certain age, usually sixteen (16) years. Standards of living and educational demands for employment have changed since these age limits were set by the provinces. Times change and legislation becomes outdated.

We submit that the minimum age for marriage without consent of parents be twenty-one (21) years of age for both sexes.

This will require complete co-operation by federal and provincial governments.

15. II. The present law of domicile as it pertains to divorce causes hardship, expense and loss of dignity.

16. The domicile of a person is where he calls "home". It is the place in which he intends to establish permanent residence. On marriage the domicile of the wife becomes that of the husband. The law of domicile affects many aspects of our life, including taxation, citizenship, etc.; accordingly, domicile in its various aspects is under the jurisdiction of both federal and provincial governments.

17. According to existing federal legislation, a petition for divorce must be filed in the province in which the husband is domiciled. This causes undue hardship and expense because an errant husband may change his domicile. (The exception to this is under the Divorce Jurisdiction Act, R.S.C. 1952, Chapter 84, "A woman who has been deserted by and has been living apart from her husband for a period of two years and is still living apart from him may sue her husband for divorce in the province of their matrimonial domicile.")

18. To alleviate the hardship which the enforced two-year waiting period often imposes on a deserted wife, we recommend:

(a) *Amendment to the divorce jurisdiction act to allow petition for divorce to be filed in the province in which the husband and wife were resident at the time of their separation rather than filing the writ in the place where the husband is domiciled.*

19. The above recommendation would require only a slight amendment to the Divorce Jurisdiction Act and would alleviate the present unsatisfactory situation. Nonetheless we believe that every man and woman in Canada should be entitled to his or her own domicile. However, the law discriminates against the married woman. Her domicile is that of her husband. Such discrimination is not justified. In 1929 the Privy Council decided that for the purpose of appointment to the Senate, the word "persons" should include women. Surely, for the sake of the dignity of every resident of Canada, this interpretation that women are persons should be adopted into every aspect of Canadian Law without reservations. We recommend further:

(b) *The law of domicile should be amended to recognise that a woman is a person and, accordingly, her domicile shall be her own and not follow that of her husband.*

(c) *Domicile, as far as divorce is concerned, shall mean the domicile of either party.*

20. III. The grounds for divorce in Canada recognise only the physical aspect of marriage and distort the sexual relationship by making it a basis of divorce. The true cause of marriage breakdown and desire for divorce is basic incompatibility. The present legislation completely ignores this fact; the grounds for divorce are based on a premise that is narrow and may be false. The divorce laws are flouted by the public because the grounds for divorce (mainly adultery) are narrow. It is not recognised by the government that insanity, cruelty and desertion destroy a marriage equally as much, or more than adultery.

21. Since it may be that some provinces will not entertain any amendment to the present grounds for divorce within its borders, any change in legislation should be acceptable to each province at its own option.

22. Accordingly, we submit for your consideration a resolution adopted at the annual meeting of the National Council of Women in June 1966, that:

> *The Government of Canada amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty, and desertion as well as adultery, these amendments to be accepted by each province at its own option.*

ADDENDUM 1

Resolutions adopted by the National Council of Women of Canada

(1) *1961—For study*

Divorce Law

(Submitted by Windsor Council and Ontario Provincial Council)

WHEREAS, The Provincial Council of Women of Ontario consider the present Divorce Law by which adultery is the chief ground for divorce to be antiquated, no longer realistic and in the result degrading;

THEREFORE the Provincial Council of Women request the National Council of Women to study the broadening of the grounds for obtaining divorce so that these grounds will be patterned after the more recent legislation of the United Kingdom (known as the Matrimonial Causes Act).

(2) *1963—Resolution Adopted*

Dissolution of Marriage

WHEREAS, The laws dealing with the dissolution of marriage (i.e. divorce and annulment) are narrow, outdated and illogical, and consequently invite continued fraud upon the courts and Parliament; and

WHEREAS, The special committees set up in recent years in the Senate and the House of Commons to study these laws and recommend changes indicate that the need and desire for change is recognized across Canada; and

WHEREAS, The deliberations, findings and recommendations of a Royal Commission on the subject would acquaint the public with the evils of the present situation and provide an objective and nonpartisan basis for amending the law; therefore

RESOLVED, That The National Council of Women of Canada request the Federal Government to establish a Royal Commission forthwith to inquire into and report on the laws in Canada affecting the dissolution of marriage.

(3) *1963—Resolution Adopted for the attention of Local and Provincial Councils*
Uniformity of Marriage Laws

WHEREAS, The legal age for marriage without parental consent varies from province to province; and

WHEREAS, In several provinces a marriage licence can be obtained without any physical examination; and

WHEREAS, The mobility of Canada's population makes it desirable to have more uniformity in regulations with respect to marriage requirements; therefore

RESOLVED, That The National Council of Women of Canada ask Provincial Councils to undertake a study of the marriage laws of their respective provinces with a view to approaching the legislatures of their respective provinces to:

(1) set the minimum age for marriage without consent of parents at 21 for both sexes, and

(2) that a health examination be mandatory before a marriage licence is issued and that the results of such examination be made known to both parties.

(4) *1964—Uniformity of Marriage Laws*

The subject was studied by Provincial Councils of Women and resolutions were presented to the respective Provincial Governments.

(5) *1965—Resolution Adopted*

Divorce and the Law of Domicile

WHEREAS, Existing federal legislation provides that petition for divorce must be filed in the province in which the husband is domiciled; and

WHEREAS, This legislation may entail serious hardship for a wife who may wish to petition for divorce but whose husband has a distant domicile; therefore

RESOLVED, That The National Council of Women of Canada request the Government of Canada to amend the Divorce Jurisdiction Act in such a way that a petition for divorce may be filed in the province in which husband and wife were resident at the time of separation rather than having to be filed in the place where the husband is domiciled.

(6) *1966—Resolutions Adopted*

The Law of Domicile

WHEREAS, Domicile is a matter under both provincial and federal jurisdiction; and

WHEREAS, The present legislation pertaining to domicile results in many inequities; and

WHEREAS, A woman is deemed to be a "person" and should have, as a right, her own domicile; and

WHEREAS, In fact, a woman on marriage, automatically assumes the domicile of her husband; and

WHEREAS, A draft model statute on the law of domicile was approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1961; therefore

RESOLVED, That The National Council of Women of Canada recommend to the Government of Canada immediate consideration to the enactment of the draft statute on the law of domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada at the proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961; and

RESOLVED, That The National Council of Women of Canada request Provincial Councils of Women and the Montreal Council of Women to urge their respective provincial governments to consider for enactment the draft statute on the law of domicile which was approved by the Conference of Commissioners on Uniformity of Legislation in Canada at the Proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada in 1961.

Divorce

WHEREAS, Grounds for divorce under the Matrimonial Causes Act are harsh and antiquated causing many social problems (common-law unions, emotionally upset children and lower moral standards); and

WHEREAS, The Federal Governmen has sole jurisdiction to amend the Matrimonial Causes Act to widen the grounds for divorce; and

WHEREAS, Every province in Canada may not wish to widen the grounds for divorce within its boundaries; therefore

RESOLVED, That The National Council of Women of Canada request the Government of Canada to amend the Matrimonial Causes Act to widen the grounds of divorce to include insanity, cruelty and desertion as well as adultery, these amendments to be accepted by each Province at its own option.

ADDENDUM 2

CHAPTER 84

An Act respecting jurisdiction in Proceedings for Divorce.

SHORT TITLE

Short title.

1. This Act may be cited as the *Divorce Jurisdiction Act*. 1930, c. 15, s. 1.

Married woman deserted and living apart for two years may commence proceedings for divorce.

Jurisdiction of court.

2. 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 and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court has jurisdiction to grant such divorce if immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced. 1930, c. 15, s. 2.

R.S., 1952.

ADDENDUM 3

NATIONALLY ORGANIZED SOCIETIES

Federated with The National Council of Women of Canada.

1. Canadian Association of Hospital Auxiliaries
2. The Canadian Dietetic Association
3. Canadian Dominion Council of the Mothers' Union
4. The Canadian Federation of Business and Professional Women's Clubs
5. Canadian Federation of University Women
6. Family Planning Federation of Canada
7. Canadian Home Economics Association
8. Canadian Woman's Christian Temperance Union
9. Girl Guides of Canada
10. The Hadassah-Wizo Organization of Canada
11. The Health League of Canada
12. The Lyceum Club and Women's Art Association of Canada Inc.
13. National Council of Jewish Women
14. Queen's University Alumnae Association
15. The Salvation Army in Canada
16. Ukrainian Women's Association of Canada
17. The Ukrainian Women's Organization of Canada
18. The Board of Women of the United Church of Canada
19. The Victorian Order of Nurses for Canada.
20. Young Women's Christian Association of Canada

PROVINCIAL AND LOCAL COUNCILS OF WOMEN

1. Alberta: Calgary, Edmonton, Red Deer.
2. British Columbia:

   Burnaby, Chilliwack, Comox Valley, Dawson Creek, Fort St. John and District, Kamloops, Kelowna, Nanaimo, New Westminster, North and West Vancouver, Trail District, Vancouver, Vernon and District, Victoria, White Rock and District.
3. Manitoba: Brandon, Dauphin, Portage la Prairie, Winnipeg.
4. New Brunswick:

   Fredericton and Area, Moncton, Sackville, Saint John.
5. Nova Scotia:

   Halifax, New Glasgow, Stellarton, Truro, West Pictou, Westville, Yarmouth.

6. Ontario:

Brantford, Chatham, Georgetown, Hamilton, Kingston, London, Niagara Falls, Orillia, Ottawa, Owen Sound, Peterborough, St. Catharines, Toronto, West Algoma, Windsor.

7. Saskatchewan:

Moose Jaw, Regina, Saskatoon, Swift Current, Yorkton.

Montreal, Quebec.

St. John's Newfoundland.

APPENDIX "28"

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

by

Ray A. Graves, Esq.,

602 Central Avenue, Saskatoon, Saskatchewan. Canada.

Messrs Chairman, Ladies and Gentlemen:

I am one of untold thousands anxiously awaiting divorce reform. I am 33 years old and my two daughters are presently 7 and 12 years of age respectively. My wife has not lived at home with us for almost 4 years. This is an awfully long time for two girls to be without a mother. It is very difficult for a father to teach girls the duties and responsibilities of a wife and mother without there being someone for them to follow as an example. Fortunately, I have always been able to hire good housekeepers and this certainly helps a great deal. However, my girls are of an age to realize that this is not a normal home atmosphere.

Approximately four years before she left, my wife started losing interest in her home and family. For the last two years prior to leaving she was under periodic psychiatric care and even spent some time in hospital in an effort to help her regain her lost interest in her family. Doctors are achieving marvelous results with psychiatry but are not yet "batting 1000". It is almost impossible to help someone if that person does not want the help. That is precisely my wife's case.

For the last twelve months or so that she was home, she would threaten to leave and go to the west coast whenever something didn't suit her, even to the point of packing her luggage several times. I made tentative arrangements for a housekeeper to care for the children, twice, before she actually left. When she finally made up her mind to leave, she voluntarily signed a separation agreement giving her consent to my having sole custody of our children.

Since she left, I have been supporting her which, along with having to hire a housekeeper, is a serious drain on my finances. This will become more serious as my children grow older. My wife now works when she feels like it and appears to be able to hold down a job if she wants to. The amount of support was incorporated in the separation agreement and she feels entitled to the money, even though she has been working and it is a hardship on her family.

The position my marriage is in, is thus: There is every reason for its dissolution except that recognized by the existing laws. We are married to each other in the eyes of the law only. We live approximately 1500 miles apart and have seen each other once in the past three years. Someone would have to do a lot of talking to convince me that a marriage exists.

This is one case where there is no consent or collusion and there is also no divorce. I could place the custody of my children in jeopardy if I were to (under the existing laws) provide the grounds for divorce and my wife has refused to do so. One reason is that she is afraid that the court would not order alimony under such circumstances. As a result, she is preventing our girls from possibly having a stepmother. This, in my case, is the most serious aspect. The existing law certainly allows one partner to be exceptionally vindictive.

I do not intend to suggest a "model set" of grounds for divorce as the briefs you have already heard are very adequate in this regard. However, when drawing up the legislation, you might find the following helpful to bear in mind.

At present, in order to obtain a divorce, the following minimum must be present:

— Consent
— Collusion
— Money

All in large quantities!

The new legislation should face up to facts and allow people who are engulfed in an unworkable marriage to have it dissolved for that reason. There is nothing wrong with two people telling a judge they can no longer live together, for various reasons, and being granted a divorce.

The extremely high expense of divorce is serious to many people and entirely out of reach for many.

Word the legislation so that custody of children cannot be used as a "club"—this is very important.

I believe that most separated people believe very strongly in marriage and are prepared to work hard to make a new marriage work out. It is an accepted fact that a high proportion of second marriages are happy. This possibility is presently being denied many thousands of people due to the existing law.

Bear in mind, the Catholic Church does not expect non-Catholics to follow their teachings. This is an important consideration. I, as a Protestant, will be ever grateful to them for this attitude.

I certainly favor the marriage breakdown concept because this is what actually happens. Now two people live together happily for several years and then all of a sudden decide to divorce. The actual breakdown in my marriage

covered several years. The new laws should be patterned as close as possible to the conditions. It is impossible for 'offense' laws to be so patterned.

From your committee questions, one soon gains the impression you are all extremely concerned about the number of unworkable and unhappy marriages. Make the new laws so that people in such a marriage can at least have the possibility of a happy marriage. Legislation in itself has never forced anyone to live 'happily ever after'. This is what the existing law attempts to do but fails miserably.

Our society is based and patterned on the married couple. A separated person is often in a dilemma because he or she is neither married or single. The results are many and often not at all pleasant.

I submit these remarks with all the respect your high office commands. If, in some cases, my terminology does not suggest this, I ask your indulgence.

If any members have questions, I will be most pleased to hear from them. I will answer all communications promptly.

Thanking you for this opportunity.

Respectfully,
Ray A. Graves.

First Session—Twenty-seventh Parliament
1966-67

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

DIVORCE

No. 13

TUESDAY, FEBRUARY 7, 1967

Joint Chairmen

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

and

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

WITNESSES:

His Honour P. J. T. O Hearn, Judge of the County Court, Halifax, N.S.
Professor J. J. Gow, Faculty of Law, McGill University, Montreal, Quebec.

APPENDICES:

29.—Brief by His Honour Judge O Hearn.
30.—Brief by Professor J. J. Gow.
31.—Brief by The National Farmers Union.
32.—Brief by Federated Women's Institutes of Canada.

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

25433—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 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."

25433—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 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

TUESDAY, February 7, 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, Burchill, Denis, Fergusson, Flynn, Gershaw and Haig—8.

For the House of Commons: Messrs. Cameron (*High Park*) (*Joint Chairman*), Baldwin, Brewin, Honey, MacEwan, Mandziuk, McCleave, McQuaid and Ryan—9.

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

The following witnesses were heard:

His Honour Judge P. J. T. O Hearn, Halifax, N.S., J. J. Gow, B. L., Ph.D., LL.D., (Aberd.)

Briefs submitted by the following are printed as Appendices:

29.—His Honour Judge O Hearn.

30.—Professor J. J. Gow.

31. The National Farmers Union.

32.—Federated Women's Institutes of Canada.

At 5.45 p.m. the Committee adjourned until Thursday next, February 9, 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 7, 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 and members of the House of Commons, since we have a quorum I will without delay introduce the first witness in the person of Peter Joseph Thomas O Hearn, born January 2, 1917, third son of Walter Joseph Aloysius O Hearn, K.C., and Catherine Mahony at Halifax, Nova Scotia. Educated College Street Public School; Saint Mary's Collegiate; Saint Mary's College, B.A., 1937; Dalhousie University, Education Certificate, 1938, McGill University, post-graduate work in education 1938-39; Dalhousie University, LL.B. 1947. Admitted to Nova Scotia Bar August 15, 1947; practised law with Fielding and O Hearn 1947-1950, Fielding, O Hearn & Vaughan 1950-55, and in his own name until made Judge of the Metropolitan County of Halifax, March 22, 1965. Appointed Assistant Prosecuting Officer of Halifax 1950, Prosecuting Officer 1956. Queen's Counsel, January, 1963.

Lieutenant 2nd Canadian Medium Regiment, R.C.A. (later it became 2nd HAA Regiment R.C.A.) 1940-42 in Canada and in England. Invalided out 1942, discharged from Camp Hill Hospital 1944.

Organized the Legal Aid Service of the Nova Scotia Barristers' Society in 1950 and was the first local director 1950-53. Member of the Council of the Society and various committees 1951-4, 1955-8, including chairmanship of the Legal Research Board for several years. Bar Society solicitor 1959-65.

President, Nova Scotia Division, Canadian Red Cross Society, 1956-8; President, Archdiocesan Union of Holy Name Societies 1958-60; President, Children's Aid Society of Halifax, 1963-5; President, Charitable Irish Society of Halifax 1965; author of *Peace, Order and Good Government—A New Constitution for Canada* (1964, MacMillians, Toronto) and various articles in legal and other periodicals. Lecturer in criminal procedure Dalhousie Law School, 1958 to date.

Married Margaret Mary McCormick, daughter of Joseph B. McCormick and Margaret Ann McNeil, September 8th, 1944. One son, Peter Kevin.

Member of the Catholic Charities Committee and the Ecumenical Commission of the Archdiocese of Halifax.

Members of the committee, this is our witness, and a personal friend of our esteemed member, Mr. Robert McCleave.

His Honour Judge Peter Joseph Thomas O Hearn, Judge of the Metropolitan County of Halifax: Honourable senators, members of the House of Commons,

members of the committee: When my office supplied this biographical sketch of me I did not expect to have it inflicted upon you in its entirety; I felt it might easily be condensed into the first three names read to you by your distinguished Chairman; for I have had those names rubbed into me, once by Mr. Alect Hart, who is, I believe, a Vice-President of the Canadian National Railways, who commented "What a bunch of Mickey names!"

I am taking a rather unusual stand on the subject before you today. As a Roman Catholic I think it is one that is in keeping with the attitude of the Church, or at least in large part. Some gentlemen present who belong to my faith may conceivably take a different point of view, for the reason that what I am advocating is a matter of policy and has nothing to do with doctrine or dogma.

What is the best policy in dealing with divorce and kindred subjects in Canada? I should like to take you through the draft bill I have prepared, and I may say at once that the main point is that the court best suited to handle the problems arising from the conditions giving rise to divorce is the Family Court; and my contention is that in considering the problem of divorce we should regard it as forming part of a unified field.

Family law is an entity which unfortunately is split between two jurisdictions, provincial and federal, and it will take a good deal of jigsawing to get the parts dovetailed properly; but I am quite sure that the efforts which this committee is so conscientiouly making towards the solution will provide the leadership that will help the provinces to play their part.

I have had the interesting experience of going through the reports of this committee supplied to me through the courtesy of Mr. Savoie, and I find mentioned in those reports every idea that I have brought forward in my brief; but I do not believe that in any of the material so far presented to you the topic I am concerned with has been dealt with to the same extent as I have discussed it.

I am under the impression that Senator Roebuck, in discussing the representations made by the Rev. Mr. Michael, suggested that perhaps the public were not quite ready to accept the concept of marriage breakdown as the governing principle of divorce. I suggest with deference that it is more difficult to convince people of the efficacy of the Family Court in relation to divorce, though in my opinion it is more important. The history of law indicates that courts by and by invent legal opportunities to do what they think is substantial justice.

I am not denying the fact that grounds are important; I think they are; but the main thing is to get the problems into court and deal with them, not in relation to principles or right and wrong but with a view to settling a social and personal problem resulting from a conflict between two personalities.

With your permission, Mr. Chairman, I will briefly go through the proposed Act.

The first time these Courts are mentioned is in section 2, where "Family Court" is defined, and the definitions indicate in some cases a provincial court set up as a family court as such, as in British Columbia, in Ontario, to some extent, though not completely covered by family courts, and in Quebec, *la cour du bien-être social*. In Nova Scotia we are beginning to experiment with it. This is the court that handles this type of problem generally—family disputes, juvenile cases and such matters—and the proposal is to put all problems concerning the status of marriage within the jurisdiction of this court.

