

**FAMILY LAW
IN
NEWFOUNDLAND**

FAMILY LAW IN NEWFOUNDLAND

BY NEWFOUNDLAND FAMILY LAW STUDY

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PREFACE

The work of researching, and proposing reforms of family law in Newfoundland began in September, 1967, with fourteen reports being submitted by the Family Law Study to the Minister of Justice between December, 1967 and October, 1970.

The first of these reports, entitled Divorce, was received by the Honourable Minister in December, 1967. The implementation of the recommendations of this report by the Government of Newfoundland, with the sanction of the provincial legislature, resulted in the Supreme Court of Newfoundland being vested with jurisdiction in divorce as of July 2, 1968. On the same date, a new federal Divorce Act was proclaimed in force.

Subsequent to December, 1967, thirteen additional reports were submitted (in the order listed below) to the Minister of Justice: (2) Education for Family Living, Marriage and Family Counselling and Marriage Reconciliation; (3) Adoption; (4) Guardianship and Custody of Infants; (5) Family Courts; (6) Judicial Separation and Annulment of Marriage; (7) Marriage; (8) Property Rights in the Family; (9) Evidence; (10) Penal Provisions of Provincial Family Law Statutes; (11) Some Aspects of Conflicts in Family Law; (12) Some Aspects of Torts in Family Law; (13) Agency and Contract, and (14) Maintenance.

Since the last of these reports was completed and submitted to the Minister of Justice in October, 1970, the Family Law Study has prepared this publication, bringing up to date the research in the fourteen reports and re-organizing the reports into chapters. The recommendations at the end of each chapter are identical to those contained in the reports to the Minister of Justice. Tables of cases and statutes and a subject index have been added.

About 30 of the 235 recommendations in the reports (now chapters of this publication) dealing with aspects of adoption, guardianship and custody of infants, maintenance, property rights, agency and contract, and evidence were incorporated in draft legislation (some of the recommendations being altered to a minor extent and passed into law during the fifth session of the thirty-fourth General Assembly of the Newfoundland House of Assembly in 1971. The remaining recommendations are under active consideration by the provincial government and a number of these have been drafted into legislation, and passed into law by the first session of the thirty-sixth General Assembly, which commenced April 19, 1972.

The table of statutes includes Newfoundland legislation enacted to the end of the fifth session of the thirty-fourth General Assembly in 1971. Relevant legislation since enacted (up to September 30, 1972) incorporating other recommendations of the Family Law Study, are included in a Table at pages 613-617.

St. John's, Nfld.,
September 30, 1972

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Legend: amd., amended; c., chapter; en., enacting, enacted; form., formerly; No., number of Act; np., not yet proclaimed; o., order; r., rule; reg., regulation; rep., repealed; s., section; sub., substitution; such references as 1966/62/60 refer to the year, and number or chapter and section of an Act.

The right hand column in this table refers to pages at which the statutes are discussed or referred to in the Study. Newfoundland statutes listed include enactments to Dec. 31, 1971. Subsequent, relevant legislation is included in a Table at pages 613-617.

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Legend: amd., amended; c., chapter; en., enacting, enacted; form., formerly; No., number of Act; np., not yet proclaimed; o., order; r., rule; reg., regulation; rep., repealed; s., section; sub., substitution; such references as 1966/62/60 refer to the year, and number or chapter and section of an Act.

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INTRODUCTION

THE ENVIRONMENT FOR THE STUDY

By an Order-in-Council of September 19, 1967 the Newfoundland Family Law Study was constituted to advise the Newfoundland Government in various matters pertaining to family relations in the province.

The chapters in this volume contain the reports made by the Study to the Government but, because of the then existing exigencies, the reports were not submitted in the same sequence as that of the chapters of this volume. Because a Joint Committee of the Canadian Senate and House of Commons had, in June, 1967, tabled a report recommending legislation dealing with divorce law reform and jurisdiction of courts to deal with divorce hearings, priority was given by the Family Law Study to the reports which are contained in this volume as chapter XIII, entitled Divorce and chapter XI, entitled Education for Family Living, Marriage and Family Counselling and Marriage Reconciliation. The reports making recommendations on these topics were submitted to the Honourable Minister of Justice for the Lieutenant-Governor in Council on December 6, 1967 and June 29, 1968, respectively. This having been done, the matters covered by the other chapters were proceeded with, and reports made to Government.

In researching family law, it was natural for a Study in Newfoundland, a Province of Canada, to look first for comparisons to the experiences in the field of family law in other Canadian provinces and elsewhere on the North American continent. But it was evident that the problems to be examined were wider and indeed universal, transcending the boundaries of continents, cultures, religions or race.

FAMILY LAW IN THE UNITED STATES AND CANADA

Since the advent of the twentieth century, much attention has been paid to the place and purpose of family law in both the United States of America and Canada. The first family court on the North American continent was established in the United States of America in 1899. The status of the family court in a community may be regarded as a gauge of the emphasis placed upon adequate treatment of the problems arising there in the field of family law.

¹ For a discussion of problems in contemporary family law, see : "The Legislative Provisions Relating to the Family - The Reciprocal Rights and Duties of the Husband and Wife", a paper delivered to the Organization Committee of the International Conference on the Family, by M. Georges Desmottes, Director of the Social Sciences Division of the National School of Public Health, France, at Laval University, Province of Quebec, Aug - Sept, 2, 1967.

For several decades a number of organizations have been interested in this field in the United States, and to a lesser degree in Canada, from the viewpoints of both the social and the legal sciences. Groups of lawyers and social workers have during this period, been deeply involved in the problems of preservation of family life and the discovery of some solutions to those conditions which arise out of undesirable family relationships or of social behavior. Neither the legal nor the social sciences working alone, can resolve such problems as those which may arise out of marriage, divorce, support, custody, guardianship, adoption, and the dependent, neglected and delinquent child. In these and other broad areas of family law, there must be a growing measure of co-operation between the legal and behavioral sciences, or the very foundations of society might be undermined.

While it is true that organizations have been interested and active in the United States and Canada, both in the legal field and the social work field, there has been little co-operation or intercommunication between them. The objective observer sees a vast amount of time, talent and money expended, sometimes in re-ploughing the same field and all too often in harvesting unrelated crops.

In North America, the existence of fifty States in the United States of America and of ten provinces in Canada, all with their own particular laws, makes the picture somewhat bewildering: But there are similar approaches to family law common to many States and Provinces, which include the following:

1. That the family is a social entity, in which the status of the husband and the wife ought to be equal.
2. That the spouses are jointly responsible for the daily needs of the household.
3. That the wife ought to have the right to administration of her own estate without the right of supervision of the husband. She may however bind her husband by contracts made by her, to provide for the daily needs of the household.
4. That there may be a community of interest concerning the division, where necessary, of the household possessions, the origin or ownership of which cannot be established.

It has been said here that the status of the Family Court in a community is a gauge of the emphasis placed upon the problems arising there in the field of family law. But on the North American continent the story of the growth of that Court, over a period of more than a half century, is not generally regarded as an impressive one. It is felt that the Court has not lived up to the hopes and

aspirations of its early supporters. The measure of understanding and co-operation between the legal profession and the social scientists, necessary to the full development of the Court and the proper treatment of family problems have not come about, and there are still mutual misgivings between many associated with the social aspects of the Court, and the legal profession. There is also a lack of confidence and respect between the two professions, insofar as their respective contributions to the Family Court are concerned. The Family Court was instituted in the United States with very high hopes of what it could and would do but, as one writer has said "the great experiment has aborted". The fault has been on both sides, and is rooted perhaps in the differences of approach typical of the two professions.

The situation facing family law in the North American continent emphasizes the continuing necessity for unremitting attention, particularly on the part of interested members of the legal and social professions, to remedy them. This is similarly true of other areas where the same difficulties, in some shape or degree, are also to be found.

THE UNITED KINGDOM OF GREAT BRITAIN AND IRELAND

Just as it is natural in family law for Newfoundland to seek comparisons on the North American continent, it is similarly so for Canada and the United States of America to turn to the laws of the United Kingdom. The laws of the states of most of the United States of America as well as of those of most provinces of Canada are based on the English Common Law. Also a great deal of the social legislation of the United Kingdom influences the shaping of the statute law of these other areas. Great Britain has long led in reforms of family law and is still in the forefront. This is illustrated as late as 1969 by the passage there of the Family Law Reform Act 1969¹ dealing inter alia, with such things as reduction of age of majority and related provisions, property rights of illegitimate children, provision for use of blood tests in determining paternity, and the presumption of legitimacy, and illegitimacy.

Perhaps the greatest difference lies in the fact that England has not followed the United States or Canada in creation of family courts, with their informal and investigatory proceedings. Similarly English divorce courts are vested with all the solemnity attached to all adversary proceedings in the High Court. But reforms which originated in the English law include provisions for a guardian *ad litem*; the decree absolute can be refused until children's rights are protected, and the court can make orders for maintenance in divorce decrees. While there is no court conciliation service, the agencies and probation services provided in the United Kingdom have long been the envy of many other jurisdictions.

1 Stats. U.K. 1969, c. 46.

AUSTRALIA AND NEW ZEALAND

The legal systems of sister Commonwealth nations Australia and New Zealand, like the Canadian system (except in Quebec), have their foundations in English Common Law, and the divorce and property laws of both countries have recently undergone revision and reform.

The Commonwealth of Australia Matrimonial Causes Act, 1959, as amended in 1965, departed from reliance exclusively on the concept of matrimonial offence in legislating grounds for divorce, and recognized marriage breakdown as a ground (for dissolving a marriage). The Act also contained provisions designed to encourage reconciliation.

Reconciliation is also promoted by provisions of the Matrimonial Proceedings Act, 1963, enacted by New Zealand, where the idea of marriage breakdown as a grounds for divorce was first recognized in 1920.

New Zealand's Matrimonial Property Act 1963 represents the most advanced legislation in the Commonwealth in its provisions relating to settlement of property disputes between husband and wife. Significant legislation providing for ownership of the family home and maintenance of defined classes of persons not adequately provided for under a deceased's will or as a result of intestacy, have been enacted in New Zealand since 1963.

COMPARATIVE LAW

A detailed study of comparative family law could become an almost endless task, since the problems change constantly from place to place and time to time. There has been a remarkable evolution in this century in the law regarding the position and the rights and responsibilities of members of the family unit in various parts of the world. An attempt to give detailed treatment here of this subject would be vain but some general observations might be useful.

EUROPE

If we look first at Europe we find the Romano-Germanic and Anglo-Saxon systems, which seem to have been followed by the codes of other parts of Europe and beyond, and have strongly influenced both North and South America. They are based essentially on the moral principles of Christianity, on political and sociological principles of liberal democracy and on the capitalistic economic structure. In this area there have been manifold changes, particularly in the twentieth century, from the rigid situation in which protection of individual members of the family, rather than of the family unit itself, was the important issue. Marriage today is an institution sustained by the free choice of the couple

for each other, and based on common rights and obligations of the spouses. While in most respects the husband is the head of the household, he is not, as he was once thought to be, in any sense omnipotent as such. The wife is a full partner in the relationship, and the protection and welfare of the children seems now to be a principle commonly accepted by many States.

In other European jurisdictions, which seem to follow the French, German and Anglo-Saxon systems, there is a lively interest in moulding family law courts to meet new social problems and stresses.

As has been said of North America, the influence of the English Common Law, and to some extent, of statute law, have been extended through settlement to other areas, some but not all of which are still associated politically with Great Britain.

THE SOCIALIST COUNTRIES

The law enforced in the U.S.S.R. as in the Peoples' Democracies, rests fundamentally on Marxism. The legal structure is compatible with the economic structure, which is not essentially designed to protect the private rights of the individual.

The family tradition was not strengthened by the early Socialist Code, which tended rather to interfere with it. Marriage was reduced to a mere formality by the Code, and divorce itself could be accomplished by a simple declaration of one of the parties. These steps were looked upon as part of a policy of emancipation, and were contained in the Codes of 1918 and 1926.

Since 1944, there has been a marked revision, if not a revulsion. Under the Russian Code on the laws of marriage, family and guardianship, marriages are now celebrated before a registrar. The change is intended to protect the rights and interests of the spouses and children. The family codes of Bulgaria, Poland, Hungary, Rumania and Czechoslovakia have all undergone changes based on the Soviet Law. In them protection has also been provided for spouses and children in the laws governing divorce. Also in these Codes, the concept of a united and open family which rests on the equal partnership between husband and wife is expressed. The fidelity, mutual assistance and co-operation of the spouses, in the interest of the family, are pledged; they are obliged also to provide for fulfillment of the family needs. In the legislation dealing with sharing of estates the contribution of the spouses in bringing up the children and in domestic duties is estimated in the same way as are economic contributions. Estate acquired during the marriage is joint; estate owned by a spouse before the marriage remains his or hers.

A divorce action is not admissible under at least the Polish Code, if it is against the interest of underage children. The welfare of children, even if they have parents, is a concern of the State.

COMMUNIST CHINA

In Communist China, the breakdown of custom which took place when in 1950 China adopted the western code must have been violent: Marriage had been a manifestation of filial piety towards ancestors and not a free choice of the parties. Parents now have a duty of support and education towards their children, and the State protects the interests of the child.

SOME MOSLEM COUNTRIES

It seems that family law in many Moslem countries resembles laws of European origin. The patriarchal theory, where obedience went back through males to a common male ancestor, has been largely changed. The "family circle" concept has taken its place. The wife has become the equal, in the law, of her husband. Marriage is based on the consent of the spouses - not that of their families, and the age limit has been raised. Divorce is organized and regulated -reconciliation is recognized and encouraged.

Polygamy is forbidden in some countries - in others the amendments to family law will undoubtedly lead to its abolition or desuetude.

OTHER ASIAN COUNTRIES

The Hindu Marriage Act of 1955 is an evolutionary measure. Polygamy is forbidden; the personal consent of the spouses is required and a minimum age is established. The modern family code of South Vietnam in 1959, and the Japanese civil code of 1947 both come far towards being similar to the enlightened codes of European countries.

CONCLUSIONS

Not every country can be included in this brief survey. It seems however, to establish two main points:

- (1) that people over much of the world's surface are active in bringing their family law up to and beyond the more sophisticated and enlightened standards of Western countries;
 - (2) that although the activity is endemic, a myriad of differences, some large, some small, may still be found in both the Eastern and Western Hemispheres.
-

It is stimulating to realize that the search for reform of family law is not limited to one country, nor to one hemisphere.¹ And with all the differences of race, cultures, religions, philosophies and degrees of development, it is possible to find some guidelines of interest.

SUMMATION OF GENERAL POINTS OF INTEREST IN DEVELOPING FAMILY LAW

From this study of disparate peoples the following points of interest, but not always of similarity, may be made:

1. That marriage should be the result of free choice of the couple for each other.
2. That in marriage there should be sharing of authority between the spouses over the family, with the woman as an equal partner.
3. That the spouses are mutually obligated to provide for the family according to their means.
4. That *patria potestas*, the patriarchal family and the omnipotence of the husband no longer exist.
5. That the family is the foundation stone of society and must be regarded as a social entity.

That the interests and welfare of the children are paramount in the eyes of the State.
6. That the State adopts a protective position in family law as in other social laws. In this the State is interested in the universal rights of the family institution, rather than in the rights of any individual.
7. The question of sharing estate differs in many places and needs attention. It is likely to differ in different communities. There can be joint estate or several estates or a mixture.

An inventory of research conducted on the family in Canada is contained in: Frederick Elkin, *The Family in Canada* (Ottawa: The Vanier Institute of the Family, 1964). The University of London's *List of Official Committees, Commissions and Other Bodies Concerned with the Reform of the Law* (5th annual edition, London: Institute of Advanced Legal Studies, 1969) includes entries on family law research underway in Australia, Botswana, Canada, England, India, Kenya, New Zealand, Scotland and Wales.

MARRIAGE

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INTRODUCTION

Marriage may be defined either as the act, ceremony or process by which the legal relationship of husband and wife is constituted; or as a physical, legal and moral union between a man and woman in complete community of life for the establishment of a family. For many, the marriage ceremony is more than an agreement whereby the participants acquire the status of married persons; as stated in Chapter XI: "It is a sacred contract with a deep religious significance." Customarily, the marriage act is preceded by an agreement to marry, popularly referred to as an "engagement".

While reference will be made to the nature of the status conferred by the marriage ceremony, this study of marriage law is primarily concerned with:

- (1) the agreement to marry (engagement), and
- (2) the marriage contract (marriage ceremony).

The study of marriage engagements will necessarily entail a review of the origins and purposes of agreements to marry in Newfoundland and elsewhere and the sanctions the law has imposed on persons in breach of such agreements. The legal right to sue in contract for the breach of a promise to marry, defences that may be raised to such actions and the damages an aggrieved person may recover, are examined. Consideration is given to the suitability of this medieval remedy in contemporary society. The ownership of the engagement ring and wedding gifts in the event a person reneges on his covenant to marry, is also discussed.

CHAPTER I

Newfoundland's Solemnization of Marriages Act¹ is the focal point of an examination of the marriage ceremony and discussion of possible reforms in the province's marriage solemnization procedures. Besides an appraisal of the ceremonial requirements to be satisfied to ensure a marriage's formal validity, there is an outline of the capacity that persons entering into a marriage contract require to guarantee the essential validity of the ceremony. Reporting and registration of marriages in Newfoundland are also analyzed.

¹ R.S.N. 1952, c. 160.

A. CONTRACT TO MARRY

(ENGAGEMENT)

INTRODUCTION

A marriage is often, though not necessarily, preceded by a contract to marry (an engagement). Generally, such contracts are governed by the same rules of law as other contracts, but due to their highly personal, non-commercial nature, such contracts possess certain peculiar properties.

The agreement to marry, an executory contract, usually takes the form of mutual promises to marry, one party's promise being the consideration for a reciprocal promise by the other.

In Ontario, the contract to marry may be oral or written, but if the contract is not to be performed within one year from the time it is entered into, The Statute of Frauds¹ will apply and a written note signed by the party obligating himself must be drawn up. While Newfoundland's legislative bodies have never enacted similar legislation, it is arguable, but not settled, that by virtue of the 'settled colony' doctrine, colonists of the province from England brought with them their country's Statute of Frauds enactments which would accordingly apply to marriage engagements in Newfoundland, in much the manner the Ontario Act regulates contracts to marry made there. At Common Law, no particular form of contract to marry is necessary and a parol agreement is enforceable, no matter the length of time between the engagement and the proposed date of the marriage.

CAPACITY

Capacity to enter into an agreement to marry is governed by the general law of contract. Hence, where the person who fails to keep his promise to marry is a minor (under the full age of nineteen years) he cannot be sued during his minority, nor can he be held accountable for the breach on reaching his majority unless he ratifies the agreement on becoming of age². The Common **Law rule** that a minor *can sue* but *cannot be sued* for breach of a contract to marry, still applies.

UNENFORCEABLE CONTRACTS

A contract to marry containing provisions which are immoral or con-

¹R.S.O. 1960, c. 381, s. 4.

²Haynes v. Evans, /1941-46/ Nfld. L.R. 416 (Sup. Ct.); see Stats.Nfld.1971, No.71, s. 3.

trary to public policy will not be enforced by the courts. If for example, either of the parties to the contract is already married, it will usually be regarded by the courts as contrary to public policy and therefore declared void, because while the previous marriage exists, each spouse is entitled in law to the other's undivided consortium. The fact that one spouse is an incurable lunatic does not entitle the other to enter into a valid agreement to marry. Nor will a court recognize a promise to marry "when the promisor obtains a divorce", or "pending the death of the promisor's present spouse". However, where a marriage had already broken down and a decree *nisi* of divorce had been obtained, an English court found that a promise afterwards made by either spouse to marry a third person is in those circumstances lawful.

UNOFFICIAL ENGAGEMENTS

One feature of modern social life, reports P.M. Bromley, Professor of Law in the University of Manchester, England, in his book on Family Law¹ is the 'unofficial engagement', where the parties term their marriage intentions to be unofficial. (Usually, no engagement ring is given and no publicity attends the parties' marriage plans.) The success of an action alleging breach of such an engagement depends on whether it can be shown that the parties had intended to be bound by their agreement. However, it is submitted by Professor Bromley² that "there is a presumption against the parties' intending to be legally bound."

TERMINATION OF CONTRACT

A contract to marry may be dissolved by the mutual agreement of the parties or on the death of one of them (where death occurs before the marriage date agreed upon). Otherwise if such a contract is not fulfilled, an action for breach of the promise to marry may ensue. Usually an aggrieved person is reluctant to commence a court proceeding to collect damages for financial and other loss resulting from breach of the marriage agreement, for fear of the publicity that may be accorded the matter and the highly personal nature of the evidence that would have to be presented in open court. Consequently, in Newfoundland, where the parties cannot privately agree on compensation for loss suffered due to a breach of the contract, legal action is usually foregone. In the history of the Supreme Court of Newfoundland, dating back to 1817, few such actions are known to have been commenced.³

Bromley, P.M., Family Law (3rd ed., 1966).

² Ibid., p.19.

³ Haynes v. Evans, /1941-46/ Nfld. L.R. 416 (Sup. Ct.); Lane v. Ryan, 1965, No. 32, in the Supreme Court of Newfoundland, an unreported decision of Higgins J., and Amin-son v. Grenning, 1968, No. 409, in the Supreme Court of Newfoundland, an unreported decision of Puddester J.

BREACH OF CONTRACT

The simplest example of a breach of promise to marry is a failure to appear for the marriage ceremony on the date fixed (unless the parties afterwards continue to act as engaged persons). If no particular date has been agreed upon, it is implied that the promise to marry is to be carried out within a reasonable time and either party may call on the other to perform the agreement at any convenient time. Such a request, if met with a refusal, may constitute a breach of the engagement.

An anticipatory breach of a promise to marry may occur where one party, before the marriage date, repudiates his promise, marries a third person, or otherwise puts it out of his power to perform the contract, thereby giving the aggrieved party an immediate right of action.

REMEDY FOR BREACH

As Equity will obviously not grant an order for the specific performance of an agreement to marry, the injured party's remedy is an action for damages¹, so long as he shows that he was ready and willing to marry the party in breach of the contract.

DEFENCES TO BREACH

In opposing such an action, the party being sued may raise the defences common to all actions for breach, and argue that: (1) the agreement is contrary to public policy or is otherwise illegal; (2) the defendant lacks capacity (is a minor or because of insanity); (3) the contract has been discharged by agreement or the parties' conduct, or (4) the agreement was induced by misrepresentation or undue influence.

The defendant may also avail of special defences peculiar to such actions, including his discovery, after the engagement but before the marriage, that his intended wife was a loose and immodest woman or is pregnant by a man other than himself, or that she had an illegitimate child some years previously, or is now suffering from any incurable disease. A woman defending an action for breach of contract to marry may contend her intended husband was a man of violent and ungovernable temper or was of a bad, disreputable character.

Most of these special defences were successfully raised in English decisions pre-dating 1850, and a judge of the Alberta Supreme Court (Appellate Division) has questioned whether unchastity of a woman or a man's immoral

See: The Judicature Act, Cons. Stats. Nfld. 1916, c. 83, Schedule: The Rules of The Supreme Court (of Newfoundland), o. 32, r. 2.

conduct would today be an adequate defence. In *Gunn v. Barr*¹, Beck, J.A. in a dissenting judgment, remarked:

"... generations ago, some English judges, in passing observations, expressed the opinion that absolute bodily chastity at all previous time in the past of the woman was an implied condition of a man's promise to marry. In those days and in that state of society the woman ordinarily lived a sheltered and retired life. It was an age and a state of society in which 'respectability' was much more highly esteemed and in which a woman's fall from virtue_ even though repented of, seemed to be the one unforgivable sin. Today we have co-education commencing with an early age and life in the business world side by side with men and a general liberty and freedom of conduct on the part of women which leaves them open to many temptations and dangers then wholly unknown. And a woman's fall, repented of is looked at with much more humaneness and Christian charity; indeed there is a strong tendency to accord to women an equal right to immorality! Under these circumstances it is, in my opinion, laying too heavy a burden on the woman to say that, if in the midst of all her temptations she should lapse from virtue, she cannot so rehabilitate herself as to become virtuous, though having ceased to be innocent, and having become fixedly virtuous be entitled to dismiss the past and to ignore it in her relationship with others."

While a defendant's own immorality will not be recognized as a valid defence, there may be justification in raising his own physical or mental infirmity, particularly if he was not aware of the infirmity or its seriousness at the time he made the promise to marry and if the infirmity has made him unfit for marriage. However, where the infirmity is of temporary duration, such as requires a hospital operation followed by a period of rest, a postponement of the marriage may be justified, though the obligation to perform the agreement at a **future** date will remain.

COMPENSATION FOR BREACH

An injured party may recover financial compensation for such damages that (1) would not have been suffered had the person in breach of the promise to marry carried out the agreement, and (2) were the foreseeable consequences of the breach at the time the contract was made. If these tests are met, "the amount of damages to be allowed", wrote Mackenzie, J.A. in *Lafayette v. Vignon*,² "is a question for the sound discretion of the Court in each particular

¹. /1926/ 1 D.L.R. 855, 860-861.

² /1928/ 2 W.W.R. 506, 513 (Sask. C.A.).

instance. They cannot be measured by any precise rule, but are given to the injured party as an indemnity for her pecuniary loss, if any, and to repair the injury to her feelings and affections and wounded pride as well as her loss of marriage."

(1) Loss of the marriage. Besides the loss of the consortium of the prospective spouse, the injured person may recover for loss of support and maintenance, for being deprived of the status of a married person, and for articles, particularly the wedding dress and other clothing which have been made valueless or worth considerably less, as a result of the breach of the promise to marry.

In mitigation of this claim, the defendant may legitimately ask the court to consider his health, the extent of his property, his income and his social position, as being relevant factors in determining the injured party's station in society had the promise to marry been carried out. He may also endeavour, by evidence of conduct, to show that the claimant held no great affection for him.

(2) Injury to feelings. In awarding compensation for injury to feelings, the court will take into account both parties' conduct, and will increase the amount of an award to correspond to the degree of injury to the aggrieved person's feelings, health and reputation. For example, a woman, in reliance on her intended husband's promise to marry, may have permitted herself to be seduced. The subsequent breach of the promise may have thus caused injury to her feelings and pride, and conceivably diminished her prospects of marrying another man. Harsh or unfair treatment by a person repudiating a promise to marry, such as by showering untrue imputations on the character of the once-intended spouse, will also increase an award.

(3) Special property damages. The amount of the damages award will include, in an appropriate case, compensation for special property loss. A defendant may have agreed as a term of the engagement that at the time of the marriage, he would settle property on his spouse. Moreover, a man or woman who closes a business or sells a home in anticipation of marriage and at the request, or with the knowledge of the intended marriage partner, may have an action for any loss thereby incurred, if the other person repudiates the contract.

LIABILITY OF THIRD PARTY

A third person whose conduct has resulted in the breach of a promise to marry will only be liable for damages at the suit of the aggrieved person if (1) he or she had actual or constructive knowledge of the engagement and (2) the degree of interference amounts to a wilful, illegal act or the holding out of some inducement (without reasonable justification).

Whether a negligent act by a third party procuring the breach is actionable, is doubtful. Advice given in good faith by a third person to a prospective spouse will probably not be a legitimate basis for an action where the person acting on the strength of the advice decides to repudiate his or her promise to marry.

MARRIAGE GIFTS AND ENGAGEMENT RING

At the time mutual promises to marry are exchanged and a man and woman become engaged, the man customarily gives his intended bride a ring as a pledge of his sincere intentions. Other gifts made between the parties after the engagement, purchases are made by both for their joint use after the marriage and wedding gifts are made to them by relatives and friends. If the marriage does not take place, what is the legal position with regard to the ring and wedding gifts?

Wedding presents are usually, though not necessarily, given in contemplation of marriage, to the prospective spouses jointly, and should the marriage for any reason not take place, the presents must be returned, unless a particular gift has obviously been given for use before the marriage.

When the marriage is cancelled due to a breach of promise to marry by the prospective husband, his intended wife may retain the ring. Where the prospective wife is in default of the agreement, she must return the ring. In the event that the prospective wife dies or suffers a disability making him or her unfit for marriage, the ring should be returned. The same rules generally apply to gifts made by the parties to each other in contemplation of marriage. However, a party who repudiates a promise to marry may recover articles purchased with his or her money, for the purpose of furnishing a home upon marriage. Articles or money lent in anticipation of wedlock should be returned.

DISCUSSION

INTRODUCTION

The action for breach of a promise to marry, which was first allowed in England's Common Law courts in or about 1651, developed at a time when a woman's freedom of choice was restricted and she had limited legal rights. Courtship was a formal affair with the engagement often being attended by a marriage settlement (where persons of the upper or upper middle classes were involved). Life interests in land and gifts of personal property were often terms of the agreement to marry, to be settled on the respective spouses upon the solemnization of the marriage.

However, the increase in estate taxes and the decline of the upper and **16**

upper middle classes made a legal action based on the breach of a promise to marry less attractive financially for prospective spouses and their respective families. No longer may a man expect a lucrative property settlement upon marrying a woman and consequently his financial loss in this respect, should the marriage agreement be repudiated, would probably be negligible.

For more than a century, a number of United States and Canadian courts have been critical of jurists who have treated the highly personal marriage engagement as a legal contract. Sir Patrick Hastings in his *Cases in Court*¹ may be quoted as follows:

"A breach of promise to marry is an attempt by the law to interfere with a purely domestic relationship which usually ends in disaster and the legal view is based upon the assumption that a promise to marry constitutes a purely legal contract, which is obviously rubbish. A promise to marry possibly is, and presumably should be, based upon a mutual desire to enjoy a happy matrimonial existence, and how in the world that desirable intention is to be achieved if one of the parties discovers that he dislikes the other intensely, utterly passes my comprehension."

There is the danger that an aggrieved person might use the threat of legal action for breach of marriage promise in order to extort money from the person failing to perform his or her undertaking. Moreover, the possibility of being subjected to such action for nothing more than a normal personal feeling of disillusionment as to the prospects of success and happiness in the proposed marriage, is patently unrealistic. Furthermore, a research writer reporting to the Ontario Law Reform Commission in a report on Marriage² observes that "a marriage must be entered into voluntarily having been described as 'the voluntary union for life of one man and one woman to the exclusion of all others' ... " and poses the query: "Is the exchange of promises on the wedding date truly voluntary if a party who does not marry will be in breach of contract and subject to damages?"

AVAILABLE REMEDIES

While abolishing the action for breach of promise to marry, in which the Study concurs, many jurisdictions have retained certain forms of remedy which may be availed of by a party aggrieved by the breach of the marriage promise.

¹ (London, 1953), p. 111.

² Report of the Family Law Project of the Ontario Law Reform Commission to the Commission on Marriage, vol. 5, p. 18 (unpublished, 1967). This project report has since been published by the Commission as the Report on Family Law, Part II - Marriage (1970).

(1) Gifts given by the injured person in contemplation of marriage -including the engagement ring - may be recovered in an action based on the doctrine of restitution. Such gifts may also be recovered by an action for deceit, by establishing that at the time of the gift the recipient did not intend to marry the donor. An action for *deceit* requires such evidence of fraudulent intent as repudiation of a promise to marry shortly after giving the undertaking and receiving gifts, or knowledge at the time of giving the promise to marry that it would not be performed.

(2) A normal sense of disappointment aside, intentional or reckless action in repudiating the contract, causing severe emotional despair or bodily harm may be a basis for compensation by an action in tort for assault.

(3) Compensation for expenses incurred in wedding preparations and the purchase of wedding garments may be recovered in an appropriate case, by an action for deceit. Often, the wedding preparations are voluntarily financed by the father of the prospective bride, and in that event may not be included in her action for damages.

(4) An action for deceit may also be the proper course to recover damages where the party in breach of the marriage promise, gave a marriage undertaking for the purpose of inducing the injured person's participation in intimate physical relations.

Otherwise, intimacy occurring after two persons exchange genuine promises to marry, loss of the marriage and support, injured feelings and wounded pride and diminished prospects of marrying another man, should not be grounds for an action in damages by the offended party, in a breach of promise suit.

. C O N T R A C T O F M A R R I A G E

INTRODUCTION

Marriage has rarely, if ever, been defined by statute in either England or Canada, and the case law is relied upon to outline the characteristics of this relationship. In his classic, definition of marriage in the 1866 English case of *Hyde v. Hyde and WoOdmansee*¹, Lord Penzance states: "I conceive that marriage, as understood in Christendom, may . . . be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." His understanding requires that:

- (1) the marriage be voluntary, with lack of true consent on the part of either party rendering the marriage contract void;
- (2) the marriage be monogamous, neither spouse being able to contract another marriage while the original union subsists;
- (3) the marriage be for life, in the sense it must be the parties' intention, when they entered into the marriage that it should last for life, unless it is determined by a divorce decree-.

In English Common Law, "marriage is an agreement by which a man and woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties." While marriage is clearly a contract, it is not entirely a matter of free choice and indeed, is quite unlike any commercial agreement in many respects and in particular:

- (1) the law relating to the *capacity* to marry differs considerably from that governing other types of contracts;
- (2) a marriage contract may only be created if special *formalities* are carried out.

In addition, a voidable marriage may be nullified by court declaration only, and then on grounds completely different than in other agreements. The marriage contract, unlike others, cannot be discharged by a mutual agreement of the parties, repudiation by one of them or frustration. Unless one of the marriage partners dies, the contract of marriage may only be brought to an end in Canada by a decree of divorce granted in accordance with the Divorce Act or by decree nullifying a

¹ 14 L.T. 188 (Divorce & Matrimonial Causes Ct.).

voidable marriage. Besides, the parties to a marriage contract cannot

² Nachimson v. Nachimson, /1930/ P. 217 (C.A.).

³

Bromley, P.M. Family Law (3rd ed., 1966), p. 2.

⁴

R.S.C. 1970, c. D-8.

decide the terms of the relationship; the spouses' rights and duties are largely fixed by law, and not by agreement. Some of these may be varied by mutual consent (for example, the spouses may mutually agree to release each other from the duty to cohabit). Others cannot be varied, and in particular, a wife cannot contract out of her right to apply to court for maintenance in a divorce or non- support proceeding.¹

CONSTITUTIONAL

Under The British North America Act. 1867², the written portion of the Canadian Constitution, section 91 (26) empowers the federal Parliament in Canada to make laws in respect of "Marriage and Divorce". By section 92 (12) of the same enactment, the legislatures of the provinces (including Newfoundland, from April 1, 1949) may legislate on "the Solemnization of Marriage in the Province".

Reinfret, J. of the Supreme Court of Canada, interpreting these two provisions of the Act in *Attorney-General for Alberta and Neilson v. Underwood* wrote', *inter alia*:

"The whole question depends upon the distinction to be made between the formalities of the ceremony of marriage and the status or capacity required to contract marriage. Solemnization of marriage is not confined to the ceremony itself. It legitimately includes the various steps or preliminaries leading to it."

In the decision of the Judicial Committee of the Privy Council, twenty-one years earlier, *In re Marriage Legislation in Canada* ⁴

it was held that (1) the exclusive power conferred on the legislatures of the provinces, to make laws relating to the solemnization of marriage in the province, operates by way of exception to the powers conferred on the Parliament of Canada as regards marriage; and (2) the powers so conferred on the provincial legislatures enable them to enact conditions as to solemnization which may affect the validity of the contract.

The importance of these interpretations of the marriage provisions of the Constitution becomes clearer in the discussion of the required capacity for, and necessary formalities of, marriage.

¹ See: *Hyrum v. Hyman*, /1929/ A.C. 601 (H.L.); The Maintenance Act, R.S.N. 1952, c. 65, ss. 2(e), 8.

³ /1934/ S.C.R. 635.

⁴ /1912/ A.C. 880.

² Stats. U.K. 1867. c. 3.

CAPACITY TO MARRY

INTRODUCTION

In order to become husband and wife, a man and woman must both (1) possess the capacity to contract a marriage, and (2) observe certain necessary formalities. Marriage laws governing capacity to marry have been established by Common Law or are enacted by the federal Parliament while the formalities of the marital ceremony are governed by Acts of the respective, provincial legislatures and will be treated under another heading of this Chapter.

In accordance with private international law, whether a person has the necessary capacity to contract a marriage depends entirely on the law of his domicile, while the formalities to be observed are those required by the law of the jurisdiction where the marriage ceremony takes place. It is therefore possible for a man living and having his domicile in Canada, who has the required capacity to marry according to Canadian law, to go through a ceremony of marriage with a woman residing in India, without leaving Canada. This is because India's laws governing the wedding ceremony recognize marriage by proxy.

As a result of the English and Canadian views of the subject, capacity to marry involves consideration of (1) the prospective spouses' ages, (2) any previous marriages contracted by either of them, (3) whether they are related within the prohibited degrees of affinity or consanguinity, (4) whether their consent to the marriage is voluntary, and (5) whether each is physically capable of contracting (and consummating) a marriage.

(1) AGE

At Common Law, a male of fourteen years and a female of twelve years may consent to enter a valid marriage. Fourteen and twelve years of age were chosen as being the ages of puberty of the boy and girl respectively - at which ages they might be expected to be able to consummate a marriage.

A report of the Ontario Law Reform Commission on Marriage, states that at the time these ages of consent were established

"the law relating to family matters placed a heavy emphasis on property interests and legitimacy of offspring. Today, however, serious consideration must be given to more factors than these. Marriage represents the creation of a new family unit by persons who have detached themselves from the homes of their own parents. The fundamental considerations must therefore be whether the maturity and economic independence of the spouses is consistent with the successful founding of such a unit,

and whether there exists the basis for a viable family group which can provide care and protection for dependants."¹

In the absence of legislation by the federal Parliament, which has jurisdiction to set the age of consent, the Common Law governs the minimum ages at which a male and female may marry in Newfoundland today. (Provisions of the Newfoundland Solemnization of Marriages Act relating to parental consent to marriage where the prospective spouses are under nineteen years, are discussed under a separate heading of this chapter.)

An examination of marriage law reforms in the world since 1950 indicates that the minimum age is continually being raised. In a number of jurisdictions including Brazil, China, Japan, the Netherlands, Australia and at least thirty of the States of the United States of America, the male is required to have reached his eighteenth birthday, and the female, her sixteenth birthday, to qualify for marriage. Statistics prepared by the Newfoundland Department of Health for the period 1961 - 66 indicate that in each year of the period, two thirds of all females and one third of all males marrying in Newfoundland were sixteen to twenty-one years of age (inclusive). Moreover, most males are at school and are usually unable to obtain any full time employment before their eighteenth birthday. Even at this age, it is questionable whether a male has achieved a level of maturity, obtained sufficient education, or qualifies for employment yielding wages adequate to support a wife (and family). Other jurisdictions recognize that a female of less than sixteen years (and in a few countries, a girl some years older) is not mature enough and has not obtained sufficient education to assume the responsibilities of a married woman. The fact a female of less than sixteen years is pregnant makes these views no less valid. Without exception, restricting marriage to girls, sixteen years of age or older, would also prevent some persons from entering into 'forced marriages' which, in the estimation of qualified social workers, often prove unsuccessful.

Accordingly, it is submitted that any federal enactment, respecting marriageable age should prohibit wedlock involving any male under eighteen years of age or any female less than sixteen.

(2) MONOGAMY

In the Judaeo-Christian culture, marriage is a monogamous union, and neither party may contract a valid marriage while he or she is married to someone else. A person who goes through a ceremony of marriage in such circumstances may be charged with committing the offence of bigamy under section

¹ Ontario Law Reform Commission, Report on Family Law, Part II - Marriage (1970), p. 39.

254 of the Criminal Code' and may be sued for divorce by his or her legal spouse under section 3 (c) of the Divorce Act.

(3) PROHIBITED DEGREES

The prohibited degrees of affinity (relationship by marriage) or consanguinity (relationship by blood) are those laid down by Archbishop Parker in 1563, adopted in 1603 in the ninety-ninth Canon and set out in the Book of Common Prayer at sections 10 and 11. In Canada, the prohibited degrees have been amended by statute². Persons within the prohibited degrees³ are unable to marry in Canada.

(4) FREEDOM OF CONSENT

The voluntary consent of the parties is essential to a valid marriage. It would therefore appear that where a party to a marriage was influenced by drugs or intoxicating alcohol or suffering from mental illness, so as to be deprived of free volition and to be incapable of realizing the nature of the ceremony and the duties and responsibilities it imposes, the marriage is void.

Using the argument of the Supreme Court of Canada in *Attorney-General for Alberta and Neilson v. Underwood*⁴ that the solemnization of marriage includes "steps or preliminaries leading up to it", Ontario's *Marriage Act*⁵ provides *inter alia*:

"(6) No person shall . . . solemnize the marriage of any person who is mentally ill or mentally defective, or who is under the influence of intoxicating liquor or narcotic drugs."

There are similar, though less restrictive, provisions in the marriage legislation of British Columbia, Alberta, Saskatchewan, Manitoba and Prince Edward Island. . It is submitted that such a provision may usefully be included in the Newfoundland Solemnization of Marriages⁶ enactment.

A series of English cases has established that freedom of consent may be lacking in a marriage ceremony due to fraud, duress, or mistake, thereby invalidating it.

¹R.S.C. 1970, c. C-34.

²

R.S.C. 1970, c. M-5.

⁴Sec: Appendix B.

/1934/ S.C.R. 635.

⁵ R.S.O. 1960, c. 228, s. 6.

⁶

R.S.N. 1952, c. 160 (as amended).

The fraud required to invalidate a marriage is such fraud as procures the appearance without the reality of consent. A woman married without disclosing to her intended spouse that she had previously been married but had not seen her first husband in seven years. When it was shown that the first husband might still be alive the court found that while the intended second husband had gone through the act of consenting to a marriage, in reality he could not have given consent in view of the subsisting union, and the court held the marriage void because the consent of one of the parties had been fraudulently obtained.¹

Duress may interfere with a person's voluntary consent to marriage where it existed during the period required to solemnize the marriage. The force may be exerted by one of the contracting parties, or may arise from an external source. In 1945, at Budapest, for example, a woman went through a ceremony of marriage in order to qualify for a passport to leave Hungary to avert danger to her life, liberty and virtue. By agreement, after obtaining the marriage certificate and her passport, she separated immediately from her spouse, with whom she had the agreement. An English court declared her marriage a nullity on the ground of lack of consent due to duress.²

There can be no real consent, and therefore the marriage is at least voidable on the ground of mistake, where one of the parties does not realize that the ceremony is a ceremony of marriage, as, for example, where a marriage ceremony at a registrar's office was thought to be merely a formal declaration of

(5) CAPACITY TO CONSUMMATE MARRIAGE

A marriage which is void at the outset may be voidable at the instance of one of the marriage partners through a judicial decree of nullity, principally on the ground of impotence. If the causes of the impotence are physical, this may be established by medical evidence and such cases are comparatively straight. Toward.

Inability to consummate a marriage has recently been made a ground for divorce under the Canadian Divorce Act, which provides *inter alia* that a divorce decree may be granted where it is shown that a marriage has not been consummated and the respondent for a period of not less than one year has been unable by reason of illness or disability to consummate the marriage.⁴

1 See: Bromley, P.M., Family Law (3 rd ed., 1966), p. 82.

2

H. v. H., /1954/ P. 258.

3 Hall v. Hall (1908), 24 T.L.R. 756 (High Ct., P.D.A. Div.).

4

R.S.C. 1970, c. D-8, s. 4 (1) (d).

FORMALITIES OF **MARRIAGE**

INTRODUCTION

While the history of the solemnization of marriage is in some doubt, this much is certain: in England, prior to the Council of Trent in 1563, notice of marriage was not required and no religious or other formal ceremony had to be performed. The only requirement of marriage was an oral declaration by the parties taking each other as husband and wife. The marriage was immediately binding where they mutually declared: "I take you as my wife (or husband)". Where they exchanged declarations that "I shall take you as my wife (husband)", the marriage became binding as soon as it was consummated. This kind of civil marriage proved an unregulated though widely observed custom that produced irregular and clandestine unions.

After 1563, the practice developed under the guidance of Canon Law, for a marriage to be celebrated with Nuptial Mass after publication of banns (a Saxon word signifying a proclamation) and with parental consent for a party who was under twenty-one years of age. Under Lord Hardwicke's Act, 1753,¹ formalities similar to these were required by law to be observed in all marriages celebrated in England. However, the Act specified that its provisions would not apply "to any marriage solemnized beyond the sea", presumably excluding the English Colony of Newfoundland from its requirements.

One of the statutes passed at the first Session of Newfoundland's new law-making assembly, in 1833, incorporated many of the requirements for solemnization contained in Lord Hardwicke's Act, 1753. The Act of 1833² repealed portions of a series of statutes providing for marriage formalities in the colony which had been enacted at Westminster in 1817, 1824, 1829 and 1832, and provided for regulation of "future celebration of marriages in this Island." Without significant alteration, the requirements of marriage celebration in Newfoundland enacted in 1833 have been included in subsequent Solemnization of Marriages legislation, codified in the Consolidated Statutes of Newfoundland (First Series) 1872, Chapter 105; the Consolidated Statutes of Newfoundland (Second Series) 1892, Chapter 133; the Consolidated Statutes of Newfoundland (Third Series) 1916, Chapter 122, and the Revised Statutes of Newfoundland 1952, Chapter 160, as amended by No. 7 of the Acts of 1954, No. 46 of the Acts of 1964, No. 61 of the Acts of 1965 and No. 71 of the Acts of 1971.

CIVIL MARRIAGE

Neither Lord Hardwicke's Act, 1753 nor the Newfoundland legislation

¹ Stats. U.K. 1753, c. 33.

² Stats. Nfld. 1833, c. 10.

of 1833 provided for celebration of marriage in civil, as opposed to religious, ceremonies. While Justices of the Peace in England during the Commonwealth celebrated civil marriage¹, the civil ceremony was not recognized by statute there until the Marriage Act, 1836². Unlike the rest of Canada and all the States of the United States of America, Newfoundland has never recognized marriage by civil ceremony except in special circumstances.

By virtue of section 2 of The Solemnization of Marriages Act³

"2. All marriages which may hereafter be solemnized in this Province shall be solemnized by persons in holy orders, or by some resident minister publicly recognized as the pastor and teacher of any congregation having a church or chapel, or by persons employed to discharge the duties of teachers or preachers of religion, such teachers or preachers being duly licensed to celebrate marriage by the Lieutenant-Governor except in the cases hereinafter especially excepted and provided for; ..."

The exception to section 2 is outlined in section 8 of the Act as follows:

"8. When the residence of any woman about to be Married shall be distant ten miles from the residence of the nearest clergyman, or teacher or preacher of religion licensed as aforesaid, any Magistrate, being first licensed for that purpose by the Lieutenant-Governor, may celebrate civil marriage - and if there be no Minister or Teacher of Religion

nor any Magistrate licensed as aforesaid, residing within fifteen miles of the woman about to be married, in such case any layman or person, duly licensed for such purpose by the Lieutenant-Governor, may celebrate marriage between any persons resident in such place."

Under section 4 of Newfoundland's Solemnization of Marriages Act, a person authorized to perform or celebrate marriage, who marries persons, either of whom is under nineteen years of age (except where the girl is pregnant or has given birth to a child out of wedlock) must first obtain the consents of the parents or guardians of the prospective spouses. Even if misled by the parties as to the genuineness of the parental consents produced (they may be forgeries) to qualify for marriage, the celebrant may be prosecuted in the Supreme Court of Newfoundland for marrying persons without first receiving properly obtained consents, and fined a maximum of two hundred dollars.

It is submitted that provision for the civil marriages involving (1) parties who for conscientious reasons, either being unattached to, or not prepared to

¹ Bromley, Family Law (3rd ed., 1966), 36 (fn.).

² Stats. U.K. 1836, c. 85. 3

R.S.N. 1952, c. 160.

accept, any religious faith, whether Christian or otherwise, refuse to be married in a religious ceremony; (2) pregnant women or divorced persons, whom some ministers from all Christian religious denominations refuse to marry; (3) persons from separate denominations or religious faiths who wish to marry but who are unwilling to sacrifice their individual beliefs and are unable to consent together to be married in any one particular religious ceremony.

It has been the experience of other Canadian provinces, where there is an option available, that most marriages are celebrated in religious, rather than in civil, ceremonies. In 1968 in Nova Scotia, only 238 of the 6,537 marriages performed involved a civil ceremony. Manitoba's last available figures indicated that all but 232 of the 7,029 marriages solemnized there in 1964 were celebrated in religious ceremonies. In Ontario during 1967-68, about 4,000 of some 58,000 marriages were performed in civil ceremonies. In Newfoundland, because of the religious beliefs and practices of the people, it may be expected that the contrast between the number of religious and civil ceremonies will be even more marked than the figures shown above for other provinces.

Newfoundland should recognize civil marriage, as well as the religious ceremony, as is the case elsewhere, for the benefit of the classes of persons above outlined, who may experience embarrassment and difficulty in locating a qualified person prepared to marry them or who are unwilling to contract a marriage in the province in accordance with its present limited Solemnization of Marriages legislation. It may suffice to add to the classes of persons presently empowered to solemnize marriage in Newfoundland, the following officials:

- (1) District Court Judges,
Stipendiary Magistrates and Family Court Judges,
- (2) Mayors of Towns and Chairman of Community Councils.
- (3)

A uniform type of ceremony should be approved for these civil marriages, as well as other formalities (including marriage licensing) to constitute a proper marriage.

MARRIAGE LICENSES

INTRODUCTION

The lack in Newfoundland of a legal requirement for a license as a prerequisite to marriage is an anomaly among Canadian provinces. The remedy, if any, to be applied poses serious questions, not only of policy but also of timing. There is evidence establishing beyond doubt the advantages inherent in a sound licensing policy. But the unique problems to be surmounted in its implemen -

tation in this province, with its thinly-spread population and inadequate medical, social and other services, seem almost, if not totally insurmountable. For these reasons, full thought must be given to the fundamental purposes of, and the principles involved in the efficient operation of, an adequate system of licensing here. This will uncover considerations of timing and of expediency peculiar to the Newfoundland situation.

Under Lord Hardwicke's Act, 1753, a marriage in England was required to be preceded by either publication of banns or the issuance of a marriage license. This provision of the Act was not adopted either in 1833 or subsequently in Newfoundland's marriage laws. While banns or the obtaining of a license may be required as a preliminary to the celebration of marriage in some churches in the Province, neither publication of banns nor marriage licenses are statutory requirements of the marriage ceremony in Newfoundland.

PURPOSES OF MARRIAGE LICENSE

In some other Canadian provinces, the purposes of the marriage license, the obtaining of which is a pre-requisite to either civil or religious marriage, are:

(1) to permit authorized public officials to satisfy themselves that the parties to the proposed marriage are of age, are outside the prohibited degrees of consanguinity and affinity, are medically qualified for marriage, and meet a particular province's residence requirement (if stipulated);

(2) to remove the responsibility from the marriage celebrant of determining a person's qualifications to marry. This has been a "running sore" in the experience of clergymen in Newfoundland. The marriage celebrant may often not be familiar with the parties involved and therefore in an ineligible position;

(3) to provide a 'breathing space' between the decision to marry and obtaining of a license on the one hand, and the subsequent ceremony of marriage on the other. In thirty States of the United States of America marriage applicants must wait from two to seven days after obtaining a license before being married.

The requirement of the publication of banns prior to marriage, after 1563, was intended to prevent clandestine unions, by giving due publicity to a proposed marriage, designating the individuals concerned "in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights; ..." ¹ In British Columbia, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick, a marriage may still be celebrated after obtaining a

¹ Wakefield v. Mackay (1807), 161 E.R. 937, 940.

marriage license or the publication of banns. In Prince Edward Island, banns may only be published as an alternative to obtaining a marriage license under special permit, and in Alberta and Nova Scotia, a licence is a necessary pre-requisite to every marriage.

Unlike the marriage license, publication of banns gives no assurance that persons are outside the prohibited degrees, or are of marriageable age or qualified medically to enter into the marriage relationship. Nor is there any certainty that either party to a proposed marriage has properly and completely severed himself or herself from a previous union. Furthermore, the purpose of banns - the ensuring of publicity of an intended marriage - may be easily counteracted in all Canadian provinces today, including the six provinces in which banns may be published as an alternative to obtaining a license.

Newfoundland excepted, marriage may be contracted in all provinces of Canada after obtaining a license, a procedure surrounded by no publicity whatsoever. In most religious faiths in Newfoundland, neither banns nor license are required prior to a marriage. The marriage law respecting publication of banns "is now anachronous" writes P.M. Bromley¹ who explains that "clandestine marriages are no longer the social evil that they were 200 years ago, neither does the modern law effectively prevent them ... A much greater social problem today is probably presented by the ease with which the Parties can rush into marriage without giving due thought to the implications of their act ..."

Without deprecating the ceremonial requirement of banns as part of the celebration of marriage by any particular denomination, it is submitted, with the reservations set forth below, that a marriage license, issued by authorized persons, should be required before a marriage may be contracted in Newfoundland. By requiring a license to establish eligibility to marry, it would be in order to amend section 4 of The Solemnization of Marriages Act (Newfoundland) so that the clergy (or proposed civil celebrants) would not be subject to possible prosecution, unless at the time of the ceremony, one of them was aware of an impediment.

DUTIES OF LICENSE ISSUERS

It would be the duty of persons authorized to issue marriage licenses, *inter alia*, first to determine whether the intended spouses:

- (1) are of marriageable age, and if not, then have properly obtained consent to marry;
- (2) have properly dissolved any prior marriage;

¹

Bromley, P.M., Family Law (3rd ed., 1966), p. 39.

(3) have passed any required pre-marital medical examination.

Duly authorized marriage license issuers would also be required to ascertain whether prospective spouses are outside the prohibited degrees of consanguinity and affinity¹ and whether they are aware of any other impediments to their marriage.

Marriageable Age and Consent of Parents or Guardians.

Earlier in this Chapter, it was noted that only the federal Parliament has jurisdiction to set the minimum marriageable age for males and females (age of capacity to marry) and to declare that where either party to a marriage is below the ages established, the union would be void. However, under the constitutional authority granted by The British North America Act, 1867, section 92(12), to enact laws governing "the Solemnization of Marriage in the Province" the legislatures of several of the provinces have passed laws requiring that where either party to a marriage is below a stated age, the union cannot take place unless and until the consent of the parents or guardians of the party or parties concerned has been first obtained. Because "Solemnization of Marriage in the Province" under the Act is not confined to the marriage ceremony, but includes the various preliminaries leading to it, the Supreme Court of Canada in *Attorney-General for Alberta and Neilson v. Underwood*² held that the requirement of parental consent below a specified age was merely one of the *formalities* to be complied with for the marriage ceremony and did *not relate to validity*.

Section 4 of Newfoundland's Solemnization of Marriages Act³ provides:

"4. If any person authorized to perform or celebrate marriage in Newfoundland shall so perform or celebrate any marriage between two persons either of whom shall be under the full age of nineteen years without having first obtained the written consent of the parents or guardians of each such person who is under such age, he shall be guilty of a misdemeanour and shall, on conviction thereof before the Supreme Court be liable to such penalty as the said Court shall award, not exceeding the sum of two hundred dollars: Provided that this section shall not apply in the case of the marriage of an expectant mother, or of the mother of a child then living which was born out of wedlock."⁴

¹

²See: Appendix B.

³/1934/ S.C.R. 635.

⁴R.S.N. 1952, c. 160, s. 4, as amended by Stats. Nfld. 1964, No. 46, s.2; 1971, No. 71,

s. 4. The proviso is unclear as to whether the requirement of parental consent is inapplicable only in circumstances where the unwed expectant mother, or the mother of a child then ~~is~~

In the event either or both parties are less than nineteen years of age and the intended wife is not pregnant or has not had a child out of wedlock, and a forged or fraudulently-obtained parental consent is presented to the presiding celebrant who performs the marriage, it is extremely doubtful whether the union may be subsequently declared void. The marriage celebrant, though he acted *bona fide*, may be prosecuted under section 4 of the Act, and the parties or either of them may be subjected to a criminal prosecution for forgery, but the marriage is apparently a *fait accompli*.

In 1934, the Supreme Court of Canada decision in *Attorney-General for Alberta and Neilson v. Underwood*¹ confirmed that a province's marriage solemnization legislation could provide that in the absence of parental consent (presumably meaning a properly obtained consent), where a person was below a stated age, a marriage would be invalid absolutely or conditionally. However, in the absence of any words pointing to the intention of the provincial legislation that non-compliance with the formalities of a marriage Act should render a marriage void, a court may be inclined in favour of the presumption of the validity of a marriage and thus find it to be valid. Unlike Alberta, Ontario and Saskatchewan, Newfoundland has no legislation specifically attaching the consequence of invalidity to a marriage solemnized without properly obtaining parental consent, or having failed to comply with some other pre-requisite.

In the Saskatchewan marriage legislation² the written parental consent of any person under the age of twenty-one is a "condition precedent to a valid marriage, unless the marriage has been consummated or the parties have after the ceremony cohabited and lived together as husband and wife."

By virtue of section 21 (1) of Alberta's Marriage Act³:

"21 (1) . . . where a form of marriage is solemnized between persons, either of whom is under 18 years of age without a required consent or medical certificate, the marriage is void unless

- (a) carnal intercourse has taken place between the parties prior to the ceremony, or
- (b) the marriage has been consummated, or
- (c) the parties have after the ceremony cohabited and lived together as man and wife."

¹

/1934/ S.C.R. 635.

² R.S.S. 1965, c. 338, s. 38, as amended by Stats. Sask. 1966, c. 36, s. 4. ³

R.S.A. 1970, c. 226.

Probably a more prudent and effective course would be the adoption in Newfoundland of the Australian marriage legislation which provides that unless all the ceremonial prerequisites of a marriage are met, the marriage is presumed in law to be void except where the circumstances of the case are so exceptional and unusual as to justify the making of an order validating the union. Unlike the Albertan and Saskatchewan legislation, the Australian Act places no fetters on the discretion of a judge in determining whether an order confirming the marriage should be made.

While the suggestion was previously made that the *minimum* marriageable age for males be eighteen and for females, sixteen, the Study feels that with slight modification, the present requirement that parental consent be required where either party to a marriage is under twenty-one, is acceptable. This stipulation should apply to all such persons, even where the prospective bride is pregnant, or has given birth to a child out of wedlock. Accordingly, the 1964 amendment to section 4 of The Solemnization of Marriages Act, should be repealed.

Where a parent's or guardian's consent is withheld, persons under twenty-one who wish to marry should have access to the Province's District (or Family) Courts to obtain an order dispensing with consent upon showing that consent has been unreasonably withheld. In an interpretation of a statutory provision of the type recommended, in Ontario, Pape, J. in *Re An Infant*,¹ said:

"The policy of the legislature has been to entrust to parents the right to form and the responsibility of forming an opinion as to whether a child under the age of twenty-one should be permitted to marry, and if a parent simply says, 'I think my child is too young to marry', and there are no other circumstances to be taken into account, I cannot see how any judge can say with any confidence that his decision was unreasonable. In such a case I think the parent's decision should be upheld. In these days there is much criticism of parents for not exercising adequate and sufficient parental control over their children, and I should be most unwilling to question' the reasonableness of a refusal to consent to a marriage which was bona fide based on nothing more than the parents' view that the child was not yet at a sufficient age of maturity to arrive at a sound conclusion as to the desirability of entering into a contract so far reaching as that of marriage."

A later decision, based on similar legislation in Alberta, found that the parties should understand and appreciate what marriage means and demands, and have

¹ (1963), 6 F.L.R. 12, 19 (Aust'l., Victo. Sup. Ct.).

the means and capacities to carry out the financial and social responsibilities involved; it is not enough to allege "love" and pregnancy.¹

Obviously, the requirement in section 4 of The Solemnization of Marriages Act (Newfoundland)- that (both) parents and (all) guardians of a 'person under nineteen must consent to his or her marriage, cannot always be met, and should be modified to accommodate the following contingencies as adopted from the Marriage Act (Saskatchewan).³

CIRCUMSTANCE	CONSENT REQUIRED
(1) Where the parents of an applicant are divorced or separated under a decree of judicial separation or a separation agreement,	Consent may be given by the parent or other person who has legal or <i>de facto</i> custody of the applicant.
(2) Where one of the parents of an applicant under twenty-one years of age is dead or mentally incompetent,	The consent may be given by the other parent.
(3) Where both of the parents of an applicant are dead or mentally incompetent,	The consent may be given by a lawfully appointed guardian or an acknowledged guardian who brought up or who for three years immediately preceding the application for the license has supported the applicant.
(4) Where the applicant is a ward of the Government under The Child Welfare Act, 1964,	The consent may be given by the Director of Child Welfare.
(⁵) Where both the parents of an applicant are dead or mentally incompetent and there is no guardian of the applicant, or an applicant has been previously married and is now divorced or is a widow or	No consents are required.

1

See: Glass v. Glass (1960), 32 W.W.R. 321 (Sask. Dist. Ct.).

2

Supra, pp. 30-31.

Stats. Sask. 1966, c. 36, s. 4.

widower, or an applicant is an ex-ward of the Government under The Child Welfare Act and over the age of twenty-one years,

- (6) Where an applicant is over the age of eighteen years and is living and for not less than three months immediately preceding the date of application for the license has been living apart from his parents or guardian without having received financial aid from his parents or guardian,

No consent is required, but the marriage license issuer shall send notice to the applicant's parents, legal or acknowledged guardian or the Director of Social Services, if appropriate in the circumstances.

All consents should be duly witnessed by responsible persons, of classes which would be authorized by the appropriate Act or Regulations.

(2) Prior Marriage

Where one or both persons applying for the marriage license has been previously married, the license issuer would have to satisfy himself that the decree dissolving or nullifying the previous union is valid and recognized in Newfoundland. The license issuer may, as in some other provinces, consult the Department of Justice where, for example, a question arises as to the validity of a divorce or nullity decree obtained elsewhere in, or outside, Canada. Should the issuer, in consultation with the Department, be dissatisfied with the evidence of the termination of a prior marriage, he or she may deny a marriage license.¹

(3) Pre-Marital Medical Examination

Six Canadian Provinces - Alberta, Ontario, Prince Edward Island, Saskatchewan, British Columbia and Manitoba prescribe pre-marital medical examinations as a pre-requisite to going through a marriage ceremony. In Prince Edward Island a special Act, The Premarital Health Examination Act,² has been enacted.

Medical examinations are also required prior to marriage in forty-six states of the United States of America. In these forty-six States the medical examination includes a blood test for venereal diseases. In addition, the examin-

¹ Infra, pp. 36-37.

² R.S. P.E.I. 1951, c. 119.

ation must include checks for various degrees of mental illness in six States, for infectious tuberculosis in two States, for a chronic alcoholic condition in two States, for drug addiction in one State, and for possible uncontrollable epileptic attacks in one State.

The most extensive pre-marital examination in Canada is required by the Saskatchewan marriage legislation / which provides:

"56. (2) No clergyman or marriage commissioner shall perform a marriage ceremony until each of the parties to the intended marriage has delivered to him a health certificate (form L) signed by a duly qualified medical practitioner. The medical examinations covered by such certificate shall take place within the thirty days immediately preceding the date of the solemnization of the marriage . . ."

The health certificate (form L) provides for recording of data concerning whether or not the applicant is mentally retarded or is suffering from mental illness, or is a carrier of a communicable disease. The applicant must indicate whether he or she has ever been refused a medical health certificate and must take a serological test for syphilis.

The obtaining of a medical certificate following similar tests in Newfoundland should be a requirement to be met before a marriage license is issued. This is one of the most important of all the requirements for licensing, and its wide acceptance in numerous jurisdictions is an earnest of this. But even today there are four Canadian provinces and four States of the United States of America without this protection. It will take years of unremitting and single-purposed endeavour to bring medical services in Newfoundland to the necessary point of development to provide this background to effective marriage licensing.

LICENSE ISSUERS: TEMPORARY AND LONG RANGE PROPOSALS

Provision of facilities and personnel to ensure that all requirements of a marriage license have been complied with by prospective spouses, would be found difficult enough in any province, but in Newfoundland, as already said, would be almost, if not fully, impracticable, because of its thinly-spread population and inadequate medical, social and other services. This situation cannot be quickly or easily overcome, and some of the implications and obstacles to, an adequate licensing organization functioning in the near future have been discussed above. They indicate that, at best, practical but partial expedients may have to be followed while keeping in mind and working and moving towards the more distant ideal of an efficient system, operating in a more sophisticated and centralized society, with more adequate public services than are possible at present.

¹R.S.S. 1965, c. 338, s. 56.

The designation and training of personnel in the 1,100 cities, towns and communities in Newfoundland to administer the licensing requirements proposed in this chapter, would be financially prohibitive, if not geographically impossible. The training of marriage license issuers qualified to assist minors in obtaining the proper consents; to determine whether an applicant has properly terminated a previous marriage; or to counsel license applicants on the responsibilities of marriage, is a commendable goal, to be undertaken in future by the Departments of government concerned with administration of the Solemnization of Marriages legislation.

so that the marriage licensing requirement can be economically and immediately enforced however, it is proposed that persons authorized by sections 2 and 8 of The Solemnization of Marriages Act and persons suggested by this chapter as civil marriage celebrants be empowered to nominate marriage licence issuers, preferably school teachers, welfare officers and other mature persons of integrity and high-standing in a community, who are acquainted with its inhabitant. The nominees would be appointed by the Lieutenant-Governor in Council from time to time as license issuers, to certify necessary consents, to determine whether prospective spouses are outside the prohibited degrees and to ensure that they are not privy to a subsisting marriage. The celebrants would be required to direct, upon enquiry, prospective spouses to a conveniently located license issuer. A register of all license issuers should be maintained and up-dated from time to time by, the Registrar General of Vital Statistics (a position created by The Registration (Vital Statistic Act)¹.

OBTAINING AND RECORDING MARRIAGE LICENSES AND CERTIFICATES

License applicants would complete a numbered, printed application form. If the information in the application satisfies the requirements of the Act, a marriage license would be issued. A copy of each completed application, including any necessary consents and certificates, duly signed by the applicants and indicating whether a marriage license has been approved and issued, should be forwarded to the Registrar General of Vital Statistics at the Department of Health, Confederation Building, St. John's by the license issuer at the end of the month in which the license application was approved or rejected. License issuers should be authorized to collect from license applicants a fee determined by the Department of Health, based on the cost of printing necessary application forms and licenses, and other costs of administration of the proposed requirements.

A marriage license issuer should be prohibited from issuing a license for his or her own marriage, or from performing any marriage ceremonies. Where

1 R.S.N. 1952, c. 23, s. 3.

the license applicant has been previously married, the license issuer should be authorized to receive a certified copy of a death certificate, divorce decree absolute or a nullity decree from a Canadian or foreign court as conclusive evidence of the termination of the prior marriage. Where an applicant is unable to produce such evidence or the marriage license issuer is otherwise uncertain whether a previous marriage has been properly terminated, the issuer should be required to refer the application in question to the Department of Justice of the Government of Newfoundland for an opinion as to what evidence will suffice to permit the issuance of a marriage license. Where an applicant is unable to satisfy the evidential requirements specified by the Department of Justice, and there are exceptional and urgent circumstances which warrant the solemnization of the marriage, the applicant may apply for an order from a district court judge excepting him or her from the requirement of proving termination of the prior marriage.

The marriage celebrant would be required to obtain from the prospective spouses before celebration of the marriage, their marriage license, duly issued, at least four days prior to the ceremony. This would provide a 'breathing-space' of at least four days between obtaining a license and the subsequent nuptials. Following the marriage the celebrant must forward both the license and a copy or record of the marriage certificate to the Registrar, General of Vital Statistics. At present, clergymen and other persons legally licensed to celebrate marriages in Newfoundland (specified in section 6 of The Registration (Vital Statistics) Act, as "Registering Officers") are required under section 4 of the Act to record all marriages at which they preside in a register of marriages and submit a summary of the register's contents to the Registrar General every three months if they reside outside St. John's, and monthly if they reside within St. John's. Particulars of the marriage record to be entered in the Register of a Registering Officer are outlined in section 5 of The Solemnization of Marriages Act. Requesting marriage celebrants to file the marriage license with a copy or record of the marriage certificate will not add materially to their present duties.

At the public registry provided for under section 2 of The Registration (Vital Statistics) Act where the Registrar General (under section 9 of the Act) is empowered to collect and keep a full and correct alphabetical registry of marriages that take place in the province, marriage licenses, and license applications (including necessary consents and certificates) received from marriage license issuers, could be filed as well.

Under section 16 of The Registration (Vital Statistics) Act "Officials in charge of hospitals, poor asylums, orphanages, gaols and other such public institutions, shall send notice of any . . . marriage . . . that occurs within the institutions under their charge . . ."

Penalties may be provided for persons who make or cause to be made for the purpose of being inserted in any marriage license application, marriage license or marriage register any false statement, or any person who fails to file with the Registrar General of Vital Statistics a marriage license application, marriage license, or abstract of a marriage register within the times appointed by the relevant legislation.

To achieve uniformity in the recording and registration of marriage license applications, licenses and marriage certificates, it may be in order to repeal with substitution, section 9 of The Solemnization of Marriages Act which provides that "Every teacher and preacher so licensed, who shall not have a church or chapel in which he performs divine service, and every Magistrate or other layman so celebrating any marriage. . ." under special license pursuant to section 8 of the Act, "shall, within twelve months from the time of the celebration of any such marriage, cause a certificate thereof to be registered in the office of the Minister of Provincial Affairs, ..." Records of such marriages, as all other, should be filed with marriage license applications and marriage licenses at the office of the Registrar General of Vital Statistics.

Civil marriage celebrants, including those performing marriages under special license, should also be required to file with the Registrar General of Vital Statistics, marriage licenses provided them by prospective spouses together with copies or records of every marriage performed (which civil celebrants, like religious celebrants, should maintain in a special register), every Three months where the celebrant resides outside St. John's, and monthly where he or she resides in St. John's.

One of the virtues of the proposed licensing system will be the removal of the onus from the clergy of ensuring that the persons whose marriages they solemnize are of marriageable age. If, however, a marriage is solemnized between minors who have not obtained the proper consents, or some other requirement of the Act is not complied with in issuing a marriage license or in solemnizing a marriage, provision should be made in exceptional and unusual circumstances¹ for one of, or both, the parties to the marriage to apply to a District or Family Court for an order declaring that the marriage was lawfully solemnized, notwithstanding failure to comply with The Solemnization of Marriages legislation.

DISADVANTAGES OF TEMPORARY LICENSING SYSTEM

The principal disadvantage of the proposed expedient for administration of the recommended marriage licensing requirements of the Act is the absence of a pre-marital medical examination. However, with only 428 medical pract-

¹ Supra, p. 37.

tioners (registered with the Newfoundland Medical Board)¹ to serve Newfoundland's scattered 503,000 people, the medical requirement of a license shall remain an essential goal to be implemented so soon as this province has adequate medical services.

Equally important is the prospect of having, in future, specially trained license issuers whose qualifications permit them to counsel, as well as license., prospective spouses.

¹
Source: Newfoundland Medical Directory, 1969.

GENERAL

'COMMON LAW' MARRIAGE

Historically, a 'Common Law wife' was a woman united to a man by a marriage which though informal by contemporary standards, was such as was recognized as valid by the Common Law.'

"There is some confusion" remarked Dysart, J. of the Alberta Supreme Court in *Blanchett v. Hansell et al.* "as to what formalities could be dispensed with without invalidating the marriage. The English view as laid down in *Reg. v. Millis* . . . (8 E.R. 844), is more rigid than the view generally held in most of the United States and in Canada. But whatever else the requirements of a 'common law marriage' anywhere else were, two essentials had to be present -(1) legal capacity to marry, and (2) an agreement to marry: ..."

In view of the conditions precedent to forming a 'common law marriage', a woman cannot live with a *married* man as his 'Common Law wife' but is legally only his "concubine" (popularly described as a "mistress") and 'lives in sin' with him.

Generally the illicit relationship of a married man and his concubine is not attended by any of the legal rights and duties that arise between the husband and wife of a properly solemnized marriage. However, the position of a 'Common Law wife', particularly in respect of support, is less certain, though in Newfoundland she has no enforceable right under The Maintenance Act if a "deserted wife" under that enactment is taken to be restricted to a wife who has properly solemnized a marriage under the relevant legislation.

Under The Workmen's Compensation (Amendment) Act, 1966-67⁴, section 2, The Workmen's Compensation Act, 1962 is amended by the insertion of therein paragraph 2(fA) as follows:

"(fA) 'common law wife' means a woman who, although not legally married to a man, cohabits with him and is recognized as his wife in the community in which they live; ..."

Section 11(d) of the amending legislation provides for the payment to a 'Common Law wife', as defined by the Workmen's Compensation Board, at its

1

Supra, p. 25

2 /1943/ 3 W.W.R. 275, 280 (Man. K.B.).

3

R.S.N. 1952, c. 65.

⁴ Stats. Nfld. 1966 - 67, No. 58.

discretion, of benefits accruing to a workman's estate "where a workman has had for the entire period of seven years immediately preceding his death a common law wife; or during the entire period of two years immediately preceding his death a common law wife by whom he has had one or more children, and leaves no dependent widow , ."

The offspring of either a concubine or 'Common Law wife' by virtue of the Newfoundland Children of Unmarried Parents Act, 1964¹, are entitled to support from their father.

Up to June, 1967, before the massive reforms of Canada's divorce laws, the Special Joint Committee of the Senate and House of Commons estimated there were approximately 50,000 illicit 'unions' between men and women in Canada.²

JACTITATION OF MARRIAGE

Jactitation of Marriage, the offence of falsely claiming to be a person's spouse, is seldom the subject of legal proceedings. The aggrieved party alleges in an application to court that the defendant is not married to, but is wrongfully boasting the fact of being married to, the applicant, and asks relief by way of an injunction restraining the defendant from making any such claims in future.

FALSELY PUBLICIZING MARRIAGE

Under section 20 of Newfoundland's Registration (Vital Statistics) Act.³

"Every person who shall send to any newspaper publisher or other person, for publication in any newspaper in this Province, a fictitious or false statement of the marriage or death of any person, or the birth of any child, shall be guilty of a misdemeanour, and shall be liable to fine or imprisonment, or both, at the discretion of the Supreme Court."

Under section 21 of the Act,

"Every proprietor, editor or publisher of any newspaper published in this Province, who shall knowingly and wilfully publish a fictitious or false statement of the marriage or death of any person, or of the birth of

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Stats. Nfld. 1964, No. 40.

2

Report of the Special Joint Committee of the Senate and House of Commons on Divorce (Ottawa, 1967).

3 R.S.N. 1952, c. 23. -

any child, shall be guilty of a misdemeanour, and shall be liable to fine or imprisonment, or both, at the discretion of the Supreme Court."

For the most part, this province's communications' media are careful to ascertain the validity of all marriage and 'engagement' announcements before publication, though it might be worthwhile to place a statutory duty on the media to satisfy themselves of an announcement's truth before publication.

NAME IN WHICH MARRIAGE SOLEMNIZED

The widely held impression that a person's legal name can be only that which was acquired by him at birth or under The Change of Name Act ¹ is incorrect. Although marriage confers a name upon a woman- she may at Common Law, either before or after a marriage, acquire another name by reputation. Thus, the test of whether a variation in the marriage ceremony or register from the woman's name at birth or her name by repute, seems to be: does the name variation entirely confound the identify of the particular person or where not a total variation, did it originate in fraud?

A widow or divorced woman should marry in the name acquired on her former marriage, unless either her maiden name or some other name has obliterated her name by marriage and unless the use of her maiden name or name acquired by repute is not intended to prevent discovery of an impediment to the plqrripoe

MARRIAGES BETWEEN RESIDENTS OF NEWFOUNDLAND AND UNITED KINGDOM

Sections 17 to 20 of The Solemnization of Marriages Act are contained in a part of the Act entitled "Of Marriages Between Residents In This Province And Residents In The United Kingdom". These four sections were originally enacted pursuant to Imperial legislation (Marriage of British Subjects (Facilities) Act, 1915)³ in the Marriage (United Kingdom) Regulations Act, 1916⁴ and later incorporated in the present marriage solemnization Act. This legislation applies to a marriage in the United Kingdom between British subjects resident in this province and the United

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¹ R.S.N. 1952, c. 165.

² Power, W.K., The Law & Practice Relating to Divorce And Other Matrimonial Causes in Canada (2nd ed. by Julien D. Payne, 1964), hereafter referred to as Power on Divorce, (2nd ed., 1964), p. 356.

³ (Imp.), c. 40.

⁴ Stats. Nfld. 1916, c. 12

FOREIGN MARRIAGES

The Foreign Marriage Act, 1892¹, and "Foreign Marriages Orders in Council, 1892 and 1903", enacted at Westminster, outline the formal requirements to be met in celebrating marriages involving a British subject or subjects, in foreign states, in order that such marriages will be recognized as being valid in England.

The Newfoundland legislation, The Foreign Marriages Act, first enacted in 1892², defines the procedure to be followed to satisfy the requirements of the Imperial legislation, where marriages involving British subjects take place in this state.

¹ Stats. U.K. 1892. c. 23.

² Now: R.S.N. 1952, c. 161.

RECOMMENDATIONS

CHAPTER I

The Family Law Study recommends

A. CONTRACT TO MARRY (ENGAGEMENT)

1. That the Common Law action for breach of promise to marry be abolished. A person aggrieved by the repudiation of a marriage promise may be compensated in damages by an action for restitution or for deceit. (Pages 16-18).

B. CONTRACT OF MARRIAGE

2. That any federal law respecting marriageable age in Canada should prohibit wedlock involving any male less than eighteen and any female less than sixteen years of age. (Pages 21-22).

That a marriage celebrant be prohibited from solemnizing a marriage involving any person whom he knows to be mentally ill or mentally defective, under the influence of intoxicating liquor or narcotic drugs. (Page 23).

4. (a) That civil marriage ceremonies be permitted in Newfoundland, to provide for
 - parties who for conscientious reasons, either being unattached to or not prepared to accept any religious faith, whether Christian or otherwise, refuse to be married in a religious ceremony;
 - (ii) pregnant women or divorced persons, whom some ministers from all Christian religious denominations, refuse to marry;
 - (iii) persons from separate denominations or religious faiths who wish to marry but who are unwilling to sacrifice their individual beliefs and are unable to consent together to be married in any one particular religious ceremony.
- (b) That district court judges, stipendiary magistrates, family court judges, mayors of towns and chairmen of community councils be authorized as civil marriage celebrants. (Page 27).
5. (a) That the issuance of a marriage license be a pre-requisite to any civil or

religious marriage ceremony in Newfoundland. (Page 29).

- (b) That prior to issuing any marriage license, a license issuer must satisfy himself that the intended spouses
- (i) are of marriageable age, and if not, have then obtained consent to marry;
 - (ii) properly dissolved any prior marriage;
 - (iii) have passed any required pre-marital medical examination;
 - (iv) are outside the prohibited degrees of affinity and consanguinity;
 - (v) are aware of any other impediments to their marriage. (Pages 29 -30).

(c) That the requirement under The Solemnization of Marriages Act (Newfoundland) that the consents of both parents or all guardians of a person under twenty-one (except where the female is pregnant or has given birth to a child out of wedlock) be produced to a marriage celebrant prior to marriage, be amended to provide that,

without exception, any person under twenty-one years of age intending to 'marry, shall first

- (i) obtain the written consent of his or her parents or guardians;

where the parents are divorced or separated under a decree of judicial separation or a separation agreement, consent may be
- (ii) given by the parent or other person who has legal custody of the applicant;

where one of the parents of an applicant under twenty-one years of age is dead or mentally incompetent, the consent may be given by
- (iii) the other parent;

where both parents are dead or mentally incompetent, the consent may be given by a lawfully appointed guardian or an acknowledged guardian who brought up or who for three years immediately preceding the application for a license, has supported the applicant;
- (iv)

(v) where the applicant is a ward of the Director of Child Welfare, the consent may be given by the Director;
- (vi) where both parents are dead or mentally incompetent and there 45

is no guardian of the applicant, or an applicant has been previously married and is now divorced or is a widow or widower, or an applicant is an ex-ward of the Director of Child Welfare and over the age of twenty-one, no consent is required;

(vii) where an applicant is over the age of eighteen years and is living and for not less than three months immediately preceding the date of application for the license has been living apart from his parents or guardian without having received financial aid from his parents or guardian, no consent is required, but the marriage license issuer shall send notice of the application to the applicant's parents, legal or acknowledged guardian, or such other person as is appropriate in the circumstances;

(viii) *any* consent required by this recommendation shall be duly witnessed by responsible persons, of classes which would be authorized by the appropriate Act or Regulation. (Pages 32-34).

(d) That where a person whose consent is required, unreasonably withholds the consent, the minor in respect of whom the consent is required may apply to a district or family court judge to have the necessity of consent dispensed with. (Page 32).

q11 the ,nrxxrnew);-;1 nrprpmigiteq of marrinee have heen met, the marriage shall be presumed to be void except where the circumstances of the case are so exceptional and unusual as to justify the making of a court order validating the union. (Pages 31-32).

7. (a) That the Provincial Government accept the principle of, and work towards, an organization or system of trained personnel to enforce throughout Newfoundland the licensing requirements proposed in Recommendation 5 (b) and to provide pre-marriage counselling to prospective spouses. (Page 39).

(b) That because of a lack of facilities, services and qualified personnel to introduce the ideal licensing system to Newfoundland's thinly spread population the temporary expedient outlined in Recommendation 8 be adopted. (Page 35).

8. (a) That as a temporary measure persons authorized by sections 2 and 8 of The Solemnization of Marriages Act (Newfoundland) and persons recommended herein as civil marriage celebrants, be empowered to nominate marriage license issuers, preferably school teachers, welfare officers, and other mature persons of integrity and high-standing in a community

who are acquainted with the community's inhabitants.

- (b) That the Lieutenant Governor-in-Council from time to time may appoint persons nominated as marriage license issuers.
 - (c) That the Registrar General of Vital Statistics maintain an up-to-date register of all license issuers. (Pages 35-36).
9. (a) That license applicants prior to their marriage complete a numbered, printed form and supply properly witnessed consents or satisfactory evidence of the termination of a prior marriage (where applicable), and remit with the application a fee to be determined by the Department of Health.
- (b) That an applicant should produce a certified copy of a death certificate, or a divorce decree absolute or a nullity decree from a Canadian or foreign court, to the license issuer, as conclusive evidence of the termination of a prior marriage.
 - (c) That where an applicant is unable to produce such evidence or the marriage license issuer is otherwise uncertain whether a previous marriage has been properly terminated, the issuer should refer the application in question to the Department of Justice for an opinion as to what evidence will suffice to permit the issuance of a marriage license.
 - (d) That where an applicant is unable to satisfy the evidential requirements specified by the Department of Justice, and there are exceptional and urgent circumstances which warrant the solemnization of the marriage, the applicant may apply for an order from a district court judge exempting him or her from the requirement of proving termination of the prior marriage.

That the marriage license must be obtained from an authorized license issuer at least four clear

- (e) days before the nuptials.

- (f) That the marriage license shall be presented to the marriage celebrant prior to the nuptials. (Pages 36-37).

- (g) That section 4 of The Solemnization of Marriages Act be amended so that the clergy (and proposed civil celebrants) would not be subject to possible prosecution unless at the time of the ceremony, the celebrant was aware that a necessary consent from parent or guardian has not been obtained, or at least, properly obtained, or that there was some other impediment. (Page 38).

10. (a) A copy of each completed license application, including any necessary consents and certificates, duly signed by the applicants and indicating whether a marriage license has been approved and issued, should be forwarded to the Registrar General of Vital Statistics by every license issuer at the end of the month in which each license application was approved or rejected.
- (b) That a marriage license issuer be prohibited from issuing a license for his or her own marriage, or from performing any marriage ceremonies. (Page 36).
11. (a) That every three months (where resident outside St. John's) and monthly (where resident in St. John's), marriage celebrants should forward to the Registrar General of Vital Statistics the license for and a copy or record of, every marriage performed in such period. (Page 37)..
- (b) That every person authorized by section 2 of The Solemnization of Marriages Act (Newfoundland) continue to keep a register of all marriages they celebrate, and that every civil marriage celebrant also be required to maintain a register of all marriages which he Or she solemnizes. (Page 37).
- (c) That section 9 of The Solemnization of Marriages Act be repealed and provision be made that marriage celebrants authorized by special license under section 8 of the Act maintain marriage registers and file their returns with the Registrar General of Vital Statistics (rather than with the Minister of Provincial Affairs). (Page 38).
12. That the province's communications media, including radio, television and newspapers, be required to satisfy themselves as to the validity of every marriage and 'engagement' announcement published by them, prior to publication. (Pages 41-42).
13. (a) That a medical practitioner registered with the Newfoundland Medical Association shall satisfy himself, before issuing a medical certificate required for the purpose of an intended marriage, that the applicant,
 - (i) is not mentally ill or retarded;
 - (ii) is not a carrier of a communicable disease;
 - (iii) has passed a serological test of syphilis.
- (b) That while recognizing that a medical examination is one of the most

important of all requirements for licensing, it will take years of unremitting and single-purposed endeavour to bring medical services in Newfoundland to the necessary point of development to provide this background to effective marriage licensing. (Pages 34-35).

CHAPTER H

GUARDIANSHIP AND CUSTODY OF INFANTS

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INTRODUCTION

Many years ago the topic dealt with in this chapter could have been appropriately entitled: "Guardianship". As a result of gradual changes in legal and sociological attitudes, the subject would probably now be better treated under the heading: "Custody of Infants". But as the examination of this area of law will demonstrate, there are still reasons for treating the present title as a valid and timely one.

The shift in emphasis from Guardianship to Custody, reflected in the legislation in a number of jurisdictions, has caused the term "Guardianship" to be regarded by some as little more than an historical remnant of what was once the law. This change took place in Newfoundland more gradually than elsewhere, and as a result of litigation rather than of legislation, though in recent years Newfoundland has also enacted some important statute law in this field.

HISTORICAL BACKGROUND

Historically, the father was entitled to the actual physical custody of his children from infancy. He was the children's guardian by nurture as well as by nature. Both at Common Law and in Equity, the father's claim to custody and control of his infant children, was paramount to the exclusion of all others, including that of the children's mother. This right was not abrogated even where the father formed or continued an adulterous association after a child's birth.

The father could not by agreement or deed of separation, relinquish his exclusive rights to his infant children to their mother or anyone else. The jurisdiction of the father was actually so absolute that the Courts could not even grant the mother a right of access to the children as against the father.

As far back as 1660 in England, however, in the exercise of the Crown's right as *parens patriae* (sovereign guardianship of persons under disability), the Court of Chancery (Court of Equity) could and did interfere with a father's custody of his children where (1) his unfitness of character or conduct, or (2)

his lack of means coupled with immorality or desertion, was established. In these circumstances, the Court usually appointed some suitable person (other than the father or mother) to act as guardian, and ordered the father to refrain from interfering with the appointed guardian. Until 1847, the Court of Chancery did not as a rule intervene in such matters unless an infant was possessed of property.

The Court of Chancery also exercised its authority to make an infant the ward of the Court when appointing the guardian. In these instances, both guardian and ward remained under the Court's permanent control until the ward's majority, and the guardian could consult the Court for advice. Occasionally, upon making an infant a ward, the Court appointed the father to the office of guardian. The child then remained in the father's custody while the Court ensured that the father discharged his parental responsibilities.

Eventually, the Court of Chancery exercised general supervisory jurisdiction over appointments to the office of guardian as well as the welfare of infants made wards of the Court.

In 1839, the English Parliament began to further whittle down the paramountcy of the father's claim to his children with the first of a series of statutes which recognized the mother's role in her children's upbringing. With the growing recognition accorded a mother's rights to her infant children, the office of guardian gradually went into disuse.

These developments, among others, were undoubtedly influential in leading ultimately to the general rule that decisions in custody should be based on what was most in the interest and welfare of the infant.

As stated above these changes were made during a period of several centuries in England and elsewhere by statute, and ultimately in the United Kingdom itself by the Guardianship of Infants Act, 1925¹ whereby complete equality between the parents in relation to their respective claims for custody was established.

MEANING OF CUSTODY

In most Commonwealth countries, custody is now the primary consideration. Legal "custody" (of an infant) need not mean actual physical custody but the right to control or all the residuary rights of supervising the infant's education and upbringing. Consequently there may in the same case be custody in one person and care and control in another.

¹ Stats. U.K. 1925, c. 45.

CHILD'S WELFARE AS PARAMOUNT CONSIDERATION

There was another important change or statutory declaration of a change in England in 1925 in that the "best interests" of the child were expressed to be the first and paramount consideration in matters of custody. The absolute right of the father, even over the mother, in matters of custody had generally disappeared. At one point the mother's claims became in almost every respect equal to those of the father's, and somewhat logically became even stronger when applied to cases of children of tender age. At the present time in the United States of America, the mother is given custody as against the father in over ninety per cent of such contested cases. Where possible and practicable the child's preference will be allied, *inter alia*, to considerations of age, sex and health. To put the matter broadly it may be said that now the test of the para-mount welfare of the child gives the mother a natural advantage over the father, where both parents compete for custody of a child of tender age, but that circumstances can overcome this advantage.

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THE DEVELOPMENT OF THE PRINCIPLES OF THE LAW OF CUSTODY THROUGH LITIGATION IN NEWFOUNDLAND

The considerations which moved the Suprerrie Court of Newfoundland in custody matters seem firmly established². Firstly, they followed the shift in emphasis from the Common Law to Equity in England. This shift is reflected in the provision of the Newfoundland Judicature Act³ that "in all questions relating to the custody and education of infants, the rules of equity shall prevail."

It seems also to be firmly established by the line of reported cases in Newfoundland, that although there was not the same legislative background in this province as in England the cases still establish the law that the day when the father's absolute right to custody was unquestioned has passed. The parental right is no longer absolute. While the rights of unimpeachable parents may be accepted as a normal and recognizable law of nature and society, they would not now prevail against the paramount consideration of the welfare of the child.

In one recent Supreme Court of Newfoundland appeal case, *In re Winsor*⁴, the Court reiterated the principle that the paramount consideration is the welfare of the child. One of the learned judges extended this further by

1 See: *In re McGirr*, /1884-1896/ Nfld. L.R. 560 (Sup. Ct.); *In re Rideout* (1952), 30 M.P.R. 371 (Nfld. Sup. Ct.).

2

See: *In re Sarah Jane Harvey*, /1846-1853/ Nfld. L.R. 143; *In re Harriett Sophia Rutherford*, an infant, /1854-1864/ Nfld. L.R. 589 (Sup. Ct.).

3

The Judicature Act, R.S.N. 1952, c. 114, s. 25 (15).

4

(1964), 49 M.P.R. 401, on appeal from *In re Winsor* (1963) 48 M.P.R. 445.

using the words "the welfare of the children in its largest sense - material, physical, moral, emotional and intellectual".¹

It has also been established that where the choice of custody is between the father and mother, the claim of the mother would weigh heavily in the case of a child of tender years. The natural love and confidence of a child towards its mother would lead almost inevitably to such an attitude. But even so, in the case of *In re Winsor*, in which there were conflicting claims between the father and mother for the custody of children of tender age, it was held that the father was, in the better position to give the requisite care, love and affection to the children. With their welfare as the paramount, but not the only, consideration, the decision as to custody followed this principle.

It is still true of course that while the discretion of the judge of first instance in custody cases is considerable, this would be only so in questions of fact, since he would see and hear the parties, and appeals would be on the law itself.

NEWFOUNDLAND LEGISLATION AFFECTING CUSTODY OF INFANTS

But while the law of custody developed originally in Newfoundland through a series of decisions on the Chancery side of the Supreme Court, some immortant historic principles, namely the welfare of the child, the Public Welfare Act, 1931², which was found to be limited and to need enlargement. Subsequent amendments to this Act made material changes in the law affecting the welfare of children and these were consolidated in "An Act Respecting the Welfare of Children".³ This Act was substantially repealed by The Child Welfare Act, 1964⁴ which was enacted with an eye to the modern legislation of other jurisdictions, particularly that of the United Kingdom. Indeed, it will be found that certain sections of the local Act copy closely, if not exactly, sections of the Guardianship of Infants Act, 1925 of the United Kingdom. One such provision is section 47 of the Newfoundland Act of 1964 which reads as follows:

"47. Where in any proceeding before any Court, including the Supreme Court, the custody or upbringing of a child is in question, the Court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration, notwithstanding whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody or upbringing is

¹(1964), 49 M.P.R. 401, 404.

²Stats. Nfld. 1931, c. 12.

³R.S.N. 1952, c. 60.

⁴Stats. Nfld. 1964, No. 45.

superior to that of the mother, or the claim of the mother is superior to that of the father."

CUSTODY OF ILLEGITIMATE CHILDREN

The mother is usually entitled to the custody of her illegitimate children. In any case, the evidence required to deprive her of that custody must be very strong. The fact that her character is not impeccable will not defeat her right when she has placed the child in the care of respectable people. If the putative father of an illegitimate child has custody with previous acquiescence of the mother, the father will not be deprived of that custody unless the best interests of the child require otherwise. Thus, the preferred claim of the mother to the custody of her child yields only to the principle that the first consideration is the welfare of the child. If it appears that she has abandoned the child to the father, or that her circumstances do not permit her to care properly for the child, custody may be properly awarded to the father.

RIGHTS AND DUTIES OF PARENTS AND GUARDIANS

A parent (natural guardian) as well as a court-appointed, legal guardian ¹, has rights and duties with respect to his or her child. These may be generally outlined as follows:

- (a) provision of physical protection including the exercise of a special duty of care, requiring reasonable precautions to avoid accidents involving the child;
- (b) provision of food, medical aid, clothing and shelter;
- (c) provision of education and religious training;
- (d) use of force to defend the child against assailants;
- (e) provision of moral protection;
- (f) liability for the child's acts (in tort and contract); punishment of the
- (g) child;
- (h) right to the child's services.

¹ Eversley's Law of Domestic Relations (6th ed., 1951), by L.I. Stranger - Jones, M.A. at p. 435 states that "... on comparing the law of parent and child with that of guardian and ward, it will be seen that the powers and authority of the parent are far wider and larger, and less subject to judicial control, than those of the guardian, though on the other hand the liabilities of the guardian are in some respects less than those of the parent."

ACCESS

Whereas custody is frequently determined by reference to the conduct of the parent towards his or her children, and all other considerations yield to the children's welfare, access is not refused in cases where some danger to the children is apprehended. The rationale is that although a mother, for example, may be unqualified to have custody or control of them, she may certainly be qualified to have access to her children who should not grow up without knowing their natural mother. •

The philosophy in determining access in England has been summed up by Willmer, L.J. in *S. v. S. and P.*¹ as follows:

(To) deprive a mother altogether of access to her own children . . . is 'a very strong thing to do' .. I should be disposed to go so far as to say that the court should not take that step unless satisfied that she is not a fit and proper person to be brought into contact with the children at all. Such a situation might arise, for instance, if she were a person with a criminal record, or one disposed to act with cruelty against children, or something of that sort. To say of a woman that she is a bad wife or mother may be an excellent reason for not giving her care and control, but, in my view is not sufficient ground for depriving her of any kind of access."

"Access", wrote Kay, J., in *Evershed v. Evershed* ,-"is a thing which can only be dealt with after the question of custody is determined; it means access to children who are in the custody of some other person."

In *Brooking v. Brooking*³, Doull, J. of the Nova Scotia Supreme Court (in chambers), in ruling on an application for a writ of attachment for contempt of an order of the Court which provided, *inter alia*, "that the Respondent shall have right of access to said children at all reasonable times", considered the meaning of "access":

"The cases on the matter seem to be few but such cases as there are convince me that 'access' means seeing the child while in the custody of another and does not include taking the child away from the person who has the custody for the purpose of visiting other relatives:

¹
² /1962/ 2 All E.R. 1 (C.A.).
(1882), 46 L.T. 690, 691.
³ /1953/ 1 D.L.R. 648.

Evershed v. Evershed (1882), 46 L.T. 690; *Re M.* (1915), 22 D.L.R. 435, 33 O.L.R. 515."¹

The Judge accordingly denied the applicant's contention that his wife (who had custody of the children) was in contempt of the court access order in denying him the right to take the children away from her residence in the exercise of his right of access to the children.

In *Gubody v. Gubody*², Spence J. of the Ontario Supreme Court distinguished *Evershed v. Evershed* on the basis that the English case interpreted "access" as used in a separation agreement, and disapproved of the interpretation of "access" as used in a court judgment in *Brooking v. Brooking*³. The Judge in the *Gubody* case interpreted the Ontario Infants Act⁴ (similar to Nova Scotia's Custody of Infants legislation⁵), under which, he concluded, "the court has power to make such order as to access as well as custody as it deems fit."⁶

There is no access legislation in Newfoundland, similar to that in Ontario or Nova Scotia. Hence, where parties to an action, in which an order of child custody has been made in the Supreme Court, are unable to privately agree on the arrangements for access and seek the Court's assistance, it may be argued that the Court does not have authority to provide in an access order for children to be taken from the residence of the person in whom custody and control of the children has been vested.

However, the requirement that a father or mother must visit with their children in the presence of, or at least, at the residence of the parent who has custody and control of them, will likely prove unsatisfactory both for parents and children. The children may be caught in the crossfire of bitter feeling between the estranged or divorced parents, and the visiting parent's activities with the children during times appointed for access will be severely restricted.

The Study will therefore recommend that section 47 of The Child Welfare Act, 1964 be amended to empower the Supreme Court to make such order as to access as it deems fit including as part of access the removal of a child from his or her place of residence for such temporary periods as the Court may prescribe, having regard to the child's welfare. The Court should also be empowered to vary, alter or discharge access orders.

¹2/1953/ 1 D.L.R. 648, 648 - 649.

²3/1955/ 4 D.L.R. 693.

³3/1953/ 1 D.L.R. 648.

⁴Now R.S.O. 1960, c. 187, s. 1(1),

⁵Now Infants' Custody Act, R.S.N.S. 1967, c. 145, s. 1(1) (a).

⁶3/1955/ 4 D.L.R. 693, 696; this view adopted by Dubinsky J. in *Campbell v. Campbell*, 1968/13431 (N.S. Sup. Ct., App. Div.).

THE WELFARE OF THE STATE

The substantial alterations over the years in the attitude towards guardianship and custody, and the sweeping changes which have been discussed here, from recognition of the absolute right of the father through the emergence of the test of the "best interests and welfare" of the child as the paramount consideration in matters of custody, are bases for a new concept of the law of custody. That concept is that of the intervention and active interest and organization of the State in matters of custody. This is the rationale for the statement already made that the former law of guardianship could now be regarded as little more than an historical remnant of what it once was. This is plainly evident in the legislation of many jurisdictions, and nowhere more so than in Newfoundland. The relevant Act in Newfoundland is The Child Welfare Act, 1964¹. The change is personified most clearly in the person of the Director of Child Welfare, an officer appointed to administer the Act by the Lieutenant-Governor in Council and advised and assisted by an Assistant Director and a Child Welfare Board, also appointed by the Lieutenant-Governor in Council. A child may now, on application by or for the provincial Director of Child Welfare, be placed in the care and custody of the Director, under the terms of The Child Welfare Act, 1964. "Parent" within the Act includes grandparent, step-parent, foster-parent and parent by adoption. "Child" means an unmarried boy or girl actually or apparently under the age of sixteen years.

The new concept of the intervention of the State through the Director of Child Welfare, to the treatment of a large segment of custody cases in Newfoundland, including those of neglected, delinquent, mentally defective or handicapped children, and their support and welfare. A number of offenses against children also come within The Child Welfare Act, 1964.

It is interesting to note that an application by or for the Director of Child Welfare under The Child Welfare Act, 1964, to have a child placed in his care and custody shall be entertained by a Family or Juvenile Court or Stipendiary Magistrate, but in other cases where the custody or upbringing of a child is in question the Supreme Court is the appropriate tribunal.

CHANGES IN STATE'S ATTITUDE TO CUSTODY MATTERS

While the jurisdiction of the Court of Chancery was not at the beginning contingent upon the possession of property by the infant, the court did not in practice (until 1847) intervene to appoint a guardian to make the infant a ward

¹ Stats. Nfld. 1964, No. 45, as amended by The Child Welfare (Amendment) Act, 1965, Stats. Nfld. 1965, No. 54.

where the infant had no property. Nothing could illustrate more strikingly the difference in the attitude and aims towards child custody and guardianship, from the early activities of the Courts to those now in practice under The Child Welfare Act, 1964. Now the primary reasons for the establishment of custody in the Director are the financial need of the child and the assistance which may be made available by the State to the person in whose favour it is exercised. This is a modern and praiseworthy concept of the State as *parens patriae*.

CHILD WELFARE LEGISLATION IN NEWFOUNDLAND

DEFINITIONS

Some important definitions in The Child Welfare Act, 1964 (as amended), include the following:

- Sec. 2 (a) "child" means an unmarried boy or girl actually or apparently under the age of sixteen years;
- Sec. 2 (0) "Director" means the Director of Child Welfare appointed under this Act, and includes the Assistant Director of Child Welfare;
- Sec. 2 (h) "guardian" means the natural parent or parents and any guardian of the child's person legally appointed, and includes the Director when the child has been committed to his care;
- Sec. 2 (1) "Minister" means the Minister of Public Welfare;
- Sec. 2 (m) "neglected child" means a child
 - (i) who is abandoned or deserted by both parents, or if one is dead, by the survivor, or by his guardian;
 - (ii) whose parents, or parent if only one be living, have or has allowed him to be brought up by another person at that person's expense under unsatisfactory conditions;
 - (iii) whose parents, or surviving parent if only one, are undergoing imprisonment, and there is no other person legally liable to maintain the child;
 - (iv) whose parents, or surviving parent, or guardian or other person in whose charge he may be, cannot by reason of

misfortune, disease or infirmity properly care for him, or are unfit to have charge of him, or refuse to maintain him;

- (v) who is found wandering about without a proper or settled place of abode, or is found sleeping at night in barns, out-houses or in the open air, or any other undesirable place;
- (vi) who is found living with vicious or disreputable persons;
- (vii) who by reason of neglect, intemperance or other vices of his parents or guardians is suffered to grow up without proper education and control, or in circumstances conducing to an idle and dissolute life;

whose parent or guardian is able to provide proper medical surgical or other remedial care for the child, but neglects to provide such care or, whether financially competent or not refuses permission for such care or any remedial measure when recommended by competent medical authority;

- (ix) who is found begging in any place of public resort;
- (x) who habitually frequents any tavern, pool-hall or gambling room;
- (xi) who, being under the age of fourteen years, habitually sells anything in the streets or public places after nine o'clock at night;
- (xii) who habitually absents himself from his home or school;
- (xiii) who habitually uses obscene, profane or immoral language or is guilty of any indecent conduct in any public place;
- (xiv) who is unlawfully assaulted beaten or ill-used or treated with cruelty or neglect by his parents or guardian;
- (xv) who is found having in his possession obscene pictures, drawings or printed matter;
- (xvi) who being under the age of sixteen years is employed anywhere between the hours of 9 p.m. and 8 a.m. on the following day;

- (xvii) who
 - (i) being a female, or
 - (ii) being a male under twelve years, or
 - (iii) being between twelve and fourteen years old and without the written consent of his parents or guardian is found selling newspapers or other articles in a public place,
- (xviii) whose parents are dead, and who has no relatives liable, to support him; or
- (xix) who is illegitimate and whose mother is dead, incapacitated or without means or unwilling to support him, or who is brought before the court with the consent of the mother for the purpose of transferring the guardianship of him or her to the Director; . . ."

POWERS REGARDING NEGLECTED CHILDREN

The provisions of Part I of The Child Welfare Act, 1964, under the heading of NEGLECTED CHILDREN (sections 10 to 12 inclusive), are clear and comprehensive. They include the actions to be taken by the Director or Welfare Officer in the case of neglected children and the procedure by which he may carry on the investigation of such cases. Questions of evidence and of committal of neglected children in differing circumstances, and obligations placed upon parents through application to the Court are dealt with. The question of religious upbringing is dealt with under section 16 of the Act. The Study also considers that the points made in Appendix C are relevant to this discussion.

RETURN OF CHILD TO PARENT, GUARDIAN OR OTHER PROPER PERSON

Section 15 of the Newfoundland Act (as amended) reads as follows:

- "15. - (1) Where it appears to a judge that the public interest and the interest of a child declared by him to be a neglected child or of any child against whom an offence has been committed may be best served thereby the judge may make an order
- (a) that the child be returned to his parents or guardians

or other person in whose care he may be, subject to supervision by the Director;

- (b) that the child be committed temporarily or permanently to the care and custody of some suitable person, subject to supervision by the Director; or
- (c) that, subject to subsection (2), the child be committed temporarily or permanently to the care and custody of the Director, who in his discretion may order that the child be placed in a foster home, training school or other institution which has been approved by the Minister for the care of delinquent or neglected children.

- (2) A neglected child who is apparently under the age of twelve years shall not be committed to an institution unless and until an attempt has been made to provide for that child in his own home or in a foster home.
- (3) Where a child has been committed temporarily to the care and custody of the Director, the Director or a welfare officer or some other person authorized by the Director in writing shall during the period of temporary commitment or at the expiration of that period bring the matter again before the judge for further and other consideration and action and if the parents or guardian of the child have been notified in accordance with subsection (4) the judge shall thereupon enquire and determine whether the circumstances justify an order returning the child to his parents or guardian or other person in whose care he may have been or a further order under this section and the judge shall make such order as the circumstances of the case require.
- (4) The Director or a welfare officer or some person authorized by the Director in writing shall notify the parents or guardian of the child of the time and place of the enquiry referred to in subsection (3).
- (5) Evidence taken at a prior hearing and the order of temporary committal made after the prior hearing may be admitted as evidence in an enquiry under subsection (3) without proof or on such proof as the judge may require.

- (6) At any time pending the final determination of an enquiry under subsection (3) the judge may make such order for temporary detention and care of the child as he deems proper.
- (7) The judge shall forward a copy of the evidence taken before him to the Director together with a statement containing all important facts relating to any child committed to his care and custody whether temporarily or permanently.
- (8) Notwithstanding any other provision of this Act, when a child is committed temporarily to the care and custody of the Director, the commitment shall be made for a fixed period not exceeding twelve months, but in no case shall an order be made at any time which would result in the continuous temporary commitment of the child beyond thirty-six months from the date of the first order for his temporary commitment; and
- (9) When an order has been made under Section 15 the magistrate may, upon application of the Director or of a welfare officer or of any person designated for the purpose by the Director or of a parent or guardian of the child to whom the order relates or of any person entitled to make a complaint in respect of that child, vary the order from time to time, if he is satisfied that there has been a material alteration in the needs or the circumstances of the child.
- (10) When a child has been committed to the care and custody of the Director, and while in such custody reaches the age of sixteen years, the Director may in a fit case continue his care, custody and maintenance until the child reaches the age of eighteen years; and, subject to the approval of the Minister, until the child reaches the age of twenty-one years.
- (11) Where an order has been made under section 57 of Chapter 60 of The Revised Statutes of Newfoundland, 1952, the Judge shall forward a copy of the evidence taken before him to the Director together with a statement containing all important facts relating to any child committed to his care and custody whether temporarily or permanently.
- (12) When an order has been made under section 57 of Chapter 60 of The Revised Statutes of Newfoundland, 1952, the

Magistrate may, upon application of the Director, or of any person designated for that purpose by the Director, or of a parent or guardian of the child to whom the order relates or of any person entitled to make a complaint in respect of that child, vary the order from time to time, if he is satisfied that there has been a material alteration in the needs or circumstances of the child.

- (13) Where an order has been made under section 57 of Chapter 60 of The Revised Statutes of Newfoundland, 1952, notwithstanding anything to the contrary contained in this Act, when a child is committed temporarily to the care and custody of the Director the commitment shall be made for a fixed period not exceeding twenty-four months."

SPECIAL CUSTODY POWERS OF DIRECTOR

The following powers and discretion given the Director of Child Welfare in Newfoundland are based closely on provisions of the United Kingdom Act of 1925¹:

"46.- (1) If because of the special circumstances he considers it in the best interests of the child so to do, the Director may, upon the written request of the parent or guardian of a child, take the child into his care

.

(2) The Director may, when he has accepted a child under subsection (1), make such arrangements for the support, care and welfare of the child as in the circumstances he deems fit.

(2A) If a child referred to in subsection (1) reaches the age of sixteen years while in the care and custody of the Director, the Director may, subject to subsection (3) and where he considers it in the best interests of the child so to do, continue his care, custody and maintenance of the child until the child reaches the age of eighteen years, or subject to the approval of the Minister, twenty-one years.

(3) The Director does not by taking a child into his care and custody under subsection (1) become the legal guardian of the child and he may terminate the care and custody at any time he sees fit.

(4) When any other provision of this Act conflicts with this section, this section shall prevail."

¹ Guardianship of Infants Act, 1925, Stats. U.K. 1925, c. 45.

These are examples of other similarities which may be found between the Newfoundland legislation and that of the United Kingdom.

OFFENSES AGAINST CHILDREN

This portion of The Child Welfare Act, 1964 (sections 34 to 41 inclusive), covers a number of offenses which may be committed against children, including:

- (1) utilizing children to receive alms or for purposes of making or inducing or giving of alms, whether directly or under pretense of singing, playing, performing, offering for sale;
- (2) the use of children for public performances, except where licensed or conducted for charitable or educational purposes;
- (3) the commission of any ill-offense against a child involving wilful injury to the person, physical or mental health or morals of the child;
- (4) giving or selling to a child tobacco or liquor;
- (5) employment of unmarried girls under the age of sixteen in restaurants or taverns without the written consent of their parents or guardians;
- (6) the employment of a child under the age of sixteen between the hours of 9 o'clock in the evening and 8 o'clock in the morning, subject to certain exceptions;
- (7) failure to keep proper registers of children employed;
- (8) the employment of children whose attendance at school is required at the time;
- (9) permitting the attendance in theatres, bowling alleys or other places of public amusement.

The apparent age of the child and the procedures to be followed in any charges are all outlined.

POWER OF SEARCH

Provisions for search with or without warrant and the issuing of warrants or laying of informations are covered in section 42. *Inter alia*, they provide that it is not necessary in an information laid or warrant issued to describe a child by name.

•

INTERFERING WITH WARDS

The inducing or attempting to induce a child to leave any place where it is properly in custody or has been confined by proper authority, where it has been placed for the purpose of being nursed, supported, educated or adopted are classified as offenses. This is also the case in attempts to induce a child to break an agreement lawfully entered into by or with the authority of the Director, or detaining or harbouring a child after demand made for its delivery up to the Director or Welfare Officer. These are all punishable by fine or imprisonment in default of payment.

MISCELLANEOUS PROVISIONS OF CHILD WELFARE LEGISLATION

Employment of Children by Municipalities

There are a number of miscellaneous provisions of The Child Welfare Act, 1964 including those which make the employment of children by municipalities, under proper license, lawful. Those provisions are usually enforceable by the Director.

Boarding of Children

A number of provisions for the acceptance of children for board and lodging, and the issuing of licenses and the conditions to be attached thereto are listed and breaches of such provisions would be an offense under the Act.

General Provisions

A number of provisions covering such things as the visitation of institutions, the religious persuasion of children coming within the scope of the Act, and powers of the Lieutenant-Governor in Council to pass a wide range of regulations for the effective carrying out of the purposes of the Act, are made and offenses and penalties prescribed for breaches thereof.

The taking of suits or proceedings under the Act and appeal from any court order by any person feeling aggrieved by an act or order of the Minister are provided for. There is a general provision that the Act shall be liberally construed to the end that the care of children coming within this provision shall approximate as nearly as may be that which should be given by their parents.

There is also a provision to the effect that no unauthorized person shall insert or cause to be inserted in a newspaper or periodical or publish or cause to

be published by radio or television any advertisement dealing with the adoption, boarding-out or care of children.

Control

A parent or guardian has certain rights to control the activities of his or her child or ward and the duty to exercise that right in some respects even though the child or ward has attained years of discretion.¹ There is also a power to delegate this right to proper officials duly appointed for a particular purpose. The field of education is an example, and a teacher may be delegated to apply suitable discipline in appropriate cases.

Maintenance

The responsibility of a guardian in matters of maintenance has changed, as has that of a father. In matters of maintenance, reference both to the Newfoundland Child Welfare Act, 1964, as well as The Maintenance Act² are of importance.

Education

The duties of a parent or guardian in matters of education have been referred to briefly above but have been spelled out in great detail in the legislation and regulations made thereunder. Reference to the numerous appropriate Education Acts and Regulations in Newfoundland is necessary in this regard.

Marriage of a Child or Ward

While in the early law a parent or guardian had the power to prevent his child or ward from marrying an unsuitable person in terms of rank or fortune it is doubtful if this still obtains, certainly in Newfoundland.

GUARDIANSHIP

INTRODUCTION

As has already been said, Newfoundland, unlike some other jurisdictions, did not, over the same period pass similar Guardianship legislation in which the question of jurisdiction of courts as well as the position of the guardian vis-a-vis the parent, and the relative positions of the father and mother of the child or children were spelled out. In Newfoundland the same result has been clearly established by a series of reported Supreme Court decisions going back as far as

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The "years of discretion", at Common Law, have been fixed at fourteen for males and sixteen for females: James, T.E., *Child Law* (London, 1962), p. 4.

² R.S.N. 1952, c. 65.

the 1840's, some on questions of guardianship and some in other ancillary respects such as removal of a ward from the jurisdiction.

It is clear from all these Supreme Court of Newfoundland decisions, three of which were on appeal¹ that the law regarding the powers of appointment by the Supreme Court in guardianship is established beyond doubt.-

GUARDIANSHIP NOT A MATTER OF PROFIT

A guardian is generally in the position of a trustee without the right to profit from the estate of the infant. This is purely as regards the custody of the child but if trustees of the infant's property have been appointed, the guardian would have the duty to see that the trustees in whom the infant's property is vested, make suitable provision for maintenance and see to the care and control of the income received on behalf of the infant.

TERMINATION OF THE OFFICE OF GUARDIAN

Guardianship and the right of custody would normally be terminated by the attainment of majority by the ward. The office of guardian could also be terminated by his resignation with the sanction of the court. Also, of course, in the event of the death of the ward, the guardianship would be brought to an end. If one of two testamentary guardians dies the survivor is entitled to act but where one of two jointly appointed guardians dies, the right of the survivor is automatically terminated as well, and a new application to the court would be necessary. It is important to note that the term custody (of an infant) does not mean actual physical custody but the right to control.

1 In re Penny, /1932-35/ Nfld. L.R. 383; In re Rideout (1952), 30 M.P.R. 371; In re Winsor (1963), 48 M.P.R. 445.

2 Munn et al. v. Simmonds et al., 1969, No. 460, per Mifflin J.

RECOMMENDATIONS.

CHAPTER II

1. That while it is provided by The Child Welfare Act, 1964 that where in proceedings before any Court, including the Supreme Court, the custody or upbringing of a child is in question the Court shall regard the welfare of the child as the first and paramount consideration, it should not be treated as the sole consideration. (Pages 53-54).
2. That, in dealing with questions of custody or upbringing, any Court referred to in Recommendation 1 above may in its discretion, in applying the test of the welfare of the child as the first and paramount consideration, depart from the customary adversary procedure of Courts and deal with such questions more in the nature of an enquiry. This might even involve the procedure of requiring an investigation and report if so directed by the Judge or Court.
3. That attention be given to the following proposals relative to The Child Welfare Act, 1964 No. 45 of the Acts of 1964 (as amended):
 - (a) Sec. 2(m) (xiv) - repeal of the words "beaten or"
 - (b) Sec. 2(m), (ix) to (xvii). These subsections are to be examined in the light of other legislation.
 - (c) Sec. 15 (8). Insert the words "under the Act" after the word "temporarily" in the second line.
 - (d) Sec. 15 (11), (12) and (13). Further consideration of these subsections, which touch upon delinquent children and therefore may be ultra vires here. The whole field of juvenile delinquency is presently under joint study by the proper Federal and Provincial departments of Government.¹
 - (e) Sec. 26 (1). Insert the words "subject to sub-section three (3) of this section" after the word "shall" in the third line.
 - (¹) Sec. 32 (1). Repeal of the words "release on parole" and substitution therefor of the words "conditional release".
 - (⁸) Sec. 32 (2). Repeal of the word "parole" and substitution therefor of the words "conditional release".

¹

Infra, p. 366 (fn.).

- (h) Sec. 32 (3) (a) and (b). Repeal of the word "parole" and substitution therefor of the words "conditional release".
 - (i) Sec. 33 (b). Repeal of the word "parole" and substitution therefor of the words "conditional release".
 - (j) Sec. 53. Insertion of the words "or Director" after the word "minister" in the second line.
4. That section 47 of The Child Welfare Act, 1964, be amended to empower the Supreme Court of Newfoundland or Judge thereof to make such order as to access as the Court or Judge deems fit, including as part of access, the removal of a child from his or her place of residence for such temporary periods as the Court or Judge may prescribe. (Pages 56-57).

CHAPTER III

ADOPTION

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INTRODUCTION

Adoption in Canada as elsewhere is a comparatively modern development. It did not exist at Common Law or in Equity and is therefore a substantially statutory creation. Since this is the case, the major area of examination of the law must be the adoption legislation itself. There is some caselaw, but the legislation, as will be seen, is comparatively up-to-date and complete.

Some of the earliest effective dates of adoption laws were 1851 in Massachusetts, 1873 in New Brunswick, 1921 in Ontario and 1926 in the United Kingdom. The English adoption law has been consolidated in the Adoption Act, 1958¹. In Newfoundland the first Act in this field was The Adoption of Children Act, 1940². This was repealed and substituted by the Welfare of Children Act, 1944³. The present Act, The Adoption of Children Act 1964⁴ repealed and took the place of Part V of The Welfare of Children Act.⁵

Before 1940 there were attempts at adoption in Newfoundland by agreement, and various expedients were used to try to make the agreement attractive, and withdrawal from the agreement unprofitable, to the parents. But the inescapable fact was that the parents could, and often did, when the child grew old enough to be useful to them, force the would-be adopter to return it.

Today all provinces of Canada, all States of the United States and most parts of the Commonwealth have adoption legislation. Because the United Kingdom and Ontario codifications are so comprehensive and up-to-date, they are used liberally for comparative purposes in this study of

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Stats. U.K. 1958, c.5.
adoption law.

2

Stats. Nfld. 1940, No. 32.

3

Stats. Nfld. 1944, No. 57.

4

Stats. Nfld. 1964, No. 23.

5

R.S.N. 1952, c. 60.

EFFECTS OF ADOPTION

By section 11 of The Adoption of Children Act, 1964 (Newfoundland), an adoption order, *inter alia*, (1) divests the natural parent, guardian or person in whose custody the adopted child has been, of all legal rights and frees him or them from all legal obligations and duties in respect of the child; (2) makes the adopted child, practically to all intents and purposes, the child of the adopting parent or parents, and (3) imposes, upon the adopting parent or parents all legal obligations and duties as if the adopting parent or parents were the natural parent or parents of the child as from the date of the adoption order.

Thus adopters, for almost all legal purposes, step into the shoes of the child's natural parents. The primary concern of adoption legislation is the welfare of the child - finding the right home for the child rather than that of satisfying the would-be adopters. The child must not be removed unnecessarily from parents who can provide it with security and love. It must be protected from being adopted by unsuitable people. Parents must be prevented from making hurried decisions to give up or place their child unsuitably. Adopters must be protected from undertakings and responsibilities that they cannot fulfill and on the other hand from interference by others after they have adopted the child.

