Legislative Assembly of Manitoba

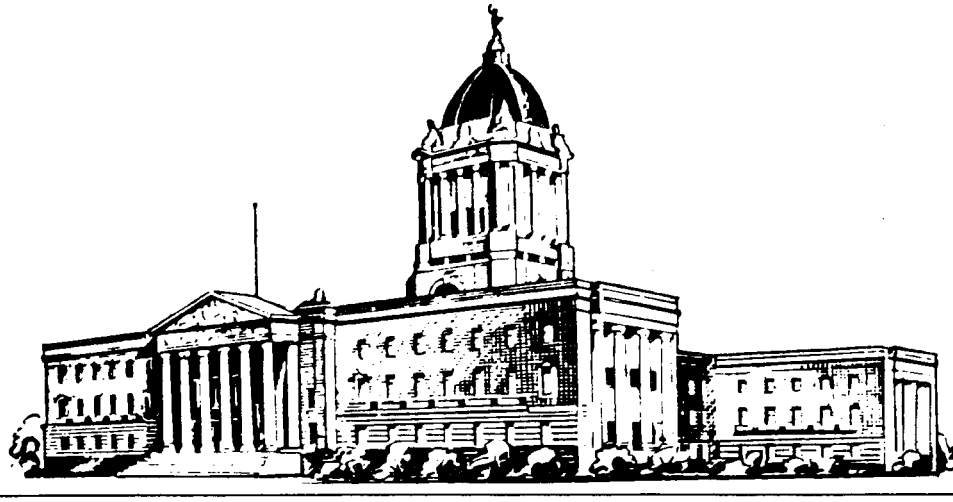
HEARING OF THE STANDING COMMITTEE

ON

STATUTORY REGULATIONS AND ORDERS

Chairman

Mr. D. James Walding
Constituency of St. Vital



TUESDAY, February 15, 1977. 10:00 a.m.

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TIME: 10 a.m.

CHAIRMAN: **MR. D. JAMES WALDING**

MR. CHAIRMAN: Order please. We might have a quorum, gentlemen. The Committee will come to order. You will recall at the last meeting Mr. Silver undertook to look into a few questions that the Committee had, in particular having to do with *The Dower Act* and the definition of "homestead". I understand that Mr. Tallin is with us this morning and will give us the benefit of his work. Mr. Tallin.

MR. TALLIN: I understand one of the questions you are wondering about is the description of "homestead" in *The Dower Act*. I am not sure exactly when *The Dower Act* was first enacted but certainly as far back as 1918 the description of "homestead" when it dealt with farm property was 320 acres. I can only assume that that had something to do with the homesteading rights that were available at that time under *The Dominion Lands Act*, that that was the amount that a homesteader could acquire by clearing and putting land under cultivation. Again, I am not sure whether or not the provisions relating to the determination of the 320 acres as being within the same section or across the road from the property in which the dwelling house is situated had anything to do with the homesteading regulations but those provisions were enacted in 1926 which was at least eight years after when I think *The Dower Act* was first put into its present form, or approximately its present form. In 1968, when this was being considered by a committee of The Bar Association, they decided not to change the definition in any way at all. There was some discussion about the fact that it was peculiar that a spouse could get a dower interest in the business assets of a farmer but not in the business assets of a business man in any other type of business, but they decided not to change that because they thought it was a matter of government policy. They were really more concerned with the procedural details of the Act rather than with the policy decision as to how much the homestead rights, you know, under *The Dower Act* Now are there any other questions that I might should affect. help you on?

MR. GRAHAM: Well, Mr. Chairman, is it not true that when - and I think I should go back a little before 1918, back to 1881, I think, in the original surveys - that the homestead at that time was 160 acres, and there were certain conditions that the homesteader had to live up to and after a three year period he was then entitled to another 160 acres which then became the homestead and that other 160 acres need not be an adjoining quarter at all, it was whatever was available at that particular time. I think this is where the original aspect of the homestead involving more than one-quarter section of land originated from.

MR. TALLIN: Yes, that is what I said. I think it developed from *The Dominion Lands Act* homestead provisions, the 320 acre provision. The limitation about being in the same section didn't come into *The Dower Act* until 1926 and I don't know whether that had anything to do with the change in the homestead regulations at approximately that time or not, but it certainly diminished the rights of the person relying on the dower interest by not being just a straight 320 acres.

MR. GRAHAM: Mr. Chairman, if the definition that exists or the interpretation that is given by legal counsel, and we know this is the case in many cases, where the one-quarter section with the buildings is the only quarter section in that section of land, the rest of the land being on another section. . .

MR. TALLIN: Not across the road.

MR. GRAHAM: Does the dower then only include 160 acres?

MR. TALLIN: Yes, as long as the other 160 acres is not within the same section and is not across a road from the 160 on which the dwelling is situated.

MR. GRAHAM: Then the dower is only 160 acres?

MR. TALLIN: Yes. Or even if it happened to be a smaller parcel, if it happened to be a 40-acre field on which the dwelling house is situated and two miles away there was another 300 acres, the dower interest would apply only to the 40 acres on which the dwelling house was situated.

MR. GRAHAM: But if it is across the road in an adjoining section of land then it is still . . .

MR. TALLIN: Then you can include the additional acreage, yes.

MR. PAWLEY: I was wondering, Mr. Tallin, if there have been any cases, to your knowledge, in which there has been any actions because of the difficulty or the failure to properly identify the second 160 acres at the time of sale of farm lands, whether these provisions have created uncertainty or any confusion later which developed into proceedings.

MR. TALLIN: I am afraid I don't know, but I wouldn't be at all surprised if there were some cases.

MR. PAWLEY: I don't want to place you in a difficult position but from your own observations of this section, do you feel that there are some improvements or clarification that might be called for that would minimize the possibility of error or confusion?

MR. TALLIN: That would depend upon the policy that was wished, I think, so far as this expresses a policy of 160 acres plus a further 160 acres if it is in the same section or across the road in an adjoining section. It clearly expresses that policy and if there was to be a policy change, then, of course, there might be an easier way of expressing it than this. As I mentioned, prior to 1926 the definition in ii stopped after 320 acres so it meant any 320 acres within the province.

MR. PAWLEY: So if we are dealing with only the 160 acres and there isn't anything in the same section that belongs to the spouse, nothing across the road, that some farm lands may be two, three miles away, then none of that land two or three miles away would be part of the homestead, the second 160 acres would only be part of the homestead if it was in the same section of land or across the road from the home buildings?

MR. TALLIN: Yes.

MR. PAWLEY: I have been wondering if there is possibility in law practices where this provision isn't strictly followed through, and a spouse consents to the sale of the home quarter section, separate consent to that 160 acres, but neglect completely insofar as any reference to including any other 160 acres as part of the homestead, whether that could have given rise to any claims for damages subsequent by a spouse in a marital breakdown. I would think it would have to be something that one would have to be very very cautious to ensure that there wasn't any possibility of that occurring, yet I have an uneasy feeling that this probably does happen from time to time, where the second 160 acres is not designated and there is no dower consent in connection therewith when it's processed through the Land Titles Office.

MR. TALLIN: I would think so but in that case I would suspect that the Land Titles officials would rely on the affidavit of the transferor that the property being transferred is not a homestead and that would be a problem for him to explain why he has sworn that something which was a homestead was not a homestead and I would think in most cases it would be because he didn't have sufficient advice as to what should have been included in the homestead.

MR. PAWLEY: So then what might happen in that case, the Land Titles would be all right but an angry spouse might very well sue the transferor for false affidavit.

MR. TALLIN: Yes.

MR. GRAHAM: Mr. Chairman, if we are worried about retroactivity here and a possibility of maybe some haziness in this area in previous transactions, would not the statute of limitations prevent or effectively prohibit the reopening of cases that have already been settled.

MR. TALLIN: I think this would be a question of an interest in land and the Statute of Limitations, I think, expresses 20 years for actions . . .

MR. GRAHAM: Twenty years?

MR. TALLIN: Yes.

MR. PAWLEY: Twenty years involving land?