I hear a rumour, from fairly reliable sources in Quebec, that there is a move on foot in that province, to refer to these courts all family matters including

judicial separation, and this is a logical move. Such courts are, if I may quote from the brief, "constantly deciding questions of the utmost importance concerning the status and welfare of individuals. They use techniques of investigation and conciliation that have proved effective in helping families to achieve stability. They deal with the social problems well and with the incidental legal problems well enough."

Some people might be inclined to keep their fingers crossed on the reflection that in some provinces the function is performed only by Justices of the Peace.

Two things to be considered in weighing the proposal are that, first, that the day of the non-professional, non-lawyer judge in Canada is past, and that in due course, reasonably soon, I believe, all judges will, have some training at least, so that if they are not trained in law they will certainly be trained in the particular field in which they will have to make decisions. The second thing to be considered is that there is always some way of correcting any legal mistake they make. This is fairly easy under our process of appeal and the prerogative writs we have.

Going through the various briefs submitted to you, I notice that suggestions of this nature are contained in the testimony of the Rev. Mr. Michael of the Seventh Day Adventist faith, and the views submitted by the Anglican Diocese of Huron, and the brief submitted by the Social Service Department of the Anglican Diocese of Nova Scotia; and a particularly good submission is that contained in the submission of the Family Association of Edmonton, which covers the point very well.

There are a great many correspondences between what I have submitted and what is contained in the report of the commission appointed by the Archbishop of Canterbury to look into the problems of divorce and the attitude of the Church of England in relation thereto, which report appeared under the title *Putting Asunder,* and Mr. Brewin refers to it consistently in his questioning.

I find myself in almost total agreement with this point of view and so I may be repeating much of what you have heard. I do take issue, however, with one or two points in it. There is a discussion of the family court method of handling divorce; it is covered extremely well and I would refer you to it.

There may be some constitutional problems here. I think case law is in favour of the power of Parliament to impose this jurisdiction on provincial courts, and Mr. Driedger in his evidence comes to the same conclusion.

The other matters in the definition section are merely technical points and I do not think I will weary you with them. On the application of the law, you have heard some evidence as to whether it should be trans-Canada. My point of view is that family law is part of property and civil rights, and the provinces have differences in culture and approach that should be taken into account, and they have the right to consider whether divorce should or should not be in effect in their jurisdictions.

I have provided a device for opting out, with a little bit of "shotgun" effect, because it has to be done positively; that is, the legislature has to do something to get out from the thing. If you leave it the other way, the tendency will be negative: they will never adopt it. Possibly, while I have made this provision apply to all parts of the Act, it would be sufficient if it applied only to section 8 and 9, which deal with divorce and separation.

In the brief I have given some material that indicates the purpose for which the Fathers of Confederation incorporated marriage and divorce within the exclusive powers of Parliament; and from my reading of the B.N.A. Act the

power over marriage and divorce would seem to be something equivalent to the United States full faith and credit clause: that is to say, these particular sections of the Act were designed to make sure that divorce decrees and orders would have the same effect throughout Canada. They would not suffer from any problem of recognition.

And, of course, divorce was taken from the provincial parliament in order to relieve the Province of Quebec of the rather thankless task of refusing divorces to the English-speaking Protestant minority, and the equally repugnant task of granting them.

I have suggested in the brief that this power should be given back to the province constitutionally, an idea that I got from Senator Pouliot, and I notice that in several sessions Mr. Prittie has introduced a bill, which would be valid constitutionally under the 1949 amendment, to make it a concurrent power subject of legislation. This is one of the bills referred to you, incidentally.

There are several matters dealing with marriage which perhaps I should discuss, because I have alleged that the law of marriage in Canada is not satisfactory. One matter is the age at which marriage may be solemnized. In that regard I do not see any bills submitted at this session, but I note that Mr. Matheson did introduce a bill to make the age 16 for men and 15 for women in previous sessions. The age I propose is 18, which, I believe, has the support of *Putting Asunder* and of the Canadian Congress of Women.

Putting Asunder brings out the fact, without supporting documentation, that statistically there is a high correlation between young marriages and divorce.

One of my duties as a County Court Judge is to perform civil marriages, and I perform about 90 percent of the civil marriages in Nova Scotia, between 80 and 90 percent, and a great many of them are what are called "shotgun" marriages. We sympathize with these people because, as you know, such marriages have but a poor chance of surviving when young people find themselves in that box; and the younger they are the more easily are they cozened into this type of marriage.

I am submitting therefore that the minimum age of 18 is realistic. Some people suggest that there should be provision for exceptional cases; but they are really thinking of shotgun marriages, and any marriage of that sort is not an auspicious way of starting married life. There is no real excuse for shotgun marriages in this day and age when social services are available to deal with the adoption of children and the problem of illegitimacy, which unfortunately is not primarily for this committee. I would be happy if it were, judging by the attitude the committee has shown in carrying out its investigation.

Illegitimacy, I believe, will disappear as a legal concept in the reasonably near future, and the welfare people are striving constantly to get rid of the difficulties incident to it.

Co-Chairman Senator ROEBUCK: There are only, or should be only, illegitimate parents.

Judge O HEARN: Yes; no illegitimate children, only illegitimate parents. The other matters in section 4 are, I think, pretty well routine.

The mention of potency and impotence brings the law more or less up to date. The provision dealing with consanguinity puts the restrictions on a minimal basis in the interest of public policy and they are more or less in line with those set in the time of Henry VIII, which have been the law ever since.

In the matter of affinity, which is the relationship a man acquires to his wife's relatives, and the other yay round with the wife, this seems to me to be an impediment that has no real civil meaning. It has no secular meaning at all, and

while possibly it derives to some extent from the Roman idea of decency, the main basis is religious and it is unmeaning to those who do not share that particular sentiment. I recall bringing it up with with Dr. Hardie at Pine Hill Divinity School and he did not know what it was until I gave him the definition, and he recognized it.

What I have suggested is that affinity be done away with as a civil disability; but there is provision for keeping it as a religious disability for those who have these religious scruples. This is in a further section.

The provisions on voidable marriages are a little radical in that they reduce void marriages to a minimum: those that are barred by public policy or those that have some social significance.

The purpose of this is to make some use of the distinction between void and voidable marriage. Void marriages can be attacked by anyone; but voidable marriages can be attacked, and impotence can be attacked only in the lifetime of the parties. This of course is not on all fours with the Canon Law, either Anglican or Roman Catholic, who are in accord on this matter; but the effect will be to enable people who have conscientious scruples about marriage to do something about it, while giving other people no right to interfere.

Section 5 (2), which deals with religious impediments, is actually modelled to some extent on the provision of the Civil Code of Quebec which allows the impediments to have their force, but I have restricted it to the effect in the religion in which the marriage takes place, because in the history of this particular aspect of marriage there was an attempt to prevent the marriage of Roman Catholics in another church with the implication that a person is not free to change his religion, and of course this would not be tolerable in this country.

Section 5 (3) deals with a technical problem and it tries to work out a particular situation.

Section 5 (4) deals with approbation and this is an extension of the scope of the existing law. Approbation, as a matter of fact, is not recognized by Roman Catholic Canon Law. I am told on good authority. The people who have got into a bad marriage that can be cured can affirm it instead of having to go through it again. This may be a little restrictive on some people but it seems to me to be a sound principle.

The CO-CHAIRMAN (*Senator Roebuck*): They can always go through the ceremony again in any province if the previous one is absolutely void.

Judge O HEARN: This is not necessary. They can affirm it now. It seemed to me a reasonable principle that where you have entered into a contract which is invalid for some reason, and subsequently you can revive it by conduct that can be recognized in ordinary law as a good ratification, and it has the same basis in the existing marriage and divorce law.

With regard to nullity suits, I have made some slight change in the general principle, with the provision that a voidable marriage can be challenged only by a party in the lifetime of the parties; provision for allowing people with an interest to void a bigamous marriage or one which is void for non-age while they are under age, would still remain. This is necessary because property rights get involved here. But I have put in a qualification which may appeal to you, that once a marriage ceases to be void and becomes voidable, then it can not be challenged because the integrity of the marriage should be preferred to any pecuniary claim. In other words, public policy would favour the marriage rather than a property claim.

Section 6 (4) is pretty well the existing law.

Section 6 (5) brings in the question of jurisdiction.

The general basis of jurisdiction in matrimonial suits is domicile of the parties, which is equivalent to domicile of the husband in most British countries. That is because such domicile is recognized or alleged to be recognized internationally as having exclusive jurisdiction over status. Actually this recognition is not very widespread outside the British Commonwealth. In many countries there is nationality or citizenship or residence as the basis; but as long as it exists you have to pay some attention to it. It has been suggested, and actually this was the genesis of this brief, in discussion with Mr. McCleave, that there be Canadian domicile, and I have attempted to incorporate it here in some cases. But even if you have Canadian domicile you have to have some court provisions, and that is what subsections (5) and (6) tend to provide.

In nullity suits the residence of the parties or of the respondent is sufficient, but the residence of the petitioner only is not sufficient, and if the respondent has not a domicile this puts the petitioner in a bit of a bind. The bringing in of Canadian domicile would solve that problem in some cases but not in all. However, I believe that the subsection would solve a great many cases, while leaving some still hanging as a matter of international recognition.

Section 6 provides that a woman who is a party to a void marriage may have a domicile separate from the man, and a woman who is a party to a voidable marriage may require a separate domicile from the man if the marriage has not become valid and they have ceased cohabitation as man and wife.

That seems reasonable. There is a bit of legal contradiction involved here but it is really a verbal one and is nothing that should get in the way of the court in solving the matter.

Sub-section (7) merely provides an expeditious and rational way of proving the religious disabilities mentioned in the previous article.

Sub-section (8) provides that the children of a void or voidable marriage are to be deemed legitimate. This is an advance on the present law, where the children of a void marriage are generally construed to be illegitimate. I do not think there is much more I can say about it. It is really a matter of internal effect, whether you feel it should be so. There is a possible constitutional difficulty here because of the conflict between civil rights and property on the one hand and marriage and divorce on the other, but I think it can be phrased to a certain extent to deal with the effect of a decree of nullity, making it a limited decree rather than a full one, which I conceive to be at least arguable as being within the domain of Parliament.

Coming to the meat of the matter, which is judicial separation and divorce, I have divided the process into two stages. I am requiring judicial separation to precede divorce in every case, and Mr. Driedger put it well in his testimony. He said judicial separation is divorce without the right to remarry. What I am trying to do is to isolate the right to remarry to a later stage so that it can be determined on its merits.

Mr. Driedger was somewhat cautious in giving his opinion that jurisdiction over judicial separation was within the competence of Parliament. I have no caution at all about that. I think it is so plain that it could hardly be dealt with by the province, notwithstanding the fact that it is dealt with by some provincial laws in its aspect of property and civil rights.

Now the great change I recommend with respect to judicial separation is that it become part of the exclusive jurisdiction of the Family Court that has been mentioned. Judicial separation is obviously a situation where the special

agents and techniques of the court are most needed and most likely to succeed. Divorce is likely to be too late a stage, for when survival of the marriage is impossible the effectiveness of the Family Court process will be negligible.

As to grounds for separation, which are dealt with in subsection (2), I think these represent something of a consensus. They are those which, in my experience in dealing with domestic cases—and that experience has been fairly broad, though for personal reasons I have never had a divorce practice—are the kind that trigger people into separating, whatever may be the ultimate background of the separation.

I do not see any benefit in requiring people to wait after separation for a three-year period, or any period.

The CO-CHAIRMAN (*Senator Roebuck*): Hear, hear.

Judge O HEARN: What I should like to see in this respect is that if they are likely to break up they get into the hands of people who can do something for them in the way of reconciliation, looking after the children, making sure of proper maintenance, and things of that kind; and while this may not be an integral part of Family Court procedures, it could be adapted to the Family Court, or in any of the courts now handling divorce or judicial separation.

This approach seems to have wide support among those who have studied the matter. Mr. Justice Walsh had some comment on it, Mr. Justice Migneault, the Catholic Charities Commission and the Anglican Diocese of Huron.

There are those, however, who seem to think that compulsory reconciliation processes are not worth very much. I am prepared to admit that what people do under compulsion is not as effective as what they do voluntarily, but in a great many fields it does work to some extent, though of course not quite as much as we should like. We have a probation service, which is a sort of reconciliation of a person to society, and this works under compulsion and does a fairly good job. Frankly, I do not share the view that compulsory conciliation is useless. *Putting Asunder* takes the position that it should not be made compulsory, but that before the merits of a judicial separation case are gone into the parties should be asked whether they have made any attempt at reconciliation, or consulted any professional advisers, and if the court is not satisfied with what has been done the matter should be adjourned to give the parties an opportunity to seek counselling. This is a fancy way of say, "We are going to compel you to do it", but in a great many cases it would succeed.

In the brief I take issue with judicial separation or divorce for insanity. Incidentally, in the quotation from More's *Utopia* there is a misprint which I shall draw to Mr. Savoie's attention. That is by the way. In my opinion this ground, which of course was been accepted in England, does not meet the test of frustration, which is the one on which I would base the dissolution of marriage. I cannot see that it amounts to anything different from physical illness or incapacity which sometimes renders the parties incapable of living together as man and wife, often to such an extent that they cannot even communicate. In these circumstances, to my mind, there are still some of the ends of marriage that can be met should be met. However, I am not making a major point of this. It seems to be a popular ground, and I can see the point of view of people who advocate it.

Divorce by consent has raised its querulous head, and I believe you have a brief from one person who was very blunt about this. We have judicial separation by consent in most places. It is very easy in most common law provinces to achieve a separation that gives the parties most of the benefits of a judicial decree—not all but most of them.

On the basis that judicial separation should precede divorce, why could not this be one of the ways of achieving judicial separation? I could see some force in this if it involved the parties getting together in conciliation processes at an early stage of the estrangement. Unfortunately, I think there are arguments against permitting this to have judicial effect as a judicial separation leading to divorce. I am submitting that there are public interests, interests of the family, of the children, of society itself, that argue against permitting judicial separation except for social and serious reasons.

We all know of people who go through a series of mariages and divorces and have very little concept of what marriage should mean and the kind of generosity of spirit it calls for to be successful. Their approach to marriage is on a very low physical plane. I am not decrying the physical side of marriage, but that is not a sufficient basis for marriage.

Section 8 (3), (4), (5) and (6) deal with more or less technical matters, and so does (7).

As I have mentioned, section 9 deals with the idea of Dissolution of Marriage and it is so phrased that judicial separation would be requisite and a year would have to pass before the parties could approach this stage. I think this structure isolates the idea of permission to remarry. You get the substance of divorce except for this in judicial separation, and by isolating it you can look at the idea itself. Why should people who have failed in one marriage have permission to remarry? I am not saying you should not answer 'yes' to the question, but at least it is a question that should be asked; and this structure permits you to ask it.

This is one of the points on which I would take issue with *Putting Asunder*. They go on the basis that once a marriage is dead it should be disposed of and got out of the legal picture. I do not think they have analyzed the matter far enough. They repeat this attack several times. But why should it be got out of the picture? Obviously, if the inability to remarry is going to cause positive evil to the parties, there is some case for saying, let us get it out of the picture. But most of the evils that arise from broken marriages are disposed of reasonably effectively by judicial separation.

You have of course what is called common-law marriage, which is very common in breakdowns; and this entails the business of legitimating children. I think that the legitimating of children is a very worthy cause, but I do not like this way of doing it, especially with young children who start life with the disabilities and stigma that such a phrase connotes.

The idea of regularizing the very stable relationships that sometimes are achieved in common-law marriages has a great deal to be said for it, and I think this is the kind of situation where permission to remarry should be considered. I would ask you to look at subsection (2) of section 9, which I have divided into two parts; and the second part, which I am not stressing too much though it should be given consideration, is that there should be a proper brake on the marriage-divorce merry-go-round. And this is the kind of brake I suggest.

After considering the matter and going through the phrasing, which incidentally I had to do over the weekend, not having had a chance to do it before, it seemed to me that it might be reworded, and I suggest it might be more acceptable in somewhat this form:

> The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt—

The words "beyond a reasonable doubt" are not necessary, but I thought I would put them in.

> —that the marriage has broken down completely and irremediably so as to be substantially frustrated; but the court shall not grant such decree where it is satisfied that neither of the parties has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success.

The CO-CHAIRMAN (*Senator Roebuck*): It would be difficult to find anyone who could make that determination.

Judge O HEARN: It would be a difficult finding in the first divorce, but if you had people coming back after three or four there would not be very much difficulty about it. On the basis of frustration, that is, a breakdown that is irremediable and that frustrates all the ends of marriage, that is a very sound ground for the dissolution of a marriage, and I do not need to urge it because it has been urged by so many people.

Adultery seems to me to stem, as a ground, from a misunderstanding of Chapter 5 of St. Matthew. The Jewish law provided it, and it has been a millstone around our necks for centuries.

I think that fairly well covers my submission. I believe I have outlined two significant differences between my position and that of *Putting Asunder*. They say that frustration should not be a basis for breakdown of marriage, but I suggest that an examination of *Putting Asunder* reveals that breakdown in itself is not a sufficient answer because they are forced to admit that mere breakdown as the only basis for dissolution, without any consideration of culpability, would lead to injustices—the injustice of the grossly guilty party getting a decree.

The other issue, I take it, is the suggestion that it is necessary to get rid of a dead marriage simply because it is dead. That is the legal effect of it.

The CO-CHAIRMAN (*Mr. Cameron*): Thank you, Judge O Hearn. It is our custom for members of the committee to direct to the witness such questions as they would like to have answered, and I believe that Mr. Honey has a question.

Mr. HONEY: I have two questions, and I would not like to have it inferred from the one I am about to put to the judge that I intend anything in the least disrespectful of the ability of County Court Judges; but I am wondering whether His Honour has seriously considered the many ramifications that flow from the dissolution of marriage—property rights, rights of inheritance, and so on. Having regard to all these matters, does Judge O Hearn still feel that the Family Court should be given the jurisdiction he proposes?

Judge O HEARN: Yes; because actually what you have in the ordinary course is a very routine procedure. It takes twenty minutes to hunt through them, so that the operation is as simple in outline as a traffic case—bang, bang, bang, just like that.

Mr. HONEY: My concern is that there may be many of these problems which would not be apparent to the Family Court Judge and the County Court Judge but which a Supreme Court Judge would seize on immediately: domicile may be one such problem, or residence, or whatever term we might decide to use. Such things might not come home with their full force to someone who might not even be trained in the law. He might not grasp the significance of some of the legal points that are involved in divorce; and, as far as I am concerned, before the members of this committee could accept Judge O Hearn's recommendation they would need to have some assurance of the qualifications and training of the Family Court Judges that were to be appointed.

Judge O HEARN: I do not know how you could get any assurance respecting the qualifications and training of any judge. This is a matter that is determined in a mysterious way, and speaking from the experience of my encounters with the Bench, both before and after I came to it, I find it is a mixed breed. You might have trouble even with someone with legal training if you were dealing with domicile and residence, but a lawyer who deals with such matters all the time, even if he is not a very good lawyer, gets to know the specialty pretty well and will become expert enough in it; and if he makes a significant mistake there are always courts of appeal.

I can see your point of view and I know that people approach this question with doubt, but I do not share your idea of the judicial ability of the hierarchy in Canada. I do not think it is as profound as that.

Mr. HONEY: One more question, Your Honour, with respect, and tht is with regard to your suggestion that the minimum age for marriage might be made 18 years.

Judge O HEARN: Yes.

Mr. HONEY: Would you provide for judicial leave, under certain circumstances, for the marriage to take place at a younger age?

Judge O HEARN: I have handled that sort of thing under the Solemnization of Marriage Act, and the request is sometimes made for permission to marry without the parents' consent under 21, and it is workable; but I do not see any justification for it under 18. What possible emergency could there be, except pregnancy, which would justify it? And that is the kind of thing that does not justify it.