Although the "parents" are by statute not the natural, but the adoptive, parents of the adopted child, the relationship, as has been said, is that the adopter for all legal purposes steps into the shoes of the child's natural parents. The exceptions to this principle are rather rare and not of practical importance in this study.

WHO MAY BE ADOPTED?

In England an adoption order may be made only in respect of a person who (1) is an infant, (2) has never been married, and (3) except in some cases where considerations of domicile take over, resides in England. In Scotland an adoption order may not be made in respect of a minor except with the consent of the infant. In Ontario where a "child" is, curiously, defined as a person under twenty-one years of age, or twenty-one or more years of age, it may be any child resident in Ontario either under or over twenty-one. The provision for adoption of a person over twenty-one years of age is not an entirely idle one. By the Nova Scotia Adoption Act¹ any person of the age of twenty-one or upwards may adopt a person younger than himself. The written consent of the proposed adoptee is required if he is over the age of twelve years, and also that of his spouse if he is married. Where the proposed adopter is married the written joinder of his spouse is necessary. In France adoption is normally for children

¹ R.S.N.S. 1967, c. 2.

under fifteen years of age, but this age may be extended to the full minority age under certain circumstances. If the child is over fifteen years of age its consent is necessary.

Adoption in Newfoundland may include any person within the jurisdiction of the court' whose adoption has been authorized under the Act and who is under twenty-one years of age. Subject to some exceptions laid down in the Act, if a child has attained the age of twelve years, the child's written consent is necessary.

CONSENT TO ADOPTION

Generally no adoption order may be made without the consent of every person who is a parent or guardian of the child, except where the person concerned has not performed his natural or legal duties or is incapable of giving consent, or is acting unreasonably. Consent may be dispensed with if a person has abandoned, neglected or persistently ill-treated the infant or has persistently failed to discharge his duties or is incapable of consent or unreasonably withholding it. In Ontario, consent may be dispensed with if, having regard to all the circumstances of the case, the court is satisfied that the best interests of the child will be served by dispensing with the requirement.

There are provisions in several jurisdictions that consent given may be withdrawn within a time specified in the legislation. But in Ontario the near absolute power of a parent to revoke consent has been replaced by the requirement that a parent wishing to withdraw his consent must satisfy the court that the welfare of the child will be promoted by such withdrawal. In Newfoundland a consent given may be cancelled within twenty-one days by a document in writing given by the consenting party. A judge¹ may also cancel a consent, if satisfied that it is in the best interests of the child.

WHO MAY APPLY TO ADOPT?

In the United Kingdom persons resident in England or Scotland may normally apply, but there are special exceptions to this provision. In Ontario applicants must be resident in that province. In Newfoundland there are no such limiting words, and it seems that any single person, whether resident or domiciled or not, may apply for an adoption order. A husband and wife may adopt jointly, but otherwise not more than one person may adopt a child. It is provided also that except with the consent of the Minister of Public Welfare³, an

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³ Now: The Minister of Social Services and Rehabilitation.

Infra., p. 73.

Infra., pp. 75-76.

adoption order cannot be made in any case where:

- (a) the applicant is under the age of twenty-one years; or
- (b) the applicant is less than twenty-five years older than the child in respect of whom the application is made.

It is provided as well that an adoption order shall not be made where the sole applicant is a male and the child in respect of whom the application is made is a female, unless the court is satisfied that there are special circumstances which justify the making of an adoption order.

There is some lack of uniformity in the laws of the several jurisdictions, even in the provinces of Canada, with respect to applications to adopt by married petitioners. In Ontario and British Columbia, as in England, a married person may apply with the written consent of the spouse. In Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia, as in Newfoundland, the two spouses must join in the petition and the adoption order is a joint one. (There is a provision in New Brunswick that an adult married person whose wife or husband is living separate and apart from such person, may apply).¹ The joinder of another spouse as a party in the petition and order does not have the same legal effect as an application by one married person with the consent of the spouse.¹ However, in Newfoundland, section 3(1) and (2) of The Adoption of Children Act, 1964. Provide that while the court may make an order authorizing joint adoption in an appropriate case (such as where a married couple seeks to adopt a child), otherwise an adoption order shall not be made authorizing more than one person to adopt a child.

PROCEDURE FOR OBTAINING ADOPTION ORDER

In Newfoundland, as in Ontario, a child must have lived with the applicant for at least six months immediately prior to the application, except in cases where the Director of Child Welfare certifies that the applicant is to his knowledge a fit and proper person to adopt the child. This may compensate for the lack of provision for residence or domicile of either the adopter or the adoptee in Newfoundland Act, but there are qualifications on this, where the six months' residence provision may be waived.

In the United Kingdom the adopters must have had care and possession of the child for at least three consecutive months preceding the making of the

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The joinder by an applicant of his or her spouse in a successful adoption application results in a joint adoption order. A person consenting to a successful adoption application does not become an adoptive parent.

order and after the child has reached the age of six weeks. There does not seem to be any "fit and proper person" provision in the English law. The vast majority of adoptions in the United Kingdom are arranged by adoption societies and the children's departments of local authorities who will be responsible for taking the child from those with custody of it and placing the child with the proposed adopters, and also for seeing that the necessary consents are given. Most children placed for adoption are illegitimate and are usually very young. In the United Kingdom, if the child is below the upper limit of the compulsory school age, no adoption order may be made unless the applicant has given to the local authorities within whose area he is then resident three months' notice in writing of his intention to apply for the order. This does not apply if the applicant is the child's parent.'

PROVISION FOR INTERIM ORDER

The power of the court to postpone the determination of the application and make an interim order giving the custody of the child for a probationary period, is recognized procedure. In Newfoundland the probationary period is not to exceed two years, and is the same in the United Kingdom. In Ontario it is not to exceed one year. In Nova Scotia there is no provision for the making of interim orders.

GUARDIAN AD LIT-EM

In Ontario it is provided as part of adoption court procedure that a guardian *ad litem* may be appointed. It will be noted that the words are permissive, whereas in the United Kingdom and the Newfoundland Acts such an appointment is mandatory at the hearing of the application, to safeguard the interests of the child before the court. There seems to be no reference to a guardian *ad litem* in the 1967 Nova Scotia Adoption Act.

FUNCTIONS OF COURTS

In the Newfoundland Act, section 17 (1) provides that "The court having jurisdiction to make adoption orders shall be the Supreme Court or, at the option of the applicant but subject to any regulations under this section, a District Court or any family court or any Magistrate within the jurisdiction of which or whom either the applicant or the child resides at the date of the application for the adoption order." But in section 2(g) the interpretation of "judge" includes "a Judge of the Supreme Court, a Judge of the District Court

1 The parent of an illegitimate child who subsequently marries someone other than the child's mother or father, or a widow (er) with a child who re-marries and with her husband (his wife), adopts the child.

for a Judicial District in the province, and a Judge of a Family Court, a Stipendiary Magistrate, a District Magistrate and an Assistant Magistrate appointed under the laws of the province; . . . "

There is obviously a lack of articulation between these provisions which ought to be resolved.

REVOCATION OF ADOPTION ORDERS

In the United Kingdom Act there is no provision for revocation of an adoption order, except in the case of subsequent legitimation of a child adopted by his father or mother alone. Neither is there any provision in the Ontario Act for revocation. In Nova Scotia an application to set aside an order may be made by a person aggrieved by an order made without notice to him. Appeal from an order may also be made to the Supreme Court. But an order shall not be subject to attack after one year from its date.

In section 19 of the Newfoundland Act it is provided that "An action or proceeding to set aside an adoption order under this Act shall not be commenced after the expiration of one year from the date of the order, save in the Supreme Court, and then it may be set aside only if it is in the interests of the adopted child so to do."

This provision must be clarified. It may not be intended to convey what must necessarily be implied from it, and at least needs rewording. In examining the comparable situation it may well be hazarded that the omission of any provision for revocation in the United Kingdom and Ontario Acts is deliberate. It could well do more harm than good to reopen a decision upon which the happiness of a child rests, particularly as it was reached by a court at some pains, in the due process of law and in the interest of the child. Even if such an application is based on facts which were not previously before the court (which is unlikely) the effect might be such as to undo all that the legislation is intended to achieve.

It may be that section 19 has appeal from, rather than revocation of, an adoption order in mind.

APPEALS

It is conceivable but not clear that an appeal would lie in Newfoundland from an adoption order made or refused. If this is the intention of section 19 the matter ought to be clarified and the courts to which appeal may be made, established. The use of the words "action or proceeding" may not cover an appeal. It may be that appeal from a single judge of a Magistrate's Court, District

Court or Family Court could be to a single judge of the Supreme Court, and from a judge of the Supreme Court to the Supreme Court in Appeal. A limit upon the time for filing and hearing an appeal ought to be set.

FOREIGN ADOPTION ORDERS

There seems to be no provision in the Newfoundland Adoption of Children Act, 1964 for recognition of the status of foreign adoptions. This is still the case in the United Kingdom, except for adoption orders made in Northern Ireland, the Isle of Man and the Channel Islands. There is a line of cases in the English courts on the subject of the recognition of other adoption orders, although the United Kingdom Adoption Act, 1958, governs only British adoptions.

There is a provision in the Ontario legislation, which reads as follows: •
"Every person heretofore adopted under the laws of Ontario and every person adopted under the laws of any other province or territory of Canada or under the laws of any other country shall for all purposes in Ontario be governed by this Part."¹

There is a similar provision in the new Nova Scotia Act.² The desirability of inclusion of a similar provision in the Newfoundland Act ought to be considered.

RELIGIOUS UPBRINGING

The weight to be given to a child's religious upbringing is an important consideration in adoption proceedings as well as in applications for guardianship or custody and accordingly is being dealt with fully in Appendix C.

PRIVATE ADOPTIONS

Under section 3 (3), (4) and (5) of the Newfoundland Adoption of Children Act, 1964 the placing by a father or mother of a child or an agreement to place the child or to give up the care and custody of the child with a view to adoption of the child by any person other than a person referred to in paragraph (b) and (c) of subsection (3), without the prior consent of the Director, is an offense. Subsections (3), (4) and (5) are as follows:

"(3) A person shall not receive a child into a home or otherwise take

¹ Stats. O. 1965, c. 14, s. 83.

² Stats. N.S. 1967 c. 2 s. 17

³ *Infra*, pp. 548-554.

the care and custody of a child with a view to adopting that child except with the prior written approval of the Director unless that person is

- (a) the mother of the child;
- (b) of the same blood as the mother of the child where the child was born out of wedlock;
- (c) of the same blood as the mother or the father of the child where the child was born in wedlock.

(4) A person who violates subsection (3) or consents to the violation is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars or in default of payment to imprisonment for a term not exceeding one month or to both such fine and imprisonment.

(5) A father or mother who without the prior consent in writing of the Director allows or agrees to allow his or her child to be taken into a home or otherwise gives up or agrees to give up the care and custody of the child with a view to the adoption of the child by any person other than a person referred to in paragraph (b) or (c) of subsection (3) is guilty of an offence and liable on summary conviction to the penalty set out in subsection (4).

This means that private placement or adoptions, other than those coming within the qualifications of section 3 (3) are prohibited in Newfoundland. This does not seem to be the case in Nova Scotia, nor in Ontario, where the Adoption Act ¹ provides as follows:

"85. Every person, other than a children's aid society, who places a child with another person on the understanding that the other person will adopt the child shall, within thirty days after the day on which the child was so placed, register the placement with the Director in the prescribed form."

The Report of the Departmental Committee on the Adoption of Children, in England² concluded:

"We believe that any restrictions on third party and direct placings could and would be evaded and that such placings would continue but

¹
Stats. O. 1965, c. 14, s. 85.

² Cmd. 9248, 1954.

adoption orders would not be applied for in these cases. Prohibition of such placings would increase *de facto* adoptions. For all these reasons we do not think it wise or practicable to prohibit either direct or third party placings."

An Ontario Law Reform Commission research writer in agreeing with this conclusion', expresses the view that the real problem is that greater care is necessary in placing the child, that a thirty day notice to the Director should be changed to seven days to the local Children's Aid Society, and that the important thing is the making of an early assessment upon which the Director gives his certificate. The writer says

"Since babies can 'grow roots' quickly, the initial placing of a child for adoption is therefore far more important than the later investigation by the Children's Aid Society. An arrangement for adoption should include a careful preliminary social survey of the adopters, including an assessment of their motives for wanting to adopt a child, and also of the state of mind of the mother of the child, to ensure that she has not been unfairly induced to part with it. It is better to prevent a bad placing than to have to remove a child from an unsuitable home into which he may have settled."

It may be pointed out here that while in Newfoundland there are no Children's Aid Societies to take action as in Ontario, the Adoption of Children Regulations, 1966 (Newfoundland) make excellent provision for early and frequent reports by welfare officers to the Director on the adjustment of the child and the adopting parents. These seem superior to the Ontario provisions for supervision and to those of the United Kingdom. If the policy of some relaxation of the law regarding private adoptions were accepted in Newfoundland, the supervisory provisions of the Adoption of Children Regulations, 1966, with little adjustment to the situation, would suit the case admirably.

PAYMENT OR REWARD

The giving or promise of or receiving of any payment or other reward in consideration of adoption of a child is prohibited, in the Newfoundland Act, as in those of the United Kingdom and Ontario.

ADVERTISING FOR ADOPTION

- In the United Kingdom Act, any advertisement which indicates that a parent or guardian wishes to have a child adopted or that a person wishes to

¹

Report of Family Law Project of the Ontario Law Reform Commission to the Commission on Children, vol. IX, p. 64, (unpublished, 1968).

adopt a child or that anyone, except a recognized adoption society or local authority, is willing to make arrangements for adoption, is prohibited.

A similar provision is included in The Child Welfare (Amendment) Act, 1965 (Newfoundland).¹

¹ Stats. Nfld. 1965, No. 54, s. 5.

RECOMMENDATIONS

CHAPTER III

The Family Law Study recommends:

1. That the confusing references to "court" and "judge" in section 2 (g) and section 17 (1) be amended to correct the lack of articulation presently existing between the two provisions. (Page 76).
2. That the provisions of section 19 of The Adoption of Children Act, 1964, be clarified, either to provide that no action or proceeding to set aside (revoke) an adoption order shall be permitted or that if it is, action must be taken within a year from the date of the order. For the reasons given under the heading "Revocation of Adoption Orders", it is conceivable that the reopening of such a case would do more harm than good. It is doubtful if the words "action" or "proceeding" combined with the closing words of section 19 would cover appeals. (Page 76).
3. That the right of appeal from an adoption order ought to be clearly expressed, in the light of the heading "Appeals", but a time limit of not more than one year for filing and hearing such an appeal ought to be set. (Page 77)
4. That the law governing recognition of foreign adoption orders along the lines of the Ontario legislation¹ and the Nova Scotia legislation be adopted in Newfoundland. (Page 77).
5. That private adoptions should not be completely prohibited by the Newfoundland Act. Elsewhere they are permitted, and indeed strongly supported. It is recommended that the Newfoundland Act be amended to allow limited direct or third party placings. Failure to do so is referred to in the Report of the Departmental Committee on the Adoption of Children in England as unwise and impracticable, and tending to evasion of the law. (Pages 77-79).

(The cases of Eskimo and Indian adoptions in Labrador are germane to this recommendation, and the Adoption of Children Regulations, 1966 could be used to good effect in this connection. This problem seems to be lessening, but it cannot be said to have disappeared.)

¹ Stats. O. 1965, c. 14, s. 83.

CHAPTER IV

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INTRODUCTION

(1) BACKGROUND

There has been a continuing, almost incessant social revolution within the family and its dependent institution of marriage since mid-Victorian days in England, which has largely been the source of Newfoundland's family law, including questions of maintenance. John Stuart Mill in 1861 wrote: "Marriage is the only actual bondage known to our law. There remain no legal slaves except the mistress of every house."¹ This reflects the Common Law view of the "one flesh" relationship of Christian marriage, which was facetiously, but not incorrectly expressed by a leading Canadian Dean of Law to his classes in the words "at Common Law a man and his wife were regarded as one - he being the one". A husband was under a duty to provide "necessaries" for his wife on the grounds that the husband's duty to keep himself included that of keeping his wife, who

¹ Report of The Committee on Statutory Maintenance Units, (Cmd.3587)1968 (U.K.), p. 4, quoting The Subjection of Women (Everyman Ed.), p. 296.

was under a duty to live with him. If the husband turned his wife out of the home without adequate reason, or if she left him because of his commission of a matrimonial offense, she could pledge his credit for her reasonable expenses, but not if she had separate means of providing these necessities.

Until the passing of An Act to amend the Law relating to the Custody of Infants/ in England, a father had no legal obligation to maintain his children unless he so contracted. Thereafter the reasonable expenses of providing for a child were held to be part of a wife's reasonable expenses for which she had authority to pledge her husband's credit.

With the advent in England in 1857 of legal dissolution of marriage (divorce), alimony became a legal debt and The Matrimonial Causes Act, 1857² gave the High Court of England the power, theretofore exercised in Parliament in Private Act divorces, to grant a decree only if the husband made a sufficient settlement on his wife to support her. But such relief was not readily available to working class wives until 1878, when courts of summary jurisdiction (Magistrate's Courts) were vested with authority to grant matrimonial relief. Until then, the Poor Law, first enacted in England in 1601, which authorized summary jurisdiction courts to order limited maintenance, remained their sole source of relief.

1968:³ The Committee on Statutory Maintenance Limits reported in April,

"The transformation of this situation constitutes one of the most striking features of social development during the last hundred years. Women have been brought into legal and political citizenship, married women are no longer chattels, mothers have achieved equality of rights in legal disputes with fathers over their children, and the family has progressed from a despotic to a democratic institution. The family law of today has been shaped by the forces which accomplished this beneficent revolution; by the demographic, occupational and social changes of the twentieth century."

"Today there are more men than women *in* the marriageable ages, and for the first time in a century women enjoy equality of opportunity to marry. The proportion of the population marrying has risen steadily since the early part of this century and very rapidly since the 1939 -1945 war. ... Today birth control is the firmly established habit of

¹
²Stats. U.K. 1839, c. 54.

³Stats. U.K. 1857, c. 85.

³Report of the Committee on Statutory Maintenance Limits, Cmd. 3587, 1968, paras. 20, 21, 23.

most parents; the large family has disappeared and has been replaced by small numbers of intentionally conceived children born within the first decade of marriage."

The number of women in the labour force has steadily increased during the past hundred years. Beginning with working class women, and continuing and increasing with the inclusion of those of the upper classes, women have invaded as well the professions and the civil service. Beginning with single women, now about one third of married women work for pay, and constitute more than a half of all women workers. "Thus, married women have now achieved both equality of opportunity to marry and easy access to the labour market."

The growing equality of the sexes has been marked by the enactment in England of legislation, such as the Married Woman's Property Acts. But there were still the barriers of class and means. Most people in the working classes could not avail of the benefits offered through litigation in the High Courts, and the need to provide relief to working class wives became a prime requirement. There has been considerable legislation providing not only additional forms of relief but easier means of seeking them in alternative courts and at lesser cost. These courts deal largely with domestic issues and provide substantial new relief, particularly to wives and children. The remedy of maintenance orders in courts of summary jurisdiction has become a particular relief available to working class spouses and children.

There has undoubtedly been a considerable increase recorded in the number of divorces in the High Courts and orders of summary courts or magistrates in domestic disputes. But it is not axiomatic that this is an irrefutable index of growing family dissolution. A body set up by the Archbishop of Canterbury reported in 1958 that "far from disintegrating, the modern family is in some ways in a stronger position than it has been at any period in our history of which we have knowledge".²

In a widespread application and provision to England and elsewhere of State-financed legal aid and advice, a substantial addition to the solution of family problems has been provided. It is an indication of the acceptance of the principle that remedies for social and family ills should not be available only to classes which are economically or socially privileged over their less fortunate contemporaries.

(2) SCOPE OF CHAPTER

A confusing aspect of this branch of law is the varied terminology used

¹Report of the Committee on Statutory Maintenance Limits, *op. cit.*, para. 26.

²Report on The Family in Contemporary Society (1958), p. 109.

•

to describe court orders made under provincial and federal law. Broadly speaking, however, the financial relief which can be ordered for support of dependents, in proceedings in Newfoundland courts, may be classified as follows:

(a) Maintenance

- (i) Maintenance of parents by their children; of deserted wives by their husbands, and of deserted children by their parents, is provided for under The Maintenance Act.¹ Application for maintenance is made by residents of the city of St. John's and vicinity to the St. John's Family Court, and by residents elsewhere in the province, to the Magistrate's Court *in* their area.

GO Under the federal Divorce Act², the Supreme Court of Newfoundland is authorized to make an interim order for the maintenance of a "child of the marriage" from the presentation (filing) of a petition for divorce until the Court's adjudication on the divorce application³. The Act also authorizes the Court, upon granting a divorce decree *nisi*, to order a husband or wife to secure or to pay such *lump sum*, or *periodic sums* as the Court thinks reasonable, for the future maintenance of both or either the other spouse and
anti Phildrpn nf

- (iii) In custody, guardianship and wardship proceedings before the Supreme Court of Newfoundland, the power of the Court to make an order for the *maintenance* of a child whose welfare is in issue, is part of the inherent power of the Court acting in respect of the child as *parens patriae*.⁵

- (iv) Under section 18 (1) (a) of The Children of Unmarried Parents Act, 1964⁶, the St. John's Family Court or a Magistrate's Court may order a putative father to pay such portion of the *maintenance* of the unwed mother before, during and after the child's birth, as the Court determines. The Court may also make an *affiliation order* for support of the illegitimate child under the Act.

²R.S.N. 1952, c. 65.

³R.S.C. 1970, c.D-8.

⁴*Ibid.*, s. 10.

⁴*Ibid.*, s. 11 (1) (a), (b).

⁵ Report of the Committee on Statutory Maintenance Limits, Cmd. 3587, 1968, para. 72.

⁶Stats. Nfld. 1964, No. 40.

- (v) *Interim maintenance* was used to describe support of a wife between the date of a decree for restitution of conjugal rights and the date by which the spouses were to resume cohabitation under the decree, in *Hounsell v. Hounsell*¹

(b) Interim Alimony

- (i) The Divorce Act empowers the Supreme Court of Newfoundland to make an interim order for the payment by either husband or wife to the other spouse of *alimony* (in Quebec, an (interim) alimentary pension) for his or her maintenance between commencement of a divorce application and the granting of the decree *nisi*.²

(ii) Until 1857 in England, the Ecclesiastical Courts had jurisdiction in questions of divorce *a mensa et thoro* (latterly described as judicial separation), nullity and restitution of conjugal rights including the right to direct the payment to the wife of alimony pending suit (between the commencement of, and final adjudication on, an action).³ Because the Supreme Court of Newfoundland was held in *Hounsell v. Hounsell*⁴ to have the jurisdiction and powers vested in the English Ecclesiastical Courts prior to 1832, the Supreme Court may, apparently, order the payment by a husband of alimony pending suit (interim alimony) in such actions.

(c) Permanent Alimony

- (i) On authority of *Hounsell v. Hounsell*, the Supreme Court of Newfoundland may, on the granting of the decree of judicial separation, order the payment of *permanent alimony*, as was the practice in England in the Ecclesiastical Courts, for the future support of the wife.⁵
- (ii) In addition, an action for a civil debt may be taken for arrears of alimony⁶ due to a wife, or arrears of support

¹ /1949/ 3 D.L.R. 38 (Sup. Ct. Nfld.).

² R.S.C. 1970, c. D-8, s. 10(a); the term "interim orders" is contained in a marginal note to section 10, though "alimony" is used in the legislation.

³ Bromley's Family Law (3rd ed., 1966), p. 218.

⁴ /1949/ 3 D.L.R. 38.

⁵ Ibid.

⁶ At Common Law, "alimony" described payments ordered to be paid by a husband to a wife during the marriage, and "maintenance" referred to the permanent allowance a husband was ordered to pay his former wife after dissolution of their marriage. This distinction is not maintained in contemporary separation and maintenance agreements or in federal or provincial legislation.

owing to the children (if any) under a separation or maintenance agreement between a husband and wife, in a Magistrate's or District Court, or in the Supreme Court of Newfoundland (depending on the amount of arrears involved)¹, and if successfully litigated, judgment obtained for the arrears.

In the first part of this chapter, alimentary and maintenance provisions of the federal Divorce Act, which came into force in Canada on July 2, 1968, are summarized.

The Maintenance Act and The Children of Unmarried Parents Act, 1964, the two provincial statutes under which actions are most frequently taken in Newfoundland at present, are analyzed separately in parts B and C and a number of changes in both of these statutes are recommended.

A summary of other maintenance as well as social welfare legislation in Newfoundland is contained in part D. There follows in part E a discussion of enforcement of maintenance and affiliation orders.

The reciprocal enforcement of maintenance orders is discussed in part F.

A note on federal income tax legislation relating to maintenance and alimony paid under Court order or private separation or maintenance agreement is contained in the final part.

¹ Magistrate's Courts have original jurisdiction in actions for civil debts not exceeding \$200: The Summary Jurisdiction Act, R.S.N. 1952, c. 117, s. 11 and First Schedule. District Courts have jurisdiction to hear actions for debts not exceeding \$10,000: The District Courts (Amendment) Act, 1971, Stats. Nfld. 1971, No. 2, s. 2 (a).

A. DIVORCE PROCEEDINGS

The Divorce Act¹ provides that a petition for divorce may include an application for maintenance for a spouse or for a child of the marriage².

Under section 10 (a) of the Act the Supreme Court of Newfoundland may make an order for *alimony* for a spouse and for *maintenance* of a child of the marriage pending the hearing and determination of a petition for divorce. Section 11 (1) (a), (b) provides for an order of *maintenance* for a spouse or for children of the marriage upon the granting of the decree *nisi* of divorce. An order made pursuant to this section may be varied or rescinded by the Supreme Court on the basis of circumstances occurring after the time the order was made.³

When the court is making an order for *alimony* the court must take into account "the means and needs" of each of the spouses⁴ and in making an order for *maintenance* for a spouse shall have regard to "the conduct of the parties and the condition, means and other circumstances" of each spouse.⁵ Similar circumstances must be taken into account when the court is making a final order for maintenance of a child.

Under the Divorce Act either spouse may be ordered to pay alimony or maintenance to the other and to pay maintenance to children of the marriage. The court may impose such "terms, conditions or restrictions as the court thinks fit and just"⁶ and may order the maintenance or alimony to be paid to a trustee.⁷

Where a decree is sought on the ground of permanent breakdown of the marriage by reason of the petitioner's desertion or the fact that the spouses have otherwise lived separate and apart for three years, the court may refuse to grant the decree if this would prejudicially affect the making of reasonable maintenance arrangements between the spouses.⁸ Similarly a court may refuse to grant the decree where the petition is based upon the ground of permanent breakdown of the marriage if the granting of the decree would prejudicially affect the making

¹R.S.C. 1970, c. D-8.

²Ibid., s. 2(b).

³Ibid., s. 11 (2); Ireland v. Ireland (1969), 70 W.W.R. 1 (Sask. Q.B.).

⁴Ibid., s. 10 (a); Moshenko v. Moshenko (1969), 70 W.W.R. 762 (Man. Q.B.). The Court can grant ancillary relief (maintenance for spouse and children) only where the decree *nisi* is granted.. Evans v. Evans and Robinson (1969), 70 W.W.R. 153 (B.C. Sup. Ct.).

⁵R.S.C. 1970 c. D-8, s. 11 (1). Misconduct of a spouse is no bar to a maintenance award in that spouse's favour, Knight v. Knight (1969), 68 W.W.R. 464 (B.C. Sup. Ct.). Ibid., s. 12 (b).

⁷Ibid., s. 12 (a). The divorce decree should spell out all relevant terms, Burkett v. Burkett (1969), 71 W.W.R. 479 (B.C. Sup. Ct.).

⁸Ibid., s. 9 (1) (f); Johnstone v. Johnstone, /1969/ 2 O.R. 765 (Ont. High Ct.).

of reasonable arrangements for the maintenance of children of the marriage.¹

Under the Act an order for alimony or maintenance has legal effect throughout Canada² and may be registered in the Supreme Court of another Province.³ When registered the order may be enforced in like manner as an order of that court or in the manner provided by Rules of Court enacted under section 19 (1) (d).

The Act does not expressly confer a power on a Supreme Court to amend an order made elsewhere in Canada when registered in that Court. A power to vary or rescind is, however, expressly conferred on the court which made the order.⁴

In Newfoundland the Judges of the Supreme Court have enacted the following rule:

"29. - (1) Where an order has been made under section 10 or 11 of the Act by the appropriate court of any other province of Canada, the order may be registered in the Province of Newfoundland by filing in the registry a copy of the order certified by the clerk of the court that made it, and when so filed it shall be entered as an order of the Supreme Court of Newfoundland and shall have and be given effect as such."⁵

authority for the enactment of rules by

the Supreme Court on this matter, provides only for the *enforcement* of orders it is doubtful whether the power to vary or rescind is included within the power to enforce. Some authority for this approach is found in *Pasowysty v. Foreman*.⁶ While summary maintenance orders have been varied under the Reciprocal Enforcement of Maintenance Orders legislation in some provinces, the enabling provincial legislation usually provides that "all proceedings may be taken on the order as if it had been an order originally obtained in the court in which it is so registered, and that court may enforce the order accordingly".⁷

¹ Divorce Act, R.S.C. 1970, c. D-8, s. 9 (1)(e).

² Ibid., s. 14.

³ Ibid., s. 15.

⁴ Ibid., s. 11 (2). Where the only change in circumstances has been the husband's taking on a new family, an application to vary will be dismissed, *Ireland v. Ireland* (1969), 70 W.W.R. 1 (Sask. Q.B.).

⁵ Divorce Rules, 1969, promulgated January 8, 1969.

⁶ (1969), 69 W.W.R. 99 (B.C. Sup. Ct.).

⁷ Ibid., 106, quoting Manitoba's Maintenance Orders (Facilities for Enforcement) Act, R.S.M. 1954, c. 151, s. 3 (1) (which Act was repealed by Stats. Man. 1961, c. 36).

A Private Member's Bill introduced into the Canadian House of Common in 1970 would confer a power to vary or rescind a registered order in the court of the province in which the spouse in whose favour the order was made now resides.¹ This legislation, if enacted, would provide adequate relief to a spouse or children.

It is not clear whether the power of the Supreme Court to award maintenance expires at the time of granting the decree *nisi*. There is some judicial authority indicating this may be the result under section 11 of the Divorce Act.² This would not prevent a court in Newfoundland from ordering maintenance for the children of the spouses under provincial statute but such statutes may not now give a divorced wife any status to initiate maintenance proceedings after the decree absolute has been granted, since she no longer is a "wife". The Private Member's Bill³ would also empower the Supreme Court to make an award of maintenance after the decree *nisi* is granted. If the Act is amended as proposed, a "divorced spouse" will be able to initiate maintenance proceedings and for that reason no amendment to provincial laws is recommended at this time.

Rule 29(1) of the Divorce Rules, 1969 (Newfoundland) now provides for the registration and enforcement of orders made "by the appropriate court of any other Province of Canada". The rule does not include ancillary orders made in the Yukon and in the Northwest Territories. This Study will recommend that Rule 29(1) be amended to include orders granted by any other appropriate court in Canada.

Under section 11, a court may require a spouse to pay maintenance to the other spouse and children of the marriage by lump sum or periodic payments or both⁴ and may also order that spouse to "secure" the payment of maintenance. An order to provide security does not enable the court to order a conveyance of a spouse's property⁵ although realizing against the security where a default occurs in payment of maintenance may affect a spouse's proprietary interest.⁶

While the Act does not authorize the enactment of rules by the Supreme Court to provide for property settlements, such rules could be enacted were authority to

be conferred
by provincial
legislation.

1 See Bill C-181, 28th Parl't., 2nd. Sess; now Bill C-69, 28th Parl't., 3rd Sess.

2

3 legislation would be

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6

Todd v. Todd (1969), 5 (3d) 92 (B.C. S'up. Ct., per Tyrwhitt-Drake, Co. Ct. J.).

Bill C-181, 28th. Parl't., 2nd. Sess.

Kumpas v. Kumpas (1969), 71 W.W.R. 317 (Man. C.A.).

Auld v. Auld, /1961/ O.W.N. 62 (Ont. C.A.).

Power on Divorce (2nd ed., 1964), pp. 523-524; Switzer v. Switzer (1969), 70 W.W.R. 161 (Alta. Sup. Ct., App. Div.); Ceicko v. Ceicko (1969), 69 W.W.R. 52 (Man. Q.B.).

valid since it pertains to "Property and Civil Rights". In Ontario, The Matrimonial Causes Act¹ enables the Supreme Court to vary the terms of a marriage settlement and to order a settlement of property² as a matter incidental to divorce proceedings. Such legislation does not conflict with, but complements, the provisions of sections 10 and 11 of the Divorce Act. The application of such legislation, however, indirectly affects the amount of maintenance a court is likely to award since it affects the value of the property retained by a spouse and that spouse's ability to provide maintenance from income. It also affects the relative ability and duty of each spouse to provide maintenance for children of the marriage.

Recommendation 2(a) of chapter VI³ provides that a judge should have the power to order a settlement of a balancing claim where the marriage is dissolved by divorce. A settlement of this nature, in order to permit an equitable determination of the relative obligation of each spouse to provide maintenance, should be processed at the same time as the divorce proceeding. Rule 7 of the Divorce Rules, 1969, (Newfoundland) however, now provides that no cause of action other than one for corollary relief under sections 10 and 11 of the Divorce Act can be included in a petition for divorce. This Study will recommend that rule 7 be amended to permit a determination of all matters Pertaining to the interest of each spouse in the other's property in the disposition of a petition for a divorce in a manner consistent with Recommendation 2(a) of chapter VI.

1 R.S.O. 1960, c. 232, s. 4.

3 *Infra*, chapter VI, p. 281.

B. THE MAINTENANCE ACT

BACKGROUND

At Common Law, a wife had no right of action against her husband for her support, nor did the children of the marriage have any legal recourse for their maintenance against the father.

A husband's credit could be used by the wife to purchase necessities for herself and the children, if she could find a merchant who was willing to supply such necessities and risk collection of the cost of them from the husband. As a father, he could be convicted of manslaughter upon proof of criminal neglect of his children causing their death.

Beginning with the Poor Law of 1601 in England, relief was afforded wives and children in need of maintenance. The Poor Law of that year provided, essentially, that "the father and grandfather, mother and grandmother, and child, of every poor, old, blind, lame and impotent person, or other poor person not able to work /was/ liable to maintain such a person at a rate to be determined by the justices."¹ This provision was incorporated in The Poor Law Amendment Act 1834, the foundation of the nineteenth century Poor Law.

In the same year, the second session of Newfoundland's first law-making assembly (under Representative Government) enacted deserted wives' and children's maintenance legislation², vesting in the wives of absconding husbands and the children of absconding mothers and fathers, the right to sue the absconder for support.

Persons against whom an order for maintenance was made under the Act who failed to comply with the order, or to provide security for performance of the order as requested by the Justices of the Peace hearing the case, could be imprisoned for not more than one month on a diet of bread and water?

Where husbands neglected to work for their families or dissipated their earnings "in Ale Houses, Taverns, or in any other wasteful and improper manner . . .", they could be committed to hard labour on the public roads for not more than fourteen days.⁴

¹Report of the Committee on Statutory Maintenance Limits, Cmd. 3587, April 1968, App. B., p. 84.

²"An Act to afford Relief to Wives and Children, Deserted by their Husbands and Parents", Stats. Nfld. 1834 (2nd sess.), c. 8, expired circa 1839; revived, Stats. Nfld. 1841, c.7; continued in force, Stats. Nfld. 1846, c. 11, Stats. Nfld. 1852, c. 18, expired circa 1856; replaced by Stats. Nfld. 1865, c.6, s.17.

³Ibid., s. 1.

⁴Ibid., s. 2.

The operation of the 1834 legislation expired about 1856 and two years later the Newfoundland legislature (under Responsible Government) passed "AN ACT to afford relief to Wives and Children deserted by their Husbands and Parents"¹.

One feature of this Act was a procedure for attaching wages of a deserting husband or father. The Justice presiding over a maintenance proceeding was authorized to summon and examine the employer of the deserting husband or father to ascertain the terms of the deserting person's employment, including his wages, and to order the employer to pay wages due or growing due, to the wife and children of the deserting persons.²

In 1865, this Act was repealed³ and identical provisions respecting maintenance of deserted wives and children, and in addition, for maintenance of deserted parents who were aged or infirm, were enacted.⁴

In the Consolidated Statutes of Newfoundland, 1872 (2nd series)⁵ these provisions appeared in a separate Act entitled: "Of Deserted Wives and Children". In the Consolidation of 1916 (3rd series) these provisions appeared in an Act entitled: "Of Deserted Wives, Children and Parents".⁶ This Act was repealed in 1931⁷ and deserted wives and children provisions were included in sections 571-581 (inclusive) of The Health and Public Welfare Act, 1931⁸.

Statutory provisions for maintenance of deserted wives and children, and of parents, were completely revised in 1952, resulting in The Maintenance Act, 1952⁹, which has since then remained in force without amendment.

NEWFOUNDLAND LEGISLATION

The purpose of The Maintenance Act is to provide a simple, inexpensive and efficient method whereby dependent parents, deserted wives and deserted children may obtain and enforce a court order requiring a child, husband or parent to make periodic payments for their maintenance and support. A review of the present Act and recommended changes are outlined below.

¹Stats. Nfld. 1858, c. 8.

²Ibid., ss. 4, 5.

³"An Act to make provision for Wives and Children Deserted by their Husbands and Parents, and for Aged Persons Deserted by their Children", Stats. Nfld. 1865,c.6, s. 17.

⁴Ibid.

⁵Cons. Stats. Nfld. 1872 (2nd series), c. 108.

⁶Cons. Stats. Nfld. 1916 (3rd series), c. 71.

⁷The Health and Public Welfare Act, 1931, Stats. Nfld. 1931, c. 12, s. 709.

⁸Ibid.

⁹Stats. Nfld. 1952, No. 19; now: R.S.N. 1952, c. 65.

JURISDICTION AND PROCEDURE GENERALLY

The Family Court at St. John's and Magistrates' Courts elsewhere in Newfoundland have jurisdiction to hear maintenance applications brought under The Maintenance Act.¹ Appeals from orders made under this Act are to the Supreme Court of Newfoundland.²

A maintenance application may be commenced upon a complaint by a dependent parent, or deserted wife or child, or by an "officer" as defined by the Act³, on their behalf. When a complaint is received by the "judge"⁴, he may issue a summons requiring the child, husband or parent to show cause why a maintenance order should not be made against him.⁵

The procedure under The Maintenance Act is relatively informal. For example, actions may be heard in private⁶ and husbands and wives are competent and compellable witnesses for and against each other.⁷ In an action under this Act, the onus of proof of lawful or reasonable excuse is on the person pleading it.⁸ There is no limitation on the time in which an action may be commenced.

Service of process is the same as under The Summary Jurisdiction Act,⁹ unless the judge directs otherwise¹, and substituted service is provided for¹².

Where expenses are incurred in serving process under, "or in carrying out any of the provisions of", the Act, if a complainant is unable to meet the expenses, they are paid out of funds provided by the Legislature¹³.

The judge has authority to order payment of a counsel fee not exceeding fifty dollars.¹⁴ The Study considers that this payment of fifty dollars may be inadequate for the reasons outlined in part C: Children of Unmarried Parents¹⁵ and will recommend that the scale of fees proposed for affiliation proceedings also apply to maintenance applications.

APPLICATION BY OR ON BEHALF OF PARENT

The Maintenance Act provides that every son and daughter is liable for the support of a "dependent" parent which "means a parent, grandparent, step-parent, foster parent, and parent by adoption who is destitute or who by reason

¹ R.S.N. 1952, c. 65, s. 2 (D).

² Ibid., s. 26.

³ Ibid., s. 2 (g).

⁴ Ibid., s. 2 (o).

⁵ Ibid., s. 4.

⁶ Ibid., s. 17.

⁷ Ibid., s. 19.

⁸ Ibid., s. 23.

⁹ Ibid., s. 18.

¹⁰ Ibid., s. 21 (1).

of age, disease, infirmity or other cause is unable to maintain himself'.¹ The Act also provides that an order may be made respecting parental support even though the parent is being cared for by another or in any home, sanatorium or other eleemosynary home.²

A complaint of non-support may be made by or on behalf of the dependent parent and the judge may issue a summons ordering the son(s) or daughter(s) to show cause why he or she should not support the dependent parent. "Son" and "daughter" include a grandchild, step-child, foster child and adoptive child except where in the opinion of the judge any such child does not owe the dependent parent an obligation of gratitude for nurture, care or affection³. If a son or daughter fails to answer the summons, an order may be made in his or her absence.⁴

DISCUSSION

At Common Law a person was under no legal obligation to support his parents regardless of the parents' circumstances. Similarly, minor children were not under a duty to support parents even though they may have had estates in their own right, and their own incomes may have exceeded those of their parents. The modification of the Common Law rules by statute in many jurisdictions is a

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carryover from the Elizabethan Poor Law⁵ which imposed a duty of maintaining a needy person upon his parents, children and grandparents. The classes of persons required to support dependent parents in Newfoundland, as noted above, are even broader than they were in early English law. The statutory extension of responsibility for support is based on the theory that, as between the state and members of the family, the latter should be primarily responsible for the care and maintenance of a needy person if they have sufficient means to provide for him. In Newfoundland there are a number of statutes which provide for support of needy persons by their children. The Study therefore submits that it may no longer be desirable to compel persons, by court process, to maintain their indigent relatives and will therefore recommend that sections 3 and 4 of The Maintenance Act be repealed.

APPLICATION BY OR ON BEHALF OF A CHILD

A person who, having care and custody of a child, deserts and wilfully refuses or neglects to maintain the child, may be ordered to pay to the person named in the order, such periodical sums for the support of the child as the

¹ R.S.N. 1952, c. 65, s. 2 (c).

² Ibid., s. 4 (4).

³ Ibid., s. 2 (i).

⁴ Ibid., s. 4 (2).

⁵ Stats. U.K. 1601, c. 2.

court may prescribe.¹ The order may be made on behalf of the child in the absence of the person summoned.²

A child is "deserted" within the meaning of the Act when (1) he or she is actually or apparently under the age of seventeen years (including a child under twenty-one years who, because of physical or mental disability, is unable to provide himself with adequate food or other necessities), and (2) the parent has-, without reasonable excuse, failed to provide him with reasonable maintenance. A child may also be "deserted" within the meaning of the Act if (3) he has left or has been removed from the home of the parent because of neglect by, or misconduct or acts of cruelty of, the parent.³

The Study's position, reiterated in chapter VIII - Family Courts⁴, is that in cases where the support of a deserted child is in issue, the related questions of child custody and access should be decided at the same time.

APPLICATION BY OR ON BEHALF OF THE WIFE

A wife may apply to the court for an order if she has been deserted by her husband.⁵ A wife is deemed to have been "deserted" by her husband when she is living apart from him (1) because of his assaults or other acts of cruelty towards her or their children; or (2) because of his refusal or neglect, without reasonable excuse, to supply her or their children, if any, with adequate food, clothing or other necessities when able to do so, or (3) because he has been guilty of uncondoned adultery, or (4) is frequently intoxicated to the extent that he is rendered incapable of managing his own affairs.⁶

The nature of the cruelty required to support a complaint under the Act is such conduct as creates danger to life, limb or health, or any course of conduct which in the opinion of the court is grossly insulting and intolerable or is of such a character without proof of actual personal violence that the wife or children seeking maintenance could not reasonably be expected to be willing to live with the husband or parent after he had been guilty of the same.⁷

Where a husband has neglected or refused, without sufficient cause, to

1 R.S.N. 1952, c. 65, s. 5 (2).

2 Ibid., s. 5 (2).

3 Ibid., s. 2 (d).

4 Infra, chapter VIII, p. 359.

5 The fact a husband has left his wife is not sufficient to constitute desertion, *Auchinvole v. Auchinvole* (1949), 3 D.L.R; 332 (B.C.C.A.); the wife must have been deserted within the meaning of The Maintenance Act, R.S.N. 1952, c. 65, s. 2 (e).

6 R.S.N. 1952, c. 65, s. 2 (e).

7 Ibid., s. 2 (a).

make adequate provision for the maintenance of his wife, being able to do so, the wife may be held to be deserted within the meaning of the Act even though she and her husband may continue to reside under the same roof. The test seems to be whether or not the parties to the marriage are leading separate lives notwithstanding their residence in the same house.¹

The judge cannot make an order in favour of a wife where there is proof of her adultery unless the adultery has been condoned.² The judge may rescind an order for maintenance if it has been established to his satisfaction that a wife has committed adultery which has not been condoned³. after the order has been made. Even if a wife is denied maintenance by reason of her adultery, a judge, upon application of the wife, or of any other person entitled to make an application, may order the husband to make payments, to any person who has care and custody of his children at the time, for their maintenance.⁴

A wife may also be denied an order for her support under section 8 of the Act where she and her spouse "have⁵ separated by mutual agreement and the wife has agreed in writing to release her husband from liability for her support and maintenance, . . .".⁶

However, this provision does not apply where:

- (1) in a separation agreement the husband has agreed to contribute to the support and maintenance of his wife and is in default under the agreement;⁷ or
- (2) in a separation agreement the husband has not provided suitably therein according to his circumstances for the support and maintenance of his wife;⁸ or
- () the wife has become or is likely to become a public charge or in need of public assistance; and
- (' the wife establishes to the satisfaction of the kidge that she is a deserted wife within the meaning of the Act¹⁰.

¹J.B. v. A.W.B. (1958), 13 D.L.R. (2d) 218 (Ont. C.A.). 3 R.S.N. 1952, c. 65, s. 7 (1).

⁴ Ibid., s. 7 (2).

⁵ Ibid., s. 7 (4).

The word "have" appears twice in succession in s. 8 (1).

⁶ R.S.N. 1952, c. 65, s. 8 (1).

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ibid., s. 8 (2) (a).

⁸ Ibid.,

s. 8 (2) (b).

⁹ Ibid.,

s. 8 (2) (c); see Williams v. Williams (1958), 13 D.L.R. (2d) 139 (Ont. Co. Ct.).

¹⁰ Ibid.,

s. 2 (e).

The Act also provides that if a wife, in her own right, is possessed of separate property of sufficient value to maintain herself and the children, then no order shall be made in excess of one-half of the amount necessary for the maintenance of the children.¹ Where both parents are possessed of means sufficient for the maintenance of their children, their obligation to support is equal.²

OTHER PROVISIONS FOR PROTECTION OF DESERTED SPOUSES OR CHILDREN

Where a judge is satisfied that there is good and probable cause for believing that a person complained against under the Act is about to leave the jurisdiction or dispose of his property to avoid his family support obligations, he may, even before a summons is issued, issue a warrant for the arrest of the person. The judge may then hold the person in custody pending disposition of the maintenance application, or alternatively, may require the person to give security with or without surety for a sum determined by the judge.³

The Act provides that where a complaint has been laid and the spouse or parent fails to appear to answer to the summons, the court may proceed to hear the complaint in his absence and, if satisfied of the justice of the complaint and that the person complained against resides in the jurisdiction, may make an order that might have been made if such person had appeared to answer the complaint.⁴

The Act provides also that after a complaint has been made a husband may be ordered to stay away from the residence of his estranged wife if the judge considers it reasonable under the circumstances.⁵ Failure to comply with this order is a summary conviction offence punishable by fine in the amount of one hundred dollars and in default, imprisonment for not more than three months.⁶

A complaint may also be laid by any person that the husband is dissipating his property to such an extent as to expose his wife and children to hardship or destitution.⁷ Upon proof of the complaint, the judge may make an order for maintenance of the wife and children even if the summoned husband is absent.

The Act further provides that certain dispositions of property are void

R.S.N. 1952, c. 65, s. 6 (3).

¹ Ibid., s. 6 (4).

² Ibid., s. 14.

³ Ibid., s. 6 (2); see: *Skinner v. Skinner* (1953), 31 M.P.R. 113 (Nfld. Sup. Ct.).

⁴ R.S.N. 1952, c. 65, s. 9 (1).

⁵ Ibid., s. 9 (2).

⁶ Ibid., s. 10 (1).

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if the object of such dispositions is to avoid the Act, but *bona fide* purchasers for value are protected if they were unaware of this intent.'

Where the court is satisfied that the circumstances of any of the parties have changed since the making of the order or that evidence has become available which was not available upon the previous hearing, it may direct a rehearing of the application and upon such rehearing may confirm, vary or rescind any order previously made.²

ENFORCEMENT OF ORDERS

This subject is considered in part E³.

SOME ASPECTS OF ENGLISH MAINTENANCE LEGISLATION

There has been considerable progress in English maintenance legislation in the last twenty years or so. Some aspects of the English law are outlined below as a basis for comparison with and the recommendation of amendments to, the Newfoundland Act.

COURTS

Magistrates' courts in England have jurisdiction in most matrimonial proceedings. They are staffed with probation officers who attempt to effect reconciliations wherever possible. The procedure in these courts is inexpensive and efficient and well suited to protection of the interests of persons in the lower economic strata.

The principal English statute dealing with matrimonial proceedings is the Matrimonial Proceedings (Magistrates' Courts) Act, 1960. Briefly, that Act extends the jurisdiction of magistrates' courts in making orders for custody and maintenance of children and confers a limited jurisdiction upon the magistrates' courts to order the wife to contribute to the maintenance of her husband.

GROUND'S FOR MAINTENANCE APPLICATION

(1) By Either Spouse⁵

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² R.S.N. 1952, c. 65, s. 25.

³ Ibid., s. 15.

⁴ Infra, pp. 148-160.

⁵ Stats. U.K. 1960, c. 48.

⁵ An application for a maintenance order must be made by a spouse. In certain cases third parties may apply to revoke, revive, or vary an order: Ibid., s. 10 (1).

Either spouse may apply to the magistrates' court for an order on the ground that the defendant spouse:

- (a) has deserted the complainant¹;
- (b) has been guilty of persistent cruelty² to
 - (i) the complainant; or
 - (ii) an infant child of the complainant; or
 - (iii) an infant child of the defendant who, at the time of the cruelty, was a child of the family³;
- (c) has been found guilty
 - (1) on indictment, of any offence which involved an assault⁴ upon the complainant; or

by a magistrates' court, of an offence against the complainant under sections 20, 42, 43 or 47 of the Offences Against the Person Act, 1861, being, in the case of the said section 42, an offence for which the defendant has been sentenced to imprisonment or any other form of detention for a term of not less than one month; or

of, or of an attempt to commit, an offence under any of sections 1 - 29 of the Sexual Offences Act, 1956⁶ or under section 1 of the Indecency with Children Act, 1960⁷ against an infant child of the complainant, or against an infant child of the defendant who, at

Stats. U.K. 1960, c. 48, s. 1 (1) (a). "Desertion" in the Act must be continuing at the time of the application to the magistrates' court: see *Hall v. Hall*, [1962] 1 W.L.R. 478 (Leeds Assizes).

² The offence of persistent cruelty under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 requires proof of a course of cruel conduct continued over a period of time. A single isolated act of cruelty is insufficient to constitute the offence.

³ Stats. U.K. 1960, c. 48, s. 1 (1) (b). "Child of the Family" in relation to the parties to a marriage, means any child of both parties and any other child of either party who has been accepted as one of the family by the other party, *Ibid.*, s. 16 (1).

⁴ See *supra*, fn. 2; the same principle applies to assaults.

⁵ Stats. U.K. 1861, c. 100; section 20 relates to wounding or inflicting grievous bodily harm; section 42 relates to common assault; section 43 relates to aggravated assault and section 47 to assault occasioning actual bodily harm.

⁶ Stats. U.K. 1956, c. 69.

⁷ Stats. U.K. 1960, c. 33.

the time of the commission of or the attempt to commit the offence, was a child of the family';

has committed adultery², or

while knowingly suffering from a venereal disease³ has insisted on^o or has without the complainant being aware of that disease, permitted sexual intercourse between the complainant and the defendant⁵; or

(1) is for the time being an habitual drunkard or a drug addict⁶.

(2) By Wife Alone

A wife may apply to the magistrates' court for an order on the ground that the husband has:

- (^g) compelled the wife to submit herself to prostitution or been guilty of such conduct as was likely to result and has resulted in the wife's submitting herself to prostitution⁷ or

Stats. U.K. 1960, c. 48, s. 1 (1) (c).

¹ Ibid., s. 1 (1) (d). See: Adultery by dependant spouse. The court cannot make an order in respect of the complainant spouse unless it is satisfied that the complainant has not condoned, connived at, or by wilful neglect or misconduct conducted to, the act or acts of adultery complained of (s. 2 (3) (a)). The court may, however, make an order in respect of the custody and maintenance of the children of the family notwithstanding such conduct on the part of the complainant spouse (s. 2 (3)); Adultery by complainant spouse. The commission of adultery by the complainant spouse bars the court from making any order in respect of the complainant unless the dependant spouse has condoned, connived at, or by wilful neglect or misconduct conducted to, such adultery (s. 2 (3) (b)).

Stats. U.K. 1960, c. 48, s. (1) (e). The complainant spouse may obtain an order from the magistrates' court on the ground that the dependant spouse, being aware that he or she was suffering from a venereal disease, has insisted on or permitted sexual intercourse without disclosing the presence of the disease.

The term "insisted" is considered to mean something less than physical compulsion. Stats.

⁴ U.K. 1960, c. 48, s. 1 (1) (e).

⁶ Ibid., s. 1 (1) (f). An "habitual drunkard" or "drug addict" is a person (not being a mentally disordered person within the meaning of the Mental Health Act, Stats. U.K. 1959, c. 72) who, by reason of habitual intemperate drinking of intoxicating liquor, or of habitual taking or using, otherwise than upon medical advice, of any drug to which any of the provisions of the Dangerous Drugs Act, Stats. U.K. 1951, c. 48, for the time being applies; (a) is at times dangerous to himself or his affairs; or (b) so conducts himself that it would not be reasonable to expect a spouse of ordinary sensibilities to continue to cohabit with him, Ibid., s. 16 (1).

Ibid., s. 1 (1) (g).

- (h) wilfully neglected to provide reasonable maintenance ¹ for the wife or for any child of the family who is, or would but for that neglect have been, a dependant

(3) By Husband Atone

A husband may apply to the magistrates' court for an order on the ground that the wife has wilfully neglected to provide, or to make a proper contribution towards, reasonable maintenance for the husband or for any child of the family who is, or would but for that neglect have been, a dependant, in a case where, by reason of the impairment of the husband's earning capacity through age, illness, or disability of mind or body, and having regard to any resources of the husband and the wife respectively which are, or should properly be made, available for the purpose, it is reasonable in all the circumstances to expect the wife so to provide or contribute.³

LIMITATION

A complaint for an order under section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 described earlier, must be made within six months of the date when the basis for the complaint occurred. Desertion, wilful neglect to maintain, habitual drunkenness and drug addiction are continuing offences and the statutory limitation does not preclude a complaint in respect of any such offence even though it has been committed for more than six months prior to the commencement of the proceedings. In a case of persistent cruelty it is only necessary that one act of cruelty be committed within the limitation period. The limitation period in adultery runs from the time when the complainant had knowledge.

TYPE OF ORDER

The magistrates' court to which the application for relief is made may make an order containing any or all of the following provisions:-

(1) A provision that the spouses shall no longer be bound to cohabit. This in fact amounts to a judicial separation, and is therefore subject to the absolute discretion of the magistrate;

- 1 Proof of actual misconduct is necessary to establish wilful neglect to maintain. Where a husband has wilfully neglected to maintain the children of the family, the wife may apply for an order in respect of their maintenance notwithstanding that her personal right to maintenance has been forfeited by reason of her own misconduct.
- 2 Stats. U.K. 1960, c. 48, s. 1 (1) (h).
- 3 Ibid., s. 1 (1) (i).

- (2) A provision that a husband shall pay to his wife (or vice versa) weekly, an amount determined by the court with reference to the circumstances, up to a maximum amount specified by the Act;
- (3) Where, on the wife's (husband's) complaint, a separation order is made on the grounds of the husband's (wife's) drug or alcohol addiction the wife (husband) may be required to pay a weekly sum as described in (2);
- (4) A provision for legal custody of any child of the family who is under the age of sixteen years;¹
- (5) In exceptional circumstances, a provision awarding custody of any such child to a third party, except where there is a subsisting order respecting custody;
- (6) A provision, in exceptional circumstances, placing a child under the supervision of a person who does not have custody (e.g. a probation officer);
- (7) A provision respecting access to a child;
- (8) A provision requiring either or both spouses to contribute to the maintenance of a "dependant", dependant being defined as a person:-
 - (a) who is under the age of sixteen years; or
 - (b) who, having attained the age of sixteen years, but not twenty-one years, is receiving full time instruction at an educational establishment or undergoing training for a trade, profession or vocation in such circumstances that he is required to devote the whole of his time to that training for a period of not less than two years; or
 - (c) whose earning capacity is impaired through illness or disability of mind or body and who has not yet attained the age of twenty-one years;
- (9) A provision for payment of costs.

¹ Newfoundland's family/magistrates' courts do not have jurisdiction to hear custody (or access) matters.

DEFINITION OF CHILDREN:

POWERS AND DUTIES RESPECTING CHILDREN

The magistrates' powers and duties extend to every "child of the family", which expression includes any child, whether legitimate, illegitimate or adopted, of both spouses, or any child, whether illegitimate or adopted, of one spouse who has been accepted as one of the family by the other spouse.

Where the court has begun to hear any application for a matrimonial order under section 1 of the Matrimonial Proceedings (Magistrates' Courts) Act, 1960, then, irrespective of whether or not it makes an order for the complainant spouse's support, the court must consider what order, if any, should be made with respect to children of the family. In determining this question, the court gives each party to the proceedings an opportunity to make representations. The court may ask a probation officer or children's officer to prepare a report on the child. This report is read in court and the parties to the proceedings have an opportunity to object to any of the contents. If an objection is raised, the spouses may support their objection by introducing evidence. It is noted that communications by spouses to or in the presence of a probation officer in reconciliation proceedings may not be included in a report without consent of the spouses.

The court is not precluded from making an order respecting a child by reason of the fact that the complainant spouse has committed adultery.¹ Nor is the court bound to discharge such an order if the complainant spouse subsequently commits adultery.²

COURT ORDERS

The magistrates' court may refuse to make a matrimonial order where it is of the opinion that the matters in issue between the parties would be more conveniently dealt with in the High Court, but if the High Court so orders in any proceedings relating to such matters, the complaint shall be re-heard and determined by the magistrates' court.³

To avoid hardship, interim orders may be made if the magistrates' court adjourns the hearing for more than one week or refuses to make an order on the

¹Stats. U.K. 1960, c. 48, s. 2 (3).

³ Ibid., s. 8 (2).

Ibid., s. 5. In *Sanders v. Sanders*, [1952] 2 All E.R. 767ff. the court pointed out that the magistrates' court should refuse to make an order where one of the spouses has already commenced, or is about to commence, substantially similar proceedings in the High Court.

ground that the issues may be more conveniently dealt with by the High Court.' This order may be directed by the High Court to cease on a date it specifies .²

The magistrates' court may also make a final or interim matrimonial order while the spouses are cohabiting. Such an order would be operative when cohabitation ceased.³ However, if the cohabitation continues for three months after the making of a final order, the order ceases to have effect and cannot come into force even though the spouses subsequently separate.⁴ The court may still make an order respecting custody of and access to children even while the spouses continue to cohabit.⁵

The magistrates' court has a general discretionary power, upon application, to revoke, vary or revive a matrimonial order.⁶ The complainant has only to satisfy the court that it was not reasonably possible for him to adduce earlier 'the evidence on which he relies.

The court must revoke a matrimonial order where the basis of the complaint is that the parties have resumed cohabitation, but provisions as to children do not have to be revoked.⁷ An order must also be revoked, on application, where the basis is that the party on whose complaint the order was made has during the subsistence of the marriage committed adultery which has not been condoned.⁸

The jurisdiction to revoke, vary or revive an order is exercisable notwithstanding that the proceedings are brought by or against a person residing outside England. However, a matrimonial order cannot be varied by way of adding a non-cohabitation clause if the defendant resides outside England.⁹ Furthermore, the court may not vary an order so as to require a person residing outside England to pay amounts exceeding the original order unless he is present or the court is satisfied that there has been service of the summons on him or that he has offered on a previous occasion to answer the complaint.¹⁰

CONCLUSIONS

(1) Family Counselling and Conciliation Procedures

¹ Stats. U.K. 1960, c. 48, s. 6 (1).

² Ibid., s. 7 (3).

³ Ibid., s. 7 (1) (a). In *Thomas v. Thomas*, [1948] 2 K.B. 294, the court held that cohabitation was not to be identified with mere residence of both spouses under the same roof. Ibid., s.

⁴ 7 (1) (b).

⁵ Ibid., s. 7 (1).

⁶ Ibid., s. 8 (1).

⁷ Ibid., s. 8 (2).

⁸ Ibid.

⁹ Ibid., s. 9 (1).

¹⁰ Ibid., s. 9 (5).

The Maintenance Act is concerned with the consequences rather than the causes of desertion. The operation of the Act is confined to determining and enforcing the financial obligations of the husband of a "deserted wife". The Act provides no machinery to discourage the taking of maintenance applications or to adjourn maintenance hearings in progress, in order to allow the spouses to reconcile their differences.

The Study considers that the incidence of desertion under the Act may be reduced, through provision of family counselling services attached to family and magistrates' courts, as in England, to promote reconciliation as an alternative to bitter, recriminatory, maintenance proceedings.

In a later chapter, the Study reports that "early symptoms of marital or family disquiet might include the laying of a complaint by a wife against her delinquent husband/in a family or magistrates' court/alleging that he had failed to support, . . . his family".¹ Early detection and treatment of marital disharmony could be achieved by magistrates' and family court counselling facilities.

The Study will recommend the amendment of The Maintenance Act to provide that whenever a complaint is laid under the Act, and before a summons is issued, counselling facilities should be made available to the spouses involved. A judge hearing a complaint under the Act should be empowered to adjourn the proceeding, where he feels there is a reasonable prospect of reconciliation, for a single period not exceeding thirty days.

Successful counselling will benefit not only the particular spouses, but also the community. Often, a husband is incapable of providing support for the two households resulting from a broken marriage, and thus his wife and children often rely on social assistance for part, or all, of their maintenance.

(2) Legal Aid

Since matrimonial proceedings are frequently charged with emotion, determination of the facts may be difficult where the spouses personally present their cases, and the conduct of the proceedings becomes an unduly onerous burden on the presiding judge'. In such proceedings, pre-trial consultation and accurate, expeditious presentation of evidence is important, as the family and magistrates' courts are extremely busy. However, many "deserted wives", and in some instances, their spouses, cannot afford to retain legal counsel. The program of The Legal Aid Committee of the Law Society of Newfoundland, which already encompasses a wide spectrum of civil and criminal proceedings, does not provide free legal assistance to parties to maintenance applications (which represent a substantial portion of litigation in the St. John's Family Court and in

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Infra, chapter XI, p. 440.

Magistrates' Courts elsewhere in the province).

The Study will therefore recommend that the provincial government maintain a legal aid fund for payment of fees and disbursements of counsel acting for indigent spouses in proceedings under The Maintenance Act. The scale of fees could be identical to that proposed for affiliation applications.)

(3) Grounds for Relief

At present, an order for maintenance of deserted children and wives may only be obtained on proof of one of the matrimonial offences outlined in section 2 of The Maintenance Act.

While not proposing to extend the grounds for making application for a maintenance order, the Study considers that one of the existing bases for complaining under the Act, namely, the assaults or other acts of cruelty of a husband towards his wife and children, should be revised.

Under the Act, "acts of cruelty" may be established by proof *inter alia*, of conduct creating a danger to life, limb or health. Cruelty may also be established upon sufficient evidence of conduct of such a character - without proof of actual personal violence - that a wife and children could not reasonably be expected to live with the husband. The definition of "acts of cruelty" should be broadened to include apprehended injury to *health* without proof thereof.

Section 2 (e) of the Act, literally interpreted, requires *inter alia* that a "deserted wife" be "living apart from her husband". However, a wife and her children who have an otherwise valid claim for support, frequently do not have the wherewithal to move away from the place where they have been residing with the delinquent husband and father. The Newfoundland courts which enforce The Maintenance Act have not always followed the decision of the Ontario Court of Appeal- which held that spouses could be living apart while residing under the same roof. The Study will recommend the deletion from the Act of the requirement that a wife, in order to qualify for maintenance, must *inter alia*, be living apart from her spouse.

(4) R e c i p r o c a l S u p p o r t O b l i g a t i o n s The

Study submits that the legal and economic emancipation of married

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²Infra, pp. 127-128.

J.B. v. A.W.B. (1958), 13 D.L.R. (2d) 218 (Ont. C.A.). Note that where a complaint is laid under s. 10 (1) of the Act, there is no requirement that the wife be living apart from ~~husband~~

women which has taken place during the past century justifies the imposition of reciprocal support obligations upon husband and wife. Similar reciprocal duties of support have been incorporated into corresponding English maintenance legislation, and under the federal Divorce Act (Canada).

(5) Maintenance of Common Law Wife

While a statutory "common law wife" is entitled to receive benefits, as in Newfoundland's Workmen's Compensation legislation¹, the provincial Maintenance Act does not afford her a right to support. Furthermore, affiliation proceedings are rarely brought for support of illegitimate children of a continuing stable common law union and (with a few exceptions) cannot be taken after an illegitimate child's first birthday.

When a common law union breaks down, the woman and any children (over a year old) have no legal recourse in Newfoundland courts for maintenance, and become the financial responsibility of the state.

Manitoba has sought to alleviate this problem by incorporating in the province's Wives' and Children's Maintenance Act the following Provision :

"6. Where

(a) a woman has lived and cohabited with a man for a period of one year or more; and

(b) he is the father of any child born to her;

she or any person on her behalf, may, within one year from her ceasing to live and cohabit with him, make an application/for maintenance/ under sections 4 and 5 in respect to herself and her child for an order/for maintenance/ under sections 13 and 17, and this Act, mutatis mutandis, applies in such a case."

The Study will recommend the amendment of the Newfoundland Act to include a similar provision.

(6) Maintenance of Children

The Newfoundland Maintenance Act, unlike corresponding English legislation, does not give a judge authority to order a husband or father to pay

¹ The Workmen's Compensation (Amendment) Act, 1966-67, Stats. Nfld. 1966-67, No. 58, s. 2 (b).

² R.S.M. 1970, c. W-170.

maintenance to children of the family unless they are his own legitimate children. The Study considers that the definition of "child" in the Newfoundland Act is too restricted and recommends that it be broadened to include any child of both spouses, whether legitimate, illegitimate or adopted by the spouses, and also any child of either spouse, whether legitimate, illegitimate or adopted who has been accepted as a member of the family by the other spouse.

The Study acknowledges that young people are continuing their studies beyond high school in rapidly increasing numbers, though the existing definition of "child" under The Maintenance Act would seem to disentitle most of them to maintenance after the age of seventeen. The Study will recommend that the definition of a "child" under the Act include any child under seventeen year's of age or any child between the ages of seventeen and twenty-one years who is receiving full-time educational, vocational or professional instruction for a period of not less than two years or any child under the age of twenty-one years whose earning capacity is impaired by illness or disability of mind or body. A similar provision is contained in England's Matrimonial Proceedings (Magistrates' Court) Act, 1960.

(7) Interim Orders

Proceedings in courts having jurisdiction under The Maintenance Act are punctuated by adjournments to allow time for attendance of witnesses, to permit one or both parties to obtain legal counsel, because the crowded court docket necessitates the hearing of evidence and argument on a number of days spread over several weeks, or where, at the suggestion of the presiding judge or either spouse, the parties undertake to resolve their marital disputes privately.

When a maintenance proceeding taken under the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (England), is adjourned for more than one week, the presiding judge may, without prejudice to the parties' rights make an interim order for support of the complainant and his or her children.

In Manitoba, section 20 (3) of The Wives' and Children's Maintenance Act¹ provides that where a judge or police magistrate adjourns a maintenance proceeding under the Act, he "may include in the terms of adjournment an order that the husband pay to the wife personally, or for her use to any third person on her behalf, such weekly, bi-weekly, semi-monthly, or monthly sum as /he/ . . . may, having regard to the means of both the husband and wife, consider reasonable".

For the reasons outlined above the Study will recommend the amendment of The Maintenance Act to give a judge a discretionary power to make

1 R.S.M. 1970, c. W-170, s. 20 (3).

such interim order as he considers reasonable having regard to the means of both husband and wife, for a specified period.

(8) Amount of Maintenance Order

Considerable time is occupied in proceedings under The Maintenance Act, by the presiding judge, and legal counsel (where present), in determining the financial means and needs of the spouses. The Study reviewed the pre-trial procedures of a number of jurisdictions in maintenance actions and was particularly impressed by the requirement, in some English magistrates' courts, that the spouses complete a form of the type contained in Appendix D, prior to the court hearing of a maintenance matter.

The Study will recommend that such a form be provided a person taking an action under the Act, at the time he or she lays the complaint, and another copy of the form be served with the summons, on the other spouse. The forms completed by both spouses duly sworn and signed, could be submitted in evidence at the commencement of the court hearing on the maintenance application.

(9) Retroactive Orders

Because of the volume of litigation in magistrates' courts and the St. John's Family Court, and the necessity of locating and effecting personal service on a delinquent spouse of a summons issued pursuant to a wife's complaint under The Maintenance Act, a maintenance application may not be heard for several weeks after a complaint has been made. Between the laying of a complaint and the hearing on the summons, a wife and her children may have to rely on relatives or friends, or the Department of Social Services and Rehabilitation for necessities. The Family Court Judge and stipendiary magistrates in Newfoundland should be vested with discretionary power, where a wife and/or children are found to be deserted under The Maintenance Act and a maintenance order is made, to make such order retroactive to the date on which the complaint was laid.

C. CHILDREN OF UNMARRIED PARENTS

HISTORY OF LEGISLATION

Until 1834 in England, the only legislation affecting children of unmarried parents - sometimes referred to as bastardy law consisted of penal provisions directed against both father and mother of the illegitimate child (the bastard) which sought to discourage illegitimacy and thereby reduce the cost of maintaining such children from public monies.

Despite the views of the Poor Law Inquiry Commission in a Report published in 1834, Parliament decided to relieve tax payers from supporting illegitimate children (as had been provided for in earlier Poor Law legislation), by enacting The Poor Law Amendment Act 1834, which authorized the parish in which the unwed mother of an illegitimate child was residing, to sue for a maintenance order against the child's reputed father, for the child's support up to seven years of age.

Such proceedings proved both expensive and unsatisfactory, and by a further amendment to the Poor Law in 1844, bastardy was taken out of the Poor Law legislation and made a civil matter between parents. The mother of the child was given the power formerly held by the parish to sue the putative father for support.

In Newfoundland, the first bastardy legislation - "An Act to provide for the maintenance of bastard children" - was enacted in 1834¹, and provided *inter alia*, that where an affiliation² order for the illegitimate child's support was made, "the Mother or reputed Father of such Child or Children shall find sufficient security that *the same shall not become chargeable to the Colony*, . . ."³

In 1865, the subjects of bastardy, and deserted wives', children and parents' maintenance legislation, were incorporated in one Act.⁴ The preamble to the legislation stated that "much expense is annually occasioned to the public and much suffering sometimes experienced by those who are . . . abandoned."

Under the Act, a Justice could provide by an order for support of an

¹Stats. Nfld. 1834 (2nd sess.), c. 7.

²"Affiliation": The act of imputing or determining the paternity of a bastard child, and the obligation to maintain it.

³*Ibid.*, s. 2 (italics added).

⁴"The Act to make provision for Wives and Children Deserted by their Husbands and Parents, and for Aged Persons Deserted by their Children", Stats. Nfld. 1865, c. 6, repealing Stats. Nfld. 1834 (2nd sess.), c. 7 et al.

illegitimate child to the age of ten years.' The Act further provided that a payment of \$ 150 by the putative father would relieve him of all obligations under an affiliation order.²

The bastardy provisions of the 1865 legislation were included in a separate Act, entitled "Of Illegitimate Children", in the 1872³ and 1916⁴ consolidations of Newfoundland statutes.

This legislation (as amended)⁵ continued in force in Newfoundland until 1944 and was then repealed by the Welfare of Children Act, 1944⁶, which included new bastardy provisions⁷.

In 1964, bastardy law was thoroughly revised in Newfoundland with the passage of The Children of Unmarried Parents Act, 1964⁸, which also repealed the legislation enacted in 1944.⁹

BACKGROUND

In 1968, the Dominion Bureau of Statistics¹⁰ reported, 32,629 (9.0 per cent) of the 364,310 live births in Canada were illegitimate. One third of the illegitimate children in that year were born to women [eighteen to](#) twenty-one years of age. The province of Quebec had the lowest rate of illegitimate births (7.3 per cent), followed by Newfoundland and Prince Edward Island (7.4 per cent).

The rate of illegitimate births in Newfoundland in 1968 represented 948 of the 12,820 live births, and was the highest rate of illegitimacy ever recorded in the province by the Dominion Bureau of Statistics. In the past thirty years, the lowest illegitimacy rate for Newfoundland (3 per cent) was recorded in 1947.

These statistics do not, however, comprehensively state the extent of illegitimacy in Newfoundland, due to misinformation provided by some unmarried mothers as to their actual marital status for vital statistics records; occasional omissions to report births which do not take place in maternity

Stats. Nfld. 1865, c. 6, s. 5.

Ibid., s. 7.

Cons. Stats. Nfld. 1872, c. 112.

1 Cons. Stats. Nfld. 1916, c. 72.

2 Stats. Nfld. 1921, c. 22 (repealing Cons. Stats. Nfld. 1916, c. 72, s. 3).

3 Stats. Nfld. 1944, No. 57, s. 181.

4 Ibid., ss. 86-130; R.S.N. 1952, c. 60, ss. 88-132.

5 Stats. Nfld. 1964, No. 40.

6 9 Ibid.,

7 s. 49.

8 10 .

Vital Statistics, 1968 (Catalogue No. 84-201, Annual), Table 10.

hospitals, and the practice of unmarried, expectant mothers from Newfoundland going to maternity care facilities elsewhere in Canada and in the United States to give birth and place their children there for adoption. Not do the statistics include stillbirths or abortions among unmarried women.

A variety of explanations have been offered for the increasing rate of illegitimacy, including the influence on the unmarried mother of a deprived childhood environment and the inevitable decay of contemporary family life.

Sociologists attribute the growing rate of illegitimate births to more permissive sexual mores, the decision of fewer couples to marry because the woman is pregnant, the reluctance of both men and women to use contraceptive devices, and the woman's unwillingness to submit to abortion.

They concluded, however, that the same factors, operating in reverse tend to depress the illegitimacy rate.

Evidently, a wide range of factors contributed to recorded illegitimacy statistics, though such records do not accurately reflect the problems created by premarital intimacy.

For example, in 1966 in Australia, reports the Commonwealth Year Book 1968, 27.3 per cent (20,038) of all births (few of them premature) took place to wives within eight months of their "shot gun" marriages, which "are perhaps more likely than other marriages to end in break down." The plight of the wives of many broken marriages is not unlike that of many unmarried mothers.

In contrast, not a few of the 16,541 ex-nuptial births (7.43 per cent of all births in Australia) in 1966 were to mothers living in stable illicit unions.²

In Newfoundland, the Study has concluded from reported and unreported vital statistics and interviews with magistrates, welfare officers and social workers that illegitimacy is a mounting social problem, taking a heavy toll in public and private monies and human suffering.

The total of state (provincial and federal) funds spent in Newfoundland to pay unwed mothers' maternity expenses, to support illegitimate children and their mothers, to finance foster home care, to promote the adoption of the children and to locate putative fathers and obtain affiliation orders against them

¹ Sack-vine, R. and Lanteri, A., "The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis" (1970), 44 Aust. L.J. 5, at p. 7.

² Ibid., p. 6.

(though not reported) is estimated by the Study to be considerable. Large sums of money are also contributed by private charities to church-operated orphanages where some children (both illegitimate children, and legitimate offspring of broken marriages) are raised, and to homes for unmarried mothers.

For the unmarried mother (and her child), the human suffering and financial deprivation cannot be overstated, and is due to a combination of the inadequacy of the statute law (which may be overcome) and the problem of enforcing the law against impoverished and recalcitrant fathers (which may be partially relieved by more efficient enforcement of existing laws). J.P. Wimperis in *The Unmarried Mother and Her Child*¹ writes:

"Even today the English law is based on what Johan Castberg, the Norwegian social reformer, described in 1915 as 'the outrageous and unnatural fiction that the illegitimate child has only a mother'.² Thus, except for a few specific purposes, a natural son has no legal kinship with his father - or with any other child of his mother - and has no legal right of accession or to claim against their estates³ ... Though he may gain a surname by reputation he has none by inheritance.

The /English/ law asks little indeed of the father of an illegitimate child and it enforces less; much less than in many countries. His relationship to the child is at most a monetary one, but even this is limited. No legal obligation rests upon him to do anything for it at all unless the mother takes action against him in a magistrates' court ...

"/During/ the period of the pregnancy ... she can claim nothing from him ... At first glance this may seem right, yet the formidable figures of mortality among illegitimate children compel one to question it. The infant mortality rate among illegitimate children /in England/ is 27 per cent higher than among other children, and a natural child runs a considerably greater risk of dying in the first month of its life. These early deaths, often due to premature births, which is the greatest single cause of loss of life among children, are often associated with poverty, malnutrition, lack of ante-natal care and - another special handicap of the unmarried mother- the need to work too long during pregnancy. In

¹ Wimperis, J.P., *The Unmarried Mother and Her Child*, pp. 122-124.

² See, however, *The Workmen's Compensation Act*, 1962, Stats. Nfld. 1962, No. 32, ss. 2 (i), (9), which provide for payment of benefits to dependent "members of the family" of a workman killed in an accident arising out of and in course of his employment, including the workman's illegitimate children and grandchildren, and if the workman is illegitimate, his parents and grandparents.

³ See, in Newfoundland: *The Intestate Succession Act*, R.S.N. 1952, c. 153, s.15.

the survey of women who bore babies in one month of 1946 . . . the need to return to work was given as the reason for weaning the baby by 28 per cent of the unmarried mothers as compared with only 1 per cent of the manual workers' wives."

However, it is not within the terms of reference (nor the competence) of the Study, in preparing this chapter, to concern itself with the causes and prevention of illegitimacy in Newfoundland, but rather to consider the adequacy and efficiency of machinery for ensuring that the offspring of unmarried mothers are adequately supported and properly raised.

Since 1834, there has been legislation in Newfoundland, affording to unmarried mothers the right to apply to courts of summary jurisdiction in affiliation proceedings for maintenance from putative fathers who have neglected or refused to support their children.

The concern which originally prompted paternity legislation in Newfoundland was the mounting cost to society of the support of illegitimate children. With the increasing social consciousness of the past seventy years, the main emphasis in affiliation proceedings has shifted from the public interest towards the welfare of the child.'

LEGISLATION

Since 1964, The Children of Unmarried Parents Act, 1964 has provided in Newfoundland for affiliation proceedings, which have as their purpose: (1) the determination of paternity (fatherhood) of an illegitimate child and (2) the making of an order obligating the child's father, so determined, to support it.

INTERPRETATION

Under the Act, a "child" means "a child of either sex (i) whose parents are not legally married to each other, or (ii) in respect to the marriage of whose parents reasonable doubts exist; . . ."²(such as where a previous marriage of either parent was not properly dissolved). Before an affiliation order can be made against a putative father, a child must have been born alive, concluded *The King v. DeBrouquens*³ in 1811. Lord Ellenborough, C.J. wrote:

1

See also: The Children of Unmarried Parents Act, 1964, Stats. Nfld. 1964, No. 40, s. 47 (1), which provides, inter alia, that "the magistrate dealing with an affiliation case, having regard to the welfare of the child, may declare the child to be a neglected child, and may order that the child be committed to the care and custody of the Director, ..."

2

3 Stats. Nfld. 1964, No. 40, s. 2(a).
(1811), 104 E.R. 607.

"In order to come under the denomination of a bastard, must not the child be born alive? All the provisions of the several statutes /concerning bastards/ assume the birth of a child, which of course must be born alive."¹

In the same case, Grose, J. remarked: "no dead substance is the object of legislative provisions in any of the Acts."²

The Act defines a "mother" to mean:

"(a) a single woman or widow who

- (i) has been delivered of an illegitimate child or,
- (ii) is pregnant and likely to be delivered of an illegitimate child; or (b)

a married woman who

- (i) is living apart from her husband and has been delivered of an illegitimate child, or
- (ii) is pregnant and likely to be delivered of an illegitimate child and was living apart from her husband at the time of the conception of the child."³

However, this definition does not take into account a woman who was single when she conceived a child but who has married a person other than the putative (alleged or reputed) father of the child before the child's birth or the commencement of affiliation proceedings. Out of justice to her husband (whether or not he was aware of the pregnancy when he married), the Act should be amended to provide for this situation.⁴ Otherwise the husband will have to support the wife's illegitimate child during the marriage (which he may be prepared to do) with the result that he will have a potential liability to continue to maintain the child should the marriage break down.

The definition also fails to consider the support of an illegitimate child born to a woman who is single when she gave birth but who subsequently married a person other than the alleged father. A similar omission from England's bastardy legislation was resolved in 1959 by an amendment providing that a

1 (1811), 104 E.R. 607, 608.

² Ibid.

³

Stats. Nfld. 1964, No. 40, s. 2 (c).

⁴

Such a provision was suggested in *R. v. Pilkington* (1853), 118 E.R. 872.

woman could take an action under the English Act if she "was a single woman at the date of birth of the child whether or not she is a single woman at the time of the application." To avoid hardship to a woman and her illegitimate child in this situation, the Study will recommend the enactment of legislation similar to the 1959 English amendment.

GENERAL PROVISIONS: NOTIFICATION

Section 4 (1) of the Act provides:

"When an institution has received the mother for care during pregnancy or accouchement the person in charge of the institution shall, if aware of the facts, within three days after the birth of the child notify the Director /of Child Welfare/ in the form, if any, required by the regulations of the birth of that child in the institution."

Upon being so notified, the Director "shall by enquiry obtain all information possible with respect to every child", as he is one of the persons who may, under the Act, take an action on behalf of the mother and child for their support and expenses incidental to the birth."²

However, section 4 does not provide for reporting miscarriages, abortions (which are permissible under the Criminal Code in specified circumstances) and stillbirths, to the Director. (Nor does any provision of the Act provide for compensating an unmarried mother (or her estate) for incidental maternity expenses in such events; for her maintenance before, at and after a miscarriage, stillbirth or abortion; or for the funeral expenses of a stillborn child.³)

A stillborn child has not been defined by statute in Newfoundland and would not appear to come within the meaning of "child" as used throughout the Act. In the English Births and Deaths Registration Act, 1953⁴, a stillborn child is a child which issues forth from its mother after the twenty-eighth week of pregnancy and at no time after being expelled from the mother breathes or shows any other sign of life.

An amendment to the Newfoundland Act will be recommended by the Study to provide for the reporting to the Director, of miscarriages, stillbirths and abortions.

¹Legitimacy Act, 1959, Stats. U.K. 1959, c. 73, s. 4.

²Stats. Nfld. 1964, No. 40, s. 4 (2). The Director's duties generally under the Act are outlined in ss. 5, 41-43, 45-46.

³Discussed *infra*, p. 127.

⁴Stats. U.K. 1953, c. 20, s. 41.

AFFILIATION PROCEEDINGS

Sections 6, 8, 9 and 10 of the Newfoundland Act provide for commencement of an affiliation proceeding after the child is conceived and prior to birth, while the commencement and trial of an affiliation proceeding after the illegitimate child's birth is provided for in sections 11 (1) and 12 to 17 (inclusive).

(1) Affiliation Proceedings Prior to Birth

Under section 6, "a mother¹ who is pregnant or her father or mother, the Director, or a Welfare Officer" may lay a written complaint under oath before a magistrate,² stating that the mother is pregnant, her address and the alleged father's name.

By comparison with section 6, an affiliation proceeding is commenced after the birth under section 11 by the laying of a complaint "by the mother of the child *or by any person on her behalf* or by the Director or a Welfare Officer" (*italics added*).

The provision in section 11 as regards who may lay the complaint is preferable to that in section 6. The mother's parents may have died or left the province. As a matter of practice, the complaint should be laid before the magistrate nearest the mother's residence, and unless she resides in or near St. John's (where the Director has his office), the Director would not be likely to attend before the magistrate in another community to lay the complaint on her behalf. Welfare Officers throughout the province are not always available to fulfill such a duty when requested by the (expectant) mother. The mother should be able to delegate to a person of her choice the laying of the complaint, particularly where she receives information that the alleged father is about to leave the province.

Upon receiving the complaint, the magistrate is required by section 8 to issue a summons for service on the alleged father, requiring him to appear before the magistrate at the date and place specified in the summons. Instead of issuing a summons, the magistrate "may in his discretion issue a warrant directed to any or all constables, requiring him or them to arrest the alleged father and cause him to be brought before him or some other magistrate."³ The magistrate could very well exercise this discretion where, for example, he received information that the alleged father was about to abscond.

Affiliation proceeding may be taken or continued despite mother's death: Stats. Nfld. 1964, No. 40, ss. 26,42.

1 Defined: The Children of Unmarried Parents (Amendment) Act, 1966, Stats. Nfld.

2 1966, No. 63, s. 2 (c).

Stats. Nfld. 1964, No. 40, s. 8 (1) (b).

3

Where an alleged father does not respond to a summons served upon him, the magistrate may exercise his authority under The Summary Jurisdiction Act (Newfoundland)¹ to issue a warrant for the alleged father's arrest.

When the alleged father (and the mother) appear before him, the magistrate shall take their evidence as well as the evidence "of any witness who may be brought before him on behalf of either party" in written depositions.² Any proceeding under the Act involving the taking of evidence³, or otherwise⁴, may be (and normally is) heard *in camera* (in private).

After the taking of evidence before him, the magistrate may either (1) dismiss the complaint, or (2) adjourn it *sine die* (without assigning a day for a further hearing) until after the birth of the child. The depositions shall be filed and safely kept by the magistrate as part of the court records, for use in subsequent proceedings under the Act "subject to the right of either party to recall witnesses already examined, if available."

Unless the complaint is dismissed after the taking of depositions, the alleged father is required to either (1) enter into a bond for not less than twelve hundred dollars with sureties⁶, or (2) pay into court a cash deposit of not less than \$1,200 as the magistrate may prescribe as security in lieu of a bond, to secure his appearance in court at future hearings in the affiliation proceeding. Failure to meet one or other of these requirements will result in the committal to gaol of the alleged father until the affiliation proceeding is disposed of, the cash deposit paid or bond with sureties given, as required by the magistrate⁹.

Section 10 appears to provide that committal to gaol may follow the failure of the alleged father to give the bond required, but not where the bond is furnished without sureties. In view of the stipulation in section 9 that where a bond is required there must also be sureties, section 10 should be clarified accordingly.

Should the alleged father fail to appear at any subsequent hearing under the Act, he forfeits his cash payment to the court, or the sureties on his bond are required to discharge their undertakings to pay into court the debt represented by

¹R.S.N. 1952, c. 117, s. 29.

²Stats. Nfld. 1964, No. 40, s. 8 (2).

³Ibid., s. 17..

⁴Ibid., s. 44.

⁵Ibid., s. 8 (3).

⁶Ibid., s. 9. Under s. 21 (5), "all sureties under this Act shall justify by affidavit to the satisfaction of the magistrate their ability to meet their obligations under the bond".

⁷Ibid., s. 10.

⁸Ibid.

the bond. The Act should also provide that in such circumstances, if an affiliation order is obtained against the alleged father, the monies realized from the bond or cash deposit be applied towards satisfaction of the order.

(2) Affiliation Proceedings After Birth

Section 11 (1) of the Act provides that " . . . as soon as convenient after the birth of a child a magistrate to whom an application has/after the:child's birth /been made in that behalf by the mother of 'the child or by any person on her behalf or by the Director or a welfare officer" shall, after a complaint is made, bring the alleged father before him by summons or a warrant of arrest. This provision also empowers the magistrate to ensure the appearance of the mother before him under a warrant of arrest.¹ Where the proceeding was commenced prior to the birth, the summons or warrant may, on application, be issued by the ma^oistrate following the birth without the necessity of laying a further complaint.

Section 15 provides *inter alia* that:

AI) If an alleged father has been arrested under a warrant issued upon a complaint laid after the birth of the child and the mother is, through illness, unable to be forthwith brought before the magistrate in obedience to the warrant, or if the hearing cannot be proceeded with owing to the illness or absence of a material witness or any other good cause, the magistrate may, on application therefor, adjourn the hearing and release the alleged father, . . ."

after obtaining from him a bond with sureties or a cash deposit on terms and conditions identical to those outlined in sections 9 and 10. Failure to provide the bond and sureties, or to pay the cash deposit required by section 15 will result in the alleged father's committal to gaol "until the adjourned hearing or until the bond or surety is sooner given or cash deposit made."

3

Section 15 makes no provision (similar to that in sections 9 and 10) for an alleged father, who appears before a magistrate in response to a summons (rather than by warrant of arrest), to post a bond with sureties or make a cash deposit pending conclusion of the affiliation proceedings. Granted, section 28 (1) provides that:

"Subject to this Act,

(a) the provisions of The Summary Jurisdiction Act apply *mutatis*

¹
² Stats. Nfld. 1964, No. 40, s. 11 (1).

³ Ibid., s. 12.

Ibid., s. 16.

mutandis to proceedings under this Act including, but not so as to restrict the generality of the foregoing, the trial of all matters and the enforcing of the attendance of all parties and witnesses; . .
."

However, where a summons is issued to a person for the hearing of a complaint under section 40 of The Summary Jurisdiction Act (copied from section 13 of Newfoundland's Summary Jurisdiction Act of 1848), and "both parties appear either personally *or by their respective counsel or solicitors* . . . then the . . . justice or justices shall proceed to hear and determine the same" (italics added).¹ The personal attendance of the alleged father (and unmarried mother) in affiliation proceedings - particularly for the taking of evidence - is essential. The Study will therefore recommend that the Act authorize the presiding magistrate to require a bond with sureties or a cash deposit from an alleged father appearing on the summons, if adjournments are necessary during the proceeding. The Study will further recommend that if a mother has to be brought before the magistrate under warrant, she be required to post a bond or make a cash deposit to ensure her attendance at subsequent hearings. In either of these events, failure to provide a bond with sureties or make a deposit should result in committal of the mother or alleged father to gaol, until a bond is provided or a cash deposit made.

AFFILIATION AGREEMENTS

An application to bring an alleged father before a magistrate by summons or warrant under section 11(1) of the Act (after the child's birth) shall not be taken where

44. . . the mother of the child and the alleged father enter into an agreement in respect of the support of the child and the agreement has been approved by the Director by endorsing or causing to be endorsed thereon the words, "The above agreement is hereby approved", attested by the signature of the Director, ..."²

The Act should enable the alleged father, and mother of the child to enter into such an agreement *before*, as well as after, the child's birth.

A mother who is under nineteen years of age may enter into such agreements or take any proceedings referred to in the Act-)

R.S.N. 1952, c. 117, s. 40.

Stats. Nfld. 1964, No. 40, s. 11 (2).

The Children of Unmarried Parents (Amendment) Act, 1966, Stats. Nfld. 1966, No. 63, s. 3 (3). s. 3 (3), amended 1971, No. 71, s. 25.

Section 11 (2) also provides that if an alleged father neglects or refuses to meet his obligations under such an agreement, an affiliation proceeding may be commenced under section 11 (1). This provision may no longer be necessary in view of a 1966 amendment ¹ to section 11 which added the following subsection:

"(4) Every agreement entered into between the mother of a child and the alleged father in respect of the support of the child which has been approved by the Director in accordance with subsection (2) has the

. same force and effect as if its terms were contained in an affiliation order made under this Act and may be enforced, varied or cancelled in the same manner as such affiliation order."

LIMITATION ON APPLICATIONS

Under section 13 (1), where a complaint is not laid under section 6 or 7 of the Act before the child's birth, the application to bring an alleged father before a magistrate by summons or warrant of arrest must be made within twelve calendar months after the child's birth.

If, however, the alleged father of the child has either (1) paid money for, or contributed in any way toward, the child's maintenance after the birth, or (2) has left the province within one year after the birth, the application for the summons or warrant may be made within one year after (1) the last payment of the money, (2) the making of the contribution, or (3) the alleged father's return to Newfoundland.²

CORROBORATIVE EVIDENCE

Section 19 (1) provides that:

"An affiliation order shall not be made upon the evidence of the mother of a child unless her evidence as to the paternity of the child is corroborated by some other material evidence implicating the alleged father."

This provision is substantially the same as section 130 (1) of The Welfare of Children Act (Newfoundland)³ which was interpreted by the Supreme Court of Newfoundland in two reported cases: *Snow v. Mitchell*⁴ and *Luther v. Ryan* ⁵.

The justification for, and utility of, the requirement of corroboration is

¹ Stats. Nfld. 1966, No. 63, s. 3 (3).

² Stats. Nfld. 1964, No. 40, s. 13 (2).

³ R.S.N. 1952, c. 60.

⁴ (1952), 32 M.P.R. 237.

⁵(1956), 39 M.P.R. 122.

discussed in a note in the January, 1970 issue of The Australian Law Journal¹:

"Historically, this rule was no doubt a concession to the notorious unreliability of accusations of paternity The difficulty is to devise a satisfactory means of coping with the fake accusation of paternity which is, after all, easy to make and perhaps very hard to disprove. In utilising the corroboration requirement for this purpose, the courts are faced with two obvious alternatives. They may interpret it strictly against the complainant, in which case the likelihood is that many truthful, as well as false complaints will be dismissed. The community may be prepared to accept the burden of supporting children whose complaints are dismissed for want of corroboration, in the interests of detecting false claims. However, one factor to consider is that even a strict corroboration requirement may not effectively combat the wilfully false accusation. Presumably a mother who is prepared to make such an accusation will not have undue difficulty in providing false corroborative evidence as well, particularly if her own family is prepared to close ranks with her. The other approach is for the court to accept flimsy evidence as corroborative, ... In this case the corroboration requirement is likely to be of minimum effectiveness in detecting false accusations of paternity and, indeed, the presence or absence of corroboration may well bear little relation at all to the truth."

From inquiries made of a number of magistrates and the St. John's Family Court Judge, the Study has concluded that section 19 (1) has operated satisfactorily in affiliation proceedings in Newfoundland, with few of the difficulties outlined above.

Under section 19 (2), "a married woman is both competent and compellable to testify as to the paternity of her child."²

"POSSIBLE FATHERS" PROVISION

Section 7 (1) provides, *inter alia*, that

"Where any one of two or more persons may be the father of a child born out of wedlock or of a child likely to be born out of wedlock, any person named in Section 6 may lay an information before a magistrate,

¹ , Sackville, R. and Lanteri, A., "The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis" (1970), 44 Aust. L. J. 51, at p. 53.

² Stats. Nfld. 1964, No. 40.

naming each of the possible fathers, ..."1

Similar provisions are contained in the affiliation legislation of most other provinces. Prior to the enactment of this provision in Newfoundland, if the mother of an illegitimate child had intercourse with more than one man during the period critical for conception and she could not prove which man was in fact the father, the child was denied the benefit of an order for support, and, in many cases, the responsibility for maintaining the child was left with the state. While several men may have voluntarily taken the risk of impregnating the mother, none of them could be held liable for the illegitimate child's support.

Under section 7 (2),

"The magistrate before whom an action is brought under subsection (1) may make an affiliation order against any one or more of the persons named in the information upon sufficient evidence and having regard to the amounts payable under section 18 in the case of an affiliation order, the magistrate may make an order against so many of the persons named **in** the information as the evidence shows might in the ordinary course of nature have been the father of the child, fixing the amount or amounts to be paid by each of those persons on behalf of the child . . ."

In fixing the amount or amounts to be paid by each of the alleged fathers the presiding magistrate should have a discretion to apportion liability among such of the alleged fathers as might have been the father of the child, as he sees fit, taking into account all the circumstances of the case. A recent note on the liability of possible fathers in the *Stanford Law Review*² contends:

"If one defendant has engaged in ten acts of intercourse with the mother while another has engaged in only one, or if one defendant has consistently used contraceptives while another has not, the judge should be able to order one possible father to pay more than another, based on the comparative likelihood that he is the real father."³

A presumption that a person is a "possible father" arises upon proof that he had intercourse with the mother at the relevant time, cf. *Thomas v. Jones*, /1921/ 1 K.B. 22 (C.A.). The burden of exculpating himself shifts to the "possible father", who may resort to defenses normally available in an affiliation proceeding, including: (1) a blood test; (2) proof of sterility or impotence; (3) evidence that the illegitimate child does not resemble him; (4) evidence that he did not have relations with the mother at a time when she was capable of conception. However the burden is frequently a difficult one to discharge unless the "possible father" is fortunate enough to obtain an exclusion result from a blood test.

Breslin, H.P., "Liability of Possible Fathers: A Support Remedy for Illegitimate Children" (1966), 18 *Stan. L. Rev.* 859.

Ibid.

2

3

Section 7(2) is unclear as to the scope of the magistrate's powers in apportioning liability among a number of alleged fathers and the Study will recommend that the Act be amended to provide the magistrate with wide, discretionary powers in discharging that function.

One of the objectives of section 7 was, apparently, to deter persons who might otherwise perjure themselves on an alleged father's behalf, to raise a doubt regarding the child's paternity. However, where an alleged father adduces evidence purporting to show that he is not the father, by calling a witness to testify that he, too, had intercourse with the mother, at a time critical for conception, the Act does not provide for joining such witness as a defendant. Presumably, a new complaint may be laid against the witness as a possible father. In a case where this situation arises before a Nova Scotia court,

"5(3) ... it shall be deemed that the putative father and the witness are before the magistrate in obedience to a summons or warrant / issued under the Act/ ... "¹

The Study will recommend the incorporation of a similar provision in the Newfoundland Act.

AFFILIATION ORDER: MAINTENANCE

Generally

Where an alleged father is adjudged by a magistrate to be the father of **an** illegitimate child, the magistrate is empowered to make an affiliation order requiring the father to pay to the Director on behalf of (1) the mother of the child, or (2) the child, the following:

"18. - (1) .

- (a) the expenses incidental to the lying - in and maintenance of the mother at and before the birth of the child and during such period after the birth as may in the opinion of the magistrate have been or be necessary in connection with or as a consequence of the birth of the child and the birth and maintenance of the child up to the date of the order;
- (b) the expenses of the funeral of the child if the child died before the making of the order or, if the child has not died, a sum of money payable weekly, monthly or yearly towards the main-

1 Children of Unmarried Parents Act, R.S.N.S., 1967, c. 32.

tenance and education of the child until he or she attains the age of seventeen years or as long as he or she is mentally or physically incapable of earning his own living;

- (c) the expenses of the burial of the mother in the case of her death at or in consequence of the birth of the child; and
- (d) the costs of all proceedings taken under this Act, including a counsel fee not exceeding fifty dollars and any reasonable and actual out-of-pocket expenses incurred by counsel, and the Director shall pay to counsel for the complainant the amounts paid to the Director under this paragraph."

Section .18 (1)(a) does not take into account the expenses incidental to the lying - in and maintenance of the mother before, at and after a miscarriage, a stillbirth, the termination of a pregnancy by an abortion permissible under the Criminal Code ¹, or a pregnancy which otherwise does not result in a child born alive, and the Study will recommend the amendment of the Act to so provide.

A further amendment will be recommended to section 18 (1)(b) to allow for recovery of the funeral expenses of a stillborn child.

Section 18 (1)(a) makes no provision for compensation of an unmarried mother for loss of wages which she would have earned from her employment except for her lying - in before, at and after giving birth. The mother may have been in receipt of an income in excess of her normal maintenance recoverable under the Act, prior to the pregnancy, which will terminate either temporarily, during confinement or permanently, if the mother does not return to work after the birth. While the mother must assume part of the liability for the pregnancy and any consequent loss of income, the Study submits she should be entitled to recover a portion of such lost income from the child's father, whose earning ability has not been impaired by the pregnancy. The Study will recommend that magistrates be vested with discretion to determine what compensation, if any, should be payable in respect of the mother's loss of income which she would otherwise have earned before, at and for the period necessary for recovery after, her pregnancy.

Counsel Fee

Under section 18 (I)(d) the maximum allowable complainant's counsel fee in a proceeding under the Act is fifty dollars, without regard to the length or number of hearings required, the extent of necessary pre-trial interviewing of witnesses and preparation of argument. A number of magistrates and legal practitioners in Newfoundland have advised the Study that the present counsel

¹ R.S.C. 1970, c. C-34, s. 251.

fee is inadequate. Except in extenuating circumstances, legal aid is not available in affiliation proceedings. Unmarried mothers are often without the means to pay the professional fees of legal counsel over and above the fifty dollar amount recoverable from the father under the Act. To enable an unmarried mother to have the benefit of legal counsel in settling, or proceeding to trial with, a claim under the Act the Study will recommend that they may recover the following legal fees from the father:

Office consultations with unmarried mother, other prospective witnesses or defendant's counsel	\$15.00 each;
Attendances at Magistrate's court	
For necessary adjournments	20.00 each;
For trial	50.00 first hour (each hearing); 25.00 every subsequent hour or part thereof of each hearing;
Necessary correspondence, telephone calls	3.00 per letter or call;
Preparing Affiliation Agreement	25.00

The Act should be further amended to provide that the Minister of Social Services and Rehabilitation shall pay the complainant counsel's account thirty days after the issue of an affiliation order, for the amount provided by the affiliation order, (unless counsel, before the expiry of thirty days, has had his account paid by the father), and the counsel's right to the fee will thereby be subrogated to the Minister.

Quantum of Maintenance

In determining the periodic sum to be paid weekly, monthly, or yearly by a father to an illegitimate child, the magistrate

"shall take into consideration the ability of each of the father and the mother to provide for the maintenance and education of the child and the means of the father to provide for the proper subsistence of his wife and legitimate children, if any, and for the education of his legitimate

children, if any."¹

Commutation of Liability

Section 18(4) of the Act provides that a magistrate may order that the liability of a father under the Act shall be satisfied upon payment of the following:

- " (a) the expenses of and incidental to the birth of the child;
- (b) the lying - in and maintenance of the mother at and before the birth;
- (c) a specified sum not less than twelve hundred dollars to be paid in full in three equal instalments, the first instalment to be paid on or before the expiration of thirty days from the date on which the order is made, the second instalment to be paid on or before the expiration of twelve months from the last date prescribed by this paragraph for the payment of the first instalment and the third instalment to be paid on or before the expiration of two years from the last date prescribed by this paragraph for the payment of the first instalment."

Under this provision the maintenance for which a father, under section 18 (1)(a) and(b), would have been liable to the illegitimate child and the mother, may be commuted. Unlike section 18(1), this provision does not allow the wife (1) compensation for the cost of her lying - in and maintenance after the child's birth, or (2) for funeral expenses of a child who dies before an order is made. Neither section 18 (1) nor section 18 (4) provides for the mother's reasonable maintenance incidental to a pregnancy which, due to a miscarriage, stillbirth or abortion covered by the Criminal Code is not born alive. Unless such expenses are recovered from the mother, they are, as a matter of practice, borne by the state. It is in the public interest that these expenses be made recoverable from the father, and the Study will so recommend.

The lump sum of maintenance payable under section 18 (4) (c) is *not less than* \$1,200, though in practice an order for a lump sum, or a standard form affiliation agreement settling the child's future support, usually does not provide for more than \$1,200.

Pre-natal Maintenance

An order compensating the mother for incidental expenses of, and her 1
Stats. Nfld. 1964, No. 40, s. 18 (2).

maintenance during, a pregnancy under the Act is made *following* the child's birth, though in fact, monies are normally required by the expectant mother during the latter stages of pregnancy, especially after she has ceased to work. The statute law of a number of other jurisdictions, including that of Nova Scotia, recognizes the necessity of pre-natal maintenance. The Study will recommend that where a complaint is heard before a child's birth and paternity is then established, the magistrate may immediately award to the unmarried, expectant mother an amount to cover the expenses incidental to the pregnancy and for her maintenance of not more than \$100 under an interim order.

Separate Order Respecting Mother

Whether maintenance for the child is ordered to be paid periodically or in a lump sum, the presiding magistrate "may in a separate order direct that the mother bear such part of the maintenance of her child as to him seems just."¹ In determining what is "just", the Study found that Newfoundland magistrates have, in practice, considered the wife's financial ability and other circumstances, in making such an order. A similar Nova Scotia provision uses the words "as he /the magistrate/ deems just having regard to her /the mother's/ means and circumstances."²

Under this provision, in an unreported Nova Scotia case, *Beaton v. Silverman*³, the mother, a twenty-seven-year-old secretary earning \$5,200 annually, was ordered to pay twenty-five percent of the child's future maintenance while the father, also twenty-seven years old and a member of the Nova Scotia Bar for two and a half years, was ordered to pay the balance. In that case, the total monthly maintenance payment to be shared between the mother and father was \$80 until the child's second birthday, and thereafter, \$95 until the child reached sixteen.

For the purpose of clarity, the Newfoundland Act should be amended to expressly provide that consideration shall be given to the mother's means and other circumstances in determining whether, and to what extent, she should be responsible for the child's support.

Securing of Maintenance Payments

Where an affiliation order is made under section 18 of the Act, the magistrate is required by section 19 to obtain from the father (1) a bond in a sum

¹ Stats. Nfld. 1964, No. 40, s. 18 (5).

² Children of Unmarried Parents Act, R.S.N.S. 1967, c. 32, s. 4 (5).

³ 1968, No. 13381 (N.S. Sup. Ct., Trial Div.), unreported, affd. on appeal. This was an action taken by writ of summons and Statement of Claim under Part II of the Nova Scotia Act (similar to ss. 33-40 of the Newfoundland Act).

that the wife of a civil servant is sometimes compelled to obtain social assistance, endure considerable economic hardship, and rely on relatives and friends for financial assistance. The Study will recommend the abolition of the exemption of sealer's and more particularly, civil servant's wages, from attachment for arrears of maintenance under a maintenance (or affiliation) order of a Newfoundland court. The broader question of whether or not a civil servant or sealer should enjoy any immunity from attachment of wages, is not for the Study's consideration.

Benefits payable under Workmen's Compensation legislation¹ and Victims of Crime Compensation legislation² to an injured workman, a victim of criminal conduct or to the dependants of a person fatally injured during and in the course of employment or as the result of a criminal act, cannot be attached.

(2) Distress and Sale of Personal Effects

Section 18 of The Summary Jurisdiction Act³ provides, *inter alia*:

"(1) Judgments and orders of a magistrate, two justices or a justice may be enforced by . . . distress and sale of the goods and effects of the person against whom the judgment is given or the order is made.

"(2) The working tools and implements of trade of the person, including his fishing skiff or punt, not exceeding on the whole the value of two hundred and fifty dollars and the necessary cooking apparatus beds and wearing apparel of himself and his family shall not in any case be liable to be taken in distress."

While this provision applies to orders made under The Maintenance Act, section 23 of The Children of Unmarried Parents Act, 1964, provides for distress and sale of personal effects to satisfy an affiliation order.

(³) Execution Against Real Estate

Section 18 (3) of The Summary Jurisdiction Act provides:

ti Where no sufficient distress can be found, but the judgment debtor has lands which might be subject to execution if the judgment were in the Supreme Court, the judgment creditor may after seven days' notice to the judgment debtor of his intention so to do, apply to the magistrate

1

Stats. Nfld. 1962, No. 32.

2 Stats. Nfld. 1968, No. 26.

3 R.S.N. 1952, c. 117.

who tried the case for the certificate of judgment, and may file the said certificate in the Registry of the Supreme Court; and upon its being so filed, any process of execution may be held upon it as if the judgment were given in the Supreme Court."

A more expeditious procedure for execution against lands is followed in British Columbia, where The Wives' and Children's Maintenance Act¹ provides for the filing in a registry of deeds, of a maintenance order or certified copy thereof, and thereafter the registered order or copy constitutes a charge on all lands registered there in the name of the person against whom the order is made. The registered order can be discharged by written consent of the person in whose favour the order was made or by a discharge order in favour of the land owner which may be obtained on application to the court which made the maintenance order.

The Study considers that a similar provision should be incorporated in both The Maintenance Act and The Children of Unmarried Parents Act, 1964 and will so recommend. The Study will further recommend the amendment of The Children of Unmarried Parents Act, 1964 to empower a court to set aside or enjoin a transfer or dealing in property where it is satisfied that the transfer or dealing was effected to frustrate a claim for support, as is now provided for in section 14 of The Maintenance Act.

LIABILITY OF ESTATE

Section 24 of The Children of Unmarried Parents Act, 1964 provides that every sum payable under an affiliation order "is a debt due from and chargeable upon the estate of the father and recoverable at the suit of the Director .. ." subject to variation or suspension where there is evidence that payments on the affiliation order are "depriving the widow or the legitimate children of the father of proper subsistence and education ..."

There is no similar provision respecting enforcement of a maintenance order against the estate of a deceased husband, for the reason that the wife and children left surviving have recourse against the estate under intestate succession and family relief legislation. Arrears of maintenance due to a deserted wife at the date of her husband's death are recoverable as a debt of the estate. The Study considers that arrears of maintenance should rank ahead of all other debts of the estate, save administration and funeral expenses and will so recommend. A corresponding amendment to The Children of Unmarried Parents Act, 1964 will also be recommended.

¹R.S.B.C. 1960, c. 409, s. 12.

COLLECTION OF MAINTENANCE

(1) The Children of Unmarried Parents Act, 1964

Payments due under an affiliation order or agreement must be made to the Director of Child Welfare¹, which enables the Director to ensure that such obligations are met. Section 46 of the Act provides:

"The Director shall

- (a) see that all payments directed to be made by the father under an affiliation order are duly made and in default of payment
 - (0 may take all necessary proceedings for the enforcement of the order, including the enforcement of any security given by the father, and
- (ii) shall take the proceedings authorized by law;
- (b) see that all moneys collected under an affiliation order are paid and supplied forthwith, without any deduction, to or for the persons entitled to relief in accordance with the terms of the order and this Act

Under the standard form affiliation agreement, where payments become six months in arrears, the Director convenants to forward a sworn statement of the amount then outstanding to the mother, presumably to permit her to take proceedings for default. Under the 1966 amendment to the Act², an affiliation agreement has the same force and effect as an affiliation order, and thus should be enforceable by the Director rather than by reference to the mother who may incur additional legal expense in recovering arrears under the affiliation agreement.

(2) The Maintenance Act

As a matter of practice under The Maintenance Act, payments may be made under maintenance orders to the magistrate's or family court or directly to the deserted wife, for the support of the children and herself.

In England, all payments under a maintenance order must be made

1 Stats. Nfld. 1964, No. 40, s. 18.

2 The Children of Unmarried Parents (Amendment) Act, 1966, Stats. Nfld. 1966, No. 63, s.3.

through a collecting officer of the magistrate's court which made the order, or to which the order has been transmitted, unless the court rules that such arrangement would be undesirable. The collecting officer is required to inform a wife if payments fall into arrears to the extent of four weeks. The wife may then proceed on her own to recover the arrears or instruct the collecting officer to do so on her behalf.

Consideration should be given by the Attorney-General to implementation of a similar scheme in Newfoundland after consultation with the magistrate's courts throughout the province and with the St. John's Family Court.

At St. John's, the Family Court presently receives maintenance payments through its office on a wife's behalf, at her request, and promptly and efficiently makes efforts to contact the husband whenever he defaults under an order, to arrange for him to bring payments up to date. The Study submits however that unless the staff of the St. John's Family Court is increased, payments on all maintenance orders could not be received through its office in view of the considerable number of maintenance orders made by the Court involving deserted wives and unmarried mothers and their children.

(3) The Social Assistance Act, 1971

The Study will further recommend that where a deserted wife and children, or an unmarried mother and her illegitimate child are in receipt of social assistance because the husband or alleged father has absconded, the Minister of Social Services and Rehabilitation be empowered to take an action under The Maintenance Act to recover from an absconding father or alleged father any such social assistance payments.

REGISTRATION OF MAINTENANCE AGREEMENTS

Not every deserted wife who makes a complaint under The Maintenance Act seeking support from her husband pursues such an action to conclusion. On solicitors' advice, a wife and husband may enter into a written separation agreement in the course of, or as an alternative to, proceedings under the Act, providing *inter cilia* for the wife's and children's future maintenance, usually by periodic payments made weekly, fortnightly, or monthly, in advance.

Arrears of Maintenance

Where maintenance is provided for under such separation or mainten-

Reference in this discussion to a deserted wife includes one who has de facto control of the children of the marriage, as she normally contracts on their behalf with the father, for their support.

ance agreement, and there is a default by the husband, arrears which thereby accumulate may only be recovered, in the absence of a settlement as to the arrears between the spouses, by a civil action. Depending on the amount of arrears, the action will be taken in a Magistrate's Court, a District Court, or in the Supreme Court of Newfoundland. The action would have to be taken by way of writ of summons and statement of claim in the appropriate court. The defendant spouse, depending on the court having jurisdiction, and on the defendant's place of residence in Newfoundland, would have from four to twenty-one days following service on him of the writ and statement of claim to decide whether or not to defend the action.¹ If the action for arrears is not defended, the plaintiff, after proof of service on the defendant of the writ and statement of claim, may file in court an affidavit in support of the claim and obtain and execute upon a judgment. This expensive and frequently lengthy, civil proceeding, relates only to arrears of maintenance due under an agreement.

Future Maintenance

Unless future maintenance payments are made in accordance with the agreement, the wife must lay a complaint under The Maintenance Act alleging that she is deserted, and undergo the ordeal of giving evidence in support of her allegations to justify the making of a maintenance order by the judge hearing her application.

Remedy

The Study submits that where a husband and wife enter into a separation or maintenance agreement providing for support of either spouse or their children by periodic payments, separate actions (1) for *arrears* of maintenance under an agreement and (2) for *future maintenance* under the Act, may be avoided^{ed} by amendments to The Maintenance Act which would provide that:

- (1) such agreements be registered under the Act;
- (2) such agreements, from the date of registration, shall have the same force and effect as an order made under the Act;
- (3) all provisions of the Act shall apply to agreements so registered in the same way and to the same extent as they apply to an order made under the Act.

¹ Where leave is given for service of the writ of summons (or notice thereof) outside the province by the Supreme Court of Newfoundland or a Judge thereof, the order by which leave is given specifies the period of time after service on a defendant within which he or she must enter an appearance: The Judicature Act, Cons. Stats. Nfld., 1916, (3rd series), c. 83, Schedule - The Rules of the Supreme Court, 0. XI, rr. 3,4.

By registering a maintenance agreement, the wife may avoid the necessity of seeking a formal maintenance order in a magistrate's or family court.

Legislation giving a registered agreement, which provides for the support of a spouse or children, the force and effect of a maintenance order, has been in force since 1955 in New Zealand.¹ The Law Commission has considered the feasibility of enacting similar legislation in England.²

The present Newfoundland Act makes provision for a *deserted* wife, who is party to a separation agreement, to sue *under the Act* for future maintenance, depending on the terms of the agreement and her subsequent conduct. The Act makes no provision for collection of *arrears* under such an agreement.

The amendment to The Maintenance Act, which the Study will recommend, should also state unequivocally that in order to be enforceable, a separation agreement providing for periodic maintenance payments to a wife, shall be registered not more than one week after signing by both spouses and at the time of registration must embody the *then existing* bargain between them. In addition, the amendment should allow for the husband or wife to apply for confirmation, variation or rescission of the terms of the agreement, subsequent to registration on the same basis that a maintenance order made under the Act may be confirmed, varied or rescinded under section 15. A similar provision is contained in The Children of Unmarried Parents (Amendment) Act, 1966³ with respect to registered affiliation agreements.

Because the New Zealand legislation omitted these two provisions, a New Zealand court held that a wife could register, and seek arrears under, an agreement whereby her husband agreed to support her, a considerable time after the agreement was signed, without regard being had by the court to the changed circumstances of both parties since the date of signing of the agreement.⁴

A standard form maintenance agreement could be provided for registration by either spouse in the magistrate's or family court nearest their place of residence after being completed and executed by both spouses.

² Destitute Persons Amendment Act 1955, N.Z. Stats. 1955, No. 56, s. 4.

³ Report of the Committee on Statutory Maintenance Limits, Cmd. 3587, 1968, para. 225.

⁴ Stats. Nfld. 1966, No. 63, s. 3.

⁴ Hudson v. Hudson, /1959/ N.Z.L.R. 348 (N.Z. Sup. Ct.).

F . R E C I P R O C A L E N F O R C E M E N T O F M A I N T E N A N C E O R D E R S

BACKGROUND

Since 1920, Westminster has made provision for giving force and effect in England to maintenance orders from states which enforce similar orders originating in England's courts.¹ The enforcement of such orders is provided for in legislation enacted by the reciprocating states.

Newfoundland's first legislation governing reciprocal enforcement of maintenance orders was The Maintenance Orders (Facilities for Enforcement) Act, 1951², renamed The Maintenance Orders (Enforcement) Act in the Revised Statutes of Newfoundland of 1952. This enactment, with minor amendments³, is still in force.

By virtue of the Act, a "maintenance order"⁴ made by a Newfoundland "court"⁵ (an order under The Maintenance Act⁶ by the Family Court, in St. John's, or a Magistrate's Court elsewhere in the Province) may be enforced in states declared by the Lieutenant-Governor in Council⁷ to be reciprocating states, under the reciprocal maintenance legislation of such states. Likewise, a maintenance order made in a court of a reciprocating state may be given the same force and effect in Newfoundland as a maintenance order made by a court in this province⁸. The Act also deals with transmission of *provisional* maintenance orders made in Newfoundland⁹ and reciprocating states¹⁰, for confirmation.

Reciprocating states as of March 31, 1972 are listed in Appendix G to this study.

(1) ENFORCEMENT IN NEWFOUNDLAND OF MAINTENANCE ORDERS MADE IN RECIPROCATING STATES

Section 3 of The Maintenance Orders (Enforcement) Act provides:

- Maintenance Orders (Facilities for Enforcement) Act, 1920, Stats. U.K. 1920, c. 33.
- lx. Stats. Nfld. 1951, No. 9.
 - 1 R.S.N. 1952, c. 127, as amended by Stats. Nfld. 1961, No. 34.
 - 2 Ibid., s. 2 (d).
 - 3 Ibid., s. 2 (b).
 - 4 R.S.N. 1952, c. 65.
 - 5 R.S.N. 1952, c. 127, s. 11.
 - 6 Ibid., s. 3.
 - 7 Ibid., s. 5.
 - 8 Ibid., s. **6**.
 - 9
 - 10

"(1) Where a maintenance order has, whether before or after this Act comes into force, been made against any person by a court in a reciprocating state and a certified copy of the order has been transmitted by the proper officer of the reciprocating state to the Attorney General, the Attorney General shall send a copy of the order to the proper officer of a court in Newfoundland for registration, and on receipt thereof the order shall be registered and shall from the date of such registration be of the same force and effect, and subject to the provisions of this Act, all proceedings may be taken on the order as if it had been an order originally obtained in the court in which it is so registered, and that court shall have power to enforce the order accordingly.

