Legislative Assembly of Manitoba

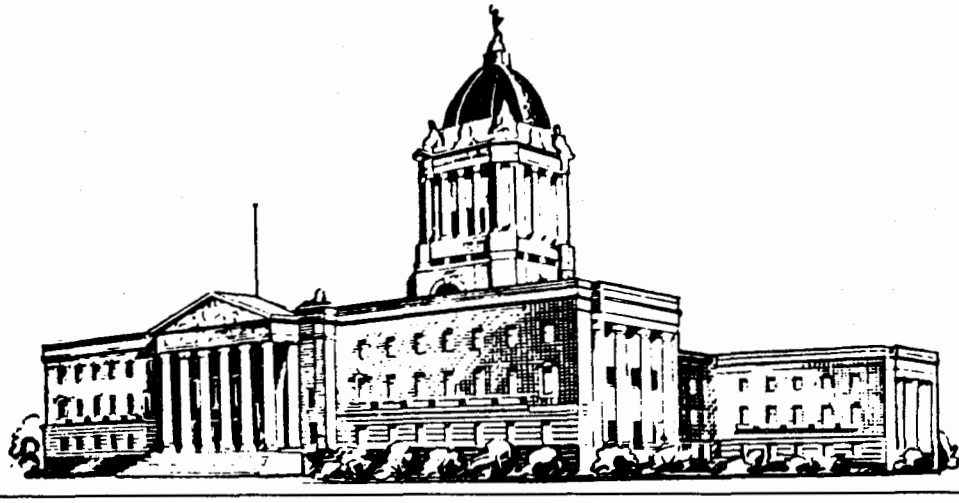
HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



TUESDAY, March 1, 1977, 10:15 a.m.

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TIME: 10:15 a.m.

CHAIRMAN: **MR. D. J. WALDING (ST. VITAL)**

MR. CHAIRMAN: Order please. We have a quorum gentlemen. The Committee will come to order. The Chairman of the Law Reform Commission is with us again this morning. Mr. Muldoon, perhaps if you would like to take your usual seat at the end of the table, we can proceed. I would ask the members of the Committee, since we have Mr. Muldoon with us and he's a very busy man, if we can keep our comments down to questions of him representing the Law Reform Commission and not get into arguments or debate amongst ourselves on the specifics. We will be going back to these topics later on.

As I recall, when we adjourned last time, we had reached Page 115 in your book, having to do with Interspousal Maintenance. Were there any further questions of Mr. Muldoon on this matter? If not, on Page 116 5. Non-Marital Cohabitation was a matter we were going back to. Are there any questions on that point? Mr. Pawley.

MR. PAWLEY: No questions, I was just making an observa tion.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: What the Attorney-General is referring to, I think, is that we do know there are certain areas where there is either a confused viewpoint or maybe even differences of viewpoint on certain matters and so far I haven't seen any real resolution of those differences. I think the other day we had a submission by Mrs. Bowman that I think some members may want to reflect on for a while. Now, whether it will change anyone's viewpoint or not remains to be seen.

MR. CHAIRMAN: Can we turn then to Page 121, definition of the marital home. Were there any questions on that point? Mr. Graham.

MR. GRAHAM: Mr. Chairman, the marital home, I think there might have been a tendency here to expand on that a little bit; I don't know whether the Attorney-General has had second thoughts on what consists of a marital home or not. I know at one time we were talking about possibly the marital home would also include a cottage at the lake, and some of the contents might possibly include the boat and maybe the snowmobile or something. I think that in reflection he may want to tighten that up a little bit, I don't know. Perhaps he could tell us.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I don't know whether we should indulge Mr. Muldoon in this debate. I want to not compromise his position as Chairman of the Law Reform Commission on a policy issue, but I do think, in answer to Mr. Graham's question, that the area that it was proposed to extend marital home to include the furnishings and other assets that are used jointly by the couple, the spouses, is still a very valid principle that we should try to proceed towards. I know that Mr. Muldoon, by way of the Law Reform Commission, has some concerns in this connection from the Law Reform Report, but I think that any of the objections that I have heard to date can be handled. For instance, I do think that insofar as third parties are concerned — and it's third parties that we are concerned about here, third parties that may be affected because of conflict of law, or because of their not having notice insofar as the purchase of an asset is concerned and thus the feeling that there was possible need for a great deal of paper work — my inclination would be to say third parties that purchase for value without notice of any defect, receive valid title. Then if there is some problem insofar as the spouses are concerned, in connection with one spouse having sold something that belonged to the other spouse, then that would involve the need for an accounting between the spouses and possible adjustment between the spouses themselves. So that to that extent, I think that we have to clarify better the position that I presented earlier, but I think, Mr. Chairman, I'm not convinced that the principle, which I feel is a sound one of immediate vesting of certain assets, community property, is not a good one, that we can still work out, as legislators.

MR. CHAIRMAN: I was hoping that we wouldn't get into a debate on that at this time, that we would restrict our remarks to questions of Mr. Muldoon, if there are any. If there are none then, on that point... Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we had a considerable debate previously on a definition of a homestead and I would like to ask Mr. Muldoon if, in their deliberations, they had considered the implications of the definition of a homestead as it is defined in The Dower Act and what the implications would mean when it comes to, say, immediate vesting of title as compared to deferred?

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, the Commission's recommendation in this regard is the one aspect in which the Commission has recommended an instantaneous community of property. The one kind of property which the Commission recommended that spouses hold instantaneously and in complete community, is what we have recommended and defined as the marital home. The implications of that, of course, are that there is complete control, proprietary interest on the part of

both spouses from the time they acquire a house, a residence if you will. We didn't include in that summer cottages — summer cottages are more likely, in many instances, to be brought into the marriage by someone and they are not the principal residence of the spouses. We recommended that this kind of property, however, the marital home, be held in joint interest because a piece of real property in Manitoba has no inter-provincial aspects; there can be no conflict-of-laws provision in regard to property within the province. The legislature has complete jurisdiction over it. I don't know of an inter-provincial house, unless it be on a border of two provinces, or the boundary.

So that the legislative authority is absolute if the property be within Manitoba; not like movable property, for example.

The implication again is that the marital home, as we have defined it, is borrowed in its definition from the definition of the homestead in The Dower Act, an institution which is of long-standing and familiar to Manitobans. The property extent may be larger with a rural marital home than with a city marital home and again, we decided to adopt the definition in the homestead because we think that in general terms, it is the rare farm spouse with her husband or wife, who doesn't do something about the farm, which is where they live, whereas in the case of a city home which is usually less extensive in terms of property, perhaps not in value, that's a residence and people usually go out from there to earn their livings in the city. So that we thought that the definition of the homestead in The Dower Act was an apt definition for a marital home and that's our recommendation in that regard. Now I hope I have met the question. I'm not sure that I have, Mr. Chairman.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I'm speaking as a farmer now and in your deliberations you have removed from immediate joint vesting, anything of a business nature. You have suggested that a financial accounting be given on a periodic basis. Now, as a farmer I would consider even the quarter section that the marital home is on to be a part of that business operation and the definition that is given in The Dower Act doesn't just relate to the quarter section that the marital home is on, but one other quarter section which the owner shall designate. If you want an immediate vesting, have you considered a time limit in which the owner shall designate that other quarter section? Shall you give him 30 days to consider which one it it is, or . . . I'm asking questions.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, I must say to you that the Commission had not considered according a time limit for designating the additional quarter section because the Commission was of the opinion, and I realize that here we are speaking of an immediate vesting and under The Dower Act we are speaking of consideration perhaps of a sale or a mortgage, the Commission, I must say, had not considered a time limit for designation of the additional quarter section. I think that's the answer.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Can you foresee a problem arising out of this?

MR. MULDOON: Yes, where the residence is on one quarter section and there is not another quarter section contiguous to it, there may well be a problem and it may be advisable that some short limit be — now I'm speaking for myself and not the Commission because the Commission made no recommendation in this regard, but it may be advisable that some short period of time be permitted to designate the other quarter section.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Firstly, Mr. Chairman, may I say to the Committee that I'm sorry I was away while I was away on government business. I've read Hansard except for last Tuesday's, and I intend to do that. I hope that I will be accorded the privileges and courtesies as a regular meer would have, because I would like to continue to participate in discussions.

I have two unrelated questions for Mr. Muldoon so let me stick to the one that Mr. Graham raised. In your deliberations, did you ever have occasion to ascertain whether or not there have ever been any problems in relation to the failure by a farmer, or the owner of a farm, to designate the additional quarter when dealing or disposing of any part of the farm property?

MR. MULDOON: Mr. Chairman, we did consider that briefly. We were unable to find any instances of difficulty although we acknowledge that there may have been but we hadn't come across any, nor had anyone who made representations to us raised any such difficulties, and I'm referring particularly to the Manitoba Farm Bureau which submitted an extensive brief to the Commission. That's undoubtedly why, if I can think back and reconstruct, we made no recommendation about a time limit because no one raised any difficulties with us, and when we considered it, some of the members of the Commission have been in the practice of law and have dealt with farming clients who have been conveying property, we hadn't come across any difficulties at all.

MR. CHERNIACK: It occurs to me that if a man owns four quarters and disposes of any portion or all of them, he has to take an affidavit as to a dower and if he disposes of two quarters, swearing that they are not part of the homestead, he is, it seems to me, in effect declaring which is the property, which is the homestead so that I don't see a problem really arising until he is ready to dispose of or deal with a mortgage, the last two quarters, one of which is the home. Then it seems to me he has

eliminated the opportunity of saying, "It's not my homestead, simply by being left." —(Interjection)— That's right. So, then, if it were the other way around and if the spouse would want to assert the right to that immediate vesting, then surely that spouse would say, "I want now to have a declaration," or "I want now to declare that these two quarters are the homestead and if you dispute it, then say so."

I'm just trying to think of the practical aspects and I'm asking Mr. Muldoon whether that was thought of?

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON. Yes, Mr. Chairman. You will recall that one of the recommendations of the Commission is that the non-title owning spouse would have the right to cause a memorial to be entered against the title, like a dower caveat now, and a notice would go to the registered owner. Now, if the registered owner said, ou have put your memorial against too much land or the wrong land, then the election comes into force immediately, or the registered owner is taken then to accept it. The Land Titles Office gives what is known as a 14-day notice for those things and if they receive no response at the end of the 14 days, it is deemed that the caveat is properly lodged and what we have suggested would be something akin to a caveat, a memorial of joint interest, really, but much akin in law to a dower caveat.

MR. CHERNIACK: Thanks, Mr. Chairman. We can come back to that with our draughtsman to just assure that. I want to move to my second question unrelated. If Mr. Graham wants to pursue this question, then I'll leave my other question.

MR. GRAHAM: Go ahead.

MR. CHERNIACK: The other one comes back to the question of what is a "marital home," and I interpret Mr. Muldoon to have said that they were concerned with the legal implications and complications in broadening the definition, but I did not hear him say anything according with the principle of accepting, let us say, the furnishings in that house.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, the law already makes a provision. I don't know whether it's well known or not well known, but the common law which we inherited in Manitoba already makes a provision about property, the distinction between real property and personal property. It may be wondered why the Land Titles Office uses so many words on paper to describe a joint interest in real property. It says, "are seized of an interest as joint tenants, and not as tennants-in-common, "and that seems redundant . And the reason for that is to overcome the presumption of law, where property is held by two persons and title is not declared publicly, the law presumes that real property is not held jointly but that personal property is held jointly. And that's why, I must say that . I don't want to seem to be lecturing down to anyone, I wondered myself for many years why titles to joint property had such a redundant phrase, and it's to overcome the presumption of the common law that real property is not held jointly, with the converse that personal property is held jointly. It seems to my colleagues and me that under the common law as it exists now, furnishings in houses are jointly owned because they're used by. . . I beg your pardon?

MR. CHERNIACK: You mean owned in common?

MR. MULDOON: No, jointly. Property used by two persons, owned by one of them or perhaps both of them and it's indefinite, is considered to be jointly owned. And I would think that the common law applies to the furnishings in a house. Now, not many lawyers raise that or perhaps they forget it but that's the provision of the common law insofar as proprietary interests in property is concerned.

MR. CHERNIACK: Mr. Chairman, would Mr. Muldoon then say that if I proceed to sell my dining room suite which I purchased two years ago and have an invoice for it in my name and sell it to someone, that title does not pass property because my wife has acquired a joint interest in that dining room set?

MR. MULDOON: No, I think there you have a document evincing your sole interest and that rebuts the presumption.

MR. CHERNIACK: Well then is not that the problem we're talking about, that the furnishings in a house usually are purchased in such a way that the invoice, that document, is in the name of one or the other. As a matter of fact, I now reflect and realize that in my family, in my household, the charge accounts at Eaton's and the Bay are in the names of one or other of us, I don't know which but I'm sure they're not in the name of both of us. So I would think that everything that has been purchased on those two credit accounts are shown to belong to one or the other, but yet, Mr. Muldoon you are suggesting that there's joint tenancy. I don't really think I should have even gone into that because that becomes a legal opinion and I think the Law Reform Commission does not pose as legal experts but rather on what the law ought to be in all justice, equity and progressive thinking. Therefore, let me come back to my original question. Was the problem facing the commission one of the implications and complications involved in joint ownership of personal property, and am I right in assuming that there was no principle which suggested that it was wrong to include this broader definition that Mr. Pawley had referred to at the previous meeting.

MR. MULDOON: I think I could say Mr. Chairman, on behalf of the Commission, that it considered

there was no principle which would stand in the way of the Legislature in its discretion including the furnishings of the family home as joint property as much as the marital home itself, we have recommended to be joint property. The only complications of course come with movable property which may have been bought in Alberta or Saskatchewan and brought into the province and maybe taken out again, and one wonders if there's a kind of a metaphysical barrier at the boundary of Manitoba that it's joint while it's in Manitoba and it becomes something else once it crosses the boundary. And those are the problems with movable property which the Commission did consider. I think that you could not take from our report that the Commission is adamant that the furnishings of the marital home should not be held jointly but we did recognize the problems with movable property and title to it, and having a regime in one province which vests title to certain property but not when the property crosses the boundary. We did consider of course in our studies how mobile the population of Canada and Manitoba is. But I think that the Commission should not be heard to be saying that we are against the furnishings of the marital home being joint property.

MR. CHERNIACK: Mr. Chairman, now I believe that the reason that there was this concern about movement of furniture and ownership relates to the ability to pass title and that the concern is that an innocent purchaser bona fide for value etc. should not be adversely affected by lack of knowledge as to who owns the asset and that that is the real concern.

MR. MULDOON: That's Mr. Chairman, the principle concern. The other concern is, what are the relationships between the spouses when they (a) move out of Manitoba if they do, or (b) when they move into Manitoba if they do. Is there a conflict of law problems there, is it the sort of thing which is going to drive them to be running to their friendly neighbourhood lawyers all the time, is it a complication which people need in their lives? Now those are the considerations the Commission concerned itself with. It hoped to propose a regime which would give equality of civil rights between the spouses but the more perfectly you try to make that equality in terms of every detail and every stick of furniture, the more complication you ensure, so that in broad terms, the catch-all is the termination of the standard marital regime where there should be a clinical cold-blooded equal sharing of the value. The Commission didn't want to get people involved in, as I say, running off to lawyers all the time to determine title to property and who owned what and that sort of thing.

MR. CHERNIACK: Does the Commission visualize that there would be a running off to the friendly neighbourhood lawyer when there is a disposition of that dining room set I discussed and that running off to that friendly neighbourhood lawyer would not be just because of the sale of the dining room set but an awful lot of other irritation, complications or problems that will already have arisen between the spouses.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, I don't think that the Commission was in any sense critical of the population of Manitoba or the times in which we live, but we did perceive that there's a spirit, if you will, of materialism, more present in the era in which we live than perhaps even in previous eras, and our thought was that it could be that the concern over the ownership of every stick of furniture and who would be entitled to receive the proceeds could add to the burdens and stresses of married life in the world in which we live and could be one of those precipitators, rather than one of those things which would tend to heal minor irritations, and minor irritations can grow into big irritations. So that it may be that on the one hand, and if I may say, Mr. Chairman, I think I understand not only Mr. Cherniack's question but I think I can read between its lines if I may say, it may be that to say that all marital home furnishings in Manitoba are jointly owned and that's that, and yet a number of people do move from one province to another and property may be acquired by one or the other or it may be moved from the marital home to another setting. All of that seemed to us to raise the kind of problems which some lawyers, academic lawyers whose field is conflict of laws, might well relish to be paid a fee to solve. I don't think, as I said before, that the Commission should be heard or seen as being adamant against according joint ownership of the furnishings but it did consider these problems in answer to the question.

MR. CHERNIACK: So in relation to real property, if you have a couple that live in Toronto and they come to Winnipeg to work for a year or two or go to University for a year or two and acquire a home, does that home not become the homestead under The Dower Act?

MR. MULDOON: Yes, it does indeed, Mr. Speaker.

MR. CHERNIACK: Well then when they leave that home and go back to Toronto, not having rented the home or sold the home but it's still here, would you say it is protected under The Dower Act?

MR. MULDOON: Yes, if it were once the homestead then it remains the homestead until disposed under The Dower Act.

If they have once lived in it, if the owner and his or her spouse has occupied it as their marital home, then its character of homestead remains until it's disposed. They might even occupy, Mr. Chairman, another marital home. They might have not sold it, it might be the third house back in their marriage

and it won't be the current house which is the homestead under The Dower Act until disposed of, that first one remains the homestead.

MR. CHERNIACK: Quite right. That is the law in Manitoba and there's only one homestead in Manitoba. Do you visualize the possibility of ten homesteads in Canada?

MR. MULDOON: If each of the ten jurisdictions had a Dower Act like Manitoba, then, yes, a person could have ten homesteads. It would have to be a very peripatetic person, mind you.

MR. CHERNIACK: Well, no, over a period of time, as long as you and I have lived, it is possible.

MR. CHAIRMAN: If there are no further questions, oh, Mr. Adam.

MR. ADAM: Thank you, Mr. Chairman. I believe you have excluded the movables as opposed to the furniture and that. . . the car, the boat.

MR. MULDOON: Yes, that's correct.

MR. ADAM: You don't consider that to be joint property?

MR. MULDOON: No, again because of their characteristic, Mr. Chairman, as being movables. Our view was again, that the more you extend, you know, single ownership has a characteristic and the characteristic is simplicity and sometimes simplicity of course is the opposite of justice. But the more you then make complex the ownership regime, the more you introduce — God knows I have nothing against the legal profession, Mr. Chairman — the more you introduce the possibility of remunerative work for the legal profession because of the complexity, every time a law makes relationship more complex it gives people rights and that's good, but it also requires an adjudication sometimes of those rights or a reconciliation of those rights and I think there has to be a balance. Now, it may be that reasonable people will disagree with the Commission but we thought that the balance lay with recommending an instantaneously, a joint ownership if you will, of the home, because the home is property, it's in Manitoba, if they move to Toronto they don't take the house with them. They may take the boat, they may take the trailer, they may take the furniture, but they don't take the house with them. So that it was in the interests of providing a regime which we thought and considered would make for ultimate justice, ultimate equality without intervening complexity of multiple ownership of every item. That's the best answer I think I can give to Mr. Adam, Mr. Chairman.

MR. ADAM: Then in order to solve, if this is a breakdown in a marriage now, and in order to solve a division of assets, movable assets, then you're saying that there'd have to be a Certificate of Title immemorial in the spouse's interests? Is that what you're saying here that should be done? Say the fellow buys an aircraft.

MR. MULDOON: Yes.

MR. ADAM: You know, that the wife helped to pay during her lifetime.

MR. MULDOON: Yes.

MR. ADAM: I'm not talking just about a car or a boat I'm talking about an aircraft, there's . /, and quite a few the guy uses it to fly around on Sunday. There's $15,000 tied up or $20,000 in an aircraft. How do they settle that? What's going to be the procedure there?

MR. MULDOON: Mr. Chairman, the Commission was concerned that we have some obstacles by living in a confederated country to a completely satisfactory, completely joint regime. Now, the a law enacted by the Legislature of Manitoba cannot reach into Ontario or Saskatchewan to require the sale of assets, to require the division of assets, to do anything with assets. If the assets are out of the jurisdiction, they're out of the jurisdiction and that's that. So what we thought was the better plan was to have the law enact an instantaneous community of property for the Real Property in the province. Now, if people then had assets out of the province, for example, one of the spouses may have a summer cottage at Kenora or at somewhere in Saskatchewan. The law of Manitoba cannot force the Registrar of Titles in Kenora or in Saskatchewan somewhere to enter a notation of joint ownership of that property, but if the regime terminates, even though the law of Manitoba cannot effect the interests in that property, a Court in Manitoba can take into account the value of the property. And that may well mean that the share comes out of the other spouse's, indeed wipes out all property in Manitoba for the other spouse because it may be needed to account for that share. So that instead of recommending laws which are impotent and useless because we can't ask any public official or any person who gives title or certifies title in another province to do anything, we say, "Let's make sure that the value at the end of the regime, not the assets, but the value is shared", because the value is money and property owned by either spouse, in the province or out of the province, can be taken into account. You can't force the transfer of the property but you sure as heck can take it into consideration and make a split of the value. We hope thereby to provide a regime of equality, and in our view justice, but one which wouldn't have the complications of conflicts of laws or the Legislature being asked to enact impotent laws.

MR. ADAM: Mr. Muldoon, what is the intent of No. 4 here under Part Two — Marital Home. What is the intent of that particular section there? Or five.

MR. MULDOON: Five, Mr. Chairman, or four.

MR. ADAM: Four. What is the intent of those sections there?

MR. MULDOON: That recommendation summarizes, we hoped in relatively lay language, our

intention that the marital home would become, by operation of law, virtually automatically, well, would become automatically the joint property of both spouses, and it provides a mechanism for demonstrating that it is the joint property of both spouses. The other one, five, has a funny complication. Manitoba, if I may contrast it with Saskatchewan, has a problem with joint tenancies. That is to say, if a property is not a homestead in Manitoba the joint tenancy can be severed unilaterally by one of the joint tenants executing a conveyance or transfer to another person. In Saskatchewan the law has been for many, many years that no unilateral severance of a joint tenancy can be affected by one of the owners, so that our recommendation here is that even when a home which is owned jointly, because it is a marital home, ceases to be a marital home but remains the joint property of the spouses, that joint ownership could not be severed unilaterally by one of them. That is to say, people move into House A and maybe it is very small and they have a family and the house is getting less and less appropriate for their needs, but it is owned jointly by them and it is their marital home. They move to House B, that becomes their marital home but House A remains their joint property if they haven't sold it. Our suggestion is that neither one of them, perhaps the one in whose name alone House A stood, could not sever the joint tenancy by unilateral conveyance, so that is the effect of (B). It is an abstruse legal point I suppose, but our view was that once a joint tenancy crystallizes in a marital home it remains a joint tenancy. **MR. ADAM**: Thank you.

MR. CHERNIACK: . . . would you then say that that joint tenancy would be severed on the separation of the parties or on the termination of the SMR?

MR. MULDOON: No. That joint tenancy would be severed either by agreement or by partition and sale — order of the Court of Queen's Bench.

MR. CHERNIACK: Would you not recommend that that be part of . . . .

MR. MULDOON: Yes. That would be probably part of the termination - I think you said separation . . .

MR. CHERNIACK: I would think so, yes.

MR. MULDOON: . . . but upon an order terminating the standard marital regime, that undoubtedly would be part unless, of course, one of the spouses who had the custody of the children needed that marital home, or perhaps former marital home, as a place to rear the children, in which case we have recommended that the severance, the accounting, be postponed until the children are no longer in need of a house with their custodial parent.

MR. CHERNIACK: Yes, that would have to be a different angle, that would then have to be in the legislation, wouldn't it?

MR. MULDOON: Oh, yes. The Law of Property Act right now would permit of course the partition or sale of the jointly owned property so we didn't make any special reference to that.

MR. CHERNIACK: But not of the homestead.

MR. MULDOON: Well, the homestead of course is a different critter, a slightly different critter if I may say so, Mr. Chairman. The homestead doesn't raise the problems of partition or sale. The gives homestead aspect the non-title holding spouse an absolute veto over any disposition; that is sale, lease or mortgage and it always has. Under some circumstances in The Dower Act, that veto right can be suppressed by a county court judge, I believe, and the circumstances are set out. They seem to be reasonable circumstances, that is that the non-title holding spouse has left with the intention of living apart from the title-holding spouse and upon an application to a judge the homestead veto can be suppressed, if you will, or abolished, removed. But those are the only circumstances, so that partition and sale are not questions involving a homestead as we know it, nor would they be questions involving a homestead of spouses who might have contracted out of the standard marital regime. What we said is that we would still want the homestead concept to remain for spouses who had contracted out of the standard marital regime, unless they further contracted out of The Dower Act and that is a double membrane, if you will, to protect the non-title holding spouse.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Yes, thank you, Mr. Chairman. Going back to the question that Mr. Adam raised with summer cottages, and I can quite understand when you have a cottage in Ontario or Saskatchewan or anywhere else in Canada, but in the cottages in the Province of Manitoba, why was it, and what was the opinion of the committee for its exclusion? It is a asset, it non-movable can't be taken out of the province.

MR. MULDOON: Quite. I suppose the commission's desire there was for some uniformity in the standard marital regime which all would understand. I'm trying to cast my mind back as to why the commission didn't recommend that a summer cottage become instantaneously owned jointly by the spouses, and it did not recommend that. It didn't consider, I suppose, trying to recall our debates over the course of a year-and-a-half on this, it didn't consider that the summer cottage would be that relevant and that so many summer cottages of Manitobans are outside the province. It would create disuniformity, if you will, it would create more complexities, I can't see that they would be insurmountable. I must say on my own behalf, not on behalf of the commission, one could include those because, as I say, they don't present the problems of movable property and they don't present

the problems of real property owned outside of the province. I suppose it was to ensure that the marital regime we were recommending would be standard that we didn't consider the summer cottage to be a relevant thing to include in the automatic joint ownership feature, and that because such a large number of summer cottages are owned just beyond the borders of the province, especially in the Lake of the Woods area.

MR. JENKINS: Yet I imagine there must be quite a number of cottages that are owned in Manitoba. I would respectfully suggest that perhaps the majority of cottage-owners have their cottages within the Province of Manitoba.

MR. MULDOON: Well, Mr. Chairman, I cannot agree or disagree. I think that could be a very valid speculation when one considers the Lake Winnipeg beaches and Falcon Lake and West Hawk Lake and all the others, so that it is possible that a majority of cottages owned by Manitobans are in Manitoba. I think if I can reconstruct the commission's reasoning, and I cannot but repeat that we considered that the marital regime we were recommending should be standard, and that for that reason we didn't consider that the cottage would be something that would be relevant to this kind of a regime. I imagine that while many Manitobans own summer cottages, in regard to the total population it is still precious few.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think there is one fundamental difference though with a summer cottage and I may be wrong but I know in my area the people that do own summer cottages, very few of them use them exclusively for their own family use. If they are not there they will rent their cottage out to someone else or maybe they will use it as a family gathering for their own personal family and their relatives. It is vastly different than a marital home in that respect, that it is used occasionally and it is used in most cases by five, six or seven families during the course of a year.

MR. CHERNIAK: Mr. Muldoon, on the termination of an SMR how do you visualize the courts will enforce splits of the condominium owned in Hawaii?

MR. MULDOON: That's one of those assets which is firmly rooted outside the Province of Manitoba and therefore outside of the jurisdiction of the Legislature as to its proprietary interests. But we visualize there that the value of that condominium would be taken into account and would be valued like all the other property and become the subject of the equalizing payment. . I don't know whether there is a reciprocal arrangement with the State of Hawaii for the enforcement of money judgements rendered in Manitoba, but we have reciprocity with every other province of Canada except Quebec, so that although the Legislature can't interfere with the proprietary interests in real property outside of the province, once a money judgment representing those is pronounced in Manitoba that judgement can be enforced. You might indeed attach it to the property and sell the property ultimately even though the Legislature can't directly deal with that property. But if the condominium in Hawaii were valued, and it would be possible to value it, then it would be one of the assets, either of the spouses jointly, if it were jointly owned, or it would one of the assets of one of the spouses and it would go into that spouse's shareable estate, the net value of it.

MR. CHERNIACK: So what you are describing would not be different between a summer cottage owned in Kenora or a condominium in Hawaii?

MR. MULDOON: Not at all, Mr. Chairman, the same.

MR. ADAM: Mr. Muldoon, there's been an attempt here to differentiate between a cottage and a marital home. I can think of many, many instances where families move out in the spring. I'll take Dauphin for one, there's Dauphin Beach, Ochre Beach there right close by, Lake Winnipegosis, Lake Manitoba are all within that area. I know of many, many families that in the spring they're gone and the cottage becomes the family home 'till November or so. I am thinking of one in particular where the family home is the cottage at the beach. In the wintertime they are gone south or else they take an apartment in the wintertime. I am just wondering whether we are making this differentiation here too specific.

MR. MULDOON: Well, Mr. Chairman, may be are. What I should say, if I may, in answer to Mr. Adam is that if that summer cottage, even though we call it a summer cottage, is the ordinary residence of the couple and they are away in the winter and they live there and that is their residence, their ordinary residence in Manitoba, then that is their marital home. No question about that because that is their ordinary residence. If you look at the definition of "homestead" in The Dower Act it says 'a dwelling house," and it can be in the city, town, village or in the country, "occupied by the owner thereof and his wife," and we would say occupied by the owner and his or her spouse, "as their home." So whatever residence is occupied by the spouses as their home we recommend be designated as the marital home. Whether that is a condominium in a highrise apartment building or whether that's a cottage by the shores of a lake, if that is their home then that is their marital home. So that one would say that in the case presented by Mr. Adam that summer cottage, although we call it a summer cottage, would be the marital home and would be deemed by law automatically to be the joint property of the spouses if that is their home. I agree.

MR. ADAM: Mr. Chairman, in the case of the family that lives six months at the beach and six

months in town, they have two marital homes, you know.

MR. MULDOON: If it comes to a fine point, I suppose the ordinary home, the home at which even if their children are grown up now, the home from which their children attended school you might say when they were young, I think that's the marital home. That's where the family resides to do its thing other than recreation, I guess. I am adding words here which don't appear in the commission's report but I am trying to interpret those recommendations for the report. One could put a fine point on it and say that there might be difficulty to determine which is the marital home, but usually the cottage is acquired subsequently. I don't know that people get married and move into a summer cottage, they usually move into a permanent residence and when children come along it is from that residence that the children go to school, and it is from that residence that people go out to make their living. I think that the law so far, the homestead law, hasn't presented any great difficulty in that regard as to what their home is. But I agree if they have no other home and they acquire the summer cottage, then that would be their home because that would be their only home in Manitoba.

MR. ADAM: Even if they rented? Even if they rented an apartment and had a summer cottage? The rented apartment is their home, that's their marital home for all intents and purposes, but they have a cottage at the beach which they use in the summertime.

MR. MULDOON: If this couple whom we are talking about are not in agreement as to what is their home, it may require an application to determine what is their home, or one of the spouses may assert that that summer cottage is their home and that, as Mr. Cherniack pointed out earlier, would require a determination. I think if I may interpret our recommendations, and I guess we didn't have Mr. Adam's example directly in mind when we made those recommendations I may say, one would say if they live half the year at a cottage and half the year at an apartment and one of them owns the cottage, then there would be a very good case for the other one lodging that memorial or deposition in the Land Titles Office to say, hey, this is a marital home, this is the only home we own in Manitoba, so it is joint, it is jointly owned. I think there would be a very good case for that. I am not sure that it would even be a court case that I am referring to, I think if the one spouse went to the Land Titles Office with the kind deposition we've recommended and filed that, nine times out of ten you would find that that was indeed their marital home and it was jointly owned because it would be the only home they owned, the apartment, presumably, they are renting.

MR. CHAIRMAN: If there are no further questions then on the Definition of a Marital Home, perhaps we can move on.

MR. GRAHAM: Mr. Chairman, I would like to ask a question of Mr. Muldoon which is entirely unrelated to this particular portion. I believe a couple of weeks ago, Mr. Muldoon, you undertook to get the approval of the Estate Planning Council for the release of their brief to your commission. Can you give us a report on that?

MR. MULDOON: Mr. Chairman, if Mr. Graham had not asked me, I was intending to raise that matter today. I looked over the Estate Planning Council's brief to the commission and it was a brief in response to our Working Paper on Family Law which had been issued for public discussion, and I may say it is not very relevant. I am afraid that the Estate Planning Council were off the point in the point we were in consideration so that I meant to mention that to you, Mr. Chairman, that I think it would serve very little purpose. After reading their brief, I haven't even asked an official, I've been in touch with some of the officials but I haven't asked them specifically if they would consent to have their brief brought before this committee. I think they would want to prepare a better brief on the point, in relation to which theirs was discussed, but I think it is not relevant tm that point. I thought it was but on looking it over, I think it isn't.

MR. GRAHAM: Thank you, Mr. Muldoon.

MR. CHAIRMAN: Thank you. Could we then move on to page 124 and to 3(b).. That was an item we intended to come back to, were there any questions on that point?

MR. SHERMAN: Mr. Chairman, the only question on this was the question of the ethics of the public exposure of the agreement and we were anxious for the Chairman's opinion on that proposal. I think there's some feeling in the committee that a copy of the written agreement could be maintained in other ways other than filing it in a public registry which would open it up to pretty general examination, I think that was the point that some of us wanted re-examined. So we would need Chairman Muldoon's reasoning for the Commission's position on this.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, the Commission's view was that perhaps after a few false starts under a new law, these agreements would probably become pretty standard. These are agreements to contract out of the standard marital regime. So that our view was that those agreements in effect would say, neither spouse has any expectation of sharing in the separate property of the other spouse. That's what contracting out of the standard marital regime would, in most cases, mean. And our view was that the agreements likely would not start enumerating their property, their bonds, their jewels, their whatever, it would probably be a kind of a "Watershed" agreement which would say, "Each one is separate as to property because we're contracting out of the standard marital regime

and we have no expectation to share the separate property of the other." In that case, the Commission thought that it wouldn't be revealing private matters because it would be a kind of a general statement. The agreement itself would be. It wouldn't have to detail specific items of property because it would be a "contracting out" and our view was that for two reasons, one, for security of the agreement, so that in a fit of pique one spouse might not rip up both copies and then say, "Prove there's an agreement." So that there would be a secure public depository for the agreement. In the second place so that a third party dealing with a married person would not be left just with that married person's word that he or she wasn't squandering the property, there would be a place, objectively, to check that this person is absolutely free to squander, to give away, to give do what he or she likes with his separate property. That would be another reason.

Now, in considering this, the Commission thought that there might be a refinement there, but the refinement didn't come out in a refined recommendation because — let me just refer back to Page 55 which is the text supporting this recommendation and gives the reasons for it. Yes, if I could just refer to the paragraph at the bottom of Page 55 of the report, Mr. Chairman. Maybe I should just refer to it and not read it because you all have copies of the report. Those are the most cogent reasons, I think, the Commission has expressed in support of this recommendation. I may say that at the end of each recommendation here at the back of the report there's the supporting text in which the Commission gives its reasons for the recommendation.

And then, the next paragraph on Page 56 suggests that if public opinion should demand confidentiality of such agreements, we think that at the very least, those marriage contracts which import utter separation of property with utterly no expectation of deferred sharing upon separation or divorce should be so designated and that kind of designation would tell third parties that either spouse is free to squander or make transfers of property for low or no consideration without impinging on the rights of the other spouse.

Those are the reasons, Mr. Chairman, for the Commission's recommendation which appears as No. 3, Sub(b) on Page 124.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, wouldn't it be sufficient that the public know whether a person is contracted out or not, and that is all they have to know?

MR. MULDOON: Well, yes, Mr. Chairman, and that's exactly the sort of consideration the Commission expressed on the second paragraph on Page 56. I think that one shouldn't regard that recommendation 3(b) with literal rigidness, something like that of course is what the Commission recommends and in its text it suggested that it might not be the whole agreement. It might be a kind of a caveat or a memorial of an agreement, which would be . . .

MR. GRAHAM: All it requires is a notice.

MR. MULDOON: A notice, yes. Yes, it could do that.

MR. CHAIRMAN: Mr. Cherniack has left the meeting? I'll come back to him if he returns. Mr. Sherman.

MR. SHERMAN: Mr. Chairman, is the Chairman of the Commission saying that that is what the Commission means by 3(b) as it's presently worded, that all that's necessary is a notice that two parties have contracted out of the standard marital regime?

MR. MULDOON: Yes. In response to Mr. Sherman, that certainly can be all the Commission means. If I could just take this occasion, Mr. Chairman, to refer to the whole report. It would be difficult to include in a summary of recommendations all the Commission's considerations and the Commission hopes that in reading this summary of recommendations which is actually just appended to the end of the report, that the members of the committee and the Legislative Assembly would read the whole report because that's where we give the supporting reasons and that's where we do our thinking in print, if you will, out loud, or what passes for our thinking on these issues which result in the recommendations. That recommendation, 3(b), one shouldn't understand to be the Commission's attempt to provide legislative drafting. There are other considerations there and it might be a different form of registration and that's what's expounded on Page 56, 55 and 56 of the report. But the reasons, and the text of the report are almost as important as the ultimate recommendations appended at the end, if I may say, with respect, Mr. Chairman.

MR. CHAIRMAN: Thank you. Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, in light of that, perhaps we should change that to, instead of a copy, just a notice of the agreement. Would that be agreeable?

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, Mr. Chairman, I appreciate Mr. Muldoon's remarks. That obviously is why the committee has requested that he work with us further on the Commission report and why he has agreed to be present for several of these meetings, because the question that we're considering at the present time is a question that came up among members of the committee in examining the precise wording of the recommendation, notwithstanding the explanations for the reasoning given in an appendage to the report. Now if we have from Mr. Muldoon the assurance that that is what is intended

by that proposal, then I am prepared to accept that. But on the surface, I think he would agree that the precise wording doesn't accord exactly with the kind of reasoned arguments that he's referred us to in the appendage.

MR. MULDOON: No, the recommendations, Mr. Chairman, are perforce a summary of the reasoning in the report, which is the real expression of the Commission's opinion of course. We tried to make it easier for the public and the Legislature to delve into our reasoning by summarizing recommendations. I think that a notice would not be inconsistent with the recommendation, especially in view of Recommendation No. 4 which follows. I think that if it were a complex agreement, it would have to be a pretty complex notice because the purpose of a notice is to put people on notice as to what they can do, how they can deal with their property. All I can say is that a simple agreement would import a simple notice and a complex agreement might import a complex notice or the Legislature might wish to make it possible for those who want to to file the whole agreement, instead of a notice. I think that there's scope for flexibility there but I think at the very least, a notice should be filed in a public registry so that people can understand that they can even accept gifts from a married person without any danger of having to disgorge them, or they can accept property at low or no consideration.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Well, Mr. Chairman, I wanted to get more definition on what was meant by the word "should" as compared with "must" or "may", but just having heard the last few comments, I gather that Mr. Muldoon, speaking on behalf of the Commission, feels that there shall be a "must" but not necessarily of the agreement itself but maybe just of the notice. At first I thought that the argument stated here was that as between the parties, it could be an option to protect a spouse, and the lawyer might well recommend to a spouse, "You better get that on the record, you have a right to, so you better get it on there, so there's no doubt about it." But now I have to look elsewhere in the Commission Report. I did not have the impression that a disposition made, I forget the term used, the squandering disposition, would be one which would not pass title, I really was not aware of that and I have to study more of what was said. I thought that it is a cause for the Court to put a stop to a squandering about to take place. But now from what Mr. Muldoon said and from this comment "to notify third parties," would make it appear as if some person, some real estate speculator who thinks that he's got an opportunity to buy some property real cheap, has to stop and wonder whether, indeed, that seller of whom he is taking legitimate, maybe I should say legal, advantage of, by using his own brains to get that, is the suggestion that that sale having been completed, would be in jeopardy because it "may" be considered that there was a squandering and there is no contracting-out agreement. Is that part of the suggestion?

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, the Commission considered that if there was going to be an equality of sharing and if we really meant it — and we did and we urge that the Legislature really mean it — then property which is squandered, given away, sold for low consideration, if any, should be recoverable by the wronged spouse, and our Recommendation No. 21, which is on Page 128, and which is explained by the Commission on Page 76, and those pages thereabout, we said that if a good friend of a spouse is placed in legal title to some valuable asset — you know, people just don't expect that a married person will be giving valuable property away, and we're not talking about trifling gifts, we're talking about property of substantial value. No one should expect that a married person is going to give that, because that would be committing a wrong on the spouse under our concept of a marital partnership, and we say that that's a partnership asset, there's an expectation of sharing there, and that such a person may be made to disgorge or to trace excessive gifts made within the six year period and recover the value by court action from the recipient for restoration to the combined shareable estates, or for some satisfaction of the equalizing payment.

Now, Mr. Chairman, if one really means that spouses should be able to share equally in the property acquired after marriage, one had better close the loopholes so that property could be funnelled out and the recipient is entitled to keep it and run, as it were. That's our view. That may be Draconian, but I can do no more than to say that was the view of the Commission.

MR. CHERNIACK: Mr. Chairman, I would like to assure Mr. Muldoon that I really mean the principle of what the Commission is proposing to us says, to the extent that I agree in immediate community sharing, which the Commission doesn't agree with. I thought that if there were immediate sharing, then there's no question that a person who purchases without the consent of the other, purchases from a spouse without consent of that spouse's spouse, will not get title. But now you're saying, if you really mean it, don't yet have community joint ownership of property immediately, but put in danger or in jeopardy or in question the asset acquired by a person who may well believe that this is a legitimate transaction taking place but who may always have a cloud over his head that within the next six years a court might say, "Well under the circumstances that is squandering." I think we've agreed — I wasn't here but I've read the record — that squandering is related to the ability or the

wealth of the person who is accused of squandering, and that a millionaire could squander $10,000 at the horse races here and that's not squandering, although in my estimation it is, but it isn't in their style of life. I really believe that for a person with an income of two or three hundred thousand dollars losing $10,000 at the racetrack is not squandering, whereas if a person who has total assets of $50,000 would really be squandering on that basis, so it is judgmental. Now, if as I say, you have a transaction involving, I don't know what, be it diamonds, be it in antiques — how about that? An antique being sold, it may have tremendous value, the vendor doesn't know the value really, he hasn't bothered to find out, sells it to an expert who pays a pittance for it, is that squandering? That is very judgmental but it means that the person who bought it for six years will be subject to challenge. You know, it seems to me that — and I use your expression, Mr. Muldoon, because it is almost pejorative to say, "Well if you really need it then you had better do it," that if you really mean it why didn't you recommend immediate vesting, therefore, there is no question of the burden placed on *cavea emptor* concept.

MR. MULDOON: Well, Mr. Chairman, the kind of squandering that's referred to there where one might be made to disgorge is not one that one would think of as being in terms of an arm's length transaction. One would think of it perhaps as the gift of a mink coat which may be a large asset for a family of modest means or some other assets of that sort, and we have expressed our reasons for not recommending instantaneous and complete community of property. Nevertheless, we think that there ought to be some safety valve. Now that may be an exceptional one and of course I didn't mean to sound pejorative to the members of the Committee, Mr. Chairman, but our view was that there was a loophole we perceived and that it ought to be closed. I think that an arm's length type of transaction may be, and we have expressed that, I believe, in our reasons that may be a question of poor judgement on the part of one of the spouses and you might not say that's squandering. But a case where it's intended to give a particular favour to someone or where it can be seen to be intended to put out of reach of the other spouse the sharing — the potential sharing — that's the case where we say there's squandering, where, you may say, I'm going to give, I'm going to convey this property to you. Now, if my marriage breaks up, of course remember that you are really a secret trustee for me and I'll get it back after the equalizing payment is adjudged or determined. That's the sort of thing.

MR. CHERNIACK: That's the secret agreement which is not registered anywhere?

MR. MULDOON: That's right.

MR. CHERNIACK: As compared with, and let's just carry your mink coat in two other directions — one is, the wealthy person, the wealthy employer who gives an employee of long-standing and great loyalty a mink coat, may well be doing something that you do at Christmas time when you give a box of chocolates to a secretary. So that's one point. The other is, let me introduce it as a possibility of it being in the nature of a commercial transaction which is not necessarily arm's length, but legally arm's length — not physically but legally arm's length — as being a payment for a service.

MR. MULDOON: I'm not sure that I catch all of Mr. Cherniack's implications, Mr. Chairman.

MR. CHAIRMAN: I'm wondering if the questioning is not becoming a little argumentative?

MR. CHERNIACK: It's just that I want to get it cleared. Now, it is true, I believe, that Mr. Muldoon is saying, on behalf of the Commission, that it is up to the purchaser, failing the proof of an opting-out agreement, it is the burden on the purchaser to satisfy himself that this is not a squandering in relation to the vendor's style of life, ability to deal with it. And I'm now concerned really about that third person, that *bona fide,* and it's got to be *bona fide,* dealer who may indeed be considered to be accepting the benefit of a squandering, innocently.

MR. MULDOON: I think, Mr. Chairman, the Commission's intention there was not to include in this thing the kind of arm's length transaction which might be just bad judgement on the part of the one who is parting with it. I know that the Commission didn't intend that those persons should have to disgorge. Now, that bad judgement may render the person who exercised it liable to take into account what was lost *vis-a-vis* the spouse. —(Interjection)— But not in every case would one expect the Court to require a disgorging of the benefit. I think, well I know that the Commission meant those kind of transactions which excite suspicion, which can be seen to be for a purpose improper to the concept of the marital partnership. Here is the lady who operates a real estate agency and she says one of her salesmen really needs a new jacket because he looks pretty shabby. Well, she may say to her husband, "I'm going to give George a holiday gift or a Christmas gift of a jacket, I'm going to send him down to the tailor's to get a jacket — he needs that." Just as Mr. Cherniack suggested, the wealthy male who is in operation of a business may give the secretary who has been a faithful servant, a mink coat. I would think that prudence would dictate to that person a little consultation with the spouse, a disclosure —I'm going to do this, and in those circumstances, of course, there would be nothing wrong. But without that kind of disclosure, it might well be a transaction which would excite suspicion, that it was a gift improper to the concept of a marital partnership, that it was indeed a squandering of assets in which the other spouse has an expectation of sharing.

Of course, the Commission wasn't attempting to draft legislation here, as you know.

MR. CHERNIACK: I'm sorry, you're right about that.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: I'm going to pass, Mr. Chairman.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, this is one of the areas which has given me some concern and I think probably if we are going to define squandering that we should be pretty cautious in our approach. What do you define as squandering? As Mr. Cherniack has suggested, going down to the races and squandering, or going down Nevada . . .

MR. CHAIRMAN: Order please. Mr. Adam, we really haven't reached that portion of it. We are on Page 124 having to do with the filing of a written agreement. Do you have a question on that?

MR. ADAM: I have listened to the word "squandering" for the last 15 minutes, Mr. Chairman, and I'm just wondering . . .

MR. CHAIRMAN: That's true. I understood Mr. Cherniack to link his question with the filing of a written agreement. If your question also does that, I will allow the question.

MR. ADAM: My question may lead to that, and I'll use a lawyer's approach to this, Mr. Chairman. — (Interjection)— I would consider squandering, and how would the non-squandering spouse approach this problem, Sir. For instance, if there isn't sufficient finances to keep the house going, enough for clothing and so on, and one spouse goes out and buys a boat and motor, which is a movable item, I would consider that, would she no longer have any control, because the Commission recommends that we don't . . . had that not be sharing a vested interest. So how would she approach that problem?

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, I'm going to be easily led. If the parties had an agreement, if I can relate it to that and then I'll answer the question — if the parties had an agreement which said that they were free to acquire their own separate property and there would be no sharing — in other words, if they contracted out of the standard marital regime, there would be nothing that spouse could do about that because if that were the separate property of the other spouse, that would be that. They would have agreed that whatever separate property they acquired, there would be no expectation or right to share. If they had not made that agreement, then there's a provision there for the one spouse, even though not seeking a separation, and my colleagues and I have known instances where people don't want to break up the marriage but one of them needs some financial discipline or control, that spouse could make an application to the Court under another recommendation we have made, for a receiving order. In other words, to become the receiver, if you will, of the assets and property of the squandering spouse and may, under that power, then re-sell the boat and motor saying, "The children need shoes and you're buying a boat and motor. That's nonsense." And the Court, on a proper case, would accord the power to the other spouse or to a third party who would become the receiver.

I don't know how common that is, except to say that my colleagues and I have seen those cases where the spouse who is concerned about the squandering of the other one, doesn't want to break up the marriage and the home, but would just like to have an instrument to bring the other one to his or her senses about spending. I think that in our recommendation there — we've made a recommendation whereby that could be done fairly simply. It depends whether they have an agreement to contract out of the Standard Marital Regime or not what the ramifications would be, and that's I think the best answer I can give Mr. Adam, Mr. Chairman'

MR. CHAIRMAN: Any further questions on the filing of documents? If not, on Page 125 . . . Mr. Sherman.

MR. SHERMAN: Excuse me, Mr. Chairman. I didn't appreciate that we were moving right through Page 124, because I had sub-section (5) marked on my copy of the Commission's Report, too.

Once again we're dealing with the alteration of the 50-50 Standard Marital Regime and the question of whether or not it should be a matter of public record. I would simply like assurances from Mr. Muldoon that what the Commission means in this section is what he says and I have accepted from him that it means in Section 3Cb), that it's not necessarily a specific detailed copy of any agreement but simply a notice.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Mr. Chairman, I could make a similar answer to the one I made to Mr. Cherniack on there.

The Commission is of the view that when spouses contract out of the Standard Marital Regime there ought to be some public notification that they're not under the Standard Marital Regime. How much detail I think would be a matter for the Legislature to decide, but I think that the spouses should have all the latitude to say, "Yes, the full agreement is a matter of public domain," or at the very least though the requirement ought to be that if they've contracted out of a Standard Marital Regime some public notification of that ought to be given.

I don't know that I can explain the Commission's views more than that because I refer again back to the text where we considered that some people might flinch at having all of their agreement part of

the public record. To the extent that the agreement is complex, the notice probably would have to be complex, but there should be provision for them to lay the whole thing out if they wish to.

Our view was that these agreements would become pretty standard and that they might not deal with every asset and all the property the spouses own but they might just say, "We're separate as to property," or "We still adhere to the principle of sharing but it's going to be 75 percent in favour of this spouse and 25 in that spouse." They could have any arrangement they want, but there ought to be a notice for every couple who's not under the Standard Marital Regime that they're not, and that there's some caution to be exercised there.

MR. SHERMAN: Well, Mr. Chairman, there's one other interesting aspect to Section 5 and that is the dissenting recommendation of Commissioner Hanly which occupied some of the committee's attention some days or weeks ago. As I have made notations on my copy of the report the committee rejected that dissenting recommendation of Commissioner Gibson, I mean — I think I said Commissioner Hanly. Is that correct, Mr. Chairman, that we rejected the recommendation of Commissioner Gibson as the Law Reform Commission did itself?

MR. CHAIRMAN: That's according to the notation on my report. If there's no wish to reopen that perhaps we can move on to Page 125.

The committee itself did have some disagreement on Section 10 there which we will be going back to resolve I'm sure. Were there any questions of Mr. Muldoon on Section 10? Mr. Graham.

MR. GRAHAM: Mr. Chairman, I would like to ask Mr. Muldoon in the formula that they use at no time do you ever arrive at a nega tive value, and yet further on you do under the "squandering" aspect of it you can arrive at a negative value in that respect.

MR. MULDOON: Well, Mr. Chairman, an artificially deemed positive value that if assets have been squandered one would take into account their value. So that in the case of squandering there might be an equalizing payment, but not ordinarily without the feature of squandering. The estate of one would not be reduced to a negative value.

MR. GRAHAM: So in that respect then it would all hinge on whether there was squandering involved or not.

MR. MULDOON: That's right.

MR. GRAHAM: Here, I believe, it is the intent or the desire of the committee, and I believe the Law Reform Commission as well, to try and eliminate as much as possible judicial discretion, and yet when you leave the squandering aspect in it you almost insist on judicial discretion in that respect.

MR. MULDOON: Well, squandering, Mr. Chairman, may require a judicial determination in that it has taken place in regard to some assets, that's true. If I may say, the view of the commission was that the squandering provisions here — and I don't know whether we have forecast because we're not clairvoyant — we forecast the nature of the thing accurately, but we thought that the squandering aspect would be rarely invoked in the ordinary course of events. It's there as a kind of a safety measure. Not being clairvoyant, of course, I reiterate, the commission nevertheless thought that it would be a rare thing.

Indeed, you know, Mr. Chairman, after law is enplaced for awhile it itself creates a climate. If it were seen that the "jig would be up" for one to squander we think that would have an effect on people who would be tempted to as well.

MR. CHAIRMAN: Aren't you finished, Mr. Graham?

MR. GRAHAM: No. I want to carry on though on this judicial discretion part. I think that we have tried as much as possible in maintenance and that to try and eliminate judicial discretion, but when it comes to the equal disposition, I think this is the area where there is always going to be differences of opinion on both sides. I shouldn't say "always", there will be cases that will be settled satisfactorily, but I think it would be rather naive on our part to think that in the disposition of post-nuptial assets that there will not be litigation of some type or another. So I just make that as a passing comment that I think we are in a field here which is almost inviting judicial discretion when you get into a complicated formula, et cetera, for disposition,

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I'd like to ask Mr. Muldoon through you' Mr: Chairman, whether the intent of the Law Reform Commission in this provision is the same as the impression that I got from the Attorney-General and the legal counsel when we discussed it earlier — and I don't want to put words into anybody's mouth — but I suggest to you, Mr. Chairman, that the impression that I got from earlier discussions was that what this section means is that where there is a business involved and where only one spouse was involved in that business directly, and where that business is in debt, that the other spouse upon separation has no responsibility for sharing in those debts. Now as I say I don't wish to put words into anybody's mouth, I may have misinterpreted the Attorney-General and legal counsel, but that's the impression I got.

MR. MULDOON: Perhaps I had better try to state what the commission means, Mr. Chairman, if I

may, instead of responding to the question in its terms. The commission means there that all assets acquired after the date of the marriage upon termination of the regime would be equally shareable. The value of them would be equally shareable as between the spouses. Now, if one spouse be operating a business, then — I hope that this is only, and I have been assured by some chartered accountants that this is only an accounting problem — I know that the meaning there is that the equity of that spouse in the business would be the shareable value. For example, during our discussions on this one of the members of the commission described it this way, that his equity, his value in his law partnerhsip would be shareable because it can be valued, because when law partnerships break up or when businesses break up, one can say what's the value accruing to the partner in that business. That value accruing to that married partner in a business would be the shareable asset and it would be the net. If the business has debts against it, if the business is going under because its debts are greater than its assets, if it is not a saleable thing, then there is nothing to share and bad business judgement has seen the ruination of a business, or bad luck. That is not something which for example would be considered a squandering, I should think, unless it were a suspicious sort of thing, an intentional tipping into bankruptcy. But that is what would remain to be shared. Here is a person who is a partner in a business and that person is married. If the business were then sold at that time, what would be the net value to that partner if that partner for example were going out of the partnership? That is the shareable asset, so that you would first deduct the debts of the business and then see what's the net value to that partner. Now that is done all the time, Mr. Chairman, when businesses are sold or partnerships changed and so the accountants we consulted assured us that that's not an insurmountable accounting problem. In fact, it's a very ordinary one.

MR. SHERMAN: But what we are getting at here, Mr. Chairman, is the question of negative value, whether there can be a negative value levied on a spouse's share of an estate. The reverse, in terms of the kinds of directions that we've been pursuing in this committee, dictates that there should be a fair and equal, 50-50 spousal sharing of a business which maintains the livelihoods of those spouses upon separation. Therefore the question naturally arises whether the reverse also should not apply if that business, even though only one spouse was active in it, was used to maintain the livelihoods of the married couple. If for example the person operating it, and it could have been the woman, put that business into debt to keep the family out of debt, which can happen, so that for various reasons it may be easier to borrow through the business than through the family, should not those debts that have been accrued be equally shareable as the profits would be equally shareable?

MR. MULDOON: Mr. Chairman, in the particular instance specified by Mr. Sherman, yes. If one looks at Recommendation No. 10, one says that it should never be a negative value unless that were attained by the existence of debts incurred directly for family maintenance obligations. In many cases that kind of a determination would be made on the accounting. Again the commission thinks that it is rarely that one would ask a court to make that kind of determination although it might. But if you say that this spouse's estate can go to a negative value, then you are left with the position of not merely sharing the actual and positive value of the other spouse's estate equally between them, but you're asking the other spouse to pour his or her share of that estate to fill in the hole for the debts incurred in the business. So that's why the commission recommended that a shareable estate should never come to a negative value unless that negative value is attained by the existence of debts incurred directly for family maintenance obligations.

MR. SHERMAN: The situation, Mr. Chairman, that I suggest to you would be covered in the view of the commission by the proposition as it's put forward here.

MR. MULDOON: Yes. If it were determined or we would think that in many instances it might well be acknowledged that those debts were incurred for family maintenance obligations and therefore they should be shared. But if it's strictly related to the business, the business hasn't prospered because of bad business judgments maybe by the spouse or the spouse's partner in the business, we think that the shareable estate of the other spouse shouldn't be called upon to recoup the debts made by bad judgment or bad luck in the business.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, the wording as I read it is one I think I understand and agree with. The describing of the business and the assurance by an accountant that you could have a net or a zero value to a business because of debts but not a negative value confused me a little; because I read the text as being broader than just a business debt, and when Mr. Sherman described what he thought was the Attorney-General's interpretation I didn't agree with either the interpretation or the description of it because I believe that what was meant was that any debt acquired other than for the purposes of maintaining the family home would not be imposed on the other partner, but would only be used to reduce the value of the assets owned by the partner owing the money.

Now, I understood it to mean this: that if a person owning the business borrows on the business for the business in excess of the assets of the business, therefore the business itself is really bankrupt — but I'm not talking about a limited company, I'm talking about a personal liability — then if that is the total assets of that person and therefore that person is really himself bankrupt, then he does not

pass to the spouse one-half of the liability. In other words, the spouse, out of her inherited wealth, is not required to pay that half; but if that person has that business which is in that kind of a negative position but has another asset, let's say an apartment block or some other kind of investment on the strength of which really his signature was good at the bank — although he did not pledge that asset — then I want to be clear that the accountants surely have not or Mr. Muldoon's interpretation isn't that the value of the business with its liability being negative would not be used to reduce the value of the other asset, namely the apartment block, but indeed would reduce it. Am I right so far?

MR. MULDOON: Yes, because one's taking the total shareablistic . . .

MR. CHERNIACK: The total, right. So that all we're saying is that if there is a debt accumulated in excess of all the assets, which is not traceable to the need to support the family, then that debt remains the debt of that person and is not shared by the spouse but only as a net estate. I believe that is what is meant and I agree with that, but one of the MLA's presently outside of this room did raise a question — first he posed the logic of it. If I share in all the benefits then why shouldn't I share in all the burdens? That's one question? The other was: How can that person then both have to pay off the net debt and have to maintain the spouse? I want Mr. Muldoon's opinion or impression of the recommendation relating back to maintenance to make sure that a person having to pay debts and having to pay maintenance is not put in the impossible position of having to pay more than that person can afford to pay. In other words, that the court making the order as to maintenance will take into account the liabilities that have to be paid for by this negative net asset.

MR. MULDOON: Mr. Chairman, Mr. Cherniack has well expressed the intention of the commission and that's why the commission recommended that in terms of maintenance judicial discretion and guidelines are most important because we thought it important to have the property sharing done in a clinical accountant's way with no discretion, or as little discretion as could be reasonably built into the law. So we say, when it comes to the equal sharing of the value of the assets, that should be done as clinically as possible without judicial discretion. When it comes to maintenance, that's an area where judicial discretion is, in our view, needed.

MR. CHAIRMAN: Thank you. Mr. Johnston.

MR. F. JOHNSTON: Mr. Muldoon may have partially answered and I'm just not following this, that the shareable estate of the spouse should never be reduced despite the extent of debts and liabilities.

We've been talking about businesses that are in possibly bad shape, or other businesses. What about an unlimited company, as Mr. Cherniack says, where there's a business where a building is built because it is required for the betterment of that business? I'm not talking about an unsuccessful business, I'm talking about a successful business. You know, the payments at the bank are being made, the profit is there every year and it's a successful business. Now if there's a sharing on that basis, or if there's a sharing of these assets, do you mean to say that if there's a 50—50 split on a profitable business that's doing well, that the one spouse will take over that mortgage on that building?

MR. MULDOON: No.

MR. F. JOHNSTON: Because it certainly should be 50—50 in that case.

MR. MULDOON: Yes.

MR. F. JOHNSTON: I mean, there's lots of businesses that borrow money that are making their payments and are successful' net'

MR. MULDOON: Yes. It's about net values.

MR. F. JOHNSTON: Net values, okay.

MR. MULDOON: The other spouse may be the least skilled person in the world to have anything to do with his or her spouse's business. We're suggesting that one would value the married business person's share of the business as if the business were going to be wound up at that point, but of course it wouldn't be, it would be an ongoing business, it would be continuing to generate its profits and meeting its costs. But an accountant could say at that point, if this business were wound up at this point what's your net equity in the business, because the marriage is being wound up at this point that becomes the shareable asset.

MR. F. JOHNSTON: One more thing I'd like to go back to, when you talk about buying the suit or the jacket for the real estate salesman . . .

MR. MULDOON: One is driven to some example.

MR. F. JOHNSTON: Well, looking at squandering or the decisions being made regarding whether money should have been spent or shouldn't, you know we get into the area there, Mr. Chairman to Mr. Muldoon, of a company buying those things to make salesmen look more respectable for the benefit of the business; and to say that the company owns them is really wrong because after the guys wore them for awhile they're worth nothing.

Then we get into the area of remodelling for the benefit of the business, these decisions. I just want to make myself satisfied that, you know, we're not entering into an area where we just can't possibly control it.

MR. MULDOON: Mr. Chairman, I think that we're not and certainly the commission doesn't intend

to. Some businesses, for example, to provide a nice neat uniform image of their enterprise provide their sales persons with standard blazers with company crests, I suppose, and those are business decisions.

When we were talking about squandering we were talking about transactions which excite suspicion of impropriety regarding the marital partnership, not the business partnership.

MR. CHERNIACK: Well, when we get to the mink coat, I wouldn't even presume to tell my wife what to do with her coat.

MR. MULDOON: Quite so.

MR. CHERNIACK: I wouldn't even presume to tell her what to do with something I gave her.

MR. MULDOON: No. Mr. Chairman, I think Mr. Cherniack's example of the mink had to do not with a gift to the spouse but a gift to an employee.

MR. CHERNIACK: The record will show that you raised the mink coat first.

MR. MULDOON: Mr. Cherniack then, Mr. Chairman, expanded upon the mink coat.

A MEMBER: Don't tell your wife about that.

MR. CHERNIACK: Well, the discussion seemed to be getting into an area where we just wouldn't have much control over it and we shouldn't try.

MR. MULDOON: That's not the intention of the commission, Mr. Chairman. The commission's intentions are that business decisions are made by the people involved in the business. If the business prospers then there'll be a shareable asset there. If it doesn't well there won't be and that's just the way life is.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Yes, Mr. Chairman, Mr. Muldoon, this is one section that makes me uneasy and the question was raised by Mr. Cherniack and Mr. Johnston: where the one partner is the active business partner and the assets will be shareable if there is a surplus at the breaking up of the marriage, but a negative value if it's the other way round. This certainly gives me some unease and some of the other members of caucus as it has been raised. For instance, the business partner makes an investment and he makes $25,000 which, if there was a breakdown, would be shareable between spouses. Then later on he makes another investment and loses $100,000 and the business folds up, and there is a breakdown in the marriage. There's a maintenance order there that he may have to pay to the other spouse $500, whatever it is, he or she, and he's left with a big debt to pay in addition to that. I think Mr. Cherniack really said it very well, perhaps better than I could say it, but it seems to be unjust. You get married for better or for worse, and it seems to me that in the maintenance order of $500 — we'll say to use a figure — that maybe it's $500 but $50 goes towards liquidating that debt equally with the other partner, and then the maintenance order would only be $450.00.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Well, Mr. Chairman, my colleagues and I saw some need, of course, for a more flexible determination of maintenance liability because we had come to the conclusion that assets should be clinically shareable and the reason, I think, that there is need for flexibility in maintenance comes from an old saw, that "You can't get blood from a stone."

The courts tend to weigh the competing values — they inevitably weigh the competing values, but if a person is unable to make payments, then that person is just unable. The courts, if there is any means, of course will weigh the value of supporting the other spouse and the children, and they will do their best and I think that's the need for judicial discretion. They will do their best to see that the other spouse and the children are not thrown on the State if they can possibly help it, that the person responsible for their maintenance indeed pays it. But ultimately you can't get blood from a stone and if the spouse who would be the maintenance payer just hasn't the means — if his debts are so extreme that there is no hope of getting anything from him, well then of course the Court isn't going to make an order because courts are not inclined to make orders which cannot be enforced.

I don't know that I can explain our position more than that, except to say that that's where the discretion belongs, we think, in the question of maintenance, not in the question of division or sharing of the value of assets.

MR. SPEAKER: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I apologize, I was out of the room for a few minutes, but was any mention made of the five-year time limit on the judgement order? — (Interjection) — Then I would like to ask the Law Reform Commission, when they placed the five-year limit in there, was that to be consistent with the succession duties, or was it an arbitrary figure that they chose?

MR. CHAIRMAN: We haven't reached that section yet, Mr. Graham, that's why it hasn't come up.

MR. GRAHAM: I'm sorry, I'll wait. I thought we were dealing with Section 11.

MR. CHAIRMAN: No, Section 10. Mr. Cherniack.

MR. CHERNIACK: I wonder, Mr. Chairman, if I could have the indulgence just to try to get Mr. Muldoon's concurrence with what I see as the problem and the answer to Mr. Adam's question. And now I speak with a little bit of experience, that a person may be called upon by a court to pay $500.00 a

month to his wife and children and may then find that his creditors are breathing down his back and saying, "You've got to pay us all kinds of money." The law generally, the law specifically is that if a creditor is not satisfied with a proposal made by a debtor as to manner of payment, the creditor can then go by way of judgement or by way of bankruptcy. The experience I am aware of is that when the creditor and the debtor cannot agree on the manner of repayment, then there is a bankruptcy and a receiving order. In that order, the court then adjudicates as to how much shall be paid to the creditor and how much shall be paid to the family support, taking all matters into consideration and never then is that person in the position of being expected to pay a dollar more than he receives. So that the "getting blood out of the stone", which is an apt analogy, becomes more easily dealt with by the fact that the court redistributes the income of that person in such a way as to protect the family and the creditors, and the court, I believe, considers that it has an equal responsibility not to favour one against the other. Therefore, a family will receive considerably less than it may have been accustomed to because of the fact that the bankrupt is required to comply with an order of the court, which may cut a debt in half or provide for payments over ten years or whatever the court does. So that I do not fear the burden of the bankrupt husband who is required to make payments and at the same time keep for himself the debt which created a negative estate.

Do I describe that thinking adequately, Mr. Muldoon? I'm sorry, I know I use it as a technique.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON. Yes, Mr. Chairman, Mr. Cherniack describes it accurately and especially in view of the federal bankruptcy laws which would apply in that situation. The Court has to make a distribution of the available income, if you will, of the debtor, to satisfy the claims and each one has to accept some sort of modification of their expectations. In many instances, of course, it's easier for the commercial creditor because that is merely a postponement and ultimately that person may get ninety cents on the dollar, or sixty cents on the dollar —(Interjection)— or twenty cents. It does work some hardship, of course, on the spouse and children who are maintained because the maintenance is for food and clothing and shelter. But generally the court, exercising its jurisdiction under the federal bankruptcy laws, does make that kind of a distribution and I concur in what Mr. Cherniack has said.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, just to carry it a little further, and this is more for clarification and information which I am not aware of — is it not a customary practice under situations like that, to apply for a maintenance variance order? And how often can a person apply for a maintenance variance order, can it be several times in one year, or at any time?

MR. MULDOON: Mr. Chairman, every time that the applicant can demonstrate a change in circumstances, that founds an application to vary the maintenance order. So if the applicant says, "Last month my disposable income was this, this month it isn't" — Now, I must say the courts generally are pretty vigilant on behalf of the spouse and children who are being maintained, to be sure that it isn't an artifice through which the circumstances are changed. But that's the law, that when there is a change in circumstances, there may be an application for variance or variation of the maintenance.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: So in effect then, there is a sort of a safeguard there in the use of a variance order which would assist in some cases?

MR. MULDOON: Yes, that's true, Mr. Chairman.

MR. CHAIRMAN: Any further questions on 10? Mr. Adam.

MR. ADAM: Can I ask just one more question for clarification? Perhaps you may or may not, but I think you probably do know — in the situation that we have been discussing, if the spouse had post-nuptial assets, would the judge, in your opinion, take that into consideration when he is making his maintenance order? —(Interjection)— You know that's not part of the marital regime, the post-nuptial assets of one spouse and the other fellow goes bankrupt, the husband, and he's got a negative thing to look after, and maintenance.

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: I'm not sure if Mr. Adam means post-nuptial deficits rather than assets. —(Interjection)—

MR. ADAM: I'm talking about pre-nuptial, not post — pre-nuptial.

MR. MULDOON: We have made a recommendation regarding the relationship of debts incurred before the marriage and what they do to the shareable estate and that's set out in the formula there. that's . . .

MR. ADAM: My question was — I think you understood the question and I think perhaps you gave me the answer but maybe I didn't understand the answer. My question was, in the event of a breakdown and there was a negative asset there, for whatever reason, but one of the spouses had pre-nuptial assets, and we're penalizing the other one spouse, the working spouse, with trying to liquidate his debts and his creditors, and the one spouse walks away with some maintenance and all

the pre-nuptial assets. This is what I am trying to get at.

MR. MULDOON: No, Mr. Chairman, no spouse should ever walk away under this regime with any value of the other's pre-nuptial assets, never. The Commission looked at marital regimes around the world and discovered that this is a common feature. It's to avoid the adventurer, the gold-digger who married someone just because he or she is rich and expects to share in that wealth and that's why we have always said that the watershed is the day of the celebration of the marriage. So that here is a person with an estate — not all of it is a shareable estate and that person has some debts. In looking at that person's own new life, one will say, well, his estate is one estate and his debts are offset by his assets. But in looking at his shareable estate, one says the watershed is the day they got married and it may be that he may have assets acquired and still held from before marriage, to pay off his debts, but the estates for sharing are the estates accumulated since the date of the marriage, and that's the recommendation. So that spouse may be in good shape to pay off those debts because he has pre-marital property, but his post-nuptial property may be reduced to zero because of it.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, I don't want to prolong this, but I think that there are Members of the Legislature who are going to have difficulty with this proposition and I apologize to Mr. Muldoon for keeping him on this point, but I think there is certainly a disposition to try to solve this satisfactorily to all and I think that a number of Members of the Legislature are going to have difficulty with it. I don't think that Mr. Cherniack's metaphorical reference to "blood from a stone" answers the question. I'm not concerned about the situation in which the reasoning that can be applied to "blood from a stone" would be applied here because I think that those problems, as have been described by the Chairman, would take care of themselves in the court. But I think there is going to be a great deal of difficulty determining what are debts incurred directly for family maintenance obligations, and what are not. This is an area that I think we'll all have difficulty with and I think that the basic question of whether business profits are shareable and therefore business debts should be shareable still remains unresolved.

Quite apart from the shareable estates, quite apart from the maintenance orders, leaving the maintenance order altogether out of it, if a business makes $100,000.00 and the couple split up, it's $50,000.00 each. If the business loses $100,000.00 and the couple split up, one person is saddled with that $100,000.00 debt. That is what is troubling people. That's what Mr. Adam is trying to get at, that's what many of us, perhaps obliquely, are trying to get at and I don't think that the application of the "blood from the stone" argument bears on this at all. That only comes into play when you are coming down to determining whether any maintenance can be paid or not and as you have said, if there is nothing there, nothing can be paid and that will work a hardship on the dependents, to be sure. But going back a step before you reach that point, many of us are not satisfied yet that this is a fair fifty-fifty partnership that we are setting up here if it only cuts one way.

MR. CHAIRMAN: Mr. Sherman, you have identified a problem that the Committee has within itself. I don't feel that Mr. Muldoon should be dragged into the Committee's arguments. If you have any questions on this of the Commission, ask them, but matters of dispute should be ironed out by the Committee itself.

MR. SHERMAN: That's fine, Mr. Chairman.

MR. CHAIRMAN: Any other questions on 10? If not, Section 11, Mr. Graham, my notes indicate that the Committee agreed to delete the five-year provision. —(Interjection)— The next questionable section was on Page 128, Section 21, going back to squandering again. Mr. Graham.

MR. GRAHAM: Mr. Chairman, I would like to ask the Chairman of the Commission, what was the rationale for establishing a six-year period prior to the application for termination of the SMR?

MR. CHAIRMAN: Mr. Muldoon.

MR. MULDOON: Well, Mr. Chairman, the Commission was of course considering some period for reaching back and disgorging and, as you would imagine, in a group of seven people, the suggestions varied widely. The six-year rationale was simply that that's the limitation period already known by most people for the recovery of a debt. That seems to be part of the landscape; many people we have met who are not lawyers know that you can't sue for a debt after six years. So that's why, after all our deliberation, we hit upon the six years because we had to suggest arbitrarily a time period and that seems to be well-known by the populace.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Would you consider putting in a time frame there that would be somewhat similar to that that exists in the Succession Duties Act, which I believe is a three-year time frame?

MR. MULDOON: Well, I have to answer on behalf of the Commission, no' that that's our considered recommendation and again, on the same rationale, that most people seem to know that you have six years to sue for a debt and if you don't do it in that time, you're through. I don't think, Mr. Chairman, may I just clarify this — I don't think that I can come before you with any rectitude and negotiate away my colleague's recommendations. I think that the consideration of some different period is for the Assembly, not for the Commission.

MR. CHAIRMAN: If there are no further questions on that item, the next section I have marked is 23(d) on the next page, 129. Do you have any questions of Mr. Muldoon on that point? Mr. Sherman.

MR. SHERMAN: No, I just was asking, Mr. Chairman, if we could just have a minute to go over that again.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, others may have other points but I think that from my point of view the reason I had marked 23(d) for re-examination was because we had marked 21 for re-examination and we have the Chairman's answer on 21 so presumably that would apply on 23(d). It has to do with the six-year period.

MR. CHAIRMAN: May we move on? The next section I had marked was 27 and as I recall our concern there was the six-month opting out provision, which I believe Mr. Muldoon dealt with the last time he was before the Committee. Mr. Muldoon.

MR. MULDOON: Yes, Mr. Chairman, I think that my colleague, Mrs. Bowman, and I have probably exhaustively explained the Commission's rationale there and I think that if we have not persuaded you we probably cannot.

A MEMBER: You have.

MR. MULDOON: Well, whatever we have done, we have done.

MR. CHAIRMAN: It is a matter that the Committee is still to resolve. That brings us then to page 134 which was where we had reached at the time we first asked Mr. Muldoon to come back. Mr. Adam.

MR. ADAM: Did we deal with — there seemed to be some concern on number 31(a) and I was just wondering whether we dealt with that? I don't know exactly what the problem was, but I marked it down here for review.

MR. CHAIRMAN: It is the same provision as 27 I am informed. The same principle involved. Mr. Jenkins.

MR. JENKINS: No, I was just going to say that was the same one as before because it was the independent legal advice that was the issue that we wanted explanation on and we received that already so this is the portion in (a) that we were holding it on.

MR. CHAIRMAN: We have then reached Section 32 and the time is 12:30. What is your will and pleasure? Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think that it might be possible to deal with Section 32 but Sections 33 on are entirely dependent on the type of legislation that is going to be brought forward and I don't think we could deal with those Sections at the present time until we see what our proposals are. If all of those are changes in other Acts — and I don't think we can effectively deal with them until we see what the legislation will entail. But I think that the Attorney-General has to be mindful of the recommendations here and I would suggest that perhaps it is now time for us to consider the drafting of a report from this Committee. I don't know what the feeling of the rest of the Committee is. I think that we have effectively exhausted pretty well all of the discussion. There are areas where we have no problems whatsoever, there are areas where we do have problems. Until we see a draft of a report it is pretty difficult to deal any further with them at this present time.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Chairman, dealing firstly with Mr. Graham's point about the balance of the sections, I see the point he makes and I wonder if in that connection it would be a fair suggestion to make that these changes that are suggested and which I believe do follow whatever is done before, should be part of a omnibus bill, that is that the bill that is brought in by the government dealing with the whole report should also deal with these changes so that they will all be lumped into one consideration rather than have the possibility of one Act failing and another one suddenly passing and changing the law without the compensations that were suggested. So that is the suggestion I wanted to make in relation to the balance of the Sections in line with what I believe was Mr. Graham's suggestion, that you can't really discuss it without knowing what is going to precede it. I am just throwing out that as a suggestion. If it were one omnibus bill then it would all be discussed in one context and either passed or not passed.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, that may well be, but I want to point out too that if in the event that some changes are neglected or unavoidably missed, then I think it would be incumbent to point out in the legislation which bill would take precedence.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: That is why I am suggesting an omnibus bill makes it one bill and therefore it would be the existing law unless it is changed by one other law we pass, the whole law of which will govern everything in the report including changes in The Dower Act, The Devolution of Estates Act, etc. In other words, if for any reason the Legislature doesn't pass all these recommended changes, then there would not be a situation where any of these Acts might have passed and the major one not have passed. That is why I say omnibus as being one bill rather than individual bills like the bill to amend The Dower Act and the bill to amend The Devolution of Estates Act, etc. etc./

MR. GRAHAM: At the same time the danger I want to point out is, that if through some unavoidable mistake we have omitted a change in one bill, I wouldn't wantto see all the work done in this negated because we had effectively missed a statute change in some bill that affected it that we didn't realize at the time.

MR. CHERNIACK: Oh, I see what you mean. You mean a sort of an overall clause at the end, what I think they call the savings clause, that would say that where there is any conflict between this statute and another this will prevail. I think probably that's .....

MR. CHAIRMAN: Order please. On a procedural matter, does the Committee wish to have one more meeting to go over what we have been talking about or should we ask the Attorney-General to bring in a report for the Committee and discuss it at that time? The Clerk advises me that next Tuesday morning, the 8th, is available for our Committee. What is your will and pleasure? Mr. Pawley.

MR. PAWLEY: I am just wondering whether we are better to pin it down for next Tuesday or leave it at the call of the Chair, because we will have to prepare a report. As long as we can complete it and have it available — if that is the Committee's wish — I gather it is — as long as we can have it available for next Tuesday, I think we can easily enough. I think in the report we don't wantto go into the mass of detail that is here, we want just some general statements of position in connection with the . . . as to speak of this Law Reform Commission report. But if there is a great deal of detail in the report then we would need more than the one week, I think, to put it together.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I think it would only be fair to members of the Committee here, that if we are going to have a report I think it would only be fair that we see a draft of that probably three or four days before we have our meeting.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: I have read Hansard except for last week so I have been able to review what the discussion was, and I did notice that there are some instances, and very few, I'm really pleased to note that there were very few where there was some disagreement amongst members as to certain provisions.

I wanted to suggest that the report could in a general way approve of the principles, noting either in particular or in general that there was not complete agreement within the Committee on certain aspects. Frankly I don't think it is of any value to record votes of 7 to 5 or 9 to 2, but that it could be in that way so that the Attorney-General could get the legislation together, and when that comes in then surely we are going to have representations, we are going to have probably more briefs presented than we have heard up to now. Frankly, I would rather leave my own option open. I would like to, if I were the only member of a committee, I would say I believe the following, but I wouldn't like to preclude the opportunity to change my mind once we again go through all the debate and hearing. So frankly I don't see any particular value in this Committee going into great detail but to generally approve and then to say there were certain points, which as I say could be enumerated or left down, where there was not agreement. Then get the work in so the Legislative Counsel doesn't feel under too much pressure to get the work done and then have it go through the legislative process. That is my suggestion. I think the Attorney-General has already

MR. GRAHAM: been apprised of that — the suggestion has already been made to him.

MR. CHERNIACK: I'm sorry, I didn't see that here.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, Mr. Chairman, I would agree with that kind of a report, that kind of formulation, I would just want to have an assurance that the Attorney-General was satisfied in his own mind that he is fully apprised of the points on which the Committee has agreed and the points on which there is some disagreement, and the areas in which we have produced suggestions of our own. I am not suggesting that he would have missed any of those points during these hearings other than through inadvertence. It might be helpful to the Attorney-General to have liaison with the members of the Committee, whether it be another Committee meeting or some other form of communication, to just reassure him and ourselves that all points are covered. There were two or three suggestions that were made that I think the Committee was pretty much in agreement with on various sections of the Commission report and I would just like to have the Attorney-General assured and have ourselves assured that those would be in the report that he is bringing forward. If he feels that he has got all that material in front of him and he can now move the formulation of the report along the lines Mr. Cherniack has suggested, that is fine.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, there is a bit of a problem. If members are available and we can bring in the report sooner than next Tuesday, I think it would be advisable in case the — I have a feeling that if we wait until next Tuesday when the report comes in we may want to make some changes at that time and we may be calling another meeting after that again. —(Interjection)— Well certainly, that is fine, but I am wondering if there is any possibility that we could get this report out by Thursday.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: First could I suggest that we will put together a report probably starting out with indicating there is general concurrence with the recommendations and then identifying those areas where there is non-concurrence, and that the non-concurrence is a total Committee viewpoint or a majority, without getting into numbers games, but not committing the entire Committee to every single area where there is non-concurrence with the general Law Reform Commission report. So if we could prepare something and I gather that from the tone of the remarks, something like what Committee members would like.

Secondly, I am just wondering if I could liaison with somebody representative of the Opposition Party represented on the Committee with this report before we get into seeking of an overall view of the Committee Report, and of course, I would do the same with my own members. If we could do that.

Then the third thing to Pete Adam, I am a little worried about the Committee myself before the end of the week. First it has to be prepared and I know that my own calendar is in pretty bad shape, I suppose we can cancel out things if Committee did feel it was that urgent that we get back here this week, but I will have terrible difficulty doing so.

MR. J. FRANK JOHNSTON: Pete, you are asking for a draft before the meeting the same as Harry is, to look at.

MR. ADAM: My only problem was that I was hoping we could get it back this week in case we had to call another meeting with that draft, and then we would be going two weeks. If it was possible to have it on Thursday, well then that would save a week.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I don't see the need for that much haste myself, Mr. Chairman. I would rather see the report drafted properly than rushed through between now and Thursday and come in and have to go through a half a dozen or a dozen revisions.

MR. CHAIRMAN: Can we agree then to meet again one week from today, March 8th, to consider the Committee's report.

MR. CHERNIACK: If the Attorney-General feels he'll have it, if he won't what is the sense of meeting.

MR. GRAHAM: Leave it to the discretion of the Attorney-General.

MR. CHERNIACK: Maybe we should leave that Tuesday open in our own diaries, but not be mad at him if he is not ready, because as Mr. Sherman said, "Well, what's the sense of getting a rough report when a few more days might give us a better...

MR. CHAIRMAN: I would caution members though that the Public Utilities Committee will begin its deliberations the following Tuesday, March 15th, which is likely to take up a lot of Committee time after that. Mr. Muldoon.

MR. MULDOON: Mr. Chairman, if I could switch my role from that of expositor to petitioner, and if I be out of order I am sure you will tell me, Mr. Chairman, may I make one submission to the Committee before it rises? If nothing else were done at this session of the Legislature, and I am sanguine that more will be, but if nothing else were done, I am sure that my colleagues and I would urge upon you consideration of the recommended amendments to The Dower Act, The Devolution of Estates Act and The Wills Act. Those would be progressive reforms if nothing else were done. They would be not even half a loaf, perhaps only a crumb, but they would be something progressive at least. I would suggest to you that they could stand even if nothing else were enacted in this report, at least as a first stage.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: . . . of Committee members, because those are areas that we haven't discussed in Committee and in the report that we put together. Do you wish to include reference to The Dower Act, The Devolution of Estates Act, and The Testator Family Maintenance Act, or should we just exclude that from the report and leave it to the legislation which will follow later, because we haven't discussed, if I recall, those three Acts? Now, do they form part of the report which we put together for our next meeting, or would we be better just to exclude those and deal with them by way of legislation later? I can make some suggestions on those Acts.

A MEMBER: Until we see what the report says, I can't comment.

MR. PAWLEY: But do you want the report to enter into those areas that we haven't discussed yet?

A MEMBER: I don't think it should because we haven't really discussed them.

MR. CHAIRMAN: Mr. Cherniack.

MR. CHERNIACK: Mr. Muldoon has forced me to reconsider what I have said. Maybe I was wrong and maybe really all that has been proposed in connection with those Acts is to declare a fifty-fifty rather than a one-third, two-thirds. —(Interjection)— If really that's all it is, then I for one would say, "Go ahead, do it." That's my own reaction. I think he's being overly pessimistic, but assuming he's right, then if all it means is fifty-fifty instead of one-third, two-thirds, then I for one would recommend . . .

MR. PAWLEY: I have a little difficulty and I don't want to reopen the discussions again but in The Devolution of Estates Act, my inclination would have been to suggest to Committee that we try to go

for a system of a higher limit than the existing $10,000 limit, to say $50,000 or $100,000, with that in excess of that being divided up according to some relationship, rather than a one-third, half basis. Now, we really haven't talked about that in Committee, have we?

A MEMBER: We may need a Committee meeting just to deal with that.

MR. CHAIRMAN: Perhaps the Attorney-General could put those in his report and the Committee could delete them if it wished. Next Tuesday morning, ten o'clock. Can I take it from the Committee's remarks that they do not wish the attendance of the Chairman of the Law Reform Commission at that meeting? That being so, thank you for your attendance this morning again, Mr. Muldoon.