Mr. HONEY: I would be inclined to agree with you in generalities, but I have a particular experience in mind where, in a case of pregnancy, the girl was 17, and there was a great deal of urging brought to bear, with the result that consent was given, the marriage was solemnized, and it has worked out very well. If in these given facts your suggestion had been in force and the minimum law was 18, that marriage would not have taken place. It may be an exception to the rule Your Honour has mentioned, but there are exceptions; and in that particular case, after a great deal of persuasion, I was able to prevail upon the parents to have the marriage take place. My judgment, after many years, has been vindicated because it has worked out very well. My point is that if we had no means of taking care of such unusual cases hardships might follow.

Judge O HEARN: I have no comment on that except that I think it was exceptional. The general rule is that such marriages do not work very well. In my opinion, 18 is about the minimum you can conceive of as a successful age.

Mr. HONEY: Would you have any objection to a provision for judicial consent?

Judge O HEARN: Oh no, I just think it is weakening the thing, but it does not matter that much, really.

Senator BURCHILL: Who establishes the family courts?

Judge O HEARN: The province does, and has done so in a great many instances. There is nothing to prevent the Parliament of Canada from establishing its own court on that line under section 101, I believe.

Senator BURCHILL: But it would have to be established in the provinces.

Judge O HEARN: There should be provincial courts. The provinces are doing this kind of work in closely related fields and are building up a staff of professional judges who have training in family law and they are the logical

courts, I suggest, to handle it. There is no doubt Parliament can give jursidiction.

Sénateur BURCHILL: Are they in existence in many provinces?

Judge O HEARN: In British Columbia, Ontario and Quebec. In Nova Scotia, family courts are just being instituted on a province-wide scale. The province of New Brunswick has, Manitoba has. British Columbia has one court called the Family and Children's Court designed to cover the whole province and which is set up on a good organizational basis. Prince Edward Island and Saskatchewan, no; Alberta and Newfoundland, yes. In Newfoundland it is handled by Magistrates. It is called Family Court.

Senator FERGUSSON: Does Judge O Hearn think it is unreasonable and unworkable that married women should have the same right to domicile as married men?

Judge O HEARN: I do not think it is at all unreasonable. The difficulty is to have it internationally recognized. The trouble with domicile is that the concept has grown up not is our own domestic law but internationally. Once it becomes real it will be recognized.

Senator FERGUSSON: It is not recognized internationally as it is in the Commonwealth. Throughout the world there are countries that have different rules regarding domicile and they are not in accordance with what we have in Canada or in most Commonwealth countries.

Judge O HEARN: The principle of separate domicile is a little inconsistent with the common law view of the unity of marriage which gives the husband the right to select the marital home; but possibly that is on its way out.

Senator FERGUSSON: The Council of Women, when they appeared before this committee, suggested that the age should be 21. Do you consider that unreasonably high?

Judge O HEARN: At this stage in history, yes. To get it up to 18 will be hard enough.

Mr. RYAN: Have you envisaged some standard form of judicial order of separation, from which possibly a judge would have discretion to deviate in individual cases? In other words, the Family Court order would be an individual order made in each case by the judge.

Judge O HEARN: I should think that would be determined according to the exigencies of the situation in the provinces. What I contemplate is that this matter of procedure would be determined by Rules of Court, made in the province, as to variation. But variation in what respect? In the conditions of the separation?

Mr. RYAN: Yes. In Ontario separation varies. There are different periods set out for separation. There are trial separations for three months or six months, more frequently than for one year, which is a long time.

Judge O HEARN: In Nova Scotia the practice is not to put in a time period. Temporary separation by agreement is left undefined so that we do not have a problem.

Mr. MCCLEAVE: It would be partially covered by Rules of Court and partially by the demands of the particular case.

Mr. RYAN: Have you considered the advisability of having the actual divorce dealt with by the Supreme Court but having the Family Court record, with the evidence and the whole background of the case, sent up to the higher tribunal, instead of having the divorce heard formally in family courts that deal with wife

beating and that sort of thing? Perhaps I could ask you this question: Do you think the formality of the higher courts has had some deterrent effect on divorces?

Judge O HEARN: Formality in procedure is not a strengthening factor in handling family problems. I think the big deterrent has been money: you can see it in the divorce statstics in Canada.

Mr. MCCLEAVE: And the amount of legal aid required in cases in the United Kingdom.

Judge O HEARN: In my opinion the Supreme Court and the assize courts are not properly equipped to handle the problems that arise. The judges have neither the time nor the outlook. Once you get it before a judge who is dealing with contracts you are dealing with another case of legal rights and wrongs.

Mr. MCCLEAVE: I would quarrel with you in that pronouncement if I had time.

Judge O HEARN: I know that the judges do try to put heart and soul into it, but they have not the proper machinery. Even with the best will in the world to help these people, the Supreme Court Judge has not the time, the facilities nor the outlook to deal properly with domestic problems.

Mr. BREWIN: Are you convinced that the family courts across Canada are in a position to handle an assignment of this kind?

Judge O HEARN: Whatever their defects, and I am not blind to them, they would do a better job than is being done now by the Supreme Court. They have people trained in welfare work who can help to find out what is going on and conduct the reconciliation process.

Mr. BREWIN: I wish to ask Judge O Hearn a question on a point which has been raised by way of comment or at any rate by an interjection on the part of Senator Roebuck. The language of the proposed section 9 (2) is: "The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt (a) that the marriage has broken down completely and irremediably, and (b) that one of the parties, at least, has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success."

Only the Deity could be expected to determine "beyond a reasonable doubt" whether any person had the characteristics here set out. We have all witnessed many marriages that gave promise of success but failed to live up to expectations, and vice versa. Isn't this asking a judge to make a finding about a subjective matter far beyond the capacity of mortal man to determine, judicially or otherwise? I should think it would be a source of acute embarrassment to the court to be called upon to make a solemn finding that neither X nor Y was capable of mature and generous behaviour, or had "other elements of character and capacity needed to marry again".

Judge O HEARN: Judges have an unlimited capacity to believe they can decide any question of fact.

Mr. BREWIN: But this is more than a matter of fact; it is something subjective.

Judge O HEARN: On consideration I have changed the wording so that it is not "beyond a reasonable doubt" but only "where it appears". The judge would not refuse a decree where the facts warranted it. When you get down to brass tacks on the thing, it would never be refused on the first divorce, but it is not hard to recognize people who get on the merry-go-round for second or third divorces: they show they have no idea what marriage is all about.

Mr. McCLEAVE: Since the judge has often asked me questions in my time, this is a chance for me to strike back. Your Honour, the suggestion about the provision of officers and other trained help to assist the family courts would mean in effect that it would be largely up to provincial initiative to ensure the effectiveness of reconciliation procedures and hope for their success, would it not?

Judge O HEARN: I think that is pretty well true. Possibly, if this device were adopted, you would find people knocking at the door in Ottawa asking for more and more money. The provinces have shown a great deal of initiative in getting into the family court business.

The CO-CHAIRMAN (*Senator Roebuck*): I would like to thank the Judge for getting down to things definite. We have had a good deal of theory presented to us in our hearings; but, sir, you have actually phrased the law that you advocate. For the first time we have had that done for us and we thank you for it. It did not have your name on it, Your Honour, and I thought it was Mr. McCleave that had drawn it, and I was amazed at the industry of the man and I wondered why he had been keeping something from me until the next day, after I had read this, I found it was not Mr. McCleave at all but Judge O Hearn.

Well, it is a magnificent piece of work, a very great piece of work. It conveys to us in practical form many ideas that have been rather nebulously talked about in the past and I am sure it will be of great assistance to us.

I do not know that we can adopt all the suggestions you have made, because you must remember and bear in mind that this is a Joint Committee of the Houses of Parliament and we are instructed—and this is our charter—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.

We have had various bills, with the exception of that recently introduced by Mr. Brewin, referred to us, all on divorce, and I think that is all; but whether we have before us the whole marriage question is doubtful—or such matters as domicile in general. I think we should avoid that like poison because it is full of difficulty. But I wonder if we have not already touched it in the Divorce Jurisdiction Act. We have broken the usual international rules without any difficulty for a number of years, and I wonder if we could not avoid the question of domicile by simply allowing the deserted wife to sue where she resides. We need not change her domicile or give her domicile, but the right of action, as we have in the Divorce Jurisdiction Act.

There are many things I might mention. I will not go through them all but I would like to say something about the tribunal.

I am sure, sir, you will not take offence when I say I have a good deal more confidence in the County Court Bench than I have in the Family Court.

Some MEMBERS OF THE COMMITTEE: Hear, hear.

The CO-CHAIRMAN (*Senator Roebuck*): I see I meet with favourable response from others on the committee. Somebody has said we have some atrocious courts and some very good ones; and we have some attrocious officials in the family courts as well. Perhaps, Your Honour, you read what the former Chief Justice of Ontario said to us—the recent Mr. Justice McRuer, now retired—in which he described the joint jurisdiction between the High Court, the Supreme Court and the County Court. He would not prevent anyone moving an action in divorce to the Superior Court but he placed responsiblity largely on the shoulders of the County Court.

I grant you that many County Court Judges are very much overloaded while some of them are not. It might be that we would have to appoint a few more

County Court Judges. But would it not be better to take one step at a time? First, County Court jurisdiction; and as time goes on and the family courts become more efficient than they are now—they are new—we might take the further step of transferring to them a little later on.

It seems to me we should not immediately take so tremendously long a step as to transfer it entirely from the Supreme Court to gentlemen who are made officials of the family courts.

There was some question about the age of marriage and I would like to point out that really the vital thing in connection with this marriage question is the children. When you question the age of parents, really the question you ask yourself is: What about children and their right to be married in the legitimate way?

It is true we could change the rules with regard to legitimacy. I fancy that is provincial and beyond our powers, and if you prohibit marriage until even 18 you will just perhaps increase the difficulty that presents itself to us now of a very large number of so-called common-law marriages and an unfortunate number of so-called illegitimate children, although I did like your statement with regard to illegitimate children: there are none such; there are and should be only illegitimate parents.

With regard to compulsory conciliation, I may say this. In every case that we in Parliament have tried since I have been Chairman of the Standing Committee on Divorce, and that is now 13 years, we have asked the question whether there is any possibility of reconciliation, and the fact is that by the time the parties come to our court—I do not know very much about the courts in general, but this is certainly true of the cases that have come before us—the marriage is gone and conciliation either voluntary or compulsory is a dead letter. That has been our experience.

Then the question about remarriage. Why should someone who has made a failure of one marriage be allowed to make a second marriage?

Here again is the question I would ask on behalf of the children of the marriage: What about the children? To prohibit people from marrying does not prohibit them from living together and producing children.

You have raised a great many points, Your Honour, and you have done so in a most practical way. You have rendered a real service to this committee in our difficult task, and may I ask you, on behalf of the committee, to accept our thanks. Let us not overlook the fact that the judge has travelled a very long distance and given of his time and "home work" in order to assist us in our work. Thank you, Your Honour.

Mr. RYAN: May I endorse what our Co-Chairman has said in appreciation of Judge O Hearn's address.

The CO-CHAIRMAN (*Mr. Cameron*): It is now my duty to introduce Professor J. J. Gow of the Faculty of Law of McGill University, Montreal.

I will quote the biographical sketch I have here: J. J. Gow, B.L., Ph.D., LL.D. (Aberd.)—Gale Professor of Roman Law, McGill University; Advocate of the Scottish Bar; Barrister and Solicitor of the Superior Courts of the States of Victoria and Tasmania.

Professor J. J. Gow (Faculty of Law, McGill University, Montreal): Messrs. Chairmen, I must thank the members of the committee for the opportunity that has been given me in coming here today and saying something to you.

I confess to a feeling of considerable discomfiture because first of all, unlike the distinguished witness who has immediately preceded me, I claim no expertise in matters of family law. I am both by training and inclination a commercial lawyer. I recall Mr. Justice Walsh saying much the same when he testified before this committee. Although on occasion I have had to earn my bread by appearing on behalf of a petitioner or a respondent in a matrimonial cause, and to that extent I am acquainted with the stark fact of unhappiness which occurs in most marriage breakdowns, I cannot lay claim to any expertise in the very difficult matters which are being investigated by your committee.

It was only by accident that, towards the end of December at McGill University, then celebrating the centennial of the Quebec Civil Code, I happened to write a paper entitled *The Problems of Matrimonial Relief.*

The paper took the form it did for two reasons. First of all, the very technical and difficult law of Quebec concerning the separation of parties to a marriage, the effects upon the children, paricularly in regard to maintenance and property rights, and the impact or lack of impact of the Marriage Act of 1963 upon the law of Quebec: all had been dealt with in a very thorough manner by Mr. H. E. Walker in his lecture given in McGill University in 1965 entitled "The Problems of Disintegrating Marriage".

In his very admirable essay he deals in great detail and thoroughness with the very technical and difficult problems which arise in Quebec by reason of the fact that divorce *a vinculo* is not recognized in that province. And this brings me to the second reason for preparing this paper, Problems of Matrimonial Relief, in the manner in which I did.

It seemed to me there was in Quebec, as far as I could see, a conspiracy of silence concerning this profound social problem of the breakdown of marriage, and indeed almost, one might say, ignorance of the existence of this committee and the very important work it is doing, which I believe shou'd and must affect all Canada from coast to coast.

Whilst I am open to correction, on going throught the record of evidence which has been heard before this committee I think I am substantially right in saying there has been little rush from persons or bodies in Quebec to come and testify before you in comparison with the wealth of carefully thought-out and, I am sure, very valuable evidence you have received from almost every other province in the country. And, of course, the evidence given by His Honour Judge O Hearn is a striking example of what is being done by persons and organizations in many parts of the country.

In this paper I attempted to do two things. The first one was intended to provoke controversy by asking the question: Why is the remedy commonly called divorce not known to the law of Quebec, or at least not recognized and acted upon in that province?

This required a litt'e historical investigation; and clearly, without going into detail, the answer given by one Loranger in his *Commentaires sur le Code civil du Bas-Canada,* published in 1879, was that in New France, when the French were in control of the country, the doctrine of the Council of Trent that the sacrament of marriage was indissoluble was not received with too much acclaim because in France itself the civil powers were not prepared to concede sovereignty in these matters to the Church. But, Loranger said, after the English came the subordination of the Church in family matters to the civil powers ceased to be and supremacy was given to the Church because, he said, "if it had not been given the impact upon us of the Protestant civil power could have been disastrous to the French Canadian nation".

Later commentators such as Mignault, and much later in the century other commentators, simply took the view that codes of law of divorce did not exist and could not exist, and some even went so far as to say that the power given to the Parliament of Canada to legislate in this matter could not be recognized by them.

Well, of course, you have heard today one witness who is a Roman Catholic, and I believe you heard the other day, from the Catholic Women's League, evidence that although personally they did not believe in divorce, that was a far cry from saying that their personal beliefs should prevail over the law of the land. And in my paper I said that whatever might be the justification given by French Canadian commentators for denying a law of divorce in Quebec, it could no longer be thought it was required to protect the integrity of the French Canadian nation. Today in the Province of Quebec, with control over education, they cannot reasonably fear inimical legislation on the part of Protestants.

Then I suggested that an investigation should be made of the facts. What is the position in Quebec? How many men, women and children are living in varying degrees of unhappiness or discomfort from lack of remedy? How many, for example, come to Ottawa to obtain dissolution of marriage by resolution of the Senate? To what extent, so far as the Quebec Civil Code is concerned, does the prohibition of divorce result in concubinage or the common law *de facto* marriage? It appears that there is a considerable amount of concubinage, particularly in large industrial centres such as Montreal.

The second line which I took in this paper was to draw the attention of my audience—perhaps I was somewhat impertinent in this—to the existence of this fact and the very great debate which is going on in the forum and particularly as to the rationale of divorce.

Should divorce be based on what is called the theory of offence by one spouse? Should it be based on what is called breakdown of the marriage, or should there be some compromise remedy available on the ground of offence or on the ground of breakdown?

At the end of the paper I put some questions—not the questions of an expert but simple questions; and I hope I am not too unknowledgeable a lay person in this field. I put these questions: What are the consequences of broken marriage upon the parties, upon the wife particularly, upon the children?—What are the social effects of a parentless family, the motherless family or the fatherless family? And then there was a final word or two upon the nature of the divorce tribunal and its jurisdiction, upon which you have heard a great deal from Judge O Hearn this afternoon.

My paper was essentially one designed for a Quebec audience and intended, I hoped, to initiate some thinking about, and some discussion of, this problem of the family in relation to the breakdown of the marriage. It so happened that there was at that meeting a considerable amount of discussion. There were papers other than mine given there, and I shall refer to them in a moment. But it brings me to a matter discussed before this committee not so long ago. I think it is in Volume 1, page 577, of the printed proceedings of your committee where a representative of the Baptist Association was testifying before you.

Some suggestion was made in the course of the evidence as to representatives from each of the provinces being heard by the committee. I do not recollect seeing the name of Quebec mentioned there. I should say this—

The CO-CHAIRMAN (*Senator Roebuck*): We have invited the Attorney General of Quebec to be here.

Professor Gow: I see that, yes. There is at the moment going on in Quebec a revision of the whole Civil Code. This revision is proceeding in a certain way, taking certain categories of the law, for example contract or torts, property and so on; and I know that one committee of that body is or will be dealing with family law; and whilst I am not a member of it and have no official connection with it, this body is bound to deal with the effect upon the family and the incidental rights of the children and of the wife of, for example, a divorce granted by resolution of the Senate.

I think that the persons concerned with the revision of the Quebec Civil Code are sufficiently conscious of the duty which lies upon them, both to the community in which they live and to the law which they profess to revise, that they must somehow or other seek to put an end to this somewhat unnecessarily wasteful and very often distressing state of affairs.

This is bound to bring them into contact with the question of divorce; and whilst I do not know what they will do, what they will recommend, I do know there are moves now going on in Quebec, because of the great changes taking place in that province, that willy-nilly force those concerned with the law to grapple, and come to terms, with the problem that confronts this committee. In other words, to come back to the expression of opinion given to this committee very early in its life by Mr. Justice Walsh for one, it would be well worth this committee's while to consider the recommendation of legislation which would apply to Quebec. On the other hand, I think it was Dr. Ollivier who took the opposite view that there ought to be no imposition of legislation on the Province of Quebec because, in his view, that would offend the religious beliefs of the bulk of the population in that province.

I am not so sure that Dr. Ollivier is right or necessarily substantially right. In other words, I am not certain that upon investigation he would find that Quebec is monolithic in this respect, as it is not monolithic in many other respects; and there is evidence before this committee to which I have already alluded, for example, the Roman Catholic Church: whilst it could not positively advocate a law of divorce, it might not oppose it. Of course, I do not know, but I think there is evidence to suggest that as a reasonable inference.

I have said that perhaps Quebec is not monolithic in this matter; perhaps Dr. Ollivier in his evidence was attaching too much importance to the force of religious belief.

At the meeting at which I gave the paper, "Problems of Matrimonial Relief", I had the good fortune to have associated with me Professor Elton, Professor of Sociology at York University of Ontario. He is a distinguished sociologist who had earlier in his career been a member of the staff of McGill University and, as well, of the University of Montreal, and therefore well acquainted, both as a human being in residence and as a professional sociologist, with that province. He gave a most interesting paper on the relation between, for example, divorce and the changes taking place in the Province of Quebec today.

It was his thesis that at one time, in the little world which was Quebec, the unit which he called the extended family—that is, the family of mother, father and children, but the nucleus surrounded by grandparents, aunts and uncles and the like—served a very important social function. It was an economic unit and also a moral unit who gazed upon the hierarchy of authority, with the father at the apex.

With the coming of industrialization, however, the breakdown of rural life, the radical change both in our way of earning our bread and in our manners and customs, this extended family has gone. Now the family unit consists of mother

and father, frequently each out seeking to earn income to support the children; and furthermore the children were living in an era when the choice of marriage was dictated by the notion of individual freedom and romantic love.