"(2) The court in which an order is to be registered shall be such court as is determined by the Attorney General."

These provisions, except for minor adjectival differences, are identical to those of section 1 of the English Maintenance Orders (Facilities for Enforcement) Act, 1920.

The Study first considered whether an order to which the section / applies, is in all respects in exactly the same position as if it had been made in Newfoundland under The Maintenance Act. If so, the wide powers vested in a judge under provincial maintenance legislation to confirm, rescind or vary a Newfoundland maintenance order- would apply equally to the confirmation, rescission or variation of a foreign maintenance order registered in a Newfoundland Family or Magistrate's court. This, however, is not the case. The courts have not interpreted the legislation in this way. Lord Merriman, P. and Davies, J. in *Filcher v. Filcher*³ concluded that:

"Section 1 (1) /of The Maintenance Orders (Facilities for Enforcement) Act, 1920/ is limited to enforcement and does not permit of complaints for alteration, variation or discharge of orders registered by virtue of that section."⁴

In an unreported New Zealand case, *Tucker v. Tucker* in 1953, Stipendiary Magistrate J.B. Thomson⁵ concluded that as a matter of construction the words of similar, New Zealand legislation, to wit: "all proceedings may be taken thereon" meant proceedings *on* the order, and not *against it* (to cancel,

¹
R.S.N. 1952, c. 127, s. 3.

⁴ Ibid., 332.

⁵
[1953] 1 N.Z.L.J. 177. Decided at Auckland, New Zealand on April 28, 1953.

vary or rescind). The corresponding words of section 3 of the Newfoundland Act are "all proceedings may be taken on the order".

Furthermore, the title of the Newfoundland Act states that its purpose is "to Facilitate the Enforcement of Maintenance Orders".

In contrast to section 3 of the Newfoundland Act, section 6 (5) expressly provides that a provisional maintenance order made by a court in a reciprocating state, confirmed and registered in a Newfoundland court, "may be varied or rescinded in like manner as if it had originally been made by the confirming /Newfoundland Family or Magistrate's/ court ..."¹

Hence, a provisional maintenance order from a reciprocating state confirmed and registered under section 6 (3) of the Act, may be subsequently rescinded or varied under section 6 (5). On the other hand, a final maintenance order of a reciprocating state registered under section 3 may not, on the face of the Act, be rescinded or varied, even though both a provisional order once confirmed by a Newfoundland court has the same force and effect as a final order registered in this province.

Rae J., of the British Columbia Supreme Court, in comparing sections 3 and 6 of British Columbia's Reciprocal Enforcement of Maintenance Orders Act², similar to sections 3 and 6 of the Newfoundland Act, wrote:

"It seems to be clear . . . that, had the Legislature intended to give a power to a court here to vary a (final) order made in a reciprocating State and registered under s. 3 of the B.C. Act for enforcement purposes, it would have done so in explicit language".³

The decision Of the British Columbia court, if followed in Newfoundland, could work a considerable hardship on both spouses in proceedings involving the province's reciprocal enforcement of maintenance legislation.

Consider the case of a wife who obtains a maintenance order against her husband at the Metropolitan Family Court in Toronto while both spouses reside there. The husband moves to St. John's, Newfoundland and his wife registers the maintenance order in the St. John's Family Court under section 3 of the Newfoundland Act. Shortly after the order is registered the husband is involved in an auto accident which permanently impairs his earning ability.

In these circumstances, the husband may have no legal recourse in New-
2 R.S.B.C. 1960, c. 332, ss. 3, 6.

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1 R.S.N. 1952, c. 127, s.6 (5).

Re Pasowysty and Foreman (1969), 5 D.L.R. (3d) 427, 431 (B.C. Sup. Ct.).

foundland courts to relieve himself from the full burden of the maintenance order made in Toronto, despite his injury and decreased earning capacity since the original order was made. Granted, the husband could apply to the Toronto Metropolitan Family Court, the court of origin of the maintenance order, for variation; but apart from the obvious expense and delay of such a course of action, it is doubtful whether the variation or rescission by the Toronto court of an order originally made there and registered in Newfoundland, can have any effect on the maintenance order as registered here. A new maintenance order of the Toronto court varying the original order of that court cannot, the Study submits, be registered under section 3 of the Newfoundland Act¹ because it is not a "maintenance order" within the meaning of the Act.

"Absurd results may follow if the proper construction of the section excludes the possibility of a registered order being discharged or even varied by the registering court" wrote Merriman, P. and Davies, J. in *Pilcher v. Pilcher*.² "For example," their Lordships state, "the husband may have conclusive evidence that the wife has died; or he may have been able to initiate proceedings for divorce . . . and may have obtained a decree on grounds which would impel a magistrate's court to discharge the order if it were in fact an order which had been obtained in that court . . ."³

It may be argued that as the effect of a final maintenance order registered under section 3, and of a provisional order confirmed under section 6 (3), is precisely the same_ the Art must 1-mve intercipd CPPtinn A151 As to 1.72 rifftion OR rescission of confirmed orders, to also apply to orders registered under section 3.

However, the Study submits the Act is not clear on this point and will therefore recommend that section 3 of The Maintenance Orders (Enforcement) Act be amended to enable a Newfoundland court to recommend the variation or rescission of a final maintenance order of a reciprocating state registered in Newfoundland, to the court of origin of the maintenance order, upon being satisfied by the applicant spouse that such variation or rescission is justified.

In addition, the Act should enable the Newfoundland court to refuse or set aside registration of a final maintenance order from a reciprocating state. The Study submits that such machinery is necessary as a safeguard in cases where, for example, a maintenance order has been obtained by fraud, or in excess of jurisdiction of the court of origin, or in absence of the spouse against whom the order was made. To afford such a safeguard, the Study will recommend that the Act provide for an application by summons to the court of registration for an order

2R.S.N. 1952, c. 127. 3
/1955/ P. 318.
Ibid., 332.

refusing or setting aside registration of a maintenance order in the circumstances set out in section 3(6) of The Reciprocal Enforcement of Judgments Act, 1960¹.

The Study also considered whether the Newfoundland Act provided for the situation where a wife resident, for example, in Ontario, applies to the Ontario court to vary or rescind an Ontario maintenance order registered in Newfoundland (where her husband is resident) under section 3 of the Newfoundland Act, or an Ontario provisional maintenance order confirmed and registered in Newfoundland under section 6(3) of the Act. The wife's financial needs may have increased since registration, justifying an increase in the support provided by her husband resident in Newfoundland.

The Study concluded that (1) the Ontario court could not make a varying or rescinding order because the spouse against whom the variation was sought was not within the jurisdiction of the Ontario court; (2) the Newfoundland Act makes no provision for entertaining recommendations from reciprocating states to vary or rescind maintenance orders from such states registered in Newfoundland.

The amendment of the Newfoundland Act will be recommended to provide that a Newfoundland court may reject or confirm a proposal from a reciprocating state to vary or rescind a maintenance order from such state registered in Newfoundland after summoning the other spouse to be heard on the proposal to vary or rescind.

Section 3 as well as section 6 of Newfoundland's Maintenance Orders (Enforcement) Act is also silent on the matter of the incidents to be attached to a registered order by the court of registration. For example, where a child maintenance order is obtained under Ontario law whereunder liability to the child ceases at the age of sixteen years, does the liability of the father terminate under maintenance law in Newfoundland, where the order is registered, at the age of seventeen years, or a year earlier, at the child's sixteenth birthday as provided by Ontario law²?

A New Zealand case- has held that the incidents of a registered order as **to its** scope and duration are those attached to the order *by the law of the court of origin*. The case interpreted the words of the New Zealand statute, similar to those of the Newfoundland Act, that a registered order shall be "of the same force and effect", to mean that a registered order is "of the same force and effect" only as far as enforcement is concerned. This result does not work an in-

¹ R.S.N. 1960, No. 12, proclaimed December 15, 1960.

² The Deserted Wives' and Children's Maintenance Act, R.S.O. 1960, c. 105, s. 2(3).

³ Cook (Bolton-Moss) v. Bolton-Moss (1938), 33 M.C.R. 79, 81.

justice on either spouse; on the contrary, the ruling would seem to afford protection to the spouse obtaining the order, because the person against whom a maintenance order is made cannot restrict his liability by going to a reciprocating state where the law of maintenance is more favourable to him than in the country where the order was obtained.

The Study will recommend that the Act clearly state the scope and incidents of an order from a reciprocating State registered or confirmed in Newfoundland.

② CONFIRMATION IN NEWFOUNDLAND OF PROVISIONAL MAINTENANCE ORDER MADE IN RECIPROCATING STATE

Section 6(1) of The Maintenance Orders (Enforcement) Act provides
that:

"6. (1) Where a maintenance order has been made by a court in a reciprocating state and the order is provisional only and has no effect unless and until confirmed by a court in Newfoundland, and a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed is received by the Attorney General and it appears to him that the person against whom the order was made is resident in Newfoundland, the Attorney General may send the said documents to the proper officer of such court as is determined by the Attorney General, and upon receipt of such documents the court shall issue a summons calling upon the person against whom the order was made to show cause why the order should not be confirmed, and cause it to be served upon such person."

Section 6(3) states that:

"(3) If at the hearing the person served with the summons does not appear or, on appearing, fails to satisfy the court that the order ought not to be confirmed, the court may confirm the order either without modification or with such modification as to the court after hearing the evidence may seem just."

Under section 6(4):

"(4) If the person against whom the summons was issued appears at the hearing and satisfies the court that for the purpose of any defence it is necessary to remit the case to the court that made the provisional order for the taking of any further evidence, the court may so remit the

case and adjourn the proceedings for the purpose."

Section 6 would operate, for example, where a wife who had been living with her husband in Newfoundland goes to a reciprocating state with the children of the marriage and applies to the family court there for support. If her application is successful, a provisional order will be made for transmission to, and confirmation by, a magistrate's or family court in Newfoundland.

Where a provisional order has been confirmed, section 6(5) of the Newfoundland Act provides that the confirmed order,

"may be varied or rescinded in like manner as if it had originally been made by the confirming court, and where on application for rescission or variation the court is satisfied that it is necessary to remit the case to the court that made the order for the purpose of taking any further evidence, the court may so remit the case and adjourn the proceedings for the purpose."

The Study submits that on every application under section 6(5) to the Newfoundland court to vary or rescind a foreign provisional order confirmed and registered under section 6(3), the case should be remitted to the court of origin to enable the spouse against whom the application is made to be heard on such application.

(3) TRANSMISSION OF MAINTENANCE ORDERS MADE IN NEWFOUNDLAND FOR REGISTRATION IN RECIPROCATING STATE

Under section 4 of the Act

"4. Where a court in Newfoundland *has*, whether before or after this Act comes into force, *made a maintenance order* against any person and it is proved to that court that *the person against whom the order was made is resident* in a reciprocating state, the court, shall, on the request of the person in whose favour the order was made, send a certified copy of the order to the Attorney General for transmission to the proper officer of that reciprocating state and the Attorney General shall transmit the certified copy accordingly."

(Italics added.)

This provision would operate, for example, where a wife or child applies to a family or magistrate's court in Newfoundland for a maintenance order against a husband or father who is in this province at the time the application is made, but who subsequently moves to a reciprocating state. Section 4 enables the Newfoundland court making the maintenance order pursuant to the wife's or child's

application, to transmit the order to the reciprocating state in which the husband has moved, for the purpose of enforcement.

(4) TRANSMISSION OF PROVISIONAL MAINTENANCE ORDERS
MADE IN NEWFOUNDLAND TO RECIPROCATING STATE FOR
CONFIRMATION

Section 5(1) of The Maintenance Orders (Enforcement) Act provides:

"5. (1) Where an application is made to a court in Newfoundland for a maintenance order against any person, and it is proved that that person is resident in a reciprocating state, the court may, in the absence of that person and without service of notice on him, if after hearing the evidence it is satisfied of the justice of the application, make any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing, but in such case the order shall be provisional only, and shall have no effect unless and until confirmed by a competent court in such reciprocating state."

Under section 5(3)

"(3) Where an order is made pursuant to subsection (1), the court shall send to the Attorney General a certified copy of the order for transmission to the proper officer of the reciprocating state."

The Newfoundland court making a provisional order is vested with authority to entertain an application to rescind or vary the provisional order, under section 5(9) which provides as follows:

"(9) The confirmation of an order *made under this section* shall not affect any power of the court by which the order was originally made to vary or rescind the order: Provided that on the making of a varying or rescinding order the court shall send a certified copy thereof, together with the depositions or a certified copy of a transcript of any new evidence adduced before the court, to the Attorney General for transmission to the proper officer of the reciprocating state in which the original order was confirmed and that in the case of an order varying an original order the order shall not have any effect unless and until confirmed in like manner as the original order." (Italics added).

G. ALIMONY AND MAINTENANCE PAYMENTS AND INCOME TAX

Federal income tax legislation pertaining to alimony and maintenance payments between spouses, first enacted by the Parliament of Canada in 1942¹, is not within the Study's terms of reference. However, a short summary of provisions of the Income Tax Act² relevant to the subject of this report and their interpretation in reported decisions of the Tax Appeal Board and the Exchequer Court of Canada, was thought to be appropriate.

(1) SUMMARY OF STATUTORY PROVISIONS

Sections 6(1) (d) and 6(1) (da) of the Income Tax Act specify the requirements for including receipts of maintenance in income while sections 11 (1) (1) and 11 (1) (1a) specify circumstances in which payments of maintenance may be deducted.³ These two sets of sections are exact complements so that any amount included in income under one section is deductible to the payer under the other, assuming both the recipient and the payer are resident in Canada.³

Deductions. When a taxpayer is living apart from his spouse and is separated from her by a divorce, judicial separation or written separation agreement⁴, he is entitled under the Income Tax Act to deduct alimony or other allowances payable on a periodic basis for the maintenance of his spouse, former spouse, and/or children⁵ of the marriage which he has paid in the year pursuant to a decree, order or judgment of a court or pursuant to a written agreement.⁶

By virtue of an amendment to the Act in 1958, where a taxpayer and his spouse are living apart, but not otherwise legally separated, the taxpayer is entitled to deduct any amount or allowance payable on a periodic basis for the maintenance of his spouse and/or children of the marriage, *under a court order*⁸. "This addition" writes Gwyneth McGregor, in *Canadian Tax Journal*, "remedied the inequitable situation prevailing up to then by which payments made pursuant to maintenance orders made, for example, by a Family Court, where there was

An Act to amend the Income War Tax Act, Stats. Can. 1942-43, c. 28, ss. 7 (1), 11. Income

1 Tax Act, R.S.C. 1970, c. I-5. In this summary, husband and wife may be used

2 interchangeably.

Lumsden, A.D., "Taxation of Alimony and Maintenance - Deductibility" (1970), 48 Can.

3 B. Rev. 594, at p. 595.

Income Tax Act, R.S.C. 1970, c. 1-5, s. 203 (1).

4 Ibid., s. 203 (17).

5 Ibid., s. 11 (1) (k.1); see: *Sharpe v. Sharpe* (1971), 18 D.L.R. (3d) 380, 382-383 (Nfld. Sup.

6 Ct.).

7 See: *Jean Boos v. M.N.R.* (1961), 27 Tax A.B.C. 283, which relied on the decision of *J.B. v. A.W.B.*, /1958/ O.R. 281 (C.A.) as to meaning of "living apart".

-8 R.S.C. 1970, c. 1-5, s. 11 (1) (I).

no divorce, judicial separation or separation agreement, were not deductible."¹

A person entitled to deduct alimony or other separation allowances, in respect of a wife, former wife or children, is not entitled to any other deduction or exemption for their maintenance or dependency on him for support.

If, for example, a taxpayer begins making such payments to a spouse during 1970 he is entitled by the Department of National Revenue (as a matter of practice) to deduct either the payments or the married status exemption of \$2,000 (but not both). If he begins making such payments for the maintenance of

01 a child- during 1970 he will be allowed to deduct either the payments or the dependent exemption of \$300 or \$550 (but not both), as well as the \$1,000 personal exemption (since increased by income tax legislation effective this year).

In some cases it may be to the advantage of a taxpayer making such payments to claim the \$2,000, \$550 or \$300 exemption rather than the alimony or maintenance payments, in the year of the divorce or separation.³

If alimony or other maintenance payments deducted by a taxpayer are made to a spouse or former spouse who is not a Canadian resident, a 15% tax on such payments must be withheld and remitted to the Receiver General of Canada by the spouse making them.

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such receipts in his or her income if

- (i) The payments have been made either pursuant to a decree, order of judgment of a competent tribunal or pursuant to a written agreement;
- (ii) The payments have been made as alimony or other allowance for the maintenance of the recipient, the children of the marriage or both;
- (iii) The amounts have been receivable on a periodic basis, and actually received;
- (iv) At the time of the receipt of the payments and throughout the remainder of the year the recipient of the payments has been living apart from his or her spouse or former spouse and must have been separated as the result of a divorce, judicial separation or written separation agreement.⁴

¹ (1969), 17 Can. Tax J. 453, at 455.

² See: M.N.R. v. Beardmore (1954), 54 D.T.C. 1125 (Ex.Ct.).

³ Income Tax Act, R.S.C. 1970, c. 1-5, s. 212 (1) (g).

⁴ R.S.C. 1970, c. 1-5, ss. 6 (1) (c), (0, 36 (5) (a).

If a taxpayer was not formally divorced or separated from his or her spouse but living apart and pursuant to an order of a competent tribunal, and actually received periodic payments as an allowance for his or her maintenance or the support of the children of his or her marriage, the recipient of such payments must include them in his or her income.¹

(2) CASELAW

"Alimony or other allowances" under the Income Tax Act have been held to include hospital and medical insurance premiums and annual golf club dues and expenses called for under a separation agreement.² However, payments by a husband of tuition fees, insurance premiums or towards purchase of a house by his wife were held non-deductible as not being periodic payments³. Mortgage payments made by a husband on a home occupied by the wife were also held not to be deductible because the payments were not made to the wife, or for her maintenance.⁴

Payments must be made periodically. Hence, a payment of \$10,000 under a divorce decree absolute was not allowed as a deduction. Where, however, a "full and final settlement of the husband's obligation to support and maintain the wife during their joint lives" called for payment of "the sum of \$20,000" of which \$6,000 was to be paid forthwith and \$14,000 in monthly instalments of \$100, the monthly payments were held to be deductible as being payable on a periodic basis⁵. The order of a District Registrar in British Columbia to a husband to make interim support payments pending the hearing of his wife's application for permanent maintenance, was held not to be a "decree", "order" or "judgment" of a "competent tribunal"⁶. A lump sum paid by a taxpayer to his spouse in respect of arrears under a written separation agreement is not deductible⁷.

Payments in respect of support of the wife and children must be made to a spouse in order to be deductible. Cheques payable to children for maintenance, pursuant to a court order, were held to be not deductible because the maintenance had not been paid to the wife.⁸ Adopted children are within the

R.S.C. 1970, c. 1-5, s. 6 (1) (1).

²Ryan v. M.N.R. (1965), 38 Tax A.B.C. 95.

³Golightly v. M.N.R., /1970/ Tax A.B.C. 161; Wilkin v. M.N.R. (1961), 61 D.T.C. 544.

⁴Cussion v. M.N.R. (1966), 41 Tax A.B.C. 48.

M.N.R. v. Hansen, /1967/ D.T.C. 440 (Ex. Ct.); see also No. 427 v. M.N.R. (1957), 57 D.T.C. 291.

⁶Wright v. M.N.R. (1964), 36 Tax A.B.C. 453.

⁷MacDonald v. M.N.R., /1968/ Tax A.B.C. 1271; see also: Rowell v. M.N.R., /1968/ Tax A.B.C. 1090; compare: Helmer v. M.N.R. (1963), 63 D.T.C. 532.

⁸M.N.R. v. Sproston, /1970/ D.T.C. 131 (Ex. Ct.).

meaning of children of the marriage under the Act and payments to a wife in respect of such persons are deductible.

A written separation agreement providing for a spouse's support must be "a formal or legal document in writing" and not a mere exchange of letters.¹ Nor is a unilateral written undertaking sufficient as a basis for claiming deduction of maintenance payments made thereunder to a wife.²

Payments of maintenance by a taxpayer to his spouse without a written separation agreement and prior to a court order are not deductible³.

(3) ROYAL COMMISSION ON TAXATION

Volume 3 of the report of the Royal Commission on Taxation (1966) states (at page 130):

"Alimony and maintenance payments made after the divorce or separation would continue to be treated substantially as at present. The payments would be deductible to the tax unit making them and would be taxable to the recipient tax unit. This treatment should apply 'whether or not the payments are made on a periodic basis.'"

The Income Tax Act⁴ which came into force January 1, 1972 adopts the views of the Royal Commission on Taxation relating to alimony and maintenance payments.

¹Gagnon v. M.N.R. (1966), 41 Tax A.B.C. 58.

²Fryer v. M.N.R. (1963), 31 Tax A.B.C. 143.

³Chenail v. M.N.R., [1968] Tax A.B.C. 641.

⁴Stats. Can. 1970-71, c. 63.

RECOMMENDATIONS

CHAPTER IV

The Family Law Study recommends:

A. THE DIVORCE ACT

1. That Rule 29 (1) of the Divorce Rules, 1969 (Newfoundland) be amended to provide for the registration and enforcement in the Supreme Court of Newfoundland of orders granted under the Divorce Act (Canada) by any other appropriate court in Canada. (Page 91).
2. That Rule 7 of the Divorce Rules, 1969 (Newfoundland) be amended to permit a determination of all matters pertaining to the interest of each spouse in the other's property on the hearing of a matrimonial cause under the Divorce Act (Canada). (Pages 91-92).

B. THE MAINTENANCE ACT

3. That sections 3 and 4, respecting maintenance of parents, be repealed. (Page 96).
4. That family counselling services be attached to the St. John's Family Court and to Magistrates' Courts elsewhere in Newfoundland, to promote reconciliation of spouses involved in maintenance proceedings. (Pages 106-107).
5. That a judge under the Act be given discretionary power to adjourn a maintenance proceeding where he is satisfied there is a reasonable prospect of reconciliation, for a single period not exceeding thirty days. (Page 107).
6. That the Government of Newfoundland establish and maintain a legal aid fund to pay the fees and disbursements of legal counsel acting for indigent spouses in maintenance proceedings. (Page 108).

/For scale of fees, see recommendation 25./

7. That the definition of "acts of cruelty" in section 2(a) be amended to include any course of conduct which in the opinion of the court is of such a character, without proof of actual or apprehended injury to health, that the wife or children could not reasonably be expected to be willing to live with the husband or parent after he has been guilty of such conduct (Page 108).

That the requirement that a "deserted wife" be living separate and apart from her husband, as one of the conditions of obtaining a maintenance order, be repealed. (Page 108).

That the Act be amended to include

- (a) a definition of a "deserted husband", similar in terms to the definition of a "deserted wife", and
 - (b) an obligation on the wife of a "deserted husband" to support and any children in his care and control. (Pages 108-109).
10. That the Act be amended to provide that where a woman has lived and cohabited with a man for a period of one year or more and they are not married to each other, and he is the father of any child born to her, she, or any person on her behalf, may within one year, from her ceasing to live and cohabit with him, make an application under sections 5, 6 or 10 for maintenance in respect to herself and her children, and this Act, mutatis mutandis, apply in such a case. (Page 109).
11. That the definition of "child" in section 2(b) be repealed with the following substitution therefor: "child" means any child of both spouses, whether legitimate or illegitimate, including a grandchild,

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the age of seventeen years, and includes a child under twenty-one years of age, who, because of physical or mental disability, or because he is receiving full-time educational, vocational or professional instruction for a period of not less than two years, is unable to provide himself with adequate food or other necessities. (Pages 109-110).
12. That a judge under the Act, upon adjourning a maintenance complaint, be vested with discretionary power to order that the husband or wife pay to the other spouse personally or to any third person on his or her behalf, for the support of the other spouse and/or any children in his or her care and control, such semi-monthly, weekly, bi-weekly, semi-weekly or monthly sum as the judge may, having regard to the means of both the husband and wife, consider reasonable. (Pages 110-111).
13. (a) That a copy of a form similar to the one in Appendix D be completed, sworn and signed by a person laying a complaint at the time the complaint is made;

- (b) another copy of the form be served with the summons to appear (issued pursuant to the complaint) on the other spouse, to be completed before the date specified for appearance, and signed and sworn before or at the commencement of the first hearing on the summons;

and both completed forms shall be entered in evidence at the hearing of a summons. (Page 111).

- 14. That the Family Court judge and stipendiary magistrates be vested with discretionary power to give effect to maintenance orders, retroactive to the date a complaint is made under The Maintenance Act. (Page 111).

C. THE CHILDREN OF UNMARRIED PARENTS ACT, 1964.

- 15. That section 2(e) be amended to include in the definition of "mother":
 - (a) a woman who is single when she conceived the illegitimate child, whether or not she is a single woman at the time of 'the birth of such child; (Page 117).
 - (b) a woman who is single at the date of the illegitimate child's birth, whether or not she is a single woman at the commencement of affiliation proceedings. (Pages 117-118).
- 16. That section 4 (1) be amended to require institutions which receive unmarried mothers for care during pregnancy to report to the Director of Child Welfare miscarriages, stillbirths and abortions involving such mothers. (Page 118).
- 17. That section 6 be amended to provide that a complaint may be made by the mother who is pregnant or her mother or father, or by any person on her behalf, or by the Director or a Welfare Officer. (Page 119).
- 18. That section 9 be amended to provide that where an alleged father fails to appear at the continuation of affiliation proceedings after the birth of an illegitimate child, the monies realized from the cash deposit made, or bond with sureties posted, to secure his future appearance, may be applied toward satisfaction of any order later made for the benefit of the mother and/or her illegitimate child. (Pages 120-121).
- 19. That section 10 be amended to provide that an alleged father may be committed to gaol by warrant of commitment if he fails to furnish a bond with sureties to the satisfaction of the magistrate under section 9. (Page 120).

20. That section 15 be amended to provide that:

- (a) where an alleged father voluntarily appears before a judge in response to a summons in an affiliation proceeding commenced after the birth of an illegitimate child, he shall make a cash deposit or post a bond with sureties to ensure his appearance at all future hearings in the proceeding; (Page 122).
- (b) where a mother is brought before a magistrate under warrant of commitment in an affiliation proceeding commenced after the birth of an illegitimate child, she shall make a cash deposit or post a bond with sureties to ensure her appearance at all future hearings in the proceeding; (Page 122).

and in either event, the cash deposit or the bond will be of an amount set by the magistrate, and failure to make the deposit or post the bond, will result in committal to gaol. (Page 122).

21. That section 11 (2) be amended to permit the mother and alleged father to enter into an affiliation agreement before, as well as after, the illegitimate child's birth. (Page 122).

22. That section 7 (2) be amended to provide a judge with discretionary powers to apportion the respective amounts of financial liability among such of the alleged fathers as might have been the father of the child, as he sees fit, taking into account all the circumstances of the case. (Page 125).

23. That the following provision be added to section 7:

"where an alleged father adduces evidence purporting to show that he is not the father by the production of a witness who states that the witness had sexual intercourse with the mother and the evidence indicates that it is possible that the mother was pregnant by the witness, then it shall be deemed that the putative father and the witness are before the magistrate in obedience to a summons or warrant issued on a complaint laid under this section and the provisions of subsections (1) and (2) shall be applicable to the putative father and to the witness." (Page 126).

24. That section 18 (1) (a), be amended to permit a mother under the Act to apply for expenses incidental to her lying-in and maintenance of a mother before, at and after a miscarriage, a stillbirth or the termination of a pregnancy by an abortion permissible under the Criminal Code,

and a portion of her loss of wages (over and above her maintenance) as determined by a judge in the exercise of his discretion. (Page 127).

25. That:

- (a) the counsel fee of fifty dollars provided for in section 18 (1)(d) be repealed, and the following scale of counsel fees substituted therefor:

Office consultations with
unmarried mother, other
prospective witnesses or
defendant's counsel \$15.00

Attendances at Magistrate's
Court

For necessary adjournments .	20.00	each;
For trial	50.00	first hour of each hearing;
	25.00	every subsequent hour or part thereof of each hearing.

Necessary correspondence,
telephone calls 3.00 per letter or call;

Preparing Affiliation
Agreement 25.00 (Pages 127-128).

- (b) the Minister of Social Services and Rehabilitation shall pay complainant counsel's account for fees thirty days after the issue of an affiliation order (unless the counsel fees are sooner paid by the father), and the counsel's right to the fees will thereby be subrogated to the Minister. (Page 128).
26. That section 18 (4) (a) and (b) be repealed, with provisions identical to those in sections 18 (1) (a), (b) as to "the expenses of the funeral of the child if the child died before the making of the order", (c), and (d), all amended as recommended, being substituted therefor. (Page 129).
27. That provision be made to permit a judge to make an interim order for payment of an amount not exceeding \$100 to cover expenses incidental to the pregnancy and for maintenance of the mother, if an affiliation proceeding is commenced and paternity is admitted or otherwise established, before the birth of the illegitimate child. • (Pages 129-130).

28. That section 18 (5) be amended by addition of the words "having regard to the mother's means and circumstances". (Page 130).

29.' That section 27 (1) be amended to allow application for 'variation of an affiliation order to be taken at any time with leave of the judge upon satisfying the judge that the application is justified. (Pages 131-132).

E. ENFORCEMENT OF MAINTENANCE JUDGMENTS

(1) THE MAINTENANCE ACT

30. That section 12 be amended to provide that:

- (a) committal of a husband to gaol for failing to make a cash deposit or post a bond with sureties, does not operate to release him from liability under a maintenance order;
- (b) the amount of the cash deposit or bond required to secure performance of a maintenance order be in the discretion of the judge in each case;
- (c) where a husband is committed to gaol' for failing to make a cash deposit or post a bond with sureties, he shall remain there for not less than six months and not more than twelve months, or until the bond is posted or the deposit is made, and the cost of commitment and conveyance to gaol is paid. (Page 149).

31. That the Attorney-General in consultation with the judge of the St. John's Family Court and Stipendiary Magistrates outside St. John's, consider whether payments under maintenance orders can be collected by officers of the court, whose duties would also include notification of a "deserted wife" after payments fall into arrears for four weeks with a view to collection of arrears by the "deserted wife" or on her instructions, by the collecting officer of the court. (Pages 157-158).

32. That an agreement entered into between a husband and wife providing for periodic payment of maintenance for either spouse or children may be registered in the St. John's Family Court or a magistrate's court elsewhere in Newfoundland within seven days of the signing of such agreement, if the agreement then represents the intention of both parties, and from the date of registration, the agreement shall have the same force and effect as an order made under the Act and may be enforced, varied or cancelled, in the same manner as such maintenance order. (Pages 159-160).

(2) THE CHILDREN OF UNMARRIED PARENTS ACT, 1964

33. That the Act be amended to provide as follows:
- (a) where an order for payment of maintenance or support is made under this Act and any person for whose benefit the order is made is a public charge or the judge making the order is of the opinion that if there is default in complying with the order any person is likely to be a public charge, he shall order the person required to make the payments to report to an officer for such period and at such times and places as he may deem necessary and to satisfy such officer that he is complying with the order for payment;
 - (b) where a judge orders any person to report to an officer under this section he shall designate the officer and may by further order alter such designation;
 - (c) any person who, when required to do so under subsection (a), without reasonable excuse fails to report to an officer is guilty of an offence and liable on summary conviction to a fine not exceeding one hundred dollars and in default of payment to imprisonment for a term not exceeding three months;
 - (d) an order made under this Act certified by the judge making it, or a certificate of a judge as to the making of an order by him shall be receivable in evidence as proof of the making of the order in any prosecution under this section without proof of the office or signature of the person certifying. (Pages 149-150).
34. That the Act be amended to provide that:
- "All deeds, assignments, and conveyances of any lands or other property made, done, or executed with the intent and purpose of defeating any order or process made or issued in pursuance of this Act are void except in the case of a bona fide purchaser for valuable consideration who was not aware of, or a party to, such intent and purpose." (Page 156).
35. That where a father is in default under an affiliation agreement for six months, proceedings to collect arrears shall be instituted at the expense of the Department of Social Services and Rehabilitation who may recover any legal fees and disbursements incurred in collection of arrears, from the father. (Page 157).
36. That the Act be amended to provide that:

"Where in any action under this Act a complainant can show such facts and circumstances as to satisfy the judge that there is good and probable cause for believing that the person complained against has made or is about to make some disposition of his or her property or some part thereof or is about to leave his or her place of residence for another locality or province, the judge may, before a summons is issued, issue a warrant for the arrest of the person and may on the appearance of the person before him hold him or her in custody until the disposition of the case or require the person to give security with or without surety in such sum as the judge deems sufficient."

(3) THE MAINTENANCE ACT AND
THE CHILDREN OF UNMARRIED PARENTS ACT, 1964

37. That both Acts be amended do provide that:
- (a) a warrant of committment, issued in the name of a person who is in default of an order without satisfactory explanation, may be suspended by a judge, by a suspended committal order, on condition that the person in default makes satisfactory arrangements with the judge for payment of arrears by instalments;
 - (b) where a person defaults in making payments under a suspended committal order, he shall be given written notice (posted to or left at the address last given by him to the court) to apply within four days of receipt of notice for adjustment of the terms of the suspended committal order, failing which he will be committed to gaol;
 - (c) where a person committed to gaol suffers unreasonable hardship from accumulation of arrears during his imprisonment, the judge may remit a portion or all of such arrears. (Pages 151-152).
38. That both Acts be amended to provide that attachment of a person's wages to satisfy an order made under either Act will be within the discretion of the judge who made the order. (Page 153).
39. That both Acts be amended to provide that:
- (a) where payments under an order made under either Act are in arrears, the order or a certified copy thereof may be registered in the Registry of Deeds for the province of Newfoundland and from the date of registration, constitute a charge on all lands registered in the Registry of Deeds in the name of the person against whom the order was made;

- (b) a registered order against lands can be discharged by registration of a consent in writing duly sworn and signed by the person in whose favour the order was made, or by a discharge order in favour of the land owner on application to the court which made the maintenance order. (Pages 155-156).

40. That both Acts be amended to provide that the Minister of Social Services and Rehabilitation may take an action under either Act to recover from an absconding husband, father or alleged father, any social assistance payments made to a deserted wife and/or her children, or to an unmarried mother and/or her illegitimate child, from the date when the husband, father or alleged father absconded. (Page 158).

5,1– That both Acts be amended to provide for arrears of maintenance due under an order made under either Act to rank ahead of all other debts of the estate of the person against whom the order was made, save for administration and funeral expenses. (Page 156).

(4) THE CIVIL SERVICE ACT

42. That section 20 (2) of the Act not apply where a person seeks to execute on an order made or an agreement registered under The Maintenance Act or The Children of Unmarried Parents Act, 1964, by attachment of wages. (Pages 154-155).

F. THE MAINTENANCE ORDERS (ENFORCEMENT) ACT

43. That section 3 of the Act be amended to provide that:
- (a) a Newfoundland court may recommend the variation or rescission of a final maintenance order of a reciprocating state registered in Newfoundland, to the court of origin of the maintenance order, upon being satisfied by the applicant spouse that such variation or rescission is justified; (Page 164).
 - (b) a Newfoundland court may refuse or set aside registration of a final maintenance order from a reciprocating state on one of the following grounds, namely, where
 - (i) the original court acted either
 - (a) without jurisdiction under the conflict-of-laws rules of the court to which application is made, or

- (b) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning *the* cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor; or
- (ii) the judgment debtor, being a person who was neither carrying on business or ordinarily resident within the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or
- (iii) the judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the state of that court or had agreed to submit to the jurisdiction of that court; or
- (iv) the judgment was obtained by fraud; or
- (v) an appeal is pending or the time within which an appeal may be taken has not expired; or
- (vi) the judgment was in respect of a cause of action that for reasons of public policy or for some similar reason would not have been entertained by the registering court; or
- (vii) the judgment debtor would have a good defence if an action were brought on the judgment; (Pages 164-165).
- (c) a Newfoundland court may reject or confirm a proposal from a reciprocating state to vary or rescind a final maintenance order from such state registered in Newfoundland after summoning the other spouse to be heard on the proposal to vary or rescind; (Page 165).
- (d) the law of a state in which a final maintenance order is made shall govern the scope and incidents of the order in reciprocating states in which the order is registered. (Pages 165-166).

44., That section 6 of the Act be amended to provide that an application to a Newfoundland court to vary or rescind a foreign provisional maintenance order confirmed and registered under section 6 (3) be remitted

to the court of origin to enable the spouse against whose order the application is made to be heard on such application. (Page 167).

G. ALIMONY AND MAINTENANCE PAYMENTS
AND INCOME TAX

(No Recommendations.)

CHAPTER V

AGENCY AND CONTRACT

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INTRODUCTION

The existence of a marriage does not automatically create an agency relationship between husband and wife. But there are certain circumstances at Common Law in which a wife is presumed to have authority to pledge her husband's credit. This applies principally to the purchase of necessities. This presumption and the defining of "necessaries" are dealt with at some length in Part A of this chapter.

The right of a deserted wife to pledge her husband's credit, and the liability of husband and wife for the ante-nuptial contracts of the wife are also discussed in Part A.

By virtue of Newfoundland's Married Women's Property legislation, discussed in Part B, a wife may own separate property and contract in her own name. Inter-spousal gifts and loans are also permissible. A number of Common Law presumptions respecting transfers of real property between husband and wife are examined, and the position of the husband and wife in life insurance contracts and in business transactions is considered.

For example, a husband and wife may be partners in a business venture and a wife, as well as her husband, may own, purchase and transfer shares. She may carry on a separate business and may act as a trustee, executrix or administratrix. In actions commenced in this province, she may act as a next friend (of a minor plaintiff) or a guardian *ad litem* (of a minor defendant).

The liability of minors in contract is the subject of Part C. At Common Law, the only contracts absolutely binding *prima facie* on minors were those (1) for necessities, and (2) for service and apprenticeship if substantially for the

minor's benefit. All other contracts made by a minor either had to be ratified in writing (to be binding) or revoked (to be unenforceable) by the minor, after reaching majority.

The age of eighteen will be recommended as the age at which full contractual capacity is attained, though this is not equivalent to a recommendation relating to the overall age of majority. The Study will also recommend that under a guarantee by an adult of a minor's contract the guarantor will be liable where the minor has avoided the contract. This seems to be in line with legal thinking in a number of jurisdictions.

A . AGENCY WITHIN THE FAMILY

THE WIFE AS AGENT OF HER HUSBAND

The existence of a marriage does not create an agency relationship between husband and wife. However, the status acquired does play an important role in certain situations. The Study has found no reported Newfoundland cases on the matters dealt with in this part but the law here corresponds to that in Ontario and the United Kingdom, which is outlined below.

1. Presumed Authority

In certain circumstances at Common Law a wife is presumed to have the authority to pledge her husband's credit, thereby making him responsible in law to a third party. To some extent this was a recognition of the Common Law duty of a husband to provide necessities for his wife. Prior to the passage of Married Women's Property legislation a married woman could not own property and was not liable personally in contract. The law sought to provide protection and some legal recourse for tradesmen who would otherwise be left without a remedy. Today married women may become liable in contract and the application of the principle of presumed authority of a wife is not of such importance.

In *Phillipson v. Hayter*¹ Willes, J. said:

"What the law does infer is that the wife has authority to contract for things that are really necessary and suitable to the style in which the husband chooses to live, in so far as the articles fall fairly within the domestic department which is ordinarily confined to the management of the wife."

One must realize that this inference is rebuttable. In other words there is a presumption that a married woman, who is cohabiting with her husband, has his authority to pledge his credit for the purchase of such necessities as would normally come within the control of a wife as a manager of a household.²

A *prima facie* case is made out by proof of cohabitation, that the goods are necessities and that the third party relied upon the husband's credit and did not intend to contract with the wife.³

The definition of "necessaries" is broad but includes, for example, food, clothing, repairs, and small articles of furniture.

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(1870). I.L.R. 6 C.P. 38. 42.

2 Debenham v. Mellon (1880), 6 App. Cas. 24 (H.L.) .

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Fridman, The Law of Agency, at pp. 72-74; Robert Simpson Co. Ltd. v. Ruggles (1929), 65 O.L.R. 186 (Sup. Ct., App. Div.).

A husband may rebut the presumption in several ways.¹ He may show that the goods or services purchased were not "necessaries" or that the third party intended to contract with the wife and did not rely upon the credit of the husband. A husband may also prove that he had already forbidden the plaintiff to give credit to his wife. The fact that a wife is provided with an adequate allowance out of which she could have paid for the articles is sufficient to rebut the presumption although there is some dispute as to whether the wife's means (income, other assets) is material.² It also appears that the husband may escape liability if he has expressly forbidden the wife to pledge his credit, whether or not the third party has notice of such restriction.³

Although the conditions under which the law developed have not changed, the principle is one properly within the general law of agency and the Study sees no reason to recommend a change at this time.

2. Agency by Estoppel or Holding Out

In certain circumstances, the parties to a marriage may develop a practice by which the goods supplied the wife are paid for by the husband. Unless he has reason to doubt the existence of such authority the third party may rely upon the past conduct of the husband and successfully claim against him. In other words, the husband has held out the wife to the particular tradesman as having the authority to pledge his credit. The husband is then estopped from denying

the effect of his authority.⁴

The difficulty here is the termination of the wife's apparent authority. A mere restriction or prohibition between husband and wife will not suffice. The burden is on the husband to inform the tradesman of the termination of authority. Occasionally an attempt is made to accomplish this by the insertion of advertisements in the press; however, despite popular belief, this notice is ineffective unless there is proof that the particular third party had personal knowledge of it before the transaction on which he is suing.⁵

Agency by estoppel or apparent authority arises under the law of agency and there is no need to change the law as it presently applies to members of the family unit.

¹ *Miss Gray, Ltd. v. Cathcart* (1922), 38 T.L.R. 562.

² *Callot v. Nash* (1923), 39 T.L.R. 291 (K.B.D.);

Biberfeld v. Berens, [1952] 2 All E.R. 237, [1952] 2 Q.B. 770 (C.A.).

³ (1870), L.R. 6 C.P. 38.

Bromley, Family Law (3rd ed., 1966) at p. 277; *Drew v. Nunn* (1879), 4 Q.B.D. 661 (C.A.).

Debenham v. Mellon (1880), App. Cas. 24 (H.L.).

3. The Agency of a Deserted Wife

While cohabitation and management of a household give rise to a rebuttable presumption of agency on the part of a wife, by operation of law a *deserted wife* has an irrevocable authority to pledge her husband's credit for the purchase of necessities. Whether this operates within the concept of quasi -agency or is really an instance of agency of necessity is still uncertain.¹

The recognition of this right of a deserted wife developed before and during the eighteenth century when a married woman was regarded as a chattel of her husband. It was a recognition of the Common Law duty of a husband to maintain his wife and children.

Although a husband cannot withdraw his authority there are certain limitations on the authority of his wife. In the first place a husband is liable only if credit was given to his wife as an agent. Secondly, his liability extends only to the purchase of necessities. Finally, the liability exists only as long as the wife is entitled to be maintained by him and, therefore, her adultery would operate as an absolute bar to recovery."²

In *Biberfeld v. Berens*³ the court held that a deserted wife's authority to pledge her husband's credit did not exist if she had sufficient personal means to maintain herself.

The deserted wife may only pledge her husband's credit for necessities, which have received a broad definition and include support for herself and her dependant children.

The break-up of a marriage may take place in many different ways. If the parties have executed a separation agreement which provides for her maintenance the law appears to be that a wife cannot pledge her husband's credit unless the agreement has been breached.⁴ There is some support⁵ for the argument thitt the authority to pledge his credit still exists if the amount of maintenance agreed upon is unreasonable or insufficient to maintain adequately the wife and children of the marriage.⁶

Fridman, *supra*, p. 61; Powell, *The Law of Agency* (2nd ed.),426.

Bromley, *supra*, 208-213.

/1952/ 2 A11 E.R. 237 (C.A.).

Report of the Family Law Project to the Ontario Law Reform Commission on Property Subjects, vol. 1, p. 34 (1967, unpublished).

Bromley, *supra*, pp. 210-211.

In England, the wife's authority ceases upon the granting of an order for judicial separation, *Sandilands v. Carus*, /1945/ 1 K.13. 270 (C.A.). It is thought that this case would apply in Newfoundland. However, a maintenance order does not terminate the authority, *Hatfield Hall v. Walters & MacDonald*, /1955/ O.W.N. 66 (C.A.).

The authority is terminated upon the divorce of the couple or the death of the husband.¹

PROPOSALS FOR REFORM

United Kingdom

In 1967 The Law Commission reviewed the concept and operation of the agency of the deserted wife.² In its working paper the Commission concluded that the doctrine should be abolished provided certain statutory steps were taken to ensure the wife's right to maintenance.

In 1969 The Law Commission recommended the abolition of the doctrine of the deserted wife's agency.³ The Commission felt that it served no useful purpose and that in the light of social security and maintenance legislation it fulfilled no social purpose.

To date no legislation based upon this recommendation has been introduced.

Ontario

The Family Law Project recommended to the Ontario Law Reform Commission the abolition of the right of the deserted wife to pledge her husband's credit for necessities.⁴

CONCLUSION

The Study agrees with the recommendations made in Ontario and the United Kingdom.

A married woman now has statutory rights to maintenance which may be enforced against her husband. She has contractual capacity and may own property. The reasons upon which the deserted wife's agency was founded no longer exist. Quick, efficient statutory remedies are now available. There is little practical value in the retention of the concept.

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2Bromley, *Supra*. p. 213.

3The Law Commission, Published Working Paper No. 9, Matrimonial and Related Proceedings - Financial Relief, 1967 paras. 41 - 52.

4The Law Commission, Report on Financial Provision in Matrimonial Proceedings, 1969, paras. 108-110.

Report of the Family Law Project of the Ontario Law Reform Commission to the Commission on Property Subjects, vol. 1, pp. 30-38,49-51, (1967, unpublished).

B. THE CONTRACTUAL RIGHTS OF MARRIED WOMEN

HUSBAND'S LIABILITY FOR HIS WIFE'S ANTE-NUPTIAL CONTRACTS

At Common Law a husband acquired control over his wife's property upon their marriage. At the same time he also became liable jointly with his wife for her ante-nuptial debts and obligations. Without such a rule, those to whom the wife owed pre-nuptial debts or obligations would have no recourse against the wife's property.

This Common Law position was altered basically with the passing in England of the various Married Women's Property Act. "These statutes increased the wife's liability for her ante-nuptial debts, since her property was released from her husband's control, and his liabilities were correspondingly decreased."

As a result of these Acts, in England a husband is no longer liable for ante-nuptial debts and obligations contracted by his wife with a third person.²

In Newfoundland, the law on this point is found in The Married Women's Property Act³ of Newfoundland to which major amendments were made in 1963⁴. The law in Newfoundland may be summarized as follows:

- (i) a husband is not liable by reason only of his being a husband, for any ante-nuptial contract entered into, or debt or obligation incurred by his wife;⁵
- (ii) a husband cannot be sued or joined as a party to any legal proceeding referred to in (i) above;⁶
- (iii) a married woman is liable for her ante-nuptial debts and obligations and may be sued thereon. Such liability is no longer restricted to the extent of her "separate property". The 1963 amendments removed the concept of a married woman's "separate" property from Newfoundland law.⁷

¹Report of the Family Law Project of the Ontario Law Reform Commission to the Commission, on Property Subjects, vol. 1, p. 20 (1967, unpublished).

²Ibid., p. 21.

³R.S.N. 1952, c. 143.

⁴Stats. Nfld. 1963, No. 13.

⁵Ibid., s. 2.

⁶Ibid.

⁷Ibid., s. 4.

At Common Law ante-nuptial contracts between a man and woman became void upon their inter-marriage. The case of *Butler v. Butler*¹ held that the English Married Women's Property Act of 1882 did not alter this rule. Consequently, even today in Ontario a married woman is not liable to her husband on ante-nuptial contracts made between them.²

• *Butler v. Butler* has been criticized as being too narrow an interpretation of the English Act of 1882. Moreover, "the unambiguous wording of the 1935 Act (5, which amended the 1882 Act)³ suggests that today the spouses may mutually enforce any ante-nuptial contract notwithstanding the marriage."⁴

The law in Newfoundland also appears to be that spouses may mutually enforce ante-nuptial contracts made between them. Although there are no reported Newfoundland cases on this point, the Newfoundland Married Women's Property Act (as amended in 1963) contains sections⁵ substantially the same as those of the English Act of 1935.

A MARRIED WOMAN'S CAPACITY TO CONTRACT IN HER OWN NAME

At Common Law a married woman had no separate contractual capacity from that of her husband. However, in Equity she was given capacity to contract to the extent of property expressly given to her for her separate use. This equitable doctrine of a married woman's "separate property" was incorporated and extended in England by the various Married Women's Property Acts. Under both the equitable and statutory doctrine of "separate property", the liability which attached to the married woman was a proprietary liability only. There was no personal liability and consequently she could not be imprisoned or made bankrupt. This limited capacity to contract to the extent of her separate property permitted a married woman, both in Equity and under statute, to contract with her husband as well as with third parties.

In order to prevent a married woman from making "an improvident disposition of her separate property"⁷ Equity developed the concept of a "restraint upon anticipation." Under this doctrine, if property were given for

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²*Butler v. Butler* (1885), 14 Q.B.D. 831, affirmed by the Court of Appeal in 16 Q.B.D. 374.

³Report of the Family Law Project to the Ontario Law Reform Commission, on Property Subjects, vol. I, p. 23 (1967, unpublished).

⁴Law Reform (Married Women and Tortfeasors) Act, 1935, Stats. U.K. 1935, c. 30.

⁵Bromley, P.R., *Family Law* (3rd ed., 1966), at p. 274.

⁶The Married Women's Property Act, R.S.N. 1952, c. 143, ss. 14, 27.

⁷Report of the Family Law Project of the Ontario Law Reform Commission, to the Commission on Property Subjects, vol. I, pp. 25-26 (1967, unpublished).

⁸Cheshire & Fifoot, *The Law of Contract*. (7th ed., 1969), p. 395.

the separate use of a married woman with the condition that such property was given without the power of anticipation, then "... she was disabled during coverture from alienating the property or anticipating the future income..."¹.

If a restraint against anticipation were to be attached to property given to a man, such restraint would be void as offending the rule against restraints upon alienation. Thus, the existence of such a concept in regards to property given to a woman is a manifestation of the inferior status of a married woman in the eyes of the law.

Restraints upon anticipation were completely abolished in England in 1949². It is still possible to create such restraints in Ontario.³

In 1963 amendments to The Married Women's Property Act of Newfoundland⁴ abolished the concept of "separate property". In addition, the Act abolishes the concept of restraints upon anticipation created on or after July 1, 1963. However, restraints upon anticipation or alienation attached to property by virtue of an instrument executed, or Act passed, *before* July 1, 1963 will continue to operate.⁶

A married woman in Newfoundland now has capacity to contract in her own name. If she breaches her contract, she will be personally, as well as proprietarily liable.⁷ Thus she may be made a bankrupt, but she may not be arrested as a judgment debtor due to an exemption under section 119 of The Judicature Act.⁸

The Study has no recommendations in this area of the law.

THE INCIDENTS OF CONTRACTUAL POWERS

(a) Loans Between Spouses

Since a wife's property and legal personality became moulded into that

¹ Snell's Principles of Equity (26th ed., 1965), p. 566.

² Married Women (Restraint upon Anticipation) Act, 1949, Stats. U.K. 1949, c. 78.

³ Report of the Family Law Project of the Ontario Law Reform Commission to the Commission on Property Subjects, vol. I, p. 27 et seq. (1967, unpublished).

⁴ Stats. Nfld. 1963, No. 13.

⁵ Ibid., s. 2.

⁶ Ibid.

⁷ But note the transitory provision of s.-2 of The Married Women's Property (Amendment) Act, 1963 of Newfoundland whereby a judgment against a married woman on a contract debt incurred before s. 4 of the Act came into force, can only be enforced against her property. R.S.N. 1952, c. 114.

⁸ The scheme of organization of this part has been adopted by the Study from the Report of the Family Law Project of the Ontario Law Reform Commission to the Commission on Property Subjects, vol. I, pp. 38-44, 48 (1967, unpublished).

of her husband upon marriage, at Common Law spouses could not make legally enforceable loans to each other. However, in Equity, inter-spousal loans could be made and enforced.

Section 5 of the revised Newfoundland Married Women's Property Act of 1952 specifically dealt with loans by a wife to her husband in the event of the husband's subsequent insolvency. However, section 5 was repealed by the amending Act of 1963 and no new specific section was enacted to replace the repealed section 5.

It is submitted that inter-spousal loans are now covered by section 2 of the Act and that loans may be made between spouses. Either spouse may sue the other for repayment of such a loan as an ordinary creditor, provided there is a contractual basis for the loan. Such a loan raises no presumption of advance-

ment.¹

(b) Gifts Between Spouses

Both the husband and the wife are capable of making gifts of property (either personal or real) to each other. Since real property must be transferred by written instruments, there is no problem in determining if there has been a gift. When a spouse alleges a gift of a chattel, without deed, he must prove delivery and donative intent. This is often more difficult to prove between spouses than between strangers due to the close relationship and inter-mingling of the property of spouses.

The burden of proof upon a spouse alleging a gift is greater than the burden on a stranger alleging such a gift.²

Certain presumptions have arisen in Common Law concerning transfers of real property between husband and wife.

The Report of the Family Law Project to the Ontario Law Reform Commission on Property Subjects summarizes the positions as follows:

"When real property is purchased by the husband and the title or equitable right of beneficial user of the property is transferred by the husband

to the wife or by the husband to the husband and wife jointly, there is a presumption of a gift in favour of the wife. Where a third party is added, that

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¹ Hall v. Hall, [1911] 1 Ch. 487.

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n is presumed to be a trustee for the wife or for the husband and wife."

² Bashall v. Bashall (1894), 11 T.L.R. 152 (C.A.).

"There is no presumption of advancement in the transfer of property by a wife to her husband. The onus is on the husband to show that a gift was intended and not a resulting trust."¹

As there are no Newfoundland cases on this point, the Common Law applies in this Province.

(c) Policies of Life Insurance

Particular attention is given contracts of life insurance entered into by spouses. The Life insurance Act, 1960 of Newfoundland² and The Married Women's Property Act³ of Newfoundland are relevant in this regard. The following paragraphs outline the present law in Newfoundland.

A person has an insurable interest in the life of his spouse.⁴

The insured may designate his beneficiary either in the insurance contract or in a declaration.⁵ He may, subject to section 22, alter or revoke a designation.⁶

Where the designated beneficiary is the spouse, child, parent, or grandchild of the insured, the insurance money and the rights and interests of the insured therein and in the contract, are exempt from execution or seizure.⁷

A married woman is specifically given the power to contract in her own benefit a policy of life insurance upon her own life *or* upon the life of her husband by section 13 of The Married Women's Property Act.⁸ Moreover, section 13 provides that when a husband or wife takes out life insurance on his/her own life and such policy is *expressed* to be for the benefit of his wife/husband and/or children, it shall create a trust in favour of the objects named therein. In such a case any monies payable under such a contract will not, so long as any trust object is unperformed, form part of the insured's estate *or* be subject to debts. Of course, the policy must have been taken out *bona fide* and not with intent to defraud creditors.

¹Report of the Family Law Project of the Ontario Law Reform Commission to the

²Commission on Property Subjects, vol. I, c. 2, p. 40, (1967, unpublished).

³Stats. Nfld. 1960, No. 17.

⁴R.S.N. 1952, c. 143.

⁵The Life Insurance Act, Stats. Nfld. 1960, No. 17, s. 10 (b).

⁶*Ibid.*, s. 21 (1).

⁷*Ibid.*, s. 21 (2).

⁸*Ibid.*, s. 27 (2).

⁹R.S.N. 1952, c. 143..

An insured/ may designate his beneficiary (for example, his or her spouse) irrevocably according to the procedure set out in section 22(1) of The Life Insurance Act, 1960 of Newfoundland.- That section states:

"22. (1) An insured may in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head or principal office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably and in that event the insured, while the beneficiary is living may not alter or revoke the designation without the consent of the beneficiary and the insurance money is not subject to the control of the insured or of his creditors and does not form part of his estate."

Any beneficiary who has reached the age of eighteen years who is not under some other legal disability, has the capacity of a person of twenty-one years of age under the Act and may receive, and give a discharge for, insurance moneys.³

(d) Capacity to be a Partner or Shareholder

The Supreme Court of Canada has held in a case^{d1} originating in Alberta that a husband and wife may be partners. Section 2 of Newfoundland's Married Women's Property Act gives a woman full capacity to enter into contracts and obligations. Therefore, a husband and wife may be partners in Newfoundland.

Again, section 2 of The Married Women's Property Act is wide enough to give a married woman capacity to own, purchase, and transfer shares. Section 8 of that Act provides that until the contrary is shown, stocks and bonds which are standing in the sole name of a married woman on April 21st, 1883 are deemed to be hers legally and beneficially to deal with as she pleases without the concurrence of her husband. Section 9 provides that all stocks and bonds transferred to a married woman *after* April 21st, 1883 are to be deemed her property for which she alone is liable. However, section 9 further provides that nothing in that section requires a company to admit a married woman as a shareholder if such is contrary to the company's by-laws or articles.

The provisions of sections 8 and 9 of The Married Women's Property Act of Newfoundland are extended to apply so far as relates to the estate, right, title or interest of the married woman, to any such property held jointly by the

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The Life Insurance Act, 1960, Stats. Nfld. 1960, No. 17, ss. 2 (s), 33.

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Ibid.

3 Ibid., s. 34.

-4 Marx v. Marx, /1964/ S.C.R. 653.

married woman and any person or persons other than her husband.'

A husband does not have to join in his wife's transfer of her interest in joint or solely-held stocks, bonds or debentures.²

(e) Capacity as a Trustee, Executrix or Administratrix

In Newfoundland, a married woman has the same capacity to act as an executrix, administratrix, or trustee, jointly or alone, as if she were a *feme sole*.³ She can sue or be sued, or transfer property jointly or alone in such capacities.⁴

(f) Separate Business of the Wife

In Newfoundland, The Married Women's Property Act does not specifically deal with a wife's capacity to engage in a separate business activity. However, section 2 and the apparent intent of that Act to give a married woman the same powers and capacities as if she were a *feme sole*, indicate that the law in Newfoundland is that a married woman has full capacity to engage in her own separate business.

Where the husband and wife are associated in the same business, it is a question of fact as to whose business it is. The test is "whether the wife is trading independently of her husband without being accountable to him for the profits of the business."⁵

(g) Next-Friend and Guardian Ad Litem

In England, even after the passage of the Married Women's Property Act of 1882, a married woman was held to be incapable of acting as a next-friend or guardian *ad litem*.⁶ This was because that statute only gave her capacity to sue and be sued as a *feme sole* in relation to her separate property.

Since Newfoundland no longer has a doctrine of separate property but rather gives a married woman the right to sue and be sued *in all respects* as if she were a *feme sole*, the reasons advanced in the *Duke of Somerset Case*⁷ do not apply in Newfoundland. Therefore, married women may act as next-friends and guardians *ad litem* in actions commenced in this Province.

¹The Married Women's Property Act, R.S.N. 1952, c. 143, s. 10.

²*Ibid.*, s. 11.

³*Ibid.*, s. 21.

⁴*Ibid.*

⁵*Walker v. Brown* (1916), 36 O.L.R. 287, 292 (High Ct.).

⁶*In re Duke of Somerset, Thynne v. St. Maux* (1887), 34 Ch. D. 465.

⁷*Ibid.*

C. LIABILITY OF INFANTS IN CONTRACT

(1) SUMMARY OF LAW¹

General

At Common Law, the only contracts which were absolutely binding on infants were those for "necessaries".² "Necessaries", in this case, is used in two senses. It includes necessary goods and services *and* it also includes contracts of benefit to the infant (e.g. contracts of apprenticeship, education).³

On the other hand, where the obligations undertaken by an infant in contract were so onerous that they outweighed the benefit conferred by the contract on the infant, the contract would be void *ab initio*.⁴ Such a contract could never be ratified by the infant, nor might the contract be enforced by the infant against the other party.

Aside from these classes of contracts, all others were "voidable" at the infant's option.⁵

These "voidable" contracts are composed of two types:

- (1) Contracts which are valid and binding on the infant unless until he repudiates them before, or within a reasonable time after attaining majority⁶; and
- (2) Contracts which are not binding on the infant unless ratified by him upon his majority.⁷

Contracts for Necessaries⁸

The question whether a contract is for a necessary or not has been held

¹The following reports and articles were most helpful to the Study in its preparation of this summary: Report of Ontario Law Reform Commission, 1969, The Age of Majority and Related Matters; J.D. Payne: "The Contractual Liability of Infants" (1966), 5 West L. Rev.

2136; Great Britain, Report of the Committee on Age of Majority, Cmd. 3342, 1967. Chitty on

3Contracts (23rd ed., 1968), vol. I, p. 184.

4Ibid.

5Butterfield v. Sibbitt, [1950] O.R. 504 (High Ct.).

6Chitty on Contracts, op. cit., p. 184.

7Cheshire & Fifoot, The Law of Contract (7th ed., 1969), p. 367.

8Ibid.

"Necessaries" is here being used in the narrow sense. Beneficial contracts are dealt with below.

to be a mixed question of fact and law.¹ First, the court determines, as a matter of law, whether the item can be categorized as a necessary. If so, then it becomes a question of fact in the particular case whether it was necessary. The Sale of Goods Act² of Newfoundland defines necessities to mean "goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

It should be noted that contracts for necessities are only *prima facie* binding on infants. They may be avoided if they contain unduly onerous terms. "The question to be determined in each *case* is whether the contract is substantially for the benefit of the infant."³ This question should be asked as of the date that the contract was made.

Section 3(1) of The Sale of Goods Act of Newfoundland provides that where necessities are sold *and* delivered to an infant, he is bound to pay a *reasonable* price for them.

The operation of these principles concerning necessities can be seen in the case of *Wong v. Kim Yee*.⁴ In that case the plaintiff had lent the infant defendant money in order that the defendant could pay for: his car repairs, trips, life insurance premiums, school transfer, a jacket, school books, and \$15 for his personal use. The infant refused to repay the money and the plaintiff sued for repayment. The court held that the infant only had to repay the money lent for the purchase of necessities and that the only necessities in the above list of expenses were the school transfer, the school books, the jacket and the \$15. The other expenses were not necessities. Since the infant was not married, the court held that life insurance was not a necessary requirement for him.

However, The Accident and Sickness Insurance Act, 1957 of Newfoundland provides that a minor after reaching age fifteen has *full capacity* to contract sickness or accident insurance on himself and "to deal with the contract."⁵ If he is married, then under section 15 he may also effect insurance on his spouse and children.

Under The Life Insurance Act, 1960⁶ of Newfoundland, an infant aged sixteen or over has full capacity to make an enforceable contract of life insurance.

¹

²Ryder v. Wombwell (1868), L.R. 4 Ex. 32 (Ex. Chain.).

³R.S.N. 1952, c. 222, s. 3 (2).

⁴Payne, "The Contractual Liability of Infants" (1966), 5 West. L. Rev. 136 at p. 138. In support of this Payne cites a beneficial contract case: *Clements v. London and North Western Railway Co.*, [1894] 2 Q.B. 482 (CA).

⁵(1961), 34 W.W.R. 506 (Sask. Dist. Ct.).

⁶Stats. Nfld. 1957, No. 30, s. 15.

Stats. Nfld. 1960, No. 17, s. 33.

The question of an infant's liability on an executory contract for necessities depends, in theory, upon whether the basis for an infant's liability is *ex contractu* or *in rem* (under a quasi contract). Although Chitty notes that an infant has been held liable on an executory contract for education and training,¹ he does not state his opinion as to which is the correct view. On the other hand, Payne² and Cheshire and Fifoot³ surmise that the *in rem* theory is correct in the case of a sale of goods and that an executory contract for goods is unenforceable. Further, they distinguish the several educational and training cases which were enforced against infants even though executory, on the ground of part performance and on the ground that such contracts are really "beneficial contracts" rather than strictly -necessaries'.

While at Common Law money loaned to an infant to purchase necessities could not be recovered, in Equity a creditor could recover the amounts which were *actually* spent on necessities.⁴

Beneficial Contracts of Service

Beneficial contracts of service are contracts of, or analogous to, apprenticeship. Briefly, an infant may bind himself to a contract of service. This is justified on the grounds that an infant should be able to make the necessary arrangements to prepare himself for the future; to "acquire the means of his earning his livelihood".⁵

In order for such a contract to bind the infant, it must be *substantially* for his benefit when construed as a whole.⁶ Otherwise, the infant may repudiate it during his minority or within a reasonable time after majority.

It is submitted that the provisions of The Apprenticeship Act⁷ would supersede or incorporate the Common Law principles.

Voidable Contracts

(1) Contracts Binding Unless and Until Repudiated

"When an infant enters into a contract which involves the acquisition

¹Chitty on Contracts (23rd ed., 1968), vol. 1, p. 186.

²Payne, *supra*, at pp. 139-142.

³Cheshire & Fifoot, *supra*, at p. 370.

⁴Marlow v. Pitfield (1719), 24 E.R. 516.

⁵Cheshire & Fifoot, *The Law of Contract* (7th ed., 1969), p. 371.

⁶Clements v. London and North Western Railway Co., [1894] 2 Q.B. 482 (C.A.).

⁷R.S.N. 1952, c. 261. See also: The Minors and Apprentices Act, R.S.N. 1952, c. 163.

⁸For further discussion of beneficial contracts of service see: Cheshire & Fifoot, *supra*, pp. 371-373 and Chitty, *supra*, pp. 190-193.

of an interest in property of a *permanent* nature, *with continuing obligations* attached to it, he may avoid it at his option either during infancy or within a reasonable time of attaining his majority"¹ (italics added).

Examples of contracts which come within this category are contracts of partnership, leases, marriage settlements, and share purchases.²

The infant is bound by such a contract *until* he avoids it. If he repudiates it within a reasonable time, he will not be liable for anything under the contract *subsequent* to the repudiation. However, he will be liable for obligations which have already accrued before repudiation.³ Furthermore, the infant cannot recover anything paid under the contract *before* repudiation unless the consideration for such payment has totally failed.⁴

If the infant does decide to avoid this kind of contract, he must do so *in tot°*. He cannot affirm those provisions which are beneficial to him and repudiate others which are prejudicial.⁵

(2) Contracts Enforceable Upon Ratification

At Common Law, those contracts which are not for necessities or which are binding unless repudiated, constitute a class of voidable contracts which cannot be enforced against the infant (though the infant could enforce them against the other contracting party) *unless* the infant ratifies such contract *after* reaching his majority.⁶

In Newfoundland, The Limitations of Actions (Personal) Act⁷ provides that in order for a plaintiff to sue a person on a ratification, made after majority, of a debt or contract made during infancy, such ratification or promise must be in writing *and* signed by the party to be charged.⁸

At Common Law, the ratification must recognize the previous debt or contract as a presently binding obligation.⁹ Such ratification does not create any new right or obligation - it simply terminates the debtor's privilege.

¹ Chitty, *supra*, at p. 194.

² Payne, "The Contractual Liability of Infants" (1966), 5 West. L. Rev. 136, at p. 143. Cork & Bandon Railway v. Cazenove (1847), 10 Q.B. 935, 116 E.R. 355.

³ Phillips v. Greater Ottawa Development Co. (1916), 33 D.L.R. 259 (Ont. Sup. Ct., App. Div.).

⁴ Henderson v. Minneapolis Steel & Machinery Co. of Canada Ltd., [1930] 3 W.W.R. 613 (Alta. Sup. Ct.). In England the Infants Relief Act, 1874 has substantially altered the Common Law with respect to infants' contracts enforceable upon ratification.

⁵ R.S.N. 1952, 0.146, s. 10.

⁶ Payne, *supra*, at pp. 145-146 of his article urges repeal of the requirements for written ratification of such contracts.

⁷ Ibid.; R. v. Rash (1923), 53 O.L.R. 245 (Sup. Ct. App. Div.).

If the infant elects to avoid such a contract by refusing to ratify it or perform his obligations under it, he must restore any consideration which is in his possession and which was paid to him by the other party under the contract.¹

If such consideration is no longer in his possession, he may still avoid the contract without incurring any liability.- Professor Payne notes that there are several Ontario decisions which hold that "the infant cannot disaffirm a transaction once it has been executed by both parties ... where the infant is unwilling or unable to restore the other party to his former position."³ He admits however that these latter decisions are against the weight of judicial authority.

Professor Payne suggests that the current position in respect to voidable contracts may be summarized as follows:⁴

- "(i) insofar as the contract is executory on the part of the infant, he may always interpose his infancy as a defence to an action for its enforcement,
- "(ii) if the contract has been wholly or partly performed on his part, but is wholly executory on the part of the other party, the infant having received no benefits from it, he may recover back what he paid or parted with,
- "(iii) where the contract has been wholly or partly performed on both sides, the infant cannot rescind and recover back what he has parted with unless he is capable of and willing to restore the other party to his former position."

Remedies

Although the general rule is that an infant may enforce his contracts against the other party, an infant cannot obtain specific performance unless he has performed his part of the contract. Otherwise, the remedy would not be mutual.⁵

Delictual Liability of Infants

Generally, an infant may be held liable for the torts he commits. Con-

¹Louden Manufacturing Co. v. Milmine (1907), 15 O.L.R. 53 (Div. Ct.).

²Noble's Ltd. v. Bellefleur (1963), 37 D.L.R. (2d) 519 (N.B. Sup. Ct. App. Div.).

³Payne, supra, at p. 146.

⁴Ibid., at pp. 147-148.

⁵Flight v. Bolland (1828), 38 E.R. 817.

sequently, some adults have tried to enforce contracts against infants by framing an action in tort rather than contract. However, the law is that an infant cannot be sued in tort if the subject matter of the suit is really *ex contractu*, or if the tort action is so connected with a contract that the tort action is merely another method of enforcing the contract.¹ But, an infant may be liable in tort if his conduct "though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it."²

Thus, an infant will only be liable in tort when the delictual act (a civil wrong) is of such a character as was not contemplated in the contract. Whether such an act can be said to be in the contemplation of the contracting parties depends upon the subject-matter of the particular contract.

Infant's Liability for Fraudulent Misrepresentation

Situations arise where an infant induces a party to enter into a contract with him by fraudulently misrepresenting his age or some other fact. If the infant defaults, the other party cannot enforce the contract due to the infancy of the other party. Nor can the innocent party seek damages for the tort of deceit since such an action would be an indirect means of enforcing the contract against the infant.

In order to prevent infants from profiting from such deceit, Equity has applied the doctrine of restitution to such cases. Accordingly, where the infant has obtained goods by such fraud and they are in his possession, the infant can be compelled to return them to the innocent party. It would appear that the doctrine is limited to situations where the particular goods are still in the possession of the infant.³

Of course, a contract induced by fraud may be avoided by the innocent party.⁴

Liability of Infants in Quasi-Contract

Payne notes that "the position in quasi-contract is substantially identical to that in tort and there is nothing to preclude an infant's liability in quasi-contract provided that the action is not used as an indirect way of enforcing an

1 *Noble's Ltd. v. Bellefleur* (1963), 37 D.L.R. (2d) 519 (N.B. Sup. Ct. App. Div.).

2 *Pollock on Contract*. (13th ed.). pp. 62-63.

4 *Lempriere v. Lange* (1879), 12 Ch. D. 67S

otherwise unenforceable contract."¹

Guaranteeing and Indemnifying Infants' Contracts

The guarantor of an infant's contract undertakes to answer for the obligation of the infant, if such infant, whose obligations he has guaranteed, fails to perform. Unless the infant making the contract is liable to discharge his obligations under the contract, the guarantor is not liable.²

Where, however, a person agrees to indemnify an infant's contract (such as where he is co-maker with the infant on a promissory note) he undertakes to assume direct responsibility for performance of the infant's obligations under the contract even where the contract cannot be enforced against the infant.

1 Payne, "The Contractual Liability of Infants" (1966), 5 West. L. Rev. 136, at p. 152.

2 Under England's Infants Relief Act, 1874 the guarantor of an infant's contract which is found to be void, is not liable under the contract.

(2) PROPOSALS FOR REFORM

The United Kingdom

In 1967, in the United Kingdom, a committee chaired by the Honourable Mr. Justice Latey ¹ considered, *inter alia*, the law relating to infants' contracts. The committee recommended the reduction of the age of majority to eighteen² and, with regard to contracts made by those under eighteen, suggested a number of changes in the law, The Family Law Reform Act 1969 of the United Kingdom has now established eighteen as the age of majority and, therefore, persons of that age have full contractual capacity.

The proposals of the Latey Committee relating specifically to infants' contracts were as follows:

1. Subject to the proposals below, contracts entered into by an infant should not be enforceable, by action or otherwise, against an infant. /Para. 299/
2. (a) Where an infant receives money, property or services under a contract which he fails to perform he should be liable to account to the other party for the benefit he has received; and
(b) The court should be empowered to relieve the infant from this liability to account to such extent as it thinks fit. /Para. 309/
3. Where an infant has parted with money or property under a contract which is unenforceable against him he should be entitled to the return of the money or property, subject to his obligation to account to the other party for any benefit the infant has received, if he resiles from the contract before it is fully performed. /Para. 310/
4. The court should have a discretion whether to give effect to any term in an infant's contract of service or apprenticeship if it is of the opinion that such term is unreasonable or harsh or not in the infant's interest. /Para. 326/
5. An infant should be liable in tort for deceit unconnected with his

Great Britain, "Report of The Committee on Age of Majority", Cmd. 3342, hereinafter referred to as the "Latey Committee".

¹ Ibid., p. 42.

age even if the effect would be to indirectly enforce a contract.
/Para. 351/

6. An infant should remain exempt from liability in tort for deceit as to his age which induces a contract. /Para. 354/
7. Any contract by a person of full age to accept liability in the event of the failure by an infant to carry out what he has undertaken to do shall be enforceable notwithstanding the unenforceability or nullity of the infant's undertaking. /Para. 362/
8. A guarantee or indemnity of an infant's undertaking should be enforceable only if it is signed in a space marked in such manner, and accompanied in the document by such words, as may be specified. The wording should be short, but designed to draw to the signatory's attention just what he is letting himself in for. A possible form of wording would be:

If you sign this YOU may become personally liable to pay the money. Sign it only if you want to be legally bound. /Para. 366/

These proposals have not been implemented. However they are being considered by England's Law Commission as part of the Commission's project on the codification of the law of contract. The Study makes further reference to the Latey Committee proposals later in this Part.

Ontario

The Ontario Law Reform Commission considered the law relating to infant's contracts in its Report on 'The Age of Majority and Related Matters' to the Ontario Minister of Justice based on a report of Ontario's Family Law Project² to the Commission.

The Commission concluded that the age of majority should be lowered to eighteen and, with respect to infants' contracts, that further changes ought to be postponed until time has permitted a study of the effect of the reduction of the age of full contractual capacity to eighteen.³ In short, the Commission felt

2 Report of the Family Law Project to the Ontario Law Reform Commission: 1 Department of Justice, 1969.

Children,

3 vol. IX, c. 9, (1968, unpublished).

Report on the Age of Majority and Related Matters, Department of Justice, 1969, pp.53-54.

that additional time should be taken before altering the protection given the interests of infants under the present law.

CONCLUSIONS

The Study has concluded there is merit in the attitude taken both in the Latey Report ¹ in the United Kingdom and by the Ontario Law Reform Commission², that if the age of contractual capacity for infants is reduced

additional changes respecting the position of infants in other areas of the law" ⁴ may be necessary and should be the subject of future study. While accepting this reasoning the Study submits that prompt reform in a number of areas is desirable. These areas are dealt with below.

Minimum Age of Contractual Capacity

It is not within the scope of the Study's terms of reference to make recommendations relating to the over-all age of majority⁴. However, the Study has concluded and will recommend that the age of eighteen be the age at which full contractual capacity is attained. A person should be deemed to have reached his or her eighteenth birthday at the commencement of the day of the eighteenth anniversary of birth.⁵

The Study's selection of eighteen years, rather than seventeen or nineteen years, as the age of full legal capacity in contract, is in some degree an arbitrary one, as the age at which each person matures sufficiently to participate in society as a young adult, planning his future and managing his affairs, varies to some extent. In reaching this conclusion the Study took account of the factors outlined below.

1. About forty percent (195,333) of Newfoundland's total population of 493,396 in 1966 were minors (under twenty-one years of age). The minor population included fifteen percent (28,644) from eighteen up to twenty-one years of age.⁷

Most persons in this age group were either attending university or a

For a very helpful commentary on the Report of the Latey Committee, see: Evans, -"The
1 Need for Reform in the Law of Infants Contracts - Some Comments on the Latey Report",
/1968/ Auckland U. L. Rev. 65.

(1969), Report on the Age of Majority and Related Matters, pp. 28-31.

2 For example: minimum age requirement for marriage, voting and obtaining of driving
3 license.

4 See Appendix H summarizing Newfoundland statutory provisions setting age requirements. At

5 Common Law a person reaches a particular age on the day immediately preceding his or her
birthday (Re Shurey, /1918/ 1 Ch. 263). Section 3(1) of the Criminal Code (R.S.C. 1970, c.
C-34) provides that a person reaches a particular age on the day immediately after his or her
birthday.

6 The term "minor" is preferable to the Common Law term "infant".

7 Source: Dominion Bureau of Statistics, Catalogue 92-613, Table 25 (1966).

trades college or were employed by Government, industry or commerce in both skilled and unskilled trades.

Approximately a third of all males and two thirds of all females who married in 1966 in Newfoundland were between the ages of eighteen and twenty-one years¹, and there were roughly the same proportions of young males and females marrying in 1967 and 1968 in the province.

With the present state of contract law, none of these people can, without the financial backing or written indemnity, of an adult, satisfactorily purchase or rent a dwelling or an apartment, go into business for themselves in a sole proprietorship, in partnership or as a company (which would involve entering into contracts, borrowing money and dealing with banks), or purchase goods (unless the vendor is certain they are necessities) on credit or under conditional sales contracts. The young unmarried segment of the population between eighteen and up to twenty-one years, who are wage earners free from the financial commitments of higher education or marriage, also represent a growing consumer group of increasing importance to retailers.

A notable exception to the general contractual incapacity of infants is the federal Canada Student Loans Act² whereby many thousands of young Canadians under the age of twenty-one years obtain, and agree to repay (with interest in certain circumstances) educational loans not exceeding \$5,000 during the entire period of higher education.

2. "The present law both molly-coddles and hampers infants. It mollycoddles them since for the vast majority of contracts and the vast majority of infants the present rules are unnecessary. It is no doubt socially desirable to protect infants from exploitation. It is probably also desirable to have some sort of shield to protect infants from their own folly, where they may enter into a contract (or a number of contracts) perfectly fair in themselves but clearly from the infants' point of view, detrimental. But in both instances this must surely only apply to a fringe of cases.

"The present law achieves its effect by applying indiscriminately to all infants of whatever age, no matter what their intelligence or experience, and to all contracts of the various classes affected, no matter how fair and advantageous. As such it is out of keeping with social reality since

¹Source: Office of Registrar General of Vital Statistics, Department of Health (unpublished).

²R.S.C. 1970, c. S-17. Under s. 15 of the Act, a guaranteed student loan may be recovered by the bank making the loan, together with interest on the loan "as though the borrower had been of full age at the time the loan was made."

in the vast majority of cases people of whatever age do keep their bargains as they ought. The present law thus allows the potential for an infant knave to shield behind a plea of infancy against, a clear moral obligation. The law hampers infants for the very reason that because of these restrictions they are in many cases legally unable to carry on normal commercial activities.

"In addition, as the Latey Report notes, by the ages of eighteen, the vast majority of people are in fact running their own lives and making their own decisions, and it is in general undesirable to hamper them with unnecessary restrictions."¹

3. While twenty-one years is generally the age of full contractual capacity in most countries, a number of jurisdictions have recognized the development of social maturity among persons under twenty-one. Under pre-scribed conditions², persons (male and female) may achieve the capacity to enter generally into enforceable contracts at eighteen years of age, under the law of Switzerland, West Germany, France, some parts of the Soviet Union and the States of Kentucky and New Hampshire in the United States. Females eighteen years of age and older in nine States of the United States of America also have full, contractual capacity. Four Canadian provinces/ permit marriage, without parental consent, of persons eighteen years of age and older while two more provinces⁴ extend this right to females only.

The voting age (in provincial elections) is eighteen years in two Canadian provinces and nineteen in three other provinces.

Under the authority of the Juvenile Delinquents Act⁷, three provinces⁸ have chosen eighteen years (rather than sixteen) as the maximum age of juveniles and a fourth province⁹ has made a similar choice as to girls only.

Evans, P.J., - "The Need for Reform in the Law of Infants Contracts - Some Comments on the Latey Report", /1968/ Auckland U.L. Rev. 65, at pp. 73, 74.

In a number of jurisdictions mentioned, the condition is the achievement of married status.

1 Ontario, New Brunswick, Alberta and Manitoba.

2 Prince Edward Island and Quebec.

3 Quebec and Saskatchewan.

4 Alberta, British Columbia and Newfoundland.

5 R.S.C. 1970, c. J-3.

6 British Columbia, Manitoba and Quebec.

7 Alberta.

8

9 210

The National Defence Act' prohibits any person, under eighteen years of age from enrolling in the Canadian Armed Forces without first obtaining parental consent.

Ratification in Writing

As noted above, in Newfoundland a promise after majority to pay a debt contracted during infancy, or ratification after full age of any promise or simple contract made during infancy, must be in writing. The Study supports the retention of the requirement that a *written* promise or ratification would be the most satisfactory evidence of such an obligation. It may be argued that the obtaining of such written promise or ratification after majority might be difficult and lead to evasion by an infant of his obligations, and that, therefore, from the viewpoint of creditor protection, this requirement should be abolished. But written proof of any such promise or ratification after majority is the best possible evidence that the infant is fulfilling rather than attempting to avoid, his obligations.

Contracts of Apprenticeship

If the age of majority in contract is reduced to eighteen years, the question of enforceability of contracts of apprenticeship should be largely removed. However, considering the number of persons under the age of eighteen who are in the labour force, such agreements should be binding whether or not a person is an infant.

A review of apprenticeship legislation is not within the scope of this Study. However, such a review should be undertaken to up-date existing legislation.

Liability of Guarantor

Should a guarantor of full age of an infant's contract be liable where the infant has avoided the contract? Proposals 7(a) and 8(b) of the Latey Committee are that such a guarantee or indemnity should be enforceable if in writing, and that a short form of notice to the maker stating what the guarantee or indemnity entails, be provided him. This is a sound suggestion and the Study will recommend the adoption of the proposal.

Protection of Infants and Creditors

The effects of the reduction of the age of contractual capacity (if that recommendation is implemented) should be studied and further consideration given to the role of law in the protection of the interests of infants and creditors in contractual matters.

1 R.S.C. 1970, c. N-4, s. 20(3).

CHAPTER V

The Family Law Study recommends:

A. AGENCY WITHIN THE FAMILY

1. **That** legislation be introduced to abolish the right of a deserted wife to pledge the credit of her husband for the purchase of necessities. (Page 190).

B. THE CONTRACTUAL RIGHTS OF MARRIED WOMEN

(No recommendations).

C. LIABILITY OF INFANTS IN CONTRACT

2. That full contractual capacity be attained at the age of eighteen years; the age of eighteen years being deemed to have been reached at the commencement of the day of the anniversary¹ of a person's birth. (Pages 208-211).¹
3. That the present law relating to apprentices remain unchanged, but that a review of the present legislation relating to apprentices be undertaken. (Page 211).
4. That legislation be introduced to provide that a guarantee by an adult of an infant's contract be binding. (Page 211).

¹ Under The Minors (Attainment of Majority) Act, 1971, No. 71, s. 6 provides for nineteen as the age at which full contractual capacity is attained.

O A 1 I V I N
CHAPTER VI

PROPERTY RIGHTS IN THE FAMILY

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INTRODUCTION

Property rights and obligations touch upon almost every aspect of the complex activities and relationships among members of the family unit and between them, the State and the public. For this reason, the topic Property Rights in the Family requires extensive treatment and is dealt with in four parts:

Part A The Effect of Marriage on Property;

Part B Succession on Death and Related Problems;

Part C Conflict of Laws;

Part D Creation of Future Interests in Property and Other Problems.

In the treatment of these parts, some of them highly technical, the Study has tried as fully as possible to avoid or minimise the use of technical jargon. The result should therefore be more comprehensible to the non-professional reader.

PART A. THE EFFECT OF MARRIAGE ON PROPERTY

This part begins with a brief description of the disabilities of married

women as to property at Common Law and the effect of the legislation subsequently passed, leading up to and including The Married Women's Property Act in England in 1882 (the forerunner of the present Newfoundland Married Women's Property Act). After a general review of existing Married Women's Property legislation in this province, particular attention is given to the areas of property law in which disputes between husbands and wives most often arise, including:

- (1) Joint bank accounts;
- (2) Joint bank accounts;
- (3) Housekeeping and other allowances;
- (4) Gifts and sales of personal chattels between husband and wife;
- (5) Settlement of disputes between husband and wife as to title to property.

Here, comparisons are made between the law in Newfoundland and British Commonwealth countries including England.

- (6) Review of matrimonial property systems.

Here, there are useful comparisons between the law of Scandinavian countries and Commonwealth countries.

- (7) Right to possession of the matrimonial home.

The laws applicable in Newfoundland are contrasted with those of England and other Canadian provinces. The 1967 Matrimonial Homes Act of England is compared with the 1964 Joint Family Homes Act of New Zealand.

- (8) Proposed system of matrimonial property.

Here, there is a discussion of the Swedish system of law and the proposal of the Ontario Family Law Project. Examples are given showing how estates of equal value would be shared in Sweden and under the Ontario Family Law Project's proposal to the Ontario Law Reform Commission.

- (9) Proposals as to the matrimonial home.

The laws of England, New Zealand and some of the western provinces of Canada are examined and discussed.

Recommendations to Part A

There are fourteen recommendations made to this Part of Chapter VI, touching most of the sub-headings noted above. One of the most important recommendations relates to adoption of the "balancing claim" with respect to sharing between husband and wife of their matrimonial property.

AmendmentS to The Married Women's Property Act, abolition of the pre- sumption of advancement and resulting trusts, and amendments to the law respecting registration, occupation and disposal of the matrimonial home, are recommended.

Legislation is also proposed respecting ownership of allowances made to a wife for housekeeping, her clothing and other personal expenditures.

PART B. SUCCESSION ON DEATH AND RELATED PROBLEMS

This Part has, for the purposes of convenience and clarification, been sub-divided as follows:

(1) Intestate succession.

After outlining the objectives of intestacy legislation and examining intestate succession patterns in a number of other jurisdictions including England, the general characteristics of the Newfoundland Intestate Succession Act are explained.

(2) Effect of adoption.

Amendments to the Newfoundland legislation affecting the position in property law of the adopted child and his adopting parents, are proposed and discussed.

(3) Legislation on wills.

Revocation of a will by subsequent marriage and the effect of anti-lapse provisions on legacies, are among the topics treated.

(4) Dependant's relief legislation.

This is concerned with provision of proper maintenance and support of a worthy dependant, where, by the terms of the will or in

intestacy, adequate support is not provided for. Questions of character, relationship, services rendered and other contributions by the dependants to the deceased, are considered. Some amendments affecting the class of "dependants" and criteria to govern claims, are noted.

(5) Illegitimates and legitimation.

Clarification of the rights of succession to property of illegitimates and legitimated children are discussed.

(6) Fatal Accidents Act.

(7) The survivorship rule.

(8) The effects of excessive gifts by spouses.

Excessive gifts or transfers for inadequate consideration, and their effect on a third person acting in good faith, are discussed. The effect of excessive gifts on the balancing claim, if adopted, claims under family relief legislation, proceeds from life insurance, pensions and annuities are considered.

Recommendations to Part B

One of the more important recommendations - in the field of intestate succession - is the increase from \$30,000 to \$35,000 in the amount of the preferential share of the surviving spouse and its application, whether or not there are issue. Proposals are also made on the subjects of the effect on third parties of excessive gifts and transfers between spouses for inadequate considerations. The availability of proceeds of life insurance policies and of pension and annuity plans in similar circumstances is recommended.

PART C. CONFLICT OF LAWS

This is a highly technical subject dealing with problems which arise within a narrow field of property law and which will be of interest to specialized legal practitioners and researchers, rather than to the general public not learned in the law. Generally, the application of the principles of conflict of laws, or as it is sometimes described, "private international law", is designed to overcome the territorial limitations on the effect of laws which would otherwise be coincident with the boundaries of one jurisdiction. These may be extended through recognition of other jurisdictions to whom the policies underlying the law are acceptable. Similarly, the courts of one jurisdiction may accept the jurisdiction of - other courts in the disposition of property law questions.

PART D. CREATION OF FUTURE INTERESTS IN PROPERTY AND OTHER PROBLEMS

This is also a technical Part, dealing with procedural points affecting creation of future interests in chattels personal and chattels real by deed or by will. This Part is sub-divided as follows:

- (1) Creation of future interests by deed inter vivos.
- (2) Creation of future interests by will.

In the discussions of (1) and (2), the interesting situation which has prevailed in Newfoundland since the passing of The Chattels Real Act in 1834, is discussed.

- (3) Tenancy by entireties.
- (4) Restraints on alienation of property.

The caselaw in Newfoundland receives special reference here.

Recommendations to Part D

Legislation is recommended to abolish estates by entireties and to provide for creation, by deed, of life and future interests in chattels real, without intervention of a trustee.

A. THE EFFECT OF MARRIAGE ON PROPERTY

MARRIED WOMEN'S PROPERTY RIGHTS

AT COMMON LAW

The disabilities of a married woman at Common Law as to ownership of property separate from her husband were relieved to a substantial extent by the courts of Chancery in England.

The courts of Ch.:II:Try, while recognizing that a married woman could at law be the owner of property, developed the concept of equitable ownership so that property could be held in trust for her by a trustee who could be required to carry out the terms of the trust. It was not a big step for courts of Chancery to make a further advance and hold that where there was no trustee in the settlement of property given to a married woman, for her separate use, her husband was a trustee of it for her and must deal with it in accordance with her directions. However, being free to dispose of her property, she might be persuaded to part with it to her husband. To meet this danger, draftsmen of settlements **in** favour of married women often included a provision in the settlement in restraint of anticipation or alienation by her during her marriage. The rules developed by the courts of Chancery in this regard were not prompted by notions of the equality of the sexes. The motivation sprang from the desire to keep property in the wife's family and to protect her from her husband's extravagances and speculations.

The property settlements that were recognized and enforced by Equity generally required a formal document, such as a will or a marriage settlement. These were often complicated and could be costly and so were not available except for the wealthy or well-to-do families. Moreover, even though a husband could be enjoined by Equity to deal with property given to his wife for her separate use in accordance with her directions, it was normally beyond her financial resources to enforce her rights.

LEGISLATION IN ENGLAND AND NEWFOUNDLAND

The advent of the industrial revolution and its attendant social changes led to demands for recognition by Parliament of the property rights of married women that Equity had created and enforced. This resulted in the enactment of legislation in England in 1870 securing to a married woman limited rights to separate property, e.g. to her own earnings and savings. This was followed by The Married Women's Property Act, 1882 which purported to put the imprimatur of equality on married women. With the passage of this legislation the techniques developed by Equity were no longer required, and rights for married women to own separate property were extended.

The provision conferring on a married woman the right to acquire, hold and dispose of property as provided in 'The Married Women's Property Act' are substantially the same as those in the English Act of 1882. The Newfoundland Act (as amended) provides:-

- "2. Subject to this Act, a married woman is
- (a) capable of acquiring, holding and disposing of any property;
 - (b) capable of rendering herself and being rendered liable in respect of any tort, contract, debt or obligation;
 - (c) capable of suing and being sued in tort or contract or otherwise; and
 - (d) subject to the law relating to the enforcement of judgments and orders,

in all aspects as if she were femme sole.

3. (1) Subject to this Act, all, which
- (a) immediately before the coming into force of this section was the separate property of a married woman or held for her separate use in trust;
 - (b) belongs at the time of her marriage to a woman married after the coming into force of this section; or
 - (c) after the coming into force of this section is acquired by or devolves upon a married woman,

belongs to her in all respects as if she were a femme sole and may be disposed of accordingly.

(2) Nothing contained in subsection (1) shall interfere with or render inoperative any restriction upon anticipation or alienation attached to the enjoyment of any property by virtue of any provision attaching such a restriction con-

R.S.N. 1952, c. 143, as amended by The Married Women's Property (Amendment) Act, 1963, Stats. Nfld. 1963, No. 13.

tained in any Act passed before this section came into force or in any instrument executed before the first day of July, 1963.

(3) Any instrument executed on or after the first day of July, 1963 is void insofar as it purports to attach to the enjoyment of any property by a woman any restriction upon anticipation or alienation which could not have been attached to the enjoyment of that property by a man.

(4) For the purposes of the provisions of this section relating to restrictions upon anticipation or alienation

- (a) an instrument attaching those restrictions executed on or after the first day of July, 1963 in pursuance of an obligation imposed before that date to attach those restrictions shall be deemed to have been executed before that date;
- (b) a provision contained in an instrument made in exercise of a special power of appointment shall be deemed to be contained in that instrument only and not in the instrument by which the power was created; and
- (c) the will of a testator dying after the thirty-first day of December, 1963, shall, notwithstanding the actual date of the execution thereof, be deemed to have been executed after the first day of July, 1963."

The amendments passed by Newfoundland in 1963 abolished the restraints on married women against anticipation or alienation that had been adopted in the original Act, in terms similar to the provision in this regard in the English Act of 1882.

The legislation in Newfoundland not only confers the right on a married woman to own separate property, but, as will be more particularly discussed later ¹, it also provides a procedure to enable either her or her husband to apply to a court to settle disputes that might arise between them as to title to, or possession of property. In most, if not all, of the corresponding statutes in the Commonwealth it is expressly provided that the application may be made by summons or otherwise in a summary way. This omission in the Newfoundland statute may not be of any significance, but if the Rules of Court in Newfoundland² do not permit a summary proceeding, it is suggested that the legislation be amended to provide that the application be made by way of an originating summons.

1

Infra, pp. 225-226.

2

Cons. Stats. Nfld. (3rd Series) 1916, c. 83, Schedule.

OWNERSHIP OF PROPERTY BETWEEN HUSBAND AND WIFE

Accounting in terms of separate ownership as between husband and wife of the property that they together own is not normally a matter of special concern to them. They may open joint bank accounts or arrange conveyances of property to one or the other, or to both, without precise consideration as to the legal consequences. Normally neither of them gives much thought as to who owns the unspent portion of the wife's housekeeping or other allowance. These and other property arrangements are most often entered into between them without any express agreement as to beneficial ownership. When, however, the marriage breaks down, one or both may insist that the issue be settled on a strictly legal basis. On the death of the first to die the issue of ownership may also be a matter of keen contention. It is proposed, therefore, initially to set out with as much certainty as is possible, the ownership rights of the two parties as developed by the courts and the methods used by the courts to determine those rights in those areas or situations in which disputes most often arise. The most common of these are:

1. Joint Bank Accounts
2. Ownership of Immovable Property
3. Housekeeping and Other Allowances made to the Wife.

In addition, consideration will be given to the problems that may arise, particularly as respects creditors, where the spouses allege that a gift or sale of personal chattels has been made by one to the other.

1. Joint Bank Accounts

Ownership as between husband and wife with respect to a bank account held jointly in their names is sometimes difficult to determine. The legal position vis-a-vis the bank is settled by the agreement into which the bank requires them to enter when the account is opened, but the rights of the husband and wife *inter se* depend primarily on their intentions, actual or presumed.

The purpose of opening a joint bank account, particularly when the deposits are made only by one spouse, is very often not clear. Where the deposits are made only by the husband the wife is aided by a presumption of advancement, which is a presumption that a gift was intended. However, this presumption does not work in the husband's favour in the reverse situation. The circumstances giving rise to the creation of the account may support or rebut the presumption. Recourse to this presumption in favour of the wife is an imperfect device to resolve what is, in many cases, an insoluble problem if the issue is to be settled on a strictly legal basis.

Where both have contributed to the account from their own resources and both use the account for joint or individual purposes, a court is likely to find that the intention was to create joint ownership which, if not terminated during their joint lives, gives the survivor absolute ownership. Aided by the presumption of advancement the result might be the same if the wife had made no contributions. It would not serve any useful purpose to review the various circumstances that a court would take into account in determining ownership, but under any system of separate property this problem will exist.

Taken a step further, ownership during their lifetime or on the death of one spouse, of property purchased from the proceeds of a joint bank account, may be a matter of dispute between them. In this situation, if the property has been taken in their joint names, a finding of joint ownership in the property is likely to result. If some of the property has been taken in one name and some in another the finding is likely to be the same. If the husband alone has contributed to the joint account and property is purchased from it and title taken in the husband's name only, the position is uncertain. If, however, the title was taken in the wife's name only she would be presumed to be the owner. If the situation was reversed and the property had been purchased out of a joint account to which the wife had alone contributed and the title taken in the husband's name only he would be presumed to hold it in trust for her by way of resulting trust. The presumption of resulting trust arises from the presumption that the wife did not intend to make a gift to him, but intended to retain the beneficial interest in herself. If the presumption of advancement has any validity it should work both ways. In some circumstances courts have invoked a presumption that the beneficial interest follows the legal interest. Where it is necessary to resolve the issues to title to a joint account or to property purchased from a joint account, it would be preferable to abandon the presumption of advancement, as such, and the presumption of resulting trust, and apply a presumption of intention that money in a joint account and property purchased from a joint account are to be held jointly.

Where it is found on the facts that the intention was to create joint ownership in a bank account with absolute title in the survivor, the argument has often been advanced in the courts that this is a testamentary disposition and so can only be made by a will. The Appellate Division of the Supreme Court of Ontario has held¹ that when the intention is to create joint ownership with rights to the survivor in the whole, the interest is created at the time that the joint account is established, hence it is not a testamentary disposition. The decision in one of these cases- was reversed by the Supreme Court of Canada on

¹ Re Reid (1921), 50 O.L.R. 595; *Edwards v. Bradley*, [1956] O.R. 225.

² *Edwards v. Bradley*, *supra*.

another ground, hence it was not necessary for that court to make a finding on the issue as to whether it was a testamentary disposition. The High Court of Australia has also held that the interest created in the survivor is not a testamentary disposition.¹

Several theories have been advanced as to the nature of the right, if any, created in one spouse by the other by the establishment of a joint bank account with the intent to give absolute title to the survivor. The right created against the bank is a chose in action and it is submitted that there is a gift, probably rightly viewed by way of assignment, by each spouse to the other of the chose in action. On this basis a present right is created in favour of each spouse and that right does not depend on the death of one or other of them for its vigour and effect. Its enjoyment only is postponed until that event happens. Accordingly it is not a testamentary disposition.

2. Ownership of Immovable Property

The ownership of the matrimonial home and of other immovable property is another area likely to give rise to disputes between husband and wife during their lifetime. The issue may also arise on the death of one or the other. More commonly the issue will arise over the home that is or was at one time occupied as the family home. Legal title in the one to whom the property has been conveyed or transferred is not conclusive of this issue.

The general law is that where the consideration has been furnished by one person and the title taken in the name of another, the latter will be presumed to hold the property by way of resulting trust for the former. The presumption can be rebutted if it is shown that a gift was intended. The law here again favours the wife over the husband in applying against him a presumption of advancement. On the other hand the husband will start out from the *prima facie* position of holding as trustee and can only prove his ownership if he can show that a gift to him was intended.

The most common situations that will arise and a general statement of the law applicable to them can be summarized as follows:-

1. The husband has furnished the whole of the purchase price:

and (a) title is placed in his own name only, the wife has no ownership;

and, (b) title is placed in the wife's name only, the presumption of advancement applies, and the outcome will depend on whether or not the husband can rebut it;

¹ Russell v. Scott (1936), 55 C.L.R. 440.

and, (c) title is placed in both names, the presumption of advancement will give the wife a one-half share, unless the husband can rebut the presumption.

2. Where husband and wife combined to furnish the consideration:

and, (a) title is placed in the wife's name only, the presumption of advancement will apply and the husband will not be entitled to any share unless he can rebut it;

and, (b) the title is taken in the husband's name only, there will be a resulting trust in the wife in proportion to the consideration furnished by her.

Where each spouse has furnished part of the consideration and the title is placed in both names, it is uncertain how the court would apply the presumption of advancement.

The issue of ownership may be further complicated where the wife has furnished the whole or part of the consideration from monies that were under her control, but alleged by the husband to be wholly or partly his property. To the extent that the monies were not the wife's separate property, to wit, savings from household or other allowances made to her by the husband, where no gift was intended, or indeed, rental income from rooms or boarders in a property of which the husband was the owner, these would not be counted as contributions by the wife on account of the purchase price of the property.

Transfers of property between spouses without consideration raise much of the same question as where a property is purchased with the monies of one and the title is taken in the name of the other. The question to be answered is: What was the intention of the spouse who furnished the consideration? Here again the wife is aided by a presumption of advancement where the grantor is the husband, but the husband does not have the advantage of the presumption, when the wife is the grantor. If in the first case the presumption of advancement is rebutted, or in the second case the husband cannot establish an intention by the wife to make a gift to him, the property will be held in trust for the other spouse.

If the purpose of the arrangement was fraudulent, for example, to defeat creditors rather than to make a gift, a court will not aid the spouse who has retained the equitable interest to obtain a reconveyance of the property. On the other hand, creditors of the grantor spouse may be able to treat the property as if it were his or her own property.

3. Housekeeping and Other Allowances

Allowances made by a husband to his wife for housekeeping expenses

have not, for the most part, been treated by courts as gifts to the wife unless they are living apart. Being made for a particular purpose. any amount not expended for that purpose remains the property of the husband unless it can be shown that a gift was intended. There is no reason to conclude that the courts would treat allowances made to the wife for clothing and other personal expenditures in any different manner.

By legislation passed in England in 1964¹ it was provided that, in the absence of any agreement to the contrary, an allowance made by a husband to his wife for expenses for the matrimonial home or for similar purposes, or any property acquired out of such money, is to be treated as belonging to them in equal shares.

GIFTS AND SALES OF PERSONAL CHATTELS BETWEEN HUSBAND AND WIFE

The matter of establishing that a gift has been made by one spouse to another can be difficult. To effect a valid gift of a chattel, there must be a deed or evidence of actual delivery. Where a deed is not employed, and actual delivery is impossible owing to the nature of the property, symbolic delivery can be made but it must be sufficient to show that it gives the donee dominion over the property. However, the nature of the property may make it difficult or impossible to establish a symbolic delivery. As against creditors the onus of showing that there has been a gift will rest on the donee claiming the property. Where there is no writing and no witnesses it will be difficult to establish a gift.

A sale of personal property between husband and wife may also be difficult to establish if the transfer is not put in writing. Regard must also be had to The Bills of Sale Act, 1955². This Act provides that a sale or mortgage of chattels that is not accompanied by immediate delivery and change of possession, unless the sale or mortgage is evidenced by a registered bill of sale, is void as against a creditor and as against a subsequent purchaser or mortgagee claiming from or under the grantor in good faith for valuable consideration and without notice. Change of possession is defined in the Act to mean "such change of possession as is open and reasonably sufficient to afford public notice thereof."³

SETTLEMENT OF DISPUTES BETWEEN HUSBAND AND WIFE AS TO TITLE TO PROPERTY

Reference was made earlier to the provision in The Married Women's Property Act of Newfoundland and of other Commonwealth countries under

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State Nfld 1955, No. 22, ss. 2 (b) & 4

¹ Married Women's Property Act 1964, Stats. U.K. 1964, c. 19.

³ The Bills of Sale Act, 1955, Stats. Nfld. 1955, No. 22, s. 2(c).

which an application can be made to a Judge of the Supreme Court by a husband or wife for the settlement of disputes between them as to title to or possession of property. The judge is empowered to make such order "as he shall think fit." The legislation does not lay down any guidelines for the exercise of the discretion by the courts but leaves it to them to work out the principles themselves. If the intention as between the spouses is clear as to what their proprietary interests in the property are to be, courts both in England and Canada will make an order in accordance with that intention, but where the intention is not clear courts have had recourse to the presumptions of advancement and resulting trust. However, where the property in dispute is the matrimonial home or other family assets associated with it, the indications are that the English courts might have less regard to the presumptions. For example in England where the property is in the name of one spouse but both spouses have made a financial contribution that is more than a nominal one, and no express intention can be established as to what their respective shares in the property were to be, the courts will lean to the application of the doctrine that equality is equity and the spouses will be held to own the property in equal shares. However, if there is evidence from which it is reasonable to infer that at the time of acquisition the intention was that each should contribute and each in fact has a certain proportion of the purchase price, the spouses will likely be held to be entitled to the property in the proportions of their contributions.

Where the title stands in the name of one spouse only and the other spouse has made no financial contribution it is most unlikely that either an English or Canadian court would, short of evidence of an express agreement, award any interest or title to the other spouse. Where title is in the name of the wife and the husband has paid the purchase price, she might, of course, be successful because of the presumption of advancement.

New Zealand

The limitations within which courts in the Commonwealth have exercised the discretion that was conferred on them in the original legislation relating to the settlement of property disputes between husband and wife were substantially altered in New Zealand by legislation passed in 1963, under an Act entitled the Matrimonial Property Act 1963². This legislation is the most advanced in the Commonwealth in its provisions relating to the settlement of property disputes between husband and wife. Such order as appears just may be made, "notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property."³ However, the power

1 The Married Women's Property Act, R.S.N. 1952, c. 143, s. 19.

2 N.Z. Stats. 1963, No. 72.

3 Ibid., s. 5(3).

must not be exercised to defeat any common intention which the court is satisfied was expressed by the husband and wife. A Judge or Magistrate may order a sale of the property and division of proceeds; a partition or division of the property, or conversion of joint ownership into ownership in common in such shares as he sees fit.

The New Zealand legislation further provides that, in considering any application relating to a matrimonial home, or to a division of the proceeds from its sale, a Judge or Magistrate shall have regard to the respective contributions of the husband and wife to the property in dispute (whether in the form of money payments, services, prudent management, or otherwise howsoever.) With respect to any other property in dispute the court may have regard to contributions of this nature.

In a case¹ heard in the Supreme Court of New Zealand in 1965, Mr. Justice Woodhouse, a judge of that Court, remarked as follows on the marked and far-reaching changes that the new legislation in New Zealand had effected:-

"Formerly, general but fixed principles of the law of property and of contracts have been regarded as the essential framework within which any discretion to resolve property disputes between husband and wife could be worked out. In New Zealand the strict legal or equitable rights of the parties have been held to be decisive, whatever might seem to be the justice of the case. But even in England the Courts have continued to work on the basis of intentions which judicial ingenuity has often been strained to discover. In both countries the solid tug of money has been allowed to submerge any faint suggestion that other contributions could play a valuable part in the acquisition of family assets. But now, . . ., orders may be made which are "just", and in making them the Courts are expressly empowered to extinguish established legal or equitable rights - even in favour of a spouse who might entirely lack any interest. Section 6(2) directs that the intention of the parties should not be overruled, but this must be a common and an expressed intention. Then in the preceding subsection there is a specific rejection of the unimaginative rule that the property rights of parties to a marriage should be determined on the basis of money alone. Clearly the intention is that legalistic assessments of the property rights of spouses must give way to the justice of the case, and this I think goes well beyond giving a statutory blessing to the sort of attempts which have been made by the Courts in England over the last few years to extend the discretion within the framework of existing principle. The significant attention to the interests of children of the marriage seems sufficient in

¹ Hofman v. Hofman, /1965/ N.Z.L.R. 795,800-801.

itself to confirm this view. In most cases they certainly could claim no rights in the property on any basis previously recognised by the law. In my opinion, therefore, this legislation should be regarded as designed to by-pass solutions which would involve tiptoeing around conventional rules or the attribution of implausible intentions to husbands and wives. These approaches in the past have been unable to produce consistently just results, as the Courts themselves have recognised, and they have involved the 'application of presumptions which were developed in a social climate which has little in common with the widely accepted view that marriage is really a partnership of equals . . . Today there seems little justice in the rule that household savings by a conscientious and thrifty wife should remain the sole property of her possibly lazy and improvident husband. Or in the presumption (rebuttable though it may be) that anything purchased in a wife's name by her husband becomes her property on the basis that it is an outright gift. Marriage is a partnership of a very special nature, and with respect, I think this Act puts a proper emphasis upon that fact. In my opinion it enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. Each is in a unique position to support or to undermine the marriage. It appears to me that considerations of this sort will now properly play a considerable part in the assessment to be made. At least it can be said with confidence that artificial adjustments founded merely on money contributions by the one spouse or the other can now be avoided, and that women who have devoted themselves to their homes and families need not suddenly find themselves facing an economic frustration (at least in the area of family assets) which their husbands or wives who are wage-earners have usually been able to avoid."

England has made some amendments in recent years but none of them is a basic change and no change at all as to the considerations to be taken in settling property disputes as between spouses. Legislation was in 1958¹ to permit the court to order a spouse who had disposed of a to pay the other a sum of money to compensate the other spouse who

¹ Matrimonial Causes (Property and Maintenance) Act, 1958, Stats. U.K. 1958, c. 35.

is able to prove an interest in the property. The amending legislation also expressly provides that in the settlement of property disputes between husband and wife the court has power to order a sale of the property in dispute.

Australia

In the State of Victoria, Australia, under the provisions of the Marriage (Property) Act 1962¹, the court may grant an injunction restraining any person from making any threatened or apprehended disposition of any property in question in the proceedings, and may under certain circumstances set aside dispositions already made but must have regard for the interests of a *bona fide* purchaser. The Court may also make an order for the sale of the property; the disposition of the proceeds, or for partition or division of the property. The general power in the Judge is to make such order as he thinks fit, but the legislation expressly provides that he must not exercise this power so as to defeat any common intention which he is satisfied has been expressed by the husband and the wife. He is not to take into account any conduct of either spouse which is not directly related to the acquisition of the property or to its extent or value.

The current legislation in the State of Victoria further provides that the "husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of sufficient evidence of intention to the contrary and in the absence of any special circumstances which appear to the Judge to render it unjust so to do, to hold or to have held as joint tenants so much of any real property in question as consists of a dwelling and its curtilage (if any) which the Judge is satisfied was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home."²

REVIEW OF MATRIMONIAL PROPERTY SYSTEMS

Scandinavia

More than forty years ago, the Scandinavian countries adopted a matrimonial property law system of general uniformity. The Swedish law embodied in the Marriage Code of 1920 is typical. Each spouse may have separate property and what is denoted as "matrimonial" property. A spouse administers his or her separate property, and, subject to certain restrictions also administers his or her matrimonial property.

1

Stats. Vict. 1962, No. 6924.

2 Marriage (Property) Act, 1962, Stats. Vict. 1962, No. 6924, s.

Separate property consists of property specifically excluded by a marriage contract, property acquired on condition that it should be kept separate (for example, under the terms of a will), and some other specified assets such as a pension. All other property is matrimonial property and includes antenuptial property acquired through work or by purchase or exchange. The income of separate property becomes matrimonial property unless otherwise agreed.

Under the Swedish system an equal division of the matrimonial property of both spouses takes place on the death of one spouse, on divorce and judicial separation, and in certain other specified events.

When the marriage is dissolved by the death of one of the spouses, there is first a partition of the matrimonial property of the deceased spouse and the survivor. On the partition the surviving spouse is entitled to property of a set minimum value, even though this is in excess of one-half of the entire matrimonial property.

A spouse can also bring about a division of the property in certain other events, for example, if he or she can satisfy the Court that the other spouse is mismanaging his or her part of the matrimonial property.

The Swedish system also provides for division of the matrimonial property by agreement between husband and wife, subject to certain safeguards for the protection of creditors. If the spouses cannot agree on the division of the property, the Court appoints an official to make the division and his division becomes final if not disapproved by the Court within a certain period.

The main restrictions on the administration of "matrimonial" property in the Swedish law are:-

- (a) immovable property cannot be disposed of or encumbered without the consent of the other spouse;
- (b) chattels which form part of the matrimonial home may not be pledged or disposed of without the consent of the other spouse, but the person to whom the chattels are transferred obtains a good title if he has acted in good faith.

Creditors can go against the property of both spouses if a debt has been contracted for ordinary household management or the bringing up of the children. Creditors can also go against the property of both where there is joint liability.

The Swedish law also provides for a special procedure for establishing ownership. The spouses may draw up an inventory of what each owns, affirm it

on their faith and honour, and have it attested by witnesses. If this is done, the inventory is admissible as evidence, though only *prima facie* proof, and in any event, is not so admissible if any of the property involved is seized, or one of the spouses declares bankruptcy, within a year of the taking of the inventories.

Special rules exist in Sweden with respect to gifts between husband and wife. Except for customary donations where the value is not out of keeping with the circumstances of the donor, to protect the property from creditors the gift must be made in the form of a marriage settlement for which publicity is provided. While transfer of savings may be made without a marriage settlement, there are provisions as to the amount which may be transferred and the time within which it must be done, together with certain other formalities. Generally, marriage settlements must be submitted for approval to the Court that has jurisdiction over the husband.

The Scandinavian system of matrimonial property has characteristics both of a community of property system and a separate property system. With systems that are much alike, Denmark calls its system a "communal" property system, whereas Sweden uses the terms "matrimonial" property and "separate" property to denote property of either spouse. In both countries, there is community of property in the sense that on the death of either, or on dissolution of marriage in their joint lifetime, and in certain other events, the communal or matrimonial property is partitioned between them. Up to the time of partition, each spouse administers his or her own matrimonial property but the right of either to dispose of or encumber it, is restricted.

Commonwealth Countries

Regimes of separate property have been under attack in recent years. When they were first established, they satisfied the ambitions of the married woman to have equal rights with her husband to own property, but with the growing recognition of the contribution of the wife to every aspect of family life, neither the traditional separate property system nor the community system is just.

The concept that a marriage is a partnership in all its aspects has received wide acceptance in Canada. This is an increasing economic fact with the entry of a substantial proportion of married women into the labour force and their financial contribution to the support of the home and family. However, where the wife is not working and not making any contribution to the monetary income of a family, lip service, at least, is widely given to her contribution to the family unit even in the economic sense. It is now widely accepted that the wife, by remaining at home and caring for it, and by caring for children, enables her husband to concentrate on economic pursuits and that she is, in a real sense,

contributing to the family income. Moreover, to a large extent, the separate property concept is not normally followed in the everyday dealings of married couples with each other, since there is a large measure of sharing and joint administration.

In Commonwealth countries, these trends have found little expression in statutory enactment. However, as has been noted, some measures of reform have been carried out in England and in certain states in Australia, matched and surpassed in New Zealand by the Matrimonial Property Act 1963¹.

Some relief from the rigors of separate property systems has been achieved in many jurisdictions through intestate legislation, and, where adequate provision is not made under a will for the surviving spouse, by dependants' relief legislation. While legislation of this kind had its genesis in a concept of right of a dependant to maintenance, and not in a concept of partnership, its underlying purpose is to ensure to dependants, including the surviving spouse, participation in the family assets on the death of the other spouse. Equally so, when the marriage is dissolved or the partnership is broken during the joint lifetime of the spouses, the law should provide for a fair division of family assets between them. The changes made by the Parliament of Canada in 1968 in the Estate Tax Act, enabling one spouse at his or her death to transmit to the other spouse, the whole or part of his or her property free from estate tax² may be evidence of a recognition of the view that is receiving widespread acceptance that family assets are not the property of one, but of both.

The New Zealand legislation is a large step forward but it is set in the framework of a traditional separate property system. It does not confer any legal rights on either spouse, but only provides that, if one or the other brings a dispute between them as to ownership before the court, the dispute is to be settled on equitable principles. If this is sound, and the Study accepts it to be sound, the natural conclusion is that the respective property rights of spouses should be embedded in the law. The legislation now in force in New Zealand really does no more than set out guidelines for the Court in the settlement of disputes.

RIGHT TO POSSESSION OF THE MATRIMONIAL HOME

The Married Women's Property Acts - Newfoundland and England

The provision in The Married Women's Property Act of Newfoundland, enabling a Judge to determine the right of a husband or wife to possession, does

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N.Z. Stats. 1963, No. 72.

not in any way extend the legal rights of either. At Common Law a deserted wife's right of continued occupation of the family home is recognized. Her right in this respect is not a tenancy, nor any other estate in the property. It is a right in the nature of a license that can be said to arise from the husband's obligation of support, and can be asserted as against her husband, whether he is owner or tenant of the property. The courts in England have held that the wife's right to remain in the home is not a right to stay indefinitely but only until such time as the court in its discretion orders her to leave.

In England, the House of Lords has decided that a deserted wife who is in occupation of the matrimonial home has no right to remain in the home as against a third party.¹ While there may be some doubt as to her position in this regard in Canada, it is likely that Canadian courts would adopt the position taken by the House of Lords. The courts might, however, protect her right to possession where there was collusion between the husband and a third party with design to oust her from possession.

Legislation in Other Canadian Provinces

In Manitoba, Saskatchewan, Alberta and British Columbia, the wife is given protection from a unilateral act of the husband in the sale or encumbrance of the homestead under Acts entitled either The Homestead Act² or the Dower Act³. Under certain circumstances the Court may dispense with the wife's consent. In addition, the wife is given a life estate in the homestead on the death of her husband, but only in Alberta and Manitoba is the husband given the same right on the death of his wife. Any dispositions by will or devolution, upon the death of a married person dying intestate, of the homestead, is subject to the life estate vested in the surviving spouse. The Alberta and Manitoba legislation also provides that a homestead once established continues to be the homestead of the husband for the purposes of the Act unless the wife consents to a change of the homestead.

Certain protection is also given in some of the provinces by way of exemption of the homestead against execution for debt.

England - Matrimonial Homes Act

In 1967, England enacted the Matrimonial Homes Act 1967⁴, providing that where one spouse is entitled to

¹ National Provincial Bank Ltd. v. Ainsworth. /1965/ 2 All E.R. 472 (H.L.).

⁴ Stats. U.K. 1967, c. 75. occupy a dwelling house by virtue of any

² The Homestead Act, R.S.B.C. 1960, c. 175; R.S.S. 1965, c. 118.

³ The Dower Act, R.S.M. 1970, c. D100; R.S.A. 1970, c. 114.

estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, the spouse not so entitled shall, if in occupation, not be evicted or excluded from the house except with the leave of the court, and, if not in occupation, the court may by order give the right to a spouse to enter and occupy. In either case, the court may make such order as it thinks fit and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case. The court may also restrict or terminate or regulate the exercise by either spouse of the right to occupation.

The Act gives rights of occupation only to a dwelling house which has been a matrimonial home of the spouses and a court may, by order, exempt part of such dwelling house from a spouse's rights of occupation. The court may also impose an obligation on the occupant spouse to pay rent and may define the respective obligations of both spouses to repair and maintain the dwelling house.