MR. TALLIN: Title to land, I think, yes.

MR. PAWLEY: We are getting into other fields but that is a very interesting point when all other limitations are much less in time.

MR. GRAHAM: Well, Mr. Chairman, it seems to me that we are at a crossroads here where in one respect we have been inclined to eliminate joint interest in business ventures, but we do have a desire to have immediate vesting in the marital home. Now I think we have to make a decision on whether we consider the farming operation as a business venture — the merits of leaving it as a business venture as opposed to involving the marital home in that respect. And I may point out here to the Committee, that the present practice of this government when it comes to the leasing of farm lands to farmers, where they are in the habit of taking the actual homestead or the two or three acres of the farmyard, the practice at the present time is taking that out of the farming operation as such and registering it under separate title, so I think we have to make sure that whatever we do here bears a relationship to existing practices, to the desires that we are going to adopt with regard to business and also our desires with regard to the marital home. Now it may be that this Committee may eventually decide that the marital home shall just include the farmyard as is the present practice with the leasing program that is being carried on by the Department of Agriculture at the present time. I think we have to look at all aspects and I would think that any decision we make should not be a hasty decision but involve fairly detailed analysis.

MR. TALLIN: Might I correct myself, it is a ten-year limitation period on land, sorry.

MR. CHAIRMAN: Is there any further discussion on this matter? Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I don't know whether you wish to debate the policy pertaining to the homestead now or subsequent to now because I want to just remark pertaining to the comments by Mr. Graham but I don't want to lead us into an area that you are not ready to entertain at this time.

MR. GRAHAM: Mr. Chairman, whether we go into the actual discussion or not, I think any remarks at this time would be beneficial if we get some indications. .

MR. PAWLEY: What worries me, Mr. Chairman, about any change at this time in the size of the holdings of the marital property, farmwise, would be the fact that I guess for 60 years, *The Dower Act* has in fact provided for this provision and to that extent, I would be very very concerned about any reduction in the size of the homestead for purposes as defined under *The Dower Act*. I think that it would be of considerable reduction insofar as rights are concerned which have been enjoyed for many years. So all I would say is that I would urge caution before we would change that provision.

MR. CHAIRMAN: Was there any other matters before the Committee that we needed Mr. Tallin's help with? If not, thank you, Mr. Tallin.

There were several other questions raised at the last meeting that Mr. Silver was going to look into and maybe bring us some answers on. Mr. Silver.

MR. SILVER: On the question that Mr. Sherman posed at the last meeting, that is where a spouse brings in X number of dollars into the marriage and during the course of the marriage the money is somehow used up or disappears, there is no evidence to indicate specifically what the money was used for and whether there were any conditions attached to its use, it is just used up, disappeared and nobody knows precisely for what purposes, under what conditions — well in a situation of that kind the intention of the Law Reform Commission in respect to the recommendation relating to that is that that money is deemed to belong to both spouses, that no special account would be taken of it, and the spouse that brought it in would not get any specific credit for it. So it all hinges on evidence. However, if there is evidence showing that the spouse who brought that money in intended to retain his or her right to it, then at the time of the SMR, of the division under the SMR, that spouse would get credit

for that amount of money. That is, to illustrate: If the spouse who brought in the money said to the other spouse, *"I've got this $50,000 which my grandfather left me, now we have this mortgage on the house on which we're paying 12 percent interest, we have this $50,000 mortgage, now I am willing to use this money to pay off the mortgage, but I want it understood that if we ever break up or for some other reason we decide to divide things up under the SMR, then it will be understood at that time that I put in this $50,000 and that I am to get credit for it."* And maybe they even write it down, but whether they write it down or not, when the time comes, if that evidence is available then the spouse would be deemed to have reserved his or her rights to that $50,000 and would get credit for it.

MR. CHAIRMAN: Mr. Jenkins and Mr. Sherman.

MR. JENKINS: Mr. Chairman, just on that last point that Mr. Silver raised. He said there might be something written down, there might not be. Now if it comes to a marriage breakdown, definitely I would suggest, that if one spouse had $50,000, and even if there wasn't an agreement, he or she is going to swear up and down that there is and you're going to have a legal entanglement. I really think for that to work there has to be something written down, otherthere is evidence to the contrary, and that's the kind of evidence that we're talking about. Why the recommendation does not require this to be in writing — Well I don't know, if it did require it to be in writing, I suppose, some would say, "That prevents me from proving what happened to my $50,000, even though there's no doubt and maybe I can prove it, but because I need it in writing, and the other spouse will not sign anything, I lose it."

MR. JENKINS: Thank you.

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: No, I'm just saying in response to Mr. Jenkin's question, of course, if the one spouse swears up and down, as you say, that there was an agreement, obviously I should think that the other spouse is going to swear up and down that there was no agreement, of course, and as Mr. Silver has indicated the Law Reform Commission recommendation is that it should be a presumption of law, unless the contrary be positively established that all of the assets of each spouse are shareable. So obviously I should think the best advice to someone who wants to make sure that these assets he's received as a gift or whatever are maintained solely for his benefit at the end of an SMR, he should have some agreement in writing if he's going to, in Mr. Silver's example, of paying off the mortgage. But that does not mean that it can't be proved by oral evidence, and we would hope that most people are honest and if the husband says, "This is the agreement we made," we would hope that husband and wife would agree that that certainly was the agreement.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I appreciate Mr. Silver's explanation, Mr. Chairman, and I conclude from what he says that there has to be tangible evidence if it's to be established that the property that a spouse brought into a marriage is to be excluded from the net shareable estate. That leads me to ask him though whether that applies to all prenuptial assets, is it necessary in the case of considering gifts, inheritances and all prenuptial assets, that it be demonstrated quite clearly that those assets are exclusive to the property of one spouse, to the hoidings of one spouse, and are not to be considered in the shareable estate.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: If the allegation is by the spouse who claims credit that a particular item was a gift and made to that spouse with the express intention that that spouse should benefit exclusively from that gift, then the other spouse would have the right to allege that that is not true, that it is not in fact a gift, or if it is then it's not that kind of a gift, and that it should be shared. So, obviously, if the first spouse is to succeed he or she is going to have to have some kind of evidence to show that he or she is telling the truth, whether it be with respect to a gift or an inheritance or anything else, that could, under the SMR, remain the exclusive property of the spouse who was the original owner of it.

MR. SHERMAN: So we're into a situation here where we're saying *"let the buyer beware"* when you go into a marriage; it has to be established pretty clearly as to what you are buying and what you are possibly giving up. Unless those things are spelled out quite clearly, gifts, inheritances, etc., as devolving purely and exclusively upon that one partner, they will be put into the shareable estate.

MR. SILVER: That is true, that this presumption that everything is shareable would have to be overcome by the spouse who alleges that a particular item is not subject to the shareable provision.

MR. SHERMAN: Well I appreciate Mr. Silver's explanation on that, Mr. Chairman, thanks.

MR. PAWLEY: There would be no problem, Mr. Silver, with the effects it would only be in the . . . normally I would think it would be solely in the area of gifts where there could be this confusion.

MR. SILVER: Yes, to the extent that , in the case of an inheritance there would be some documentation but then there might be the question, *"is the wording of documentation such that it expresses the required intention?"* There would be that kind of question there too but certainly there would be far less chance of a problem of intention where there is documentation of that kind than in the case of a gift where there might be no documentation of any kind.

MR. CHAIRMAN: Father Malinowski.

REV. MALINOWSKI: Thank you, Mr. Chairman. It is not quite clear for me, suppose Mr. Adamsky has a business and this business is worth half a million dollars and then he decides to marry a nice looking girl, suppose Miss Malinowski, and she doesn't have anything and after half a year or one year, or two years of marriage, they decide to separate. What will happen? Is she entitled to half of it because, like Mr. Silver mentioned, everything is shareable? Would you explain to me what, in these circumstances, what will be the decision? How will they divide this thing?

MR. CHAIRMAN: Mr. Silver.

MR. PAWLEY: Do you want to tackle that?