This means that for all sorts of reasons the change from a romantic notion of marriage based upon so-called love to the fact that the mother and father occupy equal positions in the family unit itself means that the incidence of unstable marriages is very much greater, unstable marriages in a time when the individual feels that he has a right to happiness. If the law denies him that right to happiness by refusing to permit him to obtain a divorce and live apart, or choose another wife, then either he will ignore the law or his generation, as soon as it comes into power and can exert political leverage, will change the law.

As I have said, Elton is a sociologist, and he predicts that the generation coming into power in Quebec is almost on the point of changing the law; and, of course, there is a coincidence between what he says and the fact that the Civil Code of Quebec is under considerable revision in all its parts.

At the same meeting a paper was given by my distinguished French colleague, Professor Beaudoin, dealing with the setting up in Quebec of a new structure of family courts. The interesting thing is that Professor Beaudoin—the paper was in French—described very much what Judge O Hearn was pressing upon you this afternoon: that is to say, what he calls a family tribunal which would deal with all matters relating to the family, upon the same theory as that of Judge O Hearn, that the family is a unit: you cannot break it up and send the children to one court and the parents to another court, and so on and so forth.

He advocates one tribunal which should have the status of a Superior Court having full jurisdiction over all matters relating to the family, and there is little doubt that steps will be taken soon, in Quebec at least, to plan at least the structure of family courts.

This is also consistent to some extent with what is happening in the United Kingdom. There of course an extremely powerful commission was set up one or two years ago, and about six months ago they published a report in which many topics were discussed, one of them the breakdown theory of marriage, another the setting-up of, if you like, a family division of the High Court of Justice—and in a sense, although we all have our different views, the family is just as important a matter of judicial concern as is the case of a contract or torts.

Messrs. Chairmen, I came here under somewhat false pretences, my purpose being to suggest, I hope not disrespectfully, that perhaps this committee might consider more particularly some of the changes going on in Quebec and realize, as I am sure they do, that there are in that province many lawyers who are giving considerable attention to these matters.

Whilst I would not have the impertinence to suggest that I would know how to solve particular difficulties, I am by no means persuaded that perhaps some working compromise might not be found binding to your committee.

Thank you very much.

The CO-CHAIRMAN (*Senator Roebuck*): You are not here under any false pretences, Professor Gow. I for one am very much interested in what is going on in Quebec, and in the thinking that is taking place in that very important province. The meeting is open for questions.

Senator FLYNN: Since I am from Quebec, I think I shou'd say a few words. Generally, I am in agreement with Professor Gow, but when he says that in the Province of Quebec there is lack of interest in this committee, while that may be true I would describe the attitude as one of indifference, because, outside the

large centres of Montreal and Quebec City, one hundred percent of the population belong to the Catholic faith, and that makes the problem merely theoretical.

I know, however, the problem is acute in Montreal and in the region of Quebec City. It seems to me we might find ground for agreement with Quebec if we did not try to solve all the problems which are incidental to those which have been referred to us by Parliament but restricted the questions of marriage and divorce to their essentials.

If we try to solve all the incidental problems, which pertain mostly to property and civil rights, we may have a direct impact on the system which is being reformed and which is still very much a live issue in Quebec.

Perhaps Professor Gow would like to comment on my suggestion that, whatever the grounds for divorce might be, we may expect eventually that if in any province, including Newfoundland—because Newfoundland, in many respects, is in the same category as Quebec as far as divorce is concerned—the legislature is not given jurisdiction over divorce, the Exchequer Court of Canada might have jurisdiction to grant decrees of divorce.

It would not solve the whole problem but at least, at the beginning, the provincial legislature could just provide that a divorce, like an annulment of marriage, would entitle the other spouse to certain rights, mainly those that are provided for putative marriages in Quebec, and possibly for the support of the spouse, as provided in our judicial separation.

That is my view of the problem. I do not know whether it is in complete accord with what the witness has said.

Professor Gow: What Senator Flynn says represents the only practicable political solution. Whilst I imagine it is possible for the Parliament of Canada to legislate on incidental matters concerning divorce, matters which would attach to property and civil rights, I confess that in that respect the members of this committee are better judges than I on the possible repercussions. I am reasonably confident that the solution the senator has indicated is probably the one which will come about, provided dissolution of marriage is made available within the provincial legislature and the courts will work out the pros and cons to ensure the civil and property rights of the people of Quebec.

Senator Flynn: Speaking of the evolution of society in Quebec, and also the law, the religious authorities are now in agreement that some form of civil marriage should be arranged. At present, only officers of the various religious faiths are empowered to perform marriages. The Catholic Church is in agreement that there should be some provision to appoint officers like judges, or welfare courts, mayors for instance, to celebrate marriages in a purely civil ceremony.

Professor Gow: I understand that the Quebec Code Revision people are recommending the same thing. There are changes taking place.

Mr. Ryan: I wish to commend Professor Gow on his presentation; it is excellent. At this time I do not wish to ask questions, particularly pertaining to the Province of Quebec, but I would ask Mr. Gow to say how far he would go in implementing his remark that he would like to see a superior family court in each province deal with all family matters. What would you consider "all family matters" to be, Mr. Gow?

Professor Gow: All family matters as given in the paper comprise such things as—

Mr. Ryan: What page?

Professor Gow: It is not in mine. I am referring to Professor Beaudoin's paper in which he said that this tribunal would be divided into several sections and would take notice of, for example, the break-up of the family, the abandoning of children, wife desertion, juvenile delinquency, alimentary obligations, custody of children, separation as to bed and board, divorce, ill treatment of children, custody of and right of access to children, division of the community of property: in other words, he covers every aspect of family life.

Mr. RYAN: There are such matters as wife beatings, drunken husbands, and so on.

Professor Gow: Those would be included. He emphasizes "*mauvais traitement aux enfants*" but he does not say anything about the matters you have mentioned.

Mr. RYAN: I thought you had in mind a sort of specialty court to deal with these other matters that clutter up the court. What would your thinking be along that line?

Professor Gow: I have not thought about this to any great extent. My thinking, in so far as it has any weight, is this: that we should certainly recognize in our court structure the importance of this unit called the family. They are setting up a Division of the High Court or Supreme Court to deal with the very difficult psychological and personal problems which this family unit creates, which tribunal would have the ability to call upon social workers and the like, with possibly special training for judges. But these are just random thoughts. One of the unfortunate facts about divorce is that it creates almost as many problems as it solves, and the incidental problems, so far as the children are concerned, are of grave concern to the nation.

The CO-CHAIMAN (*Mr. Cameron*): That concludes the questioning, and I presume, Senator Roebuck, you will thank our distinguished visitor.

The CO-CHAIRMAN (*Senator Roebuck*): Yes. It is a privilege to perform this function of thanking the witness, for our thanks are surely his due.

It is indeed beneficial to us who live in other provinces, who do not speak the French language, perhaps do not belong to the dominant church of the French community to hear something from a well-informed source about conditions in the Province of Quebec. Mr. Gow has thrown light upon what to us is a shadowy scene, and I am delighted to know that a leavening change is taking place in that province.

I think it should be noted that Quebec is not the only province in which there is reason for change and in which change is being discussed and talked about. Other provinces have different problems, but they all have problems, and the spirit of inquiry and change is abroad from one coast to the other.

I was particularly interested, Mr. Gow, in this brief that you have submitted to us, and on the very first page I found a thought that had not struck me so forcibly before. We in the Province of Ontario are continually reminded that under the Civil Code of Quebec marriage can be dissolved only by the natural death of one of the parties; for while both parties live it is indissoluble.

Well, that is what has been told us right along and you, sir, have pointed out that that phrase has been torn from its context, because in the Civil Code there are other provisions as well such as the prohibition of polygamy, and I fancy the definition you would give, sir, is not a particularly technical one. Marriage may be with the benefit of clergy, but we have a great many of them, *de facto* marriages, that are not celebrated in that way; and we have found that insistence upon the continuance of marriages that are dead brings about marriages that are not regular and so, in a sense, polygamous.

The code permits the annulment of marriages contracted without the free consent of the parties, contracted in error, and annulments for manifest impotence, consanguinity, affinity within certain degrees, the fact that the parties have not attained the required age, and a number of other such reasons.

Professor Gow's submission throws to a certain extent a different light upon what seemed to us to be a very narrow and dogmatic provision in the Quebec Code. It is not nearly so strict as it would look to us in the way in which it has been cited to us by others. And so, Professor Gow, right through your brief you have given us a good deal to think about, and we thank you for it. We thank you for coming here and spending your time, giving us of your professional knowledge and helping us in the difficult task that lies ahead of us. Thank you, sir.

The CO-CHAIRMAN (*Mr. Cameron*): There being nothing more before the committee, we will adjourn.

The committee adjourned.

APPENDIX "29"

November 28th, 1966

Robert McCleave, M.P., Esq.,
House of Commons,
Ottawa, Canada

Dear Mr. McCleave:

Many, if not most, people have strong views on marriage and divorce and I am no exception. As a Roman Catholic, I am wholeheartedly committed to the principle that sacramental marriage, at least, is indissoluble and that all marriage is best approached on that principle in the interest not only of society but of the persons concerned. That is, monogamous, indissoluble marriage is best suited to the dignity and welfare of men and women.

In a critical approach to any idea, it is quite legitimate to take into account the bias of its proponents, who may be misstating the facts, concealing evidence or sliding over contrary indications, but bias does not justify discrediting the rational force of the argument itself because of the person who uses it. On the other hand, the considered view of such a large part of mankind, especially of the Western World and, in particular, of Canada should not be treated lightly or disregarded as merely religious prejudice.

Nevertheless, the dissolution of marriage is an established fact of modern life and it is likely to be with us in some form for a considerable time hence. Such being the case, without admitting the validity of a civil dissolution of marriage, Catholics should do what they can to make the divorce laws more just and more humane. As expressed by a well-known Jesuit writer, Rev. Francis Canavan,

> There are sound reasons, therefore, for resisting the lowering of legal moral standards. None the less, the law must in the long run reflect the beliefs of the people, because it ultimately depends on their consent. When the moral consensus that has supported a law in the past breaks down to a sufficient degree, the law must change or become a dead letter. (Catholic Mind, April, 1966, p. 53)

The attached memorandum and draft Act on marriage and divorce is an attempt to improve the law in those elements that my experience suggests are deficient. While we know each other well enough, it is only fair that I should outline that experience. Despite the fact that I have avoided divorce practice (more on ethical grounds than religious ones—so many divorces involve some fraud on the court) I am familiar with divorce law and with the practice here. As a lawyer, judge, former prosecuting officer, former director of the N.S. Bar Society's Legal Aid Clinic and active member of the Halifax Archdiocesan Catholic Charities Committee, as well as being former president of several societies with welfare functions, such as the Nova Scotia Division of Red Cross, the Children's Aid Society and the Charitable Irish Society of Halifax, I have been in almost daily touch with domestic problems since I was admitted to the Bar.

I firmly believe that our approach to those problems is too legalistic and abstract and that both bench and bar tend to treat divorce too much as a privilege to be paid for, such as limited liability, rather than as a human problem. After al[1], a lawyer who engages in divorce practice, under present conditions, with the object of saving as many marriages as possible will not have

much divorce practice. By a process of natural selection, the barristers who are most efficient in getting divorces will tend to get the bulk of the business. They are not to be blamed for this but it is not a happy situation for marriages that might be saved. We need to adopt the approach that has had some success in meeting other domestic conflicts. I am submitting the attached memorandum to you, not only because you are M.P. for Halifax but because you have had to deal with these problems yourself and have shown a truly humane concern for them.

Yours sincerely.

P. J. T. O Hearn.

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

P.J.T. O Hearn, Judge of the County Court, Halifax, N.S.

MARRIAGE AND DIVORCE

DIVORCE in Canada is dealt with by the wrong courts, by the wrong judicial techniques and is granted on the wrong grounds. Divorce is a serious personal matter to the parties involved but its public importance derives from its impact on society. Broken homes lead to maladjusted personalities, unhappy children, economic disabilities, a certain social disintegration, sometimes to crime. A second marriage after a divorce can re-establish family life on a renewed basis but the traumatic effect of the separation is often not completely cured, especially in children. Divorce is a remedy for personal problems but it, itself, is a social problem.

It is not really a legal problem. There are interesting legal problems that arise in divorce cases but the only important point is to make sure that the judgment in any matrimonial suit is recognized generally and not only in the law district of the court that pronounces it.

Marriage can be considered apart from divorce but divorce cannot be considered apart from marriage. The committee should take the opportunity that is afforded it in examining divorce law to try to reach a rational scheme for both marriage and divorce that would go far to satisfy the just complaints of everybody.

It might be objected that to do so would raise questions likely to distract Parliament from the needed divorce reform and likely also to rouse controversy that would imperil the reform. This is not really probable if the needed reforms of marriage law are accepted by the committee. They are much more likely to win adherents to the divorce reform and it seems improbable that a satisfactory divorce reform can be effected while ignoring those aspects of marriage law that presently cause dissatisfaction, especially if they contribute to divorce.

A concrete proposal is attached in the form of a draft Act and this memorandum is framed as an explanation of the draft because it is the experience of the writer that, in dealing with such a topic, a draft such as this enables people to get at the real meat of the thing in aspects that are important but that are likely to be overlooked in a discussion confined to principles.

1. PURPOSE

The long title states that the Act is designed, not only to amend, but to restate the law respecting marriage and divorce. The committee is considering fundamental revision of the approach to divorce law but divorce is dependent upon marriage and cannot itself be divorced from that topic. Moreover, both the law of divorce and the law of marriage are in an unsatisfactory state in Canada. The objections to the present divorce law have been well canvassed before the Committee but there are aspects of marriage law that are unhealthy or unjust in their operation and that contribute to the number of unsatisfactory marriages and hence to the number of divorces sought.[2]

2. DEFINITIONS

It is usual to defer consideration of definitions to the end of a bill, but the definition of 'family court' is relevant to the complaint that the wrong courts handle divorce cases. The courts named in the definition are, in every instance, the ones named by provincial statutes or territorial ordinances to deal with family matters. In some places they are staffed by justices of the peace who may not be lawyers. This should not be an objection to giving them jurisdiction in matrimonial suits, however, as they are charged under provincial legislation with deciding questions of equal social and legal importance and of equal difficulty. These include, in addition to juvenile offenders, such matters as neglected children, maintenance and wardship. In many instances, where the court is designated as the family court or social welfare court, the court handles all family legal disputes except judicial separation, nullity and divorce. Such a court is constantly deciding questions of the utmost importance concerning the status and welfare of individuals. They use techniques of investigation and conciliation that have proved effective in helping families to achieve stability. They deal with the social problems well and with the incidental legal problems well enough. In each case there is some means of getting any really difficult legal problem before a court of appeal.

In contrast, divorce courts handle cases without any investigatory staff and without social welfare techniques much in the same way as the winding up of a company might proceed. Indeed, many marriages are dealt with in less time and with less care than a contested trial for speeding. The divorce courts usually have the same judicial personnel as the superior courts of the provinces and move about in like manner, on assizes. This means that an individual case gets its day in court as a legal action but none of the care that such a social problem requires. A judge on circuit is rarely disposed to adjourn such a case for further inquiries or conciliation procedures, even if it is legally possible. The tempo and procedure of the superior courts is well enough designed for deciding strictly legal questions but it is quite inappropriate for the settlement of broken marriages or other domestic problems.

A transfer of matrimonial suits to the family courts is the rational solution: to try to adapt the practice of the superior courts to the techniques of the family courts would only create confusion in the superior courts. Since Parliament has jurisdiction over Marriage and Divorce it can impose such jurisdiction on provincial courts.[3]

The 'family court' is defined here to consist of all the social welfare, family or juvenile courts of the province, as the case may be, as a single court, although the individual courts of which it is composed may have limited territorial jurisdiction. This is analogous to the way in which the Family and Children's Court of British Columbia is set up and seems best suited to deal with questions

of domicile in federal law while leaving the allocation of the business among the courts to provincial regulation.[4] The spelling of the names of the courts is that used in the Act or ordinance that establishes the court.

The other definitions are designed to avoid excess wordage. It avoids circumlocution to include void or voidable marriages within the meaning of 'marriage'. 'Matrimonial suits' are also called 'matrimonial causes' in the law but 'suit' is equally appropriate to a claim for relief and is less ambiguous. 'Petitioner' etc., are defined to include 'plaintiff' etc., because in some provinces divorces are sought in actions rather than by a petition. The latter is chosen as having a wider meaning and as being suitable where the parties make a joint claim (such as is contemplated here in nullity suits) where the action form is not suitable.

3. APPLICATION

The application of the Act retroactively would validate some marriages and invalidate others. This has an alarming sound but the most probable effect in each case would be to satisfy the parties involved. The further provisions of the Act would restrict intermeddling by other parties to a much greater degree than is now the case and making the Act retroactive would enable those who now have the problem of a civilly valid, religiously invalid, marriage or *vice versa* to solve that problem, something that is now difficult or impossible to do.

3 (2) Application to Provinces

Should the law of marriage and divorce be uniform throughout Canada? The *Confederation Debates* in the pre-Confederation Province of Canada Parliament reveal that the Fathers of Confederation were well aware of the profound differences in outlook that the predominant religious and national groups held on these topics and had no wish to disturb those views.[5] They were also aware of the impact of marriage law on provincial society especially in the reserved provincial field of property and civil rights and they had no wish to disturb that.[6] The expressed intention in giving marriage to the central parliament was to ensure recognition of marriages throughout the country[7] and the expressed intention in giving divorce to the central parliament was to relieve the legislature of Quebec of the repugnant dilemma of granting divorces or refusing them to the minority in that province[8] and to make divorce difficult[9].

On this ground, I have proposed elsewhere[10] (following a suggestion of Senator Pouliot[11]) that the constitution should be changed by transferring jurisdiction over 'Marriage and Divorce' back to the provinces and that the federal government should have, instead, a more general power to regulate the recognition of the laws and judicial decrees of the provinces in other provinces and territories, a power for which there is some need in any case. Nevertheless, to hand power over marriage and divorce back to the provinces, where it rationally belongs, would require a constitutional amendment, a matter that, in this case, should receive the consideration of the provincial governments; this would be time-consuming and might inhibit reform, which is pressing. Constitutional reform is the best solution but the proper concern of the provinces with the social and economic effects of marriage and divorce can be dealt with to a reasonable extent by excluding any provisions that a province finds objectionable from having force in that province. It is not a complete solution because it does not permit a province to adopt any reform other than the one passed by Parliament.

As long, however, as Marriage and Divorce is a class[12] of federal jurisdiction it would seem desirable for the Parliament of Canada to fulfill its function by enacting the best law that can be devised for the Canadian scene and it is

reasonably likely that the only strong objections to a reform of the law of marriage and divorce throughout the country would be to the introduction of divorce in those provinces where the courts do not provide it.

Newfoundland and Quebec would, no doubt, wish to exclude the divorce provisions and other provinces might find the reformed grounds for divorce unacceptable. Quebec might also want to exclude the provisions respecting judicial separation, as the Civil Code deal with that topic in a way that is similar to the draft but not quite the same.[13]

Subsection (2) of s. 3 is designed to do two things:—(1) It will require a provincial legislature to consider the topic and act within a reasonable time if it wishes to exclude the reform, a responsibility that most legislatures would be tempted to put off if the reform required any positive action on its part; (2) The law will not come into force and then be excluded: if it did, it would reveal any existing repugnant law and this would not be revived by the exclusion. The legislature would not be able to re-enact it as it would be within the exclusive jurisdiction of the Parliament of Canada.