An order of the court made against a spouse is effective against persons deriving title from that spouse. The Act provides for registration of such orders. However, the procedure for giving notice of an order to third parties is not defined in the Act.

The Act also protects a spouse's rights of occupation against third parties where no court order has been made. A spouse's rights of occupation rank as a charge having the same priority as an equitable *interest* created at the latest of the following dates: acquisition of the estate or interest by the other spouse; date of marriage; the commencement of the Act. The charge binds third parties only if it is registered under the Land Charges Act, 1925¹.

Further features of the English Act of 1967 are:-

(1) Where the right of occupation is a charge on the estate or interest of a spouse and the other spouse is adjudged bankrupt or makes an assignment for the benefit of his or her creditors or dies and his or her estate is insolvent, then notwithstanding that a charge has been registered under the Act it shall be void.

(2) Where a spouse is entitled to a charge that has been registered it shall be a term of any contract for sale under which vacant possession is to be given that the seller will obtain cancellation of the registration. This term shall be deemed to have been performed if there is delivered to the purchaser an application by the person so entitled for cancellation of the registration.

¹ Stats. U.K. 1925, c. 22.

New Zealand

In 1964, New Zealand enacted the Joint Family Homes Act 1964¹ which provides that a husband and wife or either of them may settle any land on the husband and wife as a joint family home. Land includes a leasehold interest and, in certain circumstances, a licensee's interest to occupy a flat. Registration of the settlement may be made through application to the District Land Registrar or to the Registrar of Deeds for the district where the land is situated.

Provision is made in the New Zealand Act for creditors of the applicant or for persons claiming any estate or interest in the land to lodge a caveat with the Registrar, forbidding the granting of the settlement. A Court may order the withdrawal of the caveat if it is satisfied that the applicant can pay and discharge his or her debts and liabilities, other than those charged on the land, without recourse to the land.

When an application for registration is approved and the Registrar has made the required entries in his Register and on the instrument of title, the husband and wife become the legal and beneficial owners in joint tenancy, if not already so, subject to existing mortgages, other charges and interests. Thereafter, the husband and wife shall have equal rights of possession, use and enjoyment, and on the death of one, the property becomes the property of the survivor. During the joint lives of the husband and wife neither of them may dispose of or deal with his or her undivided interest. However, where the net value of the property exceeds 2,000 pounds, the Supreme Court may on the application of a creditor or assignee in bankruptcy direct cancellation of any part of the settlement as to any settled property that is not essential, in connection with the dwelling house or flat, or may order a mortgage or the sale of the whole or part of the property and a distribution of the money borrowed or of the proceeds of sale in the manner provided by the Act.

PROPOSED SYSTEM OF MATRIMONIAL PROPERTY

The Study has reviewed the original recommendations that were made in 1967 by the Family Law Project in Ontario to the Ontario Law Reform Commission (and the revisions and amendments to the original recommendations that were made in 1968 and 1969) with respect to property rights between husband and wife and the right to occupy the matrimonial home. In its original report, the Ontario Family Law Project recommended a scheme of sharing of property between husband and wife that, with one significant difference, is basically the same in its results as the Swedish system. The scheme was referred to in the report of the Ontario Family Law Project as a system of separate property. In reality, however, in its execution through what is denoted as a balancing claim

¹ N.Z. Stats. 1964, No. 45, s. 3.

between the spouses, the proposal recognizes community of property in assets acquired during the marriage, except by gift from third parties. The difference between the Swedish system and the Ontario proposal is in the terminology used to describe them. Under both a spouse may have separate property but under the Swedish system this is likely to be of less significance, since, unlike the Ontario Project proposal, ante-nuptial property will be ultimately shared unless it has been kept separate by agreement. Herein lies the most significant difference.

The following two examples illustrate how estates of equal value would be shared in Sweden and under the Ontario proposal. The word "pooled" is used to denote that part of a spouse's property that would become subject to the balancing claim under the Ontario Project proposal.

EXAMPLE

1

	Husband	Wife
Separate property (post-nuptial legacies or gifts)	\$ 5,000	\$2,000
	\$25,000	\$6,000
Matrimonial or pooled property (post-nuptial earnings)		
General debts	\$ 4,000	\$ 500
Debt on separate property (Mortgage)	Nil	Nil
Net matrimonial or pooled property	\$21,000	\$5,500

Total net matrimonial or pooled property = \$26,500

SHARES

Sweden <i>Cb</i> of \$26,500)	\$13,250 to each
Ontario (1/2 of \$26,500)	\$13,250 to each

In both cases the wife would be entitled to a balancing claim of \$7,750.

EXAMPLE 2

If the legacy or gift had been an ante-nuptial one, the result as illustrated by the following table would have been the same in the Ontario Project proposal as in Example No. 1 with the wife being entitled to a balancing claim of \$7,750 while in Sweden the wife would have been entitled to a balancing claim of

\$9,250 if there had been no marriage contract making the ante-nuptial legacy or gift separate property.

	Husband	Wife
Ante-nuptial legacies or gifts	\$ 5,000	\$2,000
	\$25,000	\$6,000
Matrimonial or pooled property (post-nuptial earnings)		
General debts	\$ 4,000	\$ 500
Debt on separate property (Mortgage)	Nil	Nil
Net matrimonial or pooled property of each:		
Sweden	\$26,000	\$7,500
Ontario	\$21,000	\$5,500
Total net matrimonial or pooled property:		
Sweden	\$33,500	
Ontario	\$26,500	

SHARES

Sweden of \$33,500)	=	\$16,750 to each
Ontario of \$26,500)	=-	\$13,250 to each

If the debts of either spouse should be in excess of his or her total property resulting in a negative value for that estate, the Study recommends that for the purposes of calculating the balancing claim the value be taken as nil. The other spouse will in effect be making available half of his or her net matrimonial or pooled property for the benefit of the creditors of that spouse.

The Study is of the opinion that the underlying philosophy of the original Ontario Family Law Project proposal is sound. The basis for this proposal is that property acquired by either spouse after marriage, except by way of gifts from a third person, should be regarded as having been acquired by the combined efforts of the spouses. If this is conceded to be a sound basis, then ante-nuptial property of either should continue to be owned separately, in The

same way as gifts given to one or the other spouse by a third party during marriage.

The Ontario Family Law Project has submitted a revised report to the Ontario Law Reform Commission with respect to the balancing claim, justifying it more on the ground that a married woman is prevented from earning because of her duties in the home and less on her contribution to the production of the family assets. It is the view of the Study that the joint contribution to the family assets is a sounder basis than the negative approach of her inability to contribute directly through her own earnings.

The Study agrees that the deduction for ante-nuptial property be its net value (actual value less debts or liabilities pertaining to the property) as of the date of the marriage, and that the value of legacies or gifts acquired after marriage be taken as of the acquisition date. This will involve proof of the continued existence of the property in some form at the time that the division takes place. To take into account appreciation of the assets after marriage would unduly complicate the processing of the balancing claim. The onus of establishing the right to deductibles and their value should be on the spouse claiming them. The value at the time of marriage of ante-nuptial property or of post-nuptial legacies or gifts at the date of their acquisition should not normally be difficult to establish. There should, however, be no compulsion on a spouse to claim a deductible. Either spouse should have the right to waive a claim.

Neither spouse should have the right to claim gifts made by one to the other during their marriage as a deductible.

To the extent that either spouse has made gifts which in the opinion of the court are excessive, that portion of the excess that is not recoverable or that cannot be recovered from the donee should be added to the net estate of the donor spouse for the purpose of establishing and settling a balancing claim. Likewise in transfers by either spouse of matrimonial property for inadequate consideration the amount of the inadequacy should be added to the net estate of the transferor spouse.

The recommendation of the Study as to the events or circumstances in which an application for a balancing claim may be made are set out in the recommendations.

On the death of one spouse there will be a determination of what part of the joint properties belongs to the estate of the deceased, and what part belongs to the survivor. If it so works out that the estate of the deceased is indebted to the survivor, transfer of assets to effect a balance is not in any way to be regarded as a right of succession of the surviving spouse to the property of the

other. It is in essence a determination of what belongs to each party as of the time of the death¹. The additional right of the survivor to take a share of what has been determined as belonging to the estate of the deceased and of the separate property which that spouse owned at death is a succession right and will be discussed later² when succession rights are being considered.

Under the present law, spouses, during their joint lifetime are free to give away, to transfer without adequate consideration, or to make an *inter vivos* settlement of any or all of their property. Intestate succession and dependant's relief legislation is of no avail to the surviving spouse if the other spouse has depleted his or her estate by gifts or other transfers during the joint lifetime of the spouses. Recommendations as to these matters will be deferred to the discussion as to intestate succession³ and dependant's relief⁴ in Part B.

Concern has been expressed in the Scandinavian countries as to the application of the principle of equal sharing where the division of property takes place after a short marriage. This concern is understandable in these countries where, without agreement to the contrary, ante-nuptial acquired property is shared unless otherwise agreed, with the result that ante-nuptial property is more likely to be subject to sharing. To avoid what it considered might be an injustice, Denmark, for example, has amended its law to give the court a discretion to depart from the principle of equal sharing where the marriage has lasted only a short time. Even then the discretion must not be applied to deprive one spouse of his or her half of what had been acquired during the marriage. The Study inclines to the view that it would be advisable to give the court a discretion not only in the situation just described, but a general discretion to vary the amount of the balancing claim making it clear, however, that this could be done only under special circumstances.

For the most part the existing legislation in Canada relating to property rights, intestate succession and to rights of dependants on death, contains provisions that a claimant spouse is disqualified if he or she has been guilty of adultery or in other specified circumstances. The system that the Study will recommend as to the property rights that should prevail between spouses is based on the recognition of entitlement because of a common contribution by them, hence the conduct of either spouse should not in itself be a consideration.

Objections may be raised that the system that the Study will recommend is complicated. The answer to this is well stated by Judge Pedersen in an article

1 Other circumstances in which the "balancing claim" may operate are set out in Recommendation 2, *infra*, p. 281.

2 *Infra*, pp. 243-248.

3 *Infra*, pp. 261-265.

4 *Infra*, pp. 250-254.

entitled: "Matrimonial Property in Denmark"¹ as follows:-

"But the questions that have to be solved in matrimonial property law *are* complicated, and any system that wants to solve them cannot avoid a certain degree of complexity. Simplicity, on the other hand, may well have to be bought at the expense of the spouses, especially at that of the wife."

Judge Pedersen adds that whether the scheme is complicated or not, it is at least a fact that it has caused comparatively little litigation in Denmark since its introduction in 1925. This is what might be expected, because, once the rights have been established by legislation, spouses are in most cases likely to come to an agreement between themselves since they will be uncertain of what will happen if they do not do so.

PROPOSALS AS TO THE MATRIMONIAL HOME

The term "matrimonial home" is used in this section to mean a house, in which the spouses are living together, or, if they are separated, the last house in which they lived together, including premises that are under lease by one spouse.

As has been noted, in recent years England has enacted legislation relating to the rights of spouses to occupation of the matrimonial home, and New Zealand has passed legislation relating both as to the right of occupation of and the title to the matrimonial home³. In essence the New Zealand legislation creates one item of community property. For many years, as has also been noted⁴, the western Provinces of Canada have had legislation relating particularly to the matrimonial home or to "the homestead" as it is referred to in some of the legislation.

The legislation in England does not alter proprietary interests. It merely enables a spouse who has no proprietary interest in a matrimonial home to ensure for himself or herself certain rights of occupation, but even then not as against the trustee in bankruptcy of the spouse having the proprietary interest.

The New Zealand legislation creates the proprietary interest of joint tenancy where the settlement has been registered and ensures to the survivor the title to the property since neither spouse can deal with the undivided interest.

The legislation in New Zealand goes beyond the homestead legislation in the western provinces of Canada, under which a surviving wife (and in two

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(1965), 28 Mod. L. Rev. 137, p. 158.

Supra, pp. 233-234.

Supra, p. 235.

Supra, p. 233.

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provinces namely Manitoba and Alberta, a surviving husband) has a life estate in the homestead. Moreover, as previously noted¹, in these two provinces neither spouse can transfer any interest in the homestead without the consent of the other.

Through neglect to register the home or for other reasons, advantage may not be taken of the legislation in England and New Zealand, hence it may not achieve the benefits that it was intended to confer.

If it is desirable to confer special rights on spouses with respect to the matrimonial home, it can probably be done most effectively by legislation that neither spouse can dispose of his or her own interest during their joint lifetime without the written consent of the other as is the case in Manitoba and Alberta.

The Study's proposals as to the matrimonial home are set out in detail in the Recommendations.'

DISCUSSION OF PROPOSALS

In some respects, and particularly with regard to an attempted disposition by one spouse of the matrimonial home, the Study has gone beyond existing Canadian legislation in an endeavour to give the other 'spouse greater protection as against third parties in his or her occupation of the matrimonial home.

If the system of matrimonial property that the Study will recommend is adopted, there can be no guarantee that disputes as to title to, or possession of, property will not arise between husband and wife. Since, however, under the balancing claim system, many items of property acquired by either will, in the vast majority of cases, be ultimately pooled for sharing between them, the importance of what belongs to one or the other is greatly diminished. Nevertheless, the Study recommends retention of the existing provision in The Married Women's Property Act of Newfoundland as to the settlement of any disputes that might arise as to title to, or possession of, property. The Newfoundland Act, however, should be amended as has been done in England to give the Court express power to order a spouse, who has disposed of a property, to pay the other spouse a sum of money to compensate for the loss of an interest in the property, in which the other party is able to prove an interest.

The balancing claim system will not resolve disputes which may continue to arise as to whether the transfer of property by one spouse to the

1 *Supra*, p. 233.

2 *Infra*, pp. 283-284.

other spouse was intended as a gift. Likewise where title to immovable property is taken in the name of one spouse, with consideration having been furnished by the other spouse, this may give rise to disputes as to beneficial ownership. Beneficial ownership in joint bank accounts may also become an issue. As the law presently stands, the wife, unlike the husband, will be aided in these circumstances by the presumption of advancement. The Study will recommend that the presumption be extinguished by legislation, or, alternatively, that the presumption be established by legislation in favour of the husband to the same extent as it is now enjoyed by the wife.

The uncertainty as to the beneficial right of the wife in the unexpended portion of housekeeping and other allowances should be settled by legislation, providing, as is now the law in England, that unless the spouses have otherwise agreed, any unexpended portion or any property acquired from such portion, should be treated as belonging to them in equal shares.

In conclusion, it should be pointed out that the adoption of the balancing claim system may substantially affect the operation of the obligation of a husband to support his wife. Under the proposed system the wife might be initially in a much better position than is now the case. She might receive a substantial portion of the husband's assets, and in the long term this might reduce his ability to provide the degree of maintenance expected of him under present law. The adoption of the balancing claim system might also affect his ability to support infant children. While considerations of this nature are not an argument against the validity of the balancing claim system, they do illustrate that it is unrealistic to divorce problems of property and maintenance.

B. SUCCESSION ON DEATH AND RELATED PROBLEMS

INTESTATE SUCCESSION

Laws on succession to property of a deceased person should be based on defined objectives whether or not the deceased has left a will. The objective should be to ensure that dependants of the deceased are provided with adequate maintenance to the extent that the estate can afford. If a deceased who has no dependants has left a will, or if, having dependants, he or she has made adequate provision for them¹, there should be no right to anyone to disturb the provisions of the will. With respect to estates of persons who die intestate (without a will) as to part, or all of the estate, laws of succession should be framed to provide for dependants.

Existing legislation on intestate succession in Canada, England, and the United States of America would appear to have been designed to give priority to those persons who are, or who are most likely to be, in need of maintenance. This objective is partially achieved by giving the surviving spouse and children the first claim on the estate. If there is neither surviving spouse nor children, the underlying objectives of intestate succession legislation historically appear to have been a mixture of satisfying what might be termed a property interest (inheritances by custom, for example) or fulfilling natural expectations.

It would not be possible to design a pattern that would fit every individual situation. The best that can be done is to make rules that are most likely to achieve the objective and in so far as the rules do not achieve this objective, to give the courts the power to give relief where there are dependants.

The Study has examined the patterns of intestate succession law in many jurisdictions. They have some things in common, namely, the surviving spouse and children take the whole of the estate, with issue of deceased children taking their parent's share among them. Some jurisdictions, for example, Nova Scotia, give the surviving spouse a preferential share entitling the spouse to a claim prior to all others up to a stated minimum amount.

Newfoundland Legislation

The governing act in Newfoundland is The Intestate Succession Act², the general characteristics of which are as follows:

1 If adequate provision has not been made for them, dependants may have a right of action against the deceased's estate under The Family Relief Act, 1962, Stats. Nfld. 1962, No.56, which is discussed *infra*, pp. 250-254.

2 R.S.N. 1952, c. 153.

1. Where there is a surviving spouse and issue, they share the estate between them with children of a deceased child taking the share of their deceased parent. (Section 4)
2. Where there is no surviving spouse but issue, the estate is distributed per stirpes among the issue. (Section 5)
3. Where there is no issue the surviving spouse is entitled to a preferential share of \$30,000 and half of the residue. The other half of the residue goes to those who would take the estate if there were no widow under the next four following provisions. (Section 6 as amended)
4. If an intestate dies leaving no widow¹ or issue, his estate shall go to his father and mother in equal shares if both are living but if either of them is dead the estate shall go to the survivor. (Section 7)

If an intestate dies leaving no widow, issue, father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister is dead, the children of the deceased brother or sister shall take the share their parents would have taken if living. (Section 8)
6. If an intestate dies leaving no widow, issue, father, mother, brother or sister, his estate shall go to his nephews and nieces in equal shares and in no case shall representation be admitted. (Section 9)
7. If an intestate dies leaving no widow, issue, father, mother, brother, sister, nephew or niece, his estate shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate and in no case shall representation be admitted. (Section 10)

If there are no next of kin to take under the last mentioned provision, the property goes to the Crown.

In England, under the provisions of the Administration of Estates Act, 1925² (as amended by the Intestates' Estates Act, 1952³), if there are none of: spouse, issue, father, mother, brothers, sisters, nieces, nephews, grandparents,

¹ Section 17 of Newfoundland's Intestate Succession Act provides that "The estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man so dying the word "husband" being substituted for

² "widow" in *Section 67(1)(2)*

³ Stats. U.K. 1925, c. 23.

³ Stats. U.K. 1952, c. 64.

aunts and uncles, the property goes to the Crown which is given the right 'to provide for dependants, whether kindred or not, from the estate.' The Study favours this provision with the modification that dependants be given the right to maintenance as determined by the courts rather than by the Crown. Once those in the line of the succession according to the English pattern have been passed, more remote next of kin cannot in any sense be said to have a property interest, nor, in the vast majority of cases, have any natural expectations. In exceptional cases where remote next of kin have justifiable natural expectations, it is safe to assume that if the intestate had a special interest in them, he or she would have left a will benefitting them.

If the principle of the balancing claim recommended by the Study in Part A² is adopted, the surviving spouse, particularly if it is the wife, will in most instances, be entitled to a balancing claim against the estate of her deceased husband. This claim protects her against her husband from disposing by will of that portion of his estate that is required to settle the balancing claim. If the husband dies intestate, the balancing claim would also be the first charge on the estate. The balancing claim assures to the surviving spouse a share as of right in the family assets.

Discussion of Proposals for Intestacy Legislation

The Study has concluded that the best pattern of intestate succession on the death of either spouse is:

1. To give the surviving spouse a preferential share of \$35,000 of the estate, whether or not there are issue;
2. Where there are issue, to divide the estate in excess of the preferential share among the surviving spouse and the issue in equal shares;
3. Where there are no issue, to divide the estate as provided by The Intestate Succession Act.

To accomplish this, the Study will recommend the repeal, with substitution of The Intestate Succession Act, where it provides, *inter alia*, that there is a preferential share only when the spouse dies without issue.³ The philosophy in many jurisdictions obviously underlying the preferential share of the surviving spouse on intestacy is that of providing means to combat or cushion the effect

¹Origin and development of intestacy rules in England discussed in: Graveson, R.H. and Crane, F.R., *A Century of Family Law, 1857-1957* (Sweet and Maxwell Ltd., London, 1957), pp. 235-240.

²*Supra*, pp. 235-240.

³R.S.N. 1952, c. 153, s. 6(1).

on the spouse and issue of minor age, of sudden loss, such as that of the family home. It is not only that of protection of the surviving spouse or next of kin where there is no issue.

In Alberta, 'The Intestate Succession Act' provides, *inter alia*, that a surviving spouse shall receive a preferential share of \$20,000, where available, on an intestacy, whether or not there are issue. The surviving spouse also gets a life estate in the homestead. In Newfoundland, by comparison, The Intestate Succession Act entitles a surviving spouse to a preferential share of \$30,000 of the net estate² where available, if there are no issue; to one half of the net estate where one issue survives and to one third of the net estate where there is more than one surviving issue.

The major asset of a growing number of estates in recent years has been a dwelling house, whose market value often ranges from \$15,000 to \$30,000 and upwards. Where an intestate is survived by a spouse but no issue, the surviving spouse is normally assured of accommodation by virtue of the preferential share³. Where an intestate is survived by issue as well as by a spouse, and the estate consists mainly or wholly of a home, it might have to be sold if one or more of the surviving issue⁴ could insist on realizing immediately on his or her interest in the estate.

To guard therefore against a forced sale of the family home to satisfy the interest in an estate of one of the issue the preferential share should be provided a surviving spouse where there are issue in the same way as the existing law in Newfoundland provides where there are no issue. The intestacy legislation of several other provinces presently incorporates a similar provision⁵.

In the application of the present intestacy rules in Newfoundland, where there is a surviving spouse, such spouse is usually appointed to administer the estate of the spouse first to die, including the shares of the estate vesting in any minor surviving issue.

A related problem is that of the quantum of the preferential share. New-

R.S.A. 1970, c. 190.

¹ Value of the estate after payment of charges thereon, debts, funeral expenses, expenses of administration and succession duty.

² The home may have to be sold to satisfy charges against it, creditors' claims against the estate or estate taxes.

³ Sale of an infant's interest in chattels real is governed by The Estates of Infants Act, R.S.N. 1952, c. 144.

⁴ The Devolution of Estates Act, R.S.M. 1970, c. D70, s.6; Administration Act Amendment Act, 1963, Stats. B.C. 1963, c. 1, s. 5, as amended by Administration Act Amendment Act, 1966, Stats. B.C. 1966, c. 1, s. 11(1).

foundland's first intestacy legislation, in 1908¹, provided for a preferential share of 52,000 (where a person died leaving a spouse but no issue). In 1951², the amount of the preferential share was raised to \$20,000, and was further increased in 1966³ to \$30,000.

Taking into account the increasing market value of homes, rising mortgage interest rates, repair and maintenance costs, interest charges on home improvement loans, and expenses of heating and light, insurance, taxes and assessments and other inflationary influences, the Study will recommend that the preferential share be further raised, to \$35,000.

Where a spouse continues to reside in a dwelling house inherited from the spouse first to die, the ceiling to be recommended for the preferential share, where available, will better enable such spouse to maintain himself or herself, any minor issue as well as the house.

Distribution: Per Stirpes and Per Capita

The Intestate Succession Act of Newfoundland provides that where, in the line of succession, the only beneficiaries are brothers and sisters all still living, they take the estate in equal shares⁴. If some brothers and sisters, are still living, and some deceased, the children of deceased brothers and sisters take per stirpes (by representation⁵).

Example:

Net Estate \$30,000

Intestate left surviving:

One brother
Two children of deceased sister
Four children of deceased brother

Disposition of estate:

Surviving brother \$10,000
Two children of deceased sister @ 5,000
Four children of deceased brother @ 2,500
\$30,000

1 Stats. Nfld. 1908, c. 4, ss. 1 - 3.

2 Stats. Nfld. 1951, No. 30, s. 6.

4 The Intestate Succession Act, R.S.N. 1952, c. 153, s.

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On the other hand, when the beneficiaries are nieces and nephews only, they share equally. If there are members of a class of two degrees of kinship, for example, nephews and nieces, and children of more than one deceased nephew and niece, the estate should first be divided by the number of surviving nephews and nieces plus the number of nephews and nieces who had died and had children surviving them, and the totality of the shares applicable to the deceased nephews and nieces should be divided equally among all their children.

Example:

Net Estate \$30,000

Intestate left surviving:

One nephew
One child of deceased niece
Three children of deceased nephew

Disposition of estate

Surviving nephew	\$10,000	
Four children of deceased nephew and niece @	5,000	\$30,000

This will likely conform to the wishes of the testator and is provided for in section 9 of the Act.

SPOUSE IN DESERTION

Under section 18 of The Intestate Succession Act of Newfoundland, a spouse who "has left" the other spouse and is living in adultery at the time of the other spouse's death, is denied the right of succession to the estate of the spouse first to die. This is typical of the legislation that prevails in many jurisdictions. Whether section 18 of the Act also applies to a spouse whose misconduct has caused the other spouse to leave, is uncertain and the Study will recommend that the Act be amended accordingly. Despite section 18, a guilty spouse, in appropriate circumstances, might conceivably apply under The Family Relief Act, 1962 which is discussed below.'

EFFECT OF ADOPTION

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¹ *Infra*, pp. 250-254.

e Adoption of Children Act, 1964² preserves for an adopted child his

² Stats. Nfld. 1964, No. 23 (as amended).

right of inheritance from his natural parents or kindred' who die intestate, and gives him the right to inherit on the intestacy of his adopting parents and establishes a relationship for him only to the legal descendants of his adopting parents. The property that an adopted child has acquired by himself or by gift, inheritance or descent from an adopting parent or kindred of an adopting parent, goes on intestacy to the adopting parent's family, and any gift or inheritance from his natural parents or kindred goes as if he had not been adopted.

The current philosophy is that for all purposes the adopted child and his adopting parents should stand in the same relationship as that of natural child and natural parents. The natural parent has relinquished his responsibilities and the adopting parent has assumed them. The trend of modern legislation is to give recognition to this also in succession to property and to establish a relationship of kindred only to the kindred of the adopting parents. The Study will recommend that the Newfoundland legislation on adoption be amended accordingly.

LEGISLATION ON WILLS

It is not within the scope of the Study's considerations to make recommendations generally on the existing legislation on wills. There are, however, some aspects of wills that have particular reference to the family and it is proposed to deal with them. The Wills Act¹ provides that a will is, with one exception, revoked by the subsequent marriage of the testator³, but unlike many jurisdictions does not exempt from revocation wills that are expressed to have been made in contemplation of a particular marriage. The Study will recommend that the Newfoundland Act be amended by enacting saving legislation in this regard.

Section 18 of The Wills Act of Newfoundland contains what is commonly referred to as an anti-lapse provision providing that, except where a contrary intention appears in the will, where a testator gives a legacy in his will to his issue and that issue predeceases him, the legacy does not lapse if that issue dies leaving issue and any such issue is living at the time of the testator's death. There have been conflicting views in the courts in England as to the construction of the same provision in the English Wills Act⁴. The most favoured view is that the provision is designed only to prevent lapse and that the determination as to who takes the legacy is governed by the circumstances prevailing at the time that the legatee died and not at the time that the testator died. If, therefore, the legatee died intestate, the legacy will go to his issue or next of kin as of the time of his death. However, the Study does not subscribe to this view and will recommend

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Stats. Nfld. 1964, No. 23, s. 12 (1).

2 R.S.N. 1952, c. 147.

3 Ibid., s. 9.

4 Stats. U.K. 1837, c. 26, s. 33.

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that the Newfoundland Wills Act be amended to clarify the point in the manner provided in the Uniform Wills Act drafted by the Commissioners on Uniformity of Legislation in Canada¹. The provision in this draft makes it clear that the beneficiaries are those who would have taken from the legatee if he had died intestate immediately after the testator's death. It is more likely that a testator would prefer to benefit the legatee's issue or next of kin as of the time of the testator's death rather than issue or next of kin at the time of the legatee's death.

The Commissioners' draft makes the following other changes:

- (a) The anti-lapse provision applies also where the legatee is a brother or sister of the testator.
- (b) The persons who take the legatee's interest are those who would take on his intestacy.
- (c) The anti-lapse provision also applies if the legatee has died before the making of the will.
- (d) The anti-lapse provision also applies where the legacy or bequest is to the legatee as a member of a class.

The Study will recommend the adoption of all these provisions.

DEPENDANT'S RELIEF

The Family Relief Act, 1962 of Newfoundland² enables a judge of the Supreme Court to order that proper maintenance and support be made out of the estate of a deceased for the persons specified by the Act where, by the terms of the will or as a result of intestacy, adequate provision is not available for these purposes³. Similar legislation is in force in England, Australia, New Zealand and some other countries. In Canada, while most of the provinces have legislation of this nature, only Alberta, Saskatchewan, and Newfoundland have made the legislation applicable on intestacy. Some other jurisdictions appear to rely on the provisions of their intestacy legislation as providing adequately for the surviving spouse and children. The Study is of the opinion that at best, intestacy legislation cannot take into account the many and varied circumstances of those who may have some entitlement to rely on support from a deceased person.

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Proceedings of the 12th Annual Meeting (1929) of the Commissioners, p. 44.

2 Stats. Nfld. 1962, No. 56, s. 3.

³ See, for example: *In re Gosse* (1964), 49 M.P.R. 186.

The Study has examined The Family Relief Act, 1962 of Newfoundland in the light of some general but basic considerations. The expressed intention of the Act is the provision of proper maintenance and support for the persons who are entitled by the Act to apply for relief to a judge. These persons are termed dependants but they are limited to the widow, widower, or child of the deceased. It is evident from the selection of those who are entitled to relief that the purpose of the Act is to provide proper maintenance and support for those who normally are dependants of the deceased. The apparent weakness of this legislation, as is the case in similar legislation in other jurisdictions, is that it does not embrace all who may be in fact dependants. If the principle of the legislation is sound, and undoubtedly it is, it should be framed so as to afford relief, in so far as the estate will provide, to all persons who are in fact dependent.

Factors Taken Into Account

Moreover, elements other than dependency or proper maintenance and support have been introduced in the Newfoundland legislation as considerations that are to be taken into account by a judge. These include:¹

- (a) Whether the character and conduct of the dependant is such as should disentitle him to the benefit of an order.
- (b) The relations of the dependant and the deceased.
- (c) Any services rendered by the dependant to the deceased.

Where there is a will, the judge hearing an application may also receive any evidence that he considers "relevant of the deceased's reasons, as far as ascertainable, for making the disposition made by his will, if any, or for not making provision or further provision, as the case may be, for a dependant, . . ." ². Generally, the judge is to inquire into and consider all matters that should fairly be taken into account³.

This latter provision may be used to consider extraneous matters, such as the natural expectancies or the notion of property interest of a dependant, as defined in section 2(c) of the Newfoundland Act. In at least some jurisdictions in Canada there has been a tendency for judges to take these considerations into

¹ The Family Relief Act, 1962, Stats. Nfld. 1962, No. 56, s. 5 (1).

² Stats. Nfld. 1962, No. 56, s. 5(3)

³ Ibid., s. 5(1).

account when the applicant was not in fact a dependant of the deceased and was apparently capable of supporting himself.

In all the provinces of Canada which have enacted such legislation, the court is either required, or given a discretion, to consider the moral merits of the claim as well as the basic financial factors. Under the Ontario legislation for example, the court is enjoined from making an order in favour of a wife who was living apart from her husband at the time of his death under circumstances that would disentitle her to alimony.

In the New Zealand all order in favour of a person whose character or conduct is or has been such as in the opinion of the court would disentitle him to the benefit of an order. The New Zealand legislation is the same as the Newfoundland Family Relief Act in that the court may have regard to the deceased's reasons, so far as they are ascertainable, for making the dispositions made by his will, or for not making any provision or any further provision for any person.

Definition of "Dependant"

In most, if not all jurisdictions, in which dependant relief legislation has been enacted, the definition of dependant is too narrow and does not fully recognize the fact of dependency in the establishment of the category of persons who are entitled to claim relief. The New Zealand legislation² provides that application may be made by all or any one of the following persons for provision out of the estate of a deceased:

- (a) Wife or husband;
- (b) Children of the deceased, including an illegitimate child whose paternity or maternity has been admitted by or established against, the deceased, while the deceased and the child were both living;
- (c) The grandchildren of the deceased living at his death;
- (d) The stepchildren of the deceased who were being maintained wholly or partly by the deceased immediately before his death³;
- (e) The parents of the deceased;

²Family Protection Act 1955, N.Z. Stats. 1955, No. 88 (as amended by the Family Protection Amendment Act 1967, and the Status of Children Act 1969).

³Ibid.

³Under the New Zealand legislation, "stepchild", in relation to any deceased person, means any child by a former marriage of the deceased's husband or wife; and includes any child of the deceased's husband or wife who was living at the date of the marriage of the husband or wife to the deceased.

Provided that no claim may be made by any such parent, unless

- (i) The parent was being maintained wholly or partly or was legally entitled to be maintained wholly or partly by the deceased immediately before his or her death, or

At the date of the claim, no wife or husband or child of a marriage is living.

After considering the family relief legislation of several jurisdictions, the Study has decided to recommend that the definition of "dependant" in the Newfoundland Act be amended to include the classes of persons in paragraphs (a), (b), (c) and (d) above, and in addition, any other person who was being, or was legally entitled to be, maintained wholly or partly by the deceased, immediately before his or her death.

The Status of Children Act 1969, enacted by the Parliament of New Zealand, in addition to effecting amendments with respect to the persons entitled to apply for relief under the New Zealand Family Protection Act, provides that for all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

For the purpose of seeking relief under The Family Relief Act, 1962 the Study will recommend that the definition of "wife" be extended to include a woman who has lived with a man as man and wife continuously for not less than five years preceding the death of the man. This definition will be found in legislation in some provinces in Canada for the purposes of awarding maintenance, for example, in the Wives' and Children's Maintenance Act in Nova Scotia.'

As an aid in proof of paternity certain matters are made *prima facie* evidence of paternity by the amending New Zealand legislation. Any person who alleges that the relationship of father and child exists between himself and any other named person and any woman who alleges that any named person is the father of her child may apply to the Supreme Court for a declaration of paternity.²

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Contracting Out of Relief

The power of a dependant to contract out of family relief legislation requires consideration. Maintenance legislation should be considered as being in

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Proof of paternity is discussed further, *infra*, p. 257.
R.S.N.S. 1967, c. 341.

the public interest and accordingly a dependant should not have the power to contract out of its benefits¹. The pronouncement of Lord Hailsham in the *Hyman* case- in the House of Lords in a claim for dissolution of marriage is apt in the consideration of relief legislation. In that case Lord Hailsham held "that the power of the Court to make provision for a wife on the dissolution of her marriage is a necessary incident of the power to decree such a dissolution, conferred not merely in the interests of the wife, but of the public, and that the wife cannot by her own covenant preclude herself from invoking the jurisdiction of the Court or preclude the Court from the exercise of that jurisdiction".

Balancing Claim

A balancing claim established during the lifetime of the spouses, should not of itself be a bar to relief under The Family Relief Act, 1962. Here, too, the test of need of maintenance and support should be the prevailing one.

ILLEGITIMATES AND LEGITIMATION

The disabilities at Common Law of an illegitimate child to inherit property and of his blood relatives to inherit from him have been modified by legislation, though in varying degrees, in most provinces of Canada, in England and some other parts of the Commonwealth, and in many of the States of the United States of America. The position at Common Law was that only the wife and issue of an illegitimate child could inherit from him. He was the child of no one and could inherit from no one.

Newfoundland Legislation on Inheritance by Illegitimate Child

In Newfoundland, inheritance from and by an illegitimate child is governed by two statutes, The Intestate Succession Act³, and The Legitimacy Act⁴, which confer limited rights of succession to and from an illegitimate child. At first glance there appears to be a conflict between the provisions of section 15 of The Intestate Succession Act and section 9(1) of The Legitimacy Act, and between section 16 of the former Act and section 9(2) of the latter Act. However, if the relevant sections are read together the position would seem to be that illegitimate children and their issue inherit from their mother as if the children were legitimate, and shall inherit through her if she is dead, as if they had been legitimate. This is the effect of section 15 of The Intestate Succession Act which contains the general provision as to succession by illegitimate children and their

1 See, however, The Maintenance Act, R.S.N. 1952, c. 65, s. 8(1) and compare with s.8 (2) (1) and (c).

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3 *Hyman v. Hyman*, [1929] A.C. 601, 614.
1952, c. 153.

4 R.S.N.
R.S.N. 1952, c. 164.

issue from and through the mother. Section 9(1) of The Legitimacy Act deals only with one situation, namely, where the mother does not leave any legitimate issue surviving her, and in that case the illegitimate child or that child's issue succeeds to her property as if the child had been born legitimate.

Section 16 of The Intestate Succession Act deals only with the situation where the illegitimate child dies leaving no widow or issue. By section 9(2) of The Legitimacy Act it was not intended to confer on the mother of an illegitimate child any additional rights but only to restate her right to inherit when the illegitimate child leaves no widow or issue.

Extension of Illegitimate Children's Rights of Inheritance

If the recommendations of this Part as to the extension of the right of an illegitimate child to inherit and of the right of inheritance from an illegitimate child are accepted, the provisions in both Acts would be replaced by other legislation. On the other hand, if the decision should be to maintain the status quo, the Study will recommend that the four sections be replaced by one section to be included in The Intestate Succession Act, to the effect that for the purposes of the Act, an illegitimate child shall be treated as the legitimate child of his mother.

The present wording of section. 15 of the Newfoundland Intestate Succession Act was substantially adopted from the Uniform Intestate Succession Act as recommended by the Commissioners on Uniformity of Legislation in Canada¹. In a Report to the Commissioners in 1958, Dr. Gilbert Kennedy pointed out that the wording of this section did not place the illegitimate child in the full line of succession to and from his mother and he recommended the following rewording:- "For the purposes of this Act an illegitimate child shall be treated as the legitimate child of her mother".- This wording has been adopted by Nova Scotia in its new Intestate Succession Act³. The same wording has also been adopted in some other provinces.

If the illegitimate child has been legitimated under the provisions of the Newfoundland Legitimacy Act, by the intermarriage of his parents, he, his spouse, children, or more remote issue succeed in like manner as if he had been born legitimate. Their right is limited, in that they are only entitled to take an interest: (a) in the estate of an intestate dying after the date of legitimation; (b) under any disposition coming into operation after the date of legitimation. These limitations are unnecessarily broad and the Study will recommend that

¹ See Proceedings of the Eight Annual Meeting (1925) of the Conference of Commissioners,
² p. 28.

³ Proceedings of the Fortieth Annual Meeting (1958) of the Conference of
Commissioners, p. 77.

Stats. N.S. 1966, c. 8, s. 15, now R.S.N.S. 1967, c. 153, s. 15.

they be replaced by a provision such as is found in similar legislation in most of the other Canadian provinces to the effect that upon the intermarriage of the parents, the child is deemed legitimate *from his birth* for all purposes provided that property that has already vested in any other person shall not be affected.

As already noted the pattern of the right of an illegitimate child, who has not been legitimated, to succeed to property on an intestacy and the right of succession from him is not uniform. In the jurisdictions in which there is legislation extending the right to succession, the common element is to put the mother in the line of succession from the child and the child in the line of succession from the mother, although, under the working of the legislation in some jurisdictions, including Newfoundland, there is some doubt if the object of the legislation has been achieved to place the child, completely in the line of succession of his mother. Otherwise the pattern is diverse and the following characteristics are found in it:-

- (a) That an illegitimate child inherits from his father if the father leaves no widow or legitimate issue. This is the law in Alberta which is the only province in Canada to give any right to an illegitimate child to inherit from his father.
- (b) That if the illegitimate child was dependant, wholly or partially, on the father immediately before the father's death or if the father had been required to support the child by court order, he inherits from his father.

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This is the law in the state of Victoria, Australia.

- (c) That, without any exceptions, the illegitimate child inherits from the father.
- (d) That the illegitimate child inherits both from the father and from his kindred, lineal and collateral.
- (e) That, in applying the laws of descent and distribution, the legal status and legal relationships and the rights and obligations between a person and his parents, their descendents and kindred, are the same for all persons, whether or not their parents have been married.

This is the law in the State of Oregon in the United States.

The effect of the new legislation in New Zealand¹ is that for the purposes of intestate succession, illegitimate children would have the same status as legitimate children.

¹ Status of Children Act 1969, Stats. N.Z. 1969, No. 18.

Proof of Paternity

If the right of inheritance is to be given between the father and his illegitimate child, the problem of establishing the paternity of the child has to be resolved. The manner of proof in those jurisdictions where this right is given is not uniform but, in general, what is required is acknowledgement by the father of paternity, either by formal or other act, or establishment of paternity by a court, during the life time of the father, or in some cases, prior to or within a stated number of years after the child's birth.

As the law now stands in most jurisdictions, kinship is the prevailing test for intestate succession, and this will in the majority of cases result in the property going to dependants of the intestate. An illegitimate child has as strong a claim on his parents and other relatives as has a legitimate child, on the ground of kinship. The fact that he or she was or is not regarded as a lawful child is

relevant. In most jurisdictions the illegitimate child is considered to be a dependent of his mother, except to the extent that the father may have been ordered to make a lump sum payment or periodic payments for the child's maintenance during at least part of his or her minority. Apart from this, the mother is regarded in law as responsible for the child's support and the child is in fact dependant solely on her for support. There are no grounds on which the child should be denied the same right to inherit as that enjoyed by legitimate children of the same parents on the basis of kinship or dependency.

Discussion

The Study will recommend that an illegitimate child be permitted to establish dependency under relief legislation to the same extent as a legitimate child.

Likewise, for the purpose of intestate succession, the Study will recommend the adoption of the provision in this regard that is contained in the New Zealand legislation.

Proof of paternity by acknowledgement by the father in any particular case will be a question of fact. The court should be given power to find acknowledgement not only when it has been done by a formal act, but where in all the circumstances it is satisfied that the father has acknowledged the child to be his child.

The Study is of the opinion that any person who alleges that the relationship of father and child exists between himself and any other named person, and any woman who alleges that a named person is the father of her child may apply to the court for a declaration of paternity.

Affiliation orders made under legislation such as The Children of Unmarried Parents Act, 1964¹ may be inconclusive as to actual paternity, inasmuch as there may be cases where affiliation orders can be made against more than one person. Where an order has been made against one person only, the Study will recommend that for succession to property the order should be taken as *prima facie* proof of paternity. This is in line with the new New Zealand legislation.

Construction of "Child" in Wills

Illegitimate children have suffered a disadvantage as compared with legitimate children, in the construction of the word "child" in a will. The courts in England have invariably held that a description of a person in a will by reference to relationship to the testator or other person *prima facie* refers only to legitimate relations. The same presumption has been applied in courts in Ontario but rejected in recent years by courts in British Columbia. It is not unlikely that Newfoundland courts would follow the English rule. The presumption can at present be rebutted by a contrary intention shown in the will or by proof that the circumstances were such when the will was made that the testator must have had in mind illegitimate relatives.

In the Model Wills Act recommended by the Commissioners on Uniformity of Legislation in Canada-, there is this provision:

"In the construction of testamentary dispositions, except when a contrary intention appears by the will, an illegitimate child shall be treated as if he were the legitimate child of the mother".

This is limited to the child's relationship to the mother and presumably has been so limited because, in most circumstances, where the testator is a relative of the mother, he or she will have knowledge of any illegitimate children that she may have. Maternity of illegitimate children is usually a more widely known fact than paternity of illegitimate children.

The Study is of the opinion that the old rule of construction should be abolished.

THE FATAL ACCIDENTS ACT ³

This legislation gives persons who stand in a certain relationship to a

1 Stats. Nfld. 1964, No. 40.

2 Proceedings of the Thirty-Ninth Annual Meeting (1957) of the Conference of Commissioners, p. 143.

3 R.S.N. 1952, c. 256 (as amended by The Fatal Accidents (Amendment) Act, 1966-67, Stats. Nfld. 1966-67, No. 19).

person whose death was caused by the wrongful act, neglect or default of another person a right of action against the wrongdoer. The Fatal Accidents Act of Newfoundland gives a right of action only to the wife, husband, parent and child of the person whose death was so caused.

The Model Fatal Accidents Act, drafted by the Commissioners on Uniformity of Legislation in Canada in 1964¹ contains an extended definition of "child" and "parent". In the Model Act, "child" includes son, daughter, grandson, granddaughter, step-son, step-daughter, an adopted child, an illegitimate child, and a person to whom the deceased stood *in loco parentis*; and "parent" includes father, mother, grandfather, grandmother, step-father, step-mother, adoptive parent, and a person who stood *in loco parentis* to the deceased. These extended definitions are now contained in the New Brunswick and Manitoba legislation. The legislation in Ontario, British Columbia and Saskatchewan does not provide for an illegitimate child, but otherwise the definition of "child" and "parent" in the legislation of these provinces follows the definition in the Model Act. The Alberta legislation includes an illegitimate child but excludes those who stand *in loco parentis* to the deceased.

The legislation in all the provinces provides that in order to obtain an award against the wrongdoer the claimant must show injury resulting from the death of the deceased person. The extension of the definition of "child" and "parent" as found in the Model Act is an attempt to include those persons who are most likely to suffer injury from the death of the person to whom they stood in the defined relationship. The Study will recommend the adoption of the definition in the Model Act.

THE SURVIVORSHIP RULE

The present law of survivorship in Newfoundland is found in The Survivorship Act, 1963². Its main provision is in section 2 (1): •

"Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, the deaths are . . . , presumed to have occurred in order of seniority and accordingly the younger is deemed to have survived the older."

Section 47 of The Life Insurance Act, 1960³ provides:

"Unless a contract or a declaration otherwise provides, if a person whose

¹ Proceedings of the Forty-Sixth Annual Meeting (1964) of the Conference of Commissioners, p. 110.

² Stats. Nfld. 1963, No. 3.

³ Stats. Nfld. 1960, No. 17.

life is insured and his beneficiary die at the same time or in circumstances rendering it uncertain which of them survived the other, the insurance money is payable in accordance with subsection (1) of Section 25 as if the beneficiary had predeceased the person whose life is insured."

Section 25 (1) of The Life Insurance Act provides:

"If a beneficiary predeceases the person whose life is insured and no disposition of the share of the deceased beneficiary in the insurance money is provided in the contract or by a declaration, the share is payable

- (a) to the surviving beneficiary,
- (b) if there is more than one surviving beneficiary, to the surviving beneficiaries in equal shares, or
- (c) if there is no surviving beneficiary, to the insured or his personal representative."

In the absence of some more adequate provision, the presumption in The Survivorship Act is a necessary and useful presumption. However its results may often be inequitable. The most blatant example is the case of a husband and wife, the husband being the elder, being killed at the same time and leaving no issue. Unless the husband left a will with alternative provisions, the entire estates of both, insurance monies usually included, go to the wife's relatives, if his wife does not survive him by a specified period, usually thirty days.

When a person leaves property to another, particularly to his spouse, he or she is leaving it for the benefit of the surviving spouse and not for the benefit of the heirs of the surviving spouse. The Study agrees with the recommendation of the Ontario Family Law Project that, in so far as spouses are concerned, when they die in circumstances rendering it uncertain which of them survived the other, the estate of each spouse should be distributed separately and as if neither survived the other. The same provision should be made with respect to life insurance that has been effected by either spouse. Otherwise where there is no surviving beneficiary under the insurance policy the death of spouses in a common disaster might result in the proceeds going, in whole or in part, to the heirs of the spouse who is presumed to have survived the other under the provisions of The Survivorship Act.

EXCESSIVE GIFTS BY SPOUSES

As was pointed out in Part A of this Chapter/ a spouse may deplete his or her estate by making gifts or transferring property for an inadequate consideration during their joint lifetime and thus defeat the purposes of the balancing claim and of intestate succession and family relief legislation. The only legislative control in Canadian jurisdictions is of the nature provided for in the Newfoundland Family Relief Act, 1962² which provides that property devised or bequeathed by will in accordance with the provisions of a contract made by a testator in his lifetime *bona fide* and for valuable consideration is not liable to an order made under the Act except to the extent that the value of the property in the opinion of the Judge exceeds the value of the consideration to the testator under the contract as of the date of the contract.

Legislation of this nature is a recognition that a person should not have an unfettered right to dispose of his property during his lifetime so that it is not available for his dependants after he dies. This can be accomplished in several ways; for example, by an inter vivos trust, conveyance of immovable property, transfer of chattels personal by delivery, transfer of shares or bonds by delivery if they are bearer, and by power of attorney and transfer, if they are registered, and by purchase or assignment of life insurance.

Restraints on excessive gifts have two aspects. As between spouses, if the principle of the balancing claim is accepted on the grounds that the property of either with some exceptions, is a family asset, neither spouse should be permitted without the other's consent to dispose of such an asset to the prejudice of the other. As regards dependants of either spouse, neither spouse should be permitted to dissipate his or her property by excessive gifts so as to defeat the purpose of other legislative , provisions that have been made to meet dependants' proper maintenance claims. The same considerations apply to transfers of property made for inadequate consideration.

The problem of control of excessive gifts has been recognized in some jurisdictions and legislative controls have been adopted or recommended.

A few jurisdictions in the United States permit a widow to attack her husband's gratuitous transfers that have been made within a relatively short period before his death. The State of Louisiana provides that gifts cannot exceed a certain proportion of the transferor's estate. If they are in excess of this proportion, heirs who have a right to share in the donor's estate have a right of action to recover from the donee the excess to the extent that is necessary to

¹ *Supra*, p. 238.

² Stats. Nfld. 1962, No. 56, s. 16.

satisfy their claims. In Germany, Switzerland and Israel there are also some limited controls on excessive gifts.

The comparative legislation on this subject, with recommendations in the form of a Model Probate Code, will be found in a treatise entitled *Fraud on the Widow's Share*, by W.D. Macdonald.¹ His proposal, in general, is that a transfer by gift or for substantially less than adequate consideration, may be attacked if made within three years of the transferor's death, but if the transferor has retained a substantial interest in the property, it may be attacked if made within ten years of his death. The transferee's liability is only to the extent to which the transfer was unreasonably large.

All of the foregoing schemes or proposals have as their real basis the philosophy of family property. While they may appear to be based to some degree on a right to maintenance by the transferor, their predominant basis is the notion of a property interest in the transferor's property. The property must be available to meet what is commonly referred to in some jurisdictions in the United States as the forced share being the share to which certain persons who survive the testator, are entitled on his death.

The weakness of these schemes or proposals is that the transferee may have dissipated the property making it unavailable at the transferor's death, and may not be financially able to respond to a money judgement. Moreover, the cut-off periods for transfers that may be attacked cannot be justified.

The Ontario Family Law Project in its original recommendations, proposed,

- (a) that any transfer by a spouse, either absolutely or by way of a trust, for no consideration or for a consideration which the court considers inadequate should be void *ab initio* unless both spouses had agreed in writing to the transfer or the court had dispensed with consent as being unreasonably withheld or had approved the transfer and a scheme for the replacement of the value of the property in the non-deductible assets of the spouse for the purpose of establishing a balancing claim;
- (b) that if a void transfer has been made the net value of the property at the time of the purported transfer should be included in the residuary estate of the transferor spouse for the purposes of establishing a balancing claim.

In the revised report of the Ontario Family Law Project, to the Ontario

¹ Macdonald, William D., University of Michigan Law School, 1960.

Law Reform Commission it is recommended that a spouse should be entitled to apply to the court for the determination and settlement of a balancing claim on the ground that the other spouse is jeopardizing the applicant's legitimate expectations by making an excessive gift or gifts. A further recommendation is made in the revised report of the Ontario Family Law Project that if the court considers a gift excessive, the transfer may be declared void with effect from the date of the donation, if it is other than a *bona fide* transfer for value, and without notice. On such a finding the equitable remedies of restitution and tracing would be available against the transferee.

In the Study's opinion the general tenor of the recommendations originally made by the Ontario Family Law Study Project are preferable to those contained in the revised report. The Study recognizes that no measures for controlling excessive gifts should be adopted that would work hardship on innocent third parties. If the transfer is for an inadequate consideration the transferee will not in most cases have taken *bona fide*, if the inadequacy of consideration is substantial. Neither can any question of *bona fides* arise in the case of an outright gift, if the law is that such a gift is void. The principal danger of prejudice to a donee by gift will arise in a situation where it is difficult for him to recognize whether or not the gift is excessive. It is not a valid objection to the scheme that a donee may not know the law, as there are many types of transactions in day-to-day living in which a person may incur liability with little or no knowledge of the consequence of his action. The law could provide that the donee would have the right to apply to the court for a determination of the issue of excessiveness.

The problem of dealing with transfers for inadequate consideration is more difficult. A transferee in this case could be *bona fide* in the sense that he was not acting in collusion with the transferor. He may merely be accepting a good bargain and in that case, if the transaction is attacked, he would not be held to be acting other than *bona fide*. In the case of inadequacy of consideration, the other spouse should have the right to apply for a balancing claim, the amount by which the consideration was inadequate being added as a non-deductible asset to the other spouse's estate. The aggrieved spouse should also have the right to apply for a declaration that the transfer is void on the ground that the transferee did not take the property *bona fide*, and for an order restoring the property to the donor or paying the amount by which the consideration was inadequate.

The original proposal of the Ontario Family Law Project to the Ontario Law Reform Commission, that the aggrieved spouse may take action for a winding-up and declaration of a balancing claim on discovery that an excessive gift has been made by the other spouse, is superior to the provisions found in some countries in continental Europe and the United States and to Macdonald's Model

Probate Act. Under these schemes the remedy is enforceable only after the donor's death with the attendant greater risk that the property will have disappeared or diminished in value or be outside the jurisdiction of the court.

The Ontario proposal also applies to transfers whenever made, while the other schemes apply only to transfers made within a relatively short time prior to the donor's death.

Inter vivos trusts set up by a spouse for no consideration should be treated as gifts. If consideration has been given, the property should be subject to a balancing claim to the extent that the consideration is inadequate. As a further protection the settlor should be required either to make an affidavit that the trust does not relate to matrimonial property (meaning property that was acquired during the marriage except by way of gift from a third person to either spouse) or to produce the consent of the other spouse with proof that the consent was freely given. The court should be given power to dispense with consent if it finds it is being unreasonably withheld, or if the other spouse was incapable of giving consent, or in any other circumstances in which it was deemed equitable and just to do so.

Where the title to property has been passed to another person by a donee of a spouse or by a transferee who has not given adequate consideration, such person if he has been *bona fide*, should be deemed to have a good title that could not be successfully attacked on the grounds of excessiveness of the gift or the inadequacy of consideration.

To this point attention has been confined to excessive gifts, transfers for inadequate consideration and creation of inter vivos trusts, by a spouse in so far as they may affect the balancing claim of the other spouse. However, the same or similar considerations arise with respect to the property available on the intestacy of a spouse to satisfy a valid claim under family relief legislation. The rules of intestate succession will be no protection with respect to property that has been effectively disposed of by the intestate before his death. The ability to provide for dependants by a will is correspondingly diminished. Likewise, the benefits of family relief legislation may be lost. The only practical solution is to make property, that has been given away or that has been transferred for inadequate consideration or that has been settled under an inter vivos trust, available so far as is possible to satisfy claims under family relief legislation. If the property is still in the hands of the immediate donee or transferee or a trustee for either, it should be deemed to be part of the estate of an intestate spouse and should also be subject to an order under family relief legislation. If the property has passed beyond the immediate donee or other transferee into the hands of another person who has taken *bona fide*, that should be the end of the matter.

The same considerations should apply where one spouse creates a joint interest in property so that on his or her death the entire interest goes to a person other than his or her spouse.

A spouse may also put the proceeds of life insurance policies, and of pension and annuity schemes beyond the reach of his or her surviving spouse and other dependants. In fact, a spouse's estate may consist largely of such proceeds. The Study will recommend that the proceeds from insurance, pensions, and annuities purchased by a spouse should be available for dependants under family relief legislation. If this recommendation were adopted, some legislative provision would have to be made that the proceeds from life insurance, pensions, and annuities could not be paid to the beneficiary for a certain period after the death of the spouse who had purchased these benefits.

C. CONFLICT OF LAWS

13BALANCING CLAIM

A circumstance of importance to the effective operation of a scheme vesting in one spouse a substantive right to receive part of the value of the other spouse's property is the limitation on the power of a legislature or a court to make Acts or decisions effective beyond its territorial boundaries. The enactment by one province, for example, Newfoundland, of a "balancing claim" right¹ with concurrent legislation amending testate and intestate succession rights and dependant's relief legislation will have limited effect unless the policies justifying both the enactment of such laws and their application to particular spouses are acceptable to the courts of other jurisdictions. The possibility of recognition by other jurisdictions is important since, even if there is an exclusive connection between the spouses and their property and one province at a particular point of time, that connection is unlikely to continue throughout their joint lives or the marriage or whenever litigation may occur.

Although Newfoundland may, at the time of the marriage, have jurisdiction over the spouses by reason of their presence in that Province and over all their property, if it is situated there, the spouses may later sever these connections by moving to another jurisdiction or acquiring property located elsewhere. If either change should occur the effectiveness of a balancing claim right created by Newfoundland law will depend upon the extent to which the courts of another province will recognize and enforce the right created under the law of Newfoundland.

This issue is not peculiar to the proposed "balancing claim" right but arises under a number of existing rules of law of Newfoundland. For example, Part II of The Wills Act of Newfoundland, introduced in 1955², recognizes that some consideration has to be given to the effect of the laws of other jurisdictions in probating wills before Newfoundland's courts. Under this amending legislation the will of a person who at the date of his death made his home in Newfoundland validly disposes of his interests in movable property (wherever located) if, in spite of the fact the will does not comply with the local form of will required by Newfoundland law, it complies with any one of the following laws: (i) the law of the place where it was made; (ii) the law of his domicile at the time it was made; (iii) the law of his domicile of origin.

The purpose of the amendment is to permit a person to move from one jurisdiction to another without requiring him to make a new will every time he acquires a new place of residence in another country.

¹ *Supra*, pp. 235-240.

²

The Wills (Amendment) Act, 1955, Stats. Nfld. 1955, No. 17.

Most, if not all, Common Law jurisdictions in the world have similar legislation and the amending legislation enacted in 1955 is in fact the enactment of a Model Uniform Act drafted by the Conference of Commissioners on the Uniformity of Legislation in Canada at its meeting in 1953¹. The legislative history of The Wills Act amendment illustrates the need for one province to consider the effect the laws of other jurisdictions would have in assisting its courts to decide some of the issues likely to arise in local litigation.

A more recent illustration of the same process is found in section 6 (2) of the Canada Divorce Act,² wherein Parliament has defined under what additional circumstances³ a decree of divorce granted in a foreign country will be valid throughout Canada.

To obtain uniform results and to reduce the degree of variation in the legal rights of an individual as he moves from jurisdiction to jurisdiction, conflict of laws rules define what aspects of a legal proceeding are to be governed by Newfoundland law.

In this context if a province substantially alters its law without considering the kind of recognition its newly created rights are likely to receive elsewhere the benefits accruing to a spouse may not be effective in other jurisdictions. Moreover if a foreign jurisdiction disagreed with the purposes or policies of Newfoundland law it might defeat any attempt to enforce that law before its own courts. This could occur in all cases where either the spouses or their property or both have substantial connections with more than one jurisdiction so that the balancing claim must be processed in all places where administration of the estate might occur or where the property of the spouses is located.

Conflicts rules will not only indicate the circumstances which are sufficient to justify the attempt by one jurisdiction to change the scope and nature of the property consequences of a marriage of the spouses subject to its laws but will also define the situations where such action will be recognized by other jurisdictions. A scheme of balancing claims together with a redefinition of the property consequences of the death of a spouse will therefore be effective only if the policies underlying the laws of the enacting province are acceptable to other jurisdictions.

¹Proceedings of the Thirty-Fifth Annual Meeting (1953) of the Conference of Com-

²missioners, pp. 38 - 52.

³R.S.C. 1970, c. D-8.

Section 6 (2) of the Divorce Act provides that it does not limit or restrict "any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, . . .". See: Jordan, F.J.E., "The Federal Divorce Act (1968) and the Constitution" (1968), 14 McGill J. 20, pp. 244-246.

A closely related problem is the extent to which a court judgment in one jurisdiction quantifying the amount of an *in personam* balancing claim between particular spouses will be enforced by a court of another jurisdiction.

CHOICE OF LAW

The process of determining which law governs the rights of individuals is called the "choice of law" in the conflicts of laws. A choice of law rule selects a factual connection between a person or persons and a jurisdiction and uses that connection to determine which state provides the law applicable in a particular case. The range of possible alternatives is extensive and includes:

- (a) spouses whose marriages were celebrated in a province;
- (b) spouses who at the time of the marriage were, or, at a subsequent time become, residents of a province;
- (c) spouses who at the time of the marriage were, or, at a subsequent time become, domiciled in a province;
- (d) spouses only if, and, to the extent that, their property was situated in the province at the time of the marriage or at a subsequent time.

The only general recommendation of the Ontario Family Law Project to the Ontario Law Reform Commission is that conflicts rules concerning the balancing claim should be integrated with the existing rules as far as possible. This approach, if adopted, would tend to reduce the number of new conflicts problems likely to arise and should make it possible for most jurisdictions to recognize and accept the proposed amendments with only minor readjustments to existing conflict rules.

The traditional approach of the Common Law system has been to consider as relevant only two points of time in selecting a governing system of substantive law determining the property rights of the spouses *inter se* as a consequence of their marriage: the date of the marriage and the date of the death of a spouse.

In cases in other countries where the issue before the court has been the existence and scope of *community of property* the decisive date has been that of the marriage, and the governing system of law selected at that point of time, in part, clearly adheres to the spouses and their property irrespective of subsequent changes in their residence and domicile and changes in the *situs* of the property. These rules provide an immutable regime of property interests, giving to both

spouses a vested right to participate in the future distribution of each other's assets.

The second date, at the death of a spouse, has also been used to determine the selection of a governing system of law to define, for example, the existence and scope of the right of a surviving spouse to succeed to a share of the other's estate. In contrast to the first scheme the prospective property rights of a spouse here, will vary from time to time and become certain only by reason of the application of a governing system of law selected at the time of the death of a spouse.

The introduction of a balancing claim right of the kind recommended in Part A of this Chapter¹ has been justified on the basis of the contribution made, directly and indirectly, to the accumulation of assets by both spouses during the marriage. This right does not affect the ownership of particular assets by a spouse; it only provides a prospective claim for a money judgment in an amount based upon the relative current wealth of the spouses to the marriage. The policy justifying this right is derived from and is designed to sustain a concept of the family from a functional viewpoint. It is only by considering the differing but complementary roles each spouse is expected to perform in most family units in contemporary society that the considerable imbalance in opportunity to accumulate capital assets by each spouse becomes relevant. The basic policy which supports the balancing claim concept, although logically one which relates to property as well as marriage, is, from the conflicts viewpoint, more closely connected with marriage law than with property law. The property issues arise only as ancillary aspects of marriage law.

Of the existing conflict rules designed to select a system of law governing the property interests of spouses the particular rules concerning community of property regimes in Civil Law jurisdictions² are more appropriate to a balancing claim than the rules concerning decedent's estates. In substance, although not in form, the balancing claim approximates community of property regimes. This characterization of the right for conflicts purposes and use of existing conflicts rules concerning community will enable spouses to know with certainty at the time of their marriage the scope of their prospective interests in property throughout their joint lives or the term of their marriage. Selection of any other rule will make their mutual rights uncertain.

Since the balancing claim may be initiated on occasions other than and prior to the death of a spouse, the alternative choice of law rule which selects as the governing system of law, the law of spouse's domicile at the date of his or

¹ *Supra*, pp. 235-240.

For example: Belgium, France, the Netherlands and the Province of Quebec.

her death, cannot alone be used to determine the existence of a balancing claim.

COMMUNITY OF PROPERTY RULES

Community of property regimes, in the Civil Law sense, have been recognized and sustained in Common Law jurisdictions. The conflicts rules recognize the existence of community either by contract or by operation of the law. Of the two techniques for designating community property, the latter is identical to that proposed for the creation of Matrimonial Property under Part A of this Chapter.

At Common Law, community arises by operation of law only if that consequence flows from the law of the *matrimonial domicile* of the spouses at the time of the marriage. In this context the concept of matrimonial domicile has a technical meaning and indicates the domicile of the spouses at or acquired immediately following their marriage. It does not include domiciles the spouses may later acquire during their marriage.

In the absence of special circumstances the matrimonial domicile is that of the husband at the time of the marriage. This rule, although it appears arbitrary, avoids the possibility of two systems of law purporting to define the spouses' interests in property and, in most cases, will indicate the jurisdiction in which the spouses are likely to have their first home.

There is no definitive decision indicating what situations fall within the perimeters of "special circumstances" but the current view expressed in the leading textbooks and in two recent cases¹ is that the law of the husband's domicile will be displaced only if there is a change of domicile immediately following the marriage, and the spouses, at that time, are without means. Where such circumstances occur community will arise only if it is a consequence of the law of the place of the new domicile.

If one extends this rule to the proposed balancing claim scheme then the balancing claim right would be created only where the husband was domiciled in Newfoundland at the time of the marriage.²

A more difficult question concerns the extent to which all the property, which, under the Study's proposals, has the potential of becoming matrimonial property as defined in Part A of this Chapter will be recognized as such in other jurisdictions. This aspect of the conflicts problem can be considered under two

¹ In re Egerton's Will Trusts, [1956] Ch. 593; Frankel's Estate et al. v. The Master et al.

² (1950), 1 S.A.L.R. 220 (Sup. Ct. So. Afr., App. Div.).

This statement assumes, of course, that the "balancing claim" concept will be incorporated in legislation.

³ Supra, pp. 235-240.

general headings: interests in movable and in immovable property. Both headings, under the community recognition rules, contain sub-classifications.

In Common Law jurisdictions the law of the matrimonial domicile which creates the community of property regime, defines the range of property interests capable of falling within the scope of the community regime. Where, under that governing system of law, certain kinds of interests in property, i.e. ante-nuptial property, post-nuptial gifts or immovables are excluded from the regime, such property will also be excluded under the law of any other state when its courts are asked to recognize and enforce the community. The law of the matrimonial domicile controls the *maximum* range of community property. However, a court of another jurisdiction, when considering the scope of community created under a foreign law, may exclude some assets of this nature from the community and thereby enforce some local policy which is inconsistent with that of the matrimonial domicile.

Concerning movable property, existing conflict rules give full effect to the law of the matrimonial domicile concerning movables acquired by the spouses before they abandon that domicile. All questions of ownership of such movables will be decided according to that foreign system of law (the law of the matrimonial domicile).

The application of this rule by analogy to the balancing claim right would mean that all interests of the spouses in movable property, excluding the recommended classes of deductible interests, acquired while they had a matrimonial domicile in Newfoundland would be recognized elsewhere and subject to a balancing claim.

It is an unsettled question whether a change from the matrimonial domicile affects the interests of each spouse in movables acquired by one spouse after they abandon that domicile. The law of the new domicile will, if it applies a law other than that of the matrimonial domicile, declare such property to be held as separate property since community attaches, if at all, only at the time of the marriage. The unsettled question is whether the law of the matrimonial domicile will be applied.

In 1900 the House of Lords in *De Nicols v. Curlier et al* did apply the French law of community of property to movables acquired in England after the spouses acquired a domicile there. This case has been followed in two Ontario cases². In England a similar result was reached in a case involving immovable property.

2 Re Parsons, /1926/ 1 D.L.R. 1160 (Ont. Sup. Ct.); Beaudoin et al. v. Trudel, /1937/ 1 1 /1900/ A.C. 21 (H.L.)

D.L.R. 216 (Ont. C.A.).

This matter, however, has been considered unsettled in the leading textbooks, and, in 1962, a trial judge in British Columbia in the case of *Re Heung Won Hee*¹ held that the interests of the spouses in such property was determined by applying the law of their new domicile. This is also the current American approach.

The application of the rule of *De Nicols v. Curlier et al.* would produce results consistent with the general purpose of the proposed balancing claim since it permits participation by the spouses in the distribution of the value of their total assets accumulated during their lifetime or the marriage.

The practical difficulty with the alternative rule as illustrated by the *Re Heung Won Hee* case, *supra*, is that, if eventually it becomes settled law, it cannot be altered by Newfoundland since it is a recognition rule of other jurisdictions. In the absence of uniform legislation the only precaution Newfoundland can take is to make it clear that its intent is to include such assets within the scope of the balancing claim right.

Under conflict rules concerning community, where the asset acquired by the spouses is an interest in immovable property the law of the matrimonial domicile may attempt to include such interests but the final decision on this point is made by the *lex situs* of the property, where the litigation occurs outside the matrimonial domicile or where the property is situated outside that jurisdiction. If that law recognizes the intended scope of the community and permits its operation then the community regime will apply. The final result in such a case occurs only by the joint operation of the law of the matrimonial domicile and the *lex situs*.

In England² and in Ontario³ the courts have permitted the application of community to apply to local land. In contrast to the unsettled question concerning the effect of a change of domicile on after-acquired movables, in these cases the courts have applied the rules of community to interests in immovables acquired after a change from the spouses' matrimonial domicile. This result also offers strong support for the application of the *Re De Nicols* rule to interests in movables. • •

If courts in Common Law jurisdictions use the existing conflict rules concerning community to decide balancing claim actions, that right will likely attach to

1 (1962), 36 D.L.R. (2d) 177 (B.C. Sup. Ct.).

all movables except deductible interests and to interests in immovables.

2 In *re De Nicols*, /1900/ 2 Ch. 410; *Chiwel v. Carlyton* (an unreported case which is discussed in Cheshire, *Private International Law* 3 *Re Tremblay*, /1931/ O.R. 781 (Ont. Sup. Ct.). (7th ed.) pp. 462-463).

FOREIGN JUDGMENTS

Where a foreign court has made an order defining the amount of the balancing claim between particular spouses, then, if the spouse against whom the order was made was subject to the *in personam* jurisdiction of that court, the order will be recognized on the same bases as foreign money judgments generally. In addition, where such order was made ancillary to proceedings in a matrimonial cause, the order would also be recognized under the rule of *Phillips v. Batho*¹ if that court properly assumed jurisdiction in the matrimonial cause even though it did not have *in personam* jurisdiction. A foreign judgment would not be impeachable on the sole ground that the cause of action was unknown to local law.

The question of judgment recognition however would arise only if the spouse against whom it was rendered had insufficient assets in the jurisdiction making the order to satisfy it. Recognition becomes an issue only when the spouse in whose favour an order has been made is unable to execute the judgment in Newfoundland and must proceed against the assets of the other spouse located in another jurisdiction.

TESTATE AND INTESTATE SUCCESSION

The conflicts rules governing the distribution of a decedent's estate for both testate and intestate succession are that all interests in immovables are governed by the *lex situs* of the property and immovables are governed by the law of the domicile of the deceased at the date of his death.

The recommendations to this Part of the Chapter, that the balancing claim right co-exist with the rules concerning succession, means that after a spouse has obtained an order defining the scope of his or her interest in the other spouse's property, that spouse then becomes entitled to receive a surviving spouse's share under the law of succession governing the estate. This consequence raises no conflicts issue.

DEPENDANT'S RELIEF LEGISLATION

Dependant's relief legislation in most Common Law jurisdictions does not declare what estates are subject to its remedial provisions. The courts, however, have interpreted the legislation in the context of the Common Law conflicts rules applicable to testate and intestate succession. The result has been that such legislation has been characterized as either qualifying the scope of a testator's unfettered testamentary freedom or redefining the law of intestate succession under the proper laws governing his estate. A local dependant's relief

¹ 1/1913/ 3 K.B. 25.

statute has no application, for example, to interests in immovables situated in another jurisdiction or to movables irrespective of their location where such relief is not granted by the law of the decedent's domicile at the date of his death.

In a limited number of Common Law jurisdictions, for example, Ontario¹ and England², the Acts apply only where the deceased died domiciled in the particular jurisdiction. This limitation creates no problem concerning relief respecting the dependant's interest in movables but prevents granting relief concerning interests in immovables in the forum where the decedent was domiciled elsewhere.

From the viewpoint of conflicts it is immaterial that dependant's relief legislation applies to testate as well as intestate succession. The same choice of law rule applies.

The following rules for relief applications are well settled in jurisdictions which do not have the limitation of local domicile for the decedent.³ A local statute provides relief for maintenance out of interests in immovables if they are located in the forum irrespective of the place of the decedent's domicile and for maintenance out of interests in movables, irrespective of their location, where the decedent died domiciled in the forum. A court, however, has no jurisdiction under a local statute to grant relief for maintenance out of movables where the deceased died domiciled outside the forum.

In two situations the courts have declined to accept jurisdiction although the general pattern of choice of law rules in conflicts would permit granting relief. A court will not grant relief under a foreign statute concerning interests in immovables although the *lex situs* permits such relief and will not grant relief concerning movables situated outside the forum where the decedent had a foreign domicile at the date of his death. This self-imposed limitation, while unnecessary from the viewpoint of conflicts rules, in fact, creates no difficulty concerning immovables since administration of the decedent's estate necessitates ancillary administration of the decedent's estate under the *lex situs*. Concerning interests in movables, dependants must seek relief in the place of domicile of the deceased, which in most cases, will be the *situs* of some property and consequently a jurisdiction within which administration of the estate will occur. The application for relief can be processed at the same time as the administration of the estate in both cases.

1 The Dependents' Relief Act, R.S.O. 1960, c. 104, s. 2 (1).

2 Inheritance (Family Provision) Act, 1938, Stats. U.K. 1938, c. 45, s. 1 (1).

3

Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), 603.

MATRIMONIAL HOME

The recommendation in this Part of the Chapter for designation of the place of common residence as the matrimonial home creates no conflicts issue. The interest created by this proposal is in immovable property and the only court with jurisdiction to entertain an action is one of that place. The enactment by Newfoundland of the proposals concerning the matrimonial home creates a local right enforceable in Newfoundland only.

PROTECTION OF PROPERTY

Unlike the Civil Law systems the proposed recommendation for a balancing claim does not affect title to particular assets. Each spouse owns his or her property whether it constitutes deductible or matrimonial property. As a result, in ordinary circumstances, prior to the commencement of balancing claim proceedings each spouse is free to deal with his or her own property according to his or her own wishes. This freedom concerning spouses who had their matrimonial domicile in Newfoundland at the time of their marriage would be recognized in other jurisdictions. In *In re Bettinson's Question*¹ in 1956. Wynn-Parry J. applied section 17 of the Married Women's Property Act, 1882² of England to determine the issue of possession of chattels situated in England in strict accordance with the husband's unqualified right to manage and control all community property vested in him by the Californian law, the law of the matrimonial domicile, defining the consequences of community. In the reverse situation, which arises under the balancing claim right, jurisdictions other than Newfoundland would recognize the freedom each spouse has to deal with his or her own property. Such recognition, however, makes it difficult to determine the extent to which the rules controlling excessive gifts or transfers without adequate consideration would have extra-territorial effect. The proposed inclusion of the value of the gift or of the inadequacy of the consideration in the donor's or transferor's net estate provides an effective remedy where the actual value of that spouse's assets within the jurisdiction of the court adjudicating the balancing claim is sufficient to satisfy the actual amount of the claim. An effective remedy also exists where the donee or transferee is subject to the jurisdiction of the court. Where the balancing claim cannot be satisfied under either alternative it may not be possible to recover from the donee or transferee if that person is in another jurisdiction. A court there may decline to recognize a foreign judgment against this third party defendant and may not assume jurisdiction itself since in this instance the foreign law is attempting to control title in a particular asset which is located outside its boundaries.

¹ 1/1956/ Ch. 67.

² Stats. U.K. 1882, c. 75.

This problem does not seem to occur under community property schemes. Its existence is noted but not discussed in Macdonald, *Fraud on a Widow's Shard*. Since it involves a recognition rule of a foreign jurisdiction, Newfoundland cannot effectively legislate in this matter.

.¹Macdonald, William D., University of Michigan Law School, 1960, p. 311.

D . CREATION OF FUTURE INTERESTS IN
PROPERTY AND OTHER PROBLEMS

**CREATION OF FUTURE INTERESTS IN CHATTELS
PERSONAL AND CHATTELS REAL**

(1) BY DEED INTER VIVOS

The doctrine of tenures as developed in England and followed in Canada is applicable only to land. Chattels could only be held in absolute ownership hence the creation of future interests in *chattels* was incompatible with absolute ownership. Following this view, English property law text book writers take the position that it is impossible to create a *future interest* in chattels personal by deed inter vivos. However, it would appear that a chattel personal may be transferred to one person, with a reservation of the *use* of the chattel to another person during his life. If the form of the transfer is to confer successive property *interests* in a chattel, it is not unlikely that a court would construe the transfer as one of *use* only in the first person.

The same rules prevail at Common Law as to the creation of future interests in *chattels real*. In a Newfoundland case¹ the presiding judge was faced with the argument that by virtue of 'The Chattels Real Act² of Newfoundland successive life estates could not be created in land by deed. In that case the plaintiff, a married woman, had transferred land to the defendant, absolutely, subject to successive life estates for herself and her husband. The wife asked the court for rescission of the deed. The Judge, however, held that her intention was to convey the total title to the grantee (the defendant) with a reservation of the beneficial use in the land for herself and her husband during their lifetime. The declaration granted was that the grantee held the property in trust for the plaintiff and her husband during their lifetime and only thereafter would the beneficial title merge with the legal title.

(2) BY WILL

Successive interests in chattels personal can be created *by will* without the intervention of a trustee. One theory, which is supported by English decisions, is that where there is a bequest of a chattel personal to A for life and then to B, the interest in B is merely an executory limitation giving him only a chose in action as contrasted to a vested interest. Here also, however, as in inter vivos deeds, a court might very well construe the gift as giving A merely a use for life with the general property in B. There are decisions in Ontario upholding this

¹ Butler v. Brown (1935), 13 Nfld. L.R. 402 (Nfld. Sup. Ct.).

² R.S.N. 1952, c. 142.

view./ If, however, the first gift is construed as an absolute one, the second gift will be struck down as being repugnant to the first.

At Common Law there could be no estate for life in a chattel real because a life estate was larger than any term. Therefore, a transfer for life of a chattel real passed the absolute interest so that no vested interest or quasi remainder could be created after the life interest. Any such future interest could only be good as an executory limitation and then only by will. Nevertheless at Common Law future interests in chattels real could be created inter vivos with the interposition of a trustee. The rule prohibiting the creation of a life interest in a chattel real is of particular significance in Newfoundland because of the provisions of The Chattels Real Act which provides that all lands, tenements' and other hereditaments in Newfoundland, which by the Common Law are regarded as real estate, shall, in all Courts of Justice in the Province, be held to be "chattels real".²

It is desirable that it be possible to create future interests in land inter vivos in Newfoundland without having to employ the trustee device. Hence, the Study will recommend that the law of Newfoundland be amended accordingly. In New Zealand, the Property Law Act³ provides as follows:

"Any estate or interest that can be created' by will in any chattel real may also be created by deed."

In view of the conclusion that, without the interposition of a trustee, a future interest can only be created by will in Newfoundland by way of an executory limitation, the wording of the New Zealand legislation may not be appropriate. The Study suggests that it would be preferable to provide expressly that a valid life estate and any future interests that can be created by will may also be created by deed without the interposition of a trustee.

TENANCY BY ENTIRETIES

At Common Law a conveyance of land or transfer of chattels real to a husband and wife created a tenancy by entireties. While the husband was entitled to possession and to rents and profits he could not alone dispose of the property. If *both* spouses did not join in a disposition of the property during their joint lives the tenancy could not be terminated and the survivor took the whole. On the other hand, a joint tenancy may be terminated by one of the tenants unilaterally conveying his interest in the tenancy.

For example, *Osterhout v. Osterhout* (1904), 7 O.L.R. 402 (Div. Ct.), affirmed, (1904) 8 O.L.R. 685 (Ont. C.A.).

2 For discussion of The Chattels Real Act and Newfoundland property law generally see "The Law of Real Property in Newfoundland" (1926), 4 Can. Bar. Rev. pp. 310-314. N.Z.

3 Stats. 1952, No. 51, s. 19.

There are different views as to the effect of the Married Women's Property Acts upon estates by entireties. In some jurisdictions in the United States the courts have held that estates by entireties were not affected by the local Married Women's Property legislation on the ground that such legislation referred only to the wife's separate property. The view in other jurisdictions in the United States is that the effect of the Acts was to convert the estate into a tenancy in common during marriage. It has been held in one case¹ in Ontario that estates by entireties were not abolished by the Married Women's Property Act of that Province.

The Study will recommend that estates by entireties be expressly abolished by legislation, as they have been, for example, by The Transfer and Descent of Land Act in Alberta², which provides that, "when land is transferred to a man and his wife the transferees take according to the tenor of the transfer, and do not take by entireties unless it is so expressed in the transfer". To preserve them in any circumstances would merely perpetuate an anachronism.

RESTRAINTS ON ALIENATION OF PROPERTY

Consideration has already been given in Part A of this Chapter to the provision, in the early Married Women's Property Acts restraining a married woman from alienating property if the instrument under which she took the property contained such a restraint. This, as has been noted³, has been abolished in Newfoundland.

With respect to restraints generally on alienation, a Supreme Court Judge in Newfoundland held in 1966⁴ that a restraint in a devise of land that it would not be sold, mortgaged or exchanged or conveyed in any way by the descendants of the family of the devisees was void. In his reasons for judgment the Judge noted that through the years certain exceptions had been made to the rule that a condition could not be attached to a gift in fee simple on the ground that it was repugnant to the gift. He held, however, that in more modern times the tendency of the courts seemed to be not to perpetuate and certainly not to add to the exceptions that had sanctioned restraints on alienation to a certain person or to a particular class of persons where the class was not too restricted. To support his conclusion the Judge referred to decisions in England, Nova Scotia and Ontario with respect to real property, presumably on the assump-

1 *Campbell v. Sovereign Securities & Holding Co. Ltd.* (1958), 13 D.L.R. (2d) 195 (Ont. High Ct.), affirmed by Court of Appeal, /1958/ O.W.N. 414 (Ont. C.A.).

2 R.S.A. 1970, c. 368, s. 6.

Supra, pp. 219-220.

4 *Re Collier* (1967), 60 D.L.R. (2d) 70 (Nfld. Sup. Ct.).

tion that the same principles were applicable to chattels real. In addition he mentioned two Newfoundland cases¹ decided in 1933 and 1946, in which partial restraints in a will on alienation of land were held void. It is generally recognized that the law relating to restraints on alienation are the same for personal property as for real property, hence decisions relating to real property are relevant to chattels real". The Study does not recommend any amendment to the existing law as to restraints on alienation of property.

¹ In re Woods; Woods v. Woods et al (1933), 13 Nfld. L.R. 109 (Nfld. Sup. Ct.); In re Rourke, Gosse v. Rourke (1946), 15 Nfld. L.R. 461 (Nfld. Sup. Ct.).

² For example, Theobald on The Law of Wills, (12th ed., 1963) para. 1565, p. 543.

RECOMMENDATIONS

CHAPTER VI

The Family Law Study recommends:

A. THE EFFECT OF MARRIAGE ON PROPERTY

BALANCING CLAIM

1. That the principle of the balancing claim as defined and illustrated at pages . 235 to 240 with respect to matrimonial property of a husband or wife be adopted, the spouses, however, to have the right prior to their marriage to contract out of its application to their matrimonial assets.
2. That where the principle of the balancing claim is applicable, a judge of the Supreme Court should have the power to establish, and order the settlement of, a balancing claim in the following events or circumstances:
 - (a) when the marriage is dissolved by death, or during the spouses' joint lifetime, by divorce or judicial separation;
 - (b) when the marriage is annulled;
 - (c) when one spouse has deserted the other for more than a year and the court is satisfied that there is no possibility of reconciliation;
 -
 - (d) when one spouse is found to be mismanaging or squandering, or making excessive gifts out of his or her matrimonial property to the prejudice of the other spouse's reasonable expectations;
 - (e) on the joint application of the spouses;
 - in any other circumstances where the Court deems it equitable and just.. (Page 238). •
3. That the Court should have the power, if it should think it fit and just having regard to the means and circumstances of the spouses, to make an order requiring or permitting a spouse or his or her estate to settle a balancing claim, by transfer of property, or by lump sum or instalment payment, and to provide security for any unpaid amount. (Pages 238-239).
4. That the Court be given a discretion, in circumstances where it deems it just and equitable, to depart from the principle of equal sharing. Such circumstances would include situations where the marriage was of short duration and where the spouses had been separated for a considerable time. (Page 239).

THE MARRIED WOMEN'S PROPERTY ACT

5. That The Married Women's Property Act of Newfoundland be amended to give the Court express power as follows:
- (a) to restrain by injunction a threatened or apprehended disposition by one spouse of an interest in property in which the other spouse is able to prove an interest; (Page 241).
 - (b) to order a spouse who has disposed of a property to pay the other a sum of money to compensate for the loss of an interest in the property in which he or she is able to prove an interest; (Page 241).
 - (c) to make an order for the sale of the property and the disposition of the proceeds; for partition or division when both parties can establish an interest in the property, or, for conversion of joint ownership of the property into ownership in common in such shares as the Court sees fit.

JOINT BANK ACCOUNTS AND PROPERTY PURCHASES AND, TRANSFERS

6. That the presumption of advancement in favour of the wife on the establishment by the husband of a joint bank account or on the transfer of property by the husband to the wife without consideration, or where title on the purchase of property by the husband is placed in the wife's name, be extinguished by legislation.

In the reverse situation where the wife has established a joint bank account or has made a transfer to her husband or has had the title placed in his name, the presumption of resulting trust in favour of the wife should be abolished.

In the case of a joint bank account or of property purchased from a joint bank account the presumption of advancement and resulting trust, as the case may be, should be replaced by a presumption of intention that the joint bank account or the property so purchased is to be held in equal shares.

If the recommendations as to the abolition of the presumptions of advancement and resulting trust are not acceptable, the Study recommends, as an alternative, that a presumption of advancement be established in favour of the husband to the same extent as it is now enjoyed by the wife. (Pages 221-224).

HOUSEKEEPING AND OTHER ALLOWANCES

7. The law regarding the unexpended portion of housekeeping and other allowances or any property acquired from such portion should be changed by legislation so that such property shall, unless the spouses have otherwise agreed, be treated as belonging to them in equal shares. (Pages 224-225, 242)..

THE MATRIMONIAL HOME

(Pages 240-242).

8. That where one spouse is entitled to occupy a dwelling house by virtue of any estate or interest or contract or by virtue of any enactment giving him or her the right to remain in occupation, and the other spouse is not so entitled, the spouse not so entitled, if in occupation, should not be liable to eviction or exclusion from the house except with the leave of the Court, and, if not in occupation, the Court should be given the power to give the spouse the right to enter and occupy. In either case, the Court should have the power to make such order as it thinks fit and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children and to all the circumstances of the case. The Court should also be given the further power to restrict or terminate or regulate the exercise by either spouse of the right to occupation.
9. That where a matrimonial home is a leasehold interest, the landlord should not be able, except under an order of the Court, to evict the spouse of the tenant who is in occupation of the premises so long as that spouse continues to observe the terms and conditions of the lease. The rights of continued, occupation should prevail over any provision to the contrary in the lease. Likewise the tenant spouse should not be able to terminate, sublet or assign the lease.
10. That subject to Recommendation 11, irrespective of where the title lies, neither spouse should, without the written consent of the other, be able to sell, assign, or encumber the matrimonial home, nor be able alone during their joint lives to dispose of any interest whatsoever in the home.
11. That the Court be given the power to dispense with a spouse's consent to a proposed disposition and to order a distribution between the spouses of the proceeds of a sale or, in the case of a mortgage, of the loan. Where under such an order a spouse who had no beneficial interest in the matrimonial house is awarded part of the proceeds of the sale or mortgage, the award to such spouse should be taken into account in any subsequent determination of a balancing claim between the spouses.
12. That provision be made for the registration in the land registry of a

"matrimonial home" owned or leased by one of the spouses, such registration to be notice to third parties. Either spouse should be given the right to register a property as a matrimonial home with the right in the other spouse to apply to the court for a ruling as to whether the property has the status of a matrimonial home.

13. That if no registration has been made of the matrimonial home, a third party, purchasing or taking security in good faith and without notice that the property is the matrimonial home, should obtain a good title from the spouse having the proprietary interest.

Protection in this regard could be provided to a third party by enacting that no interest will vest in the third party unless the spouse having the legal interest makes an affidavit on the conveyancing document as to the status of the property.

If, in spite of reasonable enquiries having been made by the grantee and the required affidavit having been made, the purchaser has been deceived as to the status of the property and has paid the purchase price to the granting spouse, the other spouse should be given the right to apply to the Court for an order that the other spouse pay to him or to her one-half of the price.

Where the purchaser has not paid the purchase price the non-consenting spouse should have the right to obtain a Court order requiring the purchaser to pay, from the unpaid balance of the price, an amount up to one-half of the price. Any amount so received by the non-consenting spouse should be taken into account in any subsequent division of property between them under a balancing claim.

14. That the rights of prior lien holders, such as mortgagees, where an encumbrance was in existence before the property became a matrimonial home, and of subsequent mortgagees where both spouses had joined in the mortgage, should be protected.

B. SUCCESSION ON DEATH AND RELATED PROBLEMS

INTESTATE SUCCESSION

15. That The Intestate Succession Act be amended to provide that:

- (a) The surviving spouse be allowed a preferential share up to \$35,000 if available, whether or not there is issue;
- (b) Where there is a surviving spouse and issue, the estate in excess of the preferential share be distributed among the surviving spouse and the issue in equal shares;

(c) If an intestate leaves no spouse, issue, father, mother, brother, sister, nephew or niece, grandparent, uncle or aunt, his or her estate go to the Crown;

(d) Where on an intestacy the property of a deceased person goes to the Crown, the Supreme Court may provide for any person who can establish that he or she was a dependant, whether kindred or not, of the deceased or for whom the intestate might reasonably have been expected to make provision; (Pages 244-247).

(e) The relationship between a child and his or her father or mother be determined irrespective of whether the father or mother are or have been married to each other or not, and all other relationships shall be determined accordingly; (Pages 255-257).

However, for this purpose, paternity of an illegitimate child must have been admitted or established against the parent in his or her lifetime. Any person who alleges that the relationship of father and child exists between himself and any other named person and any woman who alleges that a named person is the father of her child should have the right to apply to the court for a declaration of paternity. An affiliation order made against one person should be taken as *prima facie* proof of his paternity. (Pages 257-258).

If this recommendation is not accepted, the provisions in The Legitimacy Act and The Intestate Succession Act as to the rights of inheritance between a mother and her illegitimate child should be replaced by a provision in The Intestate Succession Act that for the purposes of succession an illegitimate child shall be treated as the legitimate child of his mother. (Page 255).

A spouse who,

(i) without cause, has left the other spouse, or whose conduct has caused the other spouse to leave, and

is living in adultery at the time of the death of the spouse first to die, shall take no part of the estate of the deceased spouse. (Page 248).

THE ADOPTED CHILD

16. That The Adoption of Children Act, 1964, be amended as follows:

(a) To provide that for all purposes the adopted child and his adopt-

ing parents shall stand in the same relationship as that of natural child and natural parents;

- (b) To repeal the following provisions in the Act:

section 12 (3) which provides that the adopted child inherits from his natural parents or kindred if they die intestate, and

- (ii) the portion of section 12.(2) which provides that any gift or inheritance received by an adopted child from his natural parents or kindred on an intestacy of the adopted child goes as if he or she had not been adopted. (Pages 249-250).

WILLS

17. That The Wills Act be amended as follows:

- (a) That a will shall not be revoked by the subsequent marriage of the testator if it is stated in the will that it has been made in contemplation of a particular marriage; (Page 249).
- (b) That where a legatee in a will is the issue, or a brOther or sister of the testator. as individuals or as a member of a class, and he or she dies before the making of the will, or thereafter before the death of the testator, the legacy shall not lapse but shall go as if the legatee had died intestate immediately after the testator's^{14 - 4 1 7 , 7 . 1 1 1} death. (Pages 249-250).
- (c) To provide that the rule of construction whereby, in a will, words of relationship signify only legitimate relationship in the absence of contrary expression of intention, be abolished. (Page 258).

DEPENDANTS RELIEF

18. That The Family Relief Act, 1962 be amended as follows:

- (a) To provide that "dependants" shall include the following:
- (i) Wife or husband; wife being defined to include a woman who has lived with though not married to, a man as man and wife continually for not less than five years precedhis death;
- (ii) Children of the deceased, whether legitimate or illegitimate;
- (iii) The stepchildren of the deceased who were maintained wholly or partly by the deceased immediately before his death;

- (iv) Any other person who was being maintained wholly or partly or was legally entitled to be 'maintained wholly or partly by the deceased immediately before his or her death. (Pages 252-253).
- (v) To provide that the sole criterion for determining whether a "dependant" is entitled to relief, is whether or not he or she was in fact wholly or partly dependant upon the deceased for his or her support at the time of the death of the deceased. (Page 253).
- (vi) To provide that a dependant should not have the power to contract out of the benefits of the Act. (Pages 253-254).
- (vii) That the establishment of a balancing claim during the joint lifetime of the spouses should not of itself be a bar to relief to a surviving spouse. (Page 254).

LEGITIMACY AND LEGITIMATION

- 19. That The Legitimacy Act be amended to provide that an illegitimate child who has been legitimated shall be deemed to be legitimate for all purposes, provided however that property that has already been vested shall not be affected. (Pages 255-256).

FATAL ACCIDENTS ACT

- 20. That The Fatal Accidents Act be amended to provide that:
 - (a) 'child' when used in the Act shall include son, daughter, grandson, granddaughter, stepson, stepdaughter, an adopted child, an illegitimate child and a person to whom the deceased stood *in loco parentis*; and
 - (b) 'parent' when used in the Act shall include father, mother, grandfather, grandmother, stepfather, stepmother, adopting parent, and a person who stood *in loco parentis* to the deceased. (Pages 258-259).

THE SURVIVORSHIP ACT AND THE LIFE INSURANCE ACT

- 21. (a) That The Survivorship Act, 1963 be amended to provide that, so far as spouses are concerned, when they die in circumstances rendering it uncertain which of them survived the other, the estate of each spouse shall be distributed separately as if neither had survived the other;
- (h) That The Life Insurance Act, 1960 be amended to provide that, so far as spouses are concerned, when they die in circumstances rendering it uncertain which of them survived the other, the estate of each spouse shall be distributed separately as if neither had survived the other. (Pages 259-260).

EXCESSIVE GIFTS, TRANSFERS FOR INADEQUATE CONSIDERATION,
INTER VIVOS TRUSTS, LIFE INSURANCE, PENSIONS AND ANNUITIES
(Pages 261-265). ,

22. Subject to Recommendation 10, that any excessive gift of matrimonial property made by a spouse to any person, other than the other spouse, should be void *ab initio* unless
- (a) both spouses have agreed to it in writing, or
 - (b) the Court has dispensed with consent as being unreasonably withheld, or
 - (c) has approved the transfer and a scheme for replacement of the value of the property in the non-deductible assets of the donor spouse for the purpose of establishing a balancing claim.

If the consent has not been dispensed with by the Court, or if the Court has not approved the transfer, or a scheme for replacement, then

- (a) the donee should to the extent that the gift is excessive be liable to restore the property to the donor, if it has remained in the possession or control of the donee. If the property is not in the possession or control of the donee, the donee should be liable to repay to the donor the value, as of the time that the gift was *made*, but only to the extent that it was excessive;
 - (b) if the gift or its value can be recovered from the donee, its net value to the extent to which it was excessive at the time that it was made should be included in the residuary estate of the donor spouse, and
 - (c) the other spouse should be entitled to apply to the Court for the determination and settlement of a balancing claim.
23. That a person to whom a spouse proposes to make a gift, whether of matrimonial property or not, should have the right to apply to the Court for an order that the gift is not excessive and, if such an order is granted, the gift shall be valid.
24. That if the donee from a spouse of an excessive gift of matrimonial property, transfers the subject matter of the gift to a person who takes *bona fide*, that person should obtain a good title. In such an event, however, the remedies outlined in Recommendation 8 should be available to the other spouse.
25. That when a spouse transfers matrimonial property to another person for

inadequate consideration, the other spouse should be entitled to an order from the Court, if he or she proves that the transferee did not take the property *bona fide*, restraining the transfer of the property to the transferee or requiring the transferee to pay the amount by which the consideration was inadequate. If the transferee is proved to have acted *bona fide*, he should be deemed to have a good title to the property. In either case the other spouse should be entitled to apply to the court for the determination and payment of a balancing claim and the amount by which the consideration was inadequate should be added to the residuary estate of the transferor spouse, to the extent that the inadequacy of the consideration cannot be recovered from the first transferee.

26. That inter vivos trusts of matrimonial property established by a spouse for no consideration should be treated as gifts and be included in the residuary estate of the settlor spouse. If inadequate consideration has been given, the property should also be subject to a balancing claim to the extent of the inadequacy of the consideration. As a further protection the settlor should be required to make an affidavit at the time that the trust is established that the subject matter of the trust does not relate to matrimonial property, or to obtain the consent, in writing, of his spouse with proof that the consent was freely given. However, the Court should be given the power to dispense with the consent if it is being unreasonably withheld, or in any other circumstances in which it is deemed equitable and just to do so.
27. That excessive gifts, transfers for inadequate consideration and inter vivos trust settlements of property, whether matrimonial property or not, be made subject to an order of the Court under family relief legislation, except where the donee of the gift or transferee of the property has transferred the property to another *bona fide* holder. In this event the donee should be liable to pay to the estate of the deceased spouse the value of the gift as of the time it was made, to the extent that it was excessive, and a transferee who has not given adequate consideration should be liable to repay to the estate the amount by which the consideration was inadequate.
28. That the proceeds of life insurance policies, and of pension and annuity schemes, that a spouse has put beyond the reach of another spouse or of his or her dependants, should be made available for dependants under family relief legislation. To make such a provision fully effective legislation would be required prohibiting the payment of the proceeds to those who have been designated the beneficiaries under the schemes within a stated time after the death of the spouse who had effected the schemes.

C. CONFLICT OF LAWS

The only aspects of this Part which would require new legislation in Newfoundland relate to the application of the balancing claim.

The Family Law Study recommends the enactment of legislation to provide:

29. That the balancing claim right apply to all spouses who marry after the date of the proposed legislation if, at that time, they have a matrimonial domicile in Newfoundland; (Pages 268-270).
30. That the balancing claim right attach to all interests in all property, excluding deductible interests wherever acquired by the spouses between the date of the marriage and the commencement of winding-up proceedings. For the purpose of evaluation, the situs of the property affected by the balancing claim should not be relevant. (Pages 270-272).

D. CREATION OF FUTURE INTERESTS IN PROPERTY AND OTHER PROBLEMS

31. That The Chattels Real Act be amended as follows:

- (a) To permit the creation by deed of life and future interests in chattels real without the intervention of a trustee; (Page 278).
- (b) To abolish estates by entireties: (Pages 278-279).

CHAPTER VII

SOME ASPECTS OF TORTS IN FAMILY LAW

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INTRODUCTION

The subject of Torts covers that branch of the law which deals with actions resulting from the violation of a duty imposed by the Common Law or otherwise, in certain conditions, upon all persons. The action of tort is for a private or civil wrong or injury and is independent of the law of contract. It is based on the violation of a duty which the defendant, in particular circumstances, owes to the plaintiff.

A "personal tort" is one involving or consisting of an injury to the person, or to his reputation and feelings. A "property tort" involves an injury or damage to real or personal property.

As it affects the family the law of torts provides for actions for damages by a husband for the loss of services, consortium and support of his wife or his child's services. These actions arose out of the traditional property interest of a husband in the society and services of his wife, and of parents in the services of a child. The Newfoundland Family Law Study will, in Part A of this Chapter, recommend suitable legislation to replace some of these archaic Common Law **rules**.

Another field in which the law of torts is of interest to the family - discussed in Part B - is that of the liability of children for their own torts and the liability of parents for the tortious acts of their children. Actions in tort may be taken for and against children. The standard of care owed to children by the public generally, which is normally higher where a child, rather than an adult is involved, is considered. A comparatively new branch of the law deals with claims by children for injuries received pre-natally. In the United States, particularly, there has been considerable discussion regarding the right of action by an illegitimate child against his parents for "wrongful life", though little progress has been made in any jurisdiction in this area of tort law.

Actions for personal injuries inflicted by a parent on a child were unthinkable in the past, on the grounds that they would encourage family disharmony and erode the authority of parents within a family unit. Such views are no longer as strongly held as before, and one of the recommendations of the Study will be that legislation be enacted to clarify and confirm the existence of the rights of parents and child to sue one another for damages or injuries resulting from the commission of a tort.

An action in tort between husband and wife was once unavailable, on the basis that it would destroy or disturb the tranquility of the family unit. Another objection of substance was that recognition of husband-wife tort actions could encourage fraudulent or collusive claims. But prohibition of actions on

such grounds would now be an anomaly. The changes in the law and legal remedies available for interspousal torts are dealt with in Part C of the Chapter. The unrestricted right of action between husband and wife, which is becoming acceptable in more and more jurisdictions, is discussed and recommendations suggested.

A. ACTIONS FOR LOSS OF SERVICES, SOCIETY AND SUPPORT

SECTION I

A husband's property interest in the services, society and support of his wife and children has, for centuries, been recognized at Common Law in tort. He may sue a third person, who has had sexual relations with his wife (criminal conversation) or who has detained his wife (harbouring), for damages. In addition, either husband or wife may take action against a third person for enticement of his or her spouse, both may sue a person who has enticed or harboured their children and a husband may sue for seduction of his unmarried, minor daughter.

CRIMINAL CONVERSATION

At Common Law, criminal conversation was an action by which a husband might obtain damages against a person who had sexual intercourse with his (the plaintiff's) wife.

The action recognised the property interest which, by tradition, a husband had in his wife's services and sought to redress damages suffered by way of economic loss and loss of a wife's comfort and society'. A wife could not, within the law, consent to adultery since to do so would prejudice her husband's legal rights; to have his wife inviolate, for example.

At Common Law the action was available only to a husband².

Damages are to be compensatory, and not punitive or vindictive "unless, perhaps, where the defendant committed the adultery for the purpose of injuring the plaintiff."³ In assessing damages, the court may consider all circumstances relevant to the value of the wife to her husband and the harm done to the husband's feelings, honour and the stability of the family, 'The value of the wife has two aspects, first, her ability and assistance economically, and second, her character and ability as a wife and mother in the home.'⁴ Today the action is viewed as being an action on the case and damages must be proven?

¹ See: Fridman, "Consortium as an 'Interest' in the Law of Torts" (1954), 32 Can.Bar Rev. 1065.

² Power on The Law and Practice Relating to Divorce (2nd ed. by Julien D. Payne, 1964), 318.

³ Power on Divorce, n. 323.

⁴ Kungl v. Schiefer, /1962/ S.C.R. 443; Butterworth v. Butterworth et al., /1920/ P. 126.

⁵ Maliewski v. Pastushok (No. 2), /1966/ 1 O.R. 612 (C.A.).

It is obvious that the action of criminal conversation developed to buttress and protect the family unit and to serve as a deterrent, at least to some extent, to would-be adulterers.

The Common Law action of criminal conversation was abolished in England with the passing in 1857 of "An Act to amend the Law relating to Divorce and Matrimonial Causes in England")¹. However, a statutory action in damages for adultery took its place and is now embodied in the Matrimonial Causes Act 1965², as follows:

- "41. (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 apply 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 codifies the law as it was in 1857 but gives the court a broad discretion in dealing with damages.³

The law in Canada may be briefly summarized as follows: the Common Law action for criminal conversation remains in Manitoba, Saskatchewan, Ontario, New Brunswick, Nova Scotia and Prince Edward Island. Alberta and British Columbia have enacted legislation similar to that in existence in the United Kingdom.

In Newfoundland, there is no legislation concerning criminal conver-

² Stats. U.K. 1965, c. 72.

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¹ Stats. U.K. 1857, c. 85, s. 59.

Matrimonial Causes Act 1965, Stats. U.K. 1965, c. 72, s. 41 (3).

sation. Neither has the Study found any reported cases which deal with the action. It is submitted that the Common Law action for criminal conversation still exists in Newfoundland by virtue of the 'settled colony' doctrine ¹ and is governed by the principles enunciated by the courts of the United Kingdom prior to 1857.

SEDUCTION

It is convenient to mention briefly the Common Law right of a father to take action against one who has seduced his unmarried infant daughter (under the age of twenty-one years²). The action is intended to compensate the parent for the loss of the services of the daughter and is based upon the remedy of a master against one who deprived him of the services of his servant.

In some provinces, Ontario for example, legislation has been passed to create a conclusive statutory presumption of the relationship of master and servant and consequent loss of service in such an action. Damages may be awarded to the parent to compensate him for injury to his pride.

There is no relevant legislation in Newfoundland and the action is governed by Common Law principles. There are no reported Newfoundland cases which deal with claims for damages for seduction.

ENTICEMENT AND HARBOURING

(1) ENTICEMENT

The gist of the action of enticement is the intentional deprivation of the husband of the consortium of his wife. To succeed in this Common Law action the plaintiff must prove that the defendant induced the plaintiff's wife to cease cohabiting and consorting with the plaintiff. The act of enticement must be of a positive character; mere acquiescence in or approval of the cessation of cohabitation and consortium by a defendant is not sufficient.

An action for enticement differs from one for criminal conversation in that adultery need not be alleged nor proven. The damage is the deprivation of consortium. A wife may bring an action against a third party who has enticed her husband.³

In Ontario the courts have held that the question whether there has been total or only partial loss of consortium is a question of quantum of damages.

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Infra, p. 475,

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Now 19 years; Stats. Nfld. 1971, No. 71, s. 6(1).

3 Place v. Searle, /1932/ 2 K.B. 497 (C.A.).

However, the House of Lords has rejected this view, holding in the case of *Best v. Samuel Fox & Co. Ltd.*¹ that the loss of only one of the elements of consortium is not sufficient to support an action for loss of consortium. Consortium may be taken to include the companionship, love, affection, comfort; mutual services and sexual intercourse that comprise the marriage relationship,

Damages are compensatory and not punitive. In order to succeed there must be a diminution or impairment of consortium. The loss of the wife's services and society as well as the loss of her affection may be considered.

Unless legislation provides otherwise, the right to sue for damages in an action for enticement extends to the wife who has been deprived of her husband's consortium.

In Newfoundland there are no statutes which deal with the tort of enticement. The only reported case in which enticement was pleaded is *Rose v. Kavanagh*.² The case recognized the Common Law right of the husband to sue a third party who enticed away the wife of the plaintiff. Dunfield; J. adopted and applied the leading cases from the United Kingdom and Canada.

The Common Law action of enticement is also available to a parent who is deprived of the services of a child under the age of twenty-one.

(2) HARBOURING

The husband's right to an action in damages for harbouring has long been recognized by the Common Law.

Certain defences, such as affording the wife protection against the husband's acts of cruelty, may be raised.

In Alberta a statutory remedy is given by section 33 of The Domestic Relations Act⁴ which reads:

"A husband also has a right of action for damages against a person who, without lawful excuse, knowingly receives, harbours and detains his wife against the will of the husband."

In Newfoundland there is no legislation pertaining to the action for harbouring and no reported cases have been found.

1 /1952/ A.C. 716 (11.L.).

2 (1904) 42 Nfld. & P.E.I. Rep. 422 (Q.B.).

4 R.S.A. 1970, c. 113. 3 Age 19 in Newfoundland: Stats. Nfld. 1971, No. 71, ss. 6,7.

Harbouring was pleaded as a cause of action in *Rose v. Kavanagh*¹ but Dunfield, J. found the claim could not be supported by the facts, stating that:

"Defendant did not take her into any establishment of his, or, so far as is known, pay her board. She obtained, and has, a job. I therefore need not consider the question as to how "harbouring" would stand in these days when it is clear that a husband cannot prevent his wife from leaving his house at her will and staying where she pleases."
An action in harbouring does not lie at the suit of a wife.

RESEARCH DEVELOPMENTS AND PROPOSALS FOR REFORM

THE UNITED KINGDOM

1. The Royal Commission on Marriage and Divorce, 1951 - 1955²

The Commission pointed out that there had been no material change in the law regarding criminal conversation other than the statute of 1857. A wife had no right to claim damages from a woman with whom her husband had committed adultery.

The Commission stated:

"432. The present law was criticised on the ground that it affords a vindictive husband an opportunity for revenge and that it is out of touch with accepted views in requiring the court to assess a wife's value in terms of money. But for the most part the witnesses considered that the court should still have power to order a person who has contributed to the break-up of the marriage to make redress in some way for the wrong done. Some proposed that the remedy of damages should be retained but that, in assessing the amount, the court should not award compensation for the loss of the wife's services. Others suggested that the remedy should be abolished and that the court should have power instead to order the adulterer to pay maintenance for either spouse or for the children of the marriage. Those who wished the remedy to be retained proposed that a wife should be given the right to claim damages from the woman with her husband has committed adultery. One body suggested that only in a petition for divorce should it be possible to claim damages.

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/1941-46/ Nfld. L.R. 428, 435 (Sup. Ct.).

2 Cnid. 9678.

433. We consider that circumstances do arise in which it is reasonable that an adulterer should be compelled to make redress but we do not think that this should take the form of an obligation to provide maintenance, for an indefinite period, for the husband or the wife or the children of the marriage; this would introduce into the law an entirely new, and in our view undesirable, principle. We prefer that, as at present, the adulterer should be liable to pay damages. Their compensatory nature and the fact that the court has a complete discretion in directing the application of the sum awarded ensures that a claim by a husband is kept within reasonable bounds.

434. We consider, however, that a wife should now be given the same right to claim damages from an adulteress as her husband has to claim them from an adulterer, and we recommend accordingly.

435. We can see no good reason for limiting the right to claim damages against an adulterer or an adulteress to a petition for divorce."

2. The Eleventh Report of the Law Reform Committee, 1963¹

The Law Reform Committee recommended the abolition of the actions for enticement, harbouring and seduction.

3. The Law Commission

In Working Paper No. 19 on Loss of Services², the "provisional conclusions" of The Law Commission included a recommendation in favour of the abolition of the right of action of a parent against a person who has seduced his unmarried infant daughter. The Commission also reiterated its preference for the abolition of the actions for enticement of a spouse or infant daughter, and the repeal of the statutory remedy in cases of adultery.

Paragraph 91 may be of interest. It states:

"Comments so far received on our provisional proposals . . . suggest that public opinion would favour the abolition of the action for entice-

¹ Cmd. 2017.

² The Law Commission, 1968.

ment and of any claim for damage for adultery not coupled with a petition for divorce or judicial separation, but that there would be objection to a total abolition of claims for damages for adultery. Public opinion, it is said, will demand that damages be recoverable in divorce proceedings from the wealthy seducer of a poor man's wife".

The English Law Commission has since come down firmly on this matter by recommending that the actions for adultery, and the actions for enticement and harbouring of a child or spouse be abolished.

AUSTRALIA

Australia has abolished the Common Law right of action in criminal conversation and has substituted a statutory right to damages for adultery which is available to either the husband or the wife.

The Matrimonial Causes Act 1959¹, provides:

- "44. (1) A party to a marriage, whether husband or wife, may, in a petition for a decree of dissolution of the marriage on the ground that the other party to the marriage has committed adultery with a person, or on grounds including that ground, claim damages from that person on the ground
that that person is liable in damages for adultery with the other party to the marriage and, subject to this section, the court may award damages accordingly.
- (2) The court shall not award damages against a person where the adultery of the respondent with that person has been condoned, whether subsequently revived or not, or if a decree of dissolution of the marriage on the ground of the adultery of the respondent with that person, or on grounds including that ground, is not made.
- (3) Damages shall not be awarded under this Act in respect of an act of adultery committed more than three years before the date of the petition.
- (4) The court may direct in what manner the damages awarded shall be paid or applied and may, if it thinks fit, direct that they shall be settled for the benefit of the respondent or the children of the marriage.

¹ Stats. Aust'l. 1959, No. 104.

(5) No action for criminal conversation lies, whether under this Act or otherwise."

The same provisions apply in an action for judicial separation. The right to bring an independent action for damages for adultery is governed by state law and is permitted by legislation in several states, although the right is confined to the husband.

Actions for enticement and harbouring are available in Australia but probably only by the husband.

NEW ZEALAND

New Zealand abolished the right of action for criminal conversation in 1867 and substituted a statutory claim for damages similar to that provided by the United Kingdom in 1857. Under the Matrimonial Proceedings Act 1963¹ the action is available to wives as well as husbands.

The Report of the Torts and General Law Reform Committee of New Zealand, 1968²

The Committee was asked to investigate and report on the desirability of retaining or abolishing a number of actions: including enticement, seduction, harbouring and the statutory claim for damages for adultery.

The Committee considered the spouse's actions for damages for adultery and for enticement together. It agreed that the notion that a husband has any sort of property right in his wife is abhorrent today and was clearly abandoned as a basis for the action with the extension to the wife of the right to make a claim. The deterrent factor was not considered to be important, nor does the right of action do much to protect the financial interests of the children of the broken marriage. The Committee recognized that responsibility for the break-up of the marriage subsequent to the adultery is not necessarily that of the co-respondent. The adultery is probably a symptom of the failure of the marriage rather than a cause.

The Committee concluded that of the two, it would be preferable to maintain the action for enticement. Damages should be limited to compensation.

The Committee concluded:

¹ N.Z. Stats. 1963, No. 71, s. 36.

² New Zealand, The Government Printer, 1968.

"Having considered both the action for damages for adultery and the spouse's action for enticement, therefore, the Committee is of the opinion, first, that there are strong arguments against the action for damages for adultery except in cases where the co-respondent has induced the wife or husband to leave home and has thereby caused the break-up of the marriage, second, that in those cases the action for enticement provides an adequate and more appropriate remedy and third, that there are no serious countervailing arguments against retention of the latter action.

"We think that there are cases where people would rightly consider it highly unjust if the law did not provide some remedy to a husband or wife whose home was disrupted by another man or woman and we accordingly recommend the retention of the common law action for enticement of a spouse but the abolition of the action for damages for adultery."¹

The Committee recommended that legislation should make available the action in enticement to a wife as well as to a husband, and that the court have the power to enable the settlement of damages for the benefit of children.

The Committee also recommended the abolition of the actions for seduction, for enticement of a child, and for harbouring of a wife or child.

CONCLUSIONS

This Part has dealt with the tort actions which were developed in recognition of the property interest which, by tradition, a husband or parent had in the services of his wife or child. In addition these remedies were designed to preserve and secure the family unit as a cornerstone of society.

Today it is agreed that the "property interest theory" is no longer valid. Adequate remedies are available to wives and children in cases where wrongs have been committed against them. Their interests are protected by the criminal law and by the law of torts, for example, by actions in assault, battery, and for false imprisonment.

A more difficult question is the protection of the family unit. However, here as elsewhere, attitudes have changed. The new Canadian Divorce Act recognizes, to some degree, the concept of marriage breakdown. In effect, this includes recognition of the fact that in many cases it requires two people to terminate a marriage, a "mutual fault" concept. In some reported cases the

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The Report of the Torts and General Law Reform Committee of New Zealand, 1968, p.9.

courts have recognized this by granting divorce decrees to both the petitioner and the respondent, even where the original action was based upon the adultery or cruelty of one party.¹

Is it, therefore, arguable that a remedy in criminal conversation should continue to exist? The act of adultery is often evidence of the breakdown of the marriage rather than a causative factor in a subsequent breakdown. The law of torts seeks to compensate those who have suffered damage to an interest. Can it be claimed today that a husband has an interest which should be protected by the law in these circumstances?

The same reasoning may be applied to the torts of enticement and harbouring. Again adequate remedies are provided a wife or child who may be held without consent, or injured physically or mentally. There is no legal interest of a husband or father which should be recognized. Remedies are available under child welfare legislation, criminal law and the law of tort to protect those persons who may suffer injury. The continued existence of the actions for enticement and harbouring cannot in any way be said to protect the family unit.-

Perhaps one final point should be noted. Over the past one hundred years these remedies have been invoked in very few instances. The Study recognizes that this fact is not in itself an argument for abolition but it does suggest that the attitudes of society have undergone changes which should be reflected in the province's laws.

¹ VanZoost v. VanZoost (1970), 7 D.L.R. (3d) 373 (N.S. Sup. Ct.).

SECTION 2

ACTIONS FOR LOSS OF CONSORTIUM THROUGH INJURY TO SPOUSE

At Common Law a husband has a cause of action against any person who commits a tortious act against his wife which deprives him of her consortium-

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tium. The husband may recover damages for the loss of her society and services, including expenses incurred in obtaining domestic help during his wife's absence. No claim may be made for the loss of a wife's services in assisting her husband in his business ² or for the loss of a husband's earnings sustained by him as a result of an injury to his wife³.

The basis for the action for loss of consortium is the husband's property right in the society and services of a wife. There has been some strong indication that damages should be limited to compensation for loss of services only.⁴ However, recent cases indicate that the loss of a wife's society is still recognized as requiring compensation⁵.

As noted in section 1 of this Part⁶ there is a conflict of judicial opinion as to whether an action will lie for partial loss as distinct from total loss of consortium. The balance of authority seems to permit compensation for partial loss.⁸

The husband's cause of action is separate from that of the wife for damages for personal injury. The fact that it depends upon the infliction of an intentional or negligent injury upon his wife has caused confusion in respect to the effect on the husband's claim of a finding of contributory negligence against his wife. Authority is divided but the better view is that since the husband is suing in his own right his claim should not be diminished by his wife's failure to take care of herself.'

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² Winfield on Tort, (8th ed., 1967), at p. 525.

³ Montreal Tramways Company v. Deeks and McGuire, /1953/ 2 S.C.R. 404.

⁴ Kirkham v. Boughey, /1958/ 2 Q.B. 338.

⁵ Best v. Samuel Fox & Co. Ltd., /1952/ A.C. 716 (H.L.).

⁶ Goldberg et ux. v. McInnis et al. (1959), 28 W.W.R. 217 (Sask. Q.B.); Cutts et al. v.

⁷ Chumley et al., /1967/ 1 W.L.R. 742 (Q.B.D.).

⁸ Supra. pp. 296-297.

Best v. Fox, supra; Szmerski v. Robinson (1961), N.S. 36 W.W.R. 46 (Man. Q.B.); Honsey v. Sykes et al. (1963), 37 D.L.R. (2d) 225 (Sask. C.A.); Bates v. Fraser et al. (1963), 38 D.L.R. (2d) 30 (Ont. High Ct.). There are no reported Newfoundland cases

⁹ Fleming, The Law of Torts, (3rd ed., 1965), at p. 623.

¹⁰ Mallett et al. v. Dunn, /1949/ 2 K.B. 180; Young et al. v. Otto, /1948/ 1 D.L.R. 285 (Alta. Sup. Ct.); Messenger et al. v. Sears et al. (1960), 23 D.L.R. (2d) 297 (N.S. Sup. Ct. in bailee). There are no reported Newfoundland cases on this point.

In *Best v. Samuel Fox & Co. Ltd.* the House of Lords decided that a married woman whose husband has been injured by the negligent act or omission of another person has no right of action. In other words, a wife does not have a recognized legal interest in the society or services of her husband.