MR. SILVER: Well, if I have your question correctly, I don't know that there is any difference between that illustration and any other marriage except that it has existed for a short period of time. Is that . . . ?

REV. MALINOWSKI: You gave us an example of $50,000 to pay the mortgage or something like that, and then, when they make a separation or divorce, you said that he or whoever brought this $50,000 should be credited with it. I'm just asking from a different point, if he had something and she didn't have anything and after one year or two years they will be separated or divorced, is she entitled to have whatever he possessed?

MR. SILVER: Well the explanation that I gave would apply to that as well. If that $500,000 is intact, if he kept that in his own bank account throughout the marriage, then the evidence is right there that his intention was to keep that and the standard marital regime certainly allows a spouse to retain whatever assets he or she had before marriage. It is only when the spouse, after marriage, deals with those assets in such a way that it appears that he's divesting himself of sole ownership, that he's using it for the whole marriage, that he's giving it or a part of it to the other spouse. Only in cases of that kind does the question arise, should it be shareable.

REV. MALINOWSKI: I see, thank you.

MR. CHAIRMAN: Is there any further discussion on this point? If not; were there other questions that you have answers for, Mr. Silver? Mr. Pawley.

MR. PAWLEY: Mr. Silver has mentioned to me that Mr. Muldoon indicated to him that the words "independent legal advice" in the view of the Commission, envisioned two separate legal counsel and certainly it was their intention that there be two separate legal counsel. I think the last day we were meeting, I think, in fact, I had suggested that it would depend upon the circumstances as to the independence of legal counsel in providing advice. So this is at somewhat of a variance with the road that our discussions took us the other day. So I would throw that out to the Committee so that they are aware that there is that situation. It's a policy situation and if there are strong arguments for two separate legal counsel; on the other hand I was of the view that in some circumstances it might be very very difficult to arrange for two separate legal counsel.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I think the whole exercise is one where we either express a desire to accept the advice given by The Law Reform Commission or to reject it, or to accept the intent to a qualified degree. We had some discussion the other day and I think at one time it was suggested that we remove the word "independent" from that particular section and I would have to say at this particular time I personally would have to favour that move knowing full well that we have a desire to have independent legal counsel but, in many cases, it may create more hardships and work to the disadvantage, rather than to the advantage of the parties involved. So I would have to say that I would be tempted to remove the word independent, at this particular time.

MR. JENKINS: I can sympathize with some of the arguments and I thought that I suggested something the other day that might kind of solve it' by just removing "independent legal opinion" to be changed to "iegal opinion independently obtained" because I would certainly not buy the man and wife both going in to the same lawyer, at the same time, and he giving an opinion to how these people should draw up their marriage contract or whether they want to opt in or opt out of the SMR because I don't think it would be very independent because then it would depend on who was the stronger of the married partners in that deal and it almost would wind up being almost like a kangaroo court. You know, I can quite realize that there are some places where there are not legal counsel available - it's a financial hardship to have to go many miles to get another lawyer. But I do think that when the spouses are getting legal advice at least they should be both independently seeking that advice even though it may be from the same lawyer.

MR. GRAHAM: Mr. Chairman, with the respect of that I would like to ask the Attorney General just to quickly review what the intent and purpose is when in the unified family court, which we passed legislation for last year and I understand he is going to implement later on this year, it was my belief that under that unified court you could have both parties coming for counselling before that court and hopefully to... in that particular case would each one have independent legal advice at that stage? I understood that it would be coming before common legal counsel.

MR. PAWLEY: No. Mr. Chairman, the reference to common counselling is family counselling rather than legal counselling and with the family counselling usually it is before the same person attempting to bring about a reconciliation of differences. So it's a different matter than the one we're dealing with here. You know, let me just recap, I think, the concerns that the Law Reform Commission would have on this matter. I had thought that under sow dower act that as long that it could be shown that legal counsel was independent, not working under any predjudice or bias, and providing that legal opinion, that that would be adequate. I know that the Law Reform Commission is very conscious that you do certainly have situations where the one spouse may be a major client of the lawyer, a lot of land transactions, a lot of other work, and that legal counsel would be, I think, in a very difficult position to provide impartial, objective advice to the second spouse from whence very little legal work is given to that legal counsel. So I know that this is the concern the Law Reform Commission would have, that you would run into this type of conflict, conflict of interest, that the client providing a lot of work to the lawyer might be unhappy about the objective independent advice given to the spouse and therefore the lawyer might colour his advice or might weigh his advice in some circumstances, and this I know is a legitimate concern of the Law Reform Commission and this is why I would be very concerned about just abandoning any idea of independence. I don't know just how great a problem this really is. Do we have anywhere in rural Manitoba where it would require that much of a trip to obtain advice from two separate lawyers? Northern Manitoba certainly could be a problem, I guess, but in Southern Manitoba is it that great a problem? They're worried about us opening up a can of worms, I can see that.

MR. SHERMAN: I don't think the term "independent" should be eliminated from the recommendation, either in

the present form or in the form proposed by Mr. Jenkins. Either/or would be satisfactory to my way of thinking but I think the terminology should be in there and I don't really foresee the the difficulty. I think that obviously both spouses in a separation and property-division proceeding would want to satisfy themselves that they have received what they consider independent legal counsel. Now, if it happened to come from the same counsel, but both spouses agreed that it was independent as far as they were concerned, then obviously there is no problem. If one spouse felt that was not independent legal counsel in his view or her view and he wanted, or she wanted, something different, something better, then they obviously wouldn't sign any of the agreements. To me it seems that the situation would take care of itself simply by the attitude of the two parties.

MR. SILVER: In law, Mr. Chairman, that kind of thing goes beyond what the spouses might agree to. Even if both spouses attend before the same lawyer and the lawyer explains to them that, for example, that they have the option of each one seeing their own independent lawyer but they say we don't care; we have agreed on this and we are satisfied that you would give each one of us objective independent advice and then the lawyer proceeds and draws up the documents and both spouses execute them in his presence, notwithstanding all that one spouse can later on, when trouble starts, long after they've executed the document, one spouse can go before a court and say I was influenced by my husband. We both executed the document before the same lawyer. Had we had independent lawyers, I would not have executed the document, and the court would probably find in that spouse's favour.

MR. PAWLEY: Could I ask Mr. Silver what is the existing wording pertaining to dower consents.

MR. SILVER: Oh, in dower, it's a different thing. *The Dower Act* does not require independent legal advice. *The Dower Act* requires merely that the execution of the document should take place separate and apart from the other spouse' and that requirement is fulfilled therefore even where both spouses execute the document before the same lawyer as long as each one executes it while the other one is out of the office. So that is a lesser requirement in *The Dower Act*, but in other things, for example in executing a separation agreement my recollect-i is that the practice is for the executions to take place by each one in front of a different lawyer and for the document to be explained to each one by a different and independent lawyer but Mr. Pawley is right that where *The Dower Act* is concerned only execution apart from the other spouse is required and not a different independent lawyer.

MR. GRAHAM: Mr. Chairman. I think I'm clear on this but if there are two lawyers working in a partnership can one lawyer act on behalf of one member of the marriage and the other one acts on the other? Is that independent legal advice?

MR. PAWLEY: I think that if they were partners that the same objections would arise in that case as if it was a sole partnership. I don't want to debate from a legal point of view because Mr. Silver may very weii be correct. I have difficulty, personally, seeing if this did end up in a courtroom and where the spouse did indicate "yes, I agreed to this;" "yes, I did feel that there was . . . and presently I am not aware of any reason that the lawyer could not have given me fair and independent advice, " I find it difficult to think that in all circumstances — I know safer route would be certainly the separate legal counsel., but that in a reasonable circumstance that a court would overrule the finding as independent legal advice because if it was shown to be independent in the true sense of the word, I find difficult to accept that there necessarily must be two separate individuals or persons, necessarily to do that. Now I know that I am placing myself in somewhat of a delicate viewpoint as expressed by our iegal counsel and yet it's a very important point for us to be very clear on as to the wording that we have here and I think that it's going to require some further examination and it's important as to what our own policy direction is. I had felt that our own policy direction would be that "yes, the legal advice should be independent. It should not be clouded by any factors that would cause that legal opinion to be less than free and independent and proper in every respect". And if that is the case then the same person could grant that legal opinion to each party. But, on the other hand, if there are factors there that one of the parties could point to and say "Look, those factors restricted the flow of free and independent view" then that lawyer would be placing himself in a very, very awkward situation if it was ever challenged later. The alternative would be to make it very clear that it's separate independent legal advice that we are seeking, that the word separate be inserted so that there can't be any question later.