4. CAPACITY TO MARRY.

At common law, a marriage by a man under fourteen years or a woman under twelve years was voidable, void if either was under seven. The Quebec *Civil Code*, Article 115, provides that a man cannot contract marriage before the full age of fourteen years nor a woman before the full age of twelve years. With present social welfare services there does not seem to be any need for a boy and girl to get married to give their child a name, a most unfortunate way to begin married life in any case. Marriages at too young an age are likely to be unstable and the suggested age of eighteen is hardly mature enough to ensure against many ill considered marriages. There is some control over these through provincial licensing provisions under the power over Solemnization of Marriage, but the provincial restrictions are easily got round and they cannot deal with non-age as an absolute incapacity. In 1929, Great Britain adopted sixteen years as the minimum age for marriage, an age that seems ludicrous for marriage in today's world.[14]

The requirement that the parties be able to understand the nature and obligations of marriage is something that applies to all contracts and all legal act. As commonly interpreted it does not require any great intelligence, but the incapacity can arise from mental deficiency or insanity. Temporary causes, such as intoxication, affect intention and consent, rather than capacity, and are dealt with in s. 5 (1)(a).

Potency (the capacity to have sexual intercourse) was formerly considered an essential part of the capacity to marry but now the lack of it is considered to render a marriage voidable only and the draft deals with it in that context (s. 5 (1) (c)). That is, even though one partner is impotent, the parties can treat the marriage as valid and strangers are not allowed to challenge it.

4 (2) Consanguinity

Consanguinity (relation by blood) as an impediment is expressed in subsection (2) according to the current law which is derived from a statute of Henry VIII (1540).[15] It is the rule accepted by the Anglican communion but it does not cover some impediments recognized by the Roman Catholic Church and, probably, some of the Eastern churches.[16] Subsection (2) of s. 5 will reconcile the differences between civil and religious views, but only if consanguinity as a secular incapacity is limited to the extent set out in subsection (2).

4 (3) Affinity

Affinity is a relation that exists between a person and his or her spouse's relatives. It has been dealt with in a small way by the *Marriage and Divorce Act*, R.S. 1952, c. 176, but it does not seem to have any social function as a secular impediment to marriage and should be eliminated as such on that ground. It is unjust to Jews and those others, Christians or not, who do not recognize affinity as an impediment. Its operation as a religious impediment is saved by subsection (2) of section 5.

4 (4)(5) Void Marriages

The law has gradually approached the view that a marriage should be absolutely void only where it affects a public interest or is socially harmful. The public and social interest in avoiding bigamous and incestuous marriages is obvious and the like interest exists in avoiding marriages by those who are too young or who are too incompetent mentally to know the nature and obligations of marriage. The public interest will disappear, however, when the first spouse dies or the party becomes of age or sane, and in such cases the remaining objections to the marriage are private ones and should render it voidable only.

5. VOIDABLE MARRIAGES

The primary distinction between void and voidable marriages is that void marriages are absolute nullities but the parties to a voidable marriage may elect to treat it as valid or even make it valid. The election may, in some cases, be limited to the innocent party.

Clause (a) and (b) of s. 5 (1) merely spell out the intent now required by law for marriage and the necessity for a free and unmistaken consent[17]. Clause (c) deals with impotence, already mentioned under s. 3. It is expressed in very general terms but in accord with the tenor of the existing law.[18] It does not deal explicitly with the case where two people find they cannot have sexual intercourse with each other although one or both might be able to have it with others, but this seems now well established as implied in the notion of impotence.

In Great Britain, other grounds have been added by statute[19], such as venereal disease or pregnancy by another man at the time of marriage, as well as insanity not necessarily affecting the capacity to understand required by s. 4 (1) (b). Wilful refusal to consummate the marriage is also included in the British statute but, where it does not afford evidence of lack of proper matrimonial consent or impotence justifying avoidance of the marriage on one of those grounds, it would seem more appropriate to treat it as a ground for disssolution, because it is subsequent to the solemnization.

5 (2) Religious Impediments

Subsection (2) is designed to favour freedom of conscience by permitting the parties to choose the rules of any religious denomination to govern their marriage, subject to the basic requirements set out in the Act, rather than by imposing the rules of a particular denomination on all marriages.

It was not the intention of the Fathers of Confederation to disturb the beliefs, practices, rites or rights of the peoples of Canada in relation to religious marriage[20] but, in fact, since the Reformation, the impediments and incapacities recognized by the Church of England and none other have had the force of law in British Dominions where the common law prevails. In Quebec, however, Article 127 of the *Civil Code* enacted a more liberal regime, whereby the other

impediments recognized by the various denominations were recognized also for civil law purposes, and this enabled the adherents of those religions to follow their consciences in the matter: the question of a marriage that was valid by civil law but religiously invalid could arise, but rarely. Subsection (2) is similar in effect to the Quebec law. Marriage is still, for most of mankind, a contract governed by religious ideas and rules. The statute law deals with it in the manner it does only because the statute was intended to impose religious uniformity.[21] In a pluralistic society this is not appropriate and the Quebec solution is preferable, as it meets the demands of most consciences.

The Quebec law has been applied, however, to try to prevent the marriage of Roman Catholics in another church[22] with the implication that a person is not free to change his religion and this is not acceptable in our society. In subsection (2), this problem is resolved by making the rite in which the marriage is solemnized the determining factor.

Since religious impediments are included in the draft to protect individual freedom of conscience and not, as formerly, to uphold the beliefs of a particular denomination, there seems to be no reason to permit anyone not a party to challenge the marriage on such grounds: i.e., they should render the marriage voidable, not void.

5 (3) Multiple Ceremonies

Questions about validity may arise in a marriage where there are two or more religious rites or one or more religious rites and a civil ceremony. If no enacted solution is given, the courts, considering s.5 (2) and the rest of the Act, would probably conclude, quite properly, that a marriage is valid if valid under the rules relating to any of the solemnizations. The objection to this is that it is a restraint on conscience. When people go through two (or more) religious ceremonies as part of the process of getting married it is usually because they consider religion quite important and differ on the subject. In the instant case, therefore, at least one party could have the problem of a marriage valid at law but invalid in conscience and this should be resolved in favour of freedom of conscience. Analogous reasons apply in the case of a dual civil and religious ceremony: the parties usually go through a civil ceremony to secure legal benefits while the contemporary religious ceremony is for reasons of belief and conscience.

The reasons do not apply where the marriage ceremonies are not substantially contemporary: the parties would go through a later form of marriage usually to validate a marriage that they feel is defective in some aspect and their intention would therefore be to validate.[23]

5 (4) Approbation

Marriages are voidable because they were entered into without the necessary intent or consent or under fundamental mistake as to the identity of the other party or the nature of the transaction. Such a marriage can therefore be entered into by the parties when they have the requisite knowledge and intent and are free to consent. This may be done at that point simply by a tacit consent called approbation, i.e., continuing to live together as man and wife freely and with full knowledge of the nature of the marriage and its defects. In canon law approbation was assumed in some cases after a specified time, but the common law treats it as a question of fact in each case[24]. The courts can usually manage this satisfactorily and since the marriage is a matter of public record with civil effects and since 'All legal presumptions are in favour of the validity of a marriage'[25] it does not seem unreasonable to put the onus of repudiating the

marriage on the parties when they are free to do so and know that it is voidable. Until now, non-age (i.e., being under 14 or 12 years of age) has been treated as rendering a marriage merely voidable[26] so that there is no break in continuity of the law in applying subsection (4) to such a case.

6. NULLITY SUITS

Who may sue to avoid a marriage? The first part of subsection (1) states the existing law but the second part limits intervention to the spouses and to their joint lifetime. The second half is now the rule in cases of impotence[27] but it seems reasonable and just that no one not a party to the marriage should be able to attack it if it can be affirmed by a party.

People with an interest in attacking a marriage would include a partner in a second marriage entered into while the first was apparently still subsisting (i.e. not dissolved or declared null) who, under the subsection, could sue for a declaration that the other marriage, if void, was a nullity or, under subsection (2) could sue for a declaration that his own marriage is valid. Those who might acquire money or property if a marriage is invalid would also have an interest in attacking it but, if the marriage is not contrary to public policy, the integrity of the marriage should be preferred to any pecuniary claim.

The law provides adequate means for incompetent people to bring suits so that there seems to be no need to allow others to do it on their behalf expressly.

6 (2) Suits by Parties

The concept of the 'guilty party' is not appropriate to nullity suits unless one party has really done something he should not have done, e.g., used force or deceit, misrepresented his identity, or entered the marriage with an improper intent. Subsections (3) and (4) deal with such cases. In other instances it seems proper to allow both parties to sue for an annulment. Subsection (2) also allows a suit for a declaration of validity, a remedy that is not now available everywhere[28] except through indirect action, as in a suit for restitution of conjugal rights. The latter action has been dropped as repugant to the principle that the courts will not interfere in the intimate details of domestic life or attempt to regulate them. The action for restitution of conjugal rights at one time formed a basis for a presumption of desertion,[29] but there seems no real reason to incorporate it in the reform. The suit for a declaration of validity is a better method of establishing that fact.

6 (3) (4) Wrongdoer Barred

Subsections (3) and (4) are applications of the legal maxim that a wrongdoer is not permitted to take advantage of his wrongdoing.

6 (5) Jurisdiction in Nullity

While a suit for nullity may quite often mean that a possible marriage has broken down and that the special techniques of the family court are appropriate, nullity is more nearly a purely legal question than any other matrimonial question and it impinges on the law of property. It can arise incidently in other litigation about property. It is therefore a question that, in the interest of convenient judicial process, should be triable in the ordinary courts dealing with property claims, and those courts are accordingly mentioned in subsection (5) in addition to the family court.

In most common law countries, the law district of the domicil of the parties is recognized as the one that is competent to make law about their *status* and the courts of that district are recognized as competent to deal with *status*.[30] If the

law district of the domicil recognizes the laws or judgments of another law district, those laws or judgments will be generally recognized as determinative of *status*. In Canada, *status*, being a matter of civil rights and property is determined in most cases by the law of the province and for that reason a person domiciled in Canada is generally regarded as domiciled in a particular province. Laws respecting *status*, however, are not exclusively provincial. The Parliament of Canada may, for example, give a special status to seamen, as it has done in the *Canada Shipping Act*.[31] Laws respecting marriage and divorce also determine the status of people and these are within the exclusive jurisdiction of Parliament. It can determine the court of competent jurisdiction without reference to actual domicil as it has done in the *Divorce Jurisdiction Act*[32] and there seems to be no good reason why it cannot determine what is domicil for purposes of marriage and divorce: this seems to be a clear implication from the Privy Council case of *Attorney General for Alberta v. Cook*.[33]

There is no problem of recognition if the parties are domiciled anywhere in Canada because the federal law will also be the law of the law district (i.e. province) of domicil and will be entitled to international recognition as such,[34] even if the foreign court recognizes provincial domicil only.

In matter of marriage and divorce, Canadian domicil is to be preferred as the governing concept rather than provincial domicil because of the mobility of people in our day, the large number of people who are transferred for business or public service reasons, the frequency of desertions and the difficulty in many cases of determining provincial domicil. These considerations do not apply with the same force to expatriate Canadians because emigration with intent to acquire a new domicil requires more formal legal steps and often involves a change of nationality.

In nullity suits, in addition to domicil, residence of the parties is recognized as giving the courts of a law district competence. Indeed, it is enough if the respondent is resident.[35] Subsection (5) is designated to allocate suits on a fair basis to fit in with the recognized bases of jurisdiction. It does not include the case where a petitioner is resident but not domiciled in Canada, and the respondent cannot be found: in such case only a decree of the domicil or recognized by the domicil would appear to be effective for international recognition.[36] Subsection (6) may give some relief in these cases.

6 (6) Domicil of 'Wife'

A married woman takes the domicil of her husband, but what of a woman who is not validly married to the man? In England it is considered that she has the same domicil as the man,[37] but several of the United States hold otherwise. The reason for upholding only one domicil in this case is so that there will be only one law district competent to determine the status relations between the parties but in the world of today it is hardly possible to achieve such a result. The theorists object to the concept of a separate domicil because it puts the court in a dilemma: to take jurisdiction over the case it has to assume that the marriage is a nullity, the very question to be decided. There is no real problem here. What the court decides in effect is whether the woman is unmarried and whether she has a domicil in the district of the court. If the answer to both is 'yes', the court has jurisdiction to declare nullity. If the answer to either is 'no', the court has not.

Where a woman can acquire a separate domicil she has much more scope to deal with the case where the man has deserted her or where his domicil is uncertain.

6 (7) Proof of Religious Impediments

Without section 6, subsection (7), the courts would call experts in canon law as witnesses and try to apply it themselves when any question of the rules of a religious denomination arose in a matrimonial suit. This is just as undesirable as any other case where a court lawyer tries to understand and apply a strange law, a familiar matter in Canada, and the subsection eliminates most of the problem. The adjective 'competent' will enable the civil courts to confine church tribunals to their proper spheres and ensure that they operate according to the principles of natural justice.

6 (8) Children Legitimate

It seems unjust and repugnant to our ideas that children should be deprived of any rights because of the failures or incapacities of their parents. The only doubt about subsection (8) is a constitutional one. Is it trespassing on matters within provincial jurisdiction? It is expressed so as to limit the effect of a decree of nullity and that should be within the competence of Parliament, except, perhaps, where the nullity is due to a defect in the solemnization of the marriage. This could be cured by supplementary provincial legislation, which would probably follow in reasonable course. The subsection enlarges the existing law. Thereunder the issue of void marriages are illegitimate.[38]

7. 'JACTITATION' OF MARRIAGE

It happens that a person sometimes pretends to be the husband or wife of another in a way that becomes a nuisance to the other. This is hardly a matrimonial matter unless there is some legal evidence that the parties are married. In the former case, the ordinary courts should be able to deal with it. In the latter case, the appropriate court would appear to be the one that deals with the validity of marriages. Section 7 submits a reasonably efficient way of dealing with both aspects of the matter.

8. JUDICIAL SEPARATION

While judicial separation impinges on and affects the provincial law subjects of property and civil rights it is historically and of its nature a matter of marriage and divorce within the competence of the ecclesiatical courts at common law. Indeed 'divorce' in ecclesiastical law applies only to this remedy, the other being unknown.[39] There cannot be any real doubt that the Parliament of Canada has power to deal with it. It should be dealt with in any general restatement of the law of matrimonial suits but it is of particular importance in this draft because it is treated as an essential preliminary to a suit for dissolution of marriage. The reasons for this will emerge.

English and Canadian courts exercise jurisdiction in suits for judicial separation where the parties are domiciled in the law district of the court or either party is resident therein.[40] The clauses of subsection (1) allocate this jurisdiction among the Canadian courts in what appears to be a just and reasonable manner, on the basis of Canadian domicil (which is not, however, necessary to make the wording effective; i.e., the wording works even if provincial domicil is kept as the rule.)

The great change in subsection (1) is that it transfers jurisdiction to the family court exclusively. Judicial separation is obviously the situation where the special agents and techniques of the family court are most needed and most likely to succeed. Divorce is likely to be too late a stage (one reason for making judicial separation a condition precedent) and the people and processes of the family court may be irrelevant in many nullity suits where the marriage is

legally impossible. To try to do justice to a broken marriage in the austere and impersonal atmosphere of the ordinary divorce court, under the usual procedures and subject to the usual limitations of time and personnel, is not only unjust and impractical but almost absurd. It could only be defended on the view that the questions involved are merely legal and that dealing with domestic disruption is like dealing with a bill of sale or a claim for damages. This is hardly the case.

8 (2) Grounds for Separation

The causes in the draft that justify separation are close to those urged as causes for divorce in the brief of the Canadian Mental Health Association[41] and comprise most of the reasons that people give in our time for separating. The need to show real infidelity by repeated adultery or other sexual misbehaviour has been well established elsewhere and need not be reiterated here. The acts of cruelty or profligacy mentioned are also those used in canon law to justify a temporary separation and accord with common knowledge of the occasions, at least, for separation. As to desertion, there seems to be no real need for requiring a set period of desertion as a condition precedent as it would seem best to get the parties into the conciliation process as early as possible. Moreover, the draft contemplates a year's waiting period after judicial separation before divorce is possible.

There may be other grounds for separation that should be considered, such as insanity. Insanity may lead one of the parties to acts of cruelty, profligacy or crime such as would justify separation under subsection (2) clause (b) but, as the Canadian Mental Health Association brief points out,[42] insanity in itself is an illness and misfortune. It would be shameful to permit the well partner to leave the insane one in the lurch for this reason alone: There should be positive grounds arising under subsection (2) and insanity in itself should not be a ground for a decree.

Incurable insanity deserves separate consideration. If it exists it certainly frustrates some of the purposes of marriage,—consortium, sexual intercourse and the begetting and rearing of children. It is becoming more doubtful all the time with the progress of modern science that any insanity can be classified irrevocably as incurable. On the assumption that incurable insanity exists, however, the situation is strictly analogous to the case of a husband and wife where one becomes so permanently ill in a physical sense that all the ends of marriage are frustrated. There is still this aspect of consortium, of the mutual love and service of the family society, left: the sound partner can show love and devotion for the other and preserve the family society. This is the true and ultimate fulfillment of marriage, the fulfillment of each partner by love and service to the other, and it is the giving, rather than the getting that makes marriage the great means of making us better human beings. The notion that one might cast off a parner who becomes physically incapable is castigated by Lord Chancellor, Sir Thomas More, in a remarkably modern passage dealing with marriage and divorce in his *Utopia* (2nd English edition, 1556):—

> For they judge it a great point of cruelty that anybody in their most need of help and comfort, should be cast off and forsaken, and that old age, which both bringeth sickness with it, and is a sickness itself, should unkindly and unfaithfully be dealt with.

What emerges is that incurable illness, even when it cuts the ill partner off from all contact with the sound one, does not frustrate all the good of marriage. Two of the highest goods remain:—fidelty and outgoing love towards the ill partner.

In the passage just cited from *Utopia*, Sir Thomas More goes on to describe divorce by mutual consent in certain circumstances in terms implying approval, at least for non-Christian marriages. This raises the question 'Should not judicial separation by mutual consent be allowed?'. It is not permitted at present and is expressly forbidden by the Quebec *Civil Code*, Art. 186. But the marriage partners can freely enter into a separation agreement that gives them rights very similar to those given by the decree of judicial separation. Why should they not be permitted to take out a consent decree for judicial separation?

This might have some value of it meant that the good offices of the family court would be automatically called into play. On the other hand, the public interest in upholding the marriage bond, the interests of the children and, in the case of the present draft, the fact that the decree is a necessary prelude to a divorce application, argue against permitting judicial separation except for socially meaningful and serious causes. One of the causes of the discontent with the present law of divorce and discrespect for it is that many have the idea that divorce actions are largely *pro forma* and rarely deal with the real causes of the breakdown. A similar contempt could easily arise for a law permitting judicial separation for any cause or none.

8 (3) (4) Effect of the Decree and Reconciliation

The effect of the decree, as stated in subsections (3) and (4), is in accord with the existing law although the ordinary presumption of reconciliation from resumption of cohabitation may not be conclusive. Does a further matrimonial offence receive the effect of the ones committed before reconciliation? The Courts have rules for dealing with this question which it seems needless to restate.[44]

8 (5)(6) Countersuits and Both Parties to Blame

Quite often in domestic cases both parties are to blame, or the party who starts the action may not have the better cause to do so. Subsection (5) provides for the case of countersuits (rather than putting them in subsection (2) where to do so would require much extra wordage) and subsection (6) permits the court to act where both parties have given cause. The provision forbidding a decree against the wishes of a party who has not given cause is merely an instance of the legal maxim that a party shall not be allowed to profit by his own wrong, a maxim that seems to have a lot of human nature behind it. While today's approach is to try to treat the disturbance of family unity rather than to accentuate matrimonial offences, this is because the curative treatment is productive of results and the penal one is not. The need for real causes before a court intervenes in a domestic society is demanded by the considitions of ordered liberty.

8 (7) Insanity not a Bar

It is made plain by subsection (7) that causes for judicial separation that qualify under subsection (2) are not ruled out because the respondent may not be legally responsible for them by reason of insanity or other incompetency.[45]

9. DISSOLUTION OF MARRIAGE

The draft Act is designed to treat divorce as a social and personal problem rather than a judicial one. The idea of making a judicial separation a necessary preliminary to divorce has many advantages from this point of view. It brings the conciliation procedures of the family court into play in the context of separation rather than dissolution and this will have some psychological effect, even if it is the immediate intent of both parties to go on to divorce. It imposes a waiting period of a year during which the court personnel can not only continue

conciliation procedures but observe the parties and make sure that the separation is irreparable. Waiting periods are a common expedient in this regard but they have been mostly unfruitful because they have been treated as purely juridical devices or, when the King's Proctor was active, they were used to spy on the petitioner to see if he or she were committing adultery. This is not the helpful, human spirit that will help people who have a chance of resuming life together to do so.