AUSTRALIA

The husband's Common Law action is recognized in Australia.¹

THE UNITED STATES

The husband's right of action for loss of consortium exists in the United States. Prior to 1950 there was no American jurisdiction which allowed a wife a similar right of action. However, in 1950, such an action was recognized in *Hitafer v. Argonne Co. Inc.*² and became the basis for a new trend in American jurisprudence. However, the situation may be best described as unsettled, with the majority of jurisdictions still rejecting the wife's right of action. Some courts, while recognizing the merits of extending the remedy to a wife, refuse to do so, claiming it is a matter for legislative action. In other jurisdictions equality has been achieved by the abolition of the husband's right of action.³

ACTIONS BY PARENTS FOR THE LOSS OF THE SERVICES OF A CHILD

The Common Law has not provided a legal remedy for interference by third parties with parental rights as such. In certain circumstances, however, a parent may recover damages against a third party who has injured his child.

The action *per quod servitium amisit* began as a remedy for a master against one who interfered with a servant so as to deprive the master of his services. In 1653, the action was extended to provide a parent with a remedy where his child had been injured through the tortious act of another.⁴ The action is premised upon the presumption that the parent has been deprived of his child's services and should receive compensation.

"One who by reason of his tortious conduct is liable to a child for
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¹ Ontario Law Reform Commission, Report on Family Law, 1969, Part 1: Torts, p. 99.

y injury is liable also to a parent of such child if, as a result of that

² 183 F. 2d 811 (U.S.C.A.).

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Prosser, A Handbook of The Law of Torts, (3rd ed., 1964), at p. 894 et seq.

⁴

Winfield on Torts, (8th ed., 1967), at p. 528.

tort, the parent has sustained a loss of the services of the child."¹

The parent must prove that the child performed some service for him or, at least, that a right existed to the services of the child.² If the child is under the age of nineteen and living *at home* there is a presumption of service; otherwise the plaintiff must prove that services were rendered. An action does not lie if the child was too young to perform services. However, a parent may recover medical expenses made on behalf of an infant but the basis for recovery is probably his legal obligation to provide adequately for the welfare of the child

rather than a *per quod servitium* basis.⁴

The courts have, on most occasions, adopted a liberal approach to the requirement of proof of service. Since the basis of the action is the property right to services the proper person to bring the action is the father. However, the courts have allowed actions by mothers, mothers of illegitimate children, and generally by any person *in loco parentis* to the child.

The action is akin to those for seduction, enticement or harbouring except that recovery is clearly limited to economic harm. There is no compensation for the injured feelings of a parent but medical and out of pocket expenses, as well as general damages for loss of services may be recovered. .

While the action is an independent one, a condition precedent is that the defendant's conduct was wrongful to the child. The same confusion has arisen in this area as in the actions for loss of consortium when contributory negligence of the injured person has been pleaded.⁵ Contributory negligence of a parent by failing to care properly for the child will reduce a parent's claim?

Actions may arise where children have been assaulted, battered, falsely imprisoned, or negligently injured by the conduct of another. In most cases the child will also have an independent cause of action.

The Common Law principles outlined above accurately state the law of torts in Newfoundland in this area, as there is no relevant provincial legislation.

¹Street, *The Law of Torts*, (4th ed., 1968), at p. 391.

²Hall v. Hollander (1825), 107 E.R. 1206.

³Peters v. Jones, /1914/ 2 K.B. 781; Stats. Nfld. 1971, No. 71, ss. 6,7.

⁴Winfield, *supra*, at p. 694.

⁵Flemington v. Smithers (1826). 172 E.R. 131.

⁶*Supra*, pp. 296-297.

⁷Beckerson et al. v. Dougherty, /1953/ 2 D.L.R. 498 (Ont. High Ct.).

ACTIONS BY CHILDREN IN RESPECT OF INJURIES TO PARENTS

"A child is given no protection by the law of torts against interference with the parental relationship. His mother may be maimed for life as a result of the negligent conduct of the defendant, a paramour may entice her to leave the family home - but the child cannot sue in tort".¹ This states accurately the law in Canada, the United States and England.

Under The Fatal Accidents Act² of Newfoundland a child, together with other members of the immediate family, may recover where a parent has been fatally injured due to the negligence or intentional act of another.³ However, if a parent is not killed but severely injured a child has no cause of action by statute or at Common Law.

In the United States there have been a number of decisions in which these claims have been rejected by the courts. The courts have dismissed the actions arguing that there is no basis for a claim for loss of services, that damages would be difficult to assess, that there is a likelihood of duplicating compensation by expanding the causes of action, and that any reform should come from the legislature.

Most writers contend that the interest of a child in proper parental care requires protection, and resulting pecuniary losses should be recoverable.⁴

CONCLUSIONS

The decision in the *Best* case⁵ brought about a number of proposals for reform in this area of the law. Dr. Glanville Williams⁶ suggested the abolition of the right to general damages for loss of consortium and the substitution of a statutory remedy which would permit either spouse the recovery of costs properly incurred in connection with the injury, as well as the cost of providing domestic help to replace the injured spouse. If this proposal was not acceptable, Dr. Williams urged that the present action for loss of consortium be made available to a wife. He also called for a revision of the law relating to the parent's right of action for loss of services of a child.

¹Street, *supra*, at p. 394.

²R.S.N. 1952, c. 256, as amended by Stats. Nfld. 1966-67, No. 19 and Stats. Nfld. 1971, No. 9.

³Re Clarke; Registrar of Newfoundland Supreme Court v. Miskell et al. (1967-68), 53 M.P.R. 317 (Nfld. Sup. Ct.); Butler v. Dominion Steel & Coal Co. Ltd., J1936-40/ Nfld. IR 26(Sp. Ct.)

⁴Prosser, *supra*, at pp. 909,919.

⁵*Supra*, p. 304, fn. 4.

⁶Williams, "Some Reforms in The Law of Torts" (1961), 24 Mod. L. Rev. 101.

In England the eleventh report of the Law Reform Committee ¹ recommended changes in the law relating to the action for loss of services. The Committee concluded that the action for loss of consortium should be abolished and replaced by an action for compensation as proposed by Dr. Williams. The action should be available to either spouse. The Committee also felt that either the father or the mother of a dependent child who was injured by the tortious act of another, should have a cause of action for reasonable medical costs and reasonable expenses incurred in visiting such child.. The cause of action should not depend upon the child's ability to perform services. The Committee also suggested that a spouse or parent should be able to recover any earnings he or she may have lost as a result of any action reasonably taken in consequence of the injury to the other spouse or the dependent child.

No legislative action has been taken in regard to these recommendations but the whole matter has been under consideration by The Law Commission (United Kingdom). In 1968 the Commission published certain provisional conclusions", including:

"86. (a) The husband's action for loss of the wife's society and services or of a child's service should be abolished.

(c) Other pecuniary losses suffered by members of the family as a result of the injury to the victim should be recoverable whether or not the injuries are fatal."

The Ontario Law Reform Commission³ recommended the same course of action.

It appears that the bases for the Common Law actions discussed in this section are no longer acceptable. While all recent studies have recommended the abolition of such actions, the continued right to compensation in certain circumstances has received unanimous support. "Family losses proposal" as developed by the Ontario Law Reform Commission, and its possible adoption in Newfoundland are discussed in the next section.

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³ Ontario Law Reform Commission, Report on Family Law, Part I: Torts, pp. 101, 105. Cmd. 2017, 1963.

The Law Commission, published Working Paper No. 19.

See also: Payne, "Tortious Invasion of the Right of Marital Consortium," (1968), 8 Jo. of Family L. 41.

SECTION 3

PROPOSALS FOR REFORM

Sections One and Two of this Part have recommended the abolition of the Common Law actions for loss of consortium and loss of services. This step has also been recommended in the United Kingdom and Ontario. However, the abolition of these remedies must be concurrent with the adoption of statutory provisions by which recovery is provided in certain cases of loss within a family unit. In Ontario, the Law Reform Commission has made firm recommendations in this regard.¹ In the United Kingdom provisional conclusions have been reached although no final recommendations have been developed.²

This section considers the problem involved in developing suitable legislation to replace these Common Law rights of action and recommends the principles which should be the basis for legislation.

COMPARATIVE LAW

THE UNITED KINGDOM

In 1968 the United Kingdom's Law Commission recognized that the Common Law rights of action for loss of consortium and services should be abolished.³ At the same time it concluded that what was needed was an alternative remedy whereby members of the family could recover damages for the economic loss they had suffered and expenses they had incurred as a result of the tortious injury of the immediate victim. The Commission pointed out that Fatal Accidents legislation provided for such recovery in cases where the tortious act results in death and a similar remedy should exist when the support provided by the victim is lost through a non-fatal injury.⁴

The Commission considered four possible methods whereby recovery by the family could be obtained:

- "77. (i) By allowing the immediate victim, or his personal representatives, to recover with no right of recoupment from **him** by the members of the family concerned.
- (ii) By individual claims by each member of the family concerned.

2 The Law Commission, published Working Paper No. 19, (1968).

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Ibid.

Ontario Law Reform Commission, Report on Family Law, Part I, Torts: p. 111 (1969).

4 *Ibid.*

- (iii) By a system analogous to that under the Fatal Accidents Acts.
- (iv) By a representative action by one member of the family on behalf of himself and all others having claims."

In a provisional conclusion the Commission stated:

"86. (j) The best solution to the problem of reducing multiplicity of claims might be to apply to non-fatal cases a similar procedure to that under the Fatal Accidents Act whereby only one action can be brought on behalf of all those entitled to claim. This should normally be brought by the immediate victim but where he delayed unreasonably any or all claimants should be entitled to institute one action on behalf of all those entitled."

At the same time the Commission recognized that the effect of the contributory negligence of the immediate victim should be to reduce proportionately any award made to family members.

The Commission concluded, provisionally, that pecuniary losses should be recoverable. However, no conclusion was reached as to whether non-pecuniary loss should be recoverable, or, if recoverable, to what extent and on what basis.

The Commission considered the question whether recovery should be limited to a prescribed class of relatives, as under Fatal Accidents legislation or whether some other basis might be developed to permit recovery of reasonable expenses incurred by others for the benefit of the injured person.

The Commission examined the development of Fatal Accidents legislation and concluded that insofar as the recovery of economic loss was concerned there was no reason why recovery should not be based simply on the fact of dependency rather than on the bases of legal relationship to the injured person in addition to dependency. Although the Fatal Accidents legislation in the United Kingdom is similar to that in effect in Canadian provinces, it provides for recovery for a greater number of relatives than under provincial legislation. The Commission argued that if a victim had been maintaining someone who was not within the prescribed class, the denial of recovery on that basis was illogical. The important factor was that of dependency.

The Commission concluded:

"86. (e) Claimants should not be restricted to a prescribed class of relatives and dependants; anyone who has suffered pecuniary loss which flowed from or was a reasonable consequence of the wrongful injury or death should be entitled to recover.

- • • •
- (g) If non-pecuniary loss is to be recoverable it will be necessary to prescribe the class of relatives and dependants entitled to claim, unless either (a) non-pecuniary losses are restricted to fatal cases and are compensated by a payment of a fixed sum to the deceased's estate or (b) claims are limited to those who have also suffered pecuniary loss. If a class is prescribed it should probably exclude infant children.
- (h) If non-pecuniary losses of relatives and dependants are to be recoverable on any basis, the immediate victim's claim for non-pecuniary loss in fatal cases should not survive for the benefit of his estate. Nor should the claim of the relative or dependant for non-pecuniary loss survive for the benefit of his estate."

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The provisional conclusions were circulated and comment was invited. No further action has been taken.

ONTARIO

The Ontario Law Reform Commission has recommended² that for the present, legislation should be introduced to place the law relating to non-fatal injuries on a similar basis to that under The Fatal Accidents Act. ³ The Ontario proposal recommends as claimants those who are entitled to sue under The Fatal Accidents Act. The damages should be confined to pecuniary loss and the principle of contributory negligence should apply to reduce claims. Only one action should be taken.

CONCLUSIONS

The Fatal Accidents Act of Newfoundland³ should be used as the model upon which legislation could be developed to compensate persons who suffer pecuniary loss resulting from an injury inflicted negligently or intentionally upon a
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d Ontario Law Reform Commission, Report on Family Law, Part I, Torts (1969):
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er.

² R.S.O. 1960, c. 138.

³ R.S.N. 1952, c. 256 as amended by Stats. Nfld. 1966-67, No. 19, and Stats. Nfld. 1971, No. 9.

The Study will recommend the adoption of the Ontario proposals¹ with one exception. The Study feels that the right of recovery should not be limited to those who may fall within the prescribed class of relatives under the present Fatal Accidents Act. Instead, the Study suggests that the fact of dependency be accepted as the basis for such a claim. This would achieve the objective of providing compensation for those whose interests have been harmed, without limiting the recovery to those who may be related to the injured person. The Study is persuaded by the arguments put forth in the Working Paper of the United Kingdom Law Commission.² Under present circumstances a "common-law wife" or "common-law husband" would be precluded from recovering compensation. Rather than attempting to define comprehensively those who may suffer pecuniary loss the Study will recommend a definition of "dependelicy" which leaves some discretion in the courts to develop the law to achieve its objectives.

² Supra, pp. 309-311.

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¹ Supra, p. 311.

B. CHILDREN AND THE LAW OF TORTS

SECTION 1

LIABILITY FOR THE ACTS OF CHILDREN

LIABILITY OF CHILDREN

Children, like other legal persons, may commit torts. Accordingly, infants are held liable in civil actions for assault, battery, conversion, trespass to land, trespass to chattels, false imprisonment, defamation, deceit and negligence.¹ The law requires compensation of those who have incurred damages or injury as a consequence of the intentional or negligent acts of children.

Generally speaking a person is liable in law for the natural and probable consequences of his intentional acts. Therefore, the intentional application of force to the person of another without his consent is a battery and damages may be recovered. The tort of negligence is committed by the breach of a duty of care, the result of the breach being damage or injury to the person to whom the duty is owed. The existence of a duty of care is determined by the application of a "reasonable man" test to the circumstances. Similarly, the conduct of the defendant is measured against the conduct of a reasonable man in the circumstances - an objective test. If the defendant failed to act in accordance with the standard of the reasonable man and if his act caused the damage or injury of the plaintiff, the defendant is said to be negligent and must compensate the plaintiff.

There are a number of qualifications which modify the circumstances in which an infant may be held legally responsible for his tortious acts. The law has sought to balance the need for compensation with a recognition of the disadvantages of infancy. There are no Newfoundland statutes directly relevant. The present state of the law is best illustrated by reference to recent cases.

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In *Walmsley et al. v. Humenick et al.*² the infant plaintiff, aged five and one-half years, was struck in the eye by an arrow shot by the infant defendant, aged five. Both infants were engaged with others in a game of "Cowboys and Indians". The action in trespass to the person and negligence was dismissed. It was agreed before the court that the infant defendant did not shoot the arrow with any wrongful intent. Clyne, J. dismissed the action in trespass on the ground that such action required the existence of an intention which was not present. Concerning the claim in negligence the court said:

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Prosser, A Handbook of The Law of Torts, (3rd ed., 1964), para. 1024.
2 /1954/ 2 D.L.R. 232 (B.C. Sup. Ct.).

"In the present case I have no hesitation in finding that the infant defendant had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts. Putting it another way, it might be said that at his age he had not yet acquired that capacity to reason which would place him within the category of the "reasonable man" as that term is used in the cases defining negligence. Because of the defendant child's lack of capacity, the plaintiff's cause of action against him based on negligence must fail."

In *Tillander v. Gosselin*² the infant plaintiff, slightly under the age of three, sued the infant defendant, of the same age, for assault. Apparently the infant defendant had dragged the infant plaintiff from her baby carriage, causing serious injury. Grant, J. reviewed the authorities and concluded:

"... in an action for damages in trespass where the plaintiff proves that he has been injured by the direct act of the defendant, the onus falls upon the defendant to prove that his act was both unintentional and without negligence on his part. If he fails to do so, the plaintiff must succeed; but if he succeeds, he is entitled to judgment* dismissing the claim. In this action the defendant's tender age at the time of the alleged assault satisfies me that he cannot be cloaked with the mental ability of the ordinary reasonable man and hence negligence cannot be imputed to him. That same condition satisfies me that he cannot be said to have acted deliberately and with intention when the injuries were inflicted upon the infant plaintiff."³

The *Walmsley* case⁴ was applied recently by the Supreme Court of in *Yorkton Agricultural & Industrial Exhibition Association Ltd. v. Morley et al.*⁵ In Australia the tortious liability of infants was considered in *McHale v. Watson*⁶. In that case a nine-year-old girl was struck in the eye by a piece of metal thrown by a twelve-year-old boy. The boy had not intended the metal to strike the girl or to frighten her. The court dismissed the action holding that an ordinary boy of twelve would not have appreciated that any risk to the plaintiff was involved in what he did. Kitto, J. said:

"It seems to me that it would be contrary to the fundamental principle that a person is liable for harm that he causes by falling short of an

1 /1954/ 2 D.L.R. 232, 238.

2 /1967/ 1 O.R. 203 (High Ct.).

3 Ibid., 210.

4 Supra, p. 313.

5 (1966), 58 D.L.R. (2d) 282 (Sask. Q.B.).

6 (1966), 39 A.L.J.R. 459.

objective criterion of "propriety" in his conduct - propriety, that is to say, as determined by a comparison with the standard of care reasonably to be expected in the circumstances from the normal person - to hold that where a child's liability is in question the normal person to be considered is someone other than a child of corresponding age."

There has been a greater development of jurisprudence in the area of contributory negligence of infants. The leading case in Canada is *McEllistrum v. Etches*¹

where the Supreme Court of Canada held that a child of six years could be contributorily negligent. The Court further held that where age is not such as to make a discussion of contributory negligence absurd it is a question for the jury in each case to decide whether the infant exercised the care to be expected from a child of like age, experience and 'intelligence. In Nova Scotia it has been held that where contributory negligence is found to exist on the part of a child, the apportionment of fault must be made with due regard to the child's immature judgment and that its duty to take care for its own safety must not be judged by the same standard as that by which an adult is judged.²

With certain exceptions an infant is not liable for breach of contract. Therefore, where an infant improperly performs an act contemplated by such a contract, the infant is not liable in an action in contract or tort. However, where the act complained of is independent of the contract, the infant may then be liable. In *McCallum v. Urchak*,³ an infant was held liable for conversion of goods which he possessed under a lien agreement. In *Continental Guaranty Corp. of Can., Ltd. v. Mark*⁴ an infant was liable in an action for deceit.

In summary, it can be said that in cases involving questions of the liability of infants, the law has to some extent departed from a strictly objective standard. The capacity of the particular child to appreciate the risk and form a judgment must be considered. However, if his conduct is unreasonable when judged by that of others of like capacity, he may be found negligent.

Some courts, particularly in the United States, have attempted to set minimum age limits below which a child may not be held liable. The minimum age is usually determined by reference to the provisions of the criminal law. However, the majority of jurisdictions, including Canada, have chosen to judge each case individually.

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1 /1956/ S.C.R. 787.

2 (1966) 4 W.W.R. 427 (N.S. Ct. in banco).

ere are two major issues to be considered:

2 Messenger et al. v. Sears et al. (1960), 23 D.L.R. (2d) 297 (N.S. Sup. Ct. in banco).

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/1926/ 4 D.L.R. 707 (B.C.C.A.).

- (1) Is it desirable to establish a minimum age limit?
- (2) How is the conduct of an infant to be judged?

The primary objective of tort law is to compensate a person who has suffered injury or damage as a result of the activity of another. Canadian tort law is, for the most part, based upon the fault principle: there can be no recovery unless there has been fault in the sense of an intentional or negligent act. The law relating to children takes special cognizance of the disability of infants in that a subjective test is applied to determine liability. In addition, a person injured by an infant faces great practical difficulties in collecting against the wrongdoer. Infants normally have few assets. Judgments cannot be executed until the age of majority is attained. Insurance coverage is not normal. Parents are not usually responsible for the torts of their children.

Therefore, it seems that the compensatory objective of tort law is somewhat limited in cases involving infants. On the other hand to impose a heavier burden would result in the imposition of strict liability upon a certain class. Such a major change in tort law should not take place unless it is applicable to all and includes a comprehensive no-fault recovery scheme.

In some ways the present law attempts to overcome some of the practical difficulties by the imposition of an objective standard of care upon infants who participate in adult activities. For instance, children who involve themselves in the operation of motor vehicles, motor boats, airplanes and other potentially dangerous adult activities are expected to measure up to the standard required of an adult and no recognition is made of the "infancy" of the defendant.

The Criminal Injuries Compensation Act, 1968¹ may permit individuals who have suffered injury through the acts of infants to be compensated, although the basis for recovery is strictly limited.

The Ontario Law Reform Commission considered that the establishment of a minimum age for tort liability would serve no useful purpose in assisting a person injured by virtue of a child's tortious conduct to recover damages.² The Study agrees with that conclusion.

While the present law leaves the determination of negligent conduct of infants in a rather indefinite state the Study does not recommend legislative action until a general revision of the law of torts has been completed.

1 Stats. Nfld. 1968, No. 26, proclaimed March 4, 1969.

2 Ontario Law Reform Commission, Report on Family Law, Part I: pp.

75 - 76.

Torts (1969),

LIABILITY OF PARENTS

The general Common Law principle is that a parent cannot be held liable for the torts of his child.¹ This principle was accepted in the English decision of *Moon v. Towers*² and has been approved by Canadian courts.³ In other words, the law recognizes the child as a separate legal entity, capable of individual acts which may bring personal liability. There has never been a doctrine of parent-child unity similar to that of husband and wife.

There are three exceptions to the general principle. When a parent "... has knowledge of the wrong-doing and consents to it, where he directs it, where he sanctions it, where he ratifies it, or participates in the fruits of it, he becomes in effect a party to it, and as such is liable to the injured person."⁴

A parent who employs his child will be liable for the torts of his child for which he would be liable under the ordinary laws of master and servant. In such a situation liability arises not through the parent-child relationship, but through the recognized agency relationship.⁵ A master is liable for the torts of his servant committed in the course of the servant's employment.

The most common way in which parents have been held liable for the acts of their children is where the parent is sued for personal negligence in the care and control of the child. The law imposes a duty on parents to care for and control their children. A breach of this duty resulting in damages to a third party may make the parent personally liable whether or not the act of the child was itself tortious. The negligent conduct is that of the parent in failing to take adequate precautions against the occurrence of such an event. The test of the reasonable man becomes that of the "prudent parent". Thus the issue of parental liability in most cases resolves itself into the question of whether the parent has done that which a prudent parent would have done in the circumstances.⁶

The Saskatchewan Court of Appeal found a defendant father negligent, in leaving a gun and shells within easy reach of his nine-year-old son who had in turn negligently injured a child by shooting him.⁷ The Court said that everyone is presumed to know that children will meddle with anything that comes

¹ Fleming, *The Law of Torts*, (3rd ed., 1965), at p. 645.

² (1860), 141 E.R. 1306 (C.P.).

³ *Streifel v. Strotz et al.* (1958), 11 D.L.R. (2d) 667 (B.C. Sup. Ct.).

⁴ *Thibodeau v. Cheff* (1911), 24 O.L.R. 214, 218 (Div. Ct.).

⁵ *Paterson et al. v. Hardy et al.* (1968), 62 W.W.R. 219 (Sask. Q.B.).

⁶ *Ibid.*

⁷ *Black v. Hunter et al.*, [1925] 4 D.L.R. 285.

within their reach. This may be compared with another decisions also in Saskatchewan, in which an action for negligence was dismissed against a father who had carefully instructed his ten-year-old son in the use of a gun. The plaintiff was injured by the negligent firing of the gun by the son but the Court held that a parent is liable, not for the *possible* consequences of a situation which he has created, but only the *probable* consequences.

The Common Law may be summarized as follows. *Prima facie* a parent is not liable for the acts of his children which inflict injury or damage upon third parties. A parent may be liable if he has employed his child and in the course of his employment the wrongful act is committed, or if the parent has expressly or impliedly authorized or ratified the act, or if the parent was personally negligent in allowing his child to act in a way which prudent parents would not have permitted. The Study has not found any reported cases in Newfoundland on this matter; there are no relevant statutory provisions.

In the United States some jurisdictions have enacted "Parental Liability Statutes."² These are designed to assist a third party by making parents strictly liable for certain acts of their children. There are some States in which recovery may only be had for property damage, while others make parents liable for both property damage and personal injury. Common to most is the requirement that liability attaches only when the damage or injury is done "wilfully" or "maliciously". The Study has not been able to identify a jurisdiction in which liability is imposed for a child's negligent acts. In the great majority of States liability is limited to a maximum well below most damage awards in similar civil cases.

Sections 57(1) (i) and 59 of The Welfare of Children Act of Newfoundland³ permit a judge in a juvenile delinquency proceeding to order the payment of compensation up to the amount of fifty dollars to a person who has suffered loss of goods or personal injury. A parent may be ordered to make the payment.

The sections seem to contemplate only minor acts of vandalism and do not include acts of negligence. The limitation of fifty dollars is a severe restriction. In addition, it is not clear that an order under the Act precludes a civil action for recovery of damages.

There are two policy decisions for consideration in this area of the law. Is the existing law satisfactory and, if so, should it be codified? ~~Y~~

If it is not satisfactory, what changes should be

¹ made?

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Paterson et al. v. Hardy et al., supra. p. 317.

See Appendix I.
R.S.N. 1952, c. 60.

There is no reason why the civil wrongs of children should necessarily create liability in a parent. The law provides for recovery where a parent is negligent and this is as it should be. However, to place upon parents the additional burden, by way of strict liability, of answering for the tortious conduct of their children does not seem appropriate. Children are individual legal persons. The fact that the law protects them and makes it difficult to recover from them does not justify shifting responsibility to an innocent individual.

To some the introduction of a more comprehensive parental liability section would be a progressive step. However, apart from the arguments already given, these statutes have been directed primarily toward the prevention of acts of vandalism and juvenile delinquency. The limited liability under such legislation would not provide adequate compensation in most cases. In addition, the injured person now has a remedy under The Criminal Injuries Compensation Act, 1968.¹

Codification of the present law is unnecessary and might deprive the court of flexibility when dealing with new situations. Parental liability legislation does not accomplish the objective of adequate compensation unless no concern is to be had for the fault principle.

Consideration should be given to clarifying the relevant provisions of the Welfare of Children legislation, discussed above.¹

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Stats. Nfld. 1968, NQ. 26,
supra, p. 316.

2 Supra, p. 318.

SECTION 2

LEGAL ACTIONS BY AND AGAINST CHILDREN

An infant may sue or be sued in tort in the same manner as any other person recognized by law. The general rules of procedure provide that an infant must sue by his next friend and defend by a guardian *ad litem*, thus ensuring protection of his rights and interests involved.

THE STANDARD OF CARE OWED TO CHILDREN

The Common Law requires that if the presence of children in the area of risk is reasonably foreseeable, the reasonable man is presumed to know the intellectual capacity, lack of judgment, natural curiosity and erratic behaviour of children and he is, therefore, under a duty to guard against the probable risk-creating consequences of his conduct.

Thus it has been held that when a snowplow driver saw six-year-old children excited at the approach of his plow, he should have foreseen the probability of their following him and their failing to appreciate the danger of his stopping suddenly and backing over them. The driver failed to meet the standard of care of the reasonable man in the circumstances and was held liable.¹ Similarly, a corporate body should be able to reasonably foresee the likelihood of small boys climbing trees and coming into contact with company power lines.² "This does not mean, however, that such a company is necessarily responsible for every accidental contact with its wires by climbing children or that it is deemed to be endowed with prevision of every harmful contingency to which the curiosity, agility and daring of active children may expose them".³ A more common example is the finding of negligence in a case where a driver, proceeding through a residential district and knowing of the propensity of young children to run out from behind parked cars and to engage in other unpredictable behaviour, failed to use extra caution.⁴

In certain activities the courts have found the standard of care required to be that of a reasonable parent.⁵

It appears that the higher standard of care owed generally to children is really just the normal standard to be applied once the presence of children is foreseen. The reasonable man knows of the unpredictability of children and must guard against the occurrence of injury to them.

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¹ Goggin et al. v. City of Moncton et al. (1959-60), 43 M.P.R. 93, (N.B. Sup. Ct. App. Div.).

² Motile v. N.B. Electric Power Commission (1960), 44 M.P.R. 317 (Sup. Ct. Can.).

³ Ibid., p. 321.

⁴ Bottoms et al. v. McBrine (1968), 64 W.W.R. 547 (B.C. Sup. Ct.).

⁵ Ware's Taxi Ltd. et al. v. Gilliam et al., [1949] S.C.R. 637.

There are no relevant statutory provisions in Newfoundland and the Common Law principles outlined above are the law of Newfoundland.

OCCUPIER'S LIABILITY

The standard of care owed by an occupier to a person injured upon his land depends upon the legal status of the entrant.¹ This applies whether the person is an adult or a child. The standard of care owed to a trespasser is less than that owed to a licensee or invitee. The courts have tended to circumvent the harshness of the law by being more willing to find an infant to be a licensee or invitee, thus requiring a higher standard of care. The courts have developed the doctrines of allurement and implied licence to assist in the determination of these questions.

The practical effect is to demand a higher standard of care to a child than to an adult in similar circumstances.

It is not within the scope of the Study to review the law of occupier's liability. It is not advisable to consider changes in the law relating to occupier's liability to infants until other aspects of the law of occupier's liability have been considered.

GENERAL DEFENCES

The normal defences available in tort cases are valid in cases involving infants. It should be noted that children may be found contributorily negligent, which would reduce the amount of damages.

For some time the doctrine of identification, which imputed the contributory negligence of a parent to his child, was an accepted defence. However, the courts have now rejected the defence.²

In certain circumstances the necessity of some degree of orderly discipline permits classes of persons to commit what would otherwise be actionable torts. Parents and school teachers are recognized by law as having disciplinary functions which require, occasionally, the reasonable use of physical force.³

¹ See generally, Linden, *Studies in Canadian Tort Law*, (1968), c. 11.

² *Oliver v. Birmingham et al.*, /1933/ 1 K.B. 35; *Beckerson et A. v. Dougherty*, /1953/ 2 D.L.R. 498 (Ont. High Ct.).

³ *Murdock v. Richards et al.*, /1954/ 1 D.L.R. 766 (N.S. Sup. Ct.).

CONCLUSION

The Study will not recommend any change in the present circumstances. The courts have developed means by which infants receive special protection by the application of Common Law principles. Legislative action should not be contemplated until a general revision of the law of torts is undertaken. A piecemeal approach to reform is unsatisfactory and the areas of law under consideration fall into the area of general tort law rather than family law.

SECTION 3

PRE-NATAL INJURIES

Claims for damages for pre-natal injuries by infants subsequently born defective in consequence of the harm sustained *en ventre sa mere* have, until recently, received little attention by the law.¹ With the advance of medical science and the enlightened attitude of certain judges the law has developed rapidly in the United States. There are no reported cases from the Common Law provinces of Canada, or in England, Australia or New Zealand. •

In the Irish case of *Walker v. Great Northern Railway Company of Ireland*² a claim in negligence by a child against the company was dismissed. The child was born deformed after an accident to it *en ventre sa mere* due to the negligence of the company while the mother was travelling as a passenger. The Court gave two reasons for dismissing the action:

There was no duty of care owed the child by the company because the company was not aware of the existence of the child;

- (2) There was not sufficient medical evidence to establish a casual connection between the company's alleged acts of negligence and the condition of the child.

The major Canadian case is *Montreal Tramways Company v. Leveille*³ The case involved the interpretation of the Civil Code of Quebec. A child was born deformed as a result of the defendant's negligent act toward the child's mother in her seventh month of pregnancy. The Court held that the child could bring the action for damages. During the course of his judgment LaMont, J. said:

"If a child after birth has no right of action for pre-natal injuries, we have a wrong inflicted for which there is no remedy_..... If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor. To my mind it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother."

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¹ Fleming, *The Law of Torts*, (3rd ed., 1965), at p. 163.

² (1891-92), 28 L.R. Ir. 69 (Q.B. Div.).

³ [1933] S.C.R. 456.

⁴ *Ibid.*, p. 456.

A somewhat novel situation arose in *Smith v. Fox*.¹ In that case a suit for personal injuries was brought by an infant conceived but not yet born. Riddell, J. dismissed the action without prejudice to the right of the infant, when born, to pursue the action. The judge stated that while he did not have to consider whether such an action could be brought he could see no reason why it should not be, provided the child is born alive and the damage is capable of assessment.

In the United States prior to 1946 most jurisdictions denied recovery in actions for pre-natal injuries.² In the past twenty-five years a series of cases has brought about "the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."³ According to Prosser, nearly all States now permit a child, provided he is born alive, to maintain an action for the consequences of pre-natal injuries, and if he dies of such injuries an action will lie for his wrongful death.⁴

POLICY CONSIDERATIONS

The major objections to the recognition of such an action are:

- (1) The difficulty of determining whether the child was a "legal person" at the time the injury occurred;
- (2) The provision in some jurisdictions that a duty of care does not extend to those whose existence was not known to the actor at the time of the negligent act;
- (3) The difficulty of procuring adequate evidence of the causal connection between the pre-natal injury and the post-natal condition.

As to the first objection it may be said that most cases allowing recovery have involved a foetus which was viable at the time of the negligent act, although in some jurisdictions recovery has been permitted when the injury occurred in the early weeks of pregnancy. The denial of recovery in such cases would not seem just if, by adequate medical evidence, the injury could be identified and connected causally with the negligent act.

The existence of a duty of care is judged by the test of foreseeability of the reasonable man in the position of the actor. The particular plaintiff does not

¹(1922-23), 53 O.L.R. 54 (In Chambers).

²Prosser, *Handbook of the Law of Torts*, (3rd ed., 1964), at p. 354.

³*Ibid.*, p. 356.

⁴*Ibid.*

have to be foreseen so long as the conduct could reasonably have been expected to cause harm to those within the range of danger.¹ The development of the concept of duty of care in nervous shock cases eliminates a restrictive interpretation of a duty of care.

Finally, the courts have become much more receptive to the type of expert evidence required in pre-natal injury cases. The question is a matter of proof and the adequacy, or otherwise, of medical evidence should not be used as an argument in determining whether a cause of action should exist.

CONCLUSION

The law in Canada is somewhat unclear. However the trend of decisions in the United States and the United Kingdom may well be noted by Canadian Courts.

¹ Fleming, *The Law of Torts*, (3rd ed., 1965), at p. 165.

SECTION 4

AN ACTION FOR WRONGFUL LIFE

The recognition of the compensatory role of tort law has caused the development of imaginative and sophisticated claims for the protection of interests heretofore unrecognized by the law. In the United States there has been considerable discussion and some litigation concerning the right of action for damages by an illegitimate child against his parent for "wrongful life".

CASELAW

In *Zepeda v. Zepeda*¹ the court said that the act of a father in bringing about the birth of an illegitimate child was a civil wrong to the child in that the status of illegitimacy brought with it many disadvantages in law and in society. The court, however, refused to allow the action on the ground that such a sweeping change in the law should only be made by the legislature.

In *Williams v. State*² the mother of the infant plaintiff was mentally deficient and confined in the state mental hospital. While she was an inmate she was raped by another patient. As a result the infant plaintiff was born. The infant sued the State for negligence in failing to protect the mother from such harm. A motion by the defendant to set aside the claim as an insufficient cause of action was dismissed. In its decision the court stated:

"The novelty and lack of precedent for declaring that the baby bastard has a cause of action should not be a deterrent to such ruling."

There are no reported Canadian cases in this area. It is unlikely that the courts would find such an action to exist.³

CONCLUSIONS

The Study has considered the matter and will recommend no change in the present law. Amendments to existing legislation and changes in the attitudes of society are effective ways of lessening the disabilities of an illegitimate. Present conditions do not require the creation of an independent remedy in tort.

¹(1963), 190 N.E. 2d. 849 (Ill. App. Ct.).

²(1965), 260 N.Y.S. 2d. 953 (Ct. of Claims).

³For a criticism of the Williams case see Linde, M.H., "Liability to Bastard for Negligence Resulting in His Conception" (1965-66), 18 Stan. L. Rev. 530.

SECTION 5

ACTIONS IN TORT BETWEEN PARENT AND CHILD

Concern for the maintenance and preservation of the family unit has affected the attitude of the law toward actions in tort between parent and child for personal injury. Not surprisingly, there has been little jurisprudence in this area, the obvious reason being the natural reluctance of the parties involved to pursue the matter unless liability insurance is available.

In the United States there has been some litigation during the course of which various judges have taken the opportunity of developing the arguments and policy bases underlying the present state of the law. This section considers the law in the United States, Canada and England. Consideration is given to the various policy arguments, and changes are recommended.

COMPARATIVE LAW

THE UNITED STATES

Generally speaking a child may sue or be sued in the same manner as any other legal person except for the procedural requirement of representation of an infant's interest by a next friend or a guardian as the case may be.

Insofar as actions in tort for personal injury between a child and a parent are concerned, there appears to be no reported case on the matter prior to 1891. Before that time infants had successfully sued persons acting *in loco parentis* who had caused injury to the infant through the commission of a tort." However, in *Hewellette v. George*² the Supreme Court of Mississippi denied an action for false imprisonment brought by an infant against her father. The court said:

"So long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid a minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand."

McCurdy, W.E., "Torts Between Parent and Child" (1959-60), 5 Vill. L. Rev. 521 at p. 527.

2 (1891), 9 So. 885 (Sup. Ct. Miss.).

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There followed a series of cases in which actions by infants for personal injury inflicted by their parents were denied. In addition to the public policy argument the courts • reasoned that parent and child were analogous to husband and wife and, therefore, no Common Law right of action could be permitted.²

It was not until 1930 that a change of direction in judicial thinking took place. The basic reason for the change in attitude was probably the increasing number of cases in which liability insurance was available, particularly in automobile accidents. In 1930 the Supreme Court of New Hampshire permitted recovery in an action in negligence by a son against his father.³ Although the court used the existence of master-servant relationship as the basis for recovery, it concluded:

it. . There is much to be said in support of the contention that the whole theory of nonliability effected through a rule of incapacity to sue is unsound ...

... Such immunity as the parent may have from suit by the minor child for personal tort arises from a disability to sue, and not from lack of violated duty. This disability is not absolute. It is imposed for the protection of family control and harmony, and exists only where a suit or the prospect of a suit might disturb the family relations. Stated from the viewpoint of the parent, it is a privilege, but only a qualified one. It is not an answer to a suit for an intentional injury, maliciously inflicted. "4

And regarding the effect on the family:

"The communal family life is held together and its continuity assured by something finer than legal command. In the vast majority of cases, the corresponding filial and parental instincts are all-sufficient. Statutes imposing a duty to support are not for them. Such laws are for the rare exceptions; and no one suggests that they ought to be repealed because knowledge of their existence will make children unruly. The fear that the family structure will be undermined if the minor, while a member of the family, shall gain the right to sue, is not justified by such experience as we have."⁵

The change, although gradual, has occurred and a definite trend has developed in favour of abolishing the doctrine of parent-child immunity in tort

¹ (1891), 9 So. 885 (Sup. Ct. Miss.), 887.

² For example: McKelvey v. McKelvey et al. (1903), 77 S.W. 664 (Sup. Ct. Tenn.).

³ Dunlap v. Dunlap (1930), 150 Atl. 905 (Sup. Ct. N.H.).

⁴ Ibid., pp. 906, 915.

Ibid., at p. 915.

law. One of the most recent illustrations is the decision of the New York Court of Appeals in *Gelbrnan v. Gelbrnan*.¹ In that case a mother sued her son for negligence in the operation of a motor vehicle. In permitting the action the Court rejected the argument that family unity is promoted by the prohibition of such actions. In fact the court felt that in this case the suit would be a manifestation of the parental authority of disciplining the child. Recognizing the existence of compulsory insurance in automobile cases, the Court dismissed the argument that such suits would lead to family disharmony. The Court also said:

"The argument has been advanced that, by permitting suits between parent and child for nonwillful negligent acts, we will be encouraging fraudulent lawsuits. The argument fails to explain how the possibility of fraud would be magically removed merely by the child's attainment of legal majority. Nor does the argument pretend to present the first instance in which there is the possibility of a collusive and fraudulent suit. There are analogous situations in which we rely upon the ability of the jury to distinguish between valid and fraudulent claims. The effectiveness of the jury system will pertain in the present situation. The definite and vital interest of society in protecting people from losses resulting from accidents should remain paramount."²

CANADA AND THE UNITED KINGDOM

In Canada and the United Kingdom there has been considerably less litigation. Two Canadian courts have held that the existence of a parent-child relationship creates no exception to the general law concerning tort liability.

In 1924 the Supreme Court of Canada indicated that the immunity doctrine would not apply in Canada.³ However, the case was decided upon other grounds and the comments concerning the immunity doctrine were made by way of interpretation of the Quebec Civil Code.

In *Deziel et al. v. Deziel*⁴ the Ontario High Court permitted an action in negligence by an infant against his father. The child had been injured through the negligent operation of a "chairplane" ride operated by his father. The father's acts were covered by insurance. The Court held that the child was not disqualified merely by the fact of his relationship with the defendant.

The *Deziel* case *supra* relied upon the reasoning of the Court of Session

¹ (1969), 245 N.E. 2d. 192.

² *Ibid.*, p. 194.

³ *The Fidelity & Casualty Co. of New York v. Marchand*, [1924] S.C.R. 86.

⁴ [1953] 1 D.L.R. 651.

in Scotland in *Young v. Rankin*.¹ In that case recovery was permitted a child in an action in negligence against his father.

In a number of cases children have been permitted recovery against their parents for damages suffered by the commission of intentional torts.²

The Study has not discovered any reported cases in Newfoundland in which the question has been decided. It would appear that the law in Newfoundland is uncertain, although the persuasive authority of the Canadian and United Kingdom cases might be accepted in the Newfoundland courts.

POLICY CONSIDERATIONS

Writers and judges have articulated a number of arguments in favour of establishing a doctrine of immunity from suit in parent and child tort law. The major argument is that to allow such actions would encourage family disharmony and erode the authority of a parent within a family unit. The Study rejects this argument. In most cases an action would not be taken unless insurance coverage was available to cover the risk-creating activity of the defendant. In addition, a family situation which develops to a point where a member actually wishes to proceed against another where no insurance is available, does not deserve the protection of the law. A wrongful act has caused damage. The remedy should be available to the injured person at whose discretion action may be instituted.

There are also fears that an award of damages against a parent will rob others within the family unit of necessary support and maintenance. However, in most cases, insurance will provide coverage. If there is no insurance the existence of a blood relationship should not preclude action by the injured person.

The New York Court of Appeals dealt effectively with the argument that the existence of such action will increase fraudulent claims and encourage collusive activity.³ The Study agrees with the reasoning of the Court in that case. It should be noted that the same argument was raised in the early days of "nervous shock" cases.

Professor McCurdy⁴ dismisses the alleged analogy between parent and child and husband and wife:

"The relation of husband and wife and that of parent and child have in

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2/1934/ S.C. 499.

For example: *Ash v. Lady Ash* (1696), 90 E.R. 1287.

³*Supra*, p. 329.

⁴McCurdy, W.E., "Torts Between Persons in Domestic Relation" (1929-30), 43 Harv. L. Rev. 1030, at p. 1056.

general been treated differently by the law. The two relations are similar, for together they make up the family. But the similarity is legally superficial. The husband and wife relation is artificial and permanent. The parent and child relation is one normally of natural kinship, only a portion of which, in point of time, is of important legal significance: the relation of parent and minor child, which has legal recognition primarily for the purpose of the proper rearing of children. The one is created consensually, the other, in legal contemplation, is not. There is no conception of unity of legal identity of parent and minor child."

The Study concurs in these views.

C. TORTS BETWEEN HUSBAND AND WIFE

SECTION 1

SUMMARY OF LAW OF TORTS BETWEEN SPOUSES

Under the old Common Law concept of marriage, the man and the woman became one flesh - a legal unity for most purposes. At Common Law, a wife had no legal status independent of that of her husband.

As a result of this early concept of marriage, the law today relating to husband and wife torts contains many peculiarities, discussed below.'

ACTIONS BETWEEN SPOUSES

(1) Protection of Property

(a) Wife

The general rule that a husband and wife may not sue each other in tort² is no doubt based upon the old "legal unity" concept of marriage as well as the general desire of society not to encourage inter-spousal dissension.

Under section 14 of The Married Women's Property Act of Newfoundland however, a wife may bring a tort action against her husband if the *purpose* of such action is to protect or secure her own property.'

The question of what constitutes a wife's property arises in such an action. In Newfoundland, "property" includes a *chose* in action.⁴ In England, the Court of Appeal has held⁵ that a woman's right of action for an ante-nuptial tort is a *chose* in action. Furthermore, an action for damages is considered to be an action for the protection and security of a wife's property.⁶

(b) H u s b a n d There is no statutory provision similar to section 14 of The Married

¹For a more exhaustive discussion of the law of tort concerning husband and wife, see:

²Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), pp. 10-49.

³The Married Women's Property Act, R.S.N. 1952, c. 143, s. 14, as amended by Stats. Nfld. 1963, No. 13, s. 6.

⁴See: Laxton (or Ulrich) v. Ulrich (1964), 41 D.L.R. (2d) 476, (Ont. C.A.).

⁵The Married Women's Property Act, R.S.N. 1952, c. 143, s. 27. A chose in action is a right to personal things of which the owner does not have possession, but merely a right of action for their immediate or future possession.

⁶Curtis v. Wilcox. /1948/ 2 K.B. 474.

Laxton (or Ulrich) v. Ulrich, supra; McKinnon v. McKinnon, /1955/ V.L.R. 81 (Victoria Sup. Ct.); see, infra, p. 334.

Women's Property Act of Newfoundland which would permit a husband to sue his wife for the protection of his property. Therefore the general Common Law rule prevails to prevent a husband from suing his wife in tort.' He may, however, avail himself of the provisions of section 19 of The Married Women's Property Act. Under that section, if a question arises as to title to or possession of property, either the wife or husband may apply, with notice, to a judge to have the question determined. The Supreme Court of Canada in proceedings originating under section 12 of the Ontario Act (which is substantially the same as section 19 of the Newfoundland Act) has given the husband judgment for possession of the matrimonial domicile.²

(2) Ante-Nuptial Torts

(a) Wife

The law is not clear as to whether a wife may sue her husband after their marriage for a tort committed by the husband *before* their marriage.

The English Court of Appeal in *Curtis v. Wilcox*³ has held that a woman's cause of action accruing before marriage was her separate property and a *chose* in action for which she was entitled to maintain an action⁴ against her husband under The Married Women's Property Act, 1882. However, this decision has been criticized⁵ on the grounds that it confuses the thing "which protects with that which is protected" and on the ground that there is no logical reason to distinguish between *post* and *ante* nuptial torts if the purpose of the general prohibition against husband and wife tort actions is to discourage actual or apparent inter-spousal dissension.

In Newfoundland, section 27 of The Married Women's Property Act defines "property" as including a *chose* in action, and the question arises as to whether the *Curtis* case *supra* would be followed in this province. There are no reported Newfoundland cases in which this point has been considered.

Therefore, it is submitted that in view of the apparent weakness in the logic of the *Curtis* decision *supra*, it is doubtful whether a wife may sue her husband for an ante-nuptial tort in Newfoundland.

(b) H u s b a n d

Baylis v. Blackwell and Others' in re-affirming a woman's right of

¹*I3aylis v. Blackwell et al.*, /1952/ 1 K.B. 154.

²*Minaker v. Minaker*, /1949/ S.C.R. 397.

³/1948/ 2 K.B. 474.

⁴This right of action was re-affirmed in *Baylis v. Blackwell et al.*, /1952/ 1 K.B. 154.

⁵Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), p. 23.

⁶/1952/ 1 K.B. 154.

action in England for ante-nuptial torts, noted that the husband had no such corresponding right. It is submitted that in Newfoundland too, a husband has no right of action against his wife for her ante-nuptial torts.

(3) Miscellaneous Actions

The prohibition in section 14 of The Married Women's Property Act of Newfoundland relates to interspousal tort actions only. The spouses may sue each other in other causes of action as illustrated below.

(a) Wife

A wife may sue her husband for a declaration¹. She may also take an action against her husband for rescission of a deed which she has been induced to sign by her husband's fraud.- Furthermore, it appears that the courts will tend to allow a wife to sue her husband in an action which is closely analogous to a tort action *if* there is a statute which imposes the liability³. She may, also sue her husband in a civil action or initiate criminal proceedings "for the protection and security of her own property ..".⁴

(b) Husband

As noted above, either husband or wife may proceed under section 19 of The Married Women's Property Act⁵ to have questions of title to, Or possession of, property settled. However, under that section the court has no power to award damages for injury to, or detention of, the property.

Whether a husband can bring an action against his wife to recover his land is dealt with comprehensively in the Ontario Report.⁶ It would appear from *Minaker v. Minaker*⁷ that a husband may recover possession of the matrimonial home from his wife by proceeding under the appropriate section (in Newfoundland, section 19) of the Married Women's Property legislation.

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See *Dallas v. Dallas* (1961), 29 D.L.R. (2d) 388 (B.C. Sup. Ct.) where application brought by wife for declaration of her interest in shares, and in assets of business partnership with her husband under The Married Women's Property Act, R.S.B.C. 1960, c. 233, s. 13, which is similar to s. 14 of The Married Women's Property Act, R.S.N. 1952, c. 143. *Hutton v.*

2 *Hutton*, /1917/ 1 K.B. 813 (C.A.).

3 *Allen v. Nolet and Nolet* (1967), 61 D.L.R. (2d) 743 (B.C.C.A.).

4 R.S.N. 1952, c. 143, s. 14 as amended by The Married Women's Property (Amendment) Act, 1963, Stats. Nfld. 1963, No. 13, s. 6; supra, p. 332.

5 Supra, p. 333.

76 Ontario Law Reform Commission, Report on Family Law, Part I, Table (1968) at 27-28.

Minaker, /1949/ S.C.R. 397.

Minaker v.

Whether or not a husband may take an action for ejectment of his wife and thus recover possession of his real property (without proceeding under section 19) depends upon whether or not the action is regarded as one in tort. While there is some doubt on the matter¹, the consensus of judicial authority appears to be against recognizing such action.

Although a husband is barred from suing his wife in tort, he may avail himself of all other civil remedies against her². Consequently, a husband may be directed to act as the plaintiff against his wife in an issue which is being directed under interpleader proceedings.³ A husband may be able to secure an injunction against his wife in some circumstances.⁴

EFFECT OF THE MARITAL RELATIONSHIP ON THIRD PARTIES

(1) Contribution and Indemnity⁵

Section 3 of The Contributory Negligence Act⁶ of Newfoundland provides co-tortfeasors with a general right to sue each other for contribution and indemnity.

However, section 9 of that Act denies a right of damages, indemnity or contribution from a negligent spouse who, along with a third party, has negligently injured that spouse's partner. Section 9 states:

"9. In any action founded upon negligence and brought for damage or loss resulting from bodily injury to or the death of any married person, where one of the persons found to be negligent is the spouse of such married person, no damages, contribution or indemnity shall be recoverable for the portion of damage or loss caused by the negligence of such spouse, and the portion of the loss or damage so caused by the negligence of the spouse shall be determined although the spouse is not a party to the action."

The effect of section 9 is that while a third party is liable for damages, contribution and indemnity in those circumstances, the negligent spouse is not

See the consideration of the cases in the Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), pp. 27 - 29.

Minaker v. Minaker, /1949/ S.C.R. 397, at p. 402.

² De La Rue v. Ilernu, Peron & Stockwell, Limited, /1936/ 2 K.B. 164 (C.A.).

³ Eg.: Seredowicz v. Seredowicz, /1934/ 3 D.L.R. 47 (Man. C.A.); contra: Webster v.

⁴ Webster, /1916/ 1 K.B. 714.

⁵ For a detailed discussion of the evolution of the law on this topic see the Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), at pp. 32 - 35.

⁶ R.S.N. 1952, c. 159.

liable for the portion of damages caused by his negligence when damages are assessed against the third party.

(2) Apportionment

Section 2 of The Contributory Negligence Act provides that when by the fault of two or more persons, one of them suffers loss or damage, then the liability for such damages is to be apportioned according to the degree of fault of each.

Section 2 does not create any new right of contribution; it merely removes a procedural obstacle to an action by a plaintiff who is partly at fault. Therefore, the plaintiff, in availing himself of section 2, must show that he has suffered actual damage or loss.¹ Consequently a defendant cannot counter-claim against a husband for an apportionment of damages which he has been ordered to pay the wife due to defendant's and husband's joint negligence, since the defendant has not suffered damage.²

(3) Vicarious Liability

While The Married Women's Property Act³ of Newfoundland prohibits actions in tort between husband and wife, this does not seem to prohibit a spouse's suit against the employer of the other spouse based upon vicarious liability. Thus, with the exception of motor vehicle cases, the law appears to be quite clear that a wife can sue her husband's employer for damages she suffers through her husband's negligent act in the course and scope of his employment.⁴

With regard to motor vehicle situations, the law is somewhat less certain due to the necessity of considering the provisions of The Highway Traffic Act, 1962⁵ of Newfoundland. The relevant provisions of that Act state that:

"219. Without effect upon the liability of the driver thereof, the owner of a vehicle is liable for loss or damage sustained by any person by reason of negligence in the operation of the vehicle unless the vehicle was without the owner's consent in the possession of some person other than the owner, and every person driving the vehicle who is living with and as a member of the family of the owner thereof is deemed to be in possession thereof with the owner's consent unless the contrary is proved."

¹ Drinkwater et al. v. Kimber, /1952/ 2 Q.B. 281.

² Ibid., p. 289.

³ R.S.N. 1952, c. 143, s. 14.

"220.— (1) A person who is being transported by the owner or operator of a motor vehicle as a guest without payment for the transportation or entering or getting on the motor vehicle to be so transported or alighting from the motor vehicle after being so transported does not have a cause of action for damages against the owner or operator for injury, death or loss in case of accident unless the accident was caused by the gross negligence or wilful and wanton misconduct of the owner or operator of the motor vehicle and unless the gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought."

Is this statutory bar limited to the liability of the parties *qua* owner "and *qua* driver? The answer appears to be "yes" in Ontario¹ and Saskatchewan². However, those provinces' guest - passenger sections are worded differently from Newfoundland's. Saskatchewan and Ontario legislation states that the owner or driver is "not liable" for loss or damage to gratuitous passengers. Newfoundland's section 220 provides that the gratuitous passenger "does not have a cause of action" against the owner or driver.³ Therefore can a gratuitous passenger (eg. a spouse) in Newfoundland sue the driver or owner not *qua* driver or *qua* owner, but through some other legal relationship such as master-servant or contract?

The Study has not found any reported Newfoundland cases on this point. However, it is submitted that the law in Newfoundland probably is that the statutory bar in section 220 of The Highway Traffic Act, 1962 of Newfoundland is restricted to the relations *qua* owner or *qua* operator. This conclusion is based upon the ancient rule of statutory construction which states that any statute which purports to deprive a person of his Common Law rights should be construed strictly. Section 220 purports to deprive a gratuitous passenger of his Common Law right of action against the driver for ordinary negligence. Persuasive support for this view may be found in British Columbia, whose statute is similar to that of Newfoundland.⁵

In conclusion, the position of the injured spouse in a motor vehicle accident action may be summarized as follows: ⁶

¹Co-operators Insurance Association v. Kearney (1965), 48 D.L.R. (2d) 1 (S.C.C.).

²Holowenko v. Kosloski (1966), 55 W.W.R. 602 (Sask. Q.B.).

³The Highway Traffic Act, 1962, Stats. Nfld. 1962, No. 82, s. 220.

⁴Holowenko v. Kosloski (1966), 55 W.W.R. 602,603 (Sask. Q.B.).

⁴Holland and Holland v. Hallonquist (1967), 59 W.W.R. 41 (B.C.C.A.) 42-43; Mathieson v.

⁵Thompson et al. (1951-52), 4 W.W.R. (N.S.) 600 (B.C. Sup. Ct.). See also: Causey et al. v. McCarron et al. (1968), 63 W.W.R. 680 (B.C.C.A.).

⁶The following summary is taken from the Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969) at pp. 45-46. Newfoundland statutory references have been substituted for Ontario references.

- (1) Actions by a passenger spouse are not barred by section 220 (1) if the accident occurred off the highway or if the spouse was not a passenger. Such action *are* barred however, by section 14 of The Married Women's Property Act of Newfoundland.
- (2) An injured spouse who is a passenger cannot, even in the case of gross negligence, sue the negligent spouse if such a spouse is the owner *and* driver of the motor vehicle. Such actions are barred by section 14 of The Married Women's Property Act of Newfoundland.
- (3) If section 219 of The Highway Traffic Act of Newfoundland can be regarded as creating or imposing either a special liability as *owner* or a right of action on the statute rather than in tort, the injured spouse might be able to sue the other spouse.
- (4) If the negligent spouse is not the owner but is the driver of the motor vehicle, then section 220 (1) would not bar a suit against the owner who incurred liability under section 219. Furthermore, if the injured spouse and negligent spouse are in common employment, the injured spouse can sue the owner if there was gross negligence and perhaps even if there was only ordinary negligence.
- (5) If the negligent spouse alone is the servant of the owner of the motor vehicle, the law is still unsettled as to whether the injured spouse can sue the owner on the basis of vicarious liability.

INSURANCE

Under The Automobile Insurance Act, 1968¹ an insurer is not liable for bodily injury or death to the insured's spouse. Section 16 of that Act states (in part):

"16. The insurer is not liable under a contract evidenced by a motor vehicle liability policy for any liability,

•

(b) resulting from bodily injury to or the death of

(i) the daughter, son, wife or husband of any person insured by the contract while being carried in or upon entering or getting on to or alighting from the automobile, . . .".

¹ Stats. Nfld. 1968, No. 36 (proclaimed January 1, 1969).

SECTION 2

POLICY CONSIDERATIONS

The prohibition of suits between husband and wife has been described as "the outstanding anomaly in the law".¹ The major reason for the existence of interspousal immunity was the "unity" concept of the marital relationship. The passage of Married Women's Property legislation recognized the wife as a separate legal entity for certain purposes. Furthermore, the social considerations which gave rise to the "unity" concept are no longer valid.

The argument that recognition of interspousal tort actions would disrupt or destroy the tranquility of the family unit is hardly valid. In most cases the real defendant would be an insurance company, the other spouse being the defendant in name only. Also, if the parties are already separated it is incongruous to suggest that an action in tort would disrupt domestic peace. Actions between spouses are available for the protection of property, and the criminal law recognizes no immunity based upon the marital relationship. If one spouse is able to lay criminal charges of assault against the other, why should a civil action arising from the same facts be prohibited? The legal action will be evidence, rather than the effective cause, of marital discord.

Another objection is that the recognition of husband-wife tort actions would encourage collusive and fraudulent claims. This is a serious consideration but, again, the possibility of collusion or fraud should not preclude the existence of an action. The courts should be able to detect fabricated claims in the same manner as they do in other areas of litigation.

The availability of other remedies such as divorce or criminal proceedings is not relevant. The basic objective of tort law is to compensate for loss or damage incurred and it is obvious that the existence of an action is desirable particularly in motor vehicle accident cases.²

CONCLUSIONS

The Study is of the opinion that the present state of the law in this area is unsatisfactory.

The question remains as to the extent of any reforms. In some jurisdictions the right of the husband to sue his wife for the protection of his pro-

¹ Williams, Glanville, "Some Reforms in The Law of Tort", 24 Mod. L. Rev. 101.

² For an examination of the position in the United States see Herskowitz, J.L., "Tort Liability Between Husband and Wife: The Interspousal Immunity Doctrine" (1966-67), 21 U. of Miami L. Rev. 423.

erty has been recognized, thus balancing the legal position of the spouses under Married Women's Property legislation.¹ Other jurisdictions have permitted spouses to sue one another in tort but limitations have been placed upon such actions, for example, by permitting only "separated" spouses the right of action² or limiting recovery to loss or damage arising from the operation of motor vehicles.³

In the United Kingdom, The Law Reform Commission⁴ recommended, and Parliament later passed,⁵ legislation allowing tort actions between spouses but permitting the court to intervene to stay proceedings if the suit appeared to be frivolous or if the matter could be resolved by way of an application under the Married Women's Property legislation. The reason for adopting such an approach was to retain some independent control over interspousal disputes, apparently with a view to assisting in reconciliation. According to the Ontario Report⁶ the number of actions stayed under these provisions is very low. However, it may well be that this solution would be acceptable as a compromise in Newfoundland.

The alternative is to recognize an unrestricted right of action between spouses. Such right of action, which has been implemented in some jurisdictions⁷ and is under consideration in others,⁸ will be recommended by the Study.

The Study will also recommend that steps be taken to impose liability upon tortfeasors by way of contribution to, or indemnification of, other tortfeasors.

The Study is of the opinion that if the interspousal immunity doctrine is abolished it will be necessary to repeal the provisions of The Automobile Insurance Act, 1968 which exempts insurers from liability to passengers who are close relatives of the insured. It appears obvious that in most cases the action will be taken against an insurance company and if the changes in the law are to be effective, compensation should not be denied.

¹See, for example, R.S.M. 1970, c. M-70, s. 7.

²Ibid.

³See Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), at 4p. 54.

⁴Law Reform Commission, 9th Report, Cmd. 1268, 1961.

⁵Law Reform (Husband & Wife) Act, 1962, Stats. U.K. 1962, c. 48, s. 1.

⁶Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), at p. 57. For example, the State of Victoria, and New York State.

⁸The unrestricted right of action was recommended by the Ontario Law Reform Commission, Report on Family Law, Part I: Torts (1969), at p. 59.

RECOMMENDATIONS

CHAPTER VII

The Family Law Study recommends:

A. ACTIONS FOR LOSS OF SERVICES, SOCIETY AND SUPPORT

SECTION 1

The enactment of legislation to abolish

- (a) The Common Law action of criminal conversation;
- (b) The Common Law actions of enticement and harbouring, both in cases of husband and wife and parent and child; and
- (c) The Common Law action of seduction. (Pages 302-303).

SECTION 2: ACTIONS FOR LOSS OF CONSORTIUM THROUGH INJURY TO SPOUSE

- 2. The abolition of the husband's Common Law action for loss of his wife's consortium; and
- 3. The abolition of the parent's Common Law action for loss of the services of his child. (Pages 307-308).

SECTION 3: PROPOSALS FOR REFORM

- 4. That legislation be introduced to provide for the creation of a right of action to enable a person, who has suffered pecuniary loss as a result of an injury to another upon whom the claimant was dependant at the time of the injury, to recover such loss against the person whose wrongful conduct caused such injury and loss;
- 5. That damages recoverable be confined to pecuniary loss as presently awarded under The Fatal Accidents Act;
- 6. That the procedure for bringing such action be similar to that under The Fatal Accidents Act; and
- 7. That the effect of contributory negligence on the part of the injured person

is to reduce proportionately the claim under the new legislation. (Pages 309-312).

B. CHILDREN AND THE LAW OF TORTS

SECTION 1: LIABILITY FOR THE ACTS OF CHILDREN

(No recommendations)

SECTION 2: LEGAL ACTIONS BY AND AGAINST CHILDREN

(No recommendations)

SECTION 3: PRE-NATAL INJURIES

(No recommendations)

SECTION 4: AN ACTION FOR WRONGFUL LIFE ,

(No recommendations)

SECTION 5: ACTIONS IN TORT BETWEEN PARENT AND CHILD

8. That legislation be enacted to confirm the existence of the rights of parent and child to sue one another for damages or injuries resulting from the commission of a tort. (Pages 330-331).

C. TORTS BETWEEN HUSBAND AND WIFE

SECTION 1: SUMMARY OF LAW OF TORTS BETWEEN SPOUSES

(No recommendations)

SECTION 2: POLICY CONSIDERATIONS

9. That an unrestricted right of action against one another be available to husband and wife;
10. That The Contributory Negligence Act be amended to provide that a tortfeasor husband will be liable by way of contribution or indemnification to other tortfeasors; and
11. That The Automobile Insurance Act, 1968 be amended to prohibit insurers from exempting themselves from liability to passengers on the basis of their relationship to the insured. (Pages 339-340).

CHAPTER 'VIII

FAMILY COURTS

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INTRODUCTION

Family Law is the law that governs relations between members of the same family. It includes such varied problems as marriage and divorce, adoption and custody, and questions of illegitimacy, delinquency, neglect, dependency and the economic problems which go hand in hand with family disruption.

The bulk of the law relating to the family is outlined in provincial statutes. The British North America Act, 1867¹, section 92, subsection 13, 'Property and Civil Rights' places jurisdiction in those matters in the province. The subjects of "The Solemnization of Marriage in the Province" and "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedures in Civil Matters in those Courts" are also within provincial jurisdiction by virtue of subsections 12 and 14 of section 92 of The British North America Act, 1867.

¹ Stats. U.K. 1867, c. 3.

The federal Parliament has exclusive power, however, to deal with "Marriage and Divorce" by virtue of section 91, subsection 26 of The British North America Act, 1867. Section 101 of that Act gives the Parliament of Canada the power " . notwithstanding anything in this Act, from time to time (to) provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the Laws of Canada."

There are some aspects of family law which are within the ambit of criminal law, a subject completely under federal jurisdiction by virtue of subsection 27 of section 91 of The British North America Act, 1867. These include assault between members of the family, threats, failure to provide the necessities of life and habitual drunkenness in the home.¹

Criminal Code, R.S.C. 1970. c. C-34, ss. 197, 200 (non-support); 245 (common assault), 168, 171 (causing disturbance; endangering child's morality); 745 (apprehended injury or damage).

A. THE PROBLEM

It is obvious from an examination of Newfoundland statutes that jurisdiction in family law in the province is divided among Family, Magistrate's, District and Supreme Courts. The jurisdiction over family matters and children in trouble is so fragmented that people are shunted from court to court with their problems. Different aspects of one family problem may be adjudicated in different courts. For example, there could be support proceedings in a Family Court and subsequent divorce proceedings in the Supreme Court - two aspects of the same problem involving two different courts. As a result, it is impossible for the most well-meaning judge to make decisions based on the welfare of the whole family.

Another consideration is that it would be more economical for the family - in terms of time, effort and legal costs - to have legal difficulties handled in a single court. This proposition is so obvious as not to need labouring. The only thing that is not obvious, especially in large communities, is the fact that it is common for a single family to have a number of problems at one time and have them handled contemporaneously in a number of different courts. A single court for family problems would therefore avoid unnecessary multiplicity of litigation.

The late Roscoe Pound, Dean of Harvard's Faculty of Law described the treatment of family problems in the United States as follows:

"It has been pointed out more than once of late that a juvenile Court passing on delinquent children; a Court of divorce jurisdiction entertaining a suit for divorce, alimony, and custody of children; a Court of common-law jurisdiction entertaining an action for necessities furnished to an abandoned wife by a grocer; and a criminal Court or domestic relations Court in prosecution for desertion of a wife and child - that all of these Courts might be dealing piecemeal at the same time with the difficulties of the same family. Indeed, one might add an action for alienation of affection of the wife, actions about receipt of a child's earnings, habeas corpus proceedings to try the immediate custody of the child, a proceeding in a Juvenile Court for contributing to delinquency of a child, and another in a Juvenile Court to determine what to do about certain specific delinquencies of the child. It is time to put an end to the waste of time, energy, money and the interests of litigants in a system, or rather lack of system, in which as many as eight separate and unrelated proceedings may be trying unsystematically, and frequently at cross purposes to adjust the relations and order the conduct of a family which has ceased to function as such and is bringing up or

threatens to bring up delinquent instead of upright .children."¹

Such extensive multiplicity may not occur with the same frequency in Newfoundland as in the United States but in any case the possibility is there.

Another point meriting consideration is the fact that family problems, by their very nature, must be handled in a manner which differs from that used in other types of litigation, and accordingly a special family law court with appropriately trained staff has considerable merit.

Quoted in "A Comprehensive Family Court", MacDonald, James C., (1967), 10 Can. B.J. 323, at pp. 325-326.

B. FAMILY COURT - IDEALLY

Theoretically, a family court has comprehensive and integrated jurisdiction over most or all family problems, employs a professional staff of psychiatrists, psychologists, case workers, marriage counsellors, probation officers and lawyers, and is committed to the philosophy that its function is to provide whatever action is in the best interests of the family and society. One should note that the court's staff can do what the judge and lawyer cannot do; they can go into the home and observe with a trained eye the interpersonal relationship between the child and other members of the family and can give their observations and expert opinions to the court with complete neutrality.

The object of the court is to conserve, not disserve, family life; to be constructive, not destructive of marriage; to be helpful, not harmful, to the individual partners and their children; to be preventive rather than punitive in their attitude toward marriage and family failure. It is sociologically oriented, non-punitive, where possible, and attempts to focus on the overall family problem. For example, if a boy is arrested for a delinquency, correctional officers recognize that if the juvenile is to be successfully treated, it may be necessary to work with his family as well. Delinquency, marital difficulties, support problems, and the like are inter-related and may be facets of a larger family problem.

One difficulty in the judicial treatment of family problems is that marriage is a special kind of contract, giving rise to privileges and responsibilities quite different from the obligations and rights created by commercial contracts. A legal procedure designed to deal with the breach of commercially oriented agreements is not adequate to cope with the breakdown of a marriage or to help the spouses readjust following a divorce. Marriage creates a status. Dissolution of a status calls for a procedure different from that appropriate to recover damages for breach of a commercial contract. The former affects both the social and the economic order; the latter affects only the economic order.

C. FAMILY COURT PROCEDURES

Litigation involving family difficulties presents a social as well as a legal problem. A purely adversary approach to such matters is often not in the public interest and may be detrimental to the parties concerned, and in any event, traditionally deals only with the symptoms, and not with the basic causes, of family disharmony. Such an approach multiplies the misunderstandings between marriage partners and widens the gap. Routine legal and judicial procedures promote ill will and grind down self-respect. Instead of being wholly contentious, the proceeding in the family court should also be investigatory - directed to determining the best disposition or adjustment of the family situation as a whole. A preventive or therapeutic approach rather than a recriminatory, fault-finding technique is socially desirable.

The court procedure should be patterned after that in the Court of Equity. Flexibility should be a feature and the type of procedure employed should depend primarily upon the type of case and its disposition. For example, rules of evidence should be rigidly adhered to in contested divorce or contested juvenile delinquency cases. In any event parties concerned and their counsel should have an opportunity to see in advance the reports of court personnel so that there may be a refutation of any errors or inaccuracies. There are two important values at stake here. On the one hand, a family court, to be effective, needs the information made available by reports and investigations, and on the other hand, to ensure fairness and to elicit facts, demands that such investigations and reports be subject to review, and if necessary, correction.

While in an investigatory procedure, there may be a need for some relaxation in the rules of evidence, it should be noted that the family court is still a judicial tribunal and hearsay evidence should be as foreign to it as to any court. The fact that family courts are geared to a system of individualized justice should not be used as a substitute for poor practice and procedures. There should be a recognized right to counsel for all persons coming before the family court. A lawyer attached to the court may ensure observance of this right.

Because of the nature of proceedings in family court, only persons immediately concerned with the case - parents, close relatives, social service officers, counsel and witnesses - should be allowed to attend a hearing. The judge should be given discretion to exclude visitors or witnesses for such periods as he deems to be advisable. Also, records involving families should be kept as confidential as possible.

Qualified court personnel is of the utmost importance, and care should be used particularly in the appointment of judges. It would be helpful to have judges who are trained in the behavioural sciences - or at least to have judges who have some bent toward family problems.

Because of the nature of matters coming before the family court, some thought should be given to removing the traditional husband-wife privilege - and making this privilege one of husbands and wives as witnesses rather than as parties.

D. PHILOSOPHY OF A FAMILY COURT- RECOGNITION OF BASIC RIGHTS

Proceedings on behalf of families in family court are usually non-criminal in nature (a proceeding under section 745¹ of the Criminal Code¹ being one of several exceptions) and the court must be permitted to operate with a degree of flexibility consistent with the protection of the rights of individuals coming before it. Failure to permit this would negate the basic principles underlying the philosophy of these courts. In proceedings on behalf of children, basic rights of

both parents and child 1rP :/170/vP^d Th^o ri^{al}ly of parent to care for their children and to exercise their discretion in meeting the needs of their children are basic to our society. Equally basic are the rights of children to maintain their personal liberty, free from other than parental or normal community restraint, to live with their parents, and to have someone legally responsible for protecting their interests. The behavioural sciences, in emphasizing the importance to a child of his own parents, have further confirmed what tradition, religion and common sense have long accepted as true.

These rights of both the child and his parents are accompanied by corresponding responsibilities enforceable by law. The parents must send their child to school, for example, and the child must go. Both are limited in relation to the amount and kind of work the child may be allowed to do. Both must obey certain additional requirements - for example, public health laws and regulations designed for the protection of the welfare of children and of society as a whole.

But in most of their decisions with respect to their child, parents, as long as they meet legal standards of care, are free to follow their own judgment. Their rights are protected by law as are the rights of their child.

Nevertheless, there are situations in which society has an obligation to act for the protection of the child and society. Parents may have failed to provide the child with the care, protection, or training that the law requires them to provide. There may, in fact, be no one available to fulfill these needs of the child. The child may have rebelled against the authority of his parents to the point that he is a danger to society or to himself, or the child may have committed an act which, if performed by an adult, would be a crime.

In taking action in such a case, society, in order to see that the child receives necessary care, protection or help, may have to limit the parents' rights. Similarly, the child may have his freedom restricted in his own, and in society's

1 R.S.C. 1970, c. C-34.

interest. It is a principle of our society that when such rights are limited this must be according to the laws of the province and the Parliament of Canada, and only to the extent and for the period necessary to ensure protection of the public and the welfare of the child. When the objective is attained, such rights are reestablished.

Thus, while a court must have reasonable discretion to act in the best interests of a child, and must have the facilities necessary for study, care, and treatment, the court must act within certain principles if the concept of individualized justice is to be achieved. These principles include:

1. The conditions under which the state is empowered to intervene in the upbringing of a child should be specifically and clearly outlined in the statutes.. Whenever the state seeks to intervene it should be required to show the necessary statutory provisions exist.
2. Both the child and his parents are entitled to know the basis on which the state seeks to intervene - and should be given an opportunity for rebuttal.
3. The statutes should limit the court as to the type of procedure employed in a particular case. In other words, the court should not have an unfettered discretion.
4. Certain procedural safeguards must be established to protect the rights of parents and children. Legal counsel should be made available for all parties.

The observance of the above principles will strengthen individualized justice. Of course, it is recognized that the real effectiveness of a family court will not depend alone on written standards of procedures or facilities available but also upon the wisdom, understanding, fairness and devotion of every person concerned with the care and treatment of families. Sound legislation by itself cannot create a good system; adequate facilities and personnel are necessary. A good system cannot exist in a community whose spirit is opposed or indifferent to the accomplishment of its purpose.

E. FAMILY COURTS IN CANADA

The family courts in Canada are family courts in only a limited sense. However, within their jurisdiction they do exercise a significant socio-legal function. They are structured to protect and safeguard families by providing not only legal remedies but other types of help that may be required. The family court judge has an extended responsibility.

The work of the family court in Canada varies from province to province. In most provinces the family court has jurisdiction over legislation dealing with the maintenance of deserted wives and children, and legislation dealing with family disputes. In several of the provinces the admission of children to training schools and school attendance come under the family courts' jurisdiction. Appendix K shows the jurisdiction of family courts across Canada.¹ It may be of some value in studying our Family Court Act. Appendix J contains sections from Family Court Acts across Canada which are worthwhile considering if the provincial legislature plans amendments to Newfoundland's Family Court Act.² However, there is no family court in Canada which has comprehensive jurisdiction in the field of family law.

As well, there are few, if any, family courts in Canada which have adequate facilities for the adjudication and treatment of family problems. The Metropolitan Toronto Family Court is one of the best family courts in Canada. Its facilities include: (1) six Juvenile and Family Courts; (2) a Legal Aid Office; (3) an Intake Office; (4) Counselling Services. These facilities should be considered when looking to a new structure for the Newfoundland family court set-up.

¹ *Infra*, pp. 584-587

² *Infra*, pp. 581-583

F. FAMILY COURT IN NEWFOUNDLAND

The Family Court Act¹ provides for the establishment of a Family Court, or courts, by the Lieutenant-Governor in Council, who may define the territorial limits of the jurisdiction of such court or courts.

There is presently only one Family Court as such in Newfoundland and this court is situated in St. John's. Territorial limits of the court have not been defined by the Lieutenant-Governor in Council, so presumably, it has jurisdiction throughout the province. Stipendiary Magistrates have jurisdiction in family matters in the areas of the province which are outside St. John's.

(1) THE ACT

The portions of family law which are within the Family Court jurisdiction are cases under The Welfare of Children Act², cases under The School Attendance Act, 1962³, cases involving offences committed by one spouse against another or by a parent or guardian against a child, cases involving criminal offences relating to family life and such other cases as may be assigned to it by the Lieutenant-Governor in Council.

The Lieutenant-Governor in Council may give a stipendiary magistrate who shall hold office during pleasure, the power to preside over these courts.⁴ The Lieutenant-Governor in Council may give a stipendiary magistrate the power to preside over a family court if the appointed Family Court judge is ill or absent.⁵ The salary of the judges of the Family Court shall be fixed by the Lieutenant-Governor in Council.⁶ The judge of the Family Court shall also strive for the protection of children and for good relations between consorts and shall advise all persons who seek his good offices on the rehabilitation of juvenile delinquents, the protection of children who are exposed to moral and physical dangers, and shall collaborate in improving the lot of unhappy and neglected children. He shall act as moderator when requested in a dispute between consorts or between parents and children.⁷

The Lieutenant-Governor in Council may appoint a clerk and as many probationary officers as he deems necessary for any Family Court. The clerk is the custodian of the records and shall draw up minutes of the proceedings of the

¹ R.S.N. 1952, c. 118.

² R.S.N. 1952, c. 60.

³ Stats. Nfld. 1962, No. 6.

⁴ R.S.N. 1952, c. 118, s. 3.

⁵ Ibid., s. 4.

⁶ Ibid., s. 5.

⁷ Ibid., s. 7.

court, When no judge is present, the clerk may perform any procedure of an official character, but cannot render any judgment or pronounce sentence. When there is no clerk, and at present this is the case everywhere in the province except St. John's, the judge may perform the duties and functions of the clerk. Every probation officer shall have the powers of a constable.¹ Constables and peace officers are ex-officio constables and peace officers of the Family Court.² The remuneration, salaries and other expenses incurred in the carrying out of the Act shall be paid out of the Consolidated Revenue Fund.³ The judge of the Family Court has jurisdiction in the matter of the adoption of children. The judge of the Family Court does not have jurisdiction to determine questions of custody of and access to children. Originally, the judge of the Family Court had jurisdiction and used to go on circuit to adjudicate in matters of custody. This jurisdiction was removed in 1960⁴ because of the lack, at that time of a specially trained Family Court judge; a need which has since been filled. The Family Court has jurisdiction to decide whether or not a child should be made a ward of the Director of Child Welfare. So in this sense, there is a limited jurisdiction in custody.

All Family Court trials may be held in private and the judge may exclude all persons other than counsel and witnesses at his discretion. Family courts and the judges thereof have power to administer oaths, compel the attendance of witnesses and to punish for contempt.⁵ Trials of juvenile offenders are to be in accordance with Part II of The Welfare of Children Act⁶ in a Family Court which has all the powers of a juvenile court. A Family Court judge has all the powers granted to a court of summary jurisdiction under The Summary Jurisdiction Act.⁷ The Family Court judge may enforce judgments, orders or convictions given, made or recorded before the enactment of The Family Courts Act, by a judge of a juvenile court or a court of summary jurisdiction within section 6⁸.

(2) FACILITIES AND STAFF

The Family Court in St. John's has a clerk who does administrative work. His duties have been outlined above. The staff of the Court consists of a judge, a clerk and some clerical help. The Court has no intake service, counselling service, or legal aid service. It has no professional social workers attached to it.

R.S.N. 1952, c. 118, s. 8.

Ibid., s. 9. Ibid.,

s. 10.

2 Stats. Nfld. 1960, No. 5, s. 2, repealing R.S.N. 1952, c. 118, s. 12.

3 R.S.N. 1952, c. 118, s. 13.

4 Ibid., s. 14.

68 Ibid.

Ibid., s. 15.

The Court has two juvenile probation officers from the Department of Welfare. These officers handle about one hundred and thirty juveniles each, though ideally, the work load for probation officers would be about forty juveniles. There are no probation officers for adults. There are no detention facilities attached to the court. The province has only eighty beds available for the detention of juveniles after disposition. These beds are all located on the Avalon Peninsula. This is very inadequate. The minimum which should be available for the province is one hundred and fifty, and these should not be centered in one area.

The Family Court in St. John's can obtain the services of psychiatrists, social workers and psychologists who are working in the city. Unfortunately these professional people are located for the most part in St. John's and these services are not available throughout the province. Corner Brook and Grand Falls are two areas which would probably be able to attract professional people and there are, in fact, professionals in the various behavioural sciences in these areas.

(³) OBVIOUS

NEEDS

(a) The Court Itself

(i) There ought to be specially trained judges in family law throughout the province of Newfoundland. Family courts should be available to people throughout Newfoundland as well as to those in St. John's. Some thought should be given to establishing family courts in Corner Brook, Grand Falls and possibly Labrador.

(ii) With the appointment of specialist judges (for example, judges with legal training and knowledge of, or training in, the behavioural sciences) the jurisdiction of the Family Court should be broadened to include, ideally, all aspects of family law. It is noted that cases are set down to be heard more quickly in Family Court than in Supreme Court, and the speedy disposition of family law cases is often extremely important.

(iii) If we recognize the principle that every person has a right to a fair trial, we must recognize that each person has the right to legal counsel. This right has been written into the Canadian Bill of Rights.¹ In practice in Newfoundland, a person is only represented by legal counsel in the Family Court at St. John's if he can afford to pay for it.

The Legal Aid Committee of the Newfoundland Law Society, in outlining cases which will be taken by the Society, states:

1 R.S.C. 1970, App. III.

"Where financial eligibility is established any civil matter will be undertaken *except*:

(1) Divorce and matrimonial causes including judicial separation, nullity, alimony actions, maintenance orders, alienation of affections, unless the applicant has been referred in writing by a qualified social worker, who must recommend such legal aid for the benefit of infant children, or the applicant has obtained a letter of recommendation from a qualified medical practitioner indicating that the health of the applicant or his or her children may be endangered by the continuing matrimonial problems.

(10) Family Court matters."

(b) The Court's Necessary Facilities

(i) The Family Court should have an intake service. The function of such a service is to screen the people who are coming to the Family Court. The service is diagnostic. It decides, for example, whether a court hearing is necessary in a particular case or whether some form of counselling or other treatment is necessary, and it directs the person to the appropriate agency or person. An intake service would vastly increase the efficiency of the Court by avoiding unnecessary litigation. This service would aid a Family Court to achieve its functions of helping families and protecting the community. The decisions made at intake affect individual and community rights - the right of the community to be protected, the right of the child and family to personal freedom and privacy, and at the same time, the right of the child and family to receive the services of the State for care, protection and treatment.

(ii) There is a great need for probation officers throughout the province. These officers are needed for both adult and juvenile probation.

(iii) There is a great need for adequate detention facilities - particularly for juveniles. This need is obvious in St. John's and even more so throughout the rest of the province.

(iv) The Court needs the services of professionally trained people including psychiatrists, social workers and counsellors.

1 *Italics added.*

It seems that the Newfoundland Law Society does not provide legal aid in Family Court proceedings. One should keep in mind that unlike lawyers in some provinces, lawyers in Newfoundland provide legal aid, in the classes of matters determined by the Legal Aid Committee of the Law Society, without remuneration. If legal rights are to be fully protected, some thought should be given to obtaining the services of lawyers by either

(i) having a lawyer available to family court as a law guardian, or

having society pay lawyers to represent litigants in Family Court through the use of public funds.

G. CONCLUSIONS

The present Family Court system is inadequate to meet the needs of the people in Newfoundland. Jurisdiction in matters of family law is shared by three courts, and as a result it is impossible for any single judge to make a decision based on the welfare of the whole family.

At the present time the bulk of family law cases which reach court are handled in magistrates' courts. The magistrates for the most part are trained in neither law nor the behavioural sciences. Many of them may be sociologically oriented, but are not trained. The judge of the Family Court situated in St. John's is a lawyer and has a bent towards the behavioural sciences. It may be safely concluded that the present magistrates' courts are not suited to adaptation to the Family Court system outlined here. Also there are constitutional difficulties in Canada in giving provincially-appointed judges the necessary jurisdiction.

The only Family Court, as such, which we have in Newfoundland is situated in St. John's. There is, therefore, an inconsistency in the administration of justice throughout the province. Also, the Family Court in St. John's is inadequately staffed, so that it is very difficult to achieve the purpose of a family court.

H. THE BEST COURT SYSTEM TO ACHIEVE THE IDEALS OF FAMILY COURT

There is a great need to upgrade and change the Family Courts in Newfoundland. Whichever system is adopted it is extremely important that the Family Court be properly staffed with trained judges and with adequate numbers of personnel, trained in the behavioural sciences. Every effort should be made towards the eventual achievement of a single, integrated court with comprehensive jurisdiction in matters of family law.

Ideally, the court to handle family law problems would be the Supreme Court of Newfoundland. The best system would be to appoint specialist judges to preside in a Family Court Division of the Supreme Court. The judges of the Family Court Division of the Supreme Court would be located permanently in other areas of the province as well as in St. John's. All family law matters could then be placed within the Supreme Court and there would be no constitutional difficulty.

If it is considered impracticable to have the Supreme Court hear all family law matters then an alternative could be considered. The District Courts could be given complete jurisdiction in family law matters and the Family Court could be a division of the District Courts. The judges of the District Courts are all lawyers and they are situated throughout the province. For these reasons this court, with a modest addition to its numbers, may be the most appropriate to deal with family law. Because the District Court judges are federally appointed it may be constitutionally possible to give these judges jurisdiction in divorce by making them judges of the Supreme Court for purposes of divorce proceedings. If this is found to be impracticable, consideration could be given to a reference system under which the Supreme Court would decide the question of divorce and refer matters of corollary relief to a Family Court Division of the District Court.

RECOMMENDATIONS

CHAPTER VIII

The Family Law Study recommends:

GENERAL

1. The Family Court system in Newfoundland should be upgraded and modified. The jurisdiction of the court should be widened to include all aspects of family law. (Pages 355,359).
2. Family Courts should be established in other areas of Newfoundland besides St. John's, possibly including Grand Falls, Corner Brook, Grand Bank, and at some point in Labrador. (Page 355).
3. A committee including judges of the Supreme Court may be asked for its recommendations as to which of our court systems is most adaptable to a new Family Court. (Page 359).
4. All judges of the Family Court should be lawyers with additional training in the behavioural sciences if at all possible. (Page 355).
5. Family Court judges should be judges in matters of family law only - and should not have the jurisdiction of magistrates. (Page 355).
6. All statutes dealing with family law should be consolidated into a single Family Law Code.
7. The Family Courts should have available to them auxiliary services for case study and counselling for people coming to the Court. (Page 352).
8. The Family Court Act should be amended to include specific references to points in the legislation of other provinces contained in Appendix J. (Page 352).

SPECIFIC - FACILITIES

9. Family Courts must be equipped with an intake service. Parties should have a diagnostic appraisal before a court appearance. (Pages 352, 355, 356).
10. Proper detention facilities should be provided for each Family Court. (Pages 355,356).
11. Probation officers for adults and children must be available to each Family Court. (Page 356).

12. Psychiatrists, psychologists and social workers should be available to each Court. There should be facilities for psychological testing and psychiatric treatment, an alcoholism' clinic, marriage counselling and child therapy workers for children showing anti-social behaviour because of the conflict of their parents. (Page 356).

SPECIFIC - PROCEDURES

13. Every person appearing in Family Court should be entitled to legal counsel. Some thought should be given to the idea of making lawyers available to Family Court. (Pages 348, 351, 355).
14. There should be a right of appeal to the Supreme Court from adjudications in the Family Court.
15. There should be a ban against publication of Family Court matters, where the Court considers it advisable. (Page 348).
16. The records of the Family Court should be as confidential as possible. Records should be kept of every case in Family Court. (Page 348).
17. Hearings in the Family Court should be private. The judge should have discretion in permitting people to attend hearings. (Page 348).
18. The procedure should be investigatory rather than adversary. There should be a certain flexibility in Court procedures. While there may be need for some relaxation in the rules of evidence, it should be remembered that the Family Court is still a judicial tribunal and hearsay evidence should be as foreign to it as it is to any court. (Page 348).
19. The husband-wife privilege should be the privilege of witnesses and not of parties - and section 4 of the Newfoundland Evidence Act should be amended in this respect. (Page 349).
20. The judge should have as much information before him of the client's family and social background as possible before he imposes sentence - but not before trial. (Page 348).

PENAL PROVISIONS OF PROVINCIAL FAMILY LAW STATUTES

B Just Ours

This chapter of the Newfoundland Family Law Study does not attempt to consider all penal provisions of provincial statute law. Nor is the chapter concerned with all such provisions in Newfoundland's family law statutes. The chapter is intended, rather, to provide a useful compendium of penal provisions of the province's family law legislation of widespread and frequent application.

The principal Acts in this area of study include The Child Welfare Act, 1964, The Children of Unmarried Parents Act, 1964, The Adoption of Children Act, 1964, The Maintenance Act, The Solemnization of Marriages Act, The Registration (Vital Statistics) Act, and The Change of Name Act, and relevant aspects of all of these statutes are discussed in this chapter.

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tended spouses under the age of nineteen years, their parent's written consent to the marriage, and the obtaining by fraud or misrepresentation of a change of name.

Under the Terms of Union of Newfoundland with Canada in 1949, Part II of The Welfare of Children Act respecting "Juvenile Offenders" provides for the establishment of juvenile courts, the appointment of juvenile court judges and the treatment of young offenders, whereas such matters are provided for elsewhere in Canada in the federal Juvenile Delinquents Act.'

As the province of Newfoundland is awaiting the enactment of new, federal, young offenders legislation², before reviewing (and possibly repealing) its present juvenile delinquency provisions, Part II of The Welfare of Children Act is not considered in detail in this chapter though criminal responsibility of children generally is discussed.

¹
²R.S.C. 1970, c. J-3.

First reading was given, Nov. 16, 1970 in the House of Commons, Ottawa, to a federal Young Offenders Bill, which inter alia, would repeal the Juvenile Delinquents Act (Canada). However, the Bill was still before the Justice and Legal Affairs Committee when the Third Session of the Twenty-eighth Parliament was prorogued, and had not been reintroduced in the Fourth Session up to March 31, 1972.

A. CONSTITUTIONAL AUTHORITY

Section 91 (27) of The British North America Act, 1867¹ clearly reserves the authority to legislate exclusively in relation to the Criminal Law to the Parliament of Canada.

Under this authority the Parliament of Canada has enacted the Criminal Code², the Juvenile Delinquents Act³ and the penal provisions of various federal statutes.

The Juvenile Delinquents Act does not, however, apply to Newfoundland. Part II of The Welfare of Children Act⁴, which provides for the establishment of juvenile courts, was in effect in 1949 when Newfoundland became a part of Canada and, under the Terms of Union, this Act remained in force⁵.

The Legislature of Newfoundland, under the Terms of Union, accordingly, retains legislative jurisdiction in respect of juvenile offenders.

Moreover, section 92 (15) of The British North America Act, 1867 provides that provincial legislatures may exclusively make laws in relation to "the imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section."

Under the authority of this last-mentioned provision the Legislature of Newfoundland has enacted the various penal provisions of Newfoundland statutes relating to legal relationships and the family group.

Stats. U.K. 1867, c. 3.

¹ R.S.C. 1970, c. C-34

² R.S.C. 1970, c. J-3.

³ R.S.N. 1952, c. 60.

⁴ Stats. Can. 1949, c. 1, Schedule: Terms of Union of Newfoundland with Canada, term 18.

⁵

B. JUVENILE OFFENDERS

GENERAL

Since Newfoundland is awaiting the enactment of new federal juvenile delinquency legislation¹ before reviewing and possibly repealing Part II of The Welfare of Children Act respecting "Juvenile Offenders" no report on that Part is included in this chapter. However, the criminal responsibility of children generally and the burden of proof the Crown is required to discharge in penal proceedings against a child, are discussed.

THE CRIMINAL RESPONSIBILITY OF CHILDREN

The criminal responsibility of children, particularly between the ages of seven and fourteen, has been a matter of deep concern for juvenile courts since the enactment of the first legislation to provide for the private trial of juvenile offenders and for their detention, separate and apart from adult offenders, prior to sentence.

The concern arises primarily from the confusing definition of the mental state required of a child by various authorities and from the apparent uncertainty which still exists as to the burden of proof in charges against suspected juvenile offenders.

THE DOLI INCAPAX RULE

In Kenny's Outlines of Criminal Law², infants are divided into three classes:

those under eight years of age (the age of immunity was seven at Common Law),

- (ii) between eight and fourteen, and
- (iii) between fourteen and twenty-one .

At Common Law a child under the age of seven was conclusively presumed to be incapable of crime. The age of immunity has been raised in England

¹ First reading was given November 16, 1970 to a federal Young Offenders Bill in the House of Commons, Ottawa. A summary of the Bill's provisions respecting the maximum age of young offenders, presently described as juveniles, is contained in Appendix L. (18th ed., Turner), p. 73.

to ten¹. The Criminal Code sets the age of immunity at under seven years.² In The Child Welfare Act, 1964³ a "child" is stated to mean "an unmarried boy or girl actually or apparently under the age of sixteen years". But there is no provision in the Act specifying the age of immunity in Newfoundland for juvenile offenders insofar as juvenile delinquency is concerned.

A child from seven to fourteen is still presumed to be incapable of crime; but the presumption is rebuttable, not conclusive. In the case of adult offenders there is a presumption that a man intends the natural and probable consequences of his acts, but no such presumption arises in the case of a child. Some clearer proof of the mental state required of a child is necessary.

In describing this mental state Kenny⁴ uses such terms as "guilty mind", "wicked mind", "mischievous discretion". Hale⁵ stated that the question for judicial decision was whether "it appear(s) to the court and jury that he was *doli capax*⁶, and could discern between good and evil at the time of the offence committed . . ." Again Hale stated that "if it appear(s) by strong and pregnant evidence and circumstances that he had discretion to judge between good and evil" the presumption of *deli incapax* would be rebutted and criminal responsibility would attach to the acts of the child. Further, the test for the required mental state has been expressed in the following terms in the more recent English cases⁷: Did he know the act was wrong?

In Canada, the test has been expressed in the following terms in section 13 of the Criminal Code:

"13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong."

But is this wrongness referred to in the Criminal Code legal or moral or either? In one English case⁸, it was said that the child must know that the act was not merely wrong but "gravely wrong, seriously wrong". It is clear that the

Children and Young Persons Act 1963, Stats. U.K. 1963, c. 37, s. 16 (1)..

²R.S.C. 1970, c. C-34, s. 12.

³ Stats. Nfld. 1964, No. 45, s. 2 (a).

⁴ Kenny's Outlines of Criminal Law, 18th ed., p. 74.

⁵ 1 Pleas of the Crown 26.

⁶ "Doli capax": From the Latin meaning "having knowledge of right and wrong".

⁷ R. v. Owen (1830), 172 E.R. 685; R. v. Manley (1944), 1 Cox Cr. L. Cas. 104; R. v. Smith (1845), 9 J.P. 682.

⁸ R. v. Gorrie (1919), 83 J.P. 136.

required mental state would be present if the child knew that he was committing a legal wrong. But what of the *Gorrie* statement? Apparently in view of that statement the test is a moral one operating within a legal test.

As Glanville L. Williams says in his article on The Criminal Responsibility of Children ¹, "The test of knowledge of wrong is bound up with retributive punishment and the mystical theory of moral responsibility". While moral responsibility and retributive punishment are appropriate considerations as far as adult criminal responsibility is concerned, they do not apply generally to the disposition of cases involving juvenile offenders. While punishment may be the best way to make a particular child see that he must mend his ways it may be a singularly inappropriate disposition in another case. In that regard section 38 of the Juvenile Delinquents Act provides "that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."

It follows that, assuming that the above-mentioned provision fairly represents the guiding principle of present-day juvenile offender legislation, the knowledge or appreciation of wrong test is obsolete. As Williams states² "the test was designed to restrict the punishment of children." So obviously it is not appropriate to present-day juvenile court proceedings where the disposition of the case by punishment or other treatment is decided after conviction.

Williams suggests³ that "It would be a practicable rule, and one consistent with the policy of the new legislation, to say that juvenile court magistrates may find a child guilty although he is not shown to have known his conduct to be wrong, if the sole purpose is to impose reformatory treatment". Williams also criticizes the ruling in the *Gorrie* case as going beyond the previous authorities in requiring knowledge not merely of wrong, but of grave wrong.⁴

In the Report of the Department of Justice Committee on Juvenile Delinquency⁵ doubt is expressed that there is any real advantage in retaining the appreciation of wrong test, or as it is sometimes referred to, the *doli incapax* rule. The Committee was of the opinion that the basic objective of the rule could be accomplished more effectively through flexible disposition provisions⁶.

There may be an even more cogent argument for abandoning the *doli incapax* rule. In England in a case⁷ before the Queen's Bench Divisional Court,

⁴ Ibid.

⁵ Ibid.

⁶ *Juvenile Delinquency in Canada* (1965), p. 54.

⁷ Ibid.

R.v. Padwick, *The Times*, Apr. 24, 1959.

Lord Parker, C.J. stated that before the justices ruled in a case involving a boy of eight years of age charged with breaking and entering and stealing, they should hear evidence of the boy's home background, and all his circumstances. He asked this question: "In a rotten home, what is more likely than that a child is brought up without knowledge of right and wrong?"

Finally, at fourteen a juvenile offender is presumed to intend the natural and probable consequences of his acts and comes under full criminal responsibility. However, for such offenders, trial procedure¹ and punishment² provisions are usually somewhat modified. For example, provision is made in The Welfare of Children Act³ that imprisonment shall not be imposed on any child unless the child is actually or apparently of or over the age of fifteen years if the offence is indictable, and if the offence is a summary conviction offence a child shall not be sentenced to a term of imprisonment exceeding three months.

BURDEN OF PROOF

Before a child over seven years of age can be convicted the prosecution must prove beyond a reasonable doubt that the child was competent to know the nature and consequences of his conduct and to appreciate that it was wrong. If a magistrate interprets the rule strictly, unless the prosecution adduces evidence of the child's competency, there will be no case for the juvenile offender to answer. Such a judicial interpretation of the rule could lead to preliminary questioning of suspected juvenile offenders by police.⁴

Williams suggests⁵ that the answer might be to place an evidential burden on the juvenile offender even though the burden of proof (persuasive burden) remains on the prosecution. He argues that since the fact is peculiarly within the child's knowledge, it is reasonable that the evidential burden should **be on him. He** exemplifies what he means by an evidential burden. On a charge of receiving, where the prosecution shows that the accused was in possession of stolen goods recently after the theft, there is an evidential burden on the accused to disprove knowledge that the goods were stolen. On charges under a number of provisions of the Criminal Code, there is an evidentiary burden on the accused to rebut a presumption of intent.

1 See: Juvenile Delinquents Act, R.S.C. 1970, c.

J-3, ss. 8, 9.

2 Ibid., ss. 20, 25, 26.

3 R.S.C. 1970, c. 47, (4), (5), (6).

4 For discussion of special precautions to be taken by police officers in cautioning juvenile offenders, see: R.v. Yensen (1961), 130 Can.

5 /1954/ Crim. L.R. 493, 499. C.C. 353, and 5 Cr. L.Q. 459.

C. PENAL PROVISIONS,

CHILD WELFARE ACT

Section 43 of The Child Welfare Act, 1964¹ covers certain offences respecting a child which might be termed "interfering with wards."

A -comparison of this provision with the same provision in the Ontario Act² indicates several basic differences.

Firstly, in section 43 of the Newfoundland Act the ward in respect of whom interference is prohibited by this section is a child, whereas in the Ontario provision the words "a person under the age of eighteen years" are used. Since "child", under the Newfoundland Act, means an unmarried boy or girl actually or apparently under the age of sixteen years³ it is apparent that the protection of the Ontario provision is extended to wards for an additional two year period.

It is clearly desirable that the age limits in child protection legislation should be uniform throughout Canada. In that regard it is noted that "child" was once defined in Newfoundland child welfare legislation as an unmarried boy or girl actually or apparently under the age of seventeen years.⁴

The Report of the Department of Justice Committee on Juvenile Delinquency⁵ recommends that the juvenile age be set at seventeen. The fact that the teenager of today does not become an adult socially and economically as early as did his counterpart at the beginning of the century, is one of the arguments advanced in that report⁶ for raising the juvenile age from sixteen⁷ to seventeen, and the Study submits, also lends weight to an extension of child protection legislation to apply to all persons under seventeen years of age. There is a prolonged period of dependency because of the rise in the age at which children are permitted to leave school and because more teenagers continue their education beyond high school age to meet the increasing educational requirements for employment in industry or in commerce.

The Study will accordingly recommend that the definition of "child" in The Child Welfare Act, 1964 of Newfoundland be amended by substituting "seventeen" for "sixteen".

¹Stats. Nfld. 1964, No. 45.

²Stats. Ont. 1965, c. 14, s. 39.

³Stats. Nfld. 1964, No. 45, s. 2 (a), as amended by Stats. Nfld. 1968, No. 20, s. 2. The

⁴Welfare of Children Act, R.S.N. 1952, c. 60, s. 2(b), which was repealed with substitution by The Child Welfare Act, 1964, Stats. Nfld. 1964, No. 45, ss. 2(a), 55 (1). Juvenile

⁵Delinquency in Canada (1965), p. 59, para. 132.

⁶Ibid., p. 57, para. 127.

⁷For summary of legislation respecting the age of juveniles, see Appendix L.

Secondly, the Newfoundland section uses the words "induce", "attempt to induce", "detain" and "harbour". The Ontario provision uses similar words with one significant addition. In subsection (1) (c) of Section 39 of the Ontario Act a person is prohibited from visiting, writing to, telephoning to or otherwise interfering with a ward who is placed in a foster home or other place, or his foster parents, without the consent in writing of the children's aid society under whose supervision he is.

The Study considers this subsection would be a desirable addition to the Newfoundland section and will so recommend.

Finally, the penalty under the Newfoundland section is a fine of not more than \$100 or, in default of payment of the fine, to imprisonment for a period of not more than one month.

On the other hand, the Ontario section provides for a fine of not more than \$500 or to imprisonment for a period of not more than one year, or to both.

In these days of inflation and higher wages the penalty in the Ontario section seems a more realistic deterrent. The Study, accordingly, recommends a corresponding amendment to the Newfoundland section.

Under the Newfoundland Act a "neglected child" is a child who is abandoned or deserted by both parents, or if one is dead, by the survivor, or by his guardian¹. Moreover, if a judge finds that a child is a neglected child he has various courses of action open to him². However, there is no penal provision in respect of such abandonment or desertion.

On the other hand, the Ontario Act³ has a penal provision covering desertion of, or failure to protect, a child and for leaving a child under the age of ten years unattended⁴. Contravention of the provision covering desertion of, or failure to protect, a child renders a person having the care, custody, control or charge of a child liable to a fine of not more than \$500 or to imprisonment for a term of not more than one year or both. Further, contravention of subsection (2) covering the leaving of a child under the age of ten years unattended renders the responsible person liable to a fine of not more than \$100 and, for any subsequent offence, to a fine of not more than \$200 or imprisonment for a term of not more than one year.

¹The Child Welfare Act, 1964, Stats. Nfld. 1964, No. 45, s. 2(m).

²*Ibid.*, s. 15.

³The Child Welfare Act, 1965, Stats. Ont. 1965, c. 14.

⁴*Ibid.*, s. 40.

It is simply not enough to declare children, whose parents abandon, desert, fail to support, inflict unreasonable cruelty upon or ill-treat them or leave them unattended for an unreasonable length of time, to be neglected children and deal with them as provided by the statute. Such conduct deserves punishment. The Ontario section provides for such punishment. The Newfoundland Act should have a similar provision.

While section 34 of the Newfoundland Act and section 42 of the Ontario Act dealing with offences against children are somewhat similar in content and purpose, there are significant differences.

Section 34 (1) (b) of the Newfoundland Act would seem to prohibit a child under sixteen from selling newspapers for example) The Ontario provision only makes it an offence to cause or procure a child to be in a public place for the purpose of singing, playing or performing for profit or offering anything for sale between one o'clock in the afternoon of any day and six o'clock in the morning of the following day. The restricted period in this provision is understandable but the absolute prohibition in the Newfoundland provision is not justified.

Moreover, in the Newfoundland section the exception to the offence of performing in a public place for profit, applies only to entertainments conducted for charitable or educational purposes while the Ontario section excepts entertainments staged for commercial purposes. The Study considers the Newfoundland exception too narrow.

As far as the penalty is concerned, the maximum fine of \$200 should be retained but an alternative of a term of imprisonment of not more than six months, or both, should be added.

Section 37 of the Newfoundland Act makes it an offence for a person to sell, give to, or cause to come into the possession of a child tobacco, liquor, drugs and obscene material and carries a penalty, upon conviction, of not more than \$200 and in default of payment or in addition, imprisonment for not more than two months. The prohibition with respect to the giving or selling of tobacco to a child is justified since no other Newfoundland or federal statute contains such a prohibition. But does this section prohibit the making of a gift or sale of liquor, drugs and obscene material to a child? Ontario has a penal provision covering the supplying of tobacco in any form². Contravention of the provision renders a person liable to a fine of not

1 See, also: The Employment of Children Act, 1968, Stats. Nfld. 1968, No. 25, (not proclaimed).

2 The Minors' Protection Act, R.S.O. 1960, c. 243, s. 2 (1).

less than \$2 and not more than \$50. Obviously, if reference to liquor, drugs and obscene material was removed from the Newfoundland section the present penalty would be too severe.

Liquor, drugs and obscene material are adequately dealt with in other Newfoundland¹ and federal statutes².

The Study, therefore, will recommend the amendment of section 37 by the deletion of all reference to liquor, drugs and obscene material and by the provision of a new penalty appropriate to the offence dealing solely with tobacco under the amended section.

There are no comparable provisions in the Newfoundland Act to section 43 (1) and (2) of the Ontario Act dealing with the engaging of girls and boys in street trades or occupations. Their incorporation in section 39 of the Newfoundland Act will be recommended.

Further, the Ontario Act in *section 43 (3)* prohibits the loitering by a boy or girl under sixteen in a public place between ten p.m. and six a.m. and their being in any place of public resort or entertainment during those hours unless accompanied by a parent or an adult appointed by a parent. The less restrictive Newfoundland provision³ makes it an offence to allow 'unaccompanied children "apparently under the age of fifteen years" to be in certain places of public amusement after seven p.m.

It is also the opinion of the Study that the provision in subsection (4) of the Ontario section providing for a police constable to warn a boy or girl when he first finds them in contravention of section 43, would be a desirable addition to the Newfoundland section.

Finally, the penalty provided for under subsection 8 (b) of section 39 of the Newfoundland Act is a fine of not more than \$50 whereas under the offence subsection⁴ of the Ontario Act the maximum fine for a first offence is \$25 but for subsequent offences it is increased to a maximum of \$100. It is recommended that the Newfoundland penalty be altered to conform with the Ontario provision.

THE CHILDREN OF UNMARRIED PARENTS ACT, 1964⁵

Sections 3 and 4 of this Act contain the general provisions concerning

¹The Alcoholic Liquors Act, R.S.N. 1952, c. 93, s. 69 (1) (a).

²Narcotic Control Act, R.S.C. 1970, c. N-1, s. 4 (1).

³Stats. Nfld. 1964, No. 45, s. 39 (7).

⁴Stats. Ont. 1965, c. 14, s. 43 (5).

⁵Stats. Nfld. 1964, No. 40.

the responsibilities of the Registrar of Vital Statistics, the Director of Child Welfare and of an institution which has received a mother in care during pregnancy or accouchement, insofar as the notification and recording of the birth of an illegitimate child is concerned. Section 4 (4) provides a penalty for violation of section 4 by the person in charge of such an institution.

These provisions have to be read in conjunction with sections 10 to 12 inclusive of The Registration (Vital Statistics) Act'.

There are two criticisms that should be made of these provisions. The way consueis oat mere stiouiu be a unnorm provision for the notification and recording of births, legitimate or otherwise.

Section 10 of the Newfoundland Registration (Vital Statistics) Act is the general provision covering reporting of the information about births, legitimate and, otherwise. Under this provision the obligation to furnish information of births is clearly indicated. In view of section 10, and particularly if it should be amended as will be recommended², it would seem unnecessary to retain the obligation on the institution referred to in section 4 of The Children of Unmarried Parents Act, 1964 and the penalty subsection for violation of the section by such an institution.

Secondly, the Study considers that all provisions concerning the notification of birth of a child, legitimate or otherwise, should be set out in The Registration (Vital Statistics) Act. Accordingly, if the notification obligation of the institution referred to in section 4 of the Act is retained, it should be inserted in The Registration (Vital Statistics) Act. Moreover, the obligation of the Registrar of Vital Statistics to notify the Director of Child Welfare of the birth of an illegitimate child should also be incorporated in The Registration (Vital Statistics) Act.

Section 20 (1) of the Act requires the presiding magistrate in an affiliation proceeding to order a father to give a bond for the fulfilment of an affiliation order for a sum of not less than \$1,200 with sufficient sureties or, in lieu of such bond, a cash deposit to be fixed by the magistrate as security for the payments required under the order. Subsection (2) of section 20 allows the magistrate (where the Director of Child Welfare consents) to accept the recognizance³ of the father for a sum of not less than \$1,200, instead of a bond with sureties or a cash deposit. Further, section 22(1) of the Act provides that if the father fails to furnish the bond or make the cash deposit "the magistrate may

1

R.S.N. 1952, c. 23.

2

Infra, p. 392.

3 A bond creates a fresh debt while a recognizance is an acknowledgment of a former debt upon record.

forthwith commit the father to gaol for a term of not less than six months and not more than twelve months, or until he furnishes the bond or makes the cash deposit as security and pays the costs and charges attending the commitment and conveying to gaol".

Section 20 (1) and section 22 (1) seem unnecessarily onerous and harsh. If the father is a poor man who cannot meet the requirements of section 20 (1) or (2) the magistrate may imprison him for a term of not less than six and not more than twelve months. Imprisonment certainly will not assist him to meet the payments required by the order.

The Study considers that the type of enforcement used in section 61 (1) of the Ontario Child Welfare Act, 1965 is preferable. That section provides that:

"61 (1) Where the child for whose benefit the order for maintenance is made is a public charge or the judge is of the opinion that, if there is default in the order, the child is likely to be a public charge, the judge may, in the order, order any person required to make payments thereunder to report to a probation officer at such times and places as the judge deems necessary for the purpose of ensuring that such person is complying with the order".

Then, under subsection (3) of the section, failure to report without reasonable excuse to the officer renders the person liable on summary conviction to imprisonment for a term of not more than three months.

The father is imprisoned for failure to report to a probation officer and not because of failure, perhaps through financial inability, to provide the bond or make the cash deposit required under the Newfoundland Act. In cases of financial inability arising say by reason of sickness or unemployment, the Ontario provision is obviously preferable.

The Study suggests it is of some significance that the Ontario approach is used to enforce orders for payment of maintenance or support under the Newfoundland Maintenance Act.'

It may be argued that the authority of the magistrate to imprison in default of bond or cash deposit is discretionary, not mandatory. While that is so, the authority is in the section and can be used. It should be deleted and the Ontario approach, to enforcing payments by the father, adopted.

1

R.S.N. 1952, c. 65, s. 11.

THE ADOPTION OF CHILDREN ACT, 1964¹

Section 86 of the Ontario Child Welfare Act provides a penalty for payments in connection with adoptions in the following terms:

"86. Every person who gives or receives or agrees to give or to receive any payment or reward, either directly or indirectly, in consideration of the adoption of a child under this Part, or who gives or receives or agrees to give or to receive any payment or reward, either directly or indirectly, to procure a child for the purpose of adoption is guilty of an offence and on summary conviction is liable to a fine of not more than \$2,000 or to imprisonment for a term of not more than three years, or to both".

The Study considers that a similar provision should be incorporated into the Newfoundland Adoption of Children Act, 1964.

THE MAINTENANCE ACT²

Both Newfoundland³ and Ontario⁴ have similar provisions authorizing a judge⁵ to order a person required to make maintenance payments to report to an officer (designated by the judge) for the purpose of satisfying the officer that he is complying with the order for payment. Moreover, both provinces make it an offence to fail to report without reasonable excuse⁶.

However, there is no similarity in the penalty provided for commission of the offence. The Newfoundland Act provides 'for a fine not exceeding \$100 and in default of payment to imprisonment for a term not exceeding three months.⁷ The Ontario Act, on the other hand, provides for imprisonment for a term of not more than three months.

Since the order to report is made where the person for whose benefit the order was made is a public charge or is likely to be a public charge if there is default, the Study considers the fine not to exceed \$100 to be clearly inadequate and will recommend that a penalty be provided similar to that in the Ontario legislation.

¹Stats. Nfld. 1964, No. 23.

²R.S.N. 1952, c. 65.

³Ibid., s. 11 (1).

⁴R.S.O. 1960, c. 105, s. 4 (2).

⁵"Judge" means "the judge of a Family Court or a stipendiary magistrate or two justices of the peace acting together"; R.S.N. 1952, c. 65, s. 2(f).

⁶R.S.N. 1952, c. 65, s. 11 (3); R.S.O. 1960, c. 105, s. 4 (4).

⁷R.S.N. 1952, c. 65, s. 11 (3).

THE SOLEMNIZATION OF MARRIAGES ACT¹

Section 2 of the Act states generally who may solemnize marriages in Newfoundland and provides that any unauthorized person who shall assume to officiate in the performance of marriage shall forfeit \$200.

Section 22 of the Ontario Act² states that "no person shall solemnize a marriage unless he is a judge or a magistrate, or is registered under this section as a person authorized to solemnize marriage". Further, section 49 of the Ontario Act makes it an offence for an unauthorized person to solemnize marriage and on summary conviction the unauthorized person is liable to a fine of not less than \$200 and not more than \$500 or to imprisonment for a term of not more than one year, or to both.

Unless all persons, except judges and magistrates, who are authorized to solemnize marriage, are registered as in Ontario, it could be a very difficult question of interpretation in a particular case whether a person came within the wording of the section describing those authorized. Registration would enable the Minister of Provincial Affairs to establish a uniform policy as to who should be authorized to solemnize marriage and would make the decision as to who is or is not authorized a relatively simple matter in any prosecution under section 2.

The use of the word "forfeit" to indicate a penalty for contravention of a provincial statute is unusual at the present time. The usual form of words would be "is guilty of an offence and on summary conviction is liable to a fine of \$200".

Since the solemnization of a marriage by an unauthorized person has such serious consequences as far as the parties are concerned the Study considers the present penalty inadequate and will recommend the adoption of a penalty identical to that provided by section 49 of the Ontario Act.

Section 3 of the Newfoundland Act requires that two credible witnesses be present and provides a penalty of a fine of \$200 where a marriage is performed without the two witnesses.

On the other hand, in the Ontario Act, while at least two witnesses are still required³, the penalty for a marriage performed without the required witnesses is a fine of not more than \$100⁴.

2

1 R.S.N. 1952, c. 160.

R.S.O. 1960, c. 228.

3 R.S.O. 1960, c. 228, s. 20.

⁴ Ibid., s. 51.

The Study appreciates that the Legislature wished to ensure that all marriages take place in the presence of two witnesses and for that reason considered a substantial penalty necessary to achieve its purpose.

However, section 3 of the Newfoundland Act does provide that the want of such witnesses shall not invalidate the marriage. Accordingly, while the presence of the two witnesses is mandatory the marriage is still valid if performed in their absence. It is suggested that since the failure to meet the requirement of two witnesses is not fatal to the validity of the marriage, the offence may not justify a \$200 fine, but rather that \$100, as in the Ontario Act, is sufficient.

In Newfoundland written consent must be obtained for the marriage of two persons either of whom is under the full age of twenty-one years¹. The age below which consent is required in Ontario is eighteen years¹. Moreover, a person under fourteen years of age in Ontario can only marry if certain conditions precedent are met.³ The penalty for solemnization of marriage without the necessary consent is \$200 in Newfoundland⁴; in Ontario, a fine of not more than \$100. Ontario has a provision to validate marriages solemnized in good faith despite any irregularity in the issue of the licence⁵ whereas Newfoundland has no such provision in its Act. This might explain the difference in penalty. If a provision similar to section 46 of the Ontario Act is adopted the Study would recommend that the penalty be reduced to a \$100 maximum as in Ontario.

It is noted in section 4 of the Newfoundland Act that the offence portion of the section refers to the offence as a "misdemeanour". In Canada, offences are either indictable or punishable on summary conviction. Offences formerly classified as misdemeanours are now summary conviction offences. The term should be changed accordingly.

Section 7 of the Newfoundland Act states that the defacement of a marriage register shall be a felony. Offences formerly classified as felonies are now indictable offences. The term should be changed accordingly. However, as serious as such a defacement is, the Study considers that the offence should be an offence punishable on summary conviction rather than indictable, with a punishment of a substantial fine or imprisonment for a term of not more than one year, or to both. In the present section no punishment is provided. So, although a person could be found guilty of the felony of defacement of a marriage register he could not be punished in the absence of a provision for punishment of such a felony. There is no similar provision in the Ontario Act.

1 R.S.N. 1952, c. 160, s. 4.

2

R.S.O. 1960, c. 228, s. 7.

4 *Ibid.*, s. 8.

R.S.N. 1952, c. 160, s. 4.

5

R.S.O. 1960, c. 228, s. 46.

Section 12 of the Ontario Act provides that no issuer shall issue a marriage licence to a person whose previous marriage has been dissolved or annulled unless certain conditions precedent are met. Newfoundland has no such provision.¹ The Study will recommend the incorporation in the Newfoundland Act of a provision similar to section 12 of the Ontario Act, unless Newfoundland does not provide for the general issuance of marriage licences as recommended in Chapter I, in which event the duty of ascertaining a person's eligibility to remarry would be placed on the marriage celebrant. Section 51 of the Ontario Act is the penalty provision for the contravention of section 12. A fine of not more than \$100 is the punishment specified.

Under the Newfoundland Act, the penalty for a Person officiating at a marriage not entering such marriage in the marriage register or for not returning the necessary certificate to the Minister of Provincial Affairs" is \$20. Under the Ontario Act the penalty for a similar offence⁴ is a fine of not more than \$100. The Study considers the \$20 penalty entirely inadequate and recommends a penalty identical to that provided in the Ontario Act be substituted therefor.

Section 6 of the Ontario Act prohibits the issuance of a licence or special permit to, or the marriage of, a person mentally ill or mentally defective, or who is under the influence of intoxicating liquor or narcotic drugs. The punishment for contravention of section 6 is a fine of not more than \$500 or to imprisonment for a term of not more than one year or to both⁵. The Newfoundland Act contains no such provisions.⁶ The Study will recommend the incorporation of provisions similar to sections 6 and 48 of the Ontario Act into the Newfoundland Act.

