Legislative Council,

Thursday, 9th October, 1919.

The DEPUTY PRESIDENT took the Chair at 4·30 p.m., and read prayers.

QUESTION—TREASURER'S FINANCIAL STATEMENT.

Hon. A. SANDERSON (without notice) asked the Honorary Minister: Does the leader of the House propose to follow our usual procedure by adjourning this evening in connection with the Financial Statement to be made in another place?

The HONORARY MINISTER: Yes.

QUESTION—DROVING ACT AMENDMENT BILL.

Hon. Sir E. H. WITTENOOM (without notice) asked the Honorary Minister: Will the hon. gentleman obtain for the House reliable legal information with regard to the following point arising in connection with the Droving Act Amendment Bill? Suppose a road runs through a farming district between two fences, would that road be a run? Suppose a man has a farm of 2,000 acres, and has 1,000 acres on one side of the road and 1,000 acres on the other, and a drover comes along the road, which has a fence on each side; is that drover technically or legally passing through that man's run, and in such a case has he to send a statutory notice to the owner? According to the Bill as it now stands, a drover coming within 10 miles of a homestead must send a notice to the owner. I believe that the giving of the information for which I have asked would facilitate discussion.

The HONORARY MINISTER replied: It is unlikely that the Droving Act Amendment Bill will reach the Committee stage to-day. I shall have pleasure in furnishing the information desired by the hon. member when the Bill is being dealt with next week.

BILL—KALGOORLIE FRIENDLY SOCIETIES INVESTMENT VALIDATION.

Report of Committee adopted.

BILL—DIVORCE AMENDMENT.

In Committee.

Resumed from the previous sitting; Hon. J. F. Allen in the Chair; Hon. J. Nicholson in charge of the Bill.

Clause 7—Amendment of Section 23 of principal Act (partly considered):

Clause put and passed.

Hon. J. NICHOLSON: I move—

That consideration of Clauses 8, 9, and 10 be deferred until after the consideration of the new clause, to stand as Clause 12, of which notice has been given by the Hon. J. W. Kirwan.

Motion put and passed; the clauses postponed.