9 (1) The Court for Divorce

The same courts are mentioned in s. 9 (1) as in s. 8 (1) although the general rule in the common-law districts of the Commonwealth is that only the court of the domicil of the parties or one recognized by the law of that district has jurisdiction to grant a dissolution.[46] This concept has suffered great attrition, however, especially in the United States, and the solution proposed is, it is submitted, more just and more convenient than reliance on the rather uncertain notion of domicil. If the parties are domiciled in Canada there is no more problem of foreign recognition under the draft than there is under the present law because the law of Canada will be the law of the domicil, whether it is conceived of as Canada or a single province. If the parties are not domiciled in Canada but reside here, they may well be more interested in a Canadian divorce than one obtained in their domicil, but in such case they should, of course, seek legal advice as to the best jurisdiction for their purposes.

Is the section likely to lead to the establishment in some provinces of divorce mills? This is possible but it does not seem likely, since the jurisdiction is centered on the province where the respondent resides, except in special cases. This would require a more active collaboration of the Respondent than is usual. The great safeguard against the divorce mill, however, should be a properly staffed family court.

9 (2) Grounds for Divorce

Initially, the petitioner will require grounds for a judicial separation. This will ensure that the parties have a serious cause to separate and are not just going through a series of legalized amours. Under subsection (2) the court must then be satisfied that the marriage has broken down completely and irremediably, a ground that there seems to be very general agreement on.[47] Dissolution can be justified, if at all, only on the basis that the purposes of the marriage cannot be carried out and its good fulfilled—it is frustrated and living together would make the parties worse rather than better human beings. The requirement of proof beyond a reasonable doubt may not be necessary.

The purpose of dissolution, however, is not to separate the parties (whether incidently, as now, or as a preliminary step, as under the draft) but to permit them to marry again. This is the main effect of a divorce decree. Should divorce be granted in cases where it is obvious that both parties are disqualified by temperament from sustaining a happy marriage? This is not a new idea: some countries will not permit the 'guilty' party to marry again,[48] presumably on the ground that he or she has shown an unfitness for marriage; but such a divorce may introduce undue complications into other branches of the law without substantial benefit. What is suggested here is that those people who make a career of marriage, divorce, marriage, divorce and so on, obviously do not understand what marriage is about and their marriages only lead to social harm and personal misery.

The only rational answer to this is that one cannot really predict what any human being will continue to be like and that the court could be too easily mistaken about such a question in too many cases to provide any social benefit, quite apart from the injustice such a judgment might inflict on individuals. This

argument, however, is not valid, although the unpredictability of human nature is conceded and even emphasized. Courts are making similar decisions on a probability basis daily and they should be able to cope with this question adequately. Clause (b) says, in effect, that there is no point in wiping out a marriage, although it is broken down, and permitting the parties to remarry unless one, at least, has a hope of a happy remarriage. This does not seem an undue limitation as it would affect only those who are on the marriage-divorce merry-go-round or who can be classed as psychopathic personalities.

9 (3) Effect of Decree

The effect of the decree of dissolution set out in subsection (2) conforms to the present law, stated in concise terms.[49]

10. Ancillary relief

Guardianship, custody and maintenance clearly fall within the ambit of provincial law when considered by themselves but there is ample law that a court that has jurisdiction in matrimonial causes has jurisdiction to deal with alimony and custody as incidental matters.[50] This goes far to define the meaning of 'Marriage and Divorce' as a department of the law both for family law and constitutional law, because they must be meant in the same sense in the two fields. There is a case, and a good one, therefore, for treating incidental relief in matters of maintenance and custody as within the jurisdiction of Parliament. The matter is not completely without doubt, of course, but the sounder and safer course should be to include these powers. The rights of the provinces are preserved by giving provincial law overriding effect in subsection (3). It is submitted that this is a reasonable solution to a problem that demands some solution, and the one most likely to be viable.

The courts' powers to deal with custody and maintenance should extend to all matrimonial suits, including those for nullity or a declaration of validity because, once such a case gets in the matrimonial court, the court should be able to deal with all the outstanding questions of this nature between the parties. In England, ss. 16 and 17 of the *Matrimonial Causes Act, 1965* allow the court to make extensive property settlements and such powers are desirable and may be implied in the wording of draft s. 10 (2) (a) and (b). On the other hand, such matters ordinarily are within the exclusive jurisdiction of the provinces and there may be a constitutional difficulty here. Perhaps they should be included on the basis that the powers are incidental and necessary for the proper disposition of matrimonial suits.

11. Appeals

The wording in these sections is modelled in general on the appellate provisions in the rules of the superior courts, which give very wide powers of appeal and which, in their appellate divisions, are the present courts of appeal in matrimonial suits. This is continued. The exception in subsection (1) of orders made by a judge in the exercise of his proper discretion applies only to those traffic directions that a judge is called upon to make in the course of a lawsuit. Even these are appealable if he makes his order on a wrong legal principle.

12. Rules of Court

There are provisions similar to this section in *Criminal Code* S. 424 and they deal with a similar problem: the administration of federal law by provincial courts of a great diversity of constitution. The rule making authority is usually the court itself but, in the draft, several courts will have concurrent jurisdiction in some classes of suit and, except in British Columbia, the principal court given jurisdiction, the family court, does not have the province as the unit, but is

composed of district courts. This complexity seems easier to solve by the provincial government, advised by the attorney general and in consultation with the courts involved.

Overall federal government control is preserved by subsection (4).

13. Acts Repealed

The statutes repealed deal with matters that are all disposed of in one way or another in the draft. This section should not come into force in any province that asks to be excluded from any provisions of the Act to the extent that the present law of the province depends upon the repealed Acts.

NOTES

1. This point is dealt with more fully in the discussion of ss 6(5), 7(2), 8(1) and 9(1) of the draft Act.

2. See the discussion under ss. 4, 5 and 6.

3. There should not be any real constitutional difficulty in granting jurisdiction in matrimonial suits to family courts. The objection would be to conferring on judges appointed and paid by the provinces the jurisdiction of a superior court. Divorce courts as such do not seem to have been recognized as superior courts either by legislative enactment or judicial acceptance, however, although it has been common to have the same judicial personnel for both superior and divorce courts and in some provinces divorce jurisdiction is conferred directly on the superior court. The jurisdiction of most divorce courts in Canada was modelled or remodelled on that of the English Court for Divorce and Matrimonial Causes, (1857), 20 & 21 Vic. c. 85, which was a court of record with many of the powers of a superior court, but it was not declared to be a superior court. The Department of Justice takes an amusingly ambiguous position on this: The Governor General in Council appoints the judges of the divorce courts but when a county or district court judge is appointed a judge of a divorce court the Department will not recognize him as a superior court judge.

4. See draft Act, s. 12 (b) and (e).

5. See the *Confederation Debates*, i.e., *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces,* (Quebec, 1865, reprinted by King's Printer, Ottawa, 1951) pp. 388, 389, 579. Honorable Hector Langevin, Solicitor General East, who piloted the resolution in this aspect, twice read into the record the following written declaration (pp. 388, 579):

> The word marriage has been placed in the draft of the proposed Constitution to invest the Federal Parliament with the right of declaring what marriages shall be held and deemed to be valid throughout the whole extent of the Confederacy, without, however, interfering in any particular with the doctrines or rites of the religious creeds to which the contracting parties may belong.

6. Ibid. pp. 388-9, 578-9, 690-2.

7. Ibid. pp. 388, 579.

8. Ibid., Rémillard (on the government side) p. 785.

9. Ibid., Solicitor General Langevin, at p. 389:

> We found this power existing in the constitutions of the different provinces, and not being able to get rid of it, we wished to banish it as far from us as possible...
>
> After mature consideration, we resolved to leave it to the Central Legislature, thinking thereby to increase the difficulties of a procedure which is at present so easy.

10. *Peace, Order and Good Government* (Macmillan, Toronto, 1964) pp. 5, 44, 158, 170.

11. *Debates of the Senate*, 3rd Session, 24th Parliament, vol. 108, No. 70. p. 1020. See also Mr. Prittie's Bill C-41, 1st Sess. 27th Parl., one of the bills referred to the Joint Committee.

12. See British North America Act, 1867, s. 91, class 26.

13. Code Civil de la Province de Québec, Titre VI.

14. Four hundred years ago, Sir Thomas More, in *Utopia*, suggested 18 as a minimum for women, 22 for men.

15. (1540) 32 Hen. 8, c. 38.

16. E.g., a marriage between first cousins is considered invalid unless dispensed. Under Jewish law a descendant of Aaron must marry a virgin of his own clan (Lev. XXI: 7, 17) and this has been applied by an English court in our time: Neuman v. Neuman (alias Greenberg), *Times*, Oct. 15, 1926.

17. See, e.g., *Latey on Divorce* (14th ed., 1952) pp. 18, 19; 19 Halsbury (3d Ed.) 775 & 1240; 38 C.J. 1299 & 55; 55 and C.J.S. 842 & 18.

18. Ibid. pp. 19, 353 & seq.

19. *Matrimonial Causes Act, 1965*, 1965 c. 72 s. 9 (U.K.)

20. See note 5 above.

21. See the preamble to 32 Hen. 9, c. 38 (note 15 above).

22. It was so applied in *Bergeron v. Kirklow* 45 R.L.N.S. 370 which was, however, reversed in *Howard v. Bergeron* 71 Que. K.B. 154, 1941 4 D.L.R. 360, on the ground that the Papal decree *Ne temere* is not in force in Quebec, i.e., the religious impediments are frozen as of 1867 and cannot be changed as far as Civil Code art. 127 is concerned except by the Parliament of Canada.

23. See *Yorkshire v. Chalpin*, 1943 Que. K.B. 677 (C.A.)

24. *Latey on Divorce*, pp. 201-2. Roman Catholic canonists, however, do not generally accept the possibility of approbation.

25. Ibid. 389-390; *Brown & Watt's Divorce and Matrimonial Causes* (9th ed., 1921) p. 92.

26. *Latey on Divorce*, p. 14 In England a marriage is now void rather than voidable if either party is under 16: see 12 Halsbury (3rd) 224.

27. *Latey on Divorce*, p. 194 & seq.; a different view, similar to that in the draft Act, is stated in 12 Halsbury (3rd) 223-6.

28. Most of the superior courts have express jurisdiction to make a declaratory judgment but some divorce courts do not have this explicitly. In England, the court has express power to make a declaration of the validity of marriage by s. 39(1) of the Matrimonial Causes Act, 1965. See 12 Halsbury (3rd) 223, 289-90.

29. *Latey on Divorce*, p. 186; see *Putting Asunder* (note 47), p. 127, s.29.

30. G.C. Cheshire, *Private International Law* (3rd ed. 1947) p. 146 & seq.

31. R.S.C. 1952, c. 29.

32. R.S.C. 1952, c. 84.

33. 1926 A.C. 444, at pp. 449-50.

34. Cheshire, op. cit. pp. 450-58.

35. Ibid. pp. 493 & seq.

36. Ibid.

37. *Attorney General for Alberta v. Cook* (note 33); Cheshire op. cit. 463-5.

38. *Matrimonial Causes Act, 1965,* 1965 c. 72 s. 11. Even without the limitation to voidable marriages the phraseology used would render illegitimate any child of a void marriage. See, also, 12 Halsbury (3rd) 228.

39. 12 Halsbury (3rd) 214.

40. Cheshire, op. cit, p. 493 & seq.

41. *Submission to the Special Joint Committee of the Senate and House of Commons on Divorce by the Canadian Mental Health Association,* Draft No. 3, November, 1966.

42. Ibid., pp. 7-8 ss. 9 and 10.

43. *Utopia,* Part II, Of Bondmen, Sick Persons, Wedlock and divers other matters.

44. See *Latey on Divorce,* pp. 152-6; 12 Halsbury (3rd) 303, 305-7, 416.

45. See 12 Halsbury (3rd) 292-3, but it must be remembered that insanity is not a substantive ground for divorce in Canada.

46. Cheshire, op. cit. pp. 470 & seq.

47. In addition to the Canadian Mental Health Association (note 41) others that share this view are the 22nd General Council of the United Church of Canada, and the Mortimer Committee appointed by the Archbishop of Canterbury which produced *Putting Asunder: A divorce law for contemporary society* (October, 1966). The submission of the Canadian Bar Association to the Joint Committee of the Senate and House of Commons covers grounds that could be subsumed under this canon. The Mortimer Report makes many suggestions along the line of the present submission, but the text was not available to me when preparing it.

48. E.g., South Africa: see Cheshire, op. cit., p. 491.

49. 12 Halsbury (3rd) 410-11.

50. *Lee v. Lee* 1920 3 W.W.R. 530, 54 D.L.R. 608 (C.A. Alta,); *Brown v. Brown,* (1907) 13 B.C.R. 73 Hunter C.J.B.C.); *Wood v. Wood,* (1884) 1 Man. R. 317 (Man.); *Cumpson v. Cumpson* 1934 O.R. 60, 1934 1. D.L.R. 46 (Ont. C.A.); *King v. King* (1904) 37 N.S.R. 204 (N.S.C.A.); *McNair v. McNair* 1923 2 W.W.R. 46, 1923 2 D.L.R. 465 (Alta. C.A.).

DRAFT

MARRIAGE AND DIVORCE ACT, 1967

An Act to Amend and Restate the Law respecting Marriage and Divorce

SHORT TITLE

1. This Act may be cited as the *Marriage and Divorce Act, 1967.*

INTERPRETATION

2. In this Act,

(a) 'family court' means

(i) in the Province of Ontario, the Juvenile and Family Courts;

(ii) in the Province of Quebec, the Social Welfare Courts;

(iii) in the Province of Nova Scotia, the Family Courts;

(iv) in the Province of New Brunswick, the juvenile courts;

(v) in the Province of Manitoba, the family courts;

(vi) in the Province of British Columbia, the Family and Children's Court of British Columbia;

(vii) in the Province of Prince Edward Island, the county and juvenile courts;

(viii) in the Province of Saskatchewan, the district courts;

(ix) in the Province of Alberta, the Family Courts;

(x) in the Province of Newfoundland, the Family Courts;

(xi) in the Yukon Territory, a police magistrate or two justices of the peace, sitting together;

(xii) in the Northwest Territories, a police magistrate or two justices of the peace, sitting together

(b) 'marriage' includes a void or voidable marriage;

(c) 'matrimonial suit' means any of the suits that are authorized by this Act;

(d) 'petitioner' includes a plaintiff, 'respondent' includes a defendant, 'sue' includes commencing an action and 'suit' includes an action.

APPLICATION

3. (1) This Act shall apply to all marriages whether solemnized before or after it comes into force and whether solemnized in Canada or elsewhere.

(2) This Act shall come into force on the day of , 1967, but if, before that date, the legislature of any province resolves that the Act or any provisions of it shall not be in force in that province, the Governor General in Council may issue a proclamation to that effect and thereupon the Act or the provisions in question shall not come into force in that province until the legislature resolves and the Governor General in Council issues a proclamation that they shall be in force: the latter resolution and proclamation may bring into force all or parts only of what is not in force.

CAPACITY TO MARRY

4. (1) No person, male or female, has the capacity to marry unless, when the marriage is solemnized he or she is not then married, is eighteen years of age or more and is intelligent and sane enough to know the nature and obligations of marriage.

(2) No one, male or female has the capacity to marry anyone related to him or her in lineal consanguinity, that is, in the direct line, ascendant or descendant, however far apart in degree; no man has the capacity to marry his father's or mother's sister, his sister, or any descendant of his brother or sister; no woman has the capacity to marry her father's or mother's brother, her brother or any descendant of her brother or sister; consanguinity has the same effect whether it arises through lawful wedlock or otherwise and whether it is consanguinity of the half-blood or of the whole blood.

(3) Affinity does not affect the capacity to marry but it may constitute an impediment to marriage arising under subsection (2) of section 5.

(4) A marriage is void if, when it was solemnized, the parties lacked the capacity to marry each other or either party lacked the capacity to marry.

(5) A void marriage becomes voidable if the incapacity rendering it void ceases.

VOIDABLE MARRIAGES

5. (1) A marriage is voidable if, when it was solemnized,

(a) either party did not have the intent that it should be monogamous, that it should continue until the death of one of the parties and that the parties should have their conjugal rights;

(b) either party entered it under duress or fraud; under a mistake as to of the proceedings;
the identity of the other party or under a mistake as to the nature

(c) either party was incapable of normal sexual intercourse, although not necessarily incapable of engendering children.

(2) A marriage solemnized according to the rite of a religious denomination is voidable if it is void or voidable under the rules of that denomination although it may not be otherwise void or voidable under this Act or under the laws respecting the solemnization of marriage.

(3) Where a marriage, otherwise valid under this Act and the laws respecting the solemnization of marriage, is solemnized according to the rite of more than one religious denomination, or according to the rite of one or more religious denominations and in a civil ceremony, and the parties intend each of the solemnizations to form a part only of a single transaction of marriage dependent upon more then one solemnization for completeness, the marriage is voidable if it is void or voidable according to the rules of any of the religious denominations concerned; but if the parties do not intend the solemnizations to form such a single transaction of marriage, the marriage is valid if it is valid under the rules applicable to any of the solemnizations that alone or together form a single transaction.

(4) A voidable marriage becomes valid if the parties, or the one entitled to sue for a declaration of nullity if there is only one who may do so, freely affirm it, knowing it to be voidable; a party who, knowing a marriage to be voidable, voluntarily continues to cohabit with the other party after a reasonably sufficient time to sue for a declaration of nullity has elapsed, without suing, is deemed to have affirmed the marriage.

NULLITY SUITS

6. (1) Anyone with a sufficient interest may sue for a declaration that a void marriage is a nullity and may question the validity of a void marriage in any legal proceeding but no voidable marriage shall be declared to be a nullity except at the suit of a party or after the death of a party.

(2) Except where it is otherwise provided in this section, either or both of the parties to a marriage may sue for a declaration that the marriage is valid or that, being void or voidable, it is a nullity.

(3) A party to a marriage may not sue for a declaration that the marriage is a nullity on any ground mentioned in clause (a) of subsection (1) of section 5 unless the lack of the required intent was shared by both parties or was that of the other party only.

(4) A party to a marriage may not sue for a declaration that the marriage is a nullity on any ground mentioned in clause (b) of subsection (1) of section 5, if he was a party to the duress or fraud or entered the marriage knowing that the other party was mistaken as to his identity.

(5) A suit under this section may be brought in the trial division of the superior court, in a county court or in the family court of

(a) the province where the marriage was solemnized;

(b) the province where the respondent resides;

(c) the province where the petitioner resides if the petitioner is domiciled in Canada and the respondent cannot be found; or

(d) any province, if either party is domiciled in Canada but neither resides in Canada.

(6) For the purposes of subsection (5) a woman who is a party to a void marriage may have a domicil separate from the man and a woman who is a party to a voidable marriage may acquire a separate domicil from the man if the marriage has not become valid and they have ceased cohabitation as man and wife.

(7) The decree of a competent tribunal of the religious denomination in question that a marriage solemnized according to the rite of that denomination is valid, void or voidable under the rules of that denomination shall be conclusive evidence of that fact in any court in Canada.

(8) A void or voidable marriage that is declared to be a nullity is a nullity from its beginning except that all children of the union shall be, for all purposes, the children of the parties as if they were lawfully married to each other.

JACTITATION OF MARRIAGE

7. (1) Any person may sue to restrain another person from holding himself or herself out as the husband or wife of the petitioner and for the actual damages of such holding out.

(2) The suit may be brought in any of the courts mentioned in section 6; it may also be brought in any superior court or county court having jurisdiction over the person of the respondent but in that case the court shall stay further proceedings on the suit if satisfied that the parties have gone through a form of marriage at any time unless it has jurisdiction under this Act to determine the validity of the marriage.