If the Province of Newfoundland should decide to issue marriage licences as in Ontario, an offence provision similar to section 47 of the Ontario Act will be required. Section 47 of that Act provides that if a person issues a licence without the authority to do so, he will be liable to a fine of not less than \$100 and not more than \$300 or to imprisonment for a term of not more than six months, or to both.

Section 50 of the Ontario Act provides that a person, who knowingly makes any false statement in any document required under the Act is liable on summary conviction to a fine of not less than \$200 and not more than \$500 or

¹ See: Chapter I, recommendation 9 (b), (c) and (d), *supra*, p. 47.

² R.S.N. 1952, c. 160, s. 5.

³ *Ibid.*, s. 9.

⁵ R.S.O. 1960, c. 228, ss. 27 and 29 (2).

⁶ *Ibid.*, s. 48.

See: Chapter I, recommendation 3, *supra*, p. 44.

to imprisonment for a term of not more than one year, or to both. Newfoundland has no such provision. The Study will recommend that a provision similar to section 50 of the Ontario Act be incorporated into the Newfoundland Act.

Further, the Ontario Marriage Act was amended in 1965¹ by adding a new section (section 50a) which makes it an offence for a person knowingly to make a false statement in the form of parental consent required under section 7 (4a) of the Act. The punishment provided for contravention of the section is a fine of not more than \$500.

The study considers that the Newfoundland Act should also make it an offence to knowingly make a false statement in the written consent from parents or guardians of minors² required by section 4 of the Act to be obtained by a marriage celebrant before minors can be married. Accordingly, the Study will recommend that a new section be incorporated in the Newfoundland Solemnization of Marriages Act similar to sections 7 (4a) (respecting parental consent) and 50a (penal provisions) of the Ontario Act, with the form of written parental consent, as set out in Appendix M, being witnessed as provided for in the form.³ The penalty in the Ontario provision seems appropriate to the offence.

THE REGISTRATION (VITAL STATISTICS) ACT⁴

The Newfoundland Act provides a uniform system for the registering of all births, marriages and deaths that take place in the province. However, the Ontario Act⁵ provides, through the provisions of the one Act, a far more comprehensive system. It provides a uniform system of registration of births, marriages, deaths, stillbirths, adoptions, divorces and changes of name in Ontario.

The Study will recommend the extension of the present system of registration in Newfoundland to cover all the matters now encompassed by the Ontario Act.

Section 10 of the Newfoundland Act provides that the obligation of furnishing information of births to the proper authority is initially on the father of the child, then in turn on the mother, upon any person standing in the place of the parents, the nurse in attendance and finally the occupier of the house within which the birth occurs. Under the Ontario Act the obligation to give;

Stats. Ont. 1965, c. 67.

² A person under the full age of nineteen years.

³

The form of parental consent discussed and recommended in Chapter 1, *supra*, pp. 4546 as a requirement of a licence to marry.

⁴

⁵ R.S.N. 1952, c. 23.
R.S.O. 1960, c. 419.

notice of births is initially on the medical practitioner in attendance, then upon the nurse in attendance.' In addition, within thirty days after the birth, the mother, or if she is incapable, the father, or if both are incapable, the person standing in their place, is required to forward a statement of birth to the appropriate registrar.²

Further, if all the last mentioned persons fail to forward the statement of birth, the occupier of the premises where the child was born or the nurse in attendance is required to do so.³

At the present time, it is suggested that a doctor or at least a nurse would in all probability be in attendance at the birth of a child. Therefore, it would seem to be preferable to impose the obligation of providing the necessary information within forty-eight hours upon the doctor in attendance in the first instance and then upon the nurse in attendance. To ensure against the possibility of oversight by the doctor or nurse, a statement of birth within thirty days by the mother, father, the person standing in the place of the parents, the occupier of the premises or the nurse present, similar to the requirement referred to above in the Ontario Act, should also be required.

Neglect to provide the information of birth required by section 10 of the Newfoundland Act renders the person obligated to provide the information liable to a fine not exceeding \$10. Under the Ontario Act neglect to forward the statement of birth renders the person so obligated liable to a fine of not more than \$100.

The Study considers the penalty in section 10 of the Newfoundland Act entirely inadequate and recommends the adoption of the Ontario penalty.

The obligation to furnish information on deaths under the Newfoundland Act is firstly upon the medical attendant, secondly, on the undertaker, and, failing these, on the next-of-kin of the deceased person⁴. On receipt of the information the registering officer prepares a certificate of death for signature by the medical attendant or undertaker or, failing these, by some other credible person who witnessed the death or identified the body after death.⁵

Under the Ontario Act a statement containing personal particulars of the deceased is completed by one of a designated list of persons and delivered to the

1 R.S.O. 1960, c. 419, s. 5 (1) and (2).

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Ibid.,

s. 6 (1).

³ *Ibid.*, s. 8(1).

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R.S.N. 1952, c. 23, s. 13 (1).

⁵ *Ibid.*, s. 14.

funeral director in charge of the body¹. Further, a medical certificate of death is completed by the doctor in attendance at the death and delivered to the funeral director². The funeral director completes the statement of personal particulars by adding the burial particulars and then delivers the statement and the medical certificate of death to the appropriate registrar³.

The Study considers the Ontario system of providing the necessary information on death more efficient and will recommend its adoption.

Again, as in the case of neglect to furnish information on births, neglect to provide information on deaths may be punished on conviction by a fine not exceeding \$10. The comparable Ontario provision⁴ calls for a penalty of a fine of not more than \$100. The Study will recommend the adoption of the Ontario penalty.

In view of the obligations now contained in the appropriate statutes for the furnishing of information concerning births, marriages and deaths, the imposition of such an obligation on the officials in charge of public institutions under section 16 of the Newfoundland Act would seem unnecessary. The Study will therefore recommend the repeal of section 16.

Section 19 of the Newfoundland Act provides as a penalty for the making of a false statement respecting a birth, a marriage or a death, or for the alteration or defacement of any return or register, the same pains and penalties as if such person were guilty of wilful and corrupt perjury.

Under the provisions of section 121(1) of the Criminal Code a person convicted of perjury is liable to imprisonment for fourteen years.

The offence section for the provision of false information under the Ontario Act⁵ reads as follows:

"52 - (1) Every person who wilfully makes or causes to be made a false statement in any notice, registration, statement, certificate, return or other document respecting any particulars required to be furnished under this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than six months, or both; and every legally qualified medical practitioner who wilfully makes a false statement as to the

1 R.S.O. 1960, c. 419, s. 17 (2).

2 Ibid., s. 17 (3).

3 Ibid., s. 17 (4).

4 Ibid., s. 51.

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ibid., s. 52.

cause of the death of any person, or represents himself as having been in attendance during the last illness of any person when in fact he was not called in attendance until after the death, is, in addition to any penalty imposed by this Act, subject to discipline by the Council of the College of Physicians and Surgeons of Ontario.

"52 - (2) Every person who wilfully makes or causes to be made a registration of a birth, marriage, death or still-birth as having occurred in Ontario in respect of any person whose birth, marriage, death or still-birth did not occur in Ontario is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than six months, or both."

There is no doubt that the provision of false information in these matters should be liable to a substantial punishment. However, the Study considers the punishment for perjury under the Code too severe and will recommend the adoption of a provision similar to section 52 of the Ontario Act.

Sections 20 and 21 of the Newfoundland Act make it an offence for a person to send false information on a birth, marriage or death to a newspaper publisher for publication in a newspaper in the province and for a proprietor, editor or publisher of the newspaper to knowingly and wilfully publish such false statement. The offender in both cases is guilty of a misdemeanour and liable to fine or imprisonment or both, at the discretion of the Supreme Court.

The Study doubts the necessity of these two sections at this time. Section 177 of the Criminal Code makes it an indictable offence punishable by imprisonment for two years to wilfully publish false news. The repeal of sections 20 and 21 of the Newfoundland Act will accordingly be recommended.

If it is decided to retain the sections, the words "a misdemeanour" should be changed to "an offence punishable on summary conviction" and by way of punishment, a maximum fine and term of imprisonment specified.

It should be pointed out that section 335 of the Criminal Code provides, in part, as follows:

"335. (1) Every one who unlawfully

(a) destroys, defaces or injures a register, or any part of a register of births, baptisms, marriages, deaths or burials that is required or authorized by law to be kept in Canada, or a copy or any part of a copy of such a register that is required by law to be transmitted to a registrar or other officer,

(b) inserts or causes to be inserted in a register or copy referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth; baptism, marriage, death or burial, or erases any material part from such a register or copy, ...

is guilty of an indictable offence and is liable to imprisonment for five years."

Further, section 336 of the Code provides as follows: "336.

Every one who

(a) being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, knowingly makes or issues a false certified copy, extract or certificate,

(b) not being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, fraudulently makes or issues a copy, extract or certificate that purports to be certified as authorized or required by law, or

(c) being authorized or required by law to make a certificate or declaration concerning any particular required for the purpose of making entries in a register, record or document, knowingly and falsely makes the certificate or declaration,

is guilty of an indictable offence and is liable to imprisonment for five year."

There may be some question as to whether such sections as section 19 of the Newfoundland Act and section 52 of the Ontario Act are *intra vires* the provincial legislatures in view of the above-mentioned Criminal Code provisions. If the sections are *intra vires* the legislature concerned, there would appear to be a choice of offence sections under which charges can be laid.

The Ontario Act provides for who may obtain birth certificates, death certificates and marriage certificates and who may search for the registration of any birth, death, marriage, still-birth, divorce, adoption or change of name and who may make a search of church records kept in the office of the Registrar General pursuant to section 31 of the Act. Then, section 50 of the Ontario Act makes it an offence for the appropriate registrar to communicate or allow to be communicated to any person not entitled thereto any information obtained under the Act or to allow any such person to inspect or have access to any records containing information obtained under the Act. Contravention of section 50 is

punishable on conviction by a fine of not more than \$200.¹.

Newfoundland has no similar provisions. Section 23 of the Newfoundland Act² provides that reference may be had to the registers by any person during office hours, by paying a fee of ten cents and a certified extract from any registry may be obtained on application by paying a fee of fifty cents. Further, the section provides that all clergymen, doctors, solicitors, members of the Legislature and public officers shall have free access to the registers during office hours free of charge.

While it is a fact that the Ontario Act covers the registration of many more matters than the Newfoundland Act the Study considers that the information on births and marriages should not be available to any person as is now the case, but rather should only be available on terms and conditions similar to those specified in the Ontario Act. Moreover, the offence respecting communication of information to persons not entitled to receive same should be punishable on conviction by a fine of not more than \$200.

THE CHANGE OF NAME ACT³

The difference between section 15 (1) of the Newfoundland Act respecting the obtaining of a change of name under the Act by fraud or misrepresentation and the similar provision of the Ontario Act⁴ is primarily in the nature of the punishment provided in the two sections. In the Newfoundland Act the penalty is a fine not exceeding \$500, whereas under the Ontario Act the penalty is a fine of not more than \$500 or imprisonment for a term of not more than six months.

The Study considers the Ontario penalty more appropriate for this offence. Where fraud or misrepresentation is concerned, imprisonment should be available by way of punishment to the trial judge.

The Ontario Act contains several other offence provisions which the Study considers should be incorporated into the Newfoundland Act.

Firstly, section 21 (6) of the Ontario Act provides that where a change of name has been annulled and the person concerned has been ordered to deliver

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R.S.O., 1960, c. 419, s. 53.

Section 22 of The Registration (Vital Statistics) Act, R.S.N. 1952, c. 23 was repealed by section 3 of The Registration (Vital Statistics) Act, 1953, Stats. Nfld. 1953, No. 52. It is considered that the Legislature must have intended to repeal section 23 rather than **B**

R.S.N. 1952, c. 165.

⁴R.S.O. 1960, c. 49, s. 22 (1).

up the certificate reflecting the change of name and he refuses or neglects to comply with the order, he is punishable on conviction by a fine of not more than \$100.

Secondly, section 22 (2) provides that any person who uses a refused name is punishable on conviction by a fine of not more than \$500 or to imprisonment for a term of not more than six months.

Finally, section 22 (3) provides that any person convicted of a second or subsequent offence against the Act is punishable on conviction by a fine of not more than double the maximum fine provided for the offence.

RECOMMENDATIONS

CHAPTER IX

The Family Law Study recommends:

THE CRIMINAL RESPONSIBILITY OF CHILDREN

1. That in Newfoundland juvenile delinquency legislation the age of immunity for children from criminal responsibility be set at seven years of age. (Page 367).
2. That the appreciation of wrong test (the *doli incapax* rule) be abandoned for children between the ages of seven and fourteen and that the basic objective of the rule be accomplished by flexible disposition provisions. (Pages 366-369).
3. That in juvenile court proceedings the prosecution be required to adduce evidence on all elements of the offence charged, that is to say, make out a *prima facie* case against the child. This having been done, the child should then be placed under the evidential burden to adduce evidence__ that he did not know his act to be wrong. Failure to discharge this evidential burden would result in conviction of the child. (Page 369).

THE CHILD WELFARE ACT

4. That the definition of "child" in section 2 (a) of the Act be amended by substituting "seventeen" for "sixteen". (Page 370).
5. That section 43 of the Act be amended by adding a new subsection under which a person would be prohibited from visiting, writing to, telephoning to or otherwise interfering with a ward who is placed in a foster home or other place, or his foster parents, without the consent in writing of the person or officer charged with the ward's supervision. (Page 371).
6. That section 43 (2) of the Act be amended by substituting for the present penalty a fine of not more than \$500 or imprisonment for a period of not more than one year, or both. (Page 371).
7. That a new section be incorporated in the Act to make it an offence for a parent or guardian to desert or fail to protect a child punishable on conviction by a fine of not more than \$500 or to imprisonment for a term of not more than one year, or both. (Page 372).
8. That a new section be incorporated in the Act to make it an offence to 387

leave a child under ten years unattended, punishable on conviction by a fine of not more than \$100 and, for any subsequent offence, to a fine of not more than \$200 or imprisonment for a term of not more than one year. (Page 372).

9. That section 34 (1) (b) of the Act be amended by adding after "sale" the words "between 9 o'clock in the evening of any day and 6 o'clock in the morning of the following day". (Page 372).
10. That section 34 (2) of the Act be amended to cover entertainments staged for commercial purposes. (Page 372).
11. That the penalty portion of section 34 (1) of the Act be amended by deleting all the wording after "dollars" and substituting therefor the words "or to imprisonment for a term of not more than six months, or both". (Page 372).
12. That section 37 of the Act be amended by deleting all reference to liquor, drugs and obscene material and by reducing the penalty, to provide a more appropriate penalty for the amended section. (Pages 372-373).

13. That section 38 of the Act be repealed if, in the definition of "child" "sixteen" is changed to "seventeen". (Page 373).
14. That section 39 of the Act be amended by adding thereto the following subsections:

 "(4a). No girl under sixteen years of age and no boy under twelve years of age shall engage in or be licenced or permitted to engage in any street trade or occupation.

 (4b), No boy twelve or more years of age and under sixteen years of age shall engage in any street trade or occupation between the hours of 9 o'clock in the evening and 6 o'clock in the morning of the following day". (Page 373).

15. That section 39 (7) of the Act be amended by substituting "sixteen" for "fifteen" in the fourth line of the subsection and by deleting the words "after the hour of 7 o'clock in the evening" and substituting therefor the words "between the hours of 10 o'clock in the evening and 6 o'clock in the morning of the following day". (Page 373).
16. That section 39 of the Act be amended by adding a new subsection as follows:

 "(7a) A boy or girl found contravening any provision of this

section may be warned by a constable, and, if the warning is not regarded or if, after the warning, the boy or girl is again found contravening any provision of this section, the boy or girl may be taken by the constable to the home of the boy or girl or to a place of safety and dealt with as a neglected child." (Page 373).

17. That section 39 (8) (b) of the Act be amended by deleting the words "fifty dollars for an offence" and substituting therefor the words "twenty-five dollars for the first offence and a fine of not more than one hundred dollars for any subsequent offence." (Page 373).

THE CHILDREN OF UNMARRIED PARENTS ACT

18. That section 4 of the Act be repealed if legislation is enacted concerning notification of births under The Registration (Vital Statistics) Act. If the provisions of section 4 are retained they should be re-enacted in The Registration (Vital Statistics) Act. (Pages 373-374).
19. That section 3 of the Act should be repealed and re-enacted in The Registration (Vital Statistics) Act. (Page 374).
20. That sections 20 and 22 of the Act be repealed with substitution by the following provision:

"Where the child for whose benefit the order for maintenance is made is a public charge or the judge is of the opinion that, if there is default in the order, the child is likely to be a public charge, the judge may, in the order, order any person required to make payments thereunder to report to a probation officer at such times and places as the judge deems necessary for the purpose of ensuring that such person is complying with the order.

Every person who without reasonable excuse fails to report to a probation officer when ordered to do so under this section is guilty of an offence and on summary conviction is liable to imprisonment for a term of not more than three months." (Pages 374-375).

THE ADOPTION ACT

21. That the following provision be added to the Act:

"Every person who gives or receives or agrees to give or to receive any payment or reward, either directly or indirectly, in consideration of the adoption of a child, or who gives or receives or agrees to give or receive any payment or reward, either **di-**

rectly or indirectly, to procure a child for the purpose of adoption is guilty of an offence and on summary conviction is liable to a fine of not more than \$2000 or to imprisonment for a term of not more than three years, or both." (Page 376).

THE MAINTENANCE ACT

22. That the penalty in section 11 (3) of the Act be changed from \$100 to imprisonment for a term of not more than three months. (Page 376).

"THE SOLEMNIZATION OF MARRIAGES ACT

23. That all persons authorized to solemnize marriage in Newfoundland be registered. (Page 377).
24. That the penalty provided for officiating in the performance of marriage under section 2 of the Act be changed from a forfeiture of \$200 to a fine of not less than \$200 and not more than \$500 or to imprisonment for a term of not more than one year or both. (Page 377).
25. That the penalty in section 3 of the Act be reduced from \$200 to \$100. (Pages 377-378).
26. That the following provision be added to the Act:

"If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as man and wife, such marriage shall be deemed to be a valid marriage, notwithstanding that the person who solemnized the marriage was not authorized to solemnize marriage, and notwithstanding the absence of the written consent required under Section 4". (Page 378).

27. That if Recommendation 26 is adopted, the penalty in section 4 of the Act be reduced from \$200 to \$100. (Page 378).
28. That the words "a misdemeanour" in the fifth and sixth lines of section 4 of the Act be changed to "an offence punishable on summary conviction". (Page 378).
29. That the words "a felony" in the fourth line of section 7 of the Act be changed to "an offence punishable on summary conviction" and that the penalty be a fine of \$500 or imprisonment for a term of not more than one year, or both. (Page 378).

30. (a) That the following provision be added to the Act:

"No person shall solemnize the marriage of any person in this Province whose previous marriage has been dissolved or annulled in Canada unless the party deposits with the person so authorized to solemnize marriages a copy of the final decree or judgment or of the Act dissolving or annulling the marriage, certified by the proper officer". (Page 379).

(b) That if a system of marriage licence issuance is set up in Newfoundland the following provision be enacted:

"No issuer shall issue a licence to a person whose previous Marriage has been dissolved or annulled in Canada unless such person deposits with the issuer.

(a) a copy of the final decree or judgment dissolving or annulling the marriage, certified by the proper officer; and

(b) such other material as to the dissolution or annulment of the marriage as the issuer may require". (Page 379).

31. That the penalty for the contravention of the provision in Recommendation 30 be a fine of not more than \$100. (Page 379). :

32. That the penalties in sections 5 and 9 of the Act be changed to a fine of not more than \$100. (Page 379).

33. That the following provision be incorporated in the Act:

"No person shall solemnize the marriage of any person who is mentally ill or mentally defective, or who is under the influence of intoxicating liquor or narcotic drugs." (Page 379).

34. That the penalty for contravention of the provision in Recommendation 33 be a fine of not more than \$500 or to imprisonment for a term of not more than one year or both. (Page 379).

35. That if Newfoundland sets up a system of issuance of marriage licences as recommended in Chapter I: Marriage, the following provision be incorporated in the Act:

"Every person who issues a licence unless authorized so to do,

is guilty of an offence and on summary conviction is liable to a fine of not less than \$100 and not more than \$300 or to imprisonment for a term of not more than six months, or both." (Page 379)

36. That the following provision be incorporated in the Act:

"Every person who knowingly makes any false statement in any document required under this Act, in addition to any other penalty or punishment to which he may be liable, is guilty of an offence and on summary conviction is liable to a fine of not less than \$200 and not more than \$500 or to imprisonment for a term of not more than one year, or both. (Pages 379-380).

37. That section 4 of the Act be amended by adding the following subsections:

"(2) The consent required by this section shall be in the form contained in Appendix M or in such form as the Minister of Provincial Affairs deems sufficient, and the person authorized to give the consent shall certify that the information and particulars contained herein are true and correct.

(3) Every authorized person who knowingly makes a false statement in a certificate required by subsection (2) of this section is guilty of an offence and on summary conviction is liable to a fine of not more than \$500." (Page 380).

THE REGISTRATION (VITAL STATISTICS) ACT

38. That the Act be extended to provide a uniform system of registration of births, marriages, deaths, stillbirths, adoptions, divorces and changes of name. The Model Vital Statistics Act recommended by the Conference of Commissioners on Uniformity of Legislation in Canada would be a valuable precedent to follow. (Page 380).
39. That section 10 of the Act be amended to impose the obligation of providing the necessary information concerning the birth within 48 hours upon the doctor in attendance in the first instance and then upon the nurse in attendance. A further amendment to the section should also be made to require, within thirty days after the birth, the mother, father, or if both are incapable, the person standing in their place, to forward a statement of birth to the appropriate registering officers. If all the above-mentioned persons fail to forward the statement of birth, the occupier of the premises where the child was born or the nurse in attendance would be required to do so. (Pages 380-381).

40. That the penalty in section 10 be changed from a fine not exceeding \$10 to a fine of not more than \$100. (Page 381).
41. That sections 13, 14, and 15 of the Act be replaced by sections 14 to 18 of the Model Registration Act contained in Appendix N, which substantially is the same as the Ontario Act. (Pages 381-382).
42. That the penalty for neglect to provide the necessary information on deaths be a fine of not more than \$100 rather than a fine not exceeding \$10. (Page 382).
43. That section 16 of the Act, respecting reporting of births, marriages and deaths taking place in public institutions, be repealed. (Page 382).
44. That section 19 of the Act be repealed and replaced by the following provision:

"(1) Every person who wilfully makes or causes to be made a false statement in any notice, registration, statement, certificate, return or other document respecting any particulars required to be furnished under this Act is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than six months, or both; and every legally qualified medical practitioner who wilfully makes a false statement as to the cause of the death of any person, or represents himself as having been in attendance during the last illness of any person when in fact he was not called in attendance until after the death, is, in addition to any penalty imposed by this Act, subject to discipline by the Newfoundland Medical Board.'

(2) Every person who wilfully makes or causes to be made a registration of a birth, marriage or death as having occurred in Newfoundland in respect to any person whose birth, marriage or death did not occur in Newfoundland is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than six months, or both". (Pages 382-383).
45. That sections 20 and 21 of the Act be repealed. If the repeal is not

a c -
1952, c. 52.

1The Newfoundland Medical Board Act, R.S.N.

ceptable, the words "a misdemeanour" should be changed to "an offence punishable on summary conviction" and a penalty of \$500 specified. (Page 383).

46. That section 23 of the Act be repealed and replaced by sections 30 to 34 inclusive of the Model Registration Act contained in Appendix N. Contravention of the provision should be punishable on conviction by a fine of not more than \$200. (Page 385).
47. That assuming Recommendation 46 will be approved, a provision similar to section 39 of the Model Registration Act contained in Appendix N be incorporated in the Act. Contravention of the provision should be punishable on conviction by a fine of not more than \$200. (Page 385).

THE CHANGE OF NAME ACT

48. That the penalty in section 15 (1) of the Act be changed from a fine not exceeding \$500 to a fine of not more than \$500 or to imprisonment for a term of not more than six months. (Page 385).

49. That the following provision be incorporated into the Act:

"Where a change of name has been annulled, the Registrar General may, by order, require any person to whom a certificate has been issued to forthwith deliver up the certificate, and any person who refuses or neglects to comply with such order is guilty of an offence and on summary conviction is liable to a fine of not more than \$100." (Pages 385-386).

50. That the following provision be incorporated into the Act:

"Any person whose application for a change of name is refused and who uses the name he sought to adopt in such application, is guilty of an offence and on summary conviction is liable to a fine of not more than \$500 or to imprisonment for a term of not more than six months." (Page 386).

51. That the following provision be incorporated into the Act:

"Any person who, after having been convicted of an offence against this Act, again offends against this Act is liable to a fine of not more than double the maximum fine provided for the offence." (Page 386).

CHAPTER X

EVIDENCE

INTRODUCTION

The first Evidence Act in Newfoundland was enacted in 1856¹. As early as 1833 however, the requirements of proving "the due celebration of any Marriage in Newfoundland and its Dependencies" had been prescribed by statute² while other early legislative enactments governing affiliation and deserted wife and child proceedings contained special evidentiary provisions.

The 1856 legislation *inter alia* repealed the three evidentiary provisions of "An Act for the further amendment of the law and the better advancement of Justice", enacted in 1848³, relating to competency of witnesses to give evidence in litigation to which they were parties or in which they otherwise have an interest. By virtue of "An act to amend and consolidate the Statute Law of Evidence" in 1864⁴, the 1856 statute, and two further evidentiary provisions of the 1848 Act, were repealed.

The 1864 Act was substantially incorporated into the statutory consolidations of 1872⁵, 1892⁶ and 1916⁷ and is similar to the present Evidence Act in Newfoundland which appears in The Revised Statutes of Newfoundland of 1952⁸.

The purpose of this chapter is to:

- (1) review the provisions of the present Evidence Act relating to legal relationships and the family group and various evidentiary provisions of other Newfoundland family law legislation;
- (2) examine the evidentiary provisions in the same area of law in other jurisdictions including other Canadian provinces, England, Australia and New Zealand, and
- (3) make recommendations for the reform of evidentiary aspects of Newfoundland family law.

¹Stats. Nfld. 1856, c. 15.

²Stats. Nfld. 1833, c. 10, s. 10.

³Stats. Nfld. 1848, c. 8.

⁴Stats. Nfld. 1864, c. 11.

⁵Cons. Stats. Nfld. (First Series) 1872, c. 23.

⁶Cons. Stats. Nfld. (Second Series) 1892, c. 57.

⁷Cons. Stats. Nfld. (Third Series) 1916, c. 91.

⁸R.S.N. 1952, c. 120, as amended by Stats. Nfld. 1954, No. 16; Stats. Nfld. 1971, No. 48.

CONSTITUTIONAL AUTHORITY

Legislative authority to enact' laws in the field of evidence is divided between the Parliament of Canada and provincial legislatures.

Section 91 of The British North America Act, 1867¹ provides, in part: "91 . . . the exclusive Legislative Authority of the Parliament of Canada extends to . . . (subsection 27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal matters."

Under the authority of the above-mentioned provision the Parliament of Canada has enacted the Canada Evidence Act.²

Section 2 of that Act provides as follows:

"This Part applies to all criminal proceedings, and to all civil proceedings and other matters whatever respecting which the Parliament of Canada has jurisdiction in this behalf."

Further, section 92 of The British North America Act, 1867 provides, in part:

"92, In each Province the Legislature may exclusively make laws in relation to . . . (subsection 14) 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."

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Under the authority of the above-mentioned provisions, the Legislature of Newfoundland has enacted The Evidence Act⁴ and the evidentiary provisions in other Newfoundland statutes.

The provisions of the Newfoundland Evidence Act relevant to this Study include the competency and compellability of witnesses, the question of privilege as it relates to marital communications and the need for corroboration in certain types of actions in the field of family law.

1 Stats. U.K. 1867, c. 3.

2 R.S.C. 1970, c. E-10.

3 Section 20 (1) of the Divorce Act, enacted by the Parliament of Canada (R.S.C. 1970, c. D-8), provides that the laws of evidence of the provinces apply to any proceedings under that Act.

4 R.S.N. 1952, c. 120.

WITNESSES

COMPETENCY OF WITNESS - GENERAL

The Common Law recognized various rules of incompetency of witnesses based on such grounds as insanity, infancy, crime or infamy, interest and marital relationship.

These rules have been undergoing, for a century or more, a process of piecemeal revision by legislation so that in Canada substantially the only remaining ground of incompetency is that of mental incompetency.

MENTAL INCOMPETENCY

In civil proceedings, every person is now a competent witness if he has sufficient understanding or intelligence to give evidence and to appreciate the nature and obligation of an oath¹ or affirmation².

Therefore, a small child or a deranged person would be incompetent to be a witness if the child is of such tender years or a deranged person has such weakness of intellect that he or she does not possess sufficient intelligence to give rational testimony or to properly appreciate the duty to speak the truth. Moreover, an adult who is under the influence of alcohol or a drug may be incompetent because of mental incapacity resulting from his state of intoxication.

Unlike the evidence legislation of most provinces, Newfoundland's Evidence Act makes no special provision for the evidence of a child, although such a provision, for use in the hearing of a charge of delinquency, can be found in The Welfare of Children Act, which provides:

"56. (1) When in a proceeding before a court a child of tender years who is called as a witness does not, in the opinion of the judge, understand the nature of an oath, the evidence of such child may be received,

- 1 The usual form of oath in criminal cases is as follows: "The evidence you shall give between our Sovereign Lord the King and the prisoner at the Bar shall be the truth, the whole truth and nothing but the truth. So help you God." The usual form of words in an oath in civil cases differs slightly: "The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth and nothing but the truth. So help you God."
- 2 The Oaths Act, R.S.N. 1952, c. 134, s. 4, provides as follows: "Every such affirmation shall be as follows:-
'I A.B., do solemnly, sincerely, and truly declare and affirm,' and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness."
- 3 R.S.N. 1952, c. 60, s. 56.

though not given under oath, if in the opinion of the judge such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) No person shall be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect."

Where such a provision exists it is the duty of the judge or magistrate to satisfy himself as to the child's mental capacity, and whether the child understands the nature and consequences of an oath on a *voir dire*.¹

If a judge or magistrate decides that the child is not capable of being sworn, he should then inquire whether "the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."

An adult person offered as a witness is presumed to have the necessary mental capacity. But if objection is taken, the competency of the witness is determined on a *voir dire*.² Unless the judge or magistrate concludes that the witness has sufficient mental capacity to understand the nature of an oath, to understand and answer simple questions and to understand all reasonable questions put on cross-examination, he should reject the evidence of the witness?

It would be necessary to adopt a suitable provision to cover the evidence of children and persons of weak intellect. This provision would contain a requirement similar to that in section 19 (1) of the Ontario Evidence Act⁴ whereby, in the case of a child of tender years or a person of weak intellect being offered as a witness the trial judge must make the necessary inquiry to determine whether such child or person understands the nature of an oath.

If the judge decided that the child, or person of weak intellect understood the nature of an oath, he or she would be sworn and would give testimony.

On the other hand, if the judge decided that the child, or person of weak intellect did not understand the nature of an oath, the provision would permit the reception of testimony from such child or person, provided he or she

¹R. v. Antrobus, /1947/ 2 D.L.R. 55 (B.C.C.A.).

²The preliminary examination which the judge or magistrate may make of one presented as a witness, where his competency is objected to by the opposing counsel. Udy v.

³Stewart (1886), 10 O.R. 591, at p. 605 (11. Ct. C.P. Div.).

⁴R.S.O. 1960, c. 125.

made an affirmation as required by law.¹

The present affirmation provision of The Oaths Act² would require amendment³ to allow a child of tender years or a person of weak intellect who does not understand the nature of an oath to make an affirmation in lieu of taking an oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child or person is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

EVIDENCE OF INTERESTED PARTIES

The general rule of the Common Law was that every person with an interest in the result of the action, however small and insignificant that interest might be, was presumed to be incapable of resisting the temptation to perjury and was, therefore, disqualified as a witness.⁴ Now, however, all provinces other than Newfoundland have expressly abolished this disqualification.⁵

Section 5 of the Ontario Evidence Act is typical of the provisions abolishing this disqualification. It provides as follows:

No person offered as a witness in an action shall be excluded from giving evidence by reason of an alleged incapacity from crime or interest."

The effect of section 2 of the Newfoundland Act on the Common Law rule as to evidence of interested parties and other persons and their husbands or wives, is not completely clear and the Study will recommend the inclusion in the Act of a provision similar to section 5 of the Ontario legislation.

Parties in civil actions may now be examined as witnesses on their own behalf and also as witnesses on behalf of an opposing party, without their own

¹The Oaths Act, R.S.N. 1952, c. 134, s. 3, provides as follows:- "Every person, upon objecting to be sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath."

²R.S.N. 1952, c. 134, s. 3.

³Because the trial of a charge of delinquency is a criminal, rather than civil proceeding, and may result in a conviction, the Study will not recommend a similar amendment to section 56 of The Welfare of Children Act, R.S.N. 1952, c. 60: supra, pp. 397-398. Common Law

⁴Practice Commissioners, 2nd Report, 1853, p. 10.

⁵The Evidence Act, R.S.N. 1952, c. 120, s.2.

consent except in any proceeding instituted in consequence, of adultery.

The husbands and wives of parties in civil cases are in the same position as regards competency and compellability as the parties themselves, subject to the proviso that a spouse is not compellable to disclose any communication made to him or her by the other spouse during the marriage.²

ADULTERY

The privilege concerning disclosure of evidence about adultery applies only in proceedings instituted in consequence of adultery and extends to witnesses (and their husbands or wives) whether or not they are parties to the proceedings. Adultery must be the cause of action e.g., as in divorce actions. Bastardy or affiliation applications are not such proceedings. The privilege does not apply where a witness has tendered evidence in disproof of evidence of his or her alleged adultery given at the trial.³

The protection of the section does not become available to a person until he becomes a witness. A person cannot rely upon it to refuse to have the oath administered. However, when the questions relate to the commission of adultery by the defendant then the section may be invoked.⁴

The privilege has been criticized as "a survival of ancient rules of evidence, intended to prevent a party from incriminating himself, although adultery is not a crime and its effect as an ecclesiastical offense may be now-a-days dis- regarded.">

It would appear that an admission of adultery has been deemed to be incriminating because adultery was at one time an ecclesiastical offense and subject to ecclesiastical censures and that the right to be so protected against questions tending to show adultery exists independently of statute or rules of court.⁷ This privilege became obsolete in England by the nineteenth century, and there is now virtually no rational justification for the existence of the privilege.

R.S.N. 1952, c. 120, ss. 2 and 3. (See, however: Stats. Nfld. 1971, No. 48, ss. 2,3). Ibid., ss. 2, 3 and 4. (See however: Stats. Nfld. 1971, No. 48, ss. 2, 3.)

1 Ibid., s. 3. (See, however: Stats. Nfld. 1971, No. 48, ss. 2, 3.)

2 As to waiver by a witness of protection provided by s. 3 of The Evidence Act, see: Phipson on Evidence (10th ed., 1963), pp. 271-272; *Hebblethwaite v. Hebblethwaite*

3 (1869-72), L.R. 2P. & D. 29; *Long v. Long and Johnson* (1890), L.R. 15 P. & D. 218; *Ewasiuk v. Ewasiuk* (1968), 70 D.L.R. (2d) 525 (T.C.). T.C.).

4 5 Report of the Royal Commission on Divorce and Matrimonial Causes (England), 1909/1912 (Lord Goren).

6 *Redfern v. Redfern*, /1891/ P. 139, 60 L.J.P. (N.S.) 9 (C.A.).

Harrison v. King, /19251 3 D.L.R. 395 (Alta. Sup. Ct., App. Div.).

In England The Royal Commission on Divorce and Matrimonial Causes 1909-1912, The Committee on Procedure in Matrimonial Causes 1946-1947, and The Royal Commission on Marriage and Divorce 1951-1955 all concluded that it is no longer necessary to protect the parties or witnesses in matrimonial proceedings from being questioned about their adultery and all recommended that the privilege be repealed.

If the privilege were repealed it would allow the petitioner to subpoena the respondent, and the person alleged to be involved in a matrimonial offense¹ to give evidence to prove his or her own adultery. It would mean that both husband and wife would be present at the hearing and their presence would not only assist the court in its search for the truth but might enhance the prospect of reconciliation in some cases.

In Nova Scotia The Evidence Act includes the further proviso "or unless permission to ask such question is given by the presiding judge"², and the Study will recommend that this proviso become part of the Newfoundland Evidence Act.

The operation of this proviso has been considered by the Supreme Court of that province in several cases.³

As Doull, J. said in *Hawbolt v. Hawbolt* "the statute indicates no particular grounds upon which the permission may be given and the only circumstances which seem to be indicated are those of general fairness or unfairness."⁴

MARITAL COMMUNICATIONS

The most substantial argument advanced in support of the privilege with respect to marital communications⁵ is that husbands and wives must be protected against court-room disclosure, to encourage the normal exchange of marital confidences, which is fundamental to marital harmony. But surely the exchange of marital confidences is a result rather than a cause of marital harmony.

In rebuttal, it might be argued that husbands and wives would never think of the possibility of court-room disclosure even though the privilege were repealed. Freedom of marital confidences arises not by reason of the existence of a court-room privilege but from mutual trust.

¹Divorce Rules, 1969 (Nfld.), r. 5 (2).

²R.S.N.S. 1967, c. 94, s. 43.

³*Waugh v. Waugh* (1946-47), 19 M.P.R. 216; /1946/ 2 D.L.R. 133 (N.S. Sup. Ct. in banco); *Laffin v. Laffin*, 18 M.P.R. 417; /1945/ 3 D.L.R. 595 (N.S. Sup. Ct. in banco); *Hawbolt v. Hawbolt*, 14 M.P.R. 135; /1934/ 2 D.L.R. 703 (N.S. Sup. Ct. in banco).

⁴*Hawbolt v. Hawbolt* 14 M.P.R. 135, 140.

⁵The Evidence Act, R.S.N. 1952, c. 120, s. 4.

Appearance in court as a party to or witness in an action is a very unusual event in the lives of most married couples. Accordingly, the mere possibility of such an appearance can reasonably be said to have no influence whatsoever on the frankness of marital communications.

It is submitted that the validity of the argument is at best doubtful. On the other hand, the retention of the privilege can and does exclude from the consideration of the courts highly relevant and valuable testimony.

Perhaps the real basis for retaining the privilege is a natural reluctance to pry into marital confidences. If this is the real source of the privilege, is the retention of the privilege justified? The Study is of the opinion that the answer must be in the negative since the outcome of a civil action may depend on the facts now excluded by the privilege.

The solution to the problem is to make it clear by amendment that the privilege in section 4 of The Evidence Act is not an absolute but a qualified one. This could be effected by providing that if the trial judge found that the evidence of the communication was required in the due administration of justice the privilege would no longer apply, and the Study will so recommend.

COMPETENCY AND COMPELLABILITY OF HUSBANDS AND WIVES IN PROSECUTIONS UNDER AN ACT OF NEWFOUNDLAND

Section 3 of The Evidence Act delineates situations in which the general provision on competency and compellability of witnesses does not apply.

The initial situation covered in the section is the question of the competency and compellability of an accused person or his or her spouse to give evidence in "any criminal proceeding."

It is assumed that the exception is intended to negate the effect of section 2 of the Act in prosecutions under Newfoundland statutes. Section 2 provides:

"2. On the trial of any issue joined, or any matter or question, or on any enquiry arising in any suit, action or other proceeding, in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action or other proceeding may be brought or defended, or who may have any interest in the result thereof, and the husbands and wives of the parties thereto,

and of the parties in whose behalf any such suit, action or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *viva voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding: Provided that the party so called to testify may be cross-examined by the opposite party under the rules applicable to the cross examination of witnesses."

Various courts have held that an offence against a provincial statute "is an offence which the State has made punishable at the instance of the Crown instead of merely actionable at the instance of another citizen, and this is the very essence of criminal proceedings."

Even so, if this assumption is correct, since Criminal Law is within the exclusive legislative authority of the Parliament of Canada, would it not be preferable to substitute a provision similar to section 9 of the New Brunswick Act², viz, "Nothing herein contained shall render a person charged with an offence against a law of this Province compellable to give evidence for or against himself, or the wife or husband of such person compellable to give evidence for or against such person"?

In the Study's view the provision concerning self-incrimination should be retained.

Moreover, since penal provisions of provincial statutes normally provide for offences punishable on summary conviction and not for indictable offences, the use of the term "indictable offence" would seem to be inconsistent with the presumed intent of the exception.

EVIDENCE OF HUSBAND AND WIFE CONCERNING SEXUAL INTERCOURSE

Most of the provincial Evidences Acts have a provision under which a husband or wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. Section 8 of the Ontario Evidence Act³ is typical of such a provision. It is in the following terms:

"8. Without limiting the generality of section 7, a husband or a wife

1 Maddess, /1967/ 3 C.C.C. 284, 285 (B.C. Sup. Ct.).

2 N.B. Act 1958, c. 14.

3 R.S.O. 1960, c. 125.

may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage."

The purpose of such a section is to overcome the effect of the decision of the House of Lords in *Russell v. Russell*.¹ This decision prohibited either spouse from personally giving evidence of non-access tending to bastardize a child born in wedlock as long as they were not separated by an order of the court at the time of its conception. If they were so separated at that time they could not give evidence to the effect that they had had intercourse by which the child might have been conceived.

It has been held that the rule in *Russell v. Russell* does not apply to affiliation proceedings where the mother of the child is a married woman.²

The incorporation in the Newfoundland legislation of a provision similar to section 8 of the Ontario Act is desirable and the Study will recommend accordingly.

CORROBORATION

The general rule of Canadian law is that the court may act upon the uncorroborated testimony of one witness.

However, The Evidence Act provides that corroboration is required in the following family law actions:

- (a) actions for breach of promise of marriage³, and
- (b) actions involving claims against the estates of deceased persons.⁴

In addition, The Children of Unmarried Parents Act, 1964⁵ provides in section 19 (1) that corroboration is required of the evidence of the mother of the child in an affiliation proceeding⁶.

¹ /1924/ A.C. 687, followed in *Re Brown and Argue* (1925), 57 O.L.R. 297 (Ont. Sup. Ct. 2App. Div.) and *Kijko v. Baczyski* (1921), 51 O.L.R. 225 (Ont. Sup. Ct., App. Div.). *Hantsport v. Pulsifer* (1933), 6 M.P.R. 530 (N.S. Sup. Ct. in banco).

⁴The Evidence Act, R.S.N. 1952, c. 120, s. 5.

⁵*Ibid.*, s. 14.

⁶Stats. Nfld. 1964, No. 40.

Compare: *Walsh v. Nolan* (1945), 15 Nfld. L.R. 298 (Sup. Ct. in banco), and affiliation proceeding under The Health and Public Welfare Act 1931, Stats. Nfld. 1931, c. 12 which did not require corroboration, with *Snow v. Mitchell* (1954), 32 M.P.R. 237 (Sup. Ct. Nfld.) and *Luther v. Ryan* (1957), 39 M.P.R. 122 (Nfld. Sup. Ct. in banco).

Section 19 (2) of the Ontario Evidence Act provides that no case shall be decided upon the unsworn testimony of a child unless it is corroborated by some other material evidence.

GENERAL COMMENT ON STATUTORY PROVISIONS REQUIRING CORROBORATION

The purpose of such provisions is to ensure that in certain circumstances the court does not act upon the testimony of one witness.

There is no doubt that in these certain situations it is necessary for the tribunal to proceed with caution.

However, it should be pointed out that perjury cannot be prevented by statutory provisions requiring corroboration.

If a litigant is willing to commit or suborn perjury and counsel is ready to encourage or wink at it, no statutory provisions requiring corroboration will deter them.

Such provisions may hurt only the honest litigant. His testimony may be believed in its entirety by the court yet because of such provisions he would lose his action in the absence of corroborative evidence which might simply not be available.

In seeking to avoid injustice to one side, the equal possibility of injustice to the other must not be ignored.

On the other hand, since an allegation of promise of marriage and of putative fatherhood and a claim against the estate of a deceased person are easy to make and difficult to refute there may be, on balance, ample justification for retention of this requirement.

CERTIFICATE OF CONVICTION AND DIVORCE DECREE AS PRIMA FACIE EVIDENCE OF ADULTERY

In 1943 the English Court of Appeal made a decision of paramount importance, not only because of the wide sweep of the principle it laid down but because it overruled at least three cases¹ which have been followed in Canada.²

In that case³, the Court laid down in the clearest possible terms that a previous conviction or judgment is not ever admissible evidence of the facts upon

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In the Estate of Crippen, /1911/ P. 108; Partington v. Partington and Atkinson, /1925/ P. 34; O'Toole v. O'Toole (1926), 134 L.T. 542 (P.D.A. Div.).

²

Re Noble, /1927/ 1 W.W.R. 938 (Sask. D. Ct.); Deckert v. Prudential Insurance Co., /1943/ 3 D.L.R. 747 (Ont. C.A.).

³ Hollington v. F. Hewthorn & Co., /1943/ 1 K.B. 587.

which it was founded, at any rate when those facts are directly in issue in subsequent civil proceedings.

This decision was subsequently approved by the Supreme Court of Canada in *La Fonciere Compagnie D'Assurance De France v. Parras*¹.

A difference of opinion exists in Canadian courts as to the applicability of the rule in *Hollington v. Hewthorn*, *supra* in an action for divorce where a *decree* in a previous action *involving* the same parties is tendered as *prima facie* evidence of adultery. The British Columbia Supreme Court in *Lingor v. Lingor*² felt impelled to follow the rule, quoting the *La Fonciere* decision *supra* as authority. On the other hand, the Ontario High Court in *Love v. Love et al.*³, decided that the rule did not apply to render inadmissible the decree in the previous action as *prima facie* evidence of adultery.

The *Hollington v. Hewthorn* case *supra* involved an attempt by the plaintiff to tender in evidence the conviction of one of the defendants for careless driving as *prima facie* evidence of negligence. The *La Fonciere* case *supra* involved a similar attempt to tender in evidence a conviction of negligence causing grievous bodily injury as *prima facie* evidence of criminal misconduct in the operation of a motor car.

Before the decisions in the *Hollington* and *La Fonciere* cases *supra*, a certificate of conviction of having had carnal knowledge was admitted in a divorce action⁴ as proof of adultery.

However, since the decisions in those cases the courts⁵ have refused to admit a certificate of conviction of any offense involving carnal knowledge as proof of adultery.

Section 27 of The Saskatchewan Evidence Act⁶ provides:

"In an action by a wife for dissolution of marriage, alimony or judicial separation a certificate:

- (a) setting out with reasonable particularity the conviction of the husband for an offense under Section 136, 138, 140, 142, 143 or

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3 /1955/ 1 D.L.R. 719 (B.C. Sup. Ct.).

/1943/ S.C.R. 165.

(1969), 2 D.L.R. (3d)

273 (Ont. H. Ct.).

⁴ *Lauritson v. Lauritson* (1932) 41 O.W.N. 274 (Ont. H. Ct.)

⁵ *Manuel v. Manuel* (1956), 1 D.L.R. (2d) 429 (N.S. Div. & Dist. Ct.).

⁶ R.S.S. 1965, c. 80.

Causes Ct.).

145 of the Criminal Code,¹ committed after the marriage; and

- (b) purporting to be signed by the person who made the conviction or by the local clerk of the court or other officer having custody of the records of the court in which the husband was convicted, or by the deputy of that local clerk or officer, •

shall, upon proof of the identity of the husband be admissible as *prima facie* evidence of adultery by the husband, without proof of the signature or official character of the person by whom the certificate purports to be signed."

The incorporation in the Newfoundland legislation of a provision similar to section 27 of The Saskatchewan Act is desirable and the Study will recommend accordingly. In addition, the Study will recommend that such a provision also apply in actions for judicial separation by a wife based on the grounds of adultery, sodomy or bestiality, and in divorce proceedings by a wife on the grounds of adultery, rape, bestiality, sodomy, a homosexual act or bigamy, where a certificate of conviction of the husband under section 150 of the Criminal Code (incest), section 152 (seduction under promise of marriage), section 154 (seduction of female passenger on a ship), section 155 (buggery, bestiality), section 144 (rape) or section 254 (bigamy) is tendered in evidence. The Study will further recommend that in an action *by a husband* for dissolution of marriage on the ground of bigamy the husband may introduce as *prima facie* evidence a certificate of conviction of his wife under section 254 of the Criminal Code, and in an action for judicial separation on the ground of sodomy, a husband may introduce as *prima facie* evidence, a certificate of conviction of his wife under section 150 of the Code.

In addition, the Study will recommend that a further provision be incorporated in the Newfoundland legislation to provide that in a divorce action, a decree in a previous divorce action grounded on adultery, sodomy, a homosexual act or bigamy involving the same persons as respondent and the person alleged to be involved in a matrimonial offense, shall be *prima facie* evidence of adultery, sodomy, a homosexual act, or bigamy, provided the identity of the persons involved is satisfactorily proved.

R.S.C. 1970, c. C - 34: Now section 144 (rape); now section 146 (sexual intercourse with female under fourteen or between fourteen and sixteen); now section 148 (sexual intercourse with feeble-minded female); now section 150 (incest); now section 151 (seduction of female between sixteen and eighteen years of age); now section 153 (sexual intercourse with stepdaughter, foster daughter, female ward or employee).

PRIVILEGE - MARRIAGE COUNSELLING - LEGAL PROFESSIONAL PRIVILEGE

It is well established law that "Communications passing between a client and his legal adviser together, in some cases, with communications passing between these persons and third parties¹ may not be given in evidence without the consent of the client if they were made either (1) with reference to litigation that was actually taking place or was in the contemplation of the client, or (2) if they were made to enable the client to obtain, or the adviser to give, legal advice."²

The rationale of the rule concerning this privilege was concisely stated in *Reece v. Dye*³ as follows:

"The unrestricted communication between parties and their professional advisers has been considered of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth of the case cannot be ascertained."

Full disclosure of the facts which may lead to litigation or upon the basis of which the client is seeking legal advice is considered essential to the relationship. Such full disclosure will be encouraged if the client knows that what he tells his lawyer cannot, over his objection, be revealed by his lawyer in court.

PRIVILEGE - OTHER RELATIONSHIPS

There would appear to be a sound basis for the retention of legal professional privilege but what about a similar privilege being accorded to other relationships?

At the present time in Canada under the Common Law the only privileged communication arises from the relationship between solicitor and client. However, Newfoundland's Evidence Act⁴ provides that a clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character.

The requirements for the conferring of privilege on any communication are set forth in the text of Wigmore on Evidence :

¹ See *Anderson v. Bank of British Columbia*

20 C.B.R. 221 (1876), 2 Ch. D. 644 (C.A.).

3 20 C.B.R. 221 (1876).

⁴ The Evidence Act, R.S.N. 1952, c. 120, s. 6.

⁵ Vol. VIII, s. 2285.

"Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception, . . . four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Only if these four conditions are present should a privilege be recognized".

The case for the creation of a new privilege is set out in Cross on Evidence ¹.

"The crucial question is whether there is some interest protected by the privilege which is at least as significant as the proper administration of justice. It is, of course, important not to exclude the possibility that the law is defective on account of its failure to recognize certain legitimate claims to privilege, and not merely because of its protection of interests which do not merit such solicitude. The influence of public opinion must never be ignored. The proper administration of justice mentioned above includes the notion of the rejection of relevant evidence because its reception would be unduly offensive to contemporary public opinion. It follows that that which was the subject of privilege in one generation should not necessarily be privileged in the next and vice versa."

The report of the Committee on Privileged Communications to the
3rd ed., 1967, at pp. 226 - 7.

Ontario Civil Justice Sub-section of the Canadian Bar Association¹ recommended that privilege be extended by legislation to communications between members of the public and members of the clergy, medical profession and social workers acting in their professional capacities. To date this has not been done.

However, insofar as the marriage counsellor and marriage reconciliation is concerned, while legislation might be advisable, is there a need in the light of court decisions in recent years and the enactment of the new Divorce Act?²

As part of an attempt to settle a dispute the parties frequently make statements "without prejudice", for example, during negotiations between the parties personally or between their solicitors and may include an attempt to compromise a matrimonial cause. When this is done, the contents of the statement cannot be put in evidence without the consent of the parties, there being a joint privilege.

However, in recent years there have been cases concerned with statements made to a conciliator and the question has arisen as to whether he can decline to give evidence concerning them without the consent of the parties. It is apparent from the decisions that the courts are anxious to promote matrimonial reconciliation and wish to avoid holding a mediator as a compellable witness in order to encourage the husband and wife to speak frankly to the professional worker. Of course, a matrimonial reconciliation is not the same thing as the compromise³ of a matrimonial cause.

In *McTaggart v. McTaggart*³ Denning, L.J. said:

"The probation officer has no privilege of his own in respect of disclosure any more than a priest, or a medical man, or a banker, and on that account, it has been sometimes supposed that the court will compel a probation officer to give evidence of what took place in the course of a negotiation. That is a mistake. . . . There is no chance of reconciliation, unless the parties are able to talk with frankness to the probation officer and with complete confidence that what they say will not be disclosed ..."⁴

In *Mole v. Mole*⁵ a letter written by the husband to the probation officer, whom the wife consulted with a view to reconciliation, was held to be privileged. Bucknell, L.J. said:

¹ Proceedings of the Canadian Bar Association, Vol. 47, 1964, at p. 182

² [1968] 1 S.C.R. 1000

³ [1968] P. 341, [1968] Q.B. 511 (C.A.)

⁴ [1951] P. 21; [1950] 2 All L.R. 328 (C.A.). ⁵ [1949] P. 94, 97-98.

it . but one must bear in mind that in matrimonial disputes the State is also an interested party; it is more interested in reconciliation than in divorce . " ¹

In the same case Denning, L.J., said:

"I take it that the principle laid down in *McTaggart v. McTaggart* (Supra) applies not only to probation officers but also to other persons such as clergy, doctors, or marriage-guidance counsellors, to whom the parties or one of them go to with a view to reconciliation, there being a tacit understanding that the conversations are without prejudice."²

In *Henley v. Henley*³ the conciliator was a clergyman who was a friend of the parties and it was held the privilege attached to statements made to him.

Again in *Theodoropoulos v. Theodoropoulos*⁴ the court held that where husband and wife were attempting to effect a reconciliation in the presence of a third person neither one of the spouses, nor the third person, could give evidence of the terms of the conversation without the consent of the other spouse.

This decision has been criticized on the grounds that it may impede the establishment of a case of desertion on the grounds of the refusal of an offer to return. However, the offer could always be repeated separate and apart from the reconciliation negotiations.

In Canada, Tavender, D.C.J., in *Brysh v. Davidson*⁵ examined the authorities and concluded:

"With all deference I consider the principles enunciated in these cases sound. As I see it they lay down the rule that in the case of a matrimonial dispute between husband and wife it is in the interests of the state that marriage be sustained rather than broken, and that any conversation or written communication by a spouse through a conciliator where conciliation is the object must be taken as having been made without prejudice and is therefore privileged if any party desires to claim privilege. This of course is sound because 'reconciliation' must have to do with the restoring of *status quo*."⁶

/1951/ P. 21, 23.

² Ibid., 24.

³ /1955/ P. 202; /1955/ 1 All E.R. 590 (P.D.A.).

⁴ /1964/ P. 311; /1963/ 2 All E.R. 772 (P.D.A.).

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⁶ (1963), 44 W.W.R. 654 (Alta. Dist. Ct.).

Ibid., 659.

In that case he was concerned not with a dispute between a husband and a wife but rather between an unmarried mother and the alleged putative father, so he decided he had no right to extend the privilege to cover a discussion between the parties and a welfare worker.

In *G. v. G.*,¹ an Ontario court refused to compel the defendant husband in a custody action to answer questions on discovery as to what had been said to the husband, both about the marriage and about the wife, by a marriage counsellor whom he had contacted at the wife's request.

The Court quoted the *MeTaggart* case *supra* with approval and urged that pending suitable legislation laxity in admitting evidence about privileged communications has to be resisted.

Despite the trend of the decisions in the recent cases involving matrimonial conciliation or the welfare of children there is always the danger in a particular case that the court will refuse to recognize the communications between the parties and the marriage counsellor as privileged.

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In September, 1961,² a probation officer from the family court in Toronto was held to be a competent and compellable witness to testify in a matrimonial action despite the objection that this was a privileged communication. The judge, however, expressed the view that "there should be statutory provisions to prohibit disclosure of these communications."

So much for the position in Common Law, but what about the new Divorce Act? In what way is it relevant to the consideration of the question of privilege and marriage counselling? Section 21 of the Act reads:

"21. (1) A person nominated by a court under this Act to endeavour to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court for that purpose."

It is clear from the contents of this subsection that provided a counsellor is "a person nominated by a court" under the Divorce Act he is neither competent nor compellable any legal proceedings to disclose things said or written during any endeavour towards possible reconciliation.

But does the Act create a privilege between counsellors and parties with

1 /1964/ 1 O.R. 361 (High Ct.).

² Unreported case referred to in an article by A.M. Kirkpatrick in 7 Cr. L.Q. at p. 315.

respect to admissions or communications made to the counsellor by the parties before the counsellor has been "nominated by a court" under this Act?"

Section 21 (2) of the Act reads:

"(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings."

Since its enactment this subsection has raised a simple question but one of wide application. Is subsection (2) of section 21 limited to the course of an endeavour by a person nominated under subsection (1) or is it a general statutory rule of evidence applicable to all endeavours to assist the parties to a marriage with a view to their possible reconciliation?

Until recently there was no decided case dealing with the interpretation of section 21 of the Divorce Act.

However, on 25th April 1969, a custody action¹ was commenced in the High Court of Justice in Ontario under section 1 (1) of The Infants Act.² The action involved the custody of a little girl. In the course of the trial an objection was made to certain evidence in respect of which privilege was claimed. The testimony involved a communication made by the mother of the child to a member of the John Howard Society of Ontario at a meeting of the mother and father who was a discharged prisoner. Mr. Justice Wright said:

"Although it was not cited to me, I have also since considered s. 21 of the *Divorce Act*, 1967 - 68 (Can.), c. 24³ but Mr. Andrew/the member of the John Howard Society of Ontario/was not a person 'nominated by a court' nor were his efforts directed to reconciliation but rather to the rehabilitation of the defendant husband. The section does not, *in* my
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opinion, apply."⁴

He then went on to consider the question of the scope of subsection (2) of section 21. At pages 865 - 866, he said:

"It can be strongly argued that s. 21 (2) renders inadmissible certain evidence arising from efforts made by the marriage counselling or guid-

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Robson v. Robson, /1969/ 2 O.R. 857 (High Ct.).

2 R.S.C. 1968, c. 107, s. 3

Now: R.S.C. 1970, c.D-8.

4 /1969/ 2 O.R. 857, 863.

ance facilities of which the lawyer has the duty to inform his client. If that be so, it would follow easily that certain evidence arising from efforts by any recognized marriage counselling or guidance facilities would be inadmissible under s. 21 (2).

This is not my view, but I recognize the strength of the argument and a logical extension of s. 21 (2) in that way but no further.

In my view, s. 21 (2) is restricted to rendering inadmissible evidence of anything said or of any admission or communication made in the course of an endeavour *only* by a person nominated by a Court under s. 8 (1) (b) of the *Divorce Act*.

I base that view on the general rules of statutory interpretation and arrangement, on the internal evidence of the provisions of the Act relating to reconciliation and the unlikelihood of Parliament enacting a general rule of evidence applicable to all proceedings in its jurisdiction in a subsection of a section of the *Divorce Act*.

In dealing with a similar problem in *Minister of Health v. Stafford Corporation*, 1952/Ch. 730 (C.A.), Romer, L.J. with the agreement of Evershed, M.R., and Birkett, L.J., rejected an argument that a subsection applied generally. He said at pp. 741 - 2:

"The Attorney General was not disposed to accept this as reflecting the probabilities of the matter and sought to meet the difficulty by suggesting that subsection (1) and (2) should be treated as wholly isolated from one another and that effect should be given to each without regard to the other. This treatment of two consecutive subsections in an Act of Parliament is one only to be resorted to in case of necessity. No such necessity is to be found here . .

I think that applies in the circumstances to s. 21 of the *Divorce Act* and relates s-s (2) only to s-s (1)."

The matter of without-prejudice negotiations between estranged husbands and wives has only come to the fore in recent years and the law is still far from settled insofar as the relation of the privilege to public policy and its limits are concerned. Moreover, since section 21 of the *Divorce Act* has been held to limit the privilege between counsellors and parties to counsellors "nominated by the court" under section (8) (1) (b) of that Act, it is apparent that if a general statutory rule of evidence extending an absolute privilege to all endeavours to assist the parties to a marriage to effect a reconciliation is desirable, it should be enacted by way of amendment to The Evidence Act of Newfoundland.

The Family Law Study has recommended in Chapter XI on Education for Family Living, Marriage and Family Counselling and Marriage Reconciliation that an organization referred to for convenience in that chapter as the "Newfoundland Family Guidance Association" be set up¹, that two of its functions would be marriage and family counselling and marriage reconciliation²

and that statements made to marriage conciliators by one or other of the parties be absolutely privileged³.

The Study suggested in that chapter that the stage at which marital reconciliation has the best chance of success is as soon as possible after the marital rift or misunderstanding occurs. By the time one of the parties seeks legal counsel with a view to divorce, he or she has made a firm decision that divorce is the only solution to his or her problem. The likelihood of successful efforts by a court-nominated marriage conciliator under section 8 of the Divorce Act at that stage is accordingly slight.

Therefore, it will be the recommendation of the Study that the new statutory privilege cover not only the reconciliation efforts of a Court-nominated marriage conciliator under the Divorce Act, as outlined by the Study in Chapter XI, but all other endeavours of a marriage counsellor to reconcile parties to a marriage.

Moreover, it is suggested that the marriage counselling program would be largely ineffective unless the parties are able to talk with complete frankness to the marriage counsellor and with complete confidence that what they say will not be disclosed in any subsequent proceedings.

BLOOD TESTS AND PATERNITY

The admissibility of blood-test evidence in paternity issues may arise in many situations e.g. in affiliation proceedings, in matters of custody, maintenance and succession, or in a divorce case.

It is agreed that the use of compulsion to force a person to submit to a blood test without consent would constitute a serious invasion of the rights of that person and would not be within the power of the courts to order.⁴ Moreover, if the person did not appreciate the possible results of what he was doing in

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² *Infra*, p. 454.

³ *Infra*, pp. 454-455.

⁴ *Infra*, p. 456.

W. v. W., /1964/ P. 67 (C.A.); *Whitehall v. Whitehall*, /1958/ S.L.T. 268.

submitting to the test the courts have held that the results of test should not be considered.¹

Section 20 (1) of the English Family Law Reform Act 1969² provides that in any civil proceedings, in which the paternity of any person fails to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings give a direction for the use of blood tests to ascertain whether such tests show that party to the proceedings is or is not thereby excluded from being the father. The results of the test must be received by the court as evidence.

If the party refuses or fails to submit to a blood test following such a court direction "the court may draw such inferences, if any, from that fact as appear proper in the circumstances".³

In South Australia a court of summary jurisdiction has jurisdiction to order a blood test to be made on the mother and the child at the request of the putative father in an affiliation case, and in the event of failure to submit to the test the complaint must be dismissed.⁴ Where the putative father is willing to submit to a blood test it seems only fair to give him the right to insist that the mother and child submit to a similar test.

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However, it is clear from the cases that while the court has a discretion whether to order a blood test, the discretion will not be exercised if such a test would not be in the child's best interests.⁵

¹ *Imre v. Mitchell*, /1959/ S.L.T. 13.

² Stats. U.K. 1969, c. 46.

³ Stats. U.K. 1969, c. 46, s. 23 (1). Under similar, infrequently-used, Nova Scotia legislation-section 41 of the Children of Unmarried Parents Act, R.S.N.S. 1967, c. 32 - the results of blood tests taken upon the application of any party to an affiliation proceeding, "shall be admissible in evidence only where the results establish definite exclusion of the putative father as the father of the child." If the mother refuses to submit to a blood-grouping test or to permit a blood-grouping test to be made of her child, after an order for blood testing has been made under section 41 (1) of the Act, the court "may infer from the refusal that the test would have established that the putative father could not be the father of the child." There is no provision covering refusal by the putative father to submit to a blood-grouping test.

⁴ The Maintenance Amendment Act, 1965, S. Aust'l. Stats. 1965, No. 54, s. 24.

In *Re L*, /1968/ P. 119, at p. 133, per Ormrod, J.: "It follows therefore, that the court can authorize a doctor to carry out a serological examination on the child in the present case unless there is some rule of law which prevents the court from ordering a medical examination for purely forensic purposes. I know of no such rule but it, of course, goes without saying that no court would order such an examination unless it were satisfied that it was a necessary step to enable the court to reach the wisest possible decision as to the best interests of the child." In *B. (B.R.) v. B.(J) et al.*, /1968/ P. 466 per Lord Denning, M.R. at p. 473: "It is unnecessary to review the matter at length. That was

Further, in England the burden of proof (beyond reasonable doubt) with respect to the rebuttal of the presumption of legitimacy was altered when legislation enacted in 1969 was proclaimed.¹ The effect of this alteration will be that the presumption of legitimacy may be rebutted on the balance of probabilities.

In Canada,² on the other hand, the presumption of legitimacy can only be rebutted by evidence that paternity is impossible. In *Welstead v. Brown*³ Mr. Justice Kerwin quotes Lord MacDermott in *Preston-Jones v. Preston-Jones*⁴ with approval when he said: "The evidence must no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what Lord Stowell, when Sir William Scott, described in *Loveden v. Lovedon* (1810), 2 Hag. Con. 1, at p. 3, as 'the guarded discretion of a reasonable and just man'." As Kellock, J. said at p. 483 of his judgment in the same case "the presumption is to be overborne only by evidence excluding reasonable doubt."

The Study submits that detailed consideration of evidentiary issues in affiliation and other court proceedings involving the procurement and use of blood tests should await the interpretation in England of Part III of the Family Law Reform Act 1969⁵.

EVIDENTIARY PROVISIONS - VARIOUS FAMILY LAW STATUTES

THE CHILD WELFARE ACT, 1964⁶

Section 12 (3) of the Act provides that "the judge may compel the attendance of witnesses in an investigation under this section."⁷ The comparable section in The Child Welfare Act of Ontario⁸ is section 24 (2) which provides as follows:

done in *In Re L (An Infant)*. Suffice it to say that, after full discussion, we see no reason for confining the jurisdiction, as Willmer, L.J. did, to the court's custodial jurisdiction. The jurisdiction is unlimited in a judge of the High Court. He can order a blood test to be taken whenever it is in the best interests of the child. I repeat what I said in that case: 'So also in a paternity issue, or any proceedings where it is in the best interests of the child to have its paternity settled one way or the other, the court can order a blood test. Even in a petition for divorce on the ground of adultery, the judge can in my view order a blood test on the child, for there too the child is vitally affected by the outcome.'

¹Family Law Reform Act 1969, Stats. U.K. 1969, c. 46, s. 26.

²*Welstead v. Brown*, [1952] 1 D.L.R. 465 (S.C.C.).

³*Ibid.*, 470.

⁴[1951] 1 All E.R. 124 (H.L.).

⁵Part III (Sections 20-25): Provisions for use of blood tests in determining paternity.

⁶Stats. Nfld. 1964, No. 45.

⁷Section concerns "neglected children".

⁸Stats. Ont. 1965, c. 14.

"(2) The judge has the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as may be requisite, and has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases."

Moreover, subsection 3 of the same section states who may be heard at such a hearing.

Section 16 of the Newfoundland Act requires that regard must be had to religion in determining the custody of a child. A comparable section in the Ontario Act, viz., section 37 makes provisions in subsection (1) and (2), for certain presumptions as to the religious faith of the child which do not appear in the Newfoundland Act. The Ontario provisions¹ assist the court to determine the religious persuasion of the child with some certainty. Reaching a decision must present some considerable difficulty to a Newfoundland court where the religious persuasion of the husband and wife differs.²

Section 41 of the Ontario Act makes provisions for the reporting of the ill-treatment of a child and protects the informant from legal action insofar as the disclosure is concerned unless the giving of the information is done maliciously or without reasonable and probable cause. A section of this nature would do much to encourage the reporting of ill-treatment cases by those who would be in a position to know the facts of such incidents, but who have heretofore taken the position that information of this nature is confidential and privileged and disclosure might lead to action against them. The Newfoundland Act has no equivalent provision.

THE CHILDREN OF UNMARRIED PARENTS ACT, 1964³

Section 8 of the Act empowers a magistrate to issue a summons or warrant against the alleged father, to take the evidence of the mother and the alleged father and of any witness who may be brought before him on behalf of either party. On the other hand, section 54 of The Child Welfare Act, 1965 of Ontario gives a judge the same powers with respect to witnesses as a judge has in the case of a hearing to determine whether a child is in need of protection. The powers referred to are those set out in section 24 (2) to which reference has already been made.'

¹ Stats. Ont. 1965, c. 14, s. 37.

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⁴ See Appendix C.

³ S.C. 1964, c. 21, s. 10. Supra, p. 417.

Section 19 (2) of the Newfoundland Act makes a married woman-a compellable witness in affiliation proceedings concerning the paternity of her child. It is presumed that the provision was considered necessary because of the rule in *Russell v. Russell (supra)*.

However, in the light of the decision of *Hantsport v. Pulsifer*¹ it is clear that the rule in *Russell v. Russell (supra)* does not apply to affiliation proceedings in which the mother of the child is a married woman.

If this reasoning is correct, there would seem to be no requirement to retain subsection (2) of section 19 of the Act in view of the provisions of section 2 of the Evidence Act, and the Study will recommend its repeal.

THE MAINTENANCE ACT²

Section 19 of the Act purports to make both the husband and wife competent and compellable witnesses in all proceedings under the Act.

Section 2 of The Evidence Act makes parties to actions and husbands and wives of parties competent and compellable to give evidence "On the trial of any issue joined, or any matter or question, or on any enquiry arising in any suit action or other proceeding, in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence. . ."

In view of the above-mentioned provision it would seem redundant to set out similar authority in this Act.

THE SOLEMNIZATION OF MARRIAGES ACT³

At Common Law if a person has not been heard from for seven years and if all lawful means have been taken to locate him but have failed, there is *a* presumption at law that he is dead.

Under the Matrimonial Causes Act, 1950⁴ the court is now empowered in England, if satisfied that reasonable grounds exist for presuming death, to make a decree of presumption of death and of dissolution of marriage, though there is no similar provincial presumption of death legislation in Canada.⁵

¹ Supra, p. 404 (fn.). Stats. U.K. 1950, c. 25, s. 16.

² R.S.N. 1952, c. 65. 5

³ R.S.N. 1952, c. 160 Sec Re Gould Estate (1958), 32 M.P.R. 144 (Nfld. Sup. Ct.).

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The Ontario Marriage Act¹ provides that a judge may in his discretion, make an order declaring that a spouse continuously absent for seven years and not heard of or from by the other spouse who has made reasonable inquiries, shall be presumed dead if he is satisfied as to the truth of the allegation that a spouse is missing.

Under section 11 (3) of the Act however, the successful applicant for such an order is required, before obtaining a marriage license, to sign an affidavit which includes an understanding by the applicant that if his or her previous spouse (the person presumed dead) is not in fact dead at the time of the solemnization of the subsequent marriage, such marriage is void.²

Under section 4 (1) (c) of the Divorce Act (Canada), proclaimed on July 2, 1968, a marriage may be dissolved where "the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent".

However, the provision in the Divorce Act affords no relief to the survivor of a missing spouse who wishes to remarry but due to conscientious objection to divorce or for other reasons does not wish to seek a divorce from the missing spouse.

The incorporation of a provision in the Newfoundland Act similar to section 11 of the Ontario Act would afford relief to such a person and the Study Will accordingly recommend.

THE CHANGE OF NAME ACT³

Section 11 (2) of the Newfoundland Act states that every certificate obtained from the Department of Provincial Affairs shall be received in every Court in the Province as *prima facie* evidence of the facts therein certified to be registered or recorded.

The comparable provision in the Ontario Act⁴, provides that the certifi-

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K.S.O. 1960, c. 228, s. 11.

2 The person making the affidavit under the Ontario Marriage Act is required to state (1) the particulars of the first marriage, (2) his or her belief that the first spouse is not living, (3) the fact a declaration of the first spouse's presumed death has been made, (4) particulars of the intended remarriage and (5) that he or she understands, and has advised the other person to the intended remarriage, that if the person presumed dead is not in fact dead at the time of the solemnization of the intended remarriage, such marriage is void.

3 R.S.N. 1952, c. 165.

4 R.S.O. 1960, c. 49, s. 19.

cate obtained from the clerk of the court in which the order was made is for all purposes conclusive evidence of its contents.

There would seem to be no valid reason why the certificate issued under the Newfoundland Act should not also be conclusive rather than merely *prima facie* evidence of its contents.

Section 3 (2) of the Ontario Act provides that where the applicant is an infant, he shall be deemed to be of full age for all purposes of this Act. The Newfoundland Act contains no such provision and should be amended to so provide.

RECOMMENDATIONS

CHAPTER X .

COMPETENCY OF WITNESSES

1. That The Oaths Act be amended to provide that in any legal proceeding where a child of tender years Or a person of weak intellect is offered as a witness and the child or person does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child or person may be received as sworn testimony on affirmation though not upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child or person is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. (Pages 397-399).
- Z. That section 2 of The Evidence Act be repealed with substitution therefor, providing that no person offered as a witness in an action shall be precluded from giving evidence by reason of any alleged incapacity from crime or interest. (Pages 399-400).

ADULTERY

3. That section 3 of The Evidence Act be amended by addition thereto of the following words:

"Or unless permission to ask such question is given by the presiding judge." (Pages 400-401).

MARITAL COMMUNICATIONS

4. That section 4 of The Evidence Act be amended by addition thereto of the following words:

"Unless it is found by the trial judge that the evidence of the marital communication is required in the due administration of justice." (Pages 401-402).

COMPETENCY AND COMPELLABILITY OF HUSBANDS AND WIVES

5. That The Evidence Act be amended to provide that nothing therein contained shall render a person charged with an offense against a law of this Province compellable to give evidence for or against himself, or the wife or husband of such person compellable to give evidence for or against such person. (Pages 402 - 403).

EVIDENCE OF HUSBAND AND WIFE CONCERNING SEXUAL
INTERCOURSE

6. That The Evidence Act be amended to provide that without limiting the generality of section 2 of the Act, a husband or a wife may in an action give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage. (Pages 403-404).

CERTIFICATE OF CONVICTION AND DIVORCE DECREE AS
PRIMA FACIE EVIDENCE IN DIVORCE PROCEEDINGS

7. That The Evidence Act be amended to provide that in an action by a wife for dissolution of marriage, judicial separation or maintenance, a certificate
- (a) setting out with reasonable particularity the conviction of the husband for an offense under section 144, 146, 148, 150, 151, 152, 153, 154, 155, or 254 of the Criminal Code, committed after the marriage, and
 - (b) purporting to be signed by the person who made the conviction or by the local clerk of the court or other officer having custody of the records of the court in which the husband was convicted, or by the deputy of that local clerk or other officer;

shall, upon proof of the identity of the husband, be admissible, where appropriate,

- (i) as *prima facie* evidence of adultery, sodomy, bestiality, rape, a homosexual act or bigamy by the husband in an action for dissolution of marriage,
 - (ii) as *prima facie* evidence of adultery, sodomy or bestiality by the husband in an action for judicial separation,
- as *prima facie* evidence of adultery in an action under The Maintenance Act; •

and in either event the signature or official character of ;the person by whom the certificate or decree purports to be signed need not be proved. (Pages 405-407).

8. That The Evidence Act be amended to provide that in an action by a husband for dissolution of marriage, or for judicial separation a certificate
- (a) setting out with reasonable particularity the conviction of the wife

for an offense under section 150 or 254 of the Criminal Code, committed after the marriage, and

- (b) purporting to be signed by the person who made the conviction or by the local clerk of the court or other officer having custody of the records of the court in which the wife was convicted, or by the deputy of that local clerk or other officer,

shall, upon proof of the identity of the wife, be admissible

- (0 as *prima facie* evidence of sodomy or bigamy by the wife in an action for dissolution of marriage;

as *prima facie* evidence of sodomy by the wife in an action for judicial separation;

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and in either event the signature or official character of the person by whom the certificate or decree purports to be signed need not be proved. (Pages 405-407).

- 9. That The Evidence Act be amended to provide that in a divorce action a decree in a previous divorce action involving the same persons as respondent and the person alleged to be involved in a matrimonial offense shall be *prima facie* evidence of adultery,- sodomy, a homosexual act or bigamy, provided the identity of the persons involved is satisfactorily proved. (Pages 405-407).

CORROBORATION

- 10. That The Evidence Act be amended to provide that any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceeding be rebutted by evidence which shows that it is more probable than not that that person is illegitimate or legitimate, as the case may be, and it shall not be necessary to prove that fact beyond reasonable doubt in order to rebut the presumption. (Pages 404-405).

PRIVILEGE - MARRIAGE COUNSELLING 11. That The

Evidence Act be amended to provide that:

- (a) Any person acting as a marriage counsellor or conciliator will do so under an oath of secrecy.
- (b) Any statements ever made to a counsellor or conciliator in his professional capacity by one or other of the parties to a marriage will be absolutely privileged.
- (c) Evidence of any admission ever made by either of the parties to the

counsellor or conciliator during the course of counselling or conciliation attempts will be inadmissible in evidence given by the counsellor or conciliator in any proceedings, without the consent of the said party. (Pages 412-415).

EVIDENTIARY PROVISIONS - CHILD WELFARE ACT

12. That section 12(3) of The Child Welfare Act be repealed with substitution providing that the judge has the power of summoning any person and requiring him to give evidence on oath and to produce such documents and things as may be requisite, and has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases. (Pages 417-418).
13. That The Child Welfare Act be amended to provide that every person having information of the abandonment, desertion, physical ill-treatment . or need for protection of a child shall report the information to a children's aid society or Crown Attorney, notwithstanding that the information is confidential or privileged, and no action shall be instituted against the informant unless the giving of the information is done, maliciously or without reasonable and probable cause. (Page 418).

EVIDENTIARY PROVISIONS-CHILDREN OF UNWED PARENTS LEGISLATION

14. That section 8 of The Children of Unmarried Parents Act, 1964 be repealed with substitution therefore providing that the judge has the power of summoning any person and requiring him to give evidence on oath and to produce all documents and things as may be relevant, and has the same power to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as is vested in any court in civil cases, (Page 418), and that section 19(2) of the Act be repealed, (Page 419).

EVIDENTIARY PROVISIONS - MARRIAGE LEGISLATION

15. That The Solemnization of Marriages Act be amended to provide that:
 - (1) A married person whose spouse is missing and who alleges:
 - (a) that his spouse has been continuously absent for at least seven years immediately preceding the application;
 - (b) that his spouse has not been heard from or heard of during such period by the applicant or to the knowledge of the applicant by any other person; and

- (c) that the applicant has made reasonable inquiries and has no reason to believe that his spouse is living.

may apply to a judge for an order under this section.

(2) Upon being satisfied as to the truth of the matters alleged, the judge may, in his discretion, make an order declaring that the spouse shall be presumed dead, solely for the purpose of permitting the person in . whose favour the order was made to obtain a marriage license upon depositing a copy of the order with the person issuing the license.

(3) The person in whose favour the order was made, before receiving a marriage license, shall sign an affidavit stating:

- (a) the particulars of the first marriage,
- (b) his or her belief that the first spouse is not living,
- (d) the particulars of the intended remarriage, and
- (e) that he or she understands, and has advised the other person to the intended remarriage, that if the person presumed dead is not in fact dead at the time of the solemnization of the intended remarriage, such marriage is void. (Pages 419-420).

EVIDENTIARY PROVISIONS - CHANGE OF NAME ACT

16. That section 11 (2) of The Change of Name Act be amended by substituting the word "conclusive" for the words "*prima facie*" therein. (Pages 420- 421).
17. That The Change of Name Act be amended to provide that where the applicant is an infant, he shall be deemed to be of full age for all purposes of the Act. (Page 421).

CHAPTER XI

EDUCATION FOR FAMILY LIVING, MARRIAGE AND FAMILY COUNSELLING AND MARRIAGE RECONCILIATION

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BACKGROUND

The nucleus of our society, the family, is the product of the union of a man and woman and is bound together by ties of common origin and affection. Marriage creates a legal relationship which imports mutual rights and duties to the parties - material support, fidelity, and responsibility towards their offspring. To many, it is more than a legal relationship - it is a sacred contract with a deep religious significance.

Marriage also produces other special relationships between husband and wife and between parents and child (the fundamental relationships of the family) and a further association between the family and society.

Like most human relationships, those between marriage partners and their children are often imperfect, causing tensions and conflicts. These are often exacerbated by the contacts of the family with modern society. The most important external influences contributing to the instability of the family unit have been urbanization, with its temptations and anonymity, and the growing affluence of society. The traditionally rigid partitions between social strata are disappearing, as are class marriages. Increasing social and economic independence has been achieved by women who are working in larger numbers, making careers in business, the professions and public life and gaining a large measure of political and legal equality with men. To some extent women forfeit their

femininity and its psychological advantages to vie and compete with their male co-workers or competitors and their husbands. The influence of mass advertising and entertainment weaken standards of family life and family stability.

The Study believes that a strong organization, adequately staffed by professional personnel is needed in Newfoundland in order to:

- (1) educate young people in a realistic approach to family living, including the significance of marriage as an institution and the difficulties they are likely to encounter in a marital relationship;
- (2) counsel persons contemplating a marriage (or remarriage)• or married persons whose association is endangered by financial, social or personal problems;
- (3) advise and assist in the solution of problems having a family rather than a marital connotation; and
- (4) provide opportunities for a happy alternative to divorce or, where dissolutionment is inevitable, to achieve it with a minimum of ill-effects.

The challenge of this organization will be file preservation of stable family life in our province.

A. ORGANIZATION

We now proceed to outline the type of organization within which Marriage Reconciliation, Marriage and Family Counselling and Education for Family Living could be associated.

OUTLINE OF ORGANIZATION

Ideally, each of these three could be one part of a triad set up to carry on the province-wide activities of an organization, to which, for the purpose of this discussion, we may refer as the Newfoundland Family Guidance Association. Its primary purpose could be threefold:

- (1) Education for Family Living. This would be a largely premarital activity. It would be organized by the Association and aided and carried on in and by schools, universities, churches, young people's groups, etc.
- (2) Marriage and Family Counselling. This would be available firstly to young people approaching marriage. It could include young engaged couples or others contemplating marriage, and youths of both sexes who may not at the time have any specific sentimental commitment or marriage plans but who seek counselling.

Marriage and family counselling would include long term counselling after successful reconciliation proceedings. The purpose of this would be to ensure that the reconciliation is a continuing condition and not merely a postponement of a final break-up.

Counselling ought not be limited to marital causes but should be available whether the need arises from a breach between husband and wife or from a family situation which they must face together. Illustrations of the causes of marital rifts and misunderstandings are interfering in-laws, excessive drinking by one or both of the spouses and chronic indebtedness. Parents may also have to weigh the pros and cons of a trying family situation such as, for example, to decide whether or not to give consent to marriage in such special circumstances as the pregnancy of a very young daughter.

Another important function of the marriage counsellor is to prevent the extension of conflicts between husband and wife to the children of the marriage. This can be achieved more easily before divorce proceedings are started, than after.

- (3) Marriage Reconciliation. It would make available after divorce proceedings have been contemplated and legal counsel consulted, the provision of reconciliation machinery to handle marital disputes. Reconciliation activities must be well organized, well staffed and operated with efficiency and understanding.

ADVANTAGES OF ONE ORGANIZATION

Newfoundland does not presently have any counselling or reconciliation organizations operated by private enterprise or sponsored by church, government or social groups. Only recently has a university program been started to help qualify personnel to provide this type of service. This is because, until recently, Newfoundland had never had a special divorce court nor an established court vested with divorce jurisdiction. Even after Newfoundland joined the federation of Canadian provinces in 1949, persons from Newfoundland seeking a Canadian divorce were required to obtain this relief from the Parliament of Canada.¹

The importance of having reconciliatory services available in Newfoundland was made manifest when the federal Parliament enacted the Divorce Act² which urges both legal counsel and judges hearing divorce proceedings to encourage reconciliation.

In making this therapy available, there is now an unique opportunity in Newfoundland to consider reconciliation as one function of an overall organization such as the one suggested (and referred to for convenience as the New foundland Family Guidance Association). It is true that dissimilar and unconnected organizations can work independently in the field of reconciliation as well as that of marriage and family counselling and have done so in a number of jurisdictions. It is also the case that the pastoral work of clergymen in family matters has been and will continue to be welcomed. But the possibility of setting up one overall organization in which such leaders as clergymen, doctors, lawyers, social workers, psychologists, psychiatrists, sociologists and private individuals, with a sense of professional or social responsibility, would associate together, aided and directed by an advisory board and served by experienced and specially trained field and headquarters staffs, is a more attractive one.

ADVISORY BOARDS

Another advantage of a provincial organization is that interested people of good standing in the province would, by accepting membership on advisory or

¹ Since July 2, 1968 jurisdiction to hear divorce applications has been vested in the Supreme Court of Newfoundland.

² R.S.C. 1970, c. D-8.

management boards, share in and help guide the work. Their support, like that of local authorities, would give a province-wide character to the organization. Branches of such boards would be set up in a number of communities.

The other activities of such an association will be dealt with later, as will the composition of the organization itself. Within this concept, we may first proceed to discuss Marriage Reconciliation.

B. MARRIAGE RECONCILIATION

There are numerous types of reconciliation agencies in the countries of the world. These include (1) voluntary church organizations and the familiar pastoral work of clergymen of various denominations, (2) voluntary organizations not church - oriented, (3) special State - appointed agencies including subsidized individuals, specially selected and trained, and (5) professional private fee - charging counselling and reconciliation agencies.

When divorce proceedings begin, the marriage union is no longer healthy. The ailment may be susceptible to treatment in some cases but inoperable and beyond cure in others. However a condition exists which should be diagnosed, and where possible remedied. Most if not all marriages are founded upon a genuine desire of both parties for a happy union and a healthy married life, one which will be strong enough to surmount any troubles that may be encountered. All people approaching marriage should accept the fact that married life will not be a continuously idyllic state and that, since human perfection is hardly to be expected, there must be some give and take in the relationship, some acknowledgment of one's own imperfections and allowances for those of the marriage partner. Marriage is a natural and human state and mature people who marry would have a natural and human desire to make the marriage succeed. Unfortunately not all people who marry are mature.

When one or the other of the parties to a marriage begins a divorce action, something seriously wrong has happened. The action is taken, not to strengthen or preserve the union, but to dissolve it. The taking of a divorce action is often the end result of intolerable and irremediable marital relations. In these circumstances it is not a symptom of the ailment, but the breaking out of the disease in its final virulent form. At that point in a marriage, reconciliation efforts may be useless. The marriage parties may well have tried everything in a genuine attempt to revive and preserve the union, but it may be dead long before they come into court. If this proves to be the case it is in the best interests of the parties and the community that the dead marriage be decently interred.

But bearing all this in mind, the recognizing that divorce proceedings can hardly be looked upon as akin to preventive medicine (of which more will be said later under other headings), still, as with the analogy of physical ills, everything possible ought to be done to treat the condition when the malaise becomes apparent. In this way cure or at least comfort may sometimes, if not always, be achieved.

In those cases where conciliation does not salvage the marriage and re-unite the family, the attempted therapy may at least minimize the pain of separation by adequate planning for the custody and support of the children and

financial and property provisions for the dependent spouse, even though questions of status and matters which could not be settled by negotiations have to be referred to the Supreme Court.

DUTIES OF COURT AND COUNSEL

A comparative study of modern divorce legislation and of the encouragement given to reconciliation, as well as to counselling agencies and activities, even during the course of legal proceedings, shows that in many jurisdictions there is in these days an earnest desire to do everything humanly possible to avert the occurrence of final divorce. As a result of the recommendations of the Federal Special Joint Committee of the Senate and House of Commons on Divorce, published in June, 1967, this trend is reflected in recently enacted Canadian divorce legislation. The procedure provided by sections 7 and 8 of the Divorce Act, which came into force on July 2, 1968, calls for a designedly leisurely approach in divorce litigation by both legal counsel and judges. It provides for the use of discussions and consultations, adjournments of hearings and the nomination of and co-operation with counsellors, in the interest of reconciliation. The hearing of a divorce action thus assumes a sort of continuing character. It is done so that, if possible, the last irrevocable step of dissolution can be avoided. This is not only abundantly apparent in the method of approach but in the fact that the Act imposes a specific duty on legal representatives and the Court to take steps aimed at reconciling the parties, at finding a happier alternative solution, and thereby averting the final breakdown and dissolution of the marriage.

The duties of legal counsel or solicitors who act for either side in a petition for divorce are set out in section 7 and must be carried out except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so. They are:

- (a) to draw to the attention of his client the provisions of the Act that have as their object the effecting where possible of reconciliation of the parties to a marriage;
- (b) to inform his client of the marriage counselling or guidance facilities known to him that might endeavour to assist the client and his or her spouse with a view to their possible reconciliation; **and**
- (c) to discuss with his client the possibility of the client's reconciliation with his or her spouse.

Counsel or Solicitor for the petitioner must endorse on the petition a statement

certifying that he has complied with the requirement of this section.

A provision similar to section 7 of the Canadian divorce legislation is contained in Australia's Matrimonial Causes Rules, and has been discussed in a report on Reform of the Grounds of Divorce: The Field of Choice" by The Law Commission (England). While acknowledging (Paragraph 31) that "Solicitors are among the people from whom advice may be sought at an early stage of the matrimonial differences and, ... in practice ... are very conscious of their duty to assist in a possible reconciliation . . .", the Commission expressed the reservation that members of the legal profession "are not trained in the art of marriage conciliation and can normally only pass their clients on to those who are.

Under section 8 of the Divorce Act it is similarly the duty of the Court to direct enquiries to the parties before proceeding to the hearing of evidence, to ascertain if the possibility of reconciliation exists, unless the circumstances are such that it would clearly not be appropriate to do so. If then or later in the proceedings it appears to the Court that there is a possibility of reconciliation the Court shall:

- " (a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled; and
- (b) with the consent of the parties or in the discretion of the court, nominate
 - (i) a person with experience or training in marriage counselling or guidance, or
 - (ii) in special circumstances, some other suitable person,to endeavour to assist the parties with a view to their possible reconciliation."

In making reconciliation an integral part of divorce actions, the Canadian practice follows that of other jurisdictions. Within the Commonwealth, Australia probably took the lead in establishing this policy, and has been followed by both New Zealand and the United Kingdom.

In the United Kingdom there is a State conciliation service attached to the courts, which can act as liaison between the courts and marriage guidance agencies, of which there is a considerable number. Court probation officers have been a feature of some courts in the United Kingdom for over 50 years, and

1 Her Majesty's Stationery Office, London, 1966.

have generally earned the trust and respect of the public in family matters. They are specially picked and trained officials. A number Of other jurisdictions including Sweden and Finland, Japan, the federal Republic of Germany and some parts of the United States have placed responsibility on the courts to aid conciliation wherever possible. Out of all these, principles and practices have been evolved, similar in some but not in all cases. It may be useful to discuss some of these here, for while they point out the paths to be followed, they may also disclose the pitfalls to be avoided.

NO COMPULSION IN RECONCILIATION

One of the provisionsof sections 7 and 8 of the Canadian Divorce Act discloses a principle which is basic to successful reconciliation attempts. In these sections an onus is placed upon legal counsel and the Court to draw the possibility of reconciliation to the attention of the parties "except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so". This would probably include cases in which both parties take the firm position that any further attempts would be futile. This leads to the statement of a generally accepted principle that there should be no compulsion in reconciliation. While this principle is questioned from time to time and from place to place, the weight of experience seems to establish that it is a sound one. Attempted compulsion carries with it not only the objection that it is useless in many cases but also the stronger stricture that it may violate the integrity of the person.

THE COURT AND CONCILIATION

It is part of the same principle that, while under the Act the Court is called upon to invite the parties to conciliate, except where in the opinion of the Court it is clearly inappropriate to do so, it is not required to conduct conciliation proceedings. It may grant an adjournment (a "cooling-off" period) and nominate suitable persons to attempt conciliation. The distinction seems to be generally accepted that while the Court may suggest and help arrange conciliation, it should not undertake it. It may tell the parties where they can find trained and expert advisers, but should not specially require them to seek further reconciliation. When such expert advice is available, the Court can suggest attendance at a diagnostic or screening interview. It has been found that this may encourage, without requiring, the parties to further conciliation efforts.

The judicial duties and responsibilities of the Court are too delicate to be prejudiced by associating it with active conciliation attempts. Indeed this is deemed to be so basic that in a number of jurisdictions it is provided that in contested cases where a judge has attempted to conciliate instead of nominating others, and the attempt fails, another judge shall take over and carry on the case

unless both parties request the prior judge to continue.

11:37 virtue of the Divorce Act, one of the basic requirements where conciliation is undertaken is the provision by the Court of a cooling-off period, during which conciliation efforts may mature and ripen. While no minimum period is provided, section 8 of the Act states that either of the parties may, by application to the Court after fourteen days have elapsed, have the Court proceedings resumed.

While this statutory "cooling-off" period is applicable only after proceedings are instituted, awareness of the existence of a competent counselling service would facilitate the emergence of the same technique in marital difficulties which have not reached the stage of court proceedings.

IMPORTANCE OF COMMUNITY SUPPORT

Even more basic is the knowledge of the availability in the community of competent counselling and conciliation services to which the parties can be referred. The lack of this knowledge is common to many jurisdictions, and it is now widely accepted that the resultant damage to the stability of the family is real and grave. Effective conciliation must not only exist but must receive the support of all levels of the community, through a continuing campaign of information and education as to family problems and the available machinery designed to deal with them. This campaign should be such that the public will respect and support the services provided, and that members of all political parties, as well as newspapers and interested pressure groups will endorse them. In some places Bar associations, religious groups and welfare organizations are enlisted to help create such an attitude. Conciliation efforts initiated by able judges and conducted by competent professional staffs, which receive widespread acceptance by the community should meet with a goodly measure of success. But such conciliation efforts do not begin until after divorce proceedings are started. By this time attitudes may have hardened and the whole fibre of the family relationship be more strained. The aim should be, where marital dislocations are concerned, to make the existence of the counselling service as fully known and as highly respected as that of the Court, and to regard counselling as being as much a part of normal treatment as examination and diagnosis would be before embarking on surgery. Prevention is usually less of an ordeal than cure.

IMPORTANCE OF EXPERT TRAINED STAFF

There are a number of requirements which experience has shown to be important in reconciliation procedures. One is that adequate professional staffs, formally trained in social work, some of whom have at least their Master of Social Work degree, and others with training in the behavioral sciences, should be avail-

able. Among their duties would be liaison with the courts, directing and handling of conciliation cases as well as marriage and family counselling. The training of conciliators and counsellors, including interested educated volunteers who could under direction play an important part in the case-work of reconciliation, could also be part of their responsibility. Training schemes should be developed, and in this the interest and help of the local university and of educators and expert personnel in the field of social work would be valuable. Lay counsellors and reconciliators should be selected and trained and, as has been found elsewhere; some interested *clergymen* would probably seek training, so that they could equip themselves with the knowledge of the skills required in this special field. Provision could be made to schedule regular tutorial group sessions at specified times and places so that these persons could take advantage of opportunities for training.

There ought to be a system, not only of training, but also of grading and accrediting counsellors, whether they are professionals or "lay" volunteers, in accordance with established standards. Up-to-date listings of such personnel should be maintained.

VOLUNTEER COUNSELLORS AND CONCILIATORS

The importance of the availability of interested volunteer lay conciliators must be stressed. They are used in many areas, even where substantial professional aid is available. This is the case in North America, in Europe and in Asia. The interest and attitude is the important thing; the training can come later.

Experience elsewhere indicates that the combination of well selected, trained professional and volunteer workers is a good one. Such volunteer workers could, under direction, be used to conduct screening interviews for their professional colleagues. In doing so, they could, where necessary or appropriate, arrange to have the client consult a staff psychologist or psychiatrist or a physician or lawyer, including the Legal Aid Committee of the Law Society of Newfoundland. In this way they would not only free professional personnel to devote their whole attention to more advanced aspects of the case, but would also be adding to their own skills in social work.

CONFIDENTIAL NATURE OF RELATIONS BETWEEN PARTIES AND CONCILIATOR

In reconciliation the utmost tact and sympathy must be used and the confidence of the parties must be gained and held. This will of course depend on the personality and attitude of the conciliator and the method of approach. In addition, it is important that the confidential nature of the discussions be made known to the parties and that certain principles be recognized and followed in divorce proceedings. Among these are:

- (1) Any person acting as a marriage conciliator will do so under an oath of secrecy.
- (2) Statements made to a conciliator by one or other of the parties will be absolutely privileged.¹
- (3) Evidence of any admission made by either of the parties to the conciliator during the course of conciliation attempts, will be inadmissible in evidence given by the conciliator in any proceedings, without the consent of the said party.

The second and third of these principles have largely been incorporated in section 21 of the Divorce Act with respect to reconciliation efforts by Court-nominated persons under section 8 of the Act.

The Study in an earlier chapter, recommends that these three principles apply to all endeavours by counsellors and conciliators, in a professional capacity to assist spouses.

¹ For discussion of privilege in relation to statements made to a conciliator by one or other of the spouses both before and after divorce proceedings have been commenced, see *supra*, chapter X, pp. 412-415.

C . MARRIAGE AND FAMILY COUNSELLING

INTRODUCTION

Bearing in mind the submission made earlier that one province-wide organization with a triune program would be the most effective way of dealing with the three stages proposed for the treatment of marital problems, i.e. education for family living, marriage and family counselling and marriage reconciliation, let us now go on to the treatment of Counselling.

BACKGROUND

The social evil in marital relationships which society must combat is not the incidence of divorce but the disintegration of family life. The lesson has been learned after many years that merely making divorce more difficult is not a solution. The law cannot compel people to live together in amity nor should it try to compel them to live together in enmity.

What has caused this increased disintegration of family life? It is part of a large change. It has happened over several decades in proportion to the changes in community life. If, for illustration, we examined an area that has undergone industrial growth over this period, we should probably find that at the beginning, more than now, the family home was a distinguishable social unit in a proportionally larger number of small communities. Families were not as scattered as now, and more often sons and daughters had their homes after marriage within easy reach of parents and other relatives. The little church in the community was a familiar institution, and was a social as well as a religious centre. The "Little Red Schoolhouse", with its peculiar influence was also an integral part of community life.

The rapid increase in population, the growth of primary or resource industries, followed by the development of secondary industries, attracted people from the small settlements within the range of the farm, the forest or the sea, and crowded them into larger centres of population where the land was made barren and unproductive by the very act of crowding together. The ensuing growth of the tertiary or service industries and the influence of mechanization and automation hastened the flow of population from rural to urban centres. With it went many of the characteristics and habits of the former way of life.

Life in the city was perforce less friendly and more impersonal than before. Relationships deteriorated from that of neighbour to acquaintance and from acquaintance to stranger. The social activities no longer felt the influence in the same way of the church and the home, and mass entertainment and spectator sport became a normal part of city life. Movies, radio and television

have changed even the city dweller of a decade or so ago.

In the city there was more movement, more distractions, more money, more glitter, while standards, distinctions and habits changed. Women became an accepted part of business life. and sought and gained equality in education, politics and in other fields. Nervous ailments increased and tensions grew. In summary, great areas and bodies of population became urbanized, passing from rural to urban living, with all the changes and distractions, advantages and disadvantages inevitable to such an experience. The disintegration of family life was one of the casualties of the change.

The pace of urbanization has been so swift and relentless that equivalent social adjustment has been out of the question. The dislocations are still with us, and as usual the social sciences lag far behind the changes and influences brought about by the advancements which have come through the physical sciences. This situation has confronted mankind before and probably always will.

NEED FOR COUNSELLING

Reference has been made to the part to be played by Counselling and Reconciliation in the preservation of the stability of marriage as a defence against the decay of family life. It is submitted that in efficient counselling and reconciliation machinery, coupled with a sound system of education for family living, lie the greatest hope of stemming the tide of disintegration of family life and effecting and preserving the stability of marriage.

The proposal for Counselling is to place it firmly within the triune organization which has already been described. While counselling does not presently involve formal contact with legal counsel and courts, counselling treatment calls for the same attitude and approach, the same organization and techniques as does that of conciliation. With people trained and experienced professionally in social work and related disciplines as part of a continuing organization, which also trains and uses interested volunteer help and has the support of the community, it is bound to have a healthy measure of success.

For example, social workers and interested volunteers of a family guidance association (as recommended) could play an important role, through co-operation with Newfoundland's Magistrates' Courts, in bringing professional counselling to families in conflict. A number of Stipendiary Magistrates reported that early symptoms of marital or family disquiet might include the laying of a complaint by a wife against her delinquent husband alleging that he had failed to support, or had physically mistreated his family. The Study submits that upon the trial of, and before judgment of such a complaint, both spouses could be

referred to counselling. At this early stage of marital or family unrest, proper counselling therapy is most likely to effect a reconciliation. This view is confirmed by the record of English magistrates' courts and United States' family courts which have been using similar, pre-judgment counselling services successfully for the past half century.

D . EDUCATION FOR FAMILY LIVING

INTRODUCTION

The importance of the family as the basic unit of society is universally recognized, but the preparation of persons for marriage and family life in this province and elsewhere has been lamentably inadequate.

Increasing numbers of people with higher life expectancies than previously marry earlier in life and produce offspring more rapidly after wedlock. In 1966, there were 3,728 marriages (a record number) performed in Newfoundland. Two-thirds (2,541) of the brides and a third (1,236) of the bridegrooms were 21 years of age or younger.¹

Since the marriage compact is intended for life and involves the growing together of two persons in intimate, complex relationships, more attention must be given to adequate preparation of young people for marriage.

What is required is a vigorous campaign of education for family living, organized and operated under the aegis of the proposed Newfoundland Family Guidance Association, supported by government and the public, and carried on in and by schools, universities, churches, youth groups and the like.

ORGANIZATION

As in the case of marriage and family counselling and marriage reconciliation - the other two approaches to conditions which erode marital stability and happy family life - discussed earlier, Education for Family Living must also be an organized activity. Granted, it might be possible to have an autonomous organization deal solely with this part of the question. It is submitted, however, that the triune purpose organization, dealing as well with marriage and family counselling and marriage reconciliation would be a better balanced, better organized and more effective method of approach.

This activity would really be most closely analogous to preventive medicine as it would be directed largely towards young people still in their teens, who had not reached the stage at which marriage counselling might be expected to begin. That stage was described as including young engaged couples, or others contemplating marriage, and youth of both sexes who may not at the time have any specific attachment or marriage plans, but who sought counselling. Education for Family Living, properly conceived and organized, holds the greatest hope and prothuse of strengthening the stability of marriage.

1 Source: Unpublished statistics prepared by Registrar General of Vital Statistics, Department of Health, Government of Newfoundland, for period Jan. 1st - Dec. 31st, 1966.

FALSE STANDARDS

The fundamental condition to be remedied is the false standards of value and behaviour with which so many young people enter marriage. Love and romance are the happy hunting grounds of the popular song writer, and the saturation of the air waves by radio and television has led to such a cacophony of sentimentality that it is a miracle if any young person escapes unscathed. Then there seems to be a quiet conspiracy on the part of many older people to keep youth suitably uninformed of the verities and realities of married life, and thus to watch them enter marriage full of romantic illusions and blissfully unconscious of its stresses and strains. There are too many cases of young people "falling head over heels" or should it be "heels over head" in love and dashing happily and blindly into the most vitally important human relationship of all, uninstructed and unprepared. There seem also to be too many people perfectly willing to see this happen.

THE REMEDY

The remedy is a remarkably simple one: to remove this unhealthy situation through a well-planned and effective system of Education in Family Living for youth, which would begin in the teens and carry on through the high school and college years. The cultivation of a mature attitude towards marriage among young people can only be achieved by a long term program of Education for Family Living. However quickly introduced, such a program is not likely to yield a maximum harvest for many years.

In planning, as in applying, the program, the interest and support of all the classes of people already referred to - the churches, the medical and nursing professions, lawyers, social workers, psychologists, psychiatrists, sociologists, the teaching profession and others with a sense of social and parental responsibility would be necessary.

The development of a carefully planned and graded system of education for young people and of specific education available to persons about to enter marriage is a rare opportunity. It is one which cannot be taken lightly, but should be met by the appointment of a carefully chosen and suitably qualified body whose task it would be to lay out the requirements and blueprint the facilities and the methods for pre-marital education and training in family living.

The existence of the triune purpose organization, with interested high grade leadership and efficient and experienced direction and staff, could pave the way for such a program.

Recommendation 171 of the Newfoundland Royal Commission on

Education and Youth¹ corresponds somewhat to the Study's proposal for organizing Education for Family Living. The Commission was concerned primarily with one aspect of family relations, sex education, which would "provide biological information ... and develop appropriate social attitudes and ideals of human relationships and family life". To discuss the objectives and content of such a program, the Commission suggested the appointment by the Department of Education of a committee which "should be representative of the Departments of Education and Health, the teaching profession, the medical profession, the nursing profession, and the churches".

The Study believes the suggested composition of the committee to consider implementation of sex education is admirable, with the reservation that professionally trained officials in marital and family affairs, who could be valuable on such a committee, should also be appointed. If they are not, advice from the same field, probably from outside Newfoundland might be sought. Carefully chosen young men and women of strong character and first-rate intelligence who possess leadership qualities should also be called in by the committee for consultation. Consideration might even be given to adding young people of this caliber to the committee itself.

While the Committee proposed by the Family Law Study to design a curriculum of Education for Family Living would consider sex education (as proposed by the Royal Commission on Education and Youth), this would be only as one facet of the far wider area of Education in Family Living, which must be provided. The policy of giving some courses for credit in the schools and universities will at some time have to be considered.

CONTENT OF PROGRAM

The content of programs for Education in Family Living will naturally depend upon the age and maturity of those participating and the purpose of the instruction.

Young people not immediately contemplating marriage should have opportunities in the classroom, the church hall and at youth meetings, to hear informed comment about and to discuss dating, teenage marriages, and other special concerns related to sex, marriage and family living.

Persons preparing for marriage should be given information about home management, budgeting and financing, including short term borrowing; home acquisition or leasing; hire-purchase agreements; law pertaining to property, life insurance, income tax, inheritance, and estate planning as they affect the family.

1 The Queen's Printer, St. John's, Newfoundland, October, 1967.

In addition, couples planning marriage could be educated in responsible parenthood in marriage and in communicating knowledge and attitudes on family living, including sex education, to their children. They should also be made aware of available counselling bodies and marriage and family counselling procedures.

Instruction in Education for Family Living courses could, and perhaps should be the same for both sexes.

Above all, prospective brides and grooms must be encouraged to develop the right attitude towards marriage.

It should be made abundantly clear to them that the value of the exercise of plain common sense and tolerance in the day-to-day contacts and compromises of married life is in itself beyond price.

E. ORGANIZATIONAL, FINANCIAL AND TRAINING CONSIDERATIONS INTRODUCTION

The three types of activity dealt with in this Chapter, those of Education for Family Living, Marriage and Family Counselling and Marriage Conciliation have as a common objective the preservation of family stability and the strengthening of family life, in a society which in the past few decades has seen them dangerously weakened. These activities could be carried on in separation, or they may be brought together and included in one organization, province-wide in its scope and triune in purpose and operation. The Family Law Study is convinced that the advantages from the latter approach are self-evident and will so recommend.

The reference to the province-wide scope and character of the activities may need some explanation. It is not suggested that this would apply only if there were one organization; it would be equally necessary if the activities were carried on by a number of mutually exclusive organizations.

There is another distinction which must be made abundantly clear. The marital ills which it is sought to alleviate in Canada are not divisible into twelve sets of problems, to be treated only by the provinces and territories on the basis of the established constitutional divisions. They are a matter of national as well as provincial or territorial concern, for the family is the basic unit of Canadian society. Neither the Dominion nor the provincial governments could disclaim or seek to escape from their responsibility, nor is it in any way likely that they would think of doing so. And behind them there must be the concern, and the sense of responsibility of the people of Canada.

TYPE OF ORGANIZATION

While both the federal and provincial governments are deeply concerned, it is obviously for the provinces to take the initiative in organizing. The federal government should not only allow, but encourage them to do so. Similarly, and regardless of other ways in which the federal government supports and encourages the organizations set up to deal with family life and marital problems, it should, while retaining its interest, be willing to leave the actual operations within the provinces. The provincial environment is as important in this respect as in the hearings themselves in divorce actions.

It is open to the provincial government to take one of three courses in the organization of education for family living, marriage and family counselling and marriage reconciliation. It could, with the principle of reconciliation al-

ready having been firmly supported by Parliament, and indeed its encouragement made a statutory duty of court and counsel, and with marriage and family counselling receiving the support of many jurisdictions, express warm approval of the principle, and leave the actual promotion and mechanics to a well-meaning public through voluntary organization. Secondly, it may not only express approval but add by way of encouragement some supervision, control and subvention of voluntary guidance agencies.

In either of these two alternatives it is highly likely that a number of unconnected individual agencies would arise, as well as professional marriage guidance agencies who work for a fee. It may be found, as has sometimes been the experience elsewhere, that a multiplicity of agencies can lead to confusion through numbers alone, and also because of poor organization, insufficient funds or lack of technical help and knowhow. The spirit may be willing but the flesh weak.

The third course, and this is the one supported by this Study, would involve the setting up of the type of province-wide organization which has been discussed here under the name, taken for convenience and for illustration, of "The Newfoundland Family Guidance Association". It would need a constitution and central headquarters and staff, probably situated at St. John's, which is the seat of the Supreme Court as well as of the Provincial Government. It would branch out to other communities as the need arose. It should have a parent body, from which a board of governors or directors, and perhaps advisory boards could be appointed or elected. It would need funds for a number of purposes among which would be the promotion of public relations and public education. A province-wide membership, contribution annual membership fees should be given high priority. The association would need expert professional staff, educated and trained along accepted lines. These would be the core for building up the organization, fashioning the techniques and for active work in each of the three main fields of activity and perhaps others. They would assist in organizing the training of volunteer helpers, and perhaps in some cases, in the actual training.

A carefully planned system, with competent field and headquarters workers, efficient methods and good records, its inspirations being the challenge of the part it could play in preserving stable family life and the active support of an enlightened public, would not only bring relief and encouragement to many individuals facing current problems. In the course of time, it would also play a part in re-moulding the fabric and shape of family life in Newfoundland.

TRAINING OF PERSONNEL

One fundamental obstacle to the provision of adequate education for

family living, marriage and family counselling and marriage reconciliation services is the dearth of qualified personnel. With the coming into force of the Divorce Act in July, 1968, the demand for skilled persons to provide these services, particularly marriage reconciliation therapy, increased.

Qualified marriage and family guidance counsellors and conciliators and trained volunteer help elsewhere in Canada have long been overworked and are in excessive demand. Possibly two or three institutions at most in the country have been specially organized for the training of marriage counsellors.

The onus of producing qualified personnel has been left primarily with university departments of social welfare and schools of social work. Frequently, provincial welfare departments and public and private counselling and conciliation agencies have co-operated to provide university - trained students with field 'experience.

In 1965 Memorial University of Newfoundland established a Department of Social Work within the Faculty of Arts and Science, offering a four year program of study leading to the degree of Bachelor of Arts with a Social Welfare option. Approximately sixty students are presently enrolled in the program which produced its first graduates in May, 1969.

The Department's curriculum emphasizes social and public welfare, including the organization, planning and financing of public welfare services and individual counselling. In two respects the Social Welfare curriculum differs from that of some other universities in: (1) the absence of field training and (2) the greater emphasis on the social sciences (including psychology, anthropology and sociology).

The University intends to introduce field work requirements in the continuing expansion and development of the Social Welfare curriculum. It will retain the social sciences as part of the program, to better prepare students to understand and cope with problems of social welfare, including marital and family ills.

A Master of Social Work program is presently under consideration by the Department, that would permit graduates of the Bachelor of Arts Social Welfare program to obtain further, specialized training, and obtain this degree.

Future program planning by the University's Department of Social Work should take into account the growing demands for trained marriage and family counsellors and marriage conciliators as well as for instructors to teach education for family-living programs.

LICENSING OF COUNSELLING AND RECONCILIATION GROUPS

In view of the experience of other jurisdictions with marriage and family counsellors and marriage councilors, particularly in the United States, the licensing and invigilation of organizations providing such services is recommended.

It is estimated that among those engaged in counselling in the United States there are as many as 50,000 people falsely representing themselves as counsellors, who in fact possess little or no education, training or experience in the field and who annually swindle unwary people seeking cures for their marital maladies, of substantial sums of money.

All public organizations (including the Association we have recommended) and private agencies, if any, who practice counselling and conciliation in Newfoundland, whether for fee or not, should be approved and licensed on an annual basis by government. There are precedents for this proposal in other Commonwealth countries. Standards dealing with facilities and with the qualifications of personnel and services offered by marriage guidance agencies should be met before a license to operate is issued or renewed. Standards of operation should be rigidly enforced and the licensing of agencies and their professional personnel, be subject to annual report and inspection.

Any such public or private agency seeking financial aid by way of gifts, donations or the purchase of memberships should be required to make annual public disclosure of their activities, and as well, to furnish to government their financial reports.

FINANCING THE ORGANIZATION

Given the will to succeed, good planning, inspired leadership and public support, the vision of the Family Guidance Association can be made a reality. But it must also have the staff of life.

Such an organization should not want for lack of funds. Its financial support could come from five sources. They are:

- (1) The federal government.
- (2) The provincial government
- (3) Municipal governments.
- (4) Membership fees.
- (5) Gifts and contributions.

(1 & 2) FEDERAL AND PROVINCIAL GOVERNMENTS

These two sources are coupled together for the reasons given under the 449

heading "Organizational, Financial and Training Considerations". The preservation of family stability is a concern which is not divisible as between the federal and provincial fields. As was said there, "/It is/ a matter of national as well as provincial or territorial concern, for the family is the basic unit of society".¹ For this reason both governments should be ready to contribute financially to the cost involved in education for family living, marriage and family counselling and marriage reconciliation, whatever the type of organization or organizations approved may be.

While for reasons already given, provincial governments with the encouragement of the federal government and carrying on the activities dealing with these family problems within the provincial environment, the federal government has a very direct responsibility towards their maintenance. "Marriage and Divorce" are by the terms of The British North America Act, 1967² the responsibility of the Parliament of Canada. The Divorce Act places a duty on court and counsel in divorce matters, of inquiring if there is a possibility of reconciliation of the parties. In the case of legal counsel this includes informing the parties of existing marriage conciliation or guidance facilities, and in the case of the court, of nominating with the consent of the parties or in the discretion of the court, specific existing conciliation or guidance persons or organizations. Since federal legislation imposes these obligations, the federal government must take some responsibility for the existence, ready availability and calibre of such organizations.

In other jurisdictions in which the State has formally encouraged courts or counsel to promote reconciliation, it contributes to the cost involved. This is true of countries within and without the Commonwealth, whether federal in form of government or not.

The same principle must apply as well to education for family living and marriage and family counselling, as to marriage reconciliation. It should be approved and sustained by governments, both federal and provincial. In modern society the interests and actions of government touch upon the rights and responsibilities and upon the welfare of the family and its constituent members, at every angle of life and living.

(3) MUNICIPAL GOVERNMENTS

Just as in the case of senior governments, the governments of municipalities have a concern for and duty towards the families in their area. It is in their interest to see that the family unit is healthy and solvent, as an indispensable unit of the municipality. They should therefore show their interest and concern by their financial help to the work of the proposed Association.

1

Supra, p. 446.

2

Stats. Can. 1867, c. 3, s. 91 (26).

(4) MEMBERSHIP FEES

These would have a dual purpose, firstly that of adding to the funds of the organization but, more importantly, that of bringing the public in as partners in the enterprise. Provision should be made to keep them fully cognizant of the aim of the proposed Association and informed of its activities. The development of an adequate Publications Service by the Association would accomplish this object.

(5) GIFTS AND CONTRIBUTIONS

The claim of the organization on the support of public spirited bodies or citizens, as well as those who have benefited from its services, would be as valid as any other made by charitable or eleemosynary institutions. Properly advanced, such a claim should be recognized by corporations, partnerships and other business enterprises and by individuals, when presented through the medium of an appeal for financial aid.

COST TO RECIPIENTS OF SERVICES PROVIDED

The question of meeting the cost of the services rendered under the three headings of Education for Family Living, Marriage and Family Counselling, and Marriage Reconciliation is not a simple one. Indeed it could receive different treatment within the several fields of activity. The choice would have to be between having free services throughout or free in some but not in other respects. Let us therefore examine the headings of activity in which it would be difficult or impossible to charge fees.

Firstly, there is that of Education for Family Living. Here the very nature of the service and the avenues proposed to be used would make it impossible to impose either group or individual fees. But this ought not prevent schools or other organizations from paying a sum of money for a regular series of group discussions given to their pupils by the proposed Association, at the rate paid to any person who comes to the school or other organization to give instruction on a subject that is part of the curriculum.

The case of charging for reconciliation activities encouraged by the Court under section 8 of the Canadian Divorce Act, in which reconciliation agencies are recommended to the parties by the Court, is almost if not fully as difficult. In a divorce action the Act places a duty on the Court to ascertain if there is a possibility of reconciliation, and if it appears that there is, to nominate a suitable person or agency to endeavour to assist the parties with a view to their possible reconciliation. This presupposes that there must be such persons or agencies in existence and available. Their services cannot be provided without

some expense, in training or in time involved or both. If there were an attempt to charge the parties a fee in such a circumstance for processes called for by the Act and recommended by the Court, it is submitted that it would not only be unwise, but might defeat the very purpose of the Act. It would seem therefore that this heading must be treated in the same way as that of Education for Family Living, with no fee charged.

This leaves only one activity for which fees might be charged, that of Marriage and Family Counselling. Elsewhere fees are charged by private organizations or persons who set up as professional counsellors. While in this chapter the use of one overall organization is recommended, the question as to whether fees should or should not be charged by it for counselling services sought by husband or wife or both, could still be answered in the affirmative for all cases. Alternatively, fees might be charged only where the organization is satisfied that they could be paid without hardship. One or the other of these alternatives could apply, although it is proposed that the organization be the beneficiary of funds from both public and private sources. On the other hand it may well be argued that all services of such an organization ought to be given without the collection of fees.

A considerable number of organizations and individuals in widely separated places, interested or active in the preservation of the cohesive family unit in contemporary society were consulted by the Study and they agreed that the collection of fees for services related to education for family living and marriage reconciliation procedures would be unwise and probably self-defeating in effect. In the matter of levying a charge for marriage or family counselling, opinion was divided but only in minor degree. It was unanimous on the point that the charging of fees ought not in any case be the criterion upon which the availability of advice or counselling would be determined, and that no person's inability to pay should deprive him or her of the benefits of counselling.