MR. GRAHAM: Well, Mr. Chairman, I think we would all like to see independent advice but I have to say, as a person representing a rural area and knowing something of the legal caseload involved in rural areas by those that do wish to practice in rural Manitoba, I have to express some concern because I know most of our rural lawyers, if they're doing a good job at all, are so over-worked that it is very difficult to even find time in their busy schedule to bring any subject before them. I know that most housewives do not do their laundry in their livingroom , they usually do it in a back room or in the basement, then it may be in the case of family matters people do not wish to appear on the local scene. I don't know. I have no knowledge in that respect. It may be that they might want to air their family differences in a locale which is removed from the local scene but I do have to say that in the rural areas there is a problem with adequate legal advice being available in many cases.

MR. PAWLEY: Mr. Silver says that the intention here of the Law Reform Commission is definitely different than it is in *The Dower Act* . Certainly in this *Dower Act* separate and apart advice given is adequate. I'm wondering if the incuent change is made here then I think it would be upon us to make a similar change in *The Dower Act* . I wonder how we could explain two different procedures in this approach; one for *The Dower Act*, and one here. Surely the consequences of a dower release could be every bit and sometimes more significant than this would be. Would not the legal advice that you provided imply the need for a change in *The Dower Act* as well as here, Mr. Silver?

MR. SILVER: Well, the practice even now with *The Dower Act* as it is, the practice is with respect to more substantial interspousal documents, for example separation agreements. I think the practice that the lawyers usually follow is to have the other party sign before another lawyer.

MR. PAWLEY: I beg to differ. In rural areas. It's very unusual, Mr. Silver, and I think even in the city, but whether a decision to retain the recommendation of the Law Reform Commission as to independent legal advice, whether

that implies a need to change *The Dower Act*, to make *The Dower Act* provision stricter by requiring there too that the parties attend before two different lawyers, I really can't say.

MR. PAWLEY: What I'm concerned about, you know there are so many things that one has to weigh. Certainly, if *The Dower Act* was changed, generally in the sale of lands the spouses both very much agree to the sale, and really in 98 percent of the situations there is no . . . In fact, I can recall one instance where a couple did come in to see me in connection with a sale of lands and on providing the separate advice as to dower rights, the one party changed her mind and decided that she did not want to waive dower rights. That was the only instance where the parties had agreed to the sale of property. Now I'm concerned about what one does here. There would be the danger of then having to get three sets of lawyers involved, the lawyer for the spouse consenting, the lawyer involved in the sale of the property, and the lawyer involved in the purchase of the property. Mr. Graham, I'm wondering about the practical problems that we could be confronted with.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, I've said this before and I'll probably say it again, that probably the greatest beneficiary of changes in Family Law will be the legal profession.

MR. PAWLEY: Why do you think we are all pushing it?

MR. GRAHAM: It is my hope that when we do finalize this Family Law that it will be one that is workable and those that are involved in the dissolution of marriage will retain as much as possible for their own benefit the assets that have acquired during that marriage. I would not want to see legislation brought forward that ensured that the legal profession got a major portion of the assets of that marriage and that is why I have expressed this on numerous occasions. We want to make the law as straightforward as possible, that will minimize the amount of legal involvement for the parties concerned. So I make that general observation once more.

MR. PAWLEY: Could we not instruct that a definition be prepared which would clearly indicate the meaning of the word "independent" here? That independent would have to be advice which is unfettered by the introduction of any aspect that might weigh on the part of that person giving that advice more in favour of one party than the other, place the onus on the lawyer very clearly by way of definition and if it could be shown that he was not weighted down but could act in a free and independent way, unfettered, that in that type of circumstance then it would be acceptable as long as the advice was being given separate and apart from each individual party. But if the lawyer giving the advice to the one spouse was collecting a couple of thousand dollars in legal fees for instance from the other spouse during the course of the year, I wouldn't consider that to be independent and free advice, or if there were other associations that would fetter that advice. Some way or other, Mr. Silver, is it not possible that we could provide some definition to the word "independent" that would place a responsibility on that person providing that adi advice, that it was really free and independent in the true sense?

MR. GRAHAM: How about legal advice dealing with *The Dower Act?*

MR. PAWLEY: Yes.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: Well, I think the safest thing would be, if independent legal advice in the full sense of the expression is considered too onerous, then the safest thing would be to require the same thing as *The Dower Act* now requires. To give each lawyer the job of deciding whether or not he can give independent legal advice seems to me is a very difficult thing for the lawyer.

MR. GRAHAM: We're not here to protect the lawyers.

MR. SILVER: Every lawyer acts many times in real estate transactions for both parties, the purchaser and the vendor, and many times the lawyer asks himself after the transaction is long concluded, "Now if I had been acting for only the purchaser, would I have permitted the transaction to go through?" I don't think you can really ever answer that question, regardless of the amount of business he may get from one or another of the parties. That kind of thing is so intangible it's almost impossible for a lawyer to decide when, whether or not and in what case he is influenced by one of the parties more than by the other party. It may be past business, it may be an expectation of future business and it's entirely unconscious. Nobody is suggesting that it is deliberate, of course. So that, I think, might cause some problems.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, on reflection, perhaps the term "independent" is causing us most of our difficulty, although we want the concept of independence to be retained perhaps the semantics are the cause of our hang-up here. Maybe we should be looking at a different term such as impartial legal advice. It's easier for either spouse to determine whether it is impartial or not and for lawyers themselves to determine whether it is impartial or not, than it is to get into all the ramifications of independence. That might not be the right term either but I agree with Mr. Jenkins that we should retain the concept of independence but whether the proper Anglo-Saxon word to articulate that concept in this application is the word "independent" or not is now a question in my mind.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: May I suggest this: if we depart from the wording "independent legal advice" and go to some other wording, not the wording that is presently in *The Dower Act*, but some other wording, then we may open up a new field for court action and court decisions as to what the words mean. I think that it is pretty well-established now by court decisions as to what precisely "independent legal advice" means. So if we use those words, if in terms of policy we feel it's a good thing, then we know what it means as two different lawyers.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Can we not do it this way, Mr. Silver, and I'd like your comments on this, that we instruct that the same wording and the same process presently used for *The Dower Act* be used here? I don't think we should have

one inconsistent to the other and if those are the words used in *The Dower Act* then I am prepared to certainly accept it here and I'm not aware of problems insofar as the granting of legal opinion is concerned in *The Dower Act*, that there have been many cases where it has been an abusive factor. Could we not just agree to use *The Dower Act* provisions here? I'm afraid that we are getting ourselves tied down here and not being able to proceed and we do have an accepted practice now under *The Dower Act* which I am not aware, and maybe Mr. Silver can correct me, but I am not aware of any great problems insofar as the present procedure under *The Dower Act*.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well, Mr. Chairman, let's go back into the practical world for a minute here. If I sign a contract with Mr. Jenkins, I don't care whether it's to put shingles on a roof or whatever it is, if we agree to a contract and there are witnesses to that contract and there is no legal advice given by parties acting for either one of us, is that a legal contract? This is really what we are talking about, is the signing of a contract. Now if two people agree to a contract and they have witnesses, is that a legal contract whether there is legal advice given or not?