(3) A court that orders a suit stayed under subsection (2) may transfer the suit to any court having jurisdiction under this Act to determine the validity of the marriage, whether it is in the same province or not.

JUDICIAL SEPARATION

8. (1) Either party to a marriage may sue for a judicial separation in the family court of

(a) the province where the petitioner resides;

(b) the province where the petitioner and respondent last resided together, if the respondent has deserted the petitioner or the petitioner has left the respondent for any cause mentioned in subsection (2) and if the respondent cannot be found; or

(c) any province, if the parties are domiciled in Canada but neither party resides in Canada.

(2) The family court, after investigating the history of the marriage and the characters of the parties and after such procedures to reconcile them and to assure the welfare of any children of the marriage as it deems proper, may decree a judicial separation of the parties, if satisfied that it is in the interest of at least one of the parties or of the children to do so and that

(a) the respondent has repeatedly committed adultery or sexually devient acts with another person or an animal that have not been caused, connived at, consented to or condoned by the petitioner;

(b) the respondent, by repeated acts of mental or physical cruelty, by leading a criminal or profligate life or by habitual drunknenness or drug addiction, has made cohabitation unsafe or not reasonably tolerable for the petitioner or for the children;

(c) the respondent has deserted the petitioner by ceasing, without just cause, to cohabit with the petitioner or to provide proper maintenance for the petitioner.

(3) Upon a decree of judicial separation, the right and obligation of each party to cohabit with the other ceases and neither party is obliged to have sexual intercourse with the other.

(4) Where a husband and wife who have been judicially separated are reconciled, the decree ceases to have effect, except as is otherwise provided by valid provincial law, and resumption of cohabitation is conclusive evidence of reconciliation.

(5) The provisions of subsection (2) shall apply to a countersuit for judicial separation by the respondent.

(6) It is not a bar to a judicial separation that both petitioner and respondent have furnished grounds for it if the court is satisfied that it is in the interests of at least one of the parties or the children to grant the separation, but the court shall not grant a judicial separation against the wishes of a party who has not furnished grounds for the separation.

(7) It is not a bar to a judicial separation that a party is mentally ill or incompetent if that party has, in fact, whether intentionally or otherwise, furnished any ground for the separation.

DISSOLUTION OF MARRIAGE

9. (1) A person who has been granted a judicial separation may, when a year has elapsed since the decree, apply to the court that granted the decree or to a court mentioned in subsection (1) of section 8 for the dissolution of the marriage.

(2) The court applied to may grant a decree dissolving the marriage, if satisfied beyond a reasonable doubt

(a) that the marriage has broken down completely and irremediably, and

(b) that one of the parties, at least, has the maturity, generosity and other elements of character and capacity needed to marry again with a reasonable possibility of success.

(3) An absolute decree dissolving a marriage is a judgment *in rem* that the marriage is at an end and either party, if otherwise capable, may marry again as soon as the time for appeal has expired or, if an appeal is asserted, as soon as it has been dismissed.

ANCILLARY RELIEF

10. (1) A court in which any matrimonial suit is pending may make such order as may be proper for the maintenance of the parties and for the custody and maintenance of the children until the suit is determined.

(2) A court that declares a marriage valid or a nullity that grants a judicial separation or that dissolves a marriage may, by the decree or by a separate order at any time thereafter,

(a) provide for the guardianship, custody and maintenance of the children and what access there shall be to a child by the party not awarded custody of that child;

(b) provide for the maintenance of the female party or, if he is unable to maintain himself, of the male party;

(c) provide that the female may or may not continue to be known by the surname of the male party;

and the court may change any of the foregoing provisions from time to time if changed circumstances justify it in doing so.

(3) Every provision in every such decree or order concerning guardianship, custody, maintenance, access or surname shall conform to the law of the province for which the court is constituted and may be superseded by the judgment, order or decree of a court having jurisdiction over the matter under the law of the province.

APPEALS

11. (1) Every judgment, decree, order or decision made by a judge, in court or in chambers, in a matrimonial suit, except orders made in the exercise of the discretion that belongs to him by law, may be appealed to the court of appeal for the province.

(2) On appeal, the court of appeal shall have all the powers of the court or judge appealed from, including the power to amend, to hear evidence and to draw inferences of fact; it may make any order that ought to have been made or such further or other order as the case requires and shall confirm, modify or quash the judgment, decree, order or decision appealed from as the justice of the case requires and, if it modifies or quashes, it may order a new trial of the suit or of issues therein.

(3) In this section, 'court of appeal' means

(a) in the Province of Ontario, the Court of Appeal;

(b) in the province of Quebec, the Court of Queen's Bench, appeal side

(c) in the Province of Nova Scotia, the Appeal Division of the Supreme Court;

(d) in the Province of New Brunswick, the Court of Appeal, otherwise known as the Appeal Division of the Supreme Court;

(e) in the Province of British Columbia, the Court of Appeal;

(f) in the Province of Prince Edward Island, the Supreme Court;
(g) in the Province of Manitoba, the Court of Appeal;
(h) in the Provinec of Saskatchewan, the Court of Appeal;
(i) in the Province of Alberta, the Appellate Division of the Supreme Court;
(j) in the Province of Newfoundland, the Supreme Court, constituted by two or more judges thereof;
(k) in the Yukon Territory, the Court of Appeal and
(l) in the Northwest Territories, the Court of Appeal.

RULES OF COURT

12. (1) The lieutenant governor in council of a province may make rules not inconsistent with this Act or any other Act of the Parliament of Canada to regulate matrimonial suits in the courts of the provinces, including appeals.

(2) Rules made under subsection (1) may

(a) regulate the sittings of a court or of any division thereof or of any judge of the court sitting in chambers, and the duties of the officers of the court, except in so far as the sittings and duties are regulated by law;
(b) provide for the allocation of matrimonial suits among the territorial divisions of the province that relate to the courts in question;
(c) regulate the pleading, practice and procedure in the court;
(d) provide when and how matrimonial suits for different remedies, including counter-suits, may be combined in one suit or tried together or may be combined or tried together with applications or actions under provincial law for the guardianship, custody or maintenance of a party or of the children;
(e) provide for the transfer of matrimonial suits between the different courts in the province or between the courts of the province and of other provinces;
(f) require the parties to submit to pre-trial conferences or examinations by the officers of the court or to mental, psychological or physical examination by a medical practitioner or psychologist designated by the court and to take part in conciliation procedures;
(g) provide for the assistance to the court of experts in medicine, surgery, psychiatry, psychology, foreign law, canon law or the rules of any religious denomination or family welfare work, as assessors or otherwise (provided that no issue in a matrimonial suit shall be tried by a jury);
(h) regulate the imposition and amount of costs; and
(i) regulate appeals.

(3) Rules of court relating to matrimonial suits or any class thereof that are in force in any province shall continue in force except to the extent that they may be amended or repealed by rules made under this Act.

(4) The Governor in Council may make such provisions as he considers proper to secure uniformity in the rules of court in matrimonial suits and to secure the recognition and enforcement of the judgments, orders and decrees in such suits of the courts of a province in other provinces and any provision made under the authority of this subsection shall prevail and have effect as if enacted in this Act.

(5) Rules and provisions made under the authority of this section shall be published in the *Canada Gazette*.

REPEAL

13. (1) Upon the coming into force of this Act in any province, the following Acts will no longer be in force in that province:—

The Marriage and Divorce Act, Chapter 176 of the Revised Statutes, 1952;

The Divorce Act (Ontario), Chapter 85 of the Revised Statutes, 1952;

The Divorce Jurisdiction Act, Chapter 84 of the Revised Statutes, 1952;

The British Columbia Divorce Appeals Act, Chapter 21 of the Revised Statutes, 1952.

(2) No decree of nullity, judicial separation or dissolution of marriage shall be made except in conformity with this Act, in any province where it is in force.

APPENDIX "30"

Brief to the Special Joint Committee of the Senate
and House of Commons on Divorce by
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PROBLEMS OF MATRIMONIAL RELIEF

If the language of the Civil Code be taken literally, together with the belief that those residents of Quebec who are affected by its provisions on marriage, loyally and meekly obey, then there would be few, if any, problems of matrimonial relief arising within "la belle province" for article 185 is as dogmatic in philosophy as it is curt in expression—

> "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

Yet the Civil Code does not wholly ignore the consequences of original sin, for example,

(i) *it prohibits polygamy* (arts. 118 and 136)

(ii) it *permits annulment* of a marriage

(a) contracted without the *free consent* of either party (arts. 116 and 148);

(b) where one of the parties has contracted under *error* as to the person of the other (art. 148);

(c) to which at the time of the marriage one party was apparently and manifestly *impotent*;

(d) between parties *related* to each other by *consanguinity* or *affinity* within certain degrees (arts. 124, 125, 126 and 152);

(e) contracted before both parties have attained the *required age* of 14 years if male, twelve years if female (arts. 115 and 153);

(f) lacking consent of father or mother, tutor or curator, or without advice of a family council, in cases (under majority, insanity) where such consent or advice was necessary (art. 150)

(g) improperly constituted (art. 156)

(iii) it permits separation *a mensa et thoro* to either spouse on the ground of

(a) the other's adultery (arts. 187, 188)

(b) outrage, ill-usage or grievous insult (scil. saevita) committed to him or her by the other (art. 189) and to the wife if the husband refuse to receive and maintain her (art. 191)

Transcending these domestic remedies there is the divorce *a vinculo*, obtainable by those who have the money and the patience, by means of a private Act of the Parliament of Canada. Although the law of Quebec cannot wholly ignore the fact that a "Quebec" marriage has been dissolved by statute, it does its best to turn its back to the whole affair. The consequences of this Nelsonian attitude can be horrific. For the moment, however, my task is to ask whether in this Province there should be provided not only separation *a mensa et thoro* but also divorce *a vinculo* and to suggest, should the answer in principle be in the affirmative, some of the problems which such an answer creates.

Should there be provided in the province of Quebec the remedy of divorce *a vinculo*?

At this stage in the history of Western European and North American civilization, to many it may seem a trifle artless to ask why the law of Quebec does not recognize the remedy of divorce, yet, in order that there be as little misunderstanding as the artificial context of an academic discussion permits the question should be put and demands answers. What the contemporary answers, if any, would be are matters beyond the writer's ken, but some historical answers are available.

There is little doubt that the philosophy of the law of Quebec in the matter of divorce, namely, that marriage is a religious sacrament, is that which prevailed in the greater part of Western Europe from about the 13th century until about the end of the 18th. Under *Roman law*, and throughout the Empire (East and West), marriage was a civil contract with which the state did not interfere. It became a matter of litigation or judicial intervention only when the parties could not agree upon a divorce or the consequent division of property or the future of the children. In short, divorce was by mutual consent or on certain specified grounds, *divortium ex bona gratia* (Constantine 331 A. D.), *divortium cum damno* (Justinian 542 A.D.). Marriage and divorce were for the parties, whom failing the temporal power. In so far as a "church" or religious organization was concerned it was free to establish rules applicable to and binding on a member to the extent of his conscience and membership but no more.

The Roman Catholic Church did not, at least by the end of the first millennium of the Christian era, accept this philosophy and based its contrary view on Matthew (5:31-32, 19:8-9), Mark (10:11), Luke (16:18) and Corinthians (I. 7:10). That martial Christian and founder of the canon law, Gratian by his Decretum (1140) declared the indissolubility of marriage, but the definitive step was taken by the Council of Trent (1545-63) which anathematized those who denied that marriage was one of the evangelical sacraments and who argued that the Church erred in maintaining the indissolubility of marriage as a sacrament. Some forty years before Luther, (*circa* 1520) rejected the sacramental nature of marriage and its indissolubility. Calvin conceded divorce for adultery and desertion. On the whole, the Reformers were, in theory at least, prepared to recognize civil divorce but conventional morality or the Roman Catholic Church were the stronger. With the exception of Holland, the Scandinavian countries and Scotland, broadly speaking, Western Europe, whether catholic or protestant, and protestant England knew no "civil divorce" other than that which the Church, the Head of State or Parliament granted.

In that Europe the first relatively modern attempt to assert the primacy of the concept of marriage as a civil contract subject to the jurisdiction of the courts was made by the catholic Joseph II of Austria by his ordinance of 1783, but the momentous break with the ecclesiastical laws of what Bryce described as "the dark and middle ages" came with the French Revolution. In 1792 the French legislature introduced divorce by mutual consent and for adultery or incompatibility of temperament. The Code Napoleon (arts. 229-33) did not repudiate these grounds but limited their application and added cruelty. This freedom was shortlived. In 1816 the Bourbons abolished divorce and the remedy was not restored until the Loi Naquet was passed in 1884, this time without the ground of mutual consent. In 1941 the Pétain regime, which abolished "Liberty, Equality, Fraternity" in favour of "Work, Family, Homeland", restricted the availability of the remedy notwithstanding the marriage of the Maréchal to a divorcée. This restriction was annulled by de Gaulle's ordonnance of 1945. For the rest of Europe the turning point was partly the revolution of 1848, partly the advent of codification. Whatever the reason, divorce in country after country, whether protestant or catholic, became a secular remedy. In England the Matrimonial Causes Act, 1857 established a jurisdiction in the civil courts to grant divorce on the ground of adultery. This Act, as amended by the Parliament of Canada, is the basis of divorce jurisdiction in Ontario and the Western Provinces. Nova Scotia has had a Divorce Act since 1758, New Brunswick since 1787, and Prince Edward Island since 1835. Newfoundland, like Quebec, has no comparable legislation.

On the face of things, therefore it looks as if the influences which had affected Europe, England, and the rest of Canada had simply passed by Quebec, leaving, *faute de mieux* the Roman Catholic Church securely in control of the social institutions of the province. This may have been so, but perhaps the explanation is not quite so simple.

Loranger, in the second volume of his fascinating "*Commentaire sur le Code Civil du Bas-Canada*" (Commentary on the Civil Code of Lower Canada) published in 1879, suggests a more complex pattern of events. In his Avant-Propos he poses the question—

"What authority has precedence in this field? The ecclesiastic authority? The Civil authority? Or do these two authorities share the jurisdiction between themselves . . . ?"—and describes how France disliked the decrees of the Council of Trent and that out of the decrees of the Parliament of Paris "decrees encouraged and advocated by the Gallic jurists, there arose a new form of jurisprudence, affirming the State's competence as regards the impediments to marriage, and, in this regard proclaiming the superiority of the civil authority over the spiritual authority. From this jurisprudence was born civil marriage, the child of the Revolution, the godless marriage of the *Code Napoléon!*" Two pages later he points out that in New France "under French rule, the dominant principle in the field of marriage, as in all other fields of shared authority, was the sovereignty of the civil authority over the ecclesiastic authority. The fact is beyond dispute. It was the civil and canon jurisprudence of France which influenced the Colony, where, as in the mother country, Gallic liberties prevailed. These liberties, as we pointed out in volume one of this work, "are totally inapplicable in Canada, since they owe their existence in France solely to the relationship between Church and State; since these relationships, which existed under the old regime in the Colony, were severed by the change of sovereignty, and since the century long independence of the Church in Canada has destroyed every last trace of them." Then he goes on to suggest that in the absence of a Quebec jurisprudence, a Quebec jurisconsult, unlike his French counterpart, is unable in this matter "to lean towards

the civil authority". His real, as distinct from his forensic, reasons for this conclusion emerge in his criticism of Pothier's opinion that "Marriage, being a contract, concerns like all other contracts, the political order, and is therefore subject, like all other contracts, to the legislation of the secular authority which God has established to regulate all that which concerns the government and good order of civil society." After excusing Pothier's fall from grace, he says—

"There is no doubt but that the dominant ideas of the mother country in the field of civil and religious liberty, i.e. the Gallic principles, were generally prevalent in civil and canon jurisdiction during the entire period of French rule. The Gallic principle in this field is the predominance of the civil authority over the religious authority...

"Through the change of Sovereignty, the Church in Canada was freed of its dependence on the State, and the doctrine of the competence of the civil authority as regards marriage disappeared along with several other tenets. Had this doctrine survived under the new regime, it would have meant that legislation concerning Catholic marriage in Lower Canada would have passed to the Protestant government of England. It is not hard to imagine the damaging effects on our religious liberty which the exercise of this power would have had. Those who value the conservation of this liberty no less than political liberty and who consider them both as the foundation of our national autonomy will be immediately aware of these effects.

"Fortunately, the contrary principle prevailed...Catholic marriage with its own individual characteristics was legally recognized in Lower Canada."

Fortified by this jurisprudential separation of Church from State, Loranger has no difficulty in concluding that an Act of the Parliament of Canada cannot dissolve a marriage contracted in Lower Canada. Whether the parties be catholic or protestant, to both alike articles 118 and 185 of the Civil Code apply and to the former there is the added reason of religious faith.

Sixteen years later, Mignault, in discussing art. 185, says, "I must admit that, as a Catholic, I consider marriage validly contracted to be indissoluble while both parties live. This is the doctrine of canon law and a Catholic cannot, in conscience, claim otherwise... in this province, and as regards divorced Catholics who wish to remarry, the principle set forth by canon law and taught by the Catholic Church remains unchanged, unassailable and indisputable." Some forty-seven years later still, Trudel, in 1942, commenting on art. 185, is no less emphatic, "Besides this very clear theory in our civil legislation, Canadian jurists must take into account federal legislation on divorce. Before doing so, the author, as a Catholic, must make this reservation, that he accepts these laws neither in principle nor in practice".

These are the ostensible answers as given by three reputable Québecois jurisconsults. Do they in 1966 justify in Quebec the prohibition of art. 185?

There seems little doubt that so far as "national autonomy" of those who in Quebec speak French as their mother tongue there is no need to rely upon the Roman Catholic Church. They control the legislature, the public services, their education, lower and higher, in fact the means of intellectual communication from press to television. They cannot reasonably fear inimical legislation by another sovereign power, protestant or otherwise. If a threat to their "national autonomy" does exist it can only be from the fact that from the Rio Grande to the North Pole, with the exception of Quebec, the French-Canadian writ does not run. Whatever the nature of that threat it is doubtful whether the Roman Catholic Church can be as in the past it appears to have been, a bulwark against what the Greeks would have called the barbarians.

Assuming little substance in the argument based on l'autonomie nationale, is art. 185 justified on the ground so succinctly expressed by Mignault that "the principle set forth by canon law and taught by the Catholic Church remains unchanged, unassailable and indisputable?" Even if it be true that the vast majority of those who live in Quebec are among the most faithful of their church, does it follow that the law of that church must be the law of the land, if so, why?

Clearly, any attempt to provide an answer to this question must canvass issues of such complexity that consideration of them would necessitate a journey far beyond the confines of this brief paper. Some of them merit brief reference. For example given that a stable family life is a desired end of our society, a Christian church which *ex hypothesi* is concerned with the internal regeneration of a human soul is necessarily concerned with the rules of law relating to marriage and its dissolution. Even if within a given community there is a Christian majority of one denomination has it the power in 1966 to impose on all within the territorial boundaries a matrimonial law based on its own ethic? Even if it has the power should such a majority use it? What is the rationale of art. 185? Is it that Jesus when he said, "What therefore God has joined together let not man put asunder", he was legislating for all mankind so that a Christian is under a duty not only to oppose a law providing for divorce and permitting remarriage but to seek its repeal, or was he merely asserting that for the Christian marriage is a personal *vinculum matrimonii*, a precept of lifelong fidelity which a Christian ought to obey or strive to obey? Even if Jesus did so legislate, is the prohibition of art. 185 reasonable and just in modern society? Is it in accord with the nature of men and women? How many Québecois seek papal annulment? How many obtain divorce by Act of Parliament? How many husbands leave their wives and conversely? How many fatherless families are there? How much concubinage is there? How many illegitimate children? If there can be separation *a mensa et thoro*, why cannot there be divorce *a vinculo*—is the distinction real or fanciful? In short, what, if any, are the social consequences of art. 185? In human terms does it cause less or more harm to husband, wife, and children than a law allowing divorce?