The area of discussion therefore was reduced to the class of cases in which the parties involved might be able to pay some amount, which could be varied according to ability to pay. The difficulties and embarrassments inherent in such a policy were recognized, but some suggestions were received, such as that of the use of a standard form containing a sliding scale of fees per time unit of consultation, varying from zero through a rising number of amounts to a maximum. This form could be given to the party or parties at the first contact with the counsellors, and left with them to indicate what they could and would pay. This is done in at least one area.

The overwhelming weight of opinion received by the Family Law Study was that if a Newfoundland Family Guidance Association is set up, and the several recommended sources or revenue made available, no fees as such ought to

be charged parties by whom counselling was sought and to whom it was given. It was felt that, within the sources of income outlined above/ „the use of that of "Gifts and Contributions" would better serve the purpose. This could be done by way of direct approach to parties who have benefited from the counselling services of the organization.

¹ Supra, p. 449.

RECOMMENDATIONS

CHAPTER XI

The Family Law Study recommends:

ORGANIZATION

1. That provisions for organized Marriage and Family Counselling and Marriage Reconciliation as well as for a program of Education for Family Living are vital to the preservation of a cohesive family unit. (Page 428).
2. That a province-wide organization, strongly supported by the public and adequately staffed by professional personnel is necessary to carry out these functions in Newfoundland. (Page 428).

That the purpose and functions of this organization, referred to for convenience in this Chapter as the Newfoundland Family Guidance Association be three-fold:

(a) Education for Family Living:

A largely but not exclusively premarital activity, organized by the Association and carried on in and by schools, universities, churches, young people's groups, etc. This would not be restricted to sex education.

The primary responsibility for sex education should rest upon parents. Where schools must necessarily substitute for the parents in teaching sex education, it should not be taught only from a purely biological viewpoint, but also within the atmosphere of the moral customs and beliefs of the Judaeo-Christian culture, which seem to meet best the personal and social needs involved.

Teachers should be properly qualified and text books carefully selected. The presence of nominees of the main religious bodies on advisory boards (Recommendations 4 & 5) could ensure that text books meet with the general approval of the churches (Page 428))

(b) Marriage and Family Counselling:

To be available to young people contemplating marriage, and youths of both sexes who may not at the time have any specific sentimental commitment or marriage plans but who seek counselling. It would include also counselling in family situations and in marital rifts and misunderstandings between husbands and wives and longterm counselling after successful reconciliation proceedings. (Page 429).

(c) Marriage Reconciliation:

To be available to married couples after divorce proceedings are contemplated and legal counsel has been consulted. (Page 430).

That the organization should have central provincial headquarters and professional staff at St. John's, and a provincial organization from which a board of governors or directors and advisory boards would be chosen. Branches would be established in other communities as the need arises. Each of the main religious bodies should be invited to nominate a member to all such boards. (Pages 447-448).

5. That advisory boards be constituted from interested persons of good standing in a community (other than professional staff) to share in and help guide the work of the organization. (Pages 430-431).
6. That all public organizations (including the Association we have recommended) and private agencies, if any, who practice counselling and conciliation in Newfoundland, whether for fee or not, should be approved and licensed on an annual basis by government. The pastoral work of the individual clergy of the several religions would be excepted from these requirements. (Page 449).

That any public or private agency seeking financial aid by way of gifts, donations or the purchase of memberships should be required to make annual public disclosure of their activities, and as well, to furnish government with yearly financial reports. (Page 449).

8. That while there must be a national sense of responsibility shown by all levels of government as well as by the people, for the stability of the family unit, the provincial government should take the initiative in setting up the organization. (Pages 449-450).

That the organization be financed from five sources:

- (a) The federal government.
- (b) The provincial government.
- (c) Municipal governments.
- (d) Membership fees. (An island-wide membership is of the utmost moral and psychological value.)
- (e) Gifts and contributions. (Pages 449-451).

RECONCILIATION

10. (a) That adequate reconciliation machinery, employing trained professional staff as well as rigorously selected and trained volunteer help, be an integral part of the proposed organization available to all married couples who are parties to divorce proceedings and who are recommended to it by legal counsel or referred to it by the Court. In addition, wherever appropriate, parties to divorce proceedings should be reminded of the traditional interest and services of the clergy, in reconciling the differences of parties to a marriage.
- (b) That the value of liaison and collaboration of clergy and trained professional reconciliators must always be borne in mind. (Pages 432- 433, 436-437).
11. That while there should be no compulsion in applying reconciliation procedures, legal counsel should be meticulous in drawing to the attention of his client the provisions of the Divorce Act that have reconciliation as their objective, and in informing the client of existing guidance facilities known to him, including the traditional interest and services of the clergy in this field. (Pages 435-436).
12. That full community knowledge and support of existing reconciliation opportunities be achieved, the development of a Publications Service being an important part of such a program. (Page 436).
13. That any person acting as a marriage conciliator will do so under an oath of secrecy. (Page 437-438).

MARRIAGE AND FAMILY COUNSELLING

14. That marriage and family counselling be firmly a part of the activities of the proposed triune organization with the same general attitude and approach, the same techniques and the same quality of trained professional and volunteer help as in conciliation. Its activities should include advice to young people approaching marriage, to married couples experiencing marital rifts and misunderstandings and family rather than strictly marital troubles. (Pages 439-441).
15. That community knowledge and support be encouraged as indispensable to the success of counselling. The Publications Service (Recommendation 12) would be an important part of such a program. (Page 440).

EDUCATION FOR FAMILY LIVING

16. That Education for Family Living be a part of the organized activity of the proposed triune organization. (Page 442),
17. That a Committee along the lines recommended by the Royal Commission

ion on Education and Youth, but with somewhat wider perspective, be set up to plan the scope of this activity. (Page 444).

18. That this program be administered by the provincial Department of Education, advised and aided by the proposed triune organization, and be made available through schools, colleges and any other selected media. (Pages 443-444)

COSTS TO RECIPIENTS OF SERVICES PROVIDED

19. That no fees be charged by the proposed Association for services in Education for Family Living or Marriage Reconciliation and in the case of Marriage and Family Counselling, while no fees as such ought to be charged, beneficiaries of the counselling services be invited, where appropriate, to make a financial contribution to the Association. (Pages 451-453).

TRAINING OF PERSONNEL

20. That program planning by the Department of Social Welfare at Memorial University should take into account the impending increase in demands for trained marriage and family counsellors and marriage conciliators as well as for instructors to teach Education for Family Living programs. (Pages 447-448).

CHAPTER XII

JUDICIAL SEPARATION AND ANNULMENT OF MARRIAGE

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INTRODUCTION

In the Province of Newfoundland, as elsewhere in Canada, the relationship between husband and wife may be altered or terminated by

- (1) Divorce;
- (2) Judicial Separation;
- (3) Annulment;
- (4) Death.

A divorce decree absolute dissolves a marriage reinstating the spouses as single persons who are eligible to remarry. Under the Canadian Divorce Act¹, a federal statute proclaimed July 2, 1968, the grounds for divorce were broadened considerably, to include eight matrimonial offenses² and eight classes of marriage breakdown³.

Jurisdiction in divorce proceedings emanating from Newfoundland was transferred, under authority of the Divorce Act, from a committee of the Canadian Senate to the Supreme Court of Newfoundland, effective July 2, 1968. The Supreme Court of Newfoundland first heard divorce suits in November, 1968.

1 R.S.C. 1970, c. D-8.

2 Ibid., s. 3. 3

Ibid., s. 4.

Provisions of the Divorce Act requiring solicitors and legal counsel to discuss with clients the possibility of reconciliation as an alternative to dissolution of the marriage¹ were examined in chapter XI.

In this chapter, the Family Law Study reviews the development, status, and utility of contemporary law in Newfoundland respecting (1) judicial separation (separation by court order) and separation by agreement, and (2) annulment of marriage.

¹ R.S.C. 1970, c. D-8, s. 7.

A. JUDICIAL SEPARATION

INTRODUCTION

The old ecclesiastical remedy of divorce *a mensa et thoro* (separation from bed and board) was a product of the Roman Catholic Church, which at the Council of Trent in 1563, proclaimed that a consummated marriage was indissoluble, but recognized that one spouse might commit such a serious offense against the other that cohabitation would become intolerable. Accordingly, the institution of divorce *a mensa et thoro* emerged, whereby the parties separated under Ecclesiastical court order but remained husband and wife.

Within forty years, legal separation was introduced to the Ecclesiastical Law of England. The precise time of introduction is doubtful, though it was recognized in England's Canon Law as early as 1603.

However, for most of the next two hundred and fifty years (until 1857) in England, absolute divorce could be obtained only by Private Act of the British Parliament sitting at Westminster, and 229 such statutes were passed.

Not until 1857, by The Matrimonial Causes Act; 1857 did full divorce become part of England's family law. By the same Act, the former Ecclesiastical decree of divorce *a mensa et thoro* was replaced by the decree of judicial separation and jurisdiction to hear suits for judicial separation was transferred from Canon Law, to Common Law, courts.

A judicial separation is a separation imposed by a court at the instance of one or both of the parties to the marriage. However, it does not remove the *vinculum* (bond) of marriage as does an absolute divorce. While the parties ~~man~~ man and wife, the decree withdraws the legal right to cohabit. It entitles the successful party to live apart from the offending spouse indefinitely without concern of later reprisals for desertion. Under the decree, neither husband nor wife is free to remarry.

"Judicial Separation . . .", wrote Lord Buckmaster, a member of the Judicial Committee of the Privy Council, in 1929, ". . . is nothing but enforcing through an order of the Court an arrangement which the parties could - were they willing - equally effect for themselves; . . ." ²

Were one of the spouses to violate a term of a decree of judicial separation, he could be found in contempt of the court judgment and,

¹ Stats. U.K. 1867, c. 85.

in addition, be

² Hyman v. Hyman, [1929] A.C. 601, 625.

ordered to comply with the decree and to compensate the offended spouse.

JURISDICTION

Not until 1948 was a suit taken in Newfoundland for a decree of divorce *a mensa et thoro* (judicial separation). It was then decided by Dunfield, J., in *Hounsell v. Hounsell*¹ after a preliminary hearing of points of law, that the Supreme Court had all the powers exercised by the Ecclesiastical courts in England as of 1832, including jurisdiction in actions for judicial separation, and in the alternative, restitution of conjugal rights. (This was the decision of a single judge from which no appeal was taken.)

GROUND

In the exercise of its jurisdiction, England's Ecclesiastical tribunals had recognized cruelty, adultery, bestiality and sodomy (including attempted bestiality or sodomy) as grounds for separation.

Up to April 1, 1949, when Newfoundland joined the Canadian Confederation, no law had been enacted by any local legislative body, or made by Westminster to apply to Newfoundland, governing grounds for judicial separation. In theory, therefore, the grounds recognized by the English Ecclesiastical courts, applicable in Newfoundland since 1610 under the 'settled colony' doctrine, were the only ones available for the purpose of judicial separation in this province (although a single judge of the Supreme Court of Newfoundland recognized desertion for two years in *Green v. Green*, a decision reversed on appeal).

Under The British North America Act, 1867³, the written portion of the Canadian constitution, the federal Parliament is given authority to enact legislation governing Divorce, including, it is submitted, the substantive law of judicial separation, though this authority has never been specifically exercised. In view of the Canadian Divorce Act, it may now be that the remedy of judicial separation, infrequently used in Newfoundland in the past,⁴ may become an anachronism in the province's family law.

Before proclamation of the Divorce Act (Canada) on July 2, 1968, Canadian residents who were either unable or unwilling to prove adultery (practically the only ground for divorce then available) could apply to a provincial superior court (Ontario excepted) for a judgment of judicial separation (under

¹ /1949/ 3 D.L.R. 38 (Nfld. Sup. Ct.).

² (1963), 37 D.L.R. (2d) 136 (Nfld. Sup. Ct.); on appeal (1964), 49 M.P.R. 315.

³ Stats. U.K. 1867, c. 3.

⁴ Between Jan. 1, 1940 and July 1, 1970, seven actions were taken in the Supreme Court of Newfoundland asking for an order of judicial separation.

Quebec's Civil Code a similar remedy is called "separation from bed and board") which was then available on wider grounds than available in divorce proceedings. Judicial separation was also sought by persons opposed to divorce on religious or conscientious grounds.

THE DIVORCE ACT

As earlier indicated¹, the Canadian Divorce Act made possible the transfer of jurisdiction to hear divorce applications from the Senate to the superior courts of Newfoundland and Quebec.

As well, the legislation considerably broadened the grounds for divorce. In addition to the ground of adultery, the Divorce Act provides that a divorce action may be taken where the respondent, since the celebration of the marriage, has committed one of the following matrimonial offenses: sodomy, bestiality, rape, a homosexual act, bigamy, and treatment of the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

A divorce petition may also be presented under the Act to a superior court of a province by a husband or wife, where they are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of the respondent's imprisonment (for a period or periods specified in the Act); where, for three years immediately preceeding the petition, the respondent has been grossly addicted to alcohol, or a narcotic as defined by the Narcotic Control Act² (with no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period); or where the petitioner has had no knowledge of or information as to the whereabouts of the respondent and, throughout a three year period immediately preceeding presentation of a divorce petition has been unable to locate the respondent; where the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; or where the spouses have been living separate and apart by reason of the petitioner's desertion of the respondent, for a period of not less than five years, or where the spouses, for any other reason than desertion, have been living separate and apart for not less than three years, immediately preceeding the presentation of the petition.

As used in the Divorce Act, "divorce" (which is not specifically defined) deals solely with the dissolution of marriage. The Act does not incorporate the proposal of the Special Joint Committee of the Senate and House of Commons

¹ *Supra*, p. 459.

² *R.S.C. 1970, c. N-1.*

in its report on Divorce, published in June, 1967, to grant "to the courts of all the Provinces. . . a uniform authority to decree Judicial Separation.' NOT does the Act disturb the pre-Confederation law of legal separation which developed in nine provinces including Newfoundland. However, Parliament legislated very broad grounds for divorce, including all of the grounds for legal separation formerly available in the nine provinces, apparently in the expectation that, with the extension of the grounds for divorce, the remedy of judicial separation in Canada would be rarely sought in future.

In England and Wales, for example, applications for legal separation during the past century have decreased with each extension of the divorce grounds. For the year 1964, 40,621 divorce suits, compared with 253 applications for judicial separation, were filed. The number of divorce suits in that year was 10,000 more than all applications for judicial separation filed in England and Wales in the previous one hundred years.

Even before the reform of Canada's divorce laws during 1968, the decree of judicial separation had been infrequently sought in the courts of all but one of the nine Canadian provinces having jurisdiction. The exception was Quebec, where divorce is against the religious doctrine of ninety percent of the population in that province. The largest number of separations (from bed and board) in Quebec in one year - approximately 6,000 - had been granted in 1961. By comparison, the largest number of Quebec residents obtaining divorces in a year had been 998 (in 1966). However, in the first two years after proclamation of the Divorce Act on July 2, 1968, affording considerably broader grounds than previously, divorce applications in Quebec totalled 11,561 or 15.9 percent of all divorce suits (72,462) commenced in Canada while there was a decline in applications for separation from bed and board.

1 Ottawa, 1967, p. 35.

B. SEPARATION AGREEMENTS

The essential feature of a separation agreement is that the husband and wife agree thenceforth to live separate and apart. Each spouse releases the other from his or her duty to cohabit. In some instances, all marital privileges and obligations are discharged, though the spouses cannot terminate the marriage status by agreement.

Occasionally described as "private" or "extra judicial" separations, such agreements are governed by the general law of contract. As no special form of contract is required, a separation agreement, whether oral, written or arising from the parties' conduct, which is supported by an adequate consideration - for example, the spouse's covenants (referred to in some agreements as "the premises") - will be binding on both spouses. A written separation agreement under seal is properly described as a deed of separation, and may be varied by subsequent written agreements not under seal. The separation deed or contract may be preceded by an agreement to separate, an executory contract referred to as 'separation articles'. Separation by oral contract has been regarded by the courts as unsatisfactory, due to the difficulty of establishing the agreement and its particulars should the separation arrangement become the subject of litigation.

Until 1848, England's courts considered separation agreements to be contrary to public policy and not legally binding on the basis that they undermined the institution of marriage and therefore, the social structure of the state. Thereafter, the making of separation agreements was recognized by law as being a private matter between husband and wife, as a result of the House of Lords decision in *Wilson v. Wilson*.

Most separation deeds and agreements include (1) mutual promises by the spouses not to sue for restitution of conjugal rights, (2) the husband's covenant to permit the wife to live apart without interference or molestation by him, and (3) the wife's covenant to indemnify the husband against debts contracted by her during the separation.

Besides these undertakings, the spouses may also provide in the agreement for the custody of children of the marriage, the ownership and use of property and maintenance of the wife.² Some agreements contain a *dum casta* clause, which provides that a husband shall remain liable on his covenant to maintain the wife "so long as the wife shall lead a chaste life".

¹ (1848), 9 E.R. 870.

² See: Divorce Act, R.S.C. 1970, c. D-3, s. 2 (c) as to conditions under which such agreements are not collusive.

VOID AND VOIDABLE AGREEMENTS

A separation agreement may be void from the beginning where it is entered into on the mistaken assumption that the parties were validly married (when, unknown to both, their marriage was, in fact, bigamous). A provision in a separation agreement restricting a wife's right to apply to court for an order containing maintenance provisions may also be void. In Newfoundland, section 2 of The Maintenance Act ⁻¹ provides for the Act's application even where a separation agreement expressly excludes its operation. Where a husband and wife contract to regulate their marriage rights and duties in the event of future separation, such agreements may be declared by the courts to be unenforceable.

In the event the spouses to a separation agreement do not thenceforth live apart in separate places of abode, because neither has the means to find alternate living accommodation, the agreement is not necessarily voided. A reconciliation negotiated by spouses living apart, containing provisions regulating their positions if their attempt to live together again should prove unsuccessful, would not be void even though it envisaged a separation in future.- The courts explain that such agreements tend to promote the resumption of cohabitation because in the event the attempted reconciliation should fail, future rights of the spouses have not been left entirely in the air.

An agreement could be voidable at the option of one of the spouses where the other has no intention of fulfilling the agreement (fraud), or where one of the spouses has signed the agreement under threats of non-support or violence (duress).

In Canada's nine Common Law provinces the right of spouses to make private separation agreements has long been recognized. (Quebec's Civil Code does not recognize them.)

TERMINATION OF AGREEMENTS

An agreement under which husband and wife live apart may be terminated (1) by the death of one of the spouses; (2) by a later agreement to resume cohabitation; (3) by the resumption of cohabitation by the parties; (4) where one party obtains a decree of divorce (absolute) from the other.

Where a party to a separation agreement violates one of its terms, as for example, by failing to observe a non-molestation clause, the other may sue for Common Law damages. Where the breach of the non-molestation clause has either occurred or is anticipated, the injured or threatened spouse may seek an

¹ R.S.N. 1952, c. 65.

injunction restricting the other from breaching or further breaches of, the agreement. Where one spouse has agreed (under articles of separation) to sign a separation deed to live apart from the other and subsequently attempts to withdraw from his undertaking, the other spouse may apply to court for an order for specific performance.

C. SEPARATION BY SUMMARY PROCEEDING

HISTORY,

As early as 1878, criminal courts in England were empowered by statute to order that a wife should not be bound to cohabit with a spouse who had been convicted of an aggravated assault on her. By 1960 when the Matrimonial Proceedings (Magistrates' Courts) Act, 1960¹ was enacted, there were thirteen grounds on which an offended wife, and three grounds on which an offended husband, could apply for a separation order in an inexpensive and speedy proceeding.

In 1952, legislation affording a somewhat similar though less effective remedy to deserted wives in Newfoundland² was first enacted and is contained in The Maintenance Act.

•

PROCEDURE UNDER THE MAINTENANCE ACT

Under the circuitous procedure provided for obtaining a separation order under The Maintenance Act, a wife must first sign a complaint under section 6 before a judge (specified in the Act as "the judge of a Family Court or a stipendiary magistrate or two Justices of the Peace acting together") who may then issue or cause to be issued a summons for service on the husband, requiring his attendance before the judge to show cause why a *maintenance order* should not be made against him.

"Deserted" Defined

At the hearing of the complaint, a wife must first establish herself to be a "deserted wife", defined by section 2 (e) of the Act as

"includ/ing/ a wife who is living apart from her husband because

of his assaults or other acts of cruelty towards her or their children;

- (i) of his adultery which has not been condoned;
- (ii) of his refusal or neglect without reasonable excuse to supply his wife and their children, if any, with adequate food, clothing or other necessities; or
- (iii) of his being a person who by reason of frequent drinking of intoxicating liquor is incapable of managing himself or his affairs and
- (iv)

¹Stats. U.K. 1960, c. 48.

²Stats. Nfld. 1952, c. 19, now R.S.N. 1952, c. 65.

is an unfit and improper person to have the custody and control of his children or of his having been guilty of adultery that has not been condoned; . . ."

"Acts of cruelty" towards a wife or children, referred to in section 2 (e) (i), is defined in section 2 (a) of the Act as meaning:

"conduct creating a danger to life, limb or health, or any course of conduct which in the opinion of the court is grossly insulting and intolerable or is of such a character, without proof of actual personal violence, that the wife or children seeking maintenance could not reasonably be expected to be willing to live with the husband or parent after he has been guilty of the same."

Separation Order

Where a wife complains against her husband under section 6 of the Act, *a* judge, *in addition to, or in place of* any order made under either section 6 (awarding maintenance) or pursuant to section 7 (refusing maintenance due to the wife's uncondoned adultery), may make an order under section 9 (1) providing that "the husband shall not enter upon any premises where the wife is living apart from him", if in all the circumstances of the case the judge considers it reasonable to do so. The judge may also bind over the husband with or without sureties to secure the fulfillment of the order.

Breach of Separation Order

Violation of a separation order may result in forfeiture to the Crown of the bond and maximum fine of \$100 upon summary conviction of a husband for violation of the order. However, the Act makes no provision for imprisonment of a spouse violating a separation order except where he fails to pay the fine levied on conviction for the violation. Courts administering The Maintenance Act should have discretion to order the arrest and imprisonment of a spouse who disregards a separation order made in favour of a "deserted wife" and her

LIMITATIONS OF SECTION 9

The effectiveness of section 9 (1) of the Act empowering a judge to forbid a husband to "enter upon any premises where the wife is living apart from *him*" is doubtful. Stipendiary magistrates and the St. John's Family Court Judge have repeatedly held that this provision does not authorize the making of *an* order directing a delinquent husband to stay away *from a home in which he has a beneficial interest or from an apartment for which he pays the rent*. Before

an order may be made under section 9 (1), the 'deserted wife' seeking relief apparently must be residing (either with, or apart from, her spouse) in accommodation in which her spouse does not have an interest when she lays the complaint against him. Consequently, a woman who has legitimate reasons for wanting protection from her husband by way of a separation order, frequently cannot avail of section 9, because the delinquent husband owns the home or leases the apartment where the "deserted wife" and her children reside. The delinquent husband may not be able to afford to either put his family in separate accommodation or leave the family residence and reside elsewhere. However, the Study considers that where a husband has "deserted" his wife within the meaning of the Act, the court should be empowered to order him away from the family residence, even if he is the owner or rent-paying tenant of the place where the family resides, unless he can provide the family with separate, suitable living accommodation.

Under existing maintenance legislation, a separation order is sought in conjunction with an application for maintenance under section 6 of the Act. The welfare of a deserted wife and her children may best be served by providing that the application for a separation order be made a separate remedy, to be granted (1) where the wife is proved to be "deserted" within the meaning of the Act, or (2) where a judge otherwise seems a separation order to be reasonable in all the circumstances.

DESERTED HUSBAND

Unlike the English Act, the Newfoundland maintenance legislation does not provide protection for the husband (and children) of a wife (and mother) who, by virtue of her excessive consumption of alcohol or acts of adultery, may be unfit to live in company with her husband and children. Necessary amendments to The Maintenance Act to this effect would be appropriate, even though complaints brought by husbands will not be numerous.

DESERTED WIFE

As a "deserted wife" is defined under section 2 (e) (ii) of the Act as a wife ". . . living apart from her husband because of his adultery which has not been condoned", it is unnecessary to repeat this definition in section 2 (e) (iv), and the words "or of his having been guilty of adultery that has not been condoned" should be deleted from the latter provision.

D. ANNULMENT OF MARRIAGE

In Newfoundland a marriage may be declared to have never existed, or to be null and void from the date of an annulment decree.

VOID MARRIAGES

The marriage relationship may be declared void *ab initio* (from the beginning) where two people have gone through a marriage ceremony but have not acquired the status of husband and wife due to a disabling factor. Of the many such disabling factors the principal ones are:

- (1) a prior existing marriage of one of the spouses (also a ground for divorce under the Divorce Act);
- (2) the parties of the marriage are within the prohibited degrees of consanguinity (relationship by blood), or affinity (relationship by marriage) as set out in Archbishop Parker's Table of 1563. The prohibited degrees of consanguinity and affinity have been amended by federal statute;
- (3) absence of consent (occasioned, for example, by duress, mistake, fraud, misrepresentation, or such mental illness or drunkenness at the time of the marriage ceremony as makes a party to the ceremony unable to understand the nature of the marriage contract and the duties and responsibilities that it creates).

Where a decree of nullity is issued in respect of such a marriage, it is merely declaratory of the status of the parties.

VOIDABLE MARRIAGES

Alternatively, a marriage which is valid at the outset may be voidable at the instance of one of the marriage partners by a judicial decree of nullity, principally on the ground that the other spouse is unable to consummate the marriage (impotence). If the causes of the impotence are physical, this may be established by medical evidence and such cases are comparatively straight forward. Sterility is not a ground for annulment, nor in Canada is lack of consummation resulting merely from refusal to do so. Taschereau J. in *Heil v. Heil*² said "The mere refusal of marital intercourse due to caprice is not a sufficient ground to warrant a decree in nullity."

However, refusal to consummate a marriage is a ground for divorce under the Divorce Act (Canada)³ where it is proved that:

¹ Stats. Can. 1932, c. 10, now R.S.C. 1970, c. M-5; See Appendix B.

² /1942/ S.C.R. 160, 162.

³ R.S.C. 1970, c. D-8, s. 4 (1) (d). The jurisdiction of the Supreme Court of Ontario to annul a marriage on the ground of non-consummation survived the enactment of the Divorce Act: *Rose (otherwise Abroms) v. Rose*, /1970/ 1 O.R. 193 (Ont. H. Ct.).

"the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; . . ."

Although by the English Matrimonial Causes Act, 1950¹ re-enacting section 7 of the Matrimonial Causes Act, 1937,² wilful refusal to consummate is expressly declared to be a ground for annulment, it is interesting to note that a Royal Commission in England in 1956³ recommended that wilful refusal to con-

summate a marriage should be a ground of divorce and not for annulment.

Where a party is physically defective, if there is a possibility of affecting a cure by a non-dangerous operation or course of treatment, the annulment will not be granted, unless the defective party unreasonably has refused to submit to or unreasonably persists in postponing the necessary treatment or operation.

The impotence must have existed at the time of the marriage and must have continued since then and according to competent medical opinion, be permanent. This applies where the incapacity is due to either mental or to physical causes. Physical malformation or defect may not be present, but an annulment could be granted where the impotence is caused by an abnormal nervous or mental condition which creates an unconquerable aversion to the sexual act as can be explained only by incapacity. This means, as Tachereau, J. said, that it must arise from a mental or nervous condition verified by examination. Such a condition may be inferred in the absence of a physical or structural defect, when the person claiming the mental defect has resisted all attempts and refused to submit to a medical examination.

In the case of a voidable marriage, as distinguished from a void marriage, the status of marriage exists unless it is declared non-existent by judicial decree at the suit of one of the parties or by Act of Parliament. Until the annulment, the legal consequences of the purported relationship of the parties do not differ from those which result from a valid marriage.

While divorce suits are usually grounded on events that occur after the date of marriage, nullity applications are based on causes or conditions that exist at the time of the marriage ceremony. The superior courts of all Canadian provinces

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¹ 1 Stats. U.K. 1950, c. 25.

² 2 Stats. U.K. 1937, c. 57.

³ Report of The Royal Commission on Marriage and Divorce, 1956, Cmd. 9678.

the precise number of annulments granted, are incomplete.¹

The doctrine of the indissolubility of marriage, held out by the Roman Catholic and some other churches, says C.H.C. Edwards, Associate Professor at Manitoba Law School, "prevented the old ecclesiastical courts from granting decrees of divorce, but . . . did not prevent them from pronouncing that there had never been a marriage at all, and the concept of the voidable marriage was retained by the English Ecclesiastical courts after the break with Rome, and is still found in our law today."²

JURISDICTION

In *Hounsell v. Hounsell*³ Dunfield, J. held that the Supreme Court of Newfoundland has all the powers exercised by the Ecclesiastical courts in England prior to 1832 (which included jurisdiction to entertain applications for the decree of annulment). As Newfoundland's law making bodies, from their inception in 1833, enacted no statute respecting annulment, the present grounds for annulment in Newfoundland are virtually the same as those available in England prior to 1832.⁴

C.H.C. Edwards, *Family Law* (The Conference on the Family), p. 4. /1949/ 3 D.L.R. 38 (Nfld. Sup. Ct.).

4 See Appendix R for summary of Common Law relating to status of children born of marriages which are voidable or void ab initio.

RECOMMENDATIONS

CHAPTER XII

The Family Law Study recommends:

1. That section 2 (e) (iv) of The Maintenance Act be amended by deleting therefrom the words "or of his having been guilty of adultery that has not been condoned". (Page 470).
2. That section 9 of The Maintenance Act be amended to empower a judge to order the spouse of a "deserted" husband or wife whether or not such spouse is the owner or lessee of the place where she resides with the other spouse and children, to vacate and dwell apart from such place, if the judge deems the separation, order to be reasonable in all the circumstances. (Page 470).
3. That The Maintenance Act be amended to provide relief by way of a separation order for a "deserted husband" and children of a wife (and mother) who has consumed excessive quantities of alcohol, or whose adultery is uncondoned or is otherwise shown to be unfit to reside with or care for her husband and children. (Page 470).
4. That an application for a separation order be made a separate remedy under The Maintenance Act. (Page 470).
5. That courts administering The Maintenance Act be empowered to order the arrest and imprisonment of a spouse who violates a separation order. (Page 469).

CHAPTER XIII

D I V O R C E

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A. BACKGROUND OF LAW OF DIVORCE IN CANADA

The legal position which existed in Canada immediately prior to July 2, 1968 relating to divorce may be stated as follows: The remedy of divorce from the bonds of marriage existed and was available to husbands and wives domiciled in all provinces and territories of Canada. In British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island, and in the Yukon and Northwest Territories, application for dissolution of marriage was made to the local civil courts having jurisdiction in divorce. In the provinces of Quebec and Newfoundland there were no courts with jurisdiction in divorce, and parties domiciled in these provinces as well as persons whose domicile was uncertain, who wished to obtain dissolution of their particular marriage, had to make application for the passing of a special resolution of the Senate of Canada dissolving the matrimonial bonds. The Senate did not entertain petitions for relief from persons domiciled in a province in which there were courts with divorce jurisdiction.

(¹) NEWFOUNDLAND

The explanation for the absence of divorce jurisdiction in Newfoundland courts can be found in the pages of history. By virtue of the 'settled colony' doctrine, when English settlers founded a colony and took up residence there (without having first to conquer the territory) they carried with them as far as applicable to their purpose, all the privileges and responsibilities of the English Common Law and the statute law of England as it existed at that time. Newfoundland was not a conquered, but rather a settled colony, and history shows that while there were undoubtedly earlier settlements, English colonists led by John Guy arrived in Newfoundland in 1610 to organize the first colony under Royal Charter, on the shores of Conception Bay. While the settlement was not very successful and the law administered represented a meagre bodge podge of

expedients, there is no suggestion that anything but the law of England was considered in the colony.

The matrimonial law the colonists brought to Newfoundland was the law administered by the English Ecclesiastical courts which at that time could decree judicial separation and nullity but not dissolution of marriage. There was no law whereby a court in England could grant dissolution of marriage at that time and consequently early Newfoundland courts could not hear divorce proceedings. In fact divorce could be obtained in England itself only by special Act Of Parliament, a procedure seldom used because of the cost involved. The situation had not changed in England two centuries later, when in 1832, Newfoundland acquired its own legislature. Once a settled English colony (such as Newfoundland) received its own law-making body, the statute law of England enacted thereafter did not apply unless expressed by the local legislature to be applicable. It was true that Parliament at Westminster still claimed and sometimes exercised, the right to legislate for the Empire as a whole and for certain specific colonies on particular occasions. However it seems safe to say that Imperial legislation was applicable *prima facie* to the United Kingdom and to Crown colonies but not to colonies having their own legislatures, unless the legislation was expressly adopted by the colonial law-making body.

Any statute enacted by Westminster after December 31, 1832, (the day immediately preceding the first meeting of the local legislature), would have no effect in Newfoundland unless expressly given the force of law by the Representative Assembly. Thus The Matrimonial Causes Act, 1857¹, which for the first time, created jurisdiction in divorce in England's civil courts and made matrimonial causes including divorce, subjects of civil law, did not thereby clothe the Newfoundland legislature with similar authority. Nor did the Newfoundland legislature of 1857 or of any later year adopt the English statute. Indeed no statute, order-in-council or other enactment was passed in Newfoundland between 1832 and 1949 conferring divorce jurisdiction on the local courts. On March 31, 1949, Newfoundland joined a federation of provinces whose constitution vested authority in divorce matters (other than court procedure) in its federal Parliament. After that date parties domiciled in Newfoundland seeking a divorce had to obtain the passage of a Private Member's Bill through the House of Commons to achieve dissolution of marriage². In 1963 Parliament passed the Dissolution and Annulment of Marriages Act³ which delegated to the Senate authority to hear and decide by Resolution, petitions for divorce and annulment⁴, with a right of appeal to the House of Commons within thirty days following

¹ Stats. U.K. 1857, c. 85.

² Sixty-nine such Private Member's Bills were passed.

³ Stats. Can. 1963, c. 10; repealed, Stats. Can. 1967-68, c. 24, s. 26.

⁴ Forty-six such Resolutions of Divorce were passed dissolving the marriages of Newfoundland residents by the Senate.

passage of the Senate Resolution.

(2) QUEBEC AND ONTARIO

Like Newfoundland, Quebec and Ontario acquired legislatures before the passage of The Matrimonial Causes Act, 1857. The legislatures established there in 1791 did not provide the local courts with jurisdiction in divorce before Quebec and Ontario joined Confederation in 1867. After becoming part of Canada the two provinces could not legislate in this field because The British North America Act, 1867¹ had allocated jurisdiction in "Marriage and Divorce"² to Parliament.

In 1930, Parliament enacted The Divorce Act (Ontario), 1930³ (a Private Member's Bill) creating divorce jurisdiction in, and applying the English law as of July 15, 1870 (an arbitrary date selected by Parliament) to the Supreme Court of Ontario. No similar federal legislation was passed after Quebec joined Confederation conferring divorce jurisdiction on its courts, and parties domiciled there seeking divorce were required to petition the Parliament of Canada.

(3) MARITIME PROVINCES

The present provinces of Nova Scotia, New Brunswick and Prince Edward Island were originally part of Nova Scotia which was a British colony of settlement and subject to the law brought by settlers from England.

Nova Scotia received its own legislature in 1758, a full century before the English matrimonial legislation of 1857. Unlike Newfoundland, Quebec and Ontario however, Nova Scotia passed a divorce law (in 1758) vesting divorce jurisdiction in Nova Scotian courts. This law was still in force when Nova Scotia joined Confederation in 1867 (being passed by a competent provincial legislature before entry of the province into Confederation). It was subject thereafter to amendment or repeal by Parliament in matters of "Marriage and Divorce", or by the Nova Scotia legislature in matters of "Solemnization of Marriage in the Province"⁴. Until July 2, 1968, the 1758 legislation continued to be the source of authority in divorce for Nova Scotia courts.

When the present province of New Brunswick emerged (from the partition of Nova Scotia) with its own legislature in 1784, it had acquired the English law, up to October 3, 1758 (when Nova Scotia, of which it was then a part, established its own legislature) and the later Nova Scotia law from 1758 to

¹ Stats. U.K. 1867, c. 3.

² Ibid., s. 91 (26).

³ Stats. Can. 1930, c. 14; now: Annulment of Marriages Act (Ontario), R.S.C. 1970, c.A-14.

⁴ Stats. U.K. 1867, c. 3, s. 92 (12).

the date of achieving separate provincial status (including jurisdiction in divorce). New Brunswick entered Confederation in 1867 with a divorce law of its own enactment, passed in 1787 but revised in 1791, which established a Divorce Court.

Similarly, Prince Edward Island acquired English law upon settlement (as part of Nova Scotia) and Nova Scotian law from October 3, 1758 until it was constituted a separate province in 1769 (including divorce jurisdiction). While Prince Edward Island theoretically acquired Nova Scotia's divorce law, this law remained in practice a dead letter until the province passed legislation to set up its own Divorce Court by Acts of the legislature in 1833 and 1835. The Act of 1835 was not utilized, however, until 1945 when Rules of Practice and Procedure applicable to the Divorce Court were promulgated. Concurrent jurisdiction in divorce was conferred on the Supreme Court of Prince Edward Island in 1949.

(4) PRAIRIE PROVINCES, NORTHWEST TERRITORIES AND YUKON TERRITORY

The origins of divorce law in Alberta, Saskatchewan, Manitoba and the Yukon and Northwest Territories are somewhat obscure though the law of divorce in this part of Canada, until July 2, 1968, was substantially that contained in The Matrimonial Causes Act, 1857. This statute was introduced into western Canada under the 'settled colony' doctrine long before the demarcation of provincial boundaries, and subsequently continued in force by enactments of Westminster and the Parliament of Canada.

In the Rupert's Land Act, 1868¹ Westminster declared that the laws in force in Alberta, Saskatchewan, Manitoba and the Northwest Territories (carved out of property surrendered by the Hudson's Bay Company to the Crown the previous year) on July 15, 1870 would remain in force when these areas were united with Canada, subject of course to alteration thereafter by Parliament and their respective provincial legislatures (the Lieutenant-Governor *in* the case of the Northwest Territories). On July 15, 1870 the law in force included the English Matrimonial Causes Act, 1857 which has not since been amended or repealed by Parliament or the provincial legislatures.

The Yukon which was created out of a division of the Northwest Territories in 1898, acquired the law then existing in the Territories including the English Matrimonial Causes Act, 1857.

(5) BRITISH COLUMBIA

In November, 1858, a Royal Proclamation declared that the English law as of November 19, 1858 (including the English Matrimonial Causes Act of

¹ Stats. U.K. 1868, c. 105.

the year before) was to be in force in British Columbia. In 1867, a United Kingdom Ordinance was passed broadening the influence of English law to embrace Vancouver Island which united with British Columbia in that year. Both Proclamation and Ordinance were in force when in 1871 British Columbia joined Confederation.

GROUND FOR DIVORCE IN CANADA PRIOR TO JULY, 1968

In Nova Scotia, which has the oldest divorce legislation in Canada, the grounds for divorce under the Divorce Act of 1758 were adultery, desertion, impotence and marriage to kindred within the prohibited degrees of consanguinity or affinity. However, in 1761, cruelty was added, while desertion was abandoned, as a ground for divorce. In the other provinces and territories having courts with divorce jurisdiction, the effective ground for dissolution of marriage was adultery. Rape, sodomy and bestiality were also recognized as grounds for divorce but were generally included under the heading of adultery, because they are a rejection of the sexual commitment by one marriage partner towards the other. While it might be argued that the position of New Brunswick and Prince Edward Island is not completely clear (they having once been part of Nova Scotia which then recognized cruelty, impotence, desertion (for three years) and marriage to kindred as well as adultery), adultery now seems to have been the only effective ground in these provinces until 1968. As for divorces granted by the House of Commons and the Senate, while they could conceivably have granted a divorce on any grounds, in practice they also restricted themselves to the ground of adultery.

B. LAW OF DIVORCE IN OTHER JURISDICTIONS

(1) ENGLAND

Since most of the Canadian law on dissolution of marriage was derived from England's Matrimonial Causes Act, 1857 it is interesting to note the changes which have taken place in the English Law since that time, when the only basis for divorce was adultery.

The Matrimonial Causes Act, 1937 (the "Herbert Act")¹ added four more grounds: (1) wilful desertion for three or more years, (2) cruelty, (3) insanity, continuing after five years of mental illness and (4) legal presumption of death of a spouse. The grounds for 'declaration of nullity of marriage were also substantially increased by this Act.

In 1963 legislation was passed amending the law relating to condonation and collusion. Prior to this enactment, the forgiveness of one spouse for an act of adultery committed by the other was conditional on the offending spouse committing no further matrimonial offences. However, the old offence of adultery was revived should the offending spouse commit any further offences such as cruelty, desertion or another adulterous act. Under the 1963 enactment: (1) an act of adultery which had been condoned could never be revived in any circumstance, and (2) cohabitation between the parties for a period not exceeding three months, having reconciliation as its primary purpose, should not be deemed condonation of adultery or cruelty. In addition, the Act made collusion a discretionary, rather than an absolute, bar and also provided for the court to take into consideration and give direction on any agreement (for example, arrangements to settle questions of maintenance for the wife and children) made between the parties to a divorce before or during the divorce proceeding. If the court approves such an agreement, the agreement is freed from the taint of collusion. Should the court not approve, then the agreement can be rewritten or abandoned.

One of the provisions of the Matrimonial Causes Act 1965² stated that if the parties to divorce proceedings resume cohabitation for not more than three months with a view to reconciliation, this is not to be considered as interrupting the

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¹ Stats. U.K. 1937, c. 57.

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ar period required in England to establish desertion.

² Stats. U.K. 1965, c. 72.

(2) THE SCOTS LAW OF DIVORCE

Although the Scots grounds of divorce were very similar to the English, the basis of the law is Scottish tradition. The grounds are: (1) adultery, (2) cruelty, (3) incurable insanity for five years, (4) sodomy or bestiality, (5) wilful desertion for a period of three years (it is interesting to note that desertion was made a ground for divorce in Scotland as far back as 1573), and (6) legal presumption of death of the marital partner.

(3) AUSTRALIA AND NEW ZEALAND

The Commonwealth countries of Australia and New Zealand together with Canada and the United Kingdom are generally regarded as being in the vanguard of Commonwealth legal thinking. The law of these Commonwealth countries, like that of the Canadian provinces (with the exception of Quebec) is based on settlement rather than conquest. Their population is made up largely of settlers of English origin and their descendants. It will be of interest therefore to compare the laws of divorce as they have emerged in these countries with those of Canada.

(a) THE LAW OF DIVORCE IN AUSTRALIA

One of the most important steps Australia has recently taken¹ in the law of divorce has been its abandonment of exclusive reliance on the concept of matrimonial offence. The grounds importing matrimonial offence are: (1) adultery, (2) desertion for not less than two years, (3) habitual cruelty for not less than one year, (4) wilful and persistent refusal to consummate the marriage, (5) rape, sodomy or bestiality committed since the marriage, (6) habitual drunkenness or intoxication by drugs for not less than two years, (7) frequent conviction for crimes and habitually leaving the petitioner without reasonable support for five years, (8) serving a term of imprisonment of not less than three years after conviction Of a crime punishable by death or imprisonment for life and still being in prison at the date of the petition for divorce, (9) conviction for attempting to murder or unlawfully kill the petitioner or of committing offenses involving the infliction of grievous bodily harm on the petitioner, (10) wilful and habitual failure to pay maintenance under a court order or separation agreement over a two year period and (11) failure to comply throughout a period of at least one year with an order for the restitution of conjugal rights.

By virtue of the Australian Matrimonial Causes Act 1959 dissolution of a marriage may also be sought in the event of (1) insanity and confinement to an institution for five years, (2) separation for five years and (3) legal presumption of death.

1 **Matrimonial Causes Act 1959, Stats. Aust'l. 1959, No. 104.**

(b) THE LAW OF DIVORCE IN NEW ZEALAND

Under its Matrimonial Proceedings Act 1963¹, New Zealand, like Australia, has a considerable number of divorce grounds and again not all of them are based on matrimonial offence. Those most often used are: (1) a separation agreement between the parties that has been in effect for three years, (2) a separation order that has been in effect for three years, (3) adultery, (4) desertion and (5) that the parties have lived separate and apart for seven years and are unlikely to be reconciled (marriage breakdown). Unlike Australia and England, New Zealand does not recognize cruelty as a basis for divorce. While the ground of "inebriety and cruelty for three years" exists, it is seldom used. However, the available grounds for divorce in New Zealand are broad enough to ensure that anyone with a just cause can find relief somewhere.

DISCUSSION

The foregoing comparisons between Canada and other leading Commonwealth countries is not put forward to illustrate or argue the merits or demerits of dissolution of marriage. Its purpose is rather to compare the laws currently governing divorce in these countries, in all of which, as in Canada, divorce legislation has existed for many years.

1 Stats. N.Z. 1963, No. 72.

C. REFORM OF CANADIAN DIVORCE LAW

In June, 1967, after deliberations that lasted for about twelve months, the Special Joint Committee of the Senate and House of Commons on Divorce presented to Parliament a 165-page report, including recommendations for the comprehensive reform of the hodge-podge of divorce laws in Canada's provinces and territories. The setting up of the Special Joint Committee of the Senate and House of Commons on Divorce was the result of a widespread and growing feeling in Canada that major reforms in its divorce laws were urgently necessary, to remove the anomaly which these laws presented by comparison with those of other enlightened nations of the world and to meet a major social problem. The report of the Committee unmistakably confirmed the fact that the divorce law of Canada, in comparison with changes of the past one hundred years in other leading Commonwealth countries was inept and inadequate.

The Special Joint Committee, over a period of about a year, held twenty-four open meetings in which churches, social organizations and interested individuals presented their views. These views agreed without exception that reforms in the divorce law of Canada should be undertaken. The general attitude was that if there must be divorce laws, they ought to be as compassionate, humane and understanding as intelligent and sympathetic thinking could make them while maintaining the highest regard for the sanctity of marriage. But even some bodies whose principles or religious faith are firmly opposed to divorce emphasized the fact that, while they themselves did not believe in divorce, they could not expect the laws of the country to be used in such a manner as to prevent others who, unlike themselves, do not believe that marriage is monogamous and indissoluble, from acting in accordance with their own religious convictions. It was emphasized by these bodies that while they held firm beliefs in the matter of marriage they did not wish to impose these beliefs on the entire Canadian society through the medium of the law.

The Special Joint Committee recommended that the marital offense of adultery and the unnatural offenses of rape, sodomy and bestiality be retained as grounds for dissolution of marriage in Canada and that the following grounds be added: (1) cruelty, (2) desertion for three years, (3) wilful non-support, (4) bigamy by the respondent spouse, (5) wilful refusal to consummate the marriage for one year or more, (6) marriage breakdown and separation for three years by reason of mental or physical illness (the granting of divorce on this ground to be within the discretion of the court, subject to appeal), (7) marriage breakdown consequent upon the serving of a term of imprisonment by the spouse for more than three years, or for successive terms totalling three years within a period of five years (subject to the discretion of the court), (8) marriage breakdown by reason of gross and protracted addiction to alcohol or drugs (subject to absence of a substantial prospect of cure and the discretion of the court),

(9) marriage breakdown through disappearance of either the wife or husband without communication with or knowledge by the other of his or her whereabouts for a period of three years, and (10) marriage breakdown by reason of at least three years of separation immediately before institution of proceedings in which the parties have not cohabited, and in which there appears to be no reasonable prospect of cohabitation.

The Special Joint Committee further recommended that the court may adjourn proceedings if there seems to it to be reasonable grounds for reconciliation, or refuse the decree as being contrary to public interest if it would create undue hardship for the respondent or dependent children.

RIGHTS ANCILLARY TO DIVORCE

The Special Joint Committee recommended that courts having jurisdiction in divorce and annulment be given authority to issue orders respecting alimony and other rights ancillary to divorce. These would include the division of marital assets, the future maintenance of the wife and children and, under special circumstances, of the husband, and the future custody, care and education of, and access to the children. The Special Joint Committee further recommended that the Senate sitting in cases of dissolution or annulment of marriage from Quebec and Newfoundland should have similar powers by an amendment to the Dissolution and Annulment of Marriages Act¹, excepting the division of marital property between the parties which is a matter within the jurisdiction of the province by virtue of the "Property and Civil Rights"² provision of The British North America Act, 1867.

The lead had clearly been given to Canada in matters ancillary to divorce by New Zealand, Australia and England and the Special Joint Committee seems to have recognized this.

DOMICILE

A person's domicile in the legal sense (except where defined by statute) is that 'country' in which he actually has his permanent home or in which he is deemed to have his permanent place of residence. In relation to marriage and divorce prior to July, 1968, each of Canada's ten provinces, the Yukon and the Northwest Territories were separate domiciles. The Special Joint Committee recommended that the concept of provincial domicile be abandoned in favour of a national domicile. Practical reasons for adopting, by legislation, a Canadian-wide domicile in divorce, maintained the Special Joint Committee, are the require-

1 Stats. Can. 1963, c. 10; repealed, Stats. Can. 1967-68, c. 24, s. 26.

2 Stats. U.K. 1867, c. 3.

ments of modern life. Employees of businesses with branch offices may be moved at a day's notice from place to place. Such persons and many others are often without foreknowledge as to their permanent homes. Thus a new Canadian domicile was proposed in place of twelve separate domiciles within the one country. Australia, which has Federal and State Governments similar to Canada's Federal and Provincial Governments, had already set the precedent by establishing an Australian domicile rather than State domiciles for matrimonial proceedings.

During its deliberations, the Special Joint Committee considered possible changes in the domiciliary requirements for married women in matrimonial proceedings. Prior to 1930 a woman automatically acquired the domicile of her husband on marriage, and retained his domicile as long as they were lawfully married, by virtue of the Common Law doctrine that the husband and wife are one person. As a result, should the wife seek a divorce she would have to take proceedings for the dissolution of the marriage in the province or country where her husband was then domiciled. If the husband had left his wife and gone to another province or country and acquired a domicile there, severe hardship and inconvenience could be imposed on the wife. The Divorce Jurisdiction Act, 1930¹, enacted by Parliament, permitted a wife, deserted for a period of two years by her husband, to petition for divorce in the province where the couple was domiciled at the time of desertion, if the wife resided in that province continuously during those two years.

The Special Joint Committee concluded that it might not be practical for a wife to reside in a province for two years before seeking a divorce there, and stated unequivocally that the law of domicile discriminated against the wife. Under the Canadian domicile concept, proposed by the Committee, the wife would not have to ascertain the whereabouts of, and pursue her deserting husband to his new domicile to get a divorce. The Committee recommended that either the husband or the wife could seek a divorce in any province of Canada provided the petitioner had resided continuously in that province for a minimum period of one year immediately before presentation of the petition. The Committee suggested that this rule could apply as well to petitions for annulment and claims for ancillary relief by either the petitioner or respondent.

MARRIAGE COUNSELLING AND RECONCILIATION

Recent legislation in both Australia and New Zealand has given considerable attention to the important question of reconciliation between parties to divorce proceedings. In both countries it is the statutory duty of the court and of legal counsel to take certain steps to explore the possibility of reconciliation.

1

Stats. Can. 1930, c. 15; repealed, Stats. Can. 1967-68, c. 24, s. 26.

Financial assistance towards the setting up and supporting of marriage counselling and guidance agencies is provided for in the Australian legislation.

JUDICIAL SEPARATION

The Special Joint Committee took the view that the jurisdiction of Parliament over "Marriage and Divorce" includes judicial separation, which the Committee says may be regarded as "a divorce without right to re-marry". It was further held by the Special Joint Committee that this jurisdiction includes the power to prescribe the extent to which the marital rights and obligations of the parties are to be abrogated or continued. The constitutional validity of provincial legislation on matters related to divorce and judicial separation is questioned by the Special Joint Committee. The Committee recommended that the prospective reforms of the law of divorce provide for the granting to the courts of all the provinces of Canada, and to the Senate, a uniform authority to decree judicial separation as well as to rule on questions of alimony, maintenance and custody of children in separation and divorce.

ANNULMENT OF MARRIAGE

Jurisdiction in suits for nullity was first exercised in England by the Ecclesiastical courts. In Newfoundland the Supreme Court has been held to have the same jurisdiction as that exercised by the Ecclesiastical courts in England before 1832¹.

Perhaps because the same result is sought and obtained in actions for divorce and for annulment and because the jurisdiction of Parliament in "Marriage and Divorce" generally may be taken to include both divorce and nullity, there is a tendency to confuse the two causes of action. It seems desirable therefore to deal briefly with distinctions between them which should be borne in mind.

On the subject of legislation, with the exception of causes of action which might relate purely to the "Solemnization of Marriage in the Province" (marriageable age could be an instance) only Parliament has the right to make or amend laws on which an action for annulment may be taken. A provincial legislature could not abolish the grounds for nullity actions.

An annulled marriage may be described as a defective marriage and is either void or voidable. A marriage will be deemed by a court to be void if, for example, one of the parties is mentally incompetent to contract the marriage, if there is an existing prior marriage (bigamy), and for consanguinity or affinity

1 Hounsell v. Hounscll, /1949/ 3 D.L.R. 38 (Nfld. Sup. Ct.).

within the prohibited degrees. These degrees can be determined only by recourse to the Ecclesiastical law of England. Indeed the effects of early statutes are so obscure that courts have repeatedly held that the prohibited degrees are those set out in the Book of Common Prayer of the Church of England. These follow Archbishop Parker's Table of 1563. In Canada this table must be read in conjunction with federal legislation relating to the matter, enacted in 1932.¹ A void marriage is invalid irrespective of the issuance of a judicial decree of annulment which is merely declaratory of the non-occurrence of a valid marriage.

In the voidable marriage the status of marriage continues in effect until it is declared non-existent by a judicial decree at the suit of one of the parties. Such a decree deems a marriage to be void from the beginning. The usual ground on which a marriage is voidable is that Of impotence. Certain other marriages are now classified as voidable by statute, as for example in England under the Matrimonial Causes Act, 1937.

1 Stats. Can. 1932, c. 10; Now R.S.C. 1970, c. M-5; see Appendix B.

D. THE DIVORCE ACT (1968)

The Special Joint Committee's recommendations for amending the law of divorce followed closely the reforms made in other jurisdictions, during a century in which the Canadian law stood still. On July 2, 1968, a federal Divorce Act¹, incorporating many of the Committee's proposals, came into force, bringing the Canadian divorce law more in line with the more enlightened Acts of other countries.

As adopted by Parliament, the Divorce Act incorporates both matrimonial offenses (section 3) and specific kinds of marriage breakdown (section 4)².

The Divorce Act provides in section 3 that a divorce action may be taken where the respondent, since the celebration of the marriage,

- "3. (a) has committed adultery;
-
- (b) has been guilty of sodomy, bestiality or rape, or has engaged in a homosexual act;
- (c) has gone through a form of marriage with another person; or
- (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."³

A divorce petition may also be presented to a superior court of a province by a husband or wife,

- "4. (1) . . . where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

- (a) the respondent
 - (i) has been imprisoned, pursuant to his conviction for one or more offences, for a period or an aggregate period of not less than three years during the five year period

² See Appendix Q for number of divorce causes commenced under the new federal Act.

³ -

¹ R.S.C. 1970, c. D-8.

See: *Goudie v. Goudie* (1969), 9 D.L.R. (3d) 90 (Nfld. Sup. Ct.).

immediately preceding the presentation of the petition, or

(ii) has been imprisoned for a period of not less than two years immediately preceding the presentation of the petition pursuant to his conviction for an offence for which he was sentenced to death or to imprisonment for a term of ten years or more, against which conviction or sentence all rights of the respondent to appeal to a court having jurisdiction to hear such an appeal have been exhausted;

- (b) the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been grossly addicted to alcohol, or a narcotic as defined in the Narcotic Control Act, and there is no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period;
- (c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent;
- (d) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; or
- (e) the spouses have been living separate and apart
 - (i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
 - (ii) by reason of the petitioner's desertion of the respondent for a period of not less than five years,

immediately preceding the presentation of the petition.

- (2) On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of these circumstances shall be deemed to have been established."

The Divorce Act empowers the province's superior Courts, upon the

hearing of divorce applications, to make provision for the custody, care and upbringing of children of the marriage or children *in loco parentis* to either spouse and the support of both the children and the respective spouses.

Under section 5 of the Act,

"The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

- (a) the petition is presented by a person domiciled in Canada; and
- (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceeding the presentation of the petition and has actually resided in that province for at least ten months of that period."

The domicile of a married woman, provides section 6(1) of the Act, "shall be determined as *if* she were unmarried and, *if* she is a minor, as if she had attained her majority."

The Act applies to all Canadians in all provinces. No provincial legislature may amend or appeal any of the provisions of, or enact any law dealing with the substantive questions of divorce, which are treated in the federal Act.

CRITICISMS OF PARLIAMENTARY DIVORCE

The requirement, prior to July, 1968, that husbands and wives domiciled in Newfoundland were obliged to seek a Senate divorce aroused strong criticism that the cost involved was a barrier to all except those specially favoured with this world's goods, and that in actuality the Parliamentary divorce was within reach of only the comparatively affluent. The distances involved, the expense of travel of the parties and (illegal counsel between Newfoundland and Ottawa (or the employment of counsel in two places) constituted costs that ought not be encountered if local courts administered the law.

Furthermore, a Senate Committee is comparatively unsuited to hear more broadly based divorce proceedings, as against a properly constituted local court presided over by judges learned in the law.

While the Family Law Study did not doubt that the hearing of petitions for divorce before Senate Divorce Commissioners was as well conducted as possible, scepticism was expressed that a Senate Commissioner sitting in Ottawa could be in as eligible a position to administer the broadened laws, including provisions for reconciliation and marriage counselling, as provincial courts and

provincial organizations would be. The modern attitude towards divorce, as exemplified in the laws of other jurisdictions studied, is that while in some cases divorce will be unavoidable, every effort ought to be made to find a happier alternative solution. Most if not all marriages are entered into in high hopes of the rewards that a healthy and happy union can bring. But as in other human plans and endeavours the winds of adversity sometimes bring misfortune and tragedy. It must be remembered that when this happens to the marriage relationship, it causes its own anguish and heartbreak. Therefore everything humanly possible should be done through counselling and reconciliation to prevent the occurrence of divorce. Some such efforts will succeed but others may fail. The provincial environment was felt to be more conducive to success than that in a body sitting many miles away.

JURISDICTION OF COURTS

There is some difference of view in Canada, however, as to the provincial court or courts which would be best suited to exercise jurisdiction in divorce. Arguments have been advanced for giving County or District Courts concurrent jurisdiction with the Supreme Court. Others favor the Family Court for divorce proceedings as well as for other family matters.¹ Still others hold that divorce litigants ought to have access to the Supreme Court alone, or to a Divorce Court set up specially to accommodate matrimonial affairs.

The view of many doing research in Canada in the field of family law is generally against giving jurisdiction to the Family Courts at present. They do not seem to have the stature, or sufficiently qualified personnel even in many large cities in Canada, to handle divorce proceedings. Opinion was divided as to the other two Courts, but the Special Joint Committee recommended that for the convenience of litigants, the County Courts (or District Courts) of all provinces having jurisdiction to dissolve marriage be given jurisdiction in divorce equally and concurrently with the Supreme Courts of the respective provinces, with appeal to the Appellate Courts of each province. In spite of this, the Divorce Act provides that jurisdiction be restricted, at least in the first instance, to the Superior Courts of the provinces.

Under section 22 of the Divorce Act, Quebec and Newfoundland, which until 1968 relied on the federal Parliament to dispose of divorce applications from their residents, requested and obtained from the Governor in Council (prior to the coming into force of the Act. on July 2, 1968), proclamations declaring their respective Superior Courts to have authority to entertain divorce applications. In following this course, the Province of Newfoundland adopted the

¹

See Chapter VIII, *supra*, pp. 355, 359.

recommendations contained in a report on Divorce submitted to the Minister of Justice by the Newfoundland Family Law Study on December 6, 1967.

The effect of the Supreme Court of Newfoundland being vested with jurisdiction to hear divorce applications, has been to afford relief from avoidable expense and great inconvenience to husbands and wives residing here who seek divorce under the law of Canada, and to create the proper environment for the hearing of their troubles.

PROCEDURAL MATTERS

Under and by virtue of the powers conferred by section 19 of the Divorce Act, the Judges of the Supreme Court of Newfoundland passed the Divorce Rules, 1969 which came into ^{this} on January 8, 1969 and which

- govern divorce practice and procedure in this Province.

CHAPTER XIV

SOME ASPECTS OF CONFLICTS IN FAMILY LAW

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INTRODUCTION

In family law proceedings in Newfoundland involving an element of foreign law, three basic questions may arise:

- (1) whether the court in the province of Newfoundland has jurisdiction to adjudicate on the proceeding before the court;
- (2) if the Newfoundland court has jurisdiction in the proceeding, what recognition (if any) should be accorded the rules of law of a foreign legal system, which may be relevant to the proceeding; and
- (3) what recognition or effect should be given in Newfoundland to decrees, judgments, orders and other process of the courts of foreign legal systems.

Whether the Supreme Court of Newfoundland has jurisdiction to entertain a petition for divorce, for example, will depend on the petitioner having a Canadian domicile and either the petitioner or respondent meeting the requirement of residence in the province of Newfoundland, as specified in the Divorce Act (Canada)¹. Assuming the Supreme Court of Newfoundland has jurisdiction

1 R.S.C. 1970, c. D-8, s. 5.

to hear the divorce petition, the court may then have to decide whether parties to the petition who married in a foreign jurisdiction had entered into the marital relationship in accordance with the ceremonial requirements of the foreign legal system. The Supreme Court may also have to consider the possibility that the parties have already been divorced in another jurisdiction by a divorce decree recognized in Newfoundland. The effect to be given to a custody or adoption order made in another jurisdiction sometime prior to the divorce action in Newfoundland may also arise in determining questions of corollary relief under the Divorce Act.

The principles of Conflict of Laws, otherwise described as "private international law", are designed to overcome the territorial limitations on the effect of laws which would otherwise be coincident with the boundaries of one jurisdiction only. These principles are applicable to most topics dealt with by the Family Law Study and are discussed in this Chapter as they apply to adoption decrees, orders respecting custody and guardianship of infants, divorce decrees, legitimacy and legitimation, celebration of marriage, and jurisdiction in nullity proceedings. Conflict of laws aspects of Property Rights in the Family are discussed in Chapter VI¹.

MARRIAGE IN THE CONFLICT OF LAWS

A person's capacity to marry (governed by the law of his or her domicile at the date of marriage) and the requirements of the celebration of marriage (governed by the law of the place where the ceremony takes place) are discussed in this part.

The Model Uniform Act adopted by the Commissioners on Uniformity of Legislation in Canada dealing with these and other points is compared to the Acts of a number of jurisdictions. Recommendations for amendment of the Newfoundland Evidence Act² on the requirements for proof of celebration of marriage in accordance with the law of the place where the marriage was solemnized and the evidentiary value of foreign marriage certificates, are made.

CUSTODY IN THE CONFLICT OF LAWS

The welfare of the child is the paramount consideration in custody proceedings. A custody order made in Newfoundland as in other provinces, under the Divorce Act (Canada), has legal effect throughout Canada. Otherwise, the question of the weight to be given a foreign custody order may arise in a number of ways and circumstances, in proceedings before the Newfoundland

¹ Supra, pp. 266-276.

² R.S.N. 1952, c. 120.

Supreme Court (which has jurisdiction in child custody and guardianship matters), and if viewed sympathetically in the Newfoundland Supreme Court, the foreign custody order could have a bearing on a decision of that Court. Where the Newfoundland Court has an inherent or statutory jurisdiction in a custody proceeding, questions of conflicts may well arise where a custody order has already been made in another jurisdiction.

ADOPTION IN THE CONFLICT OF LAWS

One of the recommendations of Chapter III entitled Adoption¹, dealing with the recognition of foreign adoption orders, which proposes a specific amendment to The Adoption of Children Act, 1964², is repeated in this chapter.

Adoption legislation is of comparatively recent development and there is a dearth of relevant caselaw. There are already many aspects to the problems, actual or incipient, in the field of conflict of laws relating to adoption. For example, the validity and effect of an adoption may not be the same in different jurisdictions, as the rules for recognition of a foreign adoption, and the choice of law to be applied, may differ. Adoption under the Newfoundland system of law for example, may have purposes inconsistent with those acceptable under the law of another province, with the consequence that Newfoundland may not recognize the other province's adoption order.

Because of these and other considerations, the need is apparent for uniform rules as a basis for establishing the national and international validity of adoption orders. Following upon the draft Convention on the International Adoption of Children approved at the Hague in 1964, the Conference of the Commissioners on the Uniformity of Legislation in Canada is now considering a Uniform Adoption Act. Canada is a member of the Hague Conference and the second recommendation of this part of the chapter will be that the Newfoundland Commissioners request the Conference on the Uniformity of Legislation in Canada to consider the 1964 Hague convention in their future deliberations on a Uniform Adoption Act for Canada.

LEGITIMACY AND LEGITIMATION IN THE CONFLICT OF LAWS

There are a number of interesting questions discussed in this part of the chapter affecting the relationship of parent and child. These may depend on such things as the law of the father's domicile at the child's birth or the date of marriage.

Legitimation by subsequent marriage may also be recognized. Even

¹ *Supra*, p. 81.

² Stats. Nfld. 19E4, No. 23.

public acknowledgment by the father that the child is his ,may be effective. A Uniform Legitimacy Act was adopted by the Commissioners on Uniformity of Legislation in 1919 and revised in 1959. This Act has now been adopted in full by six provinces, although Newfoundland is not one of these. A similar law is applicable in Great Britain. The Uniform Act is discussed and recommendations are made.

DIVORCE DECREES IN THE CONFLICT OF LAWS

A foreign divorce decree may be held valid in Newfoundland courts, if a sufficient connection existed between the spouses and the foreign state authorized to grant the divorce decree. Although all legislative power in divorce in Canada is vested in the federal Parliament, the rules under the Common Law regarding validity of a foreign divorce may also apply in some cases. Initially in the Anglo-Commonwealth system, a decree would be valid only if granted in the place of the domicile of the husband. This rule, which has been widened considerably by a number of cases since it was first expounded in 1895 in England, has been retained in Canada in the Divorce Act.

JURISDICTION IN NULLITY PROCEEDINGS

The jurisdiction of Newfoundland's Supreme Court in nullity proceedings and recognition by the Court of foreign annulment decrees are considered.

Declaration of marital status in the Province is discussed and two recommendations are made.

A. MARRIAGE IN THE CONFLICT OF LAWS

A prerequisite of a valid marriage is that the parties have the capacity to marry and that the marriage has been celebrated according to the form prescribed by the law of the place of celebration.

CAPACITY TO MARRY

All questions of capacity to marry, other than that of the validity of foreign divorce and nullity decrees, are determined according to the law of the place of domicile of each spouse at the date of the marriage. That law determines whether a particular relationship falls within the prohibited degrees of consanguinity and affinity and whether incapacity arises by reason of non-age. The capacity of each spouse is determined by the law of his or her own domicile at the date of the marriage. If either party is under a legal disability to marry the other, the marriage is void.¹ For example, if the pre-marital domiciles of the parties are different and one spouse by reason of the prohibited degrees of relationship under the law of his domicile cannot marry, then the marriage between the parties will be void *ab initio*.

Whether the alleged incapacity arises by reason of non-age depends upon the provisions of the law of the place of domicile of the respective intended spouses relating to the minimum age for marriage. Where that law provides that a person under a certain age has no capacity to marry, a court in another Common Law jurisdiction will recognize and enforce that provision. However where that law provides only for compliance with a special procedure, such as the requirement of parental consent, in the case of marriages under a certain age², then for conflicts purposes the law is classified as one of form or mode of celebration of marriage and not one of capacity. For conflicts purposes it applies only to marriages celebrated in that jurisdiction. It does not apply to persons domiciled there whose marriages are celebrated in another country or province.

At Common Law a male of fourteen and a female of twelve had capacity to enter a valid marriage. In the absence of legislation by the federal Parliament which has jurisdiction to determine the age at which a person has capacity to marry, the Common Law still governs the minimum age today.

In Canada the prohibited degrees of affinity and consanguinity are those laid down by Archbishop Parker in 1563 as amended by the

¹

² *Sottomavor v. DeBarros* (no. 1) (1877). 3 P. 1. Marriage

² See, for example: The Solemnization of Marriages Act, R.S.N. 1952, c. 160, s. 4.

Act.¹ The capacity to marry of all persons domiciled in Canada, irrespective of the place of celebration of the marriage, is determined by these rules. FORM OF MARRIAGE CELEBRATION

Under conflicts rules the validity of a marriage on all matters of form or mode of celebration is determined by the application of the law of the place of celebration of the marriage.² If a marriage has been solemnized in accordance with that law it will be recognized as formally valid in Newfoundland. If the mode of celebration of the marriage fails to comply with that law, the marriage will be considered to be either void or voidable according to the consequence of the particular defect in solemnization under the law of the place of celebration.

PROOF OF A FOREIGN MARRIAGE

Strict proof³ of a foreign marriage requires not only proof of the celebration of the marriage (including the identification of the particular spouses⁴) but also requires direct expert evidence to show that that ceremony, under the laws of the place of celebration of the marriage, constituted a formally valid marriage.

In England, for example, the Morton Commission on Marriage and Divorce⁵ made a number of recommendations designed to facilitate proof of foreign marriages and also of foreign laws and to lessen the expense associated with such proof. The Commission recommended that the English courts be enabled to accept as sufficient evidence of the law of another state an official certificate given by a competent authority of that other jurisdiction. The Commission also recommended that in matrimonial proceedings where neither spouse contests the validity of the marriage the testimony of a spouse and production of a certificate of the marriage should be sufficient proof of the validity of the marriage.

Proof of Ceremony of Marriage

In England in certain circumstances the production of a certificate of marriage and the identification of the parties is sufficient to prove the existence of the marriage'. - ¹

R.S.C. 1970, c. M-5.

² *Frustaglio v. Barbuto*, /1960/ O.W.N. 551 (H. Ct.); *Solomon v. Walters* (1956), 18 W.W.R. 257 (B.C. Sup. Ct.); *Hunt v. Hunt*, /1958/ O.W.N. 332 (High Ct.).

³
¹ Dicey and Morris, *The Conflict of Laws* (8th ed., 1969) pp. 247-248.

⁴
See Kavass, *Proof of Foreign Marriages in Australian Divorce Proceedings* (1959), 33 A.L.J. 425, 34 A.L.J. 7; *McColm v. McColm*, /1969/ 2 O.R. 742 (High Ct.).

⁵ Report of Rival Commission on Marriages and Divorce, 1951-55, Cmd. 9678, pp. 240-2.

In Australia, under the Model Maintenance Act², proof of a foreign marriage is established by producing a certificate of marriage:

"(2) In proceedings under this Act, the court may receive as evidence of the facts stated in it a document purporting to be either the original or a certified copy of a certificate . . . of marriage alleged to have taken place in New South Wales or elsewhere."

In the absence of such enabling statutes' and in the absence of strict proof of the marriage the court may rely upon a number of presumptions. In *Baran v. Wilensky*,³ Kelly J. of the Ontario Supreme Court stated:

"It would appear from a review of the authorities dealing with marriages, including foreign marriages, that there are three presumptions of law which might be taken into consideration: The first is *semper praesumitur pro matrimonio*, which is a presumption of law; the next is 'that every intendment shall be made in favour of a marriage *de facto*', so that if any clergyman was present performing the ceremony the law would presume that he was a clergyman properly authorized to conduct the ceremony; the third is that "where an act appears to have been performed by proper persons the law will intend that everything was done in a proper manner."

In *Lewkowicz v. Korzewich*, Kellock J. stated⁴ that the mere production of an English marriage certificate raised a presumption of its validity in all respects at least that the ceremony complied with the law of the place of celebration. The certificate also constituted "some evidence" of the statements it contains, in particular, that the female was a spinster at the time of the marriage .

In *Mellen v. Dobenko*⁵ it was held sufficient proof of the marriage to provide a copy of the marriage license and certificate together with evidence of cohabitation for ten years.

Proof of Foreign Law Respecting Celebration of Marriage

In some provinces judicial notice can be taken of the provisions of

¹ Dicey and Morris, op. cit. 248. For example, marriages celebrated under the Foreign Marriage Act, 1892, Stats. U.K. 1892, c. 23, s. 1.

² *See* *Model Maintenance Act*, 1921, 1921, 71, 21 (C) 5 (1927), 61 O.L.R. 340 (Sup. Ct. App. Div.).

³ /1956/ S.C.R. 170.
(1960), 20 D.L.R. (2d) 440, 443-444, (Ont. High Ct.).

foreign law. In Manitoba, section 32 (1) of The Manitoba Evidence Act ¹ provides:

"Every court shall take judicial notice of the laws of any part of the British Commonwealth, or of the United States, or any state, territory, possession, or protectorate thereof, but foreign law shall nevertheless be pleaded where any rule or law so requires."

In Ontario under section 26 of The Evidence Act²:

"Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices thereof and other public documents purporting to be printed by or under the authority of the Parliament of the United Kingdom, or of the Imperial Government or by or under the authority of the government or of any legislative body of any dominion, commonwealth, state, province, colony, territory or possession within the Queen's dominions, shall be admitted in evidence to prove the contents thereof."

The Model Uniform Act³ provides:

- "29. (1) Judicial notice shall be taken of:
- (a) all Acts of the Imperial Parliament;
 - (b) all Acts of the Parliament of Canada;
 - (c) all ordinances made by the Governor in Council of Canada;
 - (d) all ordinances made by the Governor in Council, Lieutenant Governor in Council, or Commissioner in Council of any Province, colony, or territory which, or some portion of which, forms part of Canada, and all Acts and ordinances of the Legislature of or other legislative body or authority competent to make laws for any such Province, colony, or territory; and
 - (e) all Acts and ordinances of the Legislature of or other legislative body or authority competent to make laws for any of Her Majesty's dominions.

1 R.S.M. 1970, c. 150.

2

.R.S.O. 1960, c. 125.

3 Adopted by the Conference of Commissioners on Uniformity of Legislation in Canada in 1941 (as amended).

(2) This section applies

- (a) in respect of Her Majesty's dominions at any time heretofore existing or hereafter constituted, as well as to those now existing, and
- (b) in respect of Acts and ordinances enacted or made before as well as to those enacted or made after the enactment of this section."

It is questionable whether the exclusion of the laws of the United States from section 29 of the Uniform Act is justified. The text of statutes of that country are as accessible to litigants in Canada as those of any part of the Commonwealth.

Section 32 of the Manitoba Act differs substantially from the Ontario and Uniform Act provisions. In Manitoba a court can take judicial notice of the foreign law, including caselaw, whereas under the other provisions judicial notice is restricted to statutes. In this respect the Manitoba provision is unique in Canada.

There appears to be no valid reason for restricting judicial notice to statutes. Case reports are as accessible as statutes and counsel in preparing a case can, by seeking the assistance of a member of the bar in another jurisdiction, bring the relevant material to the attention of the court.

In Tasmania the Evidence Act¹ of 1910 (as amended) provides:

"65. Books purporting to have been printed or published, whether before or after the commencement of this Act, under the authority of the Government of the Commonwealth, or of any State, or of any country whatsoever, or by the printer to such Government, and purporting to contain statutes, ordinances, or other written laws in force in such Commonwealth, State, or country, shall on production, be admitted and received as *prima facie* evidence of such laws.

66. Printed books purporting to contain statutes, ordinances, or other written laws in force in the Commonwealth, or any State, or in any country whatsoever, although not purporting to have been printed or published by authority as aforesaid, books purporting to contain reports of decisions of courts of judges in the Commonwealth, State or country, and text-books treating of the laws of the Commonwealth, State, or country, may be referred to for the purpose of ascertaining

1 Stats. Tas. 1910, No. 20.

the laws in force in the Commonwealth, State, or country; but the courts or persons adjudicating shall not be bound to accept or act on the statements in any such books as evidence of such laws.

67. All courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such courts or persons consider to be of authority on the subjects to which they respectively relate.

68. When any writing whatsoever has been copied by means of any machine or press or operation which produces a facsimile impression or copy of such writing, such impression or copy shall, upon proof to the satisfaction of the court or person acting judicially that the same was taken or made from the original writing by means of such machine or press or operation as aforesaid, be evidence of such writing, without any proof that such impression or copy was compared with the said original thereof, and without any notice to produce such original."

These sections are comprehensive in scope. They relate to the mode of proof of the laws of all other jurisdictions whether evidenced by statutes or judicial decisions. Production of books purporting to contain statutes or the written laws constitute *prima facie* proof. Reported case decisions are admissible in evidence. Moreover section 68 provides that mechanically reproduced copies of

section of the Manitoba Evidence Act requires judicial notice to be taken of the laws of foreign jurisdictions without considering the availability of either the statutes or case decisions to counsel or to the Court. Under section 68 of the Tasmanian legislation, photostat copies are admissible in evidence.

This Study will recommend that Newfoundland's Evidence Act be amended to include provisions similar to those of the Tasmania Evidence Act.

Proof of Conformity of Celebration of Marriage with Foreign Law

The question of proving a ceremony complying with the provisions of the foreign law *prima facie* requires the use of an expert witness. The Morton Commission¹ and Professor Kavass² both recommend a simplified procedure for proof of such marriages. The Morton Commission approves the practice in

¹ Report of Royal Commission on Marriage and Divorce, 1951-1955, Cmd. 9678, paras. 913-919 (1956).

² See: Kavass, Proof of Foreign Marriages in Australian Divorce Proceedings (1959), 33 A.L.J. 425, 34 A.L.J. 7.

European countries under which a governmental official of that country may give an official statement of the law on some particular matter. The Commission recommended such certificates should be sufficient evidence of the law of the foreign country.

In Nova Scotia, sections 40(2) and 40A of the Evidence Act ¹ provide: "40

(2) Wherever in any cause or matter in any court of the Province it is necessary to prove a foreign marriage and the fact of solemnization

of such foreign marriage is proved, there shall thereupon arise a *prima facie* presumption that such foreign marriage was duly solemnized in accordance with the foreign law."

40A A Court may receive as evidence of the facts stated in it, a document purporting to be either the original or a certified copy of a certificate, entry or record of a birth, death or marriage alleged to have taken place anywhere outside the Province."

In Newfoundland under sections 17 and 18 of The Evidence Act², provision is now made for the admission into evidence of certain enumerated matters including proclamations, treaties, judgments, decrees and orders of foreign courts. Under section 17 the documents must be either signed or sealed by an appropriate officer of the foreign jurisdiction and under section 18 the documents are admissible if they would be admissible in any court proceeding in England. Similar provisions are contained in the Evidence Acts of the other provinces.³

There is no sound reason for limiting admissibility to the classes of documents referred to in these sections. In some states of Australia, a certificate of marriage is admissible if issued in any part of Her Majesty's Dominions⁴. In England in practice a certificate of marriage which is *prima facie* proof of the marriage in the country where the marriage was celebrated is *prima facie* proof in England.⁵ The Supreme Court of Canada in the *Lewkowicz* case⁶ followed the same practice, without requiring at the same time that the certificate have a *prima facie* effect in the foreign country. At the same time it is necessary to identify the particular spouses as the participants in the foreign ceremony. This may be established by their evidence or by that of witnesses present at the time of the solemnization.

¹ R.S.N.S. 1967, c. 94, as amended by Stats. N.S. 1970, c. 42, s. 2.

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R.S.N. 1952, c. 120.

³ Castel, Private International Law, 86.

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Evidence Act, Stats. N.S.W. 1898-1966, s. 30(2).

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⁶ Dicey and Morris, The Conflict of Laws (8th ed.), p. 250
/1%56/ S.C.R. 170.

This Study will recommend that The Evidence Act be amended to provide for the presumed validity of a foreign marriage by proof of its celebration and for the admissibility of a certificate of marriage issued in accordance with the law of the place of celebration. Subject to proper identification of the spouses, this should constitute *prima facie* proof of the validity of the marriage.

If this recommendation is adopted and, at the same time, a court in Newfoundland is authorized to take judicial notice of foreign law in cases where the validity of the marriage is disputed, the content of the foreign law which is judicially noticed will define the issues in dispute and additional evidence can be introduced by or on behalf of a spouse to rebut the presumption of validity arising from the production of the certificate.'

CHOICE OF LAW

As previously noted² the validity of a foreign marriage on all matters concerning form is determined by the application of the law of the place of celebration and capacity is determined by the law of the ante-nuptial domicile of each party. In addition to these circumstances a foreign marriage may be void or voidable for some other reason. A marriage may be void or voidable at Common Law for impotence or wilful refusal to consummate. While the law on the point is not clear, it is probable that the question whether either of these circumstances is relevant to create a defective marriage is to be determined by the

law of the place of celebration. If the law of the place of celebration includes impotence or wilful refusal to consummate as circumstances giving rise to nullity proceedings, then at Common Law a court in Newfoundland could annul the marriage on that basis.

Under section 4 (1) (d) of the Divorce Act⁴ these circumstances are now included as grounds for divorce. However it appears that impotence continues to be a ground for

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Meszaros v. Meszaros (1969), 5 D.L.R. (3d) 294, 295 (Ont. High Ct.), annulment.

Supra, p. 497.

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DeReneville v. DeReneville, /1948/ P. 100 (C.A.).

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R.S.C. 1970, c. D-8, s. 4 (1) (d). But see Rose v. Rose, /1970/ 1 O.R. 193 (High Ct.).

B. CUSTODY IN THE CONFLICT OF LAWS

Custody orders made in foreign jurisdictions have limited effect under the Common Law rules of conflict of laws. **In** matters pertaining to the custody of infants the court, in the exercise of the right of the Crown as *parens patriae*, exercises a special kind of judicial or a quasi-administrative function so that its decision concerning the child is not a strict adjudication of parental rights. In the case of *In re K (Infants)*¹ Lord Evershed stated:

"It is not in doubt that a judicial inquiry concerning the proper steps to be taken for the care and maintenance of a ward of the court is subject - - and necessarily subject because of the nature and purpose of the inquiry - - to a procedure in many respects quite special . I venture to repeat and to emphasize that the aim and purpose of the judicial inquiry is the benefit of the infant and for such purpose to make a decision about its immediate future upbringing or control. For such purpose also the infant is in relation to the court in a special position distinct from that of other parties - - for he or she is a ward of the court, a "child-in-law" of the court exercising the ancient prerogative and parental jurisdiction."²

As noted in Chapter II the "best interests" of the infant has emerged as the first and paramount consideration in custody proceedings so that under the rules of the Common Law the finality of a foreign custody order is affected by a court's concern with the best interest of a child.

The issue of Validity of a foreign custody order may arise in Newfoundland as a matter either ancillary to divorce proceedings or in some other way and the finality of a foreign order varies according to the circumstances under which it was made.

CUSTODY ORDERS IN DIVORCE PROCEEDINGS

Under the Divorce Act³ a petition for divorce may include a prayer for custody as a matter of corollary relief and the court may make an interim⁴ or final⁵ order providing for "the custody, care and upbringing of the children of the marriage." A custody order made in a Province has legal effect throughout

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Ibid., 208.

/1965/ A.C. 201.

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R.S.C. 1970, c. D-8.

Ibid., s. 10 (b). ^s

Ibid., s. 11 (c).

Canada' and may be registered in any other superior court in Canada and *enforced* there "in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under Section 19."² Section 19 (1) (d) authorizes a court to make rules "providing for the registration and enforcement of orders" made under the Act.

The Judges of The Supreme Court of Newfoundland have enacted the following rule:

"29. (1) Where an order has been made under section 10 or 11 of the Act by the appropriate court of any other province of Canada, the order may be registered in the Province of Newfoundland by filing in the registry a copy of the order certified by the clerk of the court that made it, and when so filed it shall be entered as an order of the Supreme Court of Newfoundland and shall have and be given effect as such."³

It is uncertain, however, whether the Supreme Court of Newfoundland has jurisdiction to amend a custody order made in another Province. It is not clear from a consideration of the Divorce Act whether "enforcing" an order includes the power to vary its terms. Moreover section 11 (2) of the Act expressly confers only on the court which made the order a power to vary it from time to time. A literal interpretation of the relevant provisions would exclude a power to vary a custody order made in another Province in proceedings in Newfoundland. Some support for this approach to statutory interpretation is to be found in *Pasowysty v. Foreman*⁴, a decision of the British Columbia Supreme Court concerning the enforcement of a maintenance order.

A Private Member's Bill was introduced in the House of Commons in 1970 to give the court of the Province of residence of the party for whose benefit the order was made concurrent jurisdiction to vary the order.⁵

In the absence of such legislation it is also uncertain whether the Supreme Court of any Province can exercise its inherent jurisdiction as *parens patriae* and circumvent the terms of a registered order by making an independent award of custody. The constitutional doctrine of the supremacy of federal legislation may suspend the operation of provincial law which is the source of the court's inherent jurisdiction. Although the issue was not argued in *Regina v.*

1 Divorce Act, R.S.C. 1970, c. D-8, s. 14.

2 Ibid., s. 15.

3 Divorce Rules, 1969, (Newfoundland), promulgated Jan. 8, 1969.

4 5 (1969), 69 W.W.R.

99. Bill C-181

(1970). 506

*O'Dell*¹ the result of that case by analogy supports the conclusion that the inherent jurisdiction is not affected at least where the order has not been registered. In this case the court held that the fact there was an order of maintenance, granted in Ontario to a wife, ancillary to a decree *nisi* of divorce did not bar the wife from taking proceedings for maintenance in Saskatchewan under The Deserted Wives' and Children's Maintenance Act². The jurisdiction of the court to grant maintenance to a wife was not excluded by the order for maintenance granted in Ontario.

In *Niccolls v. Niccolls and Buckley*³, Tyrwhitt-Drake L.J.S.C. stated:

"It seems to me that we have here an area of co-extensive jurisdiction; while parliament may not legislate as to custody simply as a civil right, it is not prevented from doing so when an issue of custody arises as a necessary adjunct to the dissolution of a marriage, over which subject its powers are supreme and complete."⁴.

Even if the Supreme Court of Newfoundland has power to vary an order and retains its inherent jurisdiction the provisions concerning custody under the Divorce Act are still important by reason of its extended definition of "child" and "children of the marriage".

Under the Act an award of custody in divorce proceedings may be made not only on behalf of issue of the marriage but also on behalf of a step-child to whom the spouse stood *in loco parentis* and on behalf of any child to whom the spouses stood *in loco parentis*.

A custody order granted under the Divorce Act and registered in Newfoundland could therefore include a wider range of persons than those ordinarily included in a custody proceeding between spouses. Under the Act a custody

¹ (1969), 67 W.W.R. 233 (Sask. Q.B. Chambers); contra, *Papp v. Papp et al.*, /1970/ 1 O.R. 331, 334 (C.A.).

² R.S.S. 1953, c. 305.

³ (1969), 68 W.W.R. 307 (B.C. Sup. Ct.).

⁴ *Ibid.* at 308-309. The court also referred to the dictum of Duff C.J. concerning the legislative authority to enact custody provisions ancillary to Marriage and Divorce legislation in the case of Reference as to Constitutionality of Adoption Act, etc., /1938/ 3 D.L.R. 497, 498 (Sup. Ct. Can.). In *Re Ritchie and Ritchie* (1969), 3 D.L.R. (3d) 676 (B.C. Family Ct.) the question was left unanswered since the divorce proceedings in this case had been concluded before the effective date of the Divorce Act of 1967-68. See also the Report of the Special Joint Committee of the Senate and the House of Commons on Divorce (1967), p. 60, quoting the Deputy Minister of Justice: "If, however, any particular provincial law should clash with a federal law, then, under the normal rule, the latter would prevail."

order may be made on behalf of any "child of the marriage" who at the date of the petition for a divorce is under sixteen years of age and on behalf of a person over that age who by reason of "illness, disability or other cause" is unable to withdraw himself from the care of the spouses.

CUSTODY ORDERS AUTHORIZED BY PROVINCIAL LEGISLATION

The Supreme Court of Newfoundland, in addition to the jurisdiction conferred by the Divorce Act, has the inherent jurisdiction¹ of "Her Majesty's Courts of King's Bench, Common Pleas Exchequer and the High Court of Chancery and in pas Licuiat has "pawcis 10 appoint guardians and keepers for infants and their estates".² Under section 25 (15) of the Judicature Act³ "in all questions relating to the custody and education of infants, the rules of equity shall prevail". Order L, rule 30 and order XXXVII, rule 20 of the Schedule to the Judicature Act³ define the procedures for raising the issue of custody in Supreme Court proceedings. Under section 47 of The Child Welfare Act, 1964⁴, in proceedings before any court the first and paramount consideration shall be the welfare of the child.

When a custody proceeding is initiated in Newfoundland on the basis of the court's inherent and statutory jurisdiction and a custody order has already been made in another jurisdiction in proceedings other than a divorce petition under the Divorce Act it is clear that the foreign custody order is not final and conclusive. The Newfoundland Supreme Court by emphasizing the paramount importance of proceeding in the best interest of the child can consider the case on its merits even where the child has been brought into the Province contrary to the terms of the foreign order. The leading case on this point is *McKee v. McKee*⁵. Lord Simonds, in delivering the opinion of the Privy Council, said, "Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great . . . /that the foreign order will not be

¹ The Judicature Act, R.S.N. 1952, c. 116, s. 4 retains the jurisdiction granted by Stats. Nfld. 1824, c. 67

² An Act for the better Administration of Justice in Newfoundland, and for other purposes, Stats. Nfld. 1824, c. 67

³ Cons. Stats. Nfld. 1916, c. 116, Schedule: The Rules of the Supreme Court. Nfld. 1824, ss. 1, 6.

⁴ Stats. Nfld. 1964, No. 45.

⁵ /1951/ A.C. 352 (P.C.).

disturbed/. But if so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant."¹

In spite of the language used, the Privy Council² in this case treated a California custody order as having almost no effect. As a result not only is it difficult to achieve finality in custody proceedings since each jurisdiction can reconsider the case on its merits as one of first impression; the court dealing with the issue of custody may have only a limited connection with the family, for example the abduction of the child into that jurisdiction in defiance of a foreign custody order.

The English Courts in *Re 11•(Infants)*³ and *Re E (An Infant)*⁴ indicated that a foreign order would be treated more sympathetically. Lord MacDermott in *J. et al v. C. et al*⁵ also adopted this approach. He stated:

"It is plain from such authorities as *Re B's Settlement*, *B. v. B.*, and *McKee v. McKee* that the existence of such an order will not oust the jurisdiction or preclude the application of s. 1 of the Act of 1925; and it is no less plain that where there is such an order its relevant provisions should be carefully assessed and taken into account . . ."⁶

GENERAL CONSIDERATIONS

The limitation apparently placed on the jurisdiction of the Supreme Court of Newfoundland in cases where a custody order has been made in another province ancillary to divorce proceedings and registered in Newfoundland arises as a result of a constitutional law doctrine of general application and one which does not take into account the special nature of custody proceedings. Lord Evershed stated⁷ that "the infant is in relation to the court in a s distinct ecial position from that of other parties". The proposed amendment (2) of to section 11 the Divorce Act states:

"11 (2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order *or by the*

¹ /1951/ A.C. 352, 364 (P.C.).

² Ibid.

³/1966/ 1 All E.R. 886 (C.A.).

⁴/1967/ 1 All E.R. 329 (Ch. D.).

⁵/1969/ 1 All E.R. 788 (H.L.).

⁶Ibid., 824.

⁷In *re K (Infants)*, /1965/ A.C. 201, 218.

⁸Bill C-181 (1970).

court for any province where the party for whose benefit the order was made is residing if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them."

This amendment, if enacted, would provide relief enabling the court of the province of residence to vary an existing custody order. If the Divorce Act is amended as proposed, the Supreme Court of Newfoundland, although it would be exercising a jurisdiction conferred by that Act only, rather than exercising its own inherent jurisdiction, would be able to make the kind of custody award it would make in the exercise of its inherent jurisdiction.

In contrast the approach of the courts where the foreign custody order has been made in proceedings other than divorce proceedings has been to give little effect to the foreign order. There is no clear indication that the approach of the courts in the *McKee v. McKee* ease¹ will be altered in any substantial way. If a change does not occur, then to the extent that the custody issue can be litigated consecutively by courts in different jurisdictions with each court considering the case as essentially one of first impression, the best interests of the child are adversely affected by the lack of permanence and security concerning his future care and upbringing.

Some jurisdictions have enacted legislation giving some effect to foreign custody orders.

In Saskatchewan, The Child Welfare Act provides:

"where, by an order made by a court of competent jurisdiction in any other province or territory of Canada, or in any other state or country specified by the Minister for the purpose of this section, full and lawful parental rights and responsibilities in respect of a child have been legally vested in any person . . . the order has for all purposes the same force and effect in Saskatchewan as if it had been made under this Act".

While The Child Welfare Act does not include custody proceedings except incidentally concerning neglected children and for adoptions, this section illustrates one technique for giving a foreign custody order the same status as one made locally.

In Australia, under the Model Maintenance Act, as enacted in New South

¹ 1951/ A.C. 352 (P.C.).

² R.S.S. 1965, c. 268, s. 142.

Wales, a custody order will not be made under section 22,(1)

“... where there is in force an order for the custody of that child made by the Supreme Court of New South Wales or of any State or Territory for the Commonwealth ...”¹

While the Act does not contain an express provision compelling the recognition of interstate custody orders, the view of P.E. Nygh in his recent book *Conflict of Laws in Australia*-, is that such orders would be enforced in each state and territory.

The conclusion of the Ontario Family Law Project in a report to the Ontario Law Reform Commission in 1966 is that the Ontario court, in cases where there is a foreign custody order, should first ask whether the Ontario court is the appropriate court to reconsider the case on its merits and whether there is another jurisdiction which may be more suited to make a final disposition of the case. Where a foreign jurisdiction is an appropriate jurisdiction to decide the issue of custody, a custody order of its courts should be entitled to consideration in Ontario and, presumably, the Ontario court would hear the case only where, in addition, it is a matter which can be dealt with there as conveniently as in any other jurisdiction.

Legislation having this effect could be enacted so that a degree of finality is accorded a foreign custody order, and at the same time reserving the jurisdiction of the Newfoundland court where there is an appropriate connection with that Province such as where the child currently resides there.

The Ontario study recommends that the residence of the parents or the person who seeks custody should indicate a sufficient interest in the family to permit the court to hear the case³ and the Study will recommend this should be enacted in Newfoundland.

A second basis of jurisdiction is the presence of the child. While this should be a sufficient basis for jurisdiction, in some cases its unqualified acceptance condones abduction of the child from another jurisdiction for the purpose of relitigating the case on the merits elsewhere. This Study will recommend that the Court in Newfoundland should assume jurisdiction only where there are circumstances other than mere presence of the child if a foreign order is in existence or custody proceedings have been initiated in an appropriate foreign jurisdiction.

1 Stats. N.S.W. 1964, No. 74, s. 22(5).

2 (1968) n. 516. ³ Report of Family Law Project of Ontario Law Reform Commission to the Commission on Children, vol. IX, pp. 73-77 (unpublished, 1968).

It should be noted that under section 11 (2) of the Divorce Act a custody order is subject to variation only if there has been a change in circumstances after the order was made.

C. ADOPTION IN THE CONFLICT OF LAWS

The validity and effect of an adoption may become an issue for conflict purposes in two different contexts. In the first place, a local court may be required to determine the validity and effect of a foreign adoption order'. Secondly, a jurisdiction may be concerned with the extra-territorial effect of its own adoption orders. In both situations the court is determining the degree of stability possessed by the family unit created by the process of adoption. This matter is of critical importance for such proceedings can realize their objectives only if they are effective in more than one jurisdiction.

PROBLEM OF ESTABLISHING VALIDITY OF ADOPTION ORDERS

Its importance and difficulty is further demonstrated by the fact that under the general scheme of conflict rules in the Common Law system it is impossible to say that an adoption, local or foreign, is valid for all purposes. Under these rules the issue of the validity of an adoption arises only in the context of an actual or hypothetical legal issue of another kind; the validity of an adoption arises as an incidental question. To illustrate this circumstance, under the existing pattern of conflict rules, a court in Newfoundland may decide in one court proceeding that an adoption has limited validity. Thus, where that court is concerned with the administration of the estate of an intestate who died domiciled in Nova Scotia the rights of an adopted child to receive a share of the estate will, concerning interests in movables, be governed, not by Newfoundland law but by the law of Nova Scotia. The law of the latter province will decide not only whether the class of adopted children can, in general, inherit but also whether this particular child will, in fact, inherit part of the estate. Concerning interests in immovables these questions are answered by the *lex situs* and that system of law may provide an answer different from that of the law of the deceased's domicile. Moreover it is immaterial in this illustration whether the adoption occurred in Newfoundland or in a foreign jurisdiction. The choice of law step would remain the same. If in the illustration Nova Scotia did not recognize the Newfoundland adoption, the adopted child would not succeed to a share of the intestate's movable property.

In effect the consequences attributed to a local adoption under a local Adoption Act apply only where, under the general choice of law rules, the local law governs the case on the merits on a main issue. Also the local adoption recognition rules apply only where the substantive law governing the case on the merits is the local law. If neither one of these circumstances exists, the governing law will be a foreign system of law. Therefore, to achieve uniformity in result and to

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See: Chapter III, *supra*, pp. 77.

give legal stability to the new family unit, some attempt should be made to correlate the jurisdiction factors sufficient to create local jurisdiction to grant an adoption to the factors sufficient to justify recognition of foreign adoption orders. Failure to do so will create adoptions of uncertain validity.

For example, most Adoption Acts now include a provision under which the requirement of the consent of a natural parent can be dispensed with by the court if particular parental defaults have occurred or if such action is in the best interests of the child. The relevant Newfoundland law on this point was enacted in 1968¹. If the parent whose consent is waived is not subject to the jurisdiction of the place where the adoption is taking place, that adoption may not be valid elsewhere or at least in the jurisdiction where that parent resides or **has his** domicile. This possibility, by itself, may be a circumstance sufficient to persuade a court that the adoption should not proceed for the danger of limited validity may convince a court that the adoption would not be in the **best interests** of the child². In a related situation the Court of Appeal of Prince Edward Island recently held that orders for the adoption of children brought into that Province would no longer be granted unless the natural parents either consented to the particular adoption or authorized a local agency of that province to consent on their behalf. It is no longer sufficient for the consent Of the parents to be given indirectly by authorizing a public authority of another province to do so. The same court, within the last year, in the case of *Re B*.⁴, has questioned its owri competence to make an adoption order where a local child has been placed with a family that resides outside the Province.

LEGISLATION

The failure to express in the adoption legislation in unambiguous terms the circumstances under which a court ought to assume jurisdiction has created latent difficulties in the administration of the law of adoption. This judicial concern, as expressed in these recent cases, could be resolved by formulating rules to indicate whether the adoption application should have been made in another designated jurisdiction, and, at the same time, redefining the recognition tests of Prince Edward Island law so that such adoptions would be valid there.

In the Canadian provinces and in other Common Law jurisdictions no attempt was made initially to relate the local competence of a court to the existing basis for recognition. In fact, in some of. the Canadian provinces, the Adoption Acts do not now expressly declare who may apply for a local adoption order.

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1 Stats. Nfld. 1968, No. 21.

3 *Re B. (an Infant)*, /1967/ 3 All E.R. 629 (Ch. D.).

Re "D" (1969), 1 D.L.R. (3d) 66 (P.E.I. Sup. Ct. in banco). See also *Re Leduc* (1961), 25 D.L.R. (2d) 680 (Sask. C.A.).

4 (1969), 1 D.L.R. (3d) 62 (P.E.I. Sup. Ct. in banco).

Moreover recognition sections when introduced in the Canadian provinces tended to recognize all foreign adoptions irrespective of the basis of the foreign court's jurisdiction. In the United Kingdom the Adoption Act, until 1968, did not include recognition provisions and its courts had not clearly stated the scope of the Common Law recognition rules. Some jurisdictions, however, have now attempted to solve problems created by initial differences in the scope of local competence and recognition rules.

Nova Scotia

In Nova Scotia all foreign adoptions made in the jurisdiction of the place of birth, residence or domicile of the child or of the place of residence or domicile of the adoptive parents will be recognized. Under the Act a Nova Scotia court has local jurisdiction only where these circumstances exist. As a result that Province will recognize all foreign adoptions when its own court would have assumed local jurisdiction in similar circumstances.

Australia-Model Adoption Act

In Australia the legislation on this point has wider application. The revision of their State Adoption Acts was preceded by an interstate Model Adoption Act ¹ with the result that the basis of local competence within a state and its recognition tests can now become uniform throughout the country. Seven of the eight jurisdictions in Australia have now enacted this Act. Local competence under this State legislation exists only where the adoptive parents are resident or domiciled and the adoptive child is present in the place of application at the time the application is made-.

The Model Act also deals with the recognition tests of foreign adoptions distinguishing sister-state adoptions from other foreign adoptions.

All sister-state adoptions will be recognized and have the same effect as a local adoption³. At some time in the future all adoptions which will receive recognition under this provision will have been made under the new Adoption Acts and from that point of time the competence and recognition tests in each state will coincide.

A foreign adoption, other than a sister-state adoption, will be recognized, however, only if the adoption occurred in the place of residence or domicile of the adoptive parents and under the foreign law the adoption gives the adoptive

¹All section references to the Model Adoption Act are to that Act as enacted in New South Wales.

² Ss. 8, 9.

³ Model Adoption Act (Austl.), s. 45.

parents a right superior to the natural parents and the adoptive parents were placed generally in relation to the adopted person in the position of parenta¹.

The distinction between the recognition of sister-state and other foreign adoptions takes account of the possibility that under a foreign legal system a process called adoption may have purposes totally inconsistent with or unrelated to the local adoption. A foreign process will be recognized only if its consequence is to create a new family unit involving parental responsibilities.²

Canada - Uniform Adoption Act

The existing Canadian legislation offers no consistent pattern for local jurisdiction and recognition tests and it is difficult for any one province to bring into operation an effective scheme for adoptions with external validity in the absence of similar legislation elsewhere. The Conference of Commissioners on Uniformity of Legislation in Canada is now considering a Uniform Adoption Act.

The report of the Alberta Commissioners to the Conference in 1967³ and 1968⁴ discusses the need for uniform legislation on recognition of adoptions but the Conference has not yet approved legislation considering this point⁵. Until this decision is made The Adoption of Children Act, 1964 in Newfoundland should be amended on the basis of recommendation four in Chapter III.

It is also recommended that the Newfoundland Commissioners to the Conference of Commissioners request the Conference to consider the need for the Uniform Adoption Act to relate the bases of local competence and recognition in adoption matters to avoid the difficulties encountered by the English and Canadian courts in the cases already noted⁶ and to provide adequate protection of the interests of the natural and adoptive parents and of the adopted child. The approach adopted in Australia is appropriate in our circumstances as a federal country.

Recent Trends In Legislation

It should be noted that the trend in recent adoption legislation, except in the United Kingdom, has been to exclude, or to classify as only one alternative, the use of the concept of domicile as a basis for competence and recognition and, in particular, in Australia to consider only the connection of the

1 Model Adoption Act (Aust'l), s. 46 (1), (2).

2 Ibid., s. 46 (2) (c), (d).

3 Proceedings of the 49th Annual Meeting (1967) of the Commissioners on Uniformity of Legislation in Canada, pp. 119-122.

4 Proceedings of the 50th Annual Meeting (1968) of the Commissioners on Uniformity of Legislation in Canada, p. 62.

5 Ibid., at p. 25.

6 See cases discussed *supra*, at pp. 513-514.

adoptive parents to a particular jurisdiction. Both developments have merit.

An essential aspect of adoption proceedings is the preliminary or pre-order care of the prospective adopted child by the applicants for the adoption. The jurisdiction in the best position to evaluate the future prospects of the adopted child is the place of residence of the members of that family. This circumstance casts doubt upon the use of the technical concept of domicile and also justifies the exclusion in Australia of the residence, place of birth or domicile of the child as local jurisdictional tests.

It should be possible, at the same time, for the jurisdiction of the place of birth, initial residence or domicile of the child to regulate by administrative or judicial procedures the interstate transfer of a child so that a future adoption will likely be in its best interests. Such procedures should include a means for terminating the rights of a natural parent and the Adoption Act of the place of adoption should recognize such termination to avoid the problem in the recent Prince Edward Island case of *Re "D"*¹ and in the English case of *Re B. (an Infant)*².

In England under the Adoption Act, 1958³, it is now possible for an applicant to obtain a provisional adoption order. Section 53 permits an applicant who is not domiciled in England or Scotland and who intends to adopt a child under the law of the country where he is domiciled to obtain a provisional adoption order authorizing him to remove the infant for that purpose. This order gives the applicant custody of the child pending its final adoption. The introduction in a new Uniform Act of a provisional adoption order procedure would provide adequate safeguards for the rights of the natural and adoptive parents and also protect the best interests of the child⁴.

Draft Convention On International Adoption Of Children*

The Draft Convention on the international adoption of children approved at The Hague in 1964 and ratified in the United Kingdom by the enactment of the Adoption Act 1968⁵, provides additional evidence of procedures for cooperation between states to ensure the international validity of adoption orders. The Convention reduces the impact of the traditional difference of nationality and domicile as the jurisdictional factor in the Civil Law and the Common Law systems respectively to alter the status of an individual. Under the Convention

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3 Stats. U.K. 1958, c. 5.

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Under the Australian Model Adoption Act, a court is authorized to refuse to recognize a /1967/ 3 All E.R. 629 (Ch. D.).

(1969), 1 D.L.R. (3d) 66 (P.E.I. Sup. Ct. in banco).

foreign adoption order if the foreign proceeding was contrary to natural justice (s.46(3)).

5 Stats. U.K. 1968, c. 53.

Articles a state may now assume jurisdiction on the basis of domicile or nationality. Where an adopting authority assumes jurisdiction on the basis of domicile it must respect any declared prohibition on adoption contained in the national law of the adopter or adopted child and must apply the national law of the child concerning consents required by that law. All adoptions made in other countries which have ratified the Convention will be recognized as valid in the United Kingdom. All other foreign adoptions will become valid and have the same consequences as a local English adoption when the Secretary of State recognizes particular jurisdictions by order.

Canada is now a member of the Hague Conference on International Law and the Articles of the Convention on Adoption should be considered in drafting a new Uniform Adoption Act.

CONSEQUENCES OF RECOGNITION

A foreign adoption when recognized should be given the same consequences as a local adoption since recognition is granted only where the governing system of law on the main issues is the law of the forum. In this situation the policies of the local law concerning adoptions should be applied and this includes all consequences of a local adoption.

There is some merit in the Australian approach of distinguishing between different foreign jurisdictions where recognition has become an issue. Where it is clear that the function of adoptions in the foreign jurisdictions is similar to that of local adoptions, then subject to the existence of an appropriate connection between the adoptive parents and that place, the adoption should be recognized. The 1968 legislation in the United Kingdom has similar effect.

There may be some political merit to restricting, in the Uniform Act, automatic recognition of adoptions to those of the other Canadian Provinces, the area of operation of uniform legislation, as has been done in Australia. Recognition of other foreign adoptions could be regulated by approving foreign jurisdictions individually by Order-in-Council as is now the case in British Columbia and the United Kingdom. This technique has been used in other Uniform Acts in Canada. An Order-in-Council would likely be granted as a matter of course for all other Common Law jurisdictions since the purposes of such adoptions tend to be the same as local ones. This procedure would also permit an assessment of the general purposes of all other foreign adoptions before granting them local validity.

D. LEGITIMACY AND LEGITIMATION
IN THE CONFLICT OF LAWS
COMMON LAW

At Common Law kinship was determined by the circumstances under which the relationship of parents and child arose. Under the Common Law rules the relationship of the first degree arose only if at either the time of conception or of birth, a child's parents were married; otherwise, the child was illegitimate. The circumstance of blood relationship, by itself was unimportant; at Common Law an illegitimate child was *filius nullius*.¹

Kinship in an ascending, descending or collateral way was determined by the same Common Law rules. Reciprocal rights and duties such as custody, maintenance and property succession only existed between those persons who could trace a continuing relationship of the first degree by conception or birth in lawful wedlock. At Common Law acquisition of membership in a family by the process of adoption was unknown.

Although these rules applied in cases where the law governing the family was the English Common Law, that law would recognize legitimation (by marriage of the parents of a child after the child's birth) under a foreign system of law, in limited circumstances as follows: if, according to the law of the father's domicile² at the time of the child's birth, and the law of the father's domicile at the date of marriage, a child can be legitimated by the subsequent marriage of his parents, he was recognized as being legitimate by the marriage, for purposes of English law. Legitimation by subsequent marriage would occur only if this was recognized by the law of the father's domicile at two different times, the date of birth and the date of marriage.³

Legitimation may also occur by a process other than marriage, such as public acknowledgment by the father that the child is his. If an acknowledgement of this nature can legitimate a child under the law of the husband's domicile at the date of its birth and at the date of the acknowledgment, the child will be legitimated.⁴

Where the child has been born in lawful wedlock he is regarded as legitimate in England and in Canadian law. A child is also regarded as legitimate

¹"Filius nullius": from the Latin meaning "an illegitimate child, son of nobody".

²At Common Law a child at birth acquired as his domicile of origin that of his father, if legitimate, and that of his mother, if illegitimate. During minority a child's domicile changed with that of his father if legitimate, and that of his mother, if illegitimate.

³Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), 434.

⁴*Re Luck*, [1940] Ch. 864 (C.A.).

if he is legitimate by the law of the domicile of each parent at the date of his birth.' Moreover a child will be regarded as legitimate in Canadian law although he is characterized as "illegitimate" by the laws of his parents' domiciles if his legal position to both parents is similar to that enjoyed by a legitimate child in Canada².

LEGISLATION

The United Provinces of Canada, by the Commissioners of the General Land Office, adopted a Uniform Act in 1919. The Act was revised in 1959, in the following terms:

This Act may be cited as "The Legitimacy Act."

2. (1) Where, before or after the coming into force of this section and after the birth of a person his parents have inter-married or intermarry, he is legitimate from birth for all purposes of the law of the Province.
- (2) Nothing in subsection (1) affects an interest in property that has vested in a person before the inter-marriage of the parents or the day of 19 . (The date of the first enactment of a legitimation statute).
3. Where before or after the coming into force of this section a decree of nullity is granted in respect of a voidable marriage a child who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being annulled continues to be legitimate notwithstanding the annulment.
4. Where, before or after the coming into force of this section, a person,
 - (a) in respect of whose spouse an order of presumption of death is made either generally, or inter alia, in relation to remarriage, or

¹
The Royal Trust Company v. Jones, /1962/ S.C.R. 132.

² Montano v. Sanchez et al., /1964/ S.C.R. 317.

(b) whose spouse was a member of the Canadian Forces in respect of whom official notification that he is dead or is presumed to be dead has been given under the laws of Canada,

enters into a marriage which would be valid if the spouse were in fact dead, then if the person to whom the order of presumption of death relates or in respect of whom the official notification was given was alive when the marriage was entered into, a child of the persons entering into the marriage is legitimate from birth for all purpose of the law of the province.

5. Subject to section 4, where, before or after the coming into force of this section, a person is born of parents who enter into a marriage that is void, the person is legitimate from birth for all the purposes of the law of the province if

- (a) the marriage was registered or recorded in substantial compliance with the law of the place where it was entered into; and
- (b) either of the parties reasonably believed that the marriage was valid.

6. (1) Sections 3, 4, and 5 apply whether the child of the persons entering into the marriage was born before or after entry into the marriage, but do not apply where the child was born eleven months after the marriage has been annulled or declared to be void by a court or other competent authority under the appropriate governing law.

(2) This Act legitimates a child notwithstanding the death of the child before the inter-marriage of the parents.

7. Nothing in sections 3, 4, 5 or 6 affects an interest in property that has vested in a person before the enactment of this Act (or the day of 19) and, in the case of marriages after the birth of the child, before the inter-marriage of the parents."

The revised Uniform Act has now been adopted in full in five provinces.¹ Recommendation 15 (e) of Chapter VI of this Study² already provides that

"the relationship between a child and his or her father or mother be determined irrespective of whether the father or mother are or have been married to each other or not, and all other relationships shall be determined accordingly."

The scope of the existing law in Newfoundland is also discussed in that chapter³. If the recommendation referred to is adopted no further amendment to provincial law is required.

In the event the recommendation is not adopted this Study will recommend that The Intestate Succession Act⁴ and The Legitimacy Act⁵ be amended by enactment of the revised Uniform Legitimacy Act.

DISCUSSION

Ontario⁶, Manitoba⁷, Saskatchewan⁸, Alberta⁹, and British Columbia¹⁰ have with minor variations adopted the revised Uniform Legitimacy Act. In Great Britain a similar law has been enacted¹¹.

Under the revised Uniform Act a person becomes legitimate not only by the, celebration of a valid subsequent marriage of his parents but also where that marriage is voidable only and is later annulled¹². If he was born before the celebration of the voidable marriage he becomes legitimate and, if born during the marriage or within eleven months after it is declared void, he remains legitimate.¹³

1 The five provinces (and year in which each province adopted the revised Uniform Act) are: Alberta (1960); British Columbia (1960); Manitoba (1962); Ontario (1962); Saskatchewan (1961).

2 Supra, p. 285.

3 Supra, pp. 25 4-25 7.

4 R.S.N. 1952, c. 153.

5 R.S.N. 1952, c. 164.

6 Stats. Ont. 1961-62, c. 71.

7 Stats. Man. 1962, c. 38.

8 Stats. Sask. 1961, c. 4.

9 Stats. Alta. 1960, c. 56.

10 Stats. B.C. 1960, c. 25.

11 Legitimacy Act, 1959, Stats. U.K. 1959, c. 73.

12 Uniform Act, s. 3.

13 Ibid., s. 6.

If the celebration of the marriage was void but it was celebrated after either an order of presumption of death was made concerning a spouse to a prior marriage¹ or after notification of death or presumed death of a spouse to a prior marriage who was a member of the Canadian Armed Forces², a child of the spouses to the subsequent marriage, whether born before or after its celebration, but before eleven months after that marriage has been declared void, is legitimate for all purposes.³

Where the marriage is void, a child born before or after its celebration or within eleven months after it is declared void, is legitimate if the marriage was registered or recorded in accordance with the law of the place of celebration and one spouse reasonably believed it to be valid.⁴

A case illustrative of the scope of the revised Uniform Act is *Royal Trust Company v. Jones*⁵. In this proceeding, involving the will of a testator who died domiciled in British Columbia, the court held that issue of the son's second marriage were legitimate although the divorce proceeding alleged to have terminated the first marriage took place in Nevada under circumstances which denied it recognition in British Columbia. However since the son and his second "wife", after the son's remarriage, acquired a domicile in California the question of the issue of the legitimacy of the children born of the second marriage was to be settled by the law of that State. Under Californian law, the issue of a marriage which is void or annulled or dissolved by divorce are legitimate. If good faith were required by one spouse in the validity of the marriage, it existed here.⁶ Although the litigation occurred in British Columbia before the enactment of the revised Uniform Act, the Supreme Court was prepared to recognize the son's issue as legitimate under circumstances now included in the revised Uniform Act.

The revised Act for the purpose of determining the legitimacy of issue, classifies all marriages celebrated in good faith whether void or voidable as circumstances entitling the issue of such marriages to the same rights as children born or conceived in lawful wedlock. In all cases falling within the purview of the revised Act a *de facto* family unit was created. Giving issue of such unions all the rights of a legitimate child is also consistent with the extended categories of persons who are "children of a marriage" within the meaning of the new Divorce Act.⁷

¹
² Uniform Act, s. 4.

³ Ibid.

⁴ Ibid., s. 6.

⁵ Ibid., ss. 5, 6; and see s. 4.

⁶ (1961), 25 D.L.R. (2d) 595 (B.C.C.A.); affirmed by /1962/ S.C.R. 132.

⁷ Ibid., 600 (B.C.C.A.).

R.S.C. 1970, c. D-8, s. 1 (a), (b).

The Study will recommend that the *revised* Uniform Act be enacted, if recommendation 15 (e) of Chapter VI of the Study¹ is not adopted.

DECLARATORY PROCEEDINGS

Declaratory proceedings are often a convenient mode of determining status.

Where the issue is the legitimacy of a person in England under section 39 (1) and (7) of the Matrimonial Causes Act 1952,² a petition for a declaration may be made in the following circumstances:

"39. (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 or 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 he is the legitimate child of his parents, 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.

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

By virtue of subsection (6), every petition shall be submitted to the Attorney-General who shall be a respondent on the hearing of the application and on any subsequent proceeding related thereto.

The jurisdiction of the English court in matters concerning legitimacy by this section is restricted to a person's own legitimacy or, in cases of legitimation, that he, his parent, or any remoter ancestor become a legitimated person,³ and also requires that he be a British subject and either is domiciled in England or Northern Ireland or claims property situated in England.

In Newfoundland, Order XXIV, Rule 5 of the Rules of Court of the

¹ *Supra*, p. 285.

² Stats. U.K. 1965, c. 72.

³

Aldrich v. The Attorney General, [1968] 1 All E.R. 345 (P.D.A.).

Supreme Court provides:

"No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

The interpretation of this rule in matters concerning a person's marital status is discussed elsewhere in this chapter², and in England, except for the terms of section 21 of the Supreme Court of Judicature (Consolidation) Act,

3 •

4

1925, is clear that the English equivalent to the Order XXIV, Rule 5 (Newfoundland) and section 39 of the Matrimonial Causes Act 1965 would overlap⁵. In Newfoundland a declaration as to legitimacy can therefore be made under Order XXIV, Rule 5.

In Ontario under The Quieting Titles Act⁶

"Where a person domiciled or claiming land in Ontario desires to establish that he is the legitimate child of his parents, or that the marriage of his father or mother or of his grandfather or grandmother was a valid marriage, or that his own marriage was a valid marriage, or that he is heir or one of the heirs of a person deceased or that he is a natural born subject of Her Majesty, he may, if the court thinks fit, have any such matters judicially investigated and declared."

While in England and Ontario the bases of the courts' jurisdiction are clearly defined there appears to be no valid reason why in England citizenship and domicile, and in Ontario, domicile or an action claiming land ought to be jurisdictional circumstances. A person's status under the Common Law system has no direct connection with domicile. If the purpose of the declaratory proceeding is to decide an issue preliminary to a property dispute the jurisdiction should not be restricted to land cases. In any case, the Ontario law concerning land would apply to settle all property interests in immovables, and concerning movable property the governing law is determined by the law of domicile of the owner, not the petitioner.

As noted elsewhere in this chapter⁷ concerning declarations of a person's

¹Cons. Stats. of Nfld. 1916, c. 83, Schedule.

²Infra, pp. 535-536.

³Stats. U.K. 1925, c. 49.

⁴Order 15, Rule 16.

⁵Aldrich v. Attorney General, /1968/ 1 All E.R. 345, 349-350 (P.D.A.).

⁶R.S.O. 1960, c. 340, s. 30.

⁷Infra, pp. 535-536.

marital status, this kind of issue is unlikely to arise unless the petitioner is resident in that province or the marriage was celebrated there.

This Study will recommend that the jurisdiction of the Supreme Court of Newfoundland be extended to include these two circumstances.

E. DIVORCE DECREES IN THE CONFLICT OF LAWS

INTRODUCTION

For the purpose of determining the marital status of any person in Newfoundland when a divorce decree has been granted by a foreign jurisdiction, a Newfoundland court determines the validity of the foreign decree by applying the Common Law and statutory rules of Canadian law which define the circumstances under which the foreign state has a sufficient interest in the spouses and their marriage to conclusively terminate their status as husband and wife. The fact that the foreign court was authorized to grant the divorce under its own law does not obligate a court in Canada to recognize the foreign decree as valid. Under the Anglo-Commonwealth law a foreign decree is valid only if a sufficient connection existed between the spouses and the foreign state granting the divorce at the time of the divorce proceedings.

The validity of a foreign divorce may become an issue in Newfoundland proceedings not only where the direct issue is the capacity of a person to remarry but also in situations where a person attempts to enforce a right ancillary to an existing marriage such as making a claim on intestacy as a surviving spouse.

Legislative jurisdiction in Canada defining the circumstances under which a foreign divorce decree is valid has been used rarely¹, and by reason of its direct relationship to capacity to marry, only Parliament has enacted legislation on this matter¹.

The legal effect, however, of a foreign divorce decree is not limited to the application of federal legislation and for that reason this Chapter includes an analysis of the rules at Common Law which determine whether a foreign divorce decree is valid.

The validity of the decree will be recognized if it was granted under circumstances which satisfy any one of a number of Common Law or statutory recognition tests. No state in the world now has exclusive jurisdiction to grant a divorce decree; a foreign decree is valid if granted by any one of a number of states having concurrent jurisdiction.

The Divorce Jurisdiction Act, 1930, Stats. Can. 1930, c. 15, repealed, Stats. Can. 1967-

68, c. 24, s. 26. See Divorce Act, R.S.C. 1970, c. D-8, s. 6.

2 The British North America Act, 1867, Stats. U.K. 1867, c. 3, s. 91 (26).

RECOGNITION OF FOREIGN DIVORCES AT COMMON LAW

Le Mesurier Rule

Initially, however, in the Anglo-Commonwealth system the courts developed a concept of exclusive and conclusive jurisdiction so that a divorce decree could be granted only in the place where the spouses were domiciled¹ or had their home. In 1895 the Privy Council adopted this position in *Le Mesurier v. Le Mesurier*² and that case has often been applied in Canada.³

As long as this rule remained the sole basis for recognition of foreign divorce decrees a decree would be valid only if granted in the place of the domicile of the husband since, at Common Law, a wife throughout the marriage had the domicile of her husband. This was true not only where the spouses lived together but also where the wife was living separate and apart from her husband⁴.

Although the place of domicile no longer has exclusive jurisdiction over divorce, a divorce decree granted in the place of domicile of the spouse will be recognized.⁵

Armitage Rule

The first departure from the rule in the *LeMesurier* case occurred in 1906 in *Armitage v. The Attorney-General, Gillig v. Gillig*⁶. In this case the divorce was obtained in South Dakota when the husband was domiciled in New York. In the circumstances of this case the divorce decree granted in South Dakota could not be recognized under the *LeMesurier* rule since the husband was not domiciled in that jurisdiction. However, since it was clear that the place of domicile, the State of New York, would recognize that decree the English court also recognized it. The *Armitage* rule has been applied in Canada in a number of

¹In *Osvath-Lathoczy v. Osvath-Lathoczy* (1959), 19 D.L.R. (2d) 495, 496 the Supreme Court of Canada held, (quoting Lord v. Colvin (1859), 4 Drew 366): "That place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or the happening of which is uncertain) shall occur to induce him to adopt some other place." 1959/ A.C. 517 (P.C.).

²*Stephens v. Falchi*, /1938/ 3 D.L.R. 590 (Sup. Ct. Can.); *Brown v. McInness*, /1927/ 1 W.W.R. 597 (B.C. Sup. Ct.); *Fields v. Fields* (1925), 58 N.S.R. 65 (N.S. Sup. Ct.).

³*Attorney General for Alberta v. Cook*, /1926/ A.C. 444 (P.C.). In this case the wife retained the domicile of her husband although she had obtained a decree of judicial separation.

⁴In *Indyka v. Indyka*, /1969/ 1 A.C. 33 (ILL.), p. 855 the House of Lords criticised the use of the concept.

⁵/1906/ P. 135.

cases¹.

Under the *Armitage* rule a foreign divorce decree is recognized if it would be recognized under the law of the place where the husband was domiciled at the time the divorce was granted.

Schwebel v. Ungar

In 1965, the Supreme Court of Canada in *Schwebel v. Ungar*² extended the *Armitage* rule by recognizing a foreign divorce decree which would not have been recognized by the law of the place of domicile of the husband at the time it was granted but which was recognized by the law of the country in which- the spouses subsequently acquired a domicile. Ritchie J. for the Court, stated:

“... as a general rule, under Ontario law a divorce is not recognized as valid unless it was so recognized under the law of the country where the husband was domiciled at the time when it was obtained ... The Court of Appeal of Ontario has treated these singular circumstances as constituting an exception to the general rule to which I have just referred ...

(I agree) that for the limited purpose of resolving the difficulty created by the peculiar facts of this case, the governing consideration is the status of the respondent under the law of her 'domicile at the time of her second marriage and not the means whereby she secured that status. . .”³

In this case the spouse acquired a capacity to marry only because she and her first husband acquired a domicile in Israel after the divorce was granted and Israel recognized the Italian divorce proceeding as valid. The divorce was not granted in the place of her husband's domicile nor recognized by the law of the place of his domicile at the time of the divorce proceedings.

Travers v. Holley Rule

Another basis for recognition of foreign divorce decrees developed from the enactment in many jurisdictions of statutes permitting a deserted wife to petition for a divorce in the place where her husband had been domiciled before desertion or where she resided for a specified period⁴. The Canadian legislation on this point was enacted in 1930 as The Divorce Jurisdiction Act, 1930⁵. The

¹Walker v. Walker, /1950/ 2 W.W.R. 411 (B.C.C.A.); Royal Trust Co. v. Jones (1961), 25

²D.L.R. (2d) 595 (B.C. Sup. Ct.).

³/1965/ S.C.R. 148.

⁴Ibid., 154.

⁵See for example in Australia, the Matrimonial Causes Act 1959, Stats. Austl. 1959, No. 104, s. 24; in New Zealand, Matrimonial Proceedings Act 1963, N.Z. Stats. 1963, No. 71, s. 20; in England, the Matrimonial Causes Act 1965, c. 72.

⁶Stats. Can. 1930, c. 15, repealed, Stats. Can. 1967-68, c. 24, s. 26.

initial effect of such legislation was to make it possible for a divorce to be granted which would be valid in that country. It would be invalid elsewhere unless it would be recognized under the *Arndt-ewe* mid . In 1953 the English Court of Appeal in *Travers v. Holley and Holley*² developed an additional test for recognition of foreign decrees so that a decree would be recognized if, in fact, the English Court would have granted a divorce in circumstances substantially similar to those which existed between the wife and the foreign jurisdiction at the time the divorce was granted. Somerville L.J. stated:

"On principle it seems to me plain that our courts in this matter should recognize a jurisdiction which they themselves claim."

The rule in *Travers v. Holley and Holley* has been applied in Canada⁴.

Indyka v. Indyka

More recently in England the House of Lords in *Indyka v. Inclyka*⁵ reconsidered its approach to divorce recognition. While this case has not yet been applied in Canada, adoption of the approach of the House of Lords by the Canadian courts will likely occur. This may bring about a new basis for recognition of foreign divorce decrees. While it is difficult to determine the precise scope of the *Indyka* case it is clear that all members of the House of Lords agreed that the rule of *Travers v. Holley and Holley* is too limited in scope and that a foreign decree ought to be recognized in all cases where "a real and substantial connection existed between the petitioner and the country exercising jurisdiction."⁶ A substantial connection may exist by combining a number of particular circumstances and assessing their overall importance although no particular circumstance, by itself, is important. In *Angelo v. Angelo*⁷ and *Peters v. Peters*⁸ other courts in England have interpreted the *Indyka* case to mean that

This would occur only where the husband was domiciled in a jurisdiction which recognized the foreign divorce decree.

² /1953/ 2 All E.R. 794. In *Robinson-Scott v. Robinson-Scott*, /1958/ P. 71 the *Travers v. Holley* rule was extended to recognize all foreign divorce decrees granted under circumstances under which the English Court would have had jurisdiction under its own statute. It was no longer necessary that the statutory basis of jurisdiction under the foreign statute be similar to the English law.

³ /1953/ 2 All E.R. 794, 795 (C.A.).

⁴ *Re Solemnization of Marriage Act, Yeager and Duder v. The Registrar General of Vital Statistics* (1958), 26 W.W.R. 651 (Alta. Sup. Ct.); *Re Solemnization of Marriage Act, B. and B. v. Deputy-Registrar General of Vital Statistics* (1960), 31 W.W.R. 40 (Alta. Sup. Ct.).

⁵ /1969/ 1 A.C. 33 (ILL.).

⁶ The House of Lords by adopting the recognition rule of "real and substantial connection" was critical of but did not overrule the *Le Mesurier* case.

⁷ /1967/ 3 All E.R. 314 (P.D.A.).

⁸ *Ibid.* .See also *Blair V. Blair*, /1969/ 1 W.L.R. 221 (P.D.A.).

a foreign divorce decree will be recognized on the basis of a real and substantial connection¹.

Mayfield v. Mayfield also illustrates the application of the rule of the *Indyka* case. In the *Mayfield* case in determining the validity of a decree of divorce in Germany the court stated:

"The German court assumed jurisdiction on the ground that the wife was a German national, having dual nationality after her marriage to the petitioner, and also on the ground that she was permanently resident within the jurisdiction of the court. I have been satisfied by expert evidence that the German court had jurisdiction in the matter by its municipal law, and that the decree would be recognized in German law as finally dissolving the marriage. The respondent wife, in other words, had, to use an expression that was employed in *Indyka v. Indyka* . . . , a real and substantial connection with the territorial area over which the German court exercised its jurisdiction. The husband petitioner, on the other hand, had no such connection. He is of British nationality, a citizen of the United Kingdom and Colonies, and domiciled and permanently resident in England. He was the person who brought the proceedings in Germany and in whose favour the decree was granted. So far as I can gather from the notarial translation, the decree was for denial of conjugal rights and desertion, though I do not think that the grounds on which the decree was granted are material.

If the wife had brought the proceedings and had secured a decree, there can be no question, in my view, but that the case would be covered by *Indyka v. Indyka* . . . and that we should recognize the German decree as valid to dissolve the marriage. It is, then, a material distinction that the proceedings were brought by the husband, who had no close or real or substantial connection with Germany, and not the wife? In my view, the difference is not material. What is the material fact is that the German decree operated on the status of the wife, who had such close, substantial and real connection. If it operated on the status of the wife and should be recognized as such, for the reasons which I ventured to give in *Lepre v. Lepre* . . we should recognize the decree as also operating on the status of the husband."³

³ Where a petitioner obtains a divorce in a country with which he does not have a real and substantial connection, the decree will be recognized in England if another jurisdiction with which the petitioner had a substantial connection recognizes the decree: *Mather v. Mahoney* (Formerly *Mather*), /1968/ 3 All E.R. 223 (P.D.A.).
/1969/ P. 119.
Ibid., 121.

CANADIAN DIVORCE ACT

The Common Law bases of recognition of foreign divorce decrees have been retained in Canada by section 6 (2) of the Divorce Act.

In addition the Divorce Act provides two additional tests for recognition.

Under section 5 a court in a province has jurisdiction to hear a petition for divorce on the basis of a period of actual and ordinary residence of one spouse in that province and the domicile of the petitioner in Canada although

the divorce was granted in that province or in Canada. Under section 14 a decree of divorce granted under the Act has legal effect throughout Canada. This section provides an additional recognition test where the decree has been granted in a sister province since a decree granted in compliance with the requirements of section 5 cannot be questioned elsewhere in Canada.

The second test for recognition applies to divorces granted in a foreign country. Under section 5 (2) a foreign divorce granted after July 1, 1968, will be recognized if the wife had her domicile in that place where the divorce was granted. The Common Law concept of unity of domicile of the spouses has been abolished by section 6(1), (2) of the Divorce Act.

ESTOPPEL

Where a divorce has been granted in a foreign jurisdiction under circumstances which prevent recognition of its validity in Newfoundland, a court of that province may, in some circumstances estop a spouse from establishing the invalidity of the foreign divorce. It is clear that jurisdiction cannot be conferred upon a foreign court by consent of the spouses, by their mere appearance or by participation in the foreign litigation. Nevertheless in some provinces, the courts have held that in certain circumstances an invalid decree of divorce prevents the spouse who was petitioner in proceedings before the foreign court from realizing **not** only any property right that spouse would have under the marriage but also any "other legal advantage" that person would have as a spouse of a local defendant. Its most recent application in Ontario in *Re Lesser and Lesser*¹ denied a husband who had obtained an invalid divorce decree in Mexico from proceeding under section 12 of Ontario's Married Women's Property Act² for a resolution of a dispute with his wife concerning possession of property in Ontario. It has also been applied to prevent a spouse from making a claim for alimony³, a claim

(1968), 66 D.L.R. (2d) 486 (Ont. High Ct.).

² R.S.O. 1960, c. 229.

³ *Rosswrom v. Rosswrom* (1914), 7 O.W.N. 583 (Ont. H. Ct.); *Ackerman v. Ackerman*,

under the other spouse's insurance policy', a claim to dower or to the surviving spouse's share⁻.

The basis of the doctrine is not clear. In the cases the courts have considered primarily two circumstances, the first being the inequitable result which would arise if a spouse who initiated the foreign divorce proceedings and abandoned all the material obligations by obtaining the decree could later enforce the ancillary rights of marriage in his or her own favour. The second circumstance has been to consider a foreign divorce proceeding to have two possible results, one *in rem* and the other *in personam*. If the status of marriage is treated as the *res* then the foreign jurisdiction, lacking authority to terminate the marriage, cannot vary the position of the husband and wife. However, rights ancillary to that status of a kind capable of being processed as a money claim could be classified as personal or *in personam* claims. To the extent they are so classified, the spouse is barred from initiating later actions because the foreign court, incidental to the divorce issue, has implicitly barred those claims.

It is not certain whether the estoppel argument would apply to all foreign divorces or only to those obtained outside of Canada. Section 14 of the Divorce Act states:

"A decree of divorce granted under this Act ... has legal effect throughout Canada."

1

In *Re Williams and Ancient Order of United Workmen* (1907), 14 O.L.R. 482 (Divisional Ct.); *Re Banks* (1918), 42 O.L.K. 64 (High Ct., In Chambers).

2

Re Hodgins (1920), 18 O.W.N. 231 (Ont. Cty. Ct., In Chambers); *Re Lavis*, /1959/ O.W.N. 291 (High Ct.); *Re Capon*, /1965/ 2 O.R. 83 (Ont. C.A.); *Re Plummer*, /1942/ 1 D.L.R. 34 (Alta. Sup. Ct., App. Div.); *Royal Trust Co. v. Jones* (1961), 25 D.L.R. (2d) 595 (B.C. Sup. Ct.).

F. JURISDICTION IN NULLITY PROCEEDINGS

Legislative Jurisdiction

In *Hounsell v. Hounsell*¹, Dunfield J. held that the Supreme Court of Newfoundland possessed the jurisdiction of the Ecclesiastical courts in England as of 1832. Under section 92 of The British North America Act, 1867, a province may enact legislation rendering a marriage of a minor void or voidable under certain circumstances, as for example, where parental consent is not obtained, and may provide a procedure for avoiding such marriages.² Subject to this exception the federal Parliament has exclusive power to determine in what circumstances an action for annulment will lie.

Judicial Jurisdiction

The jurisdiction of a Canadian court in nullity proceedings depends upon the kind of connection which exists between the spouses and the province within which the action is brought. Such jurisdiction may differ according to whether the marriage is void or voidable.

If the marriage is void *ab initio* there is no need to obtain a decree of annulment since the invalidity of the marriage can be established in any court proceedings where the status of the parties is in issue. But in the case of a void marriage *if* nullity proceedings are initiated, it may be easier for the court to assume jurisdiction since the domicile of the wife does not depend upon that of her husband. In the case of a void marriage it is possible for only one spouse to be domiciled in the jurisdiction and that domicile may be a sufficient basis for jurisdiction.

In contrast if the marriage is voidable and not void, until the nullity decree is granted the domicile of the wife is dependent upon that of her husband. Unless the husband is domiciled in the province a local court cannot hear the case if the only alleged basis of jurisdiction for the court is the domicile of the spouses.

The Supreme Court of Newfoundland has jurisdiction to annul a marriage where it is alleged to be *void* on the basis of either the domicile of one spouse in the province³, the residence of the respondent or of both spouses⁴,

¹(1949), 23 M.P.R. 59 (Nfld. Sup. Ct.); *Green v. Green* (1963), 49 M.P.R. 315 (Nfld. Sup. Ct. in banco); *Foley v. Foley* (1954), 34 M.P.R. 273 (Nfld. Sup. Ct.); *Bursey v. Bursey* (1966), 251 M.P.R. 256 (Nfld. Sup. Ct.).

³Att. Gen. for Alta. and *Neilson v. Underwood*, /1934/ S.C.R. 635.

Bevand v. Bevand, /1955/ 1 D.L.R. 854 (N.S. Ct. for Div. & Matri'l Causes); *Khan v.*

4Khan (1959), 21 D.L.R. (2d) 171 (B.C. Sup. Ct.).

Garthwaite v. Garthwaite, /1964/ P. 356, 390 (C.A.); *Gower v. Starrett*, /1948/ 2 D.L.R. 853 (B.C. Sup. Ct.).

and, possibly where the marriage was celebrated in the province¹. Where the marriage is voidable the jurisdiction of the court exists if both parties are domiciled in Newfoundland and if the respondent or both spouses are resident in the province³.

The validity of a nullity decree granted in a foreign jurisdiction will be recognized whether the marriage is void or voidable, if it is granted in the place of domicile of the spouses⁴, if both parties were resident in the foreign country⁵ and if the decree would be recognized in the country of the domicile of the spouses⁶. Where the marriage is *void* a foreign nullity decree may also be recognized on the basis of the domicile of only one party⁷.

If a valid nullity decree has been granted in a foreign country the marriage of the spouses has been annulled for all purposes of the law of Newfoundland.

Declaratory Proceedings

In Newfoundland Order XXIV, Rule 5 of the Rules of Court⁸ provides: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

This rule enables a court to make a declaration as to status even though no other relief is claimed. The use of declaratory relief to determine the status of a person is of recent development and the leading case is *Har-Shefi v. Har-Shefi (No. 1)*⁹. In Canada declaratory proceedings _ have been taken in Newfoundland¹⁰, Ontario¹¹, Manitoba¹², and in British Columbia¹³.

1 Ross Smith v. Ross Smith, /1963/ A.C. 280 (H.L.); Reid v. Francis, /1929/ 4 D.L.R. 311 (Sask. C.A.); Bevand v. Bevand, /1955/ 1 D.L.R. 854 (N.S. Ct. for Div. & Matril Causes). DeReneville v. DeReneville, /1948/ P. 100 (C.A.).

3 Ramsay-Fairfax v. Ramsay-Fairfax, /1956/ P. 115 (C.A.).

4 Gower v. Starrett, /1948/ 2 D.L.R. 853 (B.C. Sup. Ct.); Garthwaite v. Garthwaite, /1964/ P. 356, 390 (C.A.).

5 VonLorang v. Administrator of Austrian Property, /1927/ A.C. 641 (H.L.); Fleming v. Fleming, /1934/ 4 D.L.R. 90 (Ont. Sup. Ct.).

6 Corbett v. Corbett, /1957/ 1 W.L.R. 486 (P.D.A.); Abate v. Abate, /1961/ P. 29. Re

7 Capon (1965), 49 D.L.R. (2d) 675, 688 (Ont. C.A.).

8 Cons. Stats. Nfld. 1916, c. 83, Schedule.

9 /1955/ P. 161 (C.A.).

10 Re Gould (1959), 18 D.L.R. (2d) 54 (Nfld. Sup. Ct.).

11 Alspector v. Alspector, /1957/ O.R. 454 (Ont. C.A.); Friedman v. Smookler (1963), 43 D.L.R. (2d) 210 (Ont. High Ct.).

12 Januszkiewicz v. Januszkiewicz (1965), 55 D.L.R. (2d) 727 (Man. Q.B.).

13 Khan v. Khan (1960), 21 D.L.R. (2d) 171 (B.C. Sup. Ct.); Sara v. Sara (1962), 36 D.L.R. (2d) 449 (B.C.C.A.).

Declaratory proceedings have been used to determine whether an existing marriage is valid or invalid and to determine the validity of a foreign decree of divorce or annulment.

A court has jurisdiction to grant a declaration as to status if the petitioner is domiciled in the jurisdiction at the time of the commencement of the proceeding¹. It is not clear whether residence of the one spouse would be sufficient to confer jurisdiction on the court.²

The Ontario Family Law Project in a report to the Ontario Law Reform Commission, *A Declaration of Status*, the jurisdiction of the court should be extended so that it is not difficult for a person to determine whether or not a marriage is valid and in particular, in the ordinary proceeding for a mere declaration, the Ontario court should assume jurisdiction on the basis of ordinary residence of either party in Canada, celebration of a marriage in Canada, or Canadian citizenship. If a claim is also made for the custody of children, or support and maintenance or a determination of property interests the court should assume jurisdiction on the basis of the circumstances appropriate to the claim for consequential relief.

In Australia under the Matrimonial Causes Act 1959³ the residence of the petitioner alone is sufficient.

Since a declaration as to status is not a matrimonial cause, in the sense that it defines, but does not alter, a person's status, it is submitted that the jurisdiction of the court should be extended to cases other than where a party has his domicile there. It is questionable, however, whether jurisdiction should be assumed, as is proposed in the Ontario Family Law Project study, on the basis of residence and other circumstances which may be connected with a province other than Ontario. It is clear that where consequential relief is sought the existence of a status of husband and wife may be related to the proper disposition of the case respecting matters of consequential relief and for that reason a declaration is appropriate in all cases where the court has jurisdiction over such matters.

Where a mere declaration as to status is sought the declaration will serve no useful purpose if not related to prospective legal issues likely to arise in the province. This is unlikely to occur unless either party is resident therein or the marriage has been celebrated in that jurisdiction.

This Study will recommend that the jurisdiction of the Supreme Court of Newfoundland be extended to include these two circumstances.

¹ Har-Shefi v. Har-Shefi (No. 1), /1953/ P. 161; Khan v. Khan (1960), 21 D.L.R. (2d) 171 (B.C. Sup. Ct.).

³ Stats. Aust'l. 1959, No. 104, s. 5 (1).

RECOMMENDATIONS.

CHAPTER XIV

The Family Law Study recommends that:

A. MARRIAGE IN THE CONFLICT OF LAWS 1.

The Evidence Act be amended to provide as follows:

- (a) Books purporting to have been printed or published whether before or after the commencement of this amendment, under the authority of the Government of this Province, or of any State, or of any country whatsoever, or by the printer to such Government, and purporting to contain statutes, ordinances, or other written laws in force in such Province, State, or country, shall on production, be admitted and received as *prima facie* evidence of such laws.
- (b) Printed books purporting to contain statutes, ordinances, or other written laws in force in the Province, or any State, or in any country whatsoever, although not purporting to have been printed or published by authority as aforesaid, books purporting to contain reports of decisions of courts or judges in the Province, State or country, and text-books treating of the laws of the Province, State, or country, may be referred to for the purpose of ascertaining the laws in force in the Province, State, or country; but the courts or persons adjudicating shall not be bound to accept or act on the statements in any such books as evidence of such laws.
- (c) All courts and persons acting judicially may, in matters of public history, literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such courts or persons consider to be of authority on the subjects to which they respectively relate.
- (d) When any writing whatsoever has been copied by means of any machine or press or operation which produces a facsimile impression or copy of such writing, such impression or copy shall, upon proof to the satisfaction of the court or person acting judicially that the same was taken or made from the original writing by means of such machine or press or operation as aforesaid, be evidence of such writing, without any proof that such impression or copy was compared with the said original thereof, and without any notice to produce such original. (Pages 499-502).

The Evidence Act be amended to provide as follows:

A marriage celebrated elsewhere than in the Province of Newfoundland shall be presumed to be valid upon

- (a) proof of celebration of the marriage;
- (b) production of a certificate of marriage issued in accordance with the law of the place where the marriage was celebrated, and
- (c) proof of the identity of the persons named on the marriage certificate. (Pages 502-504).

B. CUSTODY IN THE CONFLICT OF LAWS

The Family Law Study recommends that where there has been an award of custody or custody proceedings have been commenced in another jurisdiction, except where the foreign proceedings are under the Divorce Act,

- 3. the Supreme Court of Newfoundland should assume jurisdiction if the child or the person who has been awarded custody is resident in Newfoundland; (Page 511), and
- 4. the Supreme Court of Newfoundland should assume jurisdiction on the basis of the presence of the child only if there is no other convenient jurisdiction to consider the case on its merits. If there is another convenient jurisdiction the Court should direct the person who has physical control of the child to raise the issue of custody in that other jurisdiction. (Pages 511-512).

C. ADOPTION IN THE CONFLICT OF LAWS

- 5. The Adoption of Children Act, 1964 of Newfoundland be amended to include statutory tests for recognition of foreign adoptions (as proposed in Recommendation 4 of Chapter III). (Page 516).
- 6. The Newfoundland Commissioners to the Conference of Commissioners on Uniformity of Legislation in Canada request the Conference to consider
 - (a) the need to define and correlate the bases for local jurisdiction and recognition;

- (b) the need for defining procedures for co-operative interprovincial action either (i) by expressly utilizing the English provisional adoption order technique, or (ii) by recognizing as valid, adoptions in the place of residence of the adoptive parents;
- (c) the need for giving to the proper local authority power, by Order-in-Council, to recognize all adoptions of specified classes of particular foreign jurisdictions. (Page 516).

D. LEGITIMACY AND LEGITIMATION IN THE CONFLICT OF LAWS

- 7. The revised Uniform Legitimacy Act be enacted if Recommendation 15 (e) of Chapter VI of the Study is not adopted. (Pages 520-524).
- 8. The jurisdiction of the Supreme Court of Newfoundland be extended to include the hearing of applications for, and the making of, declarations of legitimacy. (Pages 524-526).

E. DIVORCE DECREES IN THE CONFLICT OF LAWS

(No Recommendations).

F. JURISDICTION IN NULLITY PROCEEDINGS

- 9. The Supreme Court of Newfoundland be empowered to make declarations as to marital status, where
 - (a) either spouse is resident in Newfoundland, or
 - (b) the marriage, in respect of which the declaration is made, was celebrated in the province of Newfoundland. (Pages 535-536).

ACKNOWLEDGEMENTS

The universal nature and range of an effective study of family law was stressed in the introduction to this publication. Similarly, in the introduction to Chapter XI of this volume, two statements will be found; one, that the family is the foundation stone of society and secondly, that chronic conditions which endanger the preservation of family stability and of a healthy institution of marriage can produce erosion of the marital relationship, neglect of offspring and disintegration of family life.

Because of the wide acceptance of these truisms, traversing continents, cultures and creeds, the Newfoundland Family Law Study has encountered an active and enlightened interest in the field of its researches, in a number of jurisdictions. This has come from both within and without the learned professions, and from concerned individuals as from specialists, and representatives of Church and State. The Study is extremely grateful to all those who have helped in this way; upwards of five hundred persons and organizations may be counted among this number.

Without any thought or fear of being regarded as invidious, a special kind of thanks may properly be tendered to a number who, because of their professional interest and activity in the welfare and preservation of the family, aided the Study in one or more aspects of its work. Chiefly among these were the Ontario Law Reform Commission, particularly through its Chairman, Dr. W. Alan Leal and its specialist branch, the Ontario Family Law Project, under the Chairmanship of Dr. Ian F. G. Baxter, of the Law Faculty of the University of Toronto. Mrs. Anna Bacon Stevenson and Mr. John Swan both also of the Law Faculty of University of Toronto in family law research, were also extremely helpful. So too was Mr. Stewart Sutton, Secretary-General of the Vanier Institute of the Family. We are grateful to all these.

On the Newfoundland scene, the Study proffers thanks for courteous and expert collaboration, to Mr. R. C. B. Mercer Q. C., Registrar of the Supreme Court of Newfoundland, Mr. Ralph Andrews, Deputy Minister of Social Services and Rehabilitation, Mr. Maxwell Vincent, the Director of Child Welfare and their associates.

The Study is indebted also to a small and select group who were directly connected with the researching and drafting of some of the reports presented to Government. Among these was a group of members of the Faculty of Law of Dalhousie University, consisting of the Dean of Law, Andrew MacKay, Professors R.T. Donald and Arthur Foote, and Associate Professors F. Murray Fraser and

Clayton Hutchins, who were retained by the Study in December 1967. Dean MacKay was succeeded in office in 1968 by Professor Donald, who passed away in October, 1971. The members of this committee were primarily responsible for the researching and drafting of reports to the Minister of Justice numbered 8 to 13 inclusive, entitled respectively, (8) Property Rights in the Family, (9) Evidence, (10) Penal Provisions of Provincial Family Law Statutes, (11) Some Aspects of Conflicts in Family Law, (12) Some Aspects of Torts in Family Law and (13) Agency and Contract, all of *which appear as chapters* of this publication. Mrs. Mary Noonan (nee Maher) of the Newfoundland Bar assisted in the researching and drafting of report number 5 entitled Family Courts and of report number 14 entitled Maintenance.

The genesis of the Family Law Study was a suggestion for family law reform in a letter in 1967 from John C. Crosbie, then Minister of Health (the present Minister of Finance) to T. Alex Hickman, Q. C., Attorney-General and Minister of Justice who established terms of reference for, and appointed the Director of the Study.

The Director in announcing the completion of the task to which the Family Law Study was committed, repeats his thanks to the members of the working committees. Above all he records his gratitude to the Secretary and Research Associate, Mr. David C. Day of the Newfoundland Bar, and expresses his warm commendation of the keen interest and unflagging zeal displayed by Mr. Day in the work of the Study, and his skill in helping guide its activities and shape its findings and recommendations. In addition, Mr. Day was primarily responsible for drafting of the reports on Marriage, Maintenance, and Judicial Separation and Annulment of Marriage, which are included as chapters 1, 4 and 12 respectively of this publication.

While the Study was hard and unremitting work, it was a happy opportunity and experience to those associated with it. It is hoped that it will find its culmination in reforms to the principles and practises of family law in Newfoundland and elsewhere in Canada.

Dr. R. Gushue, S. M., C. **B. E.**, Q. C.,
Director.

St. John's, Newfoundland
September 30, 1972

APPENDICES

APPENDIX A

Table showing total marriages solemnized in Newfoundland in every year of the period 1936 to 1968 inclusive and the annual rate of marriage per thousand of population. (Source: Report on the Births, Marriages and Deaths in the Province of Newfoundland for the year 1968, prepared by the Department of Health) The average ages at marriage of the bride and bridegroom (1949-1966) were obtained from the Dominion Bureau of Statistics.

YEAR	NUMBER OF MARRIAGES	RATE PER THOUSAND	AVERAGE AGE	
			Bride	Bridegroom
1936	1,943	6.6		
1937	2,101	7.1		
1938	2,172	7.3		
1939	2,492	8.3		
1940	2,331	7.7		
1941	2,684	8.7		
1942	3,269	10.6		
1943	2,729	8.7		
1944	3,000	9.5		
1945	3,154	9.8		
1946	3,067	9.3		
1947	2,917	8.7		
1948	2,610	7.6		
1949	2,445	7.1	23.5	27.0
1950	2,515	7.2	23.6	27.2
1951	2,517	7.0	23.9	27.2
1952	2,730	7.3	23.7	27.2
1953	2,771	7.2	23.7	27.0

APPENDIX A (Cont'd)

1954		7.5	23.5	26.5
	2,952			
1955	3,211	7.9	23.4	26.5
1956	3,073	7.4	23.3	26.4
1957	3,041	7.2	23.4	26.4
1958	3,047	7.1	23.2	26.2
1959	2,893	6.6	22.9	26.2
1960	3,104	6.9	22.8	26.2
1961	3,306	7.2	22.8	26.1
1962	3,274	7.0	22.4	25.7
1963	3,280	6.8	22.6	25.7
1964	3,385	6.9	22.3	25.4
1965	3,412	6.9	22.7	25.6
1966	3,728	7.6	22.6	25.4
1967	4,021	8.0		
1968	4,242	8.4		

APPENDIX C

Degrees of affinity (relationship by marriage) and consanguinity (relationship by blood) as set out in Archbishop Parker's table of 1563, which is printed in the book of Common Prayer of the Church of England.

A man may not marry his

1. Grandmother
2. Grandfather's wife
3. Wife's grandmother
4. Aunt
- + 5. Uncle's wife
6. Wife's aunt
7. Mother
8. Stepmother
9. Wife's mother
10. Daughter
11. Wife's daughter
12. Son's wife
13. Sister
14. Granddaughter
15. Grandson's wife
16. Wife's granddaughter
17. Niece
18. Nephew's wife
19. Wife's niece*
- +20. Brother's wife

A woman may not marry her

1. Grandfather
2. Grandmother's husband
3. Husband's grandfather
4. Uncle
5. Aunt's husband*
6. Husband's uncle
7. Father
8. Stepfather
9. Husband's father
10. Son
11. Husband's son
12. Daughter's husband
13. Brother
14. Grandson
15. Granddaughter's husband
16. Husband's grandson
17. Nephew
18. Niece's husband
- +19. Husband's nephew
- + 20. Husband's brother

The relationships set forth in this table include all such relationships whether by the whole or half blood, and whether legitimate or illegitimate.

*By the Statutes of Canada, 1932, c. 10, s. 1, it is enacted that "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."

+By the Statutes of Canada, 1932, c. 10, s. 1, it is enacted that "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 ""¹

Now: Marriage Act, R.S.C. 1970, c. M-5.

APPENDIX C

NOTE ON

RELIGIOUS

UPBRINGING IN MATTERS OF ADOPTION, GUARDIANSHIP OR CUSTODY in infants,

In the United Kingdom, in matters of adoption of infants, the consent of any person required by the Adoption Act, 1958¹ may be given "either unconditionally or subject to conditions with respect of the religious persuasion in which the infant is to be brought up". This provision was made necessary when the serial number procedure, for concealing the identity of the prospective adopters from the parents, was introduced.

There is no flawless method of enforcing any such conditions once the adoption or custody is effected; but the religious affiliation of the child does in practice prove a great problem at least to some local authorities. The local authority, both when taking into care and when taking over parental rights, has to observe the child's religion and this may prove a great hindrance to adoption if there is a scarcity of adopters of the relevant creed, and because of the strictness with which this requirement is regarded by some denominations.

It is a matter of speculation how these conditions can be uniformly enforced. In boarding-out cases, which frequently lead to adoption, the Adoption Rules in the United Kingdom provide that when possible "a child should be boarded-out with someone of its own faith.

Where the person giving the consent does not know the identity of the proposed adopter, adoption may be made conditional on the child being brought up in accordance with the views of a particular religious persuasion."

Section 10 of the (Newfoundland) Adoption of Children Act, 1964³ provides that a judge, if satisfied of the ability of the applicant to fulfill the obligations and perform the duties of a parent towards the child "and the propriety of the adoption having regard to the welfare interests of the child, the religious persuasion in which he has been brought up and the interests of his adopting parents and their religious persuasion, may make an adoption order authorizing that applicant to adopt the child". The relevant Newfoundland Adoption of Children Regulations, 1966, section 6(2) and (3) are as follows:

²
Adoption Act,
1958, Stats. U.K.
1958, c. 5, s. 4 (2). ¹ Stats. U.K. 1958, c. 5, s. 4 (2).

³ Stats. Nfld. 1964, No. 23.

(2) "In selecting a child, the Director (of Child Welfare) shall take into account the religious persuasion in which the child has been brought up, the wishes of the mother or of parents as given in the consent to adoption, the interests of the applicants and their religious persuasions.

(3) Wherever possible, the Director shall place the child with applicants of the same religious persuasion as that in which the child has been brought up."

In matters of custody under The Child Welfare Act, 1964¹ somewhat similar provisions are made in section 16 which read as follows:

"16. - (1) In determining the person to whose care a child shall be committed under this Act, the court shall endeavour to. ascertain the religious persuasion to which the child belongs and shall, if possible, select a person of the same religious persuasion or a person who gives such undertaking as seems to the court sufficient that the child shall be brought up in accordance with his own religious persuasion; and that religious persuasion shall be specified in the order.

(2) This section does not apply to the placing of a child in a situation, or in temporary accommodation, but due regard shall be given to the religious preferences of any child so placed and proper tune shall be allowed for the exercise of religious duties.

(3) Where there appears to be no suitable family, home or institution of the same religious faith as that professed by the child or his family with which he may be placed, or where there is a lack of evidence as to the religion of a child, the case shall be referred to the Child Welfare Board and the disposition of the child in this regard shall be within the discretion of that Board.

(4) For the purpose of this section, in the case of a child whose parents have not been married to each other, if the child has no religious preference the first determining factor shall be the preference of the mother, if she is living, or, if she is not living, the religious persuasion of the mother at the time of her death if it can be ascertained."

1 Stats. Nfld. 1964, No. 45.

Problems of custody and religious upbringing frequently go hand-in-hand. If a child is too young to have developed any fixed religious convictions, it appears that the Court will generally consider questions of custody first and let that solve the question of religious education. The Court will rarely order a child to be brought up in a religion different from that of the person in whose custody it is placed, for fear that it might create a barrier between the child and the parent or guardian which would not be in the best interests of the child.

The child's welfare is the paramount consideration. The courts will not adjudicate between the merits of different faiths, whether they are sects of a Christian religion or non-Christian religion. It is true to say that the courts will favour some formal religious instruction rather than none at all. Today society takes a more tolerant view, not only between Christian beliefs but also of some of the great non-Christian religions and the absence of any religious belief at all. An interesting contribution to adumbration of this principle in the Newfoundland case law may be found in the judgment of Pinsent, J. in the case of *In Re Congdon, An Infant*¹ in which he cites with approval a decision of Sir J. Romilly, M.R. as follows:

"I would premise that upon points of religious doctrine a judge, acting judicially, ought not to have any preferences, and if he have any prejudices he should overcome and disregard them.

In the well-known case of *Austin v. Anstin*, cited by Mr. Morris at the bar, (the converse of this one upon the point of religion), the Master of the Rolls, Sir J. Romilly, expressed himself in language which so entirely coincides with my own opinion of the principles that should govern the exercise of judicial discretion with regard to the custody of children in a case of this complexion, that I take the following extract from the judgment, - 24 Bea., p. 263:

"In these cases the court only considers what is most for the benefit of the infant. In the matter of religion the court holds that the Roman Catholic faith and the Protestant faith are, to this extent, equally beneficial to the child, -that it considers the hope of eternal salvation does not depend upon the circumstance whether she entertains one faith or the other, but upon the manner in which she fulfills her duties upon earth. But the court, although it holds an equal hand between them, always gives a preponderance to the wishes and desires of the father, and, in the absence of other circumstances materially to the benefit of the

¹ 1/1891/ Nfld. L.R. 572, 575-576 (Sup. Ct.).

child, it directs the child to be educated in the religion of the father. But all this is subordinate to the first and primary object, which is the welfare of the child, because, as I have already stated, the future salvation of the child does not, in the judgment of the court, depend upon the faith which it entertains being either Roman Catholic or Protestant. No thing, and no person, and no combination of them can, in my opinion, with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under the care of the mother that no extent of kindness on the part of any other person can supply that place. It is the notorious observation of mankind that the loss of a mother is irreparable to her children, and particularly so if young. If that be so, the circumstances must be very strong indeed to induce this court to take a child from the guardianship and custody of her mother. It is, in point of fact, only done where it is essential to the welfare of the child. There are cases of unnatural mothers and of immoral mothers where the court is obliged to take away a child from the mother, finding that a bad mother is really worse than no mother at all; but in these cases it acts solely for the benefit of the child.

Now, upon reading through the papers in the present case, there is not a suggestion of unfitness or of anything against the character of the mother. The case is put solely on the question of what faith the child shall be educated in, and what I have to consider is whether the importance of educating the child in the Roman Catholic faith, because it was the religion of her father, is sufficiently urgent to deprive the child of the care of her mother. I am of the opinion that it is not, and that it is impossible, for the benefit of this child and for the sake of educating her as a Roman Catholic, that I can properly take her from her mother. I should hesitate to do that in any case; but in this case I think the father of the child himself must have entertained considerable doubts upon the subject.'

"Although in that case, which related to a ward of court, an order was subsequently made by the Lord Chancellor that while the mother was to retain the custody of the infant, yet, when the child came to be capable of religious instruction, he was to be educated in the religion of his father, the facts presented nothing like so strong a case against the general principle that a child should be educated in -the religion of his father as the facts in the present proceedings do.

The weight of evidence here seems to me to indicate not only great indifference on the part of the father, but to a large extent it reveals acquiescence on his part in the desires, preferences and proceedings of his wife; although it is true that when under the influence and in the society of his father, to whom he was indebted for much aid, he professed and, perhaps, was even inclined to act differently."

If a child is old enough to have developed and has developed fixed religious convictions, these should not be disturbed, if this will affect the child's welfare and happiness. On the other hand, if there is no such danger, those who have a natural right to determine the religious education of the child should be allowed to do so.

The court may interview the child to discover if its opinions are so set as to make a change in religious education dangerous.

Under the heading of Guardianship, Bromley's Family Law' says:

"A guardian is under the same statutory duty to ensure that his ward receives an efficient fulltime education as a parent. But so far as the choice of secular and religious education is concerned, the guardian's position is radically different from the parent's, for his duty is to see that the ward has a secular education befitting his normal expectations and is brought up in the faith in which he would have been brought up had his parents still been alive. Formerly, of course, this meant that the father's wishes had to be implemented, but as the Court of Appeal pointed out in *Re Collins*-, since the parents while alive now have an equal right to determine their children's religion, the guardian today must observe the mother's wishes as much as the father's. These may be deduced either directly or inferentially from the parents' own acts, for example, by express directions, by their having children brought up in a particular faith during their lifetime, or by the appointment of testamentary guardians professing a particular creed; if there is no other guide, then it is presumed that parents wish to have their children brought up in the same religion as they themselves practised.

But, as in the case of disputes between parents over the religious upbringing of their children, the final choice of a ward's religious education must depend upon what is best for its own welfare and the same factors must be borne in mind in each case. If the father's and mother's wishes were not the same, the same test must be applied.

1 Bromley, P. R., Family Law (2nd ed., 1966), pp. 378-379.

2 (1950) 1 All E.R. 1057 (C.A.).

It seems that from the above notes a number of points, in the sequence given below, could be followed in considering problems of the religious upbringing of the child in adoption, guardianship and other custody cases. The points are laid down against the preface that, today, society takes a more tolerant view, not only between Christian denominational beliefs, but also between Christian and certain non-Christian religions, and even the absence of any religious beliefs, Courts generally are not likely to adjudicate between the merits of different faiths, whether they are aspects of the Christian religion, or non-Christian religions. It may be accepted, however, that courts will favour some formal religious instructions rather than none at all.

The points may be summarized as follows:

1. The child's welfare is the paramount consideration.

If the child is old enough to form, and has formed, firm religious convictions of its own, they should not be disturbed, since it could be dangerous to attempt to effect a change. The court may interview the child to discover if its opinions are so set as to make a change dangerous.

- 3., If there is no such danger as point No. 2 is designed to avert, those who have the right to determine the religious education of the child should be allowed to do so. This would normally be the parents of the child. If they both are alive, both would have equal rights of determination, or the mother alone if the child is illegitimate. This could be conveyed by express directions of the parents or deduced from the parents' own acts, for example by having the child brought up in a particular faith in their lifetime. If there is no such guide, it may be presumed that the parents would wish to have the child brought up in the religion which they themselves practised. In the case of a dispute between parents over the religious upbringing, the tests referred to in points 1 and 3 would be applied.

4. In matters of adoption, or similar custody situations, the court is reluctant to make an order which will cause a child to be brought up in a religion different from that of the person in whose custody it is put. Because of this, determination of the question of custody ought ideally to coincide with that of religious upbringing. An order that a child be brought up in a different religion may well cause a barrier between the child and the adopter or custodian. This would not promote the welfare of the child, and ought to be avoided, if possible.

It must be borne in mind that even after the adoption, guardianship **or** custody is completed, problems might conceivably arise with respect to religious affiliation of the child, but it is difficult to foresee these and may also be difficult to meet them. On the whole, the suggested points seem capable of being an effective guide for most situations. •-

APPENDIX D

Form used at a few magistrate's courts in England for purpose of ascertaining resources and liabilities of parties to maintenance proceedings.

Source: Report of Committee on Statutory Maintenance Limits (Eng., CMD. 3587), Apr., 1968, pp. 136-138.

Date of Interview

..... Serial No.

Cross Summons Serial No.

DOMESTIC PROCEEDINGS

APPLICANT'S Full Name

Address

SPOUSE'S full name

Address

Date of marriage Place of marriage

Matrimonial home at

Children of Family (to include dependants under 21)

(a) CHILDREN OF BOTH PARTIES

Christian names	Surname	Date of Birth	Sex
.....			
.....			
.....			

(b) O T H E R C H I L D R E N O F

F A M I L Y	Christian names	Surname	Date of Birth
	Sex	Status	
.....			

Parent of Child of Family (not a party)

Full name.....

Address

Relationship

Previous interviews	
Previous	matrimonial proceedings
.....	
(dates to be verified)	

Previous proceedings before any Court in respect of any child of the family

Name of Child	Date of Proceedings	Nature of Proceedings	Result

Solicitor for the Applicant

Solicitor for the
Spouse

Occupation of out-of-pocket expenses, etc.

APPLICANT	SPOUSE
Occupation	
Employer	
Net Wage	
Family Allowance	
National assistance	
Unemployment benefit	
Pension	
Other income	
Travelling	
Clubs and H. P.	
County Court debt	
Nursery or child minder	

Other expenditure

Rent of matrimonial home

Mortgage repayments

Rates

LEGAL AID

APPLICANT	SPOUSE
Date applied for	
Granted or refused	

Solicitor appointed

APPLICANT'S
ALLEGATIONS

Employed: Occupation	Length of present employment
Employer	
Wage nett/gross	Works no.

Overtime

Unemployed: Last

occupation	Amount of benefit
Terminated	Prospects of work

Reason

Ill Health:	Nature Periods	Medical Certificates
Circumstances:	Living alone	Food and living expenses
	L	
	iving with parents/wife cohabitee	Contribution to household
	Children	Wife/cohabitee earnings
	Family allowance	
Lodgings or House	Rent/Mortgage Rates	Coal Gas
	Extras	Electricity
Commitments:	Other orders Travelling Meals out Insurances Other	H.P./Debts Clothes
	Reason for non-payment	
	Offer	
Decision	Adjourned To pay Order + arrears	Arrears remitted
	Committed 6 week suspended Order + arrears	Attachment Order: N.D. Order P. E.
		arrears

APPENDIX H

Table of total Illegitimate¹ births, Canada and provinces, 1921-1969.
(Source: Dominion Bureau of Statistics, Vital Statistics, 1969 (Preliminary Annual Report), Catalogue No. 84-201 Annual.)

¹ Illegitimacy in this report does not refer to births conceived out of wedlock but those in which parents reported themselves as not having been married to each other at the time of birth or registration and, in the case of Ontario, since 1949, those in which the marital status of the mother was reported as 'single'.

APPENDIX F

Table of illegitimate births expressed as percentages of total live births, Canada and provinces, 1921-1969: (Source: Dominion Bureau of Statistics, Vital Statistics, 1969 (Preliminary Annual Report), Catalogue No. 84-201 Annual.)

TABLE 80. Illegitimate Births, Canada and provinces, 1921-1969
TABLEAU 80. Naissances illégitimes, Canada et provinces, 1921-1969

Year - Année	Canada	Alta	Man	N.B.	N.S.	N.W.T.	Que.	Ont.	P.E.I.	Sask.	Yukon	T.N.T.
	7/19	8/4	9/1	10/2	11/3	12/4	13/5	14/6	15/7	16/8	17/9	18/0
Number - Nombre												
1921	4,721	444	46	457	245	1,659	407	241	421	152		
1922	7,307	8	42	539	250	2,334	501	489	479	240		
1923	8,538	416	74	652	373	2,196	501	501	613	330		
1924	9,276	346	85	366	415	2,431	506	503	643	475		
1925	10,433	529	96	977	440	2,538	517	524	720	688		
1926	11,531	543	98	1,077	473	3,384	539	538	777	739		
1927	11,944	470	101	961	387	3,018	533	512	866	1,827		
1928	12,409	133	101	1,165	608	3,769	653	703	849	1,048		
1929	13,306	49	138	778	701	3,196	627	625	1,050	1,121		
1930	14,912	374	149	1,325	771	4,365	744	744	1,218	1,262		
1931	15,302	577	134	1,250	797	3,183	773	833	1,159	1,502		
1932	14,800	462	161	1,172	745	4,448	778	896	1,221	1,285		
1933	14,510	462	369	1,184	827	3,439	778	896	1,221	1,285		
1934	14,510	462	369	1,184	827	3,439	778	896	1,221	1,285		
1935	15,174	515	145	1,164	843	3,650	1,171	971	1,272	1,633		
1936	16,066	641	127	1,033	888	3,913	1,176	1,043	1,310	1,187		
1937	16,947	488	169	1,060	888	4,251	1,226	1,043	1,559	1,206		
1938	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1939	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1940	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1941	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1942	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1943	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1944	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1945	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1946	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1947	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1948	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1949	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1950	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1951	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1952	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1953	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1954	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1955	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1956	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1957	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1958	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1959	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1960	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1961	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1962	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1963	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1964	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1965	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1966	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1967	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1968	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		
1969	17,034	497	169	1,126	885	4,283	1,226	1,043	1,562	1,043		

Per cent of total live Nano - Pourcentage aux naissances el antes

Average - Moyenne 1921-1929						1921-1929						1930-1939						1940-1949						1950-1959						1960-1969											
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
..						-						1921-1930						1931-1939						1941-1949						1951-1959						1961-1969					
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..						-																																			

THE MAINTENANCE ORDERS (ENFORCEMENT) ACT

States declared to be reciprocating states as to March 31, 1972, by the Lieutenant-Governor in Council, pursuant to R.S.N. 1952, c. 127, S. 11.

Alberta

Australian Capital Territory

British Columbia

England and Northern Ireland

Guernsey, CI (Bailiwick of Guernsey includes Alderney and Sark)

Isle of Man

Jersey, CI States of

Malta

Maintoba

Northern Territory of Australia

New Guinea

New Brunswick

New South Wales

New Zealand

Northwest Territories

Nova Scotia

Ontario

Papua

Prince Edward Island

Quebec

Queensland

Saskatchewan

APPENDIX G (Coned)

South Australia

Southern Rhodesia

State of Jersey

Tasmania

Victoria

Western Australia

Yukon Territory

Summary of selected Newfoundland statutory provisions setting minimum age requirements, as of March 1, 1972, including amendments thereto by The Minors (Attainment of Majority) Act, Stats. Nfld. 1971, No. 71 (most provisions of which were proclaimed in force on August 3, 1971).

**SECTION AND SUB-SECTION
OR PARAGRAPH OF ACT**

PROVISION

The Accident and Sickness
Insurance Act, 1957.

- Stats. Nfld. 1957, No. 30,
s. 15

Capacity to enter into contracts of accident and sickness insurance over the age of ~~fifteen~~ **years**.

The Adoption of Children Act,
1964.

- Stats. Nfld. 1964, No. 23,
s. 2 (e)

" 'Child' means a person who is under the age of twenty-one years". 'Twenty-one' deleted 2nd 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 17.

- s. 6 (and by Stats. Nfld. 1968,
No. 25, s. 3)

Except with consent of Director an adoption order shall not be made where applicant under twenty-five years or less than twenty-five years older than child he or she proposes to adopt.

The Alcoholic Liquors Act

- R.S.N. 1952, c. 93, s. 31 (2) (a)

Permit to sell alcoholic liquors may be granted "to an individual of the full age of twenty-one years".

- s. 65 (1)

Prohibition of knowingly issuing permit to person under twenty-one years.

- s. 65 (2)

Prohibition of vendor, licensee (or his employee) knowingly allowing person under

twenty-one years, to enter, be in or remain in any store, lounge or tavern.

s. 66

Prohibition of persons under twenty-one years entering or working in any store, lounge or tavern, buying alcoholic liquor for himself or another, applying for or obtaining a permit,

s. 66 (1) (a)

Prohibition of any person selling, giving, or otherwise supplying alcoholic liquor "to any person who has not reached the age of twenty-one years". (Note: References to 'twenty-one' would be deleted, and 'nineteen' substituted therefor, in s. 65 (1), 66, 66A (1) enacted by Stats. Nfld. 1970, No. 32, and 69 (1) (a), when ss. 18-21 (inclusive) of The Minors (Attainment. of Majority) Act, 1971, are proclaimed in force.)

The Apprenticeship Act, 1962

Stats. Nfld. 1962, No. 12,
s. 2 (a)

'Apprentice' means a person who is sixteen years of age or older who has entered into a contract of apprenticeship".

s. 27

Prohibition of employment of person between ages of sixteen and twenty-one who has not completed training as apprentice in trade for which a plan of apprenticeship training exists, for more than three months in a year unless he first enters into apprenticeship contract or obtains written authorization from Board of Apprenticeship.

The Automobile Insurance Act

Stats. Nfld. 1968, No. 36,
s. 8, (Statutory condition
2 (1) (c))

Prohibition of insured driving or operating motor vehicle if he or she is under sixteen years "or under such other age as is prescribed by law of the province in which he resides at the time this contract is made as being the minimum age at which a licence or permit to drive an automobile may be issued".

The Assessment Act, 1958

Stats. Nfld. 1958, No. 18,
s. 17 (5)

The name and capacity of the parent, guardian or other legal representative of any infant property owner shall be recorded on the assessment roll together with the infant's name.

The Certified Public Accountants Act

R.S.N. 1952, c. 243, ss. 9,
10 (c)

In order to become member of Certified Public Accountants Association, a person is required *inter alia* to be "over twenty-one years of age". 'Twenty-one' deleted and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, ss. 22, 23.

The Change of Name Act

R.S.N. 1952, c. 165, s. 4 (1) (a)

Any person "of the full age of twenty-one years" may change his name. 'Twenty-one' deleted and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 24.

s. 4 (6) (See also: s. 4 (4), (5))

"An application to change the given name of any unmarried minor child who has attained the age of twelve years may be made only with the consent in writing of the child".

s. 4 (7)

"No person may change the surname of any of the unmarried minor children of his wife born before his marriage to her, except where the provision for the change is made by any other statute or law".

The Child Welfare Act, 1964

Stats. Nfld. 1964, No. 45,
s. 2 (a)

" 'Child' means an unmarried boy or girl actually or apparently under the age of sixteen years ... " . . .

s. 2 (m) (xi), (xvi), xvii)

" 'neglected child' means a child, who being

under the *age* of fourteen years, habitually sells anything in the streets or public places after nine o'clock at night

"who being under the age of sixteen years is employed anywhere between the hours of 9:00 p.m. and 8:00 a.m. on the following day ... ;

"who

(i) being a female, or

(ii) being a male under twelve years, or

(iii) being between twelve and fourteen years old and without the written consent of his parents or guardian

is found selling newspapers or other articles in a public place, ."

s. 15 (10)

"If a child who has been committed to the care and custody of the Director reaches the age of sixteen years while in such care and custody, the Director may, if he considers it advisable to do so, continue his care, custody and maintenance of that child until that child reaches the age of twenty-one years or until some earlier date considered advisable by him".
'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 26, subject to s. 48 of Act No. 71.

The Children of Unmarried Parents
(Amendment) Act, 1966

Stats. Nfld. 1966, No. 63, s. 3
(amending Stats. Nfld. 1964,
No. 40, s. 11 (3))

"A mother who is under the age of twenty-one years may enter into any agreement or take any proceeding referred to

The City of Corner Brook Act, 1968	'Twenty-one' deleted and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 25
Stats. Nfld. 1968, No. 37, s. 14 (1) (a)	In order to qualify to be elected as a mayor or councillor, a person is required <i>inter alia</i> to be "of the full age of twenty-one years, ..": 'Twenty-one' is deleted, and substituted thereto", by Skits. Nfld. 1971, No. 71, s. 28.
s. 19	In order to qualify to vote in an election of a mayor and councilors, a person is required <i>inter alia</i> to be "of the 'full age of nineteen years; . . . " .
The City of St. John's Act	
R.S.N. 1952, c. 87, s. 8	In order to vote for mayor and councillors in the City of St. John's, an elector must be at least twenty-one years of age.
s. 90	In order to qualify for election as Mayor or a councillor, a person must <i>inter alia</i> qualify as an elector under s. 8 <i>supra</i> .
The Civil Service Act	
R.S.N. 1952, c. 22, s. 29 (a)	"Pensionable service shall not include service during . . . any period before the age of 18; . . . " .
The Community Councils Act, 1962	
Stats. Nfld. 1962, No. 1, ss. 2 (t), 10 (1) (e)	In order to vote, or to qualify for election as councillor, a person is required <i>inter alia</i> to be "of the full age of twenty-one years".
The Co-operative Societies Act	
R.S.N. 1952, c. 172, s. 6 (1)	Members of co-operative society required to be "of full legal capacity".

The Corrections Act, 1953

Stats. Nfld. 1953, No. 62,
s. 2 (f)

'juvenile' defined to include "every child apparently or actually under the age of seventeen years".

The Dental Act, 1968

Stats. Nfld. 1968, No. 82,
s. 26 (b) (ii)

In order to qualify for licence to practise dentistry or dental surgery, a person must *inter alia* be "of the full age of twenty-one years". 'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 29.

The Election Act, 1954

Stats. Nfld. 1954, No. 79,
s. 3 (a)

In order to qualify to be elected a member of the House of Assembly, a person is required *inter alia* to qualify as an elector.

The Election (Amendment) Act,
1964

Stats. Nfld. 1964, No. 29, s. 2

(Definition of an "elector"). In order to vote in provincial election, a person must be "of the full age of nineteen years".

The Employer's Liability Act

R.S.N. 1952, c. 255, s. 9

"The expression 'workman' . means any person ... whether under the age of twenty-one years or above that age . " .

The Employment of Children
Act, 1968

Stats. Nfld. 1968, No. 25,
s. 2 (a) (not proclaimed)

" 'Child' means a person under the age of sixteen years".

s. 19 (1)

"The Lieutenant-Governor in Council . . . may make regulations

(a) prohibiting the employment of per-567

sons under the age of eighteen years in any occupation specified in the regulations;

(See also: The Child Welfare Act, ^(b) 1964, Stats. Nfld. 1964, No. 45, ss. 38, 39, 44.)

prescribing the circumstances under which and the occupations in which persons under the age of eighteen years may be employed, fixing the conditions of such employment and prescribing the minimum wages for such employment; . . .

le Estates of Infants Act

R.S.N. 1952, c. 144, s. 2

Court may order that property of an infant be sold, leased, mortgaged or otherwise disposed of, by infant's next friend or guardian, in such manner and with such restrictions as shall be deemed expedient by the Court.

s. 3

"All sales, leases, mortgages, or convey-

ances, made in good faith by a guardian or next friend, in pursuance of such order, -1-11 effectual as if made by such infant after he has attained the age of twenty-one years, . . .". 'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 30.

The Health and Public Welfare Act

R.S.N. 1952, c. 51, s. 150

"For the purpose of vaccination, children in this Act shall mean persons under the age of twenty-one years".

s. 246

"It shall be the duty of every parent, guard-

ian or other person having the custody or control of any blind or deaf child or children, between the ages of seven and eighteen, years and residing in this Province to use every endeavour to cause such blind or deaf child or children to receive instruction and training suited to their condition for at least

six months in every year until such child or children have attained the age of eighteen ~~years~~".

ss. 299 - 302

Expense of maintaining a person under twenty-one years of age, committed to and detained in a hospital for care and treatment of mental and nervous diseases, shall be paid by the person's mother and father.

s. 395 (1)

"Every person who undertakes for reward the nursing and maintenance of one or more children under the age of ten years apart from their parents or having no parents, shall within forty-eight hours from the reception of any such child give notice in writing thereof to the local authority; ...". (The "local authority" is defined in s. 396 and is usually the Stipendiary Magistrate in ~~h~~

The Highway Traffic Act, 1962

Stats. Nfld. 1962, No. 82,
s. 52 (1)

"The Registrar shall not issue a driver's license

- (a) for the operation of a motor vehicle other than a motor cycle to a person who is under the age of seventeen years . . . ;
- (b) for the operation of a motor cycle to a person who is under the age of sixteen years; . . . " .

s. 79

"The Registrar may require proof of financial responsibility before issue of a vehicle license or driver's licence, or the renewal thereof, to any person ... who is under the age of twenty-one years or over the age of sixty-five years." "Twenty-one" is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 31.

(Requirements of proof of financial responsibility are outlined in s. 83).

The Human Tissue Act,
1966-67

Stats. Nfld. 1966-67, No. 78,
s. 3 (1)

"A person eighteen years of age or over
may,

(a) in writing at any time; or

(b) orally in the presence of at least two
witnesses during his last illness,

direct that his body or any specified part or
parts thereof be used after his death for
therapeutic purposes or for purposes of
medical education or for the purposes of
medical research."

s. 4 (1)

"Where a person other than a person who
has made a direction under Section 3 dies,

(b) if there is no spouse, any of his children
twenty-one years of age or over;

may direct that the body or any specified parts
thereof may be used for therapeutic purposes
or for purposes of medical education or for
purposes of medical research ".

The Industrial and Provident
Societies Act

R.S.N. 1952, c. 171, s. 22

"A person under the age of twenty-one but
above the age of sixteen may be a member of
a registered Society unless provision be made
in the rules thereof to the contrary

, but shall not be a member of the Com-
mittee, Trustee, Manager or Treasurer of the
Society." "Twenty-one' is deleted, and
'nineteen' substituted therefor, by Stats. Nfld.
1971, No. 71, s. 32.

The Judicature Act

R.S.N. 1952, c. 114,
s. 83 (1)

"The following persons are exempt from
service on juries:

(n) All persons under twenty-one and
over sixty-five years of age ".

(2)

"If any person exempted under subsection
(1)

(a) is summoned and attends to serve on any
jury the Court may, upon or without the
application of such person, release him
from service;

(b) serves on any jury, the exemption is
not a ground of objection to his so
serving or to the panel of jurors on
which he is ".

The Law Society Act

R.S.N. 1952, c. 115, s. 52 (3)

"No person shall be admitted a Solicitor of
the Supreme Court who shall not have
attained the full age of twenty-one years."
'Twenty-one' is deleted and 'nineteen' sub-
stituted therefor, by Stats. Nfld. 1971, No.
71, s. 34.

s. 50

cc. any person who has been enrolled as a
Solicitor of the Supreme Court of New-
foundland and no others may be admitted to
practice at the Bar in Her Majesty's Court in
Newfoundland " .

The Life Insurance Act, 1960

Stats. Nfld. 1960, No. 17,
s. 9 (3)

"If a person whose life is insured is under
the age of sixteen years consent to insurance
being placed on his life may be given by
one of his parents or by a person standing

in loco parentis to him".

s. 28

"If a beneficiary

(b) is designated irrevocably but has attained the age of twenty-one years and consents,

the insured may assign, exercise rights under or in respect of, surrender or otherwise deal with, the contract /of life insurance/ , as provided therein or in this Act or as may be agreed upon with the insurer".

s. 33

"Except in respect of his rights as a beneficiary, a minor who has attained the age of sixteen years has the capacity of a person of the age of twenty-one years

(a) to make an enforceable contract, and

(h) in respect of a contract.

s. 34

"A beneficiary who has attained the age of eighteen years has the capacity of a person of the age of twenty-one years to receive insurance moneys payable to him and to give a discharge therefor." 'Twenty-one' is deleted, and 'nineteen' substituted therefor, in ss. 28,33,34, of The Life Insurance Act, 1960, by Stats. Nfld. 1971, No. 71, ss. 35- 37 (inclusive).

The Limitation of Actions
(Personal) Act

R.S.N. 1952, c. 146, s. 4

"If any person who is or shall be entitled to any such action or suit is, or shall be at the time of any such cause of action accrued, within the age of twenty-one years, . . . then such person may bring the same ~~and as~~
~~ad personam~~

same within such times after coming to or being of full age, ." . `Twenty-one'is deleted, and 'nineteen' substituted therefor, by Stats.Nfld.1971,No.71,s.38

The Local Government Act,
1966

Stats. Nfld. 1966, No. 31,
s. 6(11)

"Every person living in an area referred to in subsection (10) may vote in an plebiscite held under that subsection /in order to determine whether the persons entitled to vote . . . favour the establishment of the area or any settlement in the area as a municipality, if when the plebiscite shall be

(a) is a British subject of the full age of nineteen years, ...

s. 10 (1)

In order to qualify to be elected as a councillor, a person is required *inter alia* to be "of the full age of nineteen years ".

The Local Government (Elections)
Act, 1965

Stats. Nfld. 1965, No. 49, s. 13

In order to qualify to vote in an election of councillors, a person is required *inter alia* to be "of the full age of nineteen years ".

The Maintenance Act

R.S.N. 1952, c. 65, s. 2 (b)

" 'Child' means an unmarried boy or girl, . . . actually or apparently under the age of seventeen years, and includes a child under twenty-one years of age who, because of physical or mental disability, is unable to provide himself with adequate food or other necessities; ... " `Twenty-one'is deleted and 'nineteen' substituted therefor,byStats. NF 1971, No. 71, s. 38

The Minors and Apprentices
Act

R.S.N. 1952, c. 163, s. 2

"Any Justice shall, upon application made to him, consent to and approve by writing, under his hand, any indenture of apprenticeship that shall be produced before him, . . . ; whereupon such indenture shall be as binding upon the master or mistress, apprentice and all parties concerned as if such master or mistress, apprentice or other parties, had been at the time of execution of such inden-

ter, of fell aaP "

s. 7

"Infants may bring actions in all Courts in their own names without *prochein amy* / a next friend/ for recovery of wages or claims arising out of contracts of service or for any claim under the common indebitatus counts, and shall be subject to such and the like proceedings for the recovery of costs and otherwise as if of the full age of twenty-one years ". 'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 41.

Act, 1956

Stats. Nfld. 1956, No. 39,
s. 8 (a)

In order to become a member of the Newfoundland Association of Architects, a person is required *inter alia* to be "not less than twenty-one years of age". 'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 42.

The Newfoundland Registered
Nurses Act, 1953

Stats. Nfld. 1953, No. 31, s. 13

"The credentials of all applicants for admission to schools of nursing in this province shall be evaluated by the association /of Registered Nurses of Newfoundland/ . . . and certificates of competency shall be issued to those applicants who *linter alial*

(a) have passed their eighteenth birthday

before the completion of the
pre-clinical period, . . . ".

The Optometry Act

R.S.N. 1952, c. 54, s. 11

"Every person who . . . files with the Secretary-Treasurer of the /Newfoundland Optometrical/ Board an application, . . . , stating therein that the applicant is of the full age of twenty-one years, . . . , may be admitted to examination by the Board as to his qualifications as an optometrist, . . . ".
'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 3

The Pharmaceutical Association
Act, 1954

Stats. Nfld. 1954, No. 51, s. 21 (2) "The registrar shall register /in the register of pharmaceutical apprentices/ every candidate who has the necessary academic qualifications provided for in subsection (1) for registration under this Act if he *inter alia*

(b) produces to the registrar satisfactory
evidence that

(i) he is at least 21 years of age; ... "

'21' is deleted, and 'nineteen' substituted
therefor, by Stats. Nfld. 1971, No. 71, s. 44.

The Sale of Goods Act

R.S.N. 1952, c. 222, s. 3 (1)

... where necessaries are sold and delivered to an infant or minor, or to a person who by reason of mental incapacity or drunkenness, is incompetent to contract, he ~~may not be held liable therefor~~

(2)

"Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

The School Attendance Act, 1962

Stats. Nfld. 1962, No. 6, s. 3 (1)

"This Act applies to and in respect of

(a) every boy and girl who is over the age of seven years and under the age of fifteen years . . .".

The Solemnization of Marriages Act

R.S.N. 1952, c. 160, s. 4, as amended by Stats. Nfld. 1964, No. 46, s. 2

"If any person authorized to perform or celebrate marriage in Newfoundland shall so perform or celebrate any marriage between two persons either of whom shall be under the full age of twenty-one years without having first obtained the written consent of the parents or guardians of each such person who is under such age, he shall be guilty of a misdemeanour and shall, on conviction thereof before the Supreme Court, be liable to such penalty as the said Court shall award, not exceeding the sum of two hundred dollars: Provided that this section shall not apply in the case of the marriage of an expectant mother or of the mother of a child then living which was born out of wedlock ". 'Twenty-one' is deleted, and 'nineteen' substituted therefor, by Stats. Nfld. 1971, No. 71, s. 46.

The Summary Jurisdiction Act

R.S.N. 1952, c. 117, s. 106 (3)

"Where a person allowed time for payment /of a fine/ appears to the court to be not less than seventeen nor more than twenty-one years of age, the court, may if they think fit, and subject to any rules made un-

der this Act, order that he be placed under the supervision of such person as may be appointed by the court until the sum adjudged to be paid is paid, and in such case before issuing a warrant committing the offender to prison in respect of non-payment of the sum a court of summary jurisdiction shall consider any report as to the conduct and means of the offender, which may be made by the person under whose supervision the offender has been placed " .

The Trustee Act

R.S.N. 1952, c. 166,
s. 34 (2) (a)

An infant may be a trustee.

The Venereal Disease Prevention Act

R.S.N. 1952, c. 59, s. 19

"Where any person infected with venereal disease is a child under the age of sixteen years all notices, directions or orders required or authorized by this Act . . . shall be given to the father or mother or to the person having the custody of the child for the time being .
" ..

The Welfare of Children Act

R.S.N. 1952, c. 60,
s. 47 (1) (a)

"Where a child is charged with an offence which in the case of an adult would be punishable by imprisonment, and the child is actually or apparently of or over the age of fifteen years, such child may be punished by fine or imprisonment: Provided that a child convicted on summary trial shall not be sentenced to a term of imprisonment exceeding three months." (See p. 564, *supra* for definition of "child".)

The Wills Act

R.S.N. 1952, c. 147, s. 3

"No will shall be valid if made by a person under the age of seventeen years "

The Workmen's Compensation
Act, 1962

Stats. Nfld. 1962, No. 32,
s. 43 (1)

"Where death of a workman results from
an injury, the amount of compensation
shall be

(d) where the dependents are children, a
monthly payment of thirty-five
dollars to each child under the age of
sixteen years; . . . ".

s. 45 (1)

"Payments in respect of a child shall cease
when the child attains the age of sixteen
years or dies but compensation is payable to
an invalid child without regard to the age of
the child and payment to the child shall
continue so long as in the opinion of the
/Workmen's Compensation/ Board it might
reasonably have been expected that the
workman had he lived, would have continued to
contribute to the support of the child ".

s. 45 (5)

"The Board may pay to a dependent child
under the age of eighteen years or a dependent
invalid child such additional amount on account
of illness as it may see fit but the additional
amount shall not exceed ten dollars per
month during the duration of the illness ".

This Appendix states the law as of March 31, 1972.

PARENTAL LIABILITY STATUTES

(1) STATE OF CONNECTICUT

"Sec. 52 - 572. Parental Liability For Torts Of Minors.

The parent or parents or guardian of any unemancipated minor or minors, which minor or minors wilfully or maliciously cause damage to any property or injury to any person, or, having taken a motor vehicle without the permission of the owner thereof, cause damage to such motor vehicle, shall be jointly and severally liable with such minor or minors for such damage or injury to an amount not exceeding two hundred fifty dollars, if such minor or minors would have been liable for such damage or injury if they had been adults; provided nothing herein shall be construed to relieve such minor or minors from personal liability for such damage or injury. The liability herein provided for shall be in addition to and not in lieu of any other liability which may exist*at law ".

(2) S T A T E O F M A I N E

"Sec. 217. Liability of parents for damage by children.

The parent or parents of any minor who is between 7 and 17 years of age and is living with said parent or parents, which minor or minors wilfully or maliciously cause damage to any property or injury to any person, shall be jointly and severally liable with such minor or minors for such damage or injury to an amount not exceeding 5250, if such minor or minors would have been liable for such damage or injury if they had been adults. Nothing in this section shall be construed to relieve such minor or minors from personal liability for such damage or injury ".

(3) STATE OF FLORIDA

"Sec. 45.20 Civil action against parents; willful destruction of property by minor.

(1) Any municipal corporation, county, school district and department of Florida, or any person, partnership, corporation or association, or any religious organization whether incorporated or unincorporated, shall be entitled to recover damages in an appropriate action at law in an amount not to exceed three hundred dollar's in a court of competent jurisdiction from the parents of

APPENDIX I

any minor under age of eighteen years, living with the parents, who shall maliciously or willfully destroy property, real, personal or mixed, belonging to such municipal corporation, county, school district, or department of the state, or person, partnership, corporation or association, or religious organization.

(2) The recovery shall be limited to the actual damages in an amount not to exceed three hundred dollars in addition to taxable court costs ".

Some provisions from family court legislation elsewhere in Canada which might usefully be incorporated in Newfoundland's Family Courts Act.

NOVA SCOTIA: R.S.N.S. 1967, c. 98.

Publicity

S. 5 — (2) The judge shall as far as possible guard against any publicity in proceedings in a Family Court.

MANITOBA: R.S.M. 1970, c. C230, Part II: Family Court

Court of record

S. 6 - (4) The family court is a court of record.

Confidential nature of records

S. 8 — (4) Except with the written authority of the minister, and subject to the relevant provisions, if any, of the Juvenile Delinquents Act (Canada), applicable to records and proceedings under the Act, the records of a family court shall not be released or divulged to any person other than to the parties in a proceeding before the court and to their counsel.

Reports of social and clinical studies

S. 8 — (6) Notwithstanding subsections (4) and (5), reports of social and clinical studies or examinations made under this Act shall be withheld from public inspection, except that the information from such reports may, with the consent of the minister or the consent of a person acting under the authority of the minister, be furnished to persons and governmental and private agencies and institutions conducting pertinent research studies or having a legitimate interest in the protection, welfare, and treatment of the child.

Examination of child

S. 15 — A family court judge having jurisdiction in the matter may, either before the hearing of a charge against a child, or after the hearing but before adjudication and sentence, order that an inquiry respecting, and

examination of, the child be carried out by one or more of the following persons,

- (a) a psychiatrist;
- (h) a physician;
- (c) a probation officer;
- (d) a psycholouist;
- (e) a social worker;
- (0) any other suitable qualified person;

for the purpose of assessing the emotional and physical condition and environmental circumstances of the child.

Appeal

S. 21 – (1) The parent or guardian of a child who is subject to an order made

Idem

by the director under section 18 may appeal the order to a judge of the County Court having jurisdiction in the judicial district within the
rimri-noo whPr: t1 ar.mllont rr,;inq

(2) Where an appeal is taken under subsection (1), the appellant shall

- (a) prepare a notice of appeal in writing setting out
 - (i) with reasonable certainty, the order appealed from; and
 - (ii) the grounds of the appeal;
- (b) cause the notice of appeal to be served upon the director within twenty-one days after the date of the order; and
- (d) not later than seven days after the last day for service of the notice of appeal, file in the office of the clerk of the appeal court
 - (i) the notice of appeal referred to in clause (a); and

(ii) an affidavit of service of the notice of appeal.

Director to furnish documents, etc.

(3) The director shall, within fourteen days after being served with the notice of appeal, furnish to the appeal court

- (a) any writings, document or report relating to the order appealed against;
- (b) the reasons in support of the order made by him; and
- (c) any other thing in connection with the appeal that the appeal court may require.

Deposit may be dispensed with

(4) Where a person launches an appeal under subsection (1), unless the appeal court otherwise orders, he shall not be required to deposit any money as security for the costs of the appeal; and where the appeal court orders the person to deposit money as security for costs, the amount to be deposited shall be in the discretion of the appeal courts.

Application of the Summary Convictions Act

(5) Subject to subsections (2), (3) and (4), the provisions of The Summary Convictions Act, *mutatis mutandis*, to the extent that they may be applicable, apply to an appeal under this Part.

Disposition of appeal

- (6) The judge of an appeal court hearing an appeal under this section may
- (a) dismiss the appeal; or
 - (b) make such order that he considers to be in the best interest of the child.

BRITISH COLUMBIA: Stats. B.C., 1963, c. 14 as amended.

Purpose of Court

S. 5 - (1) The Court is established for the purpose of assisting and guiding families and individual members of families in overcoming social and matrimonial problems, and for the purpose of dealing with juvenile delinquents.

APPENDIX K

Summary of the jurisdiction of the family court in a number of the provinces of Canada.

NEWFOUNDLAND: R.S.N. 1952, c. 118 as amended.

S. 6 - Family Courts shall have jurisdiction in the following cases:

- (a) cases under The Welfare of Children Act, except Part IV;
- (b) cases under The School Attendance Act;
- (c) cases involving offences committed by one spouse against another or by a parent or guardian against a child;
- (d) cases involving offences relating to family life; and
- (e) such other cases or classes of cases, including those excepted in paragraph (a) as the Lieutenant-Governor in Council may from time to time assign to them.

NOVA SCOTIA: R.S.N.S. 1967, c. 98.

S. 3 - Notwithstanding the provisions of any other Act, the Governor in Council may by order confer on a Family Court exclusive original jurisdiction or concurrent or general jurisdiction over any or all charges, offences and matters arising from any one or more of the following Acts or subjects:

- the Wives' and Children's Maintenance Act;
- (a) the Maintenance Orders Enforcement Act;
- (b) the Children of Unmarried Parents Act;
- (c) the Employment of Children Act;
- (d) Parts III, IV, V, VI and VII of the Child Welfare Act;
- (e) The Juvenile Delinquents Act (Canada);
- (f)

- (g) the Education Act, in so far as it relates to truancy and failure to compel attendance of children at school;
- (h) Section 186 (1) of the Criminal Code of Canada;
- (i) Section 231 (1) of the Criminal Code of Canada where the parties involved are husband and wife or parent and child;
- (j) the Children's Maintenance Act in actions between parent and child;
- (k) the Parent's Maintenance Act in actions between parent and child;
- (1) such other Acts or matters as the Governor in Council may - from time to time deem appropriate. 1963, c. 4, s. 4; 1965, c. 68, s. 1

ONTARIO: R.S.O. 1970, c. 369

S. 17 (2) Each provincial court (family division),

- (a) is a juvenile court for the purpose of dealing with juvenile delinquents so soon as the *Juvenile Delinquents Act* (Canada) is 'proclaimed in force in the county or district for which it was established, and such court has all the powers vested in a juvenile court under that Act;
- (b) has power to try any child charged with an offence against the laws of Ontario; and
- (c) has power to deal with all cases where jurisdiction is conferred by any Act upon a juvenile court or a judge thereof or upon a juvenile and family court or a judge thereof or upon a provincial court (family division).

MANITOBA: R.S.M. 1970, c. C230, Part II: Family Court

Jurisdiction of the court

S. 8 - (1) Notwithstanding any other Act, a family court has jurisdiction over any or all charges, offences, and matters arising from or under any one or more of the following Acts:

The Juvenile Delinquents Act (Canada).

The Child Welfare Act.

The Wives' and Children's Maintenance Act.

The Reciprocal Enforcement of Maintenance Orders Act.

The Parents' Maintenance Act.

Such other Acts or matters as the Lieutenant Governor in Council may designate.

(2) A family court has the power to try any child charged with an offence against any of the laws of the province.

ALBERTA: R.S.A. 1970, c. 133.

S. 4 (2) Notwithstanding the provisions of any other Act, the Lieutenant Governor in Council by order may confer on a named judge of a Family Court exclusive original jurisdiction or joint or general jurisdiction over any or all of the following matters:

- (p) Tyvlintppice. ord(rs for deserted wives and fs.milies under Section 27 of *The Domestic Relations Act*;
- (b) maintenance orders made against any person by a court in a reciprocating state and enforceable under *The Reciprocal En-of Maintenance Orders Act*;
- (c) charges against adult persons under *The School Act* for failure to cause a child to attend school and continue in regular attendance thereat;
- (d) hearings under Part 2 of *The Child Welfare Act*;
- (e) charges triable on summary conviction under subsection (2) paragraph (a) of the *Criminal Code*;
- (f) charges of common assault triable on summary conviction under section 231, subsection (I) of section 231 of the *Criminal Code* where a husband assaults a wife, a wife assaults a husband or a parent assaults a child;

- (g) charges triable on summary conviction under any other Act or section where, in the opinion of the Lieutenant Governor in Council, it is appropriate for the judge of a Family Court to deal with them.

BRITISH COLUMBIA: Stats. B.C., 1969, c. 28.

S. 15 - There shall be assigned to the Family Division of the court

- (a) matters arising under the *Juvenile Delinquents Act* (Canada);
- (b) matters affecting the family as may be designated by the Lieutenant-Governor in Council by regulation;
- (c) charges against any child under the laws of the Province;
- (d) such other matters as may be assigned to the Family Division by any other Act.

APPENDIX L

Summary of legislation in Canada respecting the maximum age of juveniles.

Section 2 (1) (a) of The Juvenile Delinquents Act, R.S.C. 1970, c. J-3, defines a "child" as "any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2)." Subsection (2), *inter alia*, empowers the Governor in Council, by Proclamation, to direct that "eighteen" be substituted for "sixteen" in the definition of "child" (either boy or girl, or both) under section 2 (1) (a). In Manitoba and Quebec the age of a "child" has been raised to eighteen years, under authority of subsection (2). In Alberta, a girl apparently or actually under the age of eighteen years and a boy apparently or actually under the age of sixteen years come within the meaning of a "child" under the Act. The definition in section 2 (1) (a) applies in Nova Scotia, Prince Edward Island, New Brunswick, Ontario and Saskatchewan. In Newfoundland, a "juvenile", for purposes of delinquency proceedings "includes every child apparently or actually under the age of seventeen years", by virtue of The Corrections Act, 1953, Stats. Nfld. 1953, No. 62, section 2 (1) which re-enacted an identical definition of a "juvenile" contained in Part III of The Welfare of Children Act, 1944, Stats. Nfld. 1944, no. 57. Under term 18 of The Terms of Union of Newfoundland with Canada (Schedule to Stats. Can. 1949, c. 11. The Welfare of Children Act, 1944 continued in force after Confederation.

On Nov. 17, 1970, the Solicitor-General introduced into the House of Commons, Ottawa, a Young Offenders Bill, which, if passed into law in the form presented, would, *inter alia*, have raised the maximum age of persons to which the legislation would apply, to seventeen years of age, as is presently provided for in Newfoundland under The Corrections Act, *supra*. While the maximum age of persons presently described as "juveniles" would have continued to be eighteen years of age in British Columbia, Quebec, Manitoba and (for girls) in Alberta, the maximum age would have been raised from sixteen to seventeen years of age in Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Saskatchewan and (for boys) in Alberta. As provided by The Juvenile Delinquents Act, *supra*, the maximum age could have been increased to eighteen years by the provinces in which seventeen years would have been the maximum age, under the Young Offenders legislation.

The Young Offenders Bill was still before the Justice and Legal Affairs Committee when the third session of the twenty-seventh Parliament was prorogued, and up until April 30, 1972, had not been re-introduced into Parliament.

APPENDIX M

Form of Consent of parent or guardian to marriage of persons under 19 years of age, proposed by Recommendation 37 (*supra*, p. 392).

Consent of Parent or Guardian to Marriage

Province of _____
In the matter of the proposed marriage of _____
_____ (name in full)
land,

of _____ and _____
(address-giving community, (name in full)
street & number)

of _____
(address-giving community,
street & number)

(name in full)

of the town/city of _____

in the Province of _____

;

That I am the _____
(the "parent" or "guardian"
duly appointed")

of the said _____

That _____ is under the age of (nineteen) years and

was born on the _____ day of _____ That I hereby give my consent to the
said marriage.

I hereby certify that the information and particulars herein contained are true and correct.

Dated at _____ in the

Province of Newfoundland this _____

day of _____, 19__.

(signature, occupation, and
address of witness)

(signature of parent or
guardian)

The Vital Statistics Act, recommended in 1949, amended in 1950, 1960, by Conference of Commissioners on Uniformity of Legislation in Canada, and reproduced in Model Acts Recommended from 1918 to 1961 inclusive (1962).

Sections 13 to 15 (inclusive), 30 to 34 (inclusive) and 39, referred to in recommendations 41, 46 and 47 of Chapter IX, as quoted below.

REGISTRATION OF DIVORCES AND DECREES OF NULLITY OF MARRIAGE

Registration of divorces and nullities.	13. (1) Upon receipt of a statement in the prescribed form respecting the dissolution or annulment of a marriage, the Director shall register the dissolution or annulment by signing the statement and thereupon the statement constitutes the registration of the dissolution or annulment.
Notation of divorces or nullities.	(2) Where at the time of the registration of the dissolution or annulment or at any time thereafter, there is in the office of the Director a registration of the marriage dissolved or annulled, the Director, upon production of evidence satisfactory to him as to the identity of the persons, shall cause (a) a notation of the dissolution or annulment to be made on the registration of the marriage; and (b) a notation of the registration of the marriage to be endorsed on the registration of the dissolution or annulment.
Registration of divorce or nullities outside the province of marriage solemnized in the province.	(3) Where a marriage is dissolved or annulled by an order, judgment or decree made by a court of competent jurisdiction in another province, or by an Act of the Parliament of Canada, the Director, (a) upon receipt of a certified copy of the order judgment, decree or Act; and (b) upon production of evidence satisfactory to him of the identity of the persons, together with a statement in the prescribed form,

APPENDIX N

shall, if there is in his office a registration of the marriage, register the dissolution or annulment in the manner prescribed by subsection (1) and shall make the notations required by subsection (2).

Certificates after divorce. (4) Every marriage certificate issued after the making of a notation pursuant to this section shall contain a copy of the notation.

Marriage solemnized in another province. (5) Where a marriage solemnized in another province is dissolved or annulled in (name of province), the Director upon receipt of the statement respecting the dissolution or annulment shall transmit a certified copy of the order, judgment or decree to the person having charge of registration of marriages in the province in which the marriage was solemnized.

"(NOTE: In provinces that do not have a provision in The Judicature Act or in similar legislation requiring that a statement respecting each dissolution or annulment of marriage be forwarded to the Director by the Court, an additional subsection so requiring should be inserted as subsection (1) and the other subsections should be re-numbered accordingly. In provinces that do not receive a "statement" apt words should be inserted to describe the nature of the document used for the registration.)

REGISTRATION OF DEATHS

Registration of deaths. 14. (1) The death of every person who dies in the province shall be registered as provided herein.

Personal particulars of the deceased. (2) The personal particulars of the deceased person shall, upon the request of the funeral director, be completed in the prescribed form and delivered to the funeral director,

(a) by the nearest relative of the deceased present at the death or in attendance at the last illness of the deceased;

(b) if no such relative is available, by any relative of the deceased residing or being within the registration division;

(c) if no relative is available, by any adult person present at the death;

- (d) by any other adult person having knowledge of the facts;
- (e) by the occupier of the house in which the death occurred; or
- (f) by the coroner who has been notified of the death and has made an inquiry or held an inquest regarding the death.

Certification
by medical
practitioner
or coroner.

(3) The medical practitioner who was last in attendance during the last illness of the deceased, or the coroner who conducts an inquest on the body or an inquiry into the circumstances of the death, shall forthwith after the death, inquest or inquiry, as the case may be,

- (a) complete and sign a medical certificate in the prescribed form, stating therein the cause of death according to the International List of Causes of Death, as last revised by the International Com-
 - (b) mission assembled for that purpose; and
- forthwith cause the medical certificate to be delivered to the funeral director.

Death with-
out medical
attendance.

- (4) Where
 - (a) a death occurs without medical attendance; or
 - (b) the medical practitioner mentioned in subsection (3) is not available to complete the medical certificate; and
 - (c) there is no reason to believe that the death was the result of any of the circumstances set forth in subsection (5);
 the funeral director shall forthwith notify
 - (d) a coroner having jurisdiction; or
 - (e) the local medical health officer; or
 - (f) a medical practitioner designated by the coroner or by the medical health officer,

who shall thereupon inquire into the facts and shall complete the medical certificate in accordance with subsection (3).

Deaths by
violence or
misadventure.

- (5) Subject to subsection (2) of Section 17 where there is reason to believe that a person has died,
- (a) as a result of violence or misadventure;
 - (b) by unlawful means;
 - (c) as a result of negligence or misconduct on the part of others; or
 - (d) under circumstances that require investigation, no acknowledgement of registration of the death and no burial permit shall be issued by the division registrar unless,
 - (e) the body has been examined by the coroner and inquiry has been made into the circumstances of the death, as provided by the Coroner's Act;
 - (f) the coroner has signed the medical certificate of the cause of death in *accordance* with subsection (3); and
 - (g) the other provisions of this Act respecting the registration of the death have been complied with.

(NOTE: Subsection (5) may require redrafting in some provinces to conform with the local Coroner's Act.¹)

Duty of
funeral
director.

- (6) Upon receipt of the personal particulars respecting the deceased and of the medical certificate, the funeral director shall
- (a) complete the statement in the prescribed form; and
 - (b) forthwith deliver the completed statement to

¹ In Newfoundland, see: The Registration (Vital Statistics) Act, R.S.N. 1952, c. 23, s. 13 (2), and The Summary Jurisdiction Act, R.S.N. 1952, c. 117, ss. 115-116.

- (i) the division registrar of the registration division in which the death occurred, or
- (ii) if the place of death is not known, to the division registrar of the registration division in which the body was found.

Registration of death by division registrar.

15. (1) Upon the receipt within one year from the day of the death of a statement in the prescribed form respecting the death, the division registrar, if he is satisfied as to the truth and sufficiency thereof, shall register the death by signing the statement, and thereupon the statement constitutes the registration of the death.

(2) Where it is impracticable to deliver the statement respecting a death to the proper division registrar, the statement may be delivered to the nearest division registrar, who, upon receipt of the prescribed fee, shall,

- (a) register the death by signing the statement and issue an acknowledgement of the registration of the death and a burial permit; and
- (b) forward the registration forthwith to the proper division registrar.

SEARCHES

Searches of registrations and church records.

30. (1) ' Any person, upon applying, furnishing information satisfactory to the Director and paying the prescribed fee, may, if the Director is satisfied that the information is not to be used for an unlawful or improper purpose have a search made by the Director,

- (a) for the registration in his office of any birth, still-birth, marriage, death, adoption, change of name or dissolution or annulment of marriage; or
- (b) for the record of any baptism, marriage or burial placed on file in the office of the Director under section 20.

Report on
search.

(2) The Director shall make a report on the search
which will state

- (a) whether or not the birth, stillbirth, marriage, death,
adoption, change of name, or dissolution or annul-
ment of marriage, baptism or burial is registered or
recorded; and
- (b) if registered, the registration number thereof;

and shall contain no further information.

ISSUANCE OF CERTIFICATES AND COPIES

Birth
certificates.

31. (1) Any person, upon applying, furnishing information
satisfactory to the Director and paying the prescribed fee, may, if
the Director is satisfied that it is not to be used for an unlawful or
improper purpose, obtain a certificate in the prescribed form in
respect of the registration of the birth of any person, which
certificate shall contain the following particulars only of the
registration:

- (a) the name of the person;
- (b) the date of birth;
- (c) the place of birth;
- (d) the sex of the person;
- (e) the date of registration; and
- (f) the serial number of the registration.

Certified copy
or photographic
print of
registration
of birth.

(2) A certified copy or photographic print of the re-
gistration of a birth may be issued only,

- (a) to a person who requires it to comply with The
Adoption Act;¹

¹ In Newfoundland: The Adoption of Children Act, 1964, R.S.N. 1964, no. 23.

- (b) to an officer of the Crown in right of the province who requires it for use in the discharge of his official duties; or
- (c) to a person upon the authority in writing of the Minister or upon the order of a judge of a court,

and only upon application in the prescribed form and upon payment of the prescribed fee.

Marriage
Certificate.

(3) Any person, upon applying, furnishing information satisfactory to the Director and paying the 'prescribed fee, may, if the Director is satisfied that it is not to be used for an unlawful or improper purpose, obtain a certificate in the prescribed form in respect of the registration of a marriage, which certificate shall contain the following particulars only of the registration:

- (a) the name of the parties to the marriage;
- (b) the date of the marriage;
- (c) the place where the marriage was solemnized;
- (d) the date of registration; and
- (e) the serial number of the registration.

Certified copy
or photographic registration of a marriage, may be issued only.
print of regis-
tration of
marriage.

- (4) A certified copy or photographic print of the registration of a marriage, may be issued only.
- (a) to a party to the marriage;
- (b) to a person upon the authority in writing of the Minister;
or

- (c) to a person upon the order of a judge of a court, and only upon application in the prescribed form and upon payment of the prescribed fee.

Death certificate.

(5) Any person, upon applying, furnishing information satisfactory to the Director and paying the prescribed fee, may, if the Director is satisfied that it is not to be used for an unlawful or improper purpose and subject to subsection (6), obtain a certificate in the prescribed form in respect of the registration of a death.

Cause of death to be disclosed only in special cases.

(6) No certificate issued in respect of the registration of a death shall be issued in such a manner as to disclose the cause of death as certified on the medical certificate, except,

- (a) upon the authority in writing of the Minister; or
- (b) upon the order of a judge of a court.

(7) A certified copy or photographic print of the registration of a death or stillbirth, may be issued only,

- (a) to a person upon the authority in writing of the Director or
- (b) to a person upon the order of a judge of a court, and only upon application in the prescribed form and upon payment of the prescribed fee.

Certificates from church records.

(8) Any person, upon applying in the prescribed form and paying the prescribed fee, may, with the approval of the Director and subject to the same limitations as those respecting certified copies and photographic prints set out in subsections (2), (4) and (7), obtain a certificate in the prescribed form in respect of the record of a baptism, marriage or burial placed on file under section 20.

No certificate of adoption, change of name, divorce or nullity of marriage.

(9) No certificate, certified copy or photographic print shall be issued under this Act in respect of the registration of an adoption, change of name, or dissolution or annulment of marriage.

Certificates to be issued only by Director.	32. (1) Every certificate, certified copy or photographic print, issued under section 31, shall be issued by the Director, and no person other than a person herein authorized to do so shall issue any document that purports to be issued under this Act.
Signature of Director.	(2) Where the signature of the Director (or any person appointed by the Lieutenant Governor in Council pursuant to subsection (3) of section 24) ¹ is required for any purpose of this Act, the signature may be written, engraved, lithographed or reproduced by any other mode of reproducing words in visible form.
Certificate valid after change of Director.	(3) Every document issued under this Act under the signature of the Director (or of any person appointed by the Lieutenant Governor in Council pursuant to subsection (3) of section 24) is and remains valid, notwithstanding that the Director (or the person so appointed) has ceased to hold office before the issue of the certificate.
Certificates as evidence.	33. (1) Every certificate purporting to be issued under section 31 is admissible in any court in the province as <i>prima facie</i> evidence of the facts certified to be recorded, and every certified copy or photographic print purporting to be issued under section 31 is so admissible as <i>prima facie</i> evidence of the facts recorded therein; and it is not necessary to prove the signature or official position of the person by whom the certificate or certified copy purports to be signed.
Exception.	(2) Notwithstanding the provisions of subsection (1) or of any other Act, no birth certificate and no certified copy or photographic print of a registration of birth or stillbirth, purporting to be issued under section 31 is admissible in evidence to affect a presumption of legitimacy.
Director to	(a) an application for the registration of a birth, still-

¹ Deals with administrative personnel to co-ordinate reporting and recording of vital statistics.

- (b) within one year of the refusal, an application is made to a judge of the ----- Court,

the judge upon being satisfied

- (c) that the application is made in good faith; and

- (d) as to the truth and sufficiency of the evidence adduced on the application,

and having regard to the standards respecting delayed registration set forth in the regulations for the guidance of the Director, may make an order requiring the Director to accept the application and register the birth, stillbirth, marriage or death.

Director to comply with order.

- (2) The clerk of the court shall forthwith send a copy of the order to the Director who shall comply with the order and attach the copy to the registration.

Appeal from refusal of Director to search or issue certificate.

- (3) Where

- (a) an application for a certificate or a search in respect of the registration of a birth, stillbirth, marriage or death is refused by the Director; and

- (b) within one year of the refusal, application is made to a judge of the -----Court,

the judge, upon being satisfied that

- (c) the application is made in good faith; and

- (d) the applicant has good reason for requiring the certificate or search,

may make an order requiring the Director to issue the certificate or make the search; and the clerk of the court shall forthwith forward a copy of the order to the Director, who shall comply therewith.

Appeal from order of Director under s. 22.

- 22,¹ (4) Where the Director has made an order under section

¹ Authorizes the Director of Vital Statistics to cancel a fraudulent or otherwise improper registration.

(a) any person interested may, within years
thereafter, appeal therefrom to a judge of the
----- Court; and

(b) the judge may make an order confirming or setting
aside the order of the Director,

and the order of the judge is final and binding on the Director.

Notice. (5) At least ----- days' notice of the application or
appeal shall be served on the Director.

Secrecy. 39. (1) No division registrar (or deputy division registrar)
and no person employed in the service of Her Majesty shall

(a) communicate or allow to be communicated to any
person not entitled thereto any information ob-
tained under this Act, or

(b) allow any such person to inspect or have access to
any records containing information obtained under
this Act.

Exception. (2) Nothing in subsection (1) prohibits the compilation,
furnishing or publication of statistical data that does not disclose
specific information with respect to any particular person.

APPENDIX O

The Evidence Act, R.S.N. 1952, c. 120, ss. 1-7, with amendments thereto.

CHAPTER 120

Short Title	1.	This Act may be cited as The Evidence Act.

Of Witnesses

Parties to actions &c., to be witnesses for and against each other.	2.	On the Trial of any issue joined, or any matter or question, or on an enquiry arising in any suit, action or other proceeding, in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, the parties thereto, and the persons in whose behalf any suit, action or other proceeding may be brought or defended, or who may have any interest in the result thereof, and the husbands and wives of the parties thereto, and of the parties in whose behalf any suit action or other proceeding may be brought or instituted, or opposed or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either <i>viva voce</i> or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding: Provided that the party so called to testify may be cross-examined by the opposite party under the rules applicable to the cross-examination of the witnesses.

Parties not competent as witnesses.	3.	Nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, compellable to give evidence against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any such criminal proceeding render any husband compellable to give evidence for or against his wife or any wife compellable to give evidence for or against her husband; nor shall anything in this Act contained affect the laws now in force relating to the estates of idiots and lunatics, or the execution or attestation of last wills and testaments: Provided that nothing herein contained shall preclude a defendant or the husband or wife of the defendant from becoming a witness, should he

or she think fit, in any summary proceeding of a criminal or other nature; and that no witness in any proceeding instituted in consequence of adultery, whether a party to the suit or not, or the husband or wife of such party, shall be liable to be asked or bound to answer any question tending to show that he or she had been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Husband or wife not compelled to disclose communication between them.	4.	No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage.
Parties to actions for breach of promise of marriage competent witnesses.	5.	The parties to any action for breach of promise of marriage shall be competent to give evidence in such action: Provided that no plaintiff in any action for breach of promise of marriage shall receive a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise.
Privilege of clergymen.	6. A	clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character.
No person to be excluded for incapacity on account of crime. Any person in court required to give evidence as if subpoenaed.	7.	From and after the passing of this Act, no person offered as a witness shall be excluded by reason of incapacity from crime from giving evidence according to the provisions of this Act or otherwise; and any person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon subpoena issued by such Court of officer.

Act No. 48 of 1971

An Act Further To Amend The Evidence Act.

Short Title	1.	This Act may be cited as the Evidence (Amendment) Act, 1971.
Additional new section.	2.	The Evidence Act, Chapter 120 of The. Revised Statutes of Newfoundland, 1952, is amended by inserting immediately after Section 1 as Section 2A the following:

Evidence re-
garding non-access
and adultery.

"2A – Without limiting the generality of Section 2,

(a) the evidence of a husband or wife shall be admissible to prove that marital intercourse did or did not take place during any period of time before or during the marriage; and

(b) a witness in any proceedings instituted in consequence of adultery, whether a party to the proceedings or not, shall not be excused from answering any question by reason that it tends to show that he or she has been guilty of adultery."

Repeal and sub-
stitution Sec. 3
Competency of
witnesses.

3. Section 3 of the said Act is repealed and the following substituted therefor:

"3.– Nothing in this Act contained shall

(a) render a person charged with an offence against a law of the province compellable to 'give evidence for or against himself or render the wife or husband of such person compellable to give evidence for or against such person;

(b) affect the laws of the province relating to the estates of mentally incompetent persons or to the execution or attestation of last wills and testaments; or

(c) preclude a defendant or the husband or wife of a defendant from becoming a witness, should he or she think fit, in any proceeding."

Addition of
new section.

4. The said Act is further amended by inserting immediately after Section 3 as Section 3A the following:

Witness not ex-
cused from answering
certain questions.

"3A – (1) A witness shall not be excused from answering any question upon the ground that the answer may tend to

(a) criminate him; or

(b) establish his liability to a civil proceeding at the instance of the Crown or of any person or to a prosecution under any Act of the Legislature.

Answer not to be
used in evidence
against witness.

(2) If, with respect to a question, a witness objects to answer upon any of the grounds referred to in subsection (1), and if, but for this Act or any Act of the Parliament of Canada, he would therefore be excused from answering such question, then, although he is by reason of this Act or by reason of any Act of the Parliament of Canada compelled to answer, the answer so given shall not be used or receivable in evidence against him in any other civil proceeding or in any other proceeding under any Act of the ~~Bill~~ ^{Act}

|

A P P E N D I X Q

Number of divorces granted by Parliament of Canada to residents of the Province of Newfoundland and rate of divorce (per hundred thousand persons), 1949-1969.

YEAR	NUMBER OF DIVORCES	RATE OF DIVORCE
1949	0	
1950	5	1.4
1951	4	1.1
1952	3	0.8
1953	9	2.3
1954	8	2.0
1955		0.2
1956	5	1.2
1957	6	1.4
1958	7	1.6
1959	1	0.2
1960	6	1.3
1961	6	1.3
1962	0	
1963	8	1.7
1964	7	1.4
1965	3	0.6
1966	11	2.2
1967	11	No record
1968	14	No record
1969	0	

Sources: Annual reports of Dominion Bureau of Statistics and the Office of the Commissioner of the Senate of Canada.

A P P E N D I X Q

TABLE 1: Disposition of divorce petitions filed in Canada, July 2, 1968¹ to December 31, 1971, by province, as of January 28, 1972. Source: Central Divorce Registry, Department of Justice, Ottawa, Mrs. C. C. Perrin, Registrar.

Province	Total Petitions	Active Petitions	Decrees Absolute	Inactive Petitions	
				Dismissed	Petitions Discontinued
Nfld.	686	230	394	2	60
P. E. I.	316	109	199	2	6
N.S.	3,139	842	2,134	54	109
N.B.	1,826	582	1,162	31	51
Quebec	22,433	8,848	13,031	118	436
Ont.	50,979	16,522	32,736	246	1,475
Man.	5,486	1,228	4,037	32	189
Sask.	3,661	1,044	2,444	22	151
Alta.	16,868	5,125	11,087	51	605
B.C.	21,388	6,524	14,229	148	487
Yukon	187	46	134	1	6
N.W.T.	108	38	69	0	1
Fed. Ct. ²	1	1	0	0	0
 TOTALS	 127,078	 41,139	 81,656	 707	 3,576

Divorce Act, Stats. Can. 1967-68, c. 24, now R.S.C. 1970, c. D-8 was proclaimed in force on July 2, 1968.

Jurisdiction to hear divorce causes vested in Federal Court of Canada by Divorce Act in circumstances therein specified.

APPENDIX Q (Cont'd.)

TABLE 2: Total petitions filed by husbands, wives, in Canada, July 2, 1968 to December 31, 1971, by province. Source: Central Divorce Registry, Department of Justice, Ottawa, Mrs. C. C. Perrin, Registrar.

Province	Total Petitions	No. of Petitions by Husbands	No. of Petitions by Wives
Nfld.	686	275	411.
P. E. I.	316	95	221
N.S.	3,139	1,168	1,971
N.B.	1,826	694	1,132
Quebec	22,433	9,767	12,666
Ont.	50,979	18,661	32,317
Man.	5,486	2,022	3,464
Sask.	3,661	1,304	2,357
Alta.	16,868	4,618	12,250
B.C.	21,388	7,661	13,727
Yukon	187	72	115
N.W.T.	108	45	63
Fed. Ct.	1	0	1
TOTALS	127,078	46,382	80,695

APPENDIX Q (Cont'd.)

TABLE 3: Note on grounds pleaded in petitions for divorce. Source: Central Divorce Registry, Department of Justice, Ottawa, Mrs. C. C. Perrin, Registrar.

Between July 2, 1968 and December 31, 1971, 686 petitions for divorce were filed in the Divorce Registry of the Supreme Court of Newfoundland. In 603 of these petitions, one ground for divorce was pleaded. During the same period, 91,850 of the 127,078 petitions for divorce filed in divorce registries across Canada pleaded one ground for divorce.

Ground	Newfoundland No. of Petitions in which pleaded	Canada No. of Petitions in which pleaded
Separation for three years	441	47,625
Adultery	134	34,706
Mental Cruelty	16	1,958
Desertion for five years	7	5,137
Physical Cruelty	3	770
Rape		20
Addiction to Alcohol	1	527
Non-consummation	0	409
Whereabouts of spouse unknown	0	355
Three years' imprisonment	0	123
Homosexual Act	0	92
Subsequent Marriage	0	67
Long term imprisonment	0	27
Addiction to Narcotics	0	15
Sodomy	0	10
Bestiality	0	9
Totals	603	91,850

In the remaining 83 petitions filed in the Divorce Registry for Newfoundland, more than one ground for divorce was pleaded. Across Canada, 35,228 petitions pleaded more than one ground. The number of times each ground was pleaded with another ground or grounds in the same petition, is summarized below.

Ground	Newfoundland No. of Petitions in which pleaded	Canada No. of Petitions in which pleaded
Mental cruelty	68	25,031
Physical Cruelty	67	23,495
Separation for three years	16	12,416
Adultery	13	10,389
Desertion for five years	4	4,364
Whereabouts unknown	3	1,092
Non-consummation	2	380
Addiction to alcohol	1	3,915
Homosexual act	1.	212
Three years imprisonment	1	206
Subsequent marriage		139
Sodomy	1	139
Rape	0	300
Addiction to narcotics	0	56
Bestiality	0	53
Long term imprisonment	0	37

APPENDIX R

Summary of law relating to status of children born of marriages which are voidable or void *ab initio*.

At Common Law a child born in wedlock is presumed to be legitimate even where conception took place before the marriage of the child's parents.¹ The presumption does not apply, however, if conception was the result of an adulterous union.²

The principle of legitimation by subsequent marriage, accepted in many legal systems, was not recognized at Common Law in England, except where a man had a bastard son by a woman whom he afterwards married and by whom he 'subsequently had other lawful sons.'³ The principle has been incorporated with slight variation into Newfoundland legislation by virtue of section 3 (1) of The Legitimacy Act (Newfoundland)⁴, which provides as follows:

"Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of illegitimate child was or is at the date of the marriage domiciled in Newfoundland, render that person, if living, legitimate from the commencement of this Act or from the date of the marriage, whichever last happens."

Section 3 (2) of the Act provides, however, that:

"Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

At Common Law, if a marriage is void *ab initio*, the children of the marriage are deemed to be illegitimate. In England, The Legitimacy Act, 1959⁵ treats

¹ Blackstone's Commentaries, Bk. 1, p. 455. By a legal fiction or presumption, the marriage was presumed to have taken place before the conception of the child.

² Birtwhistle v. Vardill (1835), 5 E. R. 1207.

³ James, T. E., Child Law, (London, 1962), p. 33 fn. 13.

⁴ R. S. N. 1952, c. 164.

⁵ Stats. U. K. 1959, c. 73.

the child of a void marriage as being the legitimate child of its parents, if (1) both or one of the parties reasonably believed their marriage was valid (free from impediment) at the time of intercourse resulting in the birth or at the time of marriage, is subsequent to the birth, and (2) the father of such child is domiciled in England at the relevant time. If, of course, both parents, at the time of their marriage were aware of an impediment to the marriage rendering it void, their children cannot be legitimated and are in the same position as children illegitimate from birth.

A child of a marriage which is subsequently annulled on the ground that it is voidable, is illegitimate at Common Law. In England, since 1949, such a child *may*, in circumstances prescribed by The Matrimonial Causes Act, 1950¹, be legitimate.

¹

Stats. U. K. 1950, c. 25.

TABLE OF LEGISLATION BASED ON RECOMMENDATIONS
OF FAMILY LAW STUDY

TABLE OF LEGISLATION BASED ON RECOMMENDATIONS OF FAMILY LAW STUDY

Table of recommendations of the Family Law Study incorporated in legislation and passed into law by the House of Assembly for Newfoundland up to and including July 5, 1972, and legislation incorporating other recommendations of the Study and given first reading by the first Session of the thirty-sixth General Assembly up to and including July 5, 1972.

RECOMMENDATION

LEGISLATION

(1) Legislation passed into law up to and including July 5, 1972.

Chapter II, R. 3 (a), (c), (e) - (j), pp. 69-70,	The Child Welfare (Amendment) Act, 1971, No. 34, ss. 2,4 (a), 5-8;

Chapter III, R. 4, p. 81; Chapter XIV, RR. 5,6, pp. 538-539,	The Adoption of Children (Amend- ment) Act, 1971, No. 30, s. 4;

Chapter IV,	The Children of Unmarried Parents Act, 1972, No. 33,

R. 15, p. 175,	s. 2;
R. 16, p. 175,	s. 4 (2);
R. 17, p. 175,	s. 6;
R. 18, p. 175,	s. 9;
RR. 19, 20, pp. 175-176,	ss. 18, 19;
R. 21, p. 176,	s. 14;
R. 24, pp. 176-177,	s.21;
R. 27, p. 177,	s. 11;
R. 29, p. 178,	s. 54 ;
R. 36, pp. 179-180,	s. 54;

Chapter V, R. 2 , p. 212,	The Minors (Attainment of Majority) Act, 1971, No. 71, s. 6;

Chapter VI, R. 17, p. 286,	The Wills (Amendment) Act, 1971, No. 29, ss. 2, 3, 4;

Chapter VI, R. 20, p. 287,	The Fatal Accidents (Amendment) Act, 1971, No. 9, s. 2;
Chapter VI, R. 21, p. 287,	The Survivorship (Amendment) Act, 1971, No. 5, s. 2;
Chapter VI, R. 31, p. 290,	The Chattels Real (Amendment) Act, 1972, No. 13, s. 2;
Chapter IX, R. 20, p. 389,	The Children of Unmarried Parents (Amendment) Act, 1971, No. 31, ss. 2, 3
Chapter IX, R. 21, pp. 389-390,	The Adoption of Children (Amendment) Act, 1971, No. 30, s. 2;
Chapter X, R. 1, p. 422,	The Evidence (Amendment) Act, 1972, No. 3, s. 2;
Chapter X, RR. 2-6, pp. 422-423,	The Evidence (Amendment) Act, 1971, No. 48, ss. 2, 3, 4;
Consolidation of adoption legislation including The Adoption of Children (Amendment) Act, 1971, No. 30, ss. 2', 4,	The Adoption of Children Act, 1972, No. 36;
Consolidation of child welfare legislation including The Child Welfare (Amendment) Act, 1971, No. 34, ss. 2, 4 (a), 5-8,	The Child Welfare Act, 1972, No. 37;

Chapter XI, RR. 1-20, pp. 454 The Newfoundland Family Guidance
457, Association Act, 1972, No. 61 (to be
proclaimed);

- (2) Legislation given first reading during the first Session of the thirty-sixth
General Assembly up to and including July 5, 1972.

Chapter IV The Maintenance (Amendment) Act,
1972,

R. 7, pp. 173-174	s. 3(a);
R. 11, p. 174,	s. 3(b);
RR. 8,9, p. 174,	s. 3(c);
R. 8, p. 174,	s. 3(d);
R. 6, p. 173, R. 8,	~~s. 3~~
5, p. 173; R. 12, p. 174; R. 14,	
p. 175,	• s. 9;

Chapter XII, R. 2, p. 474, The Maintenance (Amendment) Act,
1972, ss. 3(c), 4.

- (3) Other legislation.

Newfoundland gift tax and succession duty legislation was enacted during the
first session of the thirty-sixth General Assembly. On July 5, 1972, The
Gift Tax Act, 1972, No. 39, and The Succession Duty Act, 1972, No.40,
received Royal Assent, both having retroactive effect from January 1, 1972.

INDEX OF REPORTED NEWFOUNDLAND FAMILY LAW CASES

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INDEX OF REPORTED NEWFOUNDLAND FAMILY LAW CASES

Index of selected Newfoundland family law cases reported in the Dominion Law Reports, the Maritime Provinces Reports, the Newfoundland Law Reports and the Newfoundland and Prince Edward Island Reports.

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Walsh v. Nolan /1941-46/ Nfld. L.R. 298, Fox, J. for the Court. -

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Luther v. Ryan (1957), 39 M.P.R. 122, Walsh, C.J. for the Court.

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Foley v. Foley (1954), 34 M.P.R. 273, Dunfield, J.

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Bursey v. Bursey (1966), 51 M.P.R. 256, Furlong, C.J.

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-requirement of intention to make gift

Higgins v. Noseworthy, Adm'r. Of Noseworthy, /1921-26/ Nfld. L.R. 327, Kent, J.

Donatio inter vivos - Savings bankbook given by deceased to daughter *In re Lawrence Kennedy, deceased*, /1921-26/ Nfld. L.R. 251, Kent, J.

Joint bank account of husband and wife - wife's name added as convenience - money deposited by husband - part of his estate

In Re Will Of W.A. Bradbury Deceased, /1932-35/ Nfld. L.R. 284, Kent, J.

Joint bank account of husband and wife - effect of bequest by husband of balance of bank account

Brown v. Brown (1953), 32 M.P.R. 29, Winter, J.

Re Aylward Estate (1955-56), 37 M.P.R. 367, Walsh, C.J.

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Haynes v. Evans, /1941-46/ Nfld. L.R. 416, Fox, J.

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Nfld. Furniture Co. v. O'Reilly, /1874-1884/ Nfld. L.R. 435, Pinsent, J.

Agreement for maintenance - oral agreement to convey land as consideration - uncorroborated evidence against estate of deceased person

Whitty Et Al. v. Butler, Admr. Of Whitty, /1936-40/ Nfld. L.R. 316, Dunfield, J.

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In re Bond; Bond v. Bond et al., /1927-31/ Nfld. L.R. 109, Horwood, C.J., and Kent, J.

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In re Nowlan: Neville v. Neville, /1927-31/ Nfld. L.R. 174, Kent, J.

Effect of - successive interests in personal property - intention of parties as expressed in deed to be given effect if possible - trusteeship created *Butler v. Brown*, /1932-35/ Nfld. L.R. 402, Kent, J.

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Jackman, Admx. v. Walsh, /1874-84/ Nfld. L.R. 367, Pinsent, J.

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In re Angel's Trust, /1904-11/ Nfld. L.R. 353, Johnson, J. for the Court.

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In re M.G. James, alias Williams, an Infant, /1864-74/ Nfld. L.R. 503, 508, Hoyles, C

Application by father for custody of daughter, aged six years - custody remains in aunt who is appointed guardian

In re McGirr, an Infant, /1884-96/ Nfld. L.R. 560, Little, J.

Application by paternal grandfather for custody of boy aged eight years - custody remains in widowed mother of boy

In re Congdon, an Infant, /1884-96/ Nfld. L.R. 572, Pinsent, J.

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Vokey v. Vokey, /1927-31/ Nfld. L.R. 73, Warren, J.

Application by father for custody of daughters, aged two years and four months - custody remains in mother

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In re Jean EG. Penny, A Minor, /1932-35/ Nfld. L.R. 383, Horwood, C.J., Kent and Higgins, JJ.

Application by parents for custody of daughter aged nine who had been in *de facto* custody of aunt from birth - custody application denied *In re Rideout* (1952), 30 M.P.R. 371, Walsh, C.J. (dissenting), Dunfield and Winter, JJ.

Application by father for custody of daughters aged five and four years who had been removed from family home when wife left - application granted

In re Winsor (1963), 48 M.P.R. 445, Furlong, C.J. ; affirmed on appeal, (1964), 49 M.P.R. 401, Winter, J. (dissenting), and Puddester, J. (Higgins J. concurring).

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Sharpe v. Sharpe (1971), 18 D.L.R. (3d) 380, Higgins, J.

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Carter, Admr. v. Kelly, /1874-84/ Nfld. L.R. 370, Pinsent, J.

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In re Gosse (1964), 49 M.P.R. 186, Winter, J.

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Butler v. Dominion Steel & Coal Co., Ltd., 1193640/ Nfld. L.R. 296, Dunfield, J.

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Walsh v. Dinn (1954), 33 M.P.R. 233, Walsh, C.J. for the Court

Monks v. The Ship "Arctic Prowler" (No. 2) (1954), 34 M.P.R. 263, Walsh, D.J.A.

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Re Clarke; Registrar of the Newfoundland Supreme Court v. Miskell et al.

(1967-68), 53 M.P.R. 317, Higgins, J.

Death of husband - measure of damages - facts to be considered

Whiteway et al. v. MacDonald et al. (1971), 1 N. & P.E.I. R. 217, Higgins, J.;
affirmed on appeal.

Eveleigh Estate at al.v. . Dean (1971), 1 N. & P.E.I. R. 370, Furlong, C.J. *Cassell*

et al.v. Burry (1971), 1 N. & P.E.I. R. 1-38, Higgins, J.; varied on appeal.

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Cashin v. Cashin, /1936-40/ Nfld. L.R. 42, Horwoh, C.J.; affirmed on appeal,
14 Nfld. L.R. 72, Horwood, C.J., Kent, J. dissenting, and Higgins, J.; reversed on
appeal to Privy Council, /1938/ 1 All E.R. 536, Lord Maugham for the Privy
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In Re Sarah Jane Harvey, /1846-53/ Nfld. L.R. 143

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In re Harriet Sophia Rutherford, an Infant, /1854-64/ Nfld. L.R. 589, Robinson, J.

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Rose v. Kavanagh, /1941-46/ Nfld. L.R. 428, Dunfield, J.

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Green v. Green (1963), 47 M.P.R. 352, Dunfield, J.; reversed on appeal,
(1964), 49 M.P.R. 315, Furlong, C.J., Winter and Puddester, JJ.

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Rideout v. Rideout (1949-50), 25 M.P.R. 11, Walsh, C.J. for the Court.

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Skinner v. Skinner (1953), 31 M.P.R. 113, Dunfield, J.

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Re Will of Daniel Monroe, /1921-26/ Nfld. L.R. 70, Kent, J.

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Re Gould Estate (1958-59), 41 M.P.R. 337, Dunfield, J.

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McGrath v. The Royal Trust Company, /1941-46/ Nfld. L.R. 381, Emerson, C.J.

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