MR. PAWLEY: Here we are at least going one step further in that we are asking for a legal opinion to be given so the law can be properly explained and where we are kind of falling short is that it has to be in every case two separate lawyers involved.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, Mr. Graham has pointed out repeatedly the impracticality of insisting that two separate lawyers be involved and I think we have to accept the warnings that he has sounded. So, if independent legal advice means two separate lawyers, then I submit that it is not an acceptable definition for this Committee on this project.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: Mr. Pawley posed a question here with regard to *The Dower Act* and what does the definition in *The Dower Act* give us of an independent legal opinion. Do we have a definition for that?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: *The Dower Act* doesn't use the word "independent." *The Dower Act* merely requires that the document be executed. In fact I'll get *The Dower Act* and read it.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Mr. Chairman, did not Mr. Silver just say two or three minutes ago, or perhaps the Attorney-General did — I forget who said it, but either Mr. Silver or the Attorney-General I believe, if I heard correctly, said that in law the term independent legal advice means two separate lawyers.

MR. PAWLEY: Mr. Silver said that, I disagreed with that.

MR. SHERMAN: What I'm saying is, if that's what it means, in the light of what Mr. Graham and other rural members have said about the difficulties in finding two separate lawyers, then that is not an acceptable definition for Family Law.

MR. PAWLEY: Could I make a suggestion here because I'm worried about the fact that we have so much ahead of us and we're really dealing in something that is very very technical and maybe Mr. Silver is quite right and I am very much wrong, but I would think that we should get a further in depth look at this. Could that be done? If my interpretation of independent legal advice was correct then I don't think we would have this problem but on the other hand, if Mr. Silver's interpretation is correct then I think that we do have a problem which Mr. Graham has raised. I would ask that we give this some further in depth technical examination rather than we prolong the discussion at this point because I think it does deserve a little further examination as to the interpretation that can be applied to the word "independent."

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: In answer to the question as to how *The Dower Act* provision is worded. Reading from Section 8, Subsection 1, of *The Dower Act*: *"Where a wife executes in person a consent or release under this Act, she shall acknowledge apart from her husband that the same was voluntarily executed by her of her own free will and accord and without any compulsion on the part of her husband; and that she is aware of the nature and effect of the same."*

MR. GRAHAM: No reference to legal advice at all.

MR. SILVER: That has been in practice interpreted not to require an independent second lawyer, but the same lawyer before whom the husband executed can attend upon the execution by the wife, except that the husband must be asked to leave the room while the wife is executing it and while the lawyer is explaining the effect of it to her.

MR. PAWLEY: I think this separate and apart, the spouse to leave the room, is a must is it not?

MR. SILVER: Yes it is a must.

MR. PAWLEY: There was a case involving the signing of leases in which leases were signed on a kitchen table in a farm house and the husband and wife were both there, and it went to court — I forget the name of the case — but it dealt with it. It's an old typical law case that we took back in law school, what was the name of that? It was ruled that that wasn't separate and apart.

MR. SILVER: It is definitely a requirement.

MR. PAWLEY: Yes.

MR. JENKINS: I want to thank Mr. Silver for that explanation. 140 10

MR. CHAIRMAN: The Attorney-General is suggesting that such a definition go into the wording of any changes that we have here. Does that have the general agreement of the Committee? Mr. Jenkins.

MR. JENKINS: Mr. Chairman, the Attorney-General made a suggestion that we do have an in depth study of what constitutes independent legal advice. I would certainly welcome that.

MR. PAWLEY: I'm worried about a definitive decision right now. In view of what has been said, you know, I think we would want to contemplate a little bit about this. We still have time before we complete our work so why

not receive the benefit of advice from legal counsel who I am sure will consult with others and maybe we'll have a clearer picture if we can just deal with it a little later, in view of what has been said.

MR. CHAIRMAN: Agreed? (Agreed) Fine. As I recall when we finished last week, we had reached Pages 128 and 129. The last item that I had marked is item 20, I'm not sure whether we had dealt with 21 or not, 21 at -he bottom of Page 128.

MR. PAWLEY: I don't believe we did.

MR. SHERMAN: I think we had just got to it, Mr. Chairman.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Yes, I believe I was checking off those sections that we had dealt with and I had No. 20 checked off as having been dealt with and I do not have 21.

MR. CHAIRMAN: All right, then No. 21 is before you. Is there any discussion?

MR. PAWLEY: I suspect this would be a question of court interpretation as to what is squandering. Mr. Silver doesn't mean that if a spouse flies to Las Vegas over the weekend and gambles away half his or her assets, would that be considered considered squandering? Or, if a very foolish business decision was made, that a reasonable person could not possibly undertake, you know, say, investing all one's moneys in penny stocks because of some hot tip, would that be considered squandering? Are these questions that the court would have to determine, would be left open to a court determining, or would it pertain to somebody just drinking away the assets? What does squandering actually mean in your . . . ?

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: It would in each case be a question to be decided in each case, and it could depend, to a large extent, on the lifestyle of the parties. Maybe what is squandering in one family, based on the lifestyle of one family, is not squandering but quite normal according to the lifestyle of another family. But the only concrete example, the concrete illustration given by the Law Reform Commission in its report is that the making of an excessive gift by one spouse to a third party is deemed squandering, dissipating assets.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: One of the most common instances of that, I know a particular case now which, i guess, is heading towards court, where a spouse gave away a quarter section of land when they sensed that marital difficulties were occurring. Land was transferred about a year before the separation. That would be the kind of thing that I think would be contemplated here?

MR. SILVER: Yes, that could be, or the presentation by the husband of a mink coat to another female for example.

MR. PAWLEY: Oh, why would that be? That would just be showing warmth and kindness, Mr. Silver.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, aren't we getting just a little bit too involved in the personal lives of people here. We're dealing with squandering and now we're even saying that anything that one party gives over a six-year period prior to the separation can be argued against. I think that you're going to have the biggest hodge podge and court hassle you ever saw in your life if things of this nature are involved in the legislation. It says "Either spouse should be entitled to trace excessive gifts....

MR. SHERMAN: That's 22, we're on 2I.

MR. GRAHAM: Well, I think the two have to be dealt with almost together. One is squandering and the other is giving. We have the Gift Tax Act which makes the Crown the beneficiary rather than the other spouse in gifts. But I think we're getting too involved here in trying to cross all the t's and dot all the i's if we attempt to put into legislation sections such as these.

MR. PAWLEY: Mr. Silver, the alternative to this would be fraudulent conveyance within the six-year period where one spouse deliberately and intentionally conveys property in order to avoid that property being part and parcel of an eventual settlement under the SMR. The word "squandering" certainly can give way to tremendous moral judgments. I don't know who is going to give those moral judgments, but certainly fraudulent conveyance or a conveyance deliberately intended to avoid the consequences of this legislation should be prevented in the term within even a six-year period leading up to the termination of the marriage, deliberate fraudulent conveyance for purposes of undermining this legislation. Now I just throw that out, if that is not an aiternative to the word "squander", Mr. Chairman.

MR. CHAIRMAN: Mr. Silver.

MR. SILVER: The fraudulent conveyance and that sort of thing I believe is dealt with in a separate recommendation later on, for which the remedy is proposed of applying to the court for a receiver in cases where the other spouse appears to be disposing of the assets or is about to abscond with the assets so that they'll be out of reach of the other spouse and will not be around when the time comes for an accounting. In a case of that kind the proposed remedy is to apply to the court to appoint a receiver to preserve all the assets.

MR. PAWLEY: Some of us might consider squandering, I'm sure Mr. Graham might consider squandering if Mrs. Graham donated $l,000 to the New Democratic Party.

MR. GRAHAM: Definitely.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: I personally think we can live without Recommendation No. 2I. My own view is that we can live without Recommendation No. 2I. I agree with the Attorney-General and Mr. Graham that to get into the area of moral judgments on the subject of squand = ing is just unthinkable, and the problems that we're concerned with here are dealt with I suggest, Sir, in succeeding Recommendations, 22, 23, etc., and we can live without No. 2I.

MR. CHAIRMAN: Any further discussion on 2I?

MR. PAWLEY: There was no comment from briefs on this point, was there?

MR. CHAIRMAN: No. Mr. Adam.

MR. ADAM: Mr. Chairman, in looking at the Law Reform Commission's section on Page 75, dissipation of property, and on Page 76, in an instance of addiction to gambling or other species of extravagance or squandering, so they're taking quite a wide ranging definition of what could happen. I'm not sure, maybe we should have more legal advice on this, what we're talking about here, because we could, as some of the members of the committee have suggested, we might be opening a very wide-ranging situation where you'd have law court battles and so on.

MR. PAWLEY: Would Mr. Silver advise me whether or not in a situation where a spouse just goes out and says, "I'm going to have one real big time here, things aren't going well at home." And in the space of just several weeks just spends it all partying. Is that provided for in any other section? Is there any way of preventing that from happening, just a complete and total blowing of the assets in a short period of time, knowing full well that things are bad at home?

MR. SILVER: Well, there's the remedy of the receiving order that I alluded to previously. However, that wouldn't help to do anything about the assets that have already been lost. The dissipation aspect provides for credit to the one spouse to cover his or her losses that would otherwise result from the dissipation being perpetrated by the other spouse, so that there's some kind of compensation there for squandered assets. So if the partying is dealt with under the dissipation provision then the spouse can get credit for what was dissipated. If it is dealt with under a receiving order then the spouse doesn't get any credit for wuat has already been dissipated except that the squandering spouse is prevented from doing the same thing again.

MR. CHAIRMAN: Mr. Sherman.

MR. SHERMAN: Well, I repeat, Mr. Chairman' that we're not only getting into the bedrooms of the community but the bar-rooms and every other room in the house. What's the difference between gambling to excess and drinking to excess really? If you're trying to define squandering, are you going to try to measure all the liquor that one person consumed during a marriage over what he should have consumed, or what she should have consumed, and put a price on that and say that that excessive drinking was the squandering of X number of dollars? I think it's just an absurd and an untenable position to be in. I think that if we left this section over and went on to the subsequent sections we would see that the problems that we are really trying to get at, that is excessive gifts and that kind of thing, are dealt with in the other recommendations and we might find there's no need for No. 21.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, if you go back and you read the testimony given by the Law Reform Commission in their report on Pages 75, 76 and 77, you find that there is no evidence of any case that came before their hearings. We had no cases that I can recall. Their proposals here are on conjecture, and I quote from the top of Page 76: *"One can however foresee perhaps as an incidence of a reconciliation agreement,"* it is purely conjecture on their part, they are hypothesizing, and I think if we are basing our law reform on the need for reform, as has been evidenced by many, many briefs and cases that have been brought before us, do we project into the future and try and visualize hypothetical cases?

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: Well, if I might respond, Mr. Chairman, it seems to me that the Law Reform Commission may not have bad any particular briefs, I don't know, but I'm sure that Mr. Graham and most of the members of the committee are aware of cases where persons have just blown all sorts of money, either drinking, having a good time, gambling, whatever, and of course the reason for this provision it seems to me is just simple justice, that the person who blows the money shouldn't receive the credit for it, just as simple as that. And the important thing is that the person has to establish that money has been lost. She can't say, well my husband's been drinking, and the court can't say, well gosh, your husband's been drinking and we'll assess that at X thousands of dollars. They have to establish positively that assets have been dissipated and that means they have to have proof. Now the proof may be that on January 4th we had $15,000 in our bank account and that on that day he took out $10,000 and he went to Las Vegas and he came back and of course the money's gone. Now I think the court would assume from that and infer from that this guy took — or it may be the wife — took $10,000, and those are dissipated assets. But that's proof. And then of course if the person couldn't respond to that, the court would conclude, yes, those are dissipated assets. But it's something that has to be positively proven in court, it's not just something that the court can make up on its own. There has to be proof of the assets having been dissipated and proof of the actual assets.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Well then, I can take a hypothetical case and suggest that because this year I think it might be a dry year and I'm going to sow everything to wheat because wheat stands drought a lot better than anything else, so I sow everything I have to wheat and it turns out there's lots of moisture but it's a bad year for rust and all the wheat rusts, and my wife can come back and say, "good God you're a stupid farmer, if you had sown flax we'd have made a fortune." I dissipated $10,000 trying to grow wheat when I should have been growing flax.

MR. GOODMAN: Certainly that may be a problem in drafting, that certainly isn't what is proposed by the Law Reform Commission. And of course you referred to the particular page as 75, 76, and as they set out: *"Where a spouse failed to get a good trade-in allowance on a used car sold off through a want ad, some used furniture less than expected return,"* I should think that that would apply to a business judgment honestly made. The point is that if you do something and you do it honestly without an intention to actually dissipate the assets, of course then it seems to me you're not dissipating. You may make all sorts of poor judgments, Lord knows we all do and we all lose money from time to time, but the thing is in a dissipation of assets in the context of the Law Reform Commission recommendations, they're talking about somebody just going out and just blowing money for the

sake of blowing it, and your example I just don't think applies. It may be a problem for drafting, but i don't think that was ....

MR. GRAHAM: Do you consider the buying of I,000 lottery tickets in our Western Lottery a squandering?

MR. GOODMAN: I'd call it a very poor investment. Unless you won.

MR. CHAIRMAN: Mr. Green.

MR. GREEN: Mr. Chairman, I want to follow up for a moment the same line of questioning that was put by Mr. Graham, because I have some sympathy with what he was saying. In what way is the marriage relationship and the laws that will apply to the property that you're talking about, in what way is that going to be then different from the laws governing two partners? Is there going to be any difference in terms of what you are leading up to between the marriage, the rights of property as between husband and wife and how they dispose of it, and the rights of property as between two partners, commercial partners, and how they dispose of it?

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: I should think that if I was in partnership with someone who took company assets or the partnership assets, or some of them and dissipated them in the sense of having a grand party and going to Las Vegas and losing all my money on gambling, he is going to have to account to me for every penny that he's taken, and in the same way I am suggesting that the spouse who blows the money is going to have to account to the other spouse.

MR. GREEN: Yes, and I am not asking really that you defend one position or the other, we are talking about what the Statute says. So rather than applying the first situation, that is the partnership, that what you say about the partnership is quite correct and what would happen is that the husband and wife relationship would have the same laws governing property as a commercial partnership.

MR. GOODMAN: Well it doesn't even go nearly as far.

MR. GREEN: Yes, that was my question. In what way would it differ? It seems to me that what you have said makes it almost the same. Are you aware of any aspect in which it would differ from a partner who dissipated the funds would be held accountable by the other partner in the same way and you have indicated that a wife who dissipated the funds by purchasing a new gown every time there was a new pay cheque, she would be suable the same way as a partner. Is that right?

MR. GOODMAN: No. What we are talking about is on the breakup on the standard marital regime. i don't think that . . .

MR. GREEN: You know, let's say that the standard marital regime is such that the money is deposited in a joint account on which either party could write cheques, that this is not bad, there are people not like the normal who have been able to put away money, so $5,000 goes into the account. The wife then spends $2,500 on dresses and cosmetics and hairdos, there is then a breakup of the marriage and the husband says, "The balance belongs to me because she dissipated $2,500.00." Isn't that what you are talking about?

MR. GOODMAN: Well it may be. You were talking about her buying a dress every two weeks . . .

MR. GREEN: No, they have accumulated $5,000 . . .

MR. GOODMAN: . . . in your example, okay, the second example . . .

MR. GREEN: They have accumulated $5,000 and the wife decides that she is going to go on a spending binge - this happens both ways — so she spends $2,500. At the time of marriage breakup and with no injunction to restrain her from mentioning these expenditures, they do an accounting and they find $2,500 in the bank and the husband says, "Yes, there is $2,500 but she 'expletive deleted' disposed of $2,500, therefore this $2,500 belongs to me."

MR. GOODMAN: Whatever of that $2,500 that she spent that wasn't reasonable, of course, . . .

MR. GREEN: So then my question was: In what way the marriage relationship and the relationship of the property would be comparable if we followed this form of reasoning to property held by two commercial partners? Now for the moment I am neither praising nor criticizing that, I am asking whether that would be the effect and you at least have not distinguished areas in which it would not be the effect.

MR. GOODMAN: No, no, I think in that sense, certainly, it is the same.

MR. GREEN: Thank you.

MR. SHERMAN: Mr. Chairman, I was just going to acknowledge the explanation that Mr. Goodman gave us a few moments ago and say that I accept the explanation he has given but the proposal of the Law Reform Commission does not say what Mr. Goodman said. The proposal of the Law Reform Commission refers to the value of the squandering spouse's shareable estate, and where we're into the difficulty here is in trying to make moral judgments about what does and what does not constitute squandering. If Mr. Goodman is saying to me that the law will be framed in such a way that it will say what he said, that if it can be demonstrably shown, proven, that an established and an acknowledged amount of money or amount of the estate was dissipated without reason in such and such a way between such and such dates, then that amount shall be added to the value of that squandering spouse's shareable estate then I think I could probably live with that recommendation, but the present recommendation does not say what Mr. Goodman said and it leaves interpretation wide open to all sorts of abuses, all sorts of individual judicial decisions, all sorts of interpretations and I say that in sum total it would effect a very severe and very undesirable invasion of privacy.

MR. GOODMAN: Well of course where there was not agreement between the spouses and there is no way between them or the counsel agreeing as to what assets were dissipated, it would have to go to court and a court would have to / determine whether or not / were dissipated and I just say that these would have to be positively established and there would have to be proof, what assets, where were they, where did they go and I think we just have to have faith in the court system to deal with these problems.

MR. GRAHAM: Well, Mr. Chairman, let me just bring to your attention what this could possibiy mean. If this was in effect in the law today, what it means is if my wife and I weren't getting along too well and she's threatening to sue for divorce, and I know that full well on the 30th of March, 1971, I squandered $250,000, now does that not mean that I would do everything in my power to make sure that she didn't proceed with divorce proceedings until April or May of this year so for the next six weeks I would do everything I could to be nice to her so that she didn't go to court, and then after the end of March, she could do whatever she liked.

MR. GOODMAN: That appears to make good business sense.

MR. GRAHAM: No, but that is what this thing says right now.

MR. GOODMAN: It is just a cut-off there, a limitation period but we have that in the Statute of Limitations and there just has to be at some time in the affairs of people, a cut-off period, you know, where you can forget about certain things, it's over with.

MR. PAWLEY: Are you proposing that we do away with the limitation period?

MR. GRAHAM: I have to agree with Bud that we do away with this section. — (Interjection) — I think it's almost unenforceable.

MR. SHERMAN: I did say it and then I modified it, Mr. Chairman, to say that at least we should put it aside until we deal with the other sections because we might find that it is not necessary.

MR. PAWLEY: Could we proceed and return to it because certainly there ought to be no question where the squandering is for the purposes of dissipating the estate in anticipation of marriage breakdown. There should be no question, I think, that there be some protection and that's probably the most frequent type of squandering that will take place where it is done to get the other party, so before it reaches that point the assets are just wasted in one big binge. We have to have some protection for that type of situation, I think.

MR. GRAHAM: Well, Mr. Chairman, can I ask legal counsel, under the present set-up in court, and I have to profess ignorance of what occurs, but at the present time if there is flagrant squandering occurring, what happens in a divorce case at the present time. Is that taken into consideration by the judge when he is handing down his judgment?

MR. GOODMAN: Well, of course, you don't have the standard marital regime or the sort of 50-50 sharing now and really it is just a question of maintenance, and that squandering of assets may well be taken into consideration where let's say the one spouse says, "Well I just don't have the assets. You know, gosh, if you make me pay $500 a month this is really going to affect my living style." And the court is liable to say, "Well, you know, you just blew $50,000 so you are going to find $500 a month to take care of your spouse and children." But, in effect, it really doesn't come in now except, you know, you are talking about maintenance, alimony.

MR. GRAHAM: Well then a second question. If this was included, what would the judge do at the present time if the fellow hasn't got . . .?

MR. GOODMAN: Well, as I say, it really doesn't have any application at the present time because, in effect, while some agreement can be made between the spouses for a cash settlement, perhaps, and that will be the end of it — no monthly payments or anything else. But generally speaking the court comes into the picture, it is going to be monthly maintenance payments and the payments, of course, are fitted to sort of the family lifestyle and what's required to maintain the wife and children normally.

MR. GRAHAM: So this is mainly unenforceable anyway, is it?

MR. GOODMAN: Well, no, I don't say that it is unenforceable, I should think certainly with regard to the recommendations of the Law Reform Commission, it is enforceable if it is part of the package that you buy and legislate and in many cases where it is easily proved, there won't be any problem at all.

MR. GRAHAM: No, but if it is gone, can you effectively . . .

MR. GOODMAN: No, but if you can prove the asset was there and the asset was blown in some way — for example, I should think that if there is $50,000 in a bank account and one month before the breakup $25,000 was taken out and there is no accounting whatsoever, I should think that there is going to have to be some accounting for what you did with that 25,000, and if he refused to account for it, the court may well infer, well you know, you have just taken this away, put it in another account or something else, they don't know what you have done with it but it is very simple to just move it from one account to another and okay, maybe it's gone to Switzerland and there are a lot of assets that have gone to Switzerland, but obviously the court would then infer that, you know, these are dissipated assets and, in effect, the remaining $25,000 in that $50,000 account shouldn't be shared equally because you have already taken your $25,000 out. You know, as I say, it is just simple justice it seems to me that would apply in that case.

MR. GRAHAM: Isn't that already taken into effect at the present time? This is what I want to know.

MR. GOODMAN: There is nothing like this standard marital regime at the present time.

MR. CHAIRMAN: May we come back to 21 at a later time and move on to 22. Maybe the Attorney-General would inform the Committee what I *pro tanto* means in this section?

MR. SILVER: Well pro tanto means simply substituting one thing for the other. I haven't read the whole provisions. . .

MR. PAWLEY: It seems to me that would simply mean that where there are excessive gifts made in the six-year period leading up to the termination, that the amount attached to the value of those excessive gifts would be provided for in equalizing payment, so the party could not give away excessive gifts in that six-year period, that there would be an adjustment made in the final accounting. Would that not be it for the amount of the excessive gift?

MR. SILVER: Yes, that's true.

MR. PAWLEY: With the consent of both parties, of course.

MR. SILVER: And of course it also gives the right to proceed directly, to take court action directly against the person who receives the gift, the excessive gift and get it back directly from that person.

MR. GRAHAM: What would be considered to be excessive? Anything exceeding one percent of the shareable estate?

MR. PAWLEY: That mink coat referred to earlier might be an excessive gift, that type of thing.

MR. GRAHAM: What if it was a muskrat coat?

MR. PAWLEY: I think it would depend upon the circumstance, again,of each particular case and we would have to allow the court to determine when something was excessive and certainly they would look at all the circumstances in each individual case. I don't think we can apply a rule of thumb in advance. I think the court would have to be free to study the circumstances and to determine at that time whether a gift was excessive or not.

MR. GRAHAM: Mr. Chairman, it says, "unless the gift were made with the clearly proved assent of both spouses," now if I decided to give a half section to my son without getting my wife's consent and I had a section of land, I have given away 50 percent and I haven't got her approval, that would come under this section, would it not?

MR. PAWLEY: Well it may or may not. The court again would have to determine. I would think if you ended up giving away a half section of land leaving yourself and wife very little, and then there was a marriage breakdown shortly thereafter, that the court might consider, in those circumstances, it to be excessive. On the other hand if it was only a minor portion of your total estate, then I would think the court would be inclined not to consider it excessive but each case would be dealt with on a basis of judicial discretion.

MR. ADAM: Does the a law allow for that type of situation right now?

MR. PAWLEY: Oh, yes, subject to gift tax and things of that nature, but the law would continue to permit that sort of thing. This only states that in the event of a marital breakdown that the one spouse would be able to say and, you know, right now for instance, I mentioned earlier, I know of a divorce case in which the spouse gave away farm land and right now in court, the judge when this information was exposed in the court room, had not been prior to that raised by either party but it was exposed during cross-examination in the court room, the judge in this particular case adjourned the court and ordered that an appraisal be taken of the property. So I think even now the court has that wide enough power . . .

MR. GRAHAM: So it is something that is already existing and is in present . . .

MR. PAWLEY: I don't know whether it is written down but certainly in the case I have in mind, just recently the court was adjourned because it appeared in that case to be a fraudulent conveyance of course. Maybe that was the reason in that particular case . . .

MR. CHAIRMAN: Anything further on 22? Section 23.

MR. GRAHAM: Well 23, the last portion relates to Section 21, so should we hold section (d) in that as well?

MR. PAWLEY: Yes, that part should be held. Can the others pass, the rest?

MR. CHAIRMAN: Agreed (a), (b) and (c)? (Agreed) Section 24.

MR. SILVER: Well if we're holding the last section we should also hold (d).

MR. SHERMAN: We're passing (a), (b) and (c) and holding (d).

MR. CHAIRMAN: Yes.

MR. GRAHAM: Could I have an explanation of the limitation period in Section 24? Does that apply . . . that limitation period is for the six year review? Or what does it apply to?

MR. SILVER: It just applies to the court action for making the division of assets between the spouses and only in a case where there is divorce, where the marriage ends, not in cases of separation or other cases.

MR. PAWLEY: There's a minority report to that. Would you like to discuss, Mr. Silver, the majority versus the minority report on this?

MR. SILVER: You mean 25.

MR. PAWLEY: On the limitation, no, on 24 isn't it?

MR. SILVER: I guess it relates somehow to 24 because it deals with a saving provision.

MR. PAWLEY: That's right.

MR. SILVER: You might wish to wait for that until we discuss 25.

MR. CHAIRMAN: Anything further on 24?

MR. SHERMAN: 24 is okay.

MR. CHAIRMAN: Agree to 24. Section 25.

MR. GRAHAM: What is the present limitation period, is it two years?

MR. GOODMAN: For what?

MR. GRAHAM: The limitation for applying for a judgment on an equalizing payment.

MR. GOODMAN: There is no such thing as an equalizing payment.

MR. GRAHAM: Well I thought we were setting up an equalizing payment.

MR. GOODMAN: Well we will if this goes into law but right now there is no such thing as an equalizing payment.

MR. CHAIRMAN: Mr. Adam.

MR. ADAM: Mr. Chairman, what is the difference now of the position of the two groups here in the Law Reform Commission?

MR. GOODMAN: With regard to the first group, they are saying at any time it comes to the attention of a spouse that they had this right to an equalizing payment and that monies were coming to them, as soon as it came to their attention they could apply to the court for this equalizing payment; whereas the other three commissioners say that that shouldn't be just left indefinite, there should be a time period, let's say six years or whatever, so that if you don't find out within a definite time period, that's it and the other spouse doesn't have to worry about him for the

rest of his life.

MR. ADAM: Well, this is after the final decree of divorce that this takes place?

MR. GOODMAN: Yes, right . . .

MR. ADAM: After the final decree or pending?

MR. GOODMAN: In some cases, of course, you find that one of the parties isn't in the jurisdiction, cannot be located, and the court will allow for some form of substitutional service and proceed with the divorce proceedings and, of course, the other party may not even be aware of them at all.

MR. CHAIRMAN: Mr. Jenkins.

MR. JENKINS: In this case, Mr. Chairman, I'm afraid I would have to agree with the minority report here because we're looking at a situation, somebody 25 years later could come along and say, "Well I'm entitled to an equalization payment." I don't agree that we should make it a very short limitation but I think that there should be some limitation. As I stated , we're looking at something that could be 25, 30, 40, 50 years hence. There might be no estate or anything by that time, they could have used up that estate.

MR. CHAIRMAN: Mr. Graham.

MR. GRAHAM: Mr. Chairman, I think we should try and attempt to understand what is involved here. At the present time, the majority report says that if a person, say 12 years after separation, applies for a divorce, they should still be entitled to the equalizing payment and that would include the squandering that occurred for a six year period prior to the separation. Is that the correct interpretation, that squandering would also be involved at that time and the divorce proceedings may not occur for 10, 12 years after separation?

MR. CHAIRMAN: Mr. Goodman.

MR. GOODMAN: Number 25 relates back to 24 and when they talk about the limitation period should extend to and include the first anniversary date of the entry of a final decree of divorce or nullity and, of course, where there is separation there is still a marriage and it's only after divorce or nullity that the marriage is finished, terminated.

MR. GRAHAM: Yes.

MR. GOODMAN: So that 25 really relates back to 24, so you are just talking about divorce and nullity.

MR. GRAHAM: Going back to Section 24, in terminating . . . No, Section 23 and 22, the squandering period that we are talking about is the period involved when they were actually cohabiting and if there has been separation for 10 or 12 years, that squandering is still a valid argument in an equalizing payment.

MR. GOODMAN: No, under 23 (d) you're talking about dissipation of assets and when you are terminating a standard marital regime, the day of reckoning, the dissipation of assets, as of the date the spouses last lived together as husband and wife or where the spouses continue to live together as husband and wife the date of the institution. So, in your example, it's as of the date the spouses last lived together as husband and wife and, of course, if they haven't lived together for 10 years then the six years have long gone by.

MR. GRAHAM: The six years have gone by, I wanted to get that clear.

MR. GOODMAN: Right.

MR. CHAIRMAN: What's your feeling on the limitation? Mr. Sherman.

MR. SHERMAN: I agree with Mr. Jenkins, Mr. Chairman, that there should be some limitation.

MR. CHAIRMAN: Mr. Pawley.

MR. PAWLEY: Mr. Chairman, I think the rationale for the six year period is that it is comparable to the statute limitations insofar as debt, six years, and I think that we're better to try to keep our limitation periods as consistent one to the other as possible to minimize confusion. So I would suggest that this be retained at six years for that only. —(Interjection)— Yes.

MR. SHERMAN: Mr. Chairman, the Attorney-General is accepting the minority judgment and suggesting that it be six years.

MR. PAWLEY: Yes.

MR. SHERMAN: Well that's . . . accepting the minority judgment I mean. Did I say majority? The Attorney-General is accepting the minority and suggesting it be six years. That's agreeable to me.

MR. CHAIRMAN: Any further discussion on the six year limitation? Can we accept then the minority with a six year term? Section 26. Mr. Silver, tell us what apprehended absconding means in this context.

MR. SILVER: Well, it differs from actual absconding. Actual absconding would, of course, mean that the spouse is actually doing that, is already doing that, he's actually or has already done it, takes these assets and leaves with the assets, leaves the jurisdiction. Apprehended absconding is suspected absconding, where the other spouse has an indication that the other spouse intends to do that but he hasn't done it yet and the same distinction applies to dissipation, actual dissipation that already occurred; apprehended dissipation — I don't know if they really intended to talk about expected or intended dissipation. Yes, perhaps a spouse can see that the way the other spouse is behaving that very shortly he will have dissipated everything, will have dissipated whatever he has not already dissipated. The receiving order would require that all the existing assets be gathered in and protected from absconding or dissipation.

MR. CHAIRMAN: Any discussion on 26?

MR. SILVER: Again, of course, it would be a question of fact whether the absconding is really an absconding but the court will have to decide whether that is the case.

MR. SHERMAN: Pass.

MR. CHAIRMAN: Section 27, it's a long one, can we take it part by part? 27 (a).

MR. ADAM: It might be a good time to break for dinner, Mr. Chairman.

MR. PAWLEY: I think we should try to finish it up. Why don't we read it through, Mr. Chairman, and then break for dinner? It will take us five minutes to read this section and we can contemplate it over the lunch hour and then

head right back into discussion.

MR. GRAHAM: The first question that is facing us is whether it should be six months or twelve months or immediately whether there should be any . . .

MR. CHAIRMAN: The time of 12:30 having arrived, the Committee will adjourn and stand adjourned until 2:00 p.m. this afternoon.