Whatever the answers to these several questions the uncontradictable fact seems to be that all significant European countries north of the Mediterranean, with the exception of Italy and Spain, have secular divorce laws, including even Portugal which, until recently at all events, restricted the remedy to non-catholic marriages.

SECULAR PHILOSOPHIES OF DIVORCE

Hitherto it would appear that the assumption upon which this paper proceeds is that marriage and divorce is a matter of exclusive provincial jurisdiction. No such assumption or any relevant concession is made by the writer, but the word "jurisdiction" justifies a g'ance at the Canadian scene and the debate now going on in ultra-Laurentian Canada and beyond upon the nature of the remedy of divorce.

In March of this year there was constituted a 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. On October 18, 1966, Mr. E. A. Driedger, Deputy Minister and Deputy Attorney General, appeared before this Committee and summarized in general terms the nature and scope of matrimonial relief across the country. This summary, so far as relevant, was substantially as follows—

A. *Divorce a vinculo matrimonii*

(i) To either party in all provinces except Quebec and Newfoundland on the ground of the adultery of the other;

(ii) In Nova Scotia also for cruelty, impotence and consanguinity within prohibited degrees;

(iii) In New Brunswick also for frigidity or impotence and marriage within the prohibited degrees;

(iv) In jurisdictions where the Imperial Matrimonial Causes Act of 1857 applies (British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, Northwest Territories and Ontario) rape, sodomy and bestiality where the wife is the petitioner.

B. *Separation a mensa et thoro*

The Deputy Minister described this relief as "in effect a divorce but without the right to remarry" and stated that in all provinces except Quebec the grounds are adultery, cruelty and desertion for more than two years and, in Alberta and Saskatchewan, desertion where there is failure to comply with a judgment for restitution of conjugal rights, sodomy, bestiality or attempt to commit sodomy or bestiality.

C. *Legislative Jurisdiction*

The British North America Act assigns to the Parliament of Canada exclusive jurisdiction over "Marriage and Divorce", "Divorce" including a divorce *a vinculo matrimonii* and separation *a mensa et thoro*. The Deputy Minister expressed the opinion that the Parliament of Canada has exclusive jurisdiction to confer divorce jurisdiction on provincial courts, stated that the courts for the administration of divorce laws are at present the provincial courts established under head 14 of s. 92 of the B.N.A. Act, but that Parliament could establish a Canadian divorce court under s. 101 of the B.N.A. Act.

In subsequent hearings some of the matters discussed by the Committee have been the desirability of a Canadian domicile and a Canadian divorce court. The latter proposition was forcefully put by Mr. Justice A. A. M. Walsh, Senate Commissioner, who argued strongly for divorce cases being referred to the Exchequer Court and said *inter alia*, "The people in Quebec who object to the present system would still object to the new one, but those who do not object to the present system would have no reason to object to the cases being heard by the Exchequer Court sitting in Ottawa"; in other words, residents of Quebec who disagree with the philosophy and ethic of art. 185 would be entitled to the same relief as are or will or may be the non-Quebec residents in Canada. Perhaps the most important aspect of Mr. Walsh's proposal is that a federal divorce court would enable the development of an uniform Canadian divorce jurisprudence. On the other hand, Dr. P. M. Ollivier, Law Clerk and Parliamentary Counsel, House of Commons, expressed the opinion that the time had not yet arrived for establishing a divorce court in Quebec on the ground that in respect of the proportion of the population that is Catholic divorce is against their religion.

Putting aside, for the moment, the peculiarities of Quebec, perhaps the most interesting and fundamental question now being debated in and before the Committee is that of the rationale of divorce.

When the Morton Commission in the United Kingdom on Marriage and Divorce, which sat from 1951 to 1955, came to write its report it stated that the existing divorce law was founded on the "doctrine of the matrimonial offence", that is, (with the exception of insanity, to which special considerations apply) the petitioner seeking relief must establish that the respondent has been "guilty"

of one of the morally reprehensible grounds, for example, adultery, in respect of which divorce is granted. The two principal objections to this doctrine are—

(i) That the offences (of which alone the courts can take cognizance) are not as a rule the basic cause of the failure of the marriage, but rather symptoms of a deeper and more fundamental malaise.

(ii) The accusatorial procedure which it involves is so remote from the realities of life that many divorce proceedings are in fact elaborately concealed "divorces by consent".

The Morton Commission with one dissentient, Lord Walker (a judge of the Scottish Court of Session), agreed that the law of the matrimonial offence be retained, but differed seriously on the question whether there should be an additional ground based on the principle that there be dissolution of a marriage which has irretrievably broken down. Nine members of the Commission opposed the introduction of the doctrine of "breakdown", nine considered that the time had come for its introduction to a limited extent. Lord Walker alone recommended that the doctrine of the "matrimonial offence" be abandoned and replaced by a doctrine of "breakdown". His description of "breakdown" was—

"A broken marriage may ... be defined as one where the facts and circumstances affecting 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."

He was against the co-existence of the doctrines.

At the time when the Morton Committee made its report (20th December, 1955) "breakdown" does not appear to have been as such a ground in any of the countries there described as of the Commonwealth (App. III Table 1), or in the U.S.A. (App. III, Table 3), but such ground, either alone or with other grounds, was then available in Bulgaria, Czechoslovakia, Greece, Hungary, Poland, Russia, Switzerland, Yugoslavia (App. III Table 2). On the other hand, New Zealand recognised "Separation by agreement" and Belgium and Portugal "mutual consent". Since 1955, both New Zealand and Australia have enacted provisions empowering the Court to grant a decree where the parties have lived apart for not less than seven years (New Zealand) or five years (Australia) and there is no reasonable likelihood of cohabitation being resumed. The respective enactments of Belgium, New Zealand and Australia are discussed in the Report by a Group, appointed by the Archbishop of Canterbury in January 1964, to review the law of England concerning divorce. This Report, published in 1966 by the S.P.C.K. under the title "Putting Asunder" recommends that the doctrine of the "matrimonial offence" be abandoned and that of "breakdown" substituted. It rejects not only the "matrimonial offence" but also the doctrine of "mutual consent".

As a cursory reading of the newspapers will tell the wind of "breakdown" is wafting gently across the Canadian landscape. Time and again it has been recommended as worthy of consideration by persons or groups appearing before or making submissions to the Joint Committee sitting in Ottawa, usually together with urgent recommendations for the setting up of reconciliation procedures. The implications, legal and otherwise, of this doctrine as the sole ground can be inferred from the following statement from the Report to the Archbishop of Canterbury.

"If the principle of breakdown were adopted, all verbally formulated "grounds" of divorce would disappear. The acts and circumstances which are defined in the existing "grounds" would then fall to be considered, together with other relevant data presented by the history of a marriage, as evidence of breakdown. Being seen in the context of the matrimonial

relationship as a whole, they would lose the adventitious significance which at present derives from their isolation and verbal formulation and their true significance should then be more apparent. An act of adultery, for instance, would no longer have to be regarded as an independent and self-sufficient reason for dissolving a marriage: its import would be determined by the part it had actually played in the relationship between the husband and wife concerned."

III

SOME PROBLEMS OF THE BROKEN MARRIAGE

Whether the relief of divorce *a vinculo matrimonii* or even separation *a mensa et thoro* be given or not there are and always will be broken marriages. The tragedy of the broken marriage is also a tragedy of our society because it involves in varying degree the fragmentation of our primary social unit, the family. One of the misfortunes of our age is not so much that old loyalties are dying, old faiths disappearing, and many of our political and social institutions crumbling away, but the palpable risk that this one social structure, in which a man and woman and their children may, when all else seems to be in dissolution, still find shelter, is itself under severe stress and strain for reasons not attributable to divorce. It may be that the family unit as we have known it is neither essential nor desirable and no attempt should be made to preserve it. Assuring, however, that it is desirable if not wholly essential to the good life and that legal rules are or ought to be a means promoting that life, what problems does the contingency or fact of the broken marriage create?—The following summary may cover most of the ground and sufficiently indicate to what extent the law must play a part in seeking or making solutions.

A. *Prevention*

(i) *Before Marriage*

Is pre-marital counselling desirable? Does it or can it help prevent breakdown? Should it be compulsory for all intending marriage? If so, how and when should it be enforced?

(ii) *During Marriage and before Relief is granted*

Whether the *rationale* of the relief is "offence" or "breakdown", is a reconciliation procedure desirable? Is it or can it be made effective? Should it be compulsory for those seeking relief? If so, in what manner?

B. *The Broken Marriage*

The pros and cons of the several "ideologies" involved have been referred to. Assuming some relief, if only *a mensa et thoro,* are the "offence" and "break-down" theories mutually exclusive or can both co-exist? Assuming the desirability of specific grounds with or without a "breakdown" ground, how long should the list be? Should the concept of "guilt" be abandoned? Should the accusatorial process be abandoned? Must there always be, if only in the public interest, a contradictor? Should insanity be a ground of relief whatever the theory? Should the relief granting tribunal be entitled to refuse relief on the ground that to do so would be against the public interest or, where means are available, just provision of maintenance has not been made?

C. *The Consequences of the Broken Marriage*

Here the range of problems is immense and only some can be mentioned.

If there is a matrimonial home which of the spouses should be given it?

If there is no matrimonial home should one be supplied and by whom or what agency?

What are the particular problems (and corresponding solutions, if any,) of the motherless family?

The fatherless family?

The parentless family?

Should the maintenance of one spouse be ordered of the other?

If so, upon what grounds, how should it be enforced, how should it be collected and what are its fiscal implications?

Should one spouse be entitled to damages against the other or a third party?

D. *Re-Marriage*

Assuming relief *a vinculo matrimonii* what restrictions, if any, should be placed on liberty to re-marry?

E. *The Tribunal and its Jurisdiction*

Is the traditional court of law, for example, the Superior Court of Quebec, a suitable tribunal for adjudicating upon matters of matrimonial relief or is a "Family Court", such as that described and advocated by Professor Beaudoin more apt for this kind of "litigation"? What should be the ground or grounds of jurisdiction? Should a "Canadian" domicile be established or the domiciliary concept abandoned?

J. J. Gow
Faculty of Law
McGill University
December 10th, 1966

APPENDIX "31"

Submission
to the

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

by the

National Farmers Union

February, 1967

Submission

to the

SPECIAL JOINT COMMITTEE OF THE SENATE AND HOUSE OF COMMONS

on Divorce

by the

National Farmers Union

February, 1967

The National Farmers Union is composed of the provincial farmers' unions of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario. These farmers' unions, based on family memberships are concerned with the economic and the social welfare of farm people. The women within the farmers' unions have studied more specifically education, health and the social welfare not only of farm people but of society as a whole. We have long recognized the need for reform of the Canadian laws with regard to divorce.

The Farm Women's Union of Alberta has since 1946 requested that Canadian Divorce Laws be reformed to conform basically with the British Divorce Laws of 1937. At one time the FWUA policy on divorce law reform was reworded slightly to conform to the request of the Canadian Bar Association. In 1963 a committee of the provincial FWUA Board made a study of divorce laws in various countries and the FWUA policy was restated to include another clause.

The women of the Manitoba Farmers' Union have also been making similar studies. They requested similar reforms with the addition of a request that one Canadian domicile, as it relates to the application for divorce, be established.

The reforms requested in this submission were accepted by the National Farmers Union and a Study Committee on Divorce was appointed. This committee, composed of the four women's presidents of Alberta, Saskatchewan, Manitoba and Ontario, was not successful in its attempt to meet with the Minister of Justice when in Ottawa in 1965.

The National Farmers Union recognize that the family is the basis of Canadian society. We are greatly concerned that in most of Canada, when a marriage is beyond all hope of reconciliation, the only grounds for divorce is that of adultery. We are concerned that in 1961, twelve thousand deserted wives were receiving public maintenance in Canada. We are concerned that there are many common-law unions because desertion is not grounds for divorce and also concerned because of the limited grounds for divorce and the high cost of divorce. The state, to a limited extent, recognizes the fact of common-law unions by granting family allowances to the children. Also, children are registered in the name of their actual father. The fact remains that society discriminates against these families. Divorce and remarriage provides a better family basis in society.

We believe that the reform of the Canadian divorce procedure and the grounds for divorce are long past due. Our present court procedure gives attention to proof of guilt and defense of innocence rather than to therapy for the welfare of the individuals and the families concerned. The possibility of saving the marriage should receive first consideration.

The Australian Matrimonial Act of 1959 states that, "It is the duty of every court which has before it a matrimonial cause to consider the possibility

of the reconciliation of the parties." It promises financial assistance to Marriage Guidance Organizations in the belief that marriage counselling can and does prevent divorce. The Act also provides that no divorce shall be absolute until the court is satisfied that the welfare of the children has been properly arranged. No divorce proceeding can be initiated until three years of marriage have elapsed except by special permission of the court.

In some parts of the United States, it is compulsory that every divorce case be investigated by the Family Court or a Court of Conciliation. In Los Angeles Court of Conciliation, marriage counsellors have reconciled 43 per cent of the cases before them.

DIVORCE LAW REFORMS

The National Farmers Union submits the following for the consideration of your committee:

That divorce laws be revised so that divorces may be granted for the following reasons:

(a) Habitual drunkenness or habitual intoxication by reason of taking or using to excess narcotics or stimulating drugs or preparations for a period of not less than two years or has been an habitual drunkard or habitually been so intoxicated for a part or parts of such period;

(b) Adultery;

(c) Desertion without cause for a period of three years immediately preceding the petition;

(d) If since the celebration of marriage one spouse has treated the other party with cruelty;

(e) If one party is incurably of unsound mind and has been under treatment for five years immediately preceding the petition;

(f) The wife may petition on ground that the husband has been guilty of rape, sodomy or bestiality;

(g) Legal presumption of death of the other spouse.

We further recommend that:

(a) For the purpose of petitioning for divorce, one Canadian domicile rather than a provincial domicile be established;

(b) Foreign marriage certificates be accepted at face value.

The study committee was concerned that at times the amount of alimony awarded was unrealistic. They did not arrive at a solution but request that this question be carefully studied by your committee.

Respectfully submitted by:
Mrs. Louise Johnston, President,
Farm Women's Union of Alberta.

Mrs. Margaret Nedjelski, Women's Pres.,
Saskatchewan Farmers Union.

Mrs. Margaret Oliver, Women's Pres.,
Manitoba Farmers' Union.

Mrs. Veronica Opsitnik, Women's Pres.,
Ontario Farmers' Union.

APPENDIX "32"

FEDERATED WOMEN'S INSTITUTES OF CANADA

Recommendations for presentation

to the

SPECIAL JOINT COMMITTEE

of the

SENATE AND HOUSE OF COMMONS ON DIVORCE

PREAMBLE

There appears to be a great surge on the part of men and women, moving toward demands for change in what is deemed an antiquated law for those desiring to be divorced from husband or wife in Canada. There needs to be a widening of the causes upon which a petition for divorce may be presented, and that this is becoming more urgent in a society which considers itself erudite and civilized is increasingly evident.

It appears to the Federated Women's Institutes of Canada that when a marriage has come to the place where two people agree that a grave mistake has been made and their position is intolerable, there should be no need to be reduced to connive at a reason which is repugnant to both of them, because the law says this is the only reason upon which they can go into the court. It might be added that even criminals making a mistake, after serving whatever sentence is required of them, are allowed to begin a new life.

There should be no reason why those who, for various reasons are opposed to a change in the present law, should become anxious over the matter. There are many other laws which "allow" but are there for those who wish to make use of them—they do not require that all persons "must do". Laws governing divorce would be in the same category.

Further to the present "cause" for petition; we believe that more often than not this develops because a marriage has already disintegrated and we contend that the type of mental anguish which ensues through a break-down, which finds two persons living a quite unnatural life, is a matter for your consideration. Having come to this state, what can possibly be gained by forcing a man and woman to continue this way of life, or having one or the other simply walk out one day, not to return, leaving two people with no clear way in which to move.

Recently, reports were available in which it was stated that many men and women live together in polite society unmarried, because they are part of this group which found no sensible way out of their dilemma. The fact is not known to their friends but despite the fact that they could for themselves make a place in the community it has a very insecure foundation. The woman has almost no status in law, nor do the children, if there are any. Adoption of children does make a secure place but these two people would look ridiculous trying to go through this sort of procedure, and we doubt that present social officers would permit two persons, living together out of wedlock, to go through the motions of adoption, and so, the lay through its blindness pushes persons who have need for a normal home life into this undesirable situation.

The present laws re desertion are also most unsatisfactory. As presently constituted a woman may, after a stipulated time and after having made a conscientious effort to locate her husband, go into the court and have him

declared "dead", but if he returns and she has remarried, she is in grave difficulty. Women too, are often deserters and men, in an effort to create a home life for a family of children, are driven to actions outside the law, or, children become wards of an agency.

The severing of a marriage based on one person's mental incapacity, we realize, may present difficulties. We presume, that with no other avenue open there could, conceivably, be those who would take advantage of this stipulation. However, it would appear that with one party having been committed to an institution for a long period of treatment (five years is suggested), and those in authority giving a proper statement that the person is incurably insane, this should be sufficient reason for the second party to go into the court with a request for severance of the marriage.

A resolution passed at the 1964 National Convention of the Federated Women's Institutes of Canada, and re-affirmed at the Annual Board Meeting, April 1966, was forwarded to the Speical Joint Committee of the Senate and House of Commons on Divorce (Copy appended). We would now respectfully submit the following recommendations as changes to the present law:

RECOMMENDATIONS

1. That cruelty should include mental as well as physical but should be carefully defined.

2. That incurable insanity, as so attested by qualified authorities, and after treatment for a period of five years, should be accepted as a just cause for granting divorce.

3. That desertion when proven after a specific period, remains in effect in spite of the fact that the "deserter" may return.

4. That having proven to the courts that a marriage has disintegrated should be sufficient grounds for granting of a divorce, without resorting to the ground of adultery. It is difficult to differentiate between the seriousness of living in a constant state of upheaval, one hating the other, and some other sin one person might commit.

5. That the law must clear the way so that there may be a decent method of divorce rather than naming guilty parties. This would eliminate the situation when one party, in spitefulness, denies a divorce proceeding, despite full knowledge of the "sinning" party's behaviour.

6. Finally, today divorce is almost always available only to those who can pay the high cost involved in the present methods. While we do not think this is something to be had cheaply, on the other hand, simpler methods and reasons would obviate most of the cost as is not the case presently. Since divorce is a civil process it should be available to those where need is established and not denied to anyone, particularly for monetary reasons.

CONCLUSION

The Special Joint Committee of the Senate and House of Commons on Divorce, appointed for the hearing of representations, pro and con, has the responsibility of facing the fact that the present divorce laws, with the exception of those in the Province of Nova Scotia, are antiquated; that they do not meet the needs of present day society; that they work grave hardships on many law-abiding persons who would make a much better contribution to society if they could find a way (honestly) out of their dilemma. We would find, in the end, fewer children who become a problem to society and the community. Living, as they often do, in an atmosphere of tension, unkindness and insecurity, does nothing to help them develop into stable young men and women.

It is the sincere wish of the Federated Women's Institutes of Canada that the foregoing recommendations may have the serious consideration of the Special Joint Committee on Divorce.

Respectfully submitted,

(Mrs. J. Philip Matheson) President
Federated Women's Institutes of Canada

(Mrs. L. G. Lymburner) Chairman
FWIC Resolution Committee

Committee Members:

Mrs. R. C. Palmer

Mrs. Jos. Bielish

DIVORCE LAWS

Resolution as approved by delegates of the Federated Women's Institutes of Canada, National Convention, June 22-25, 1964.

WHEREAS—the present divorce laws cause unnecessary suffering to too many innocent people;

THEREFORE BE IT RESOLVED—that the grounds for which divorce can be granted in Canada be extended to include, cruelty, incurable insanity (5 years) and desertion.

(Mrs. J. Philip Matheson)
National President.

Resolution re-affirmed at Annual Board Meeting, Federated Women's Institutes of Canada, April 19-21, 1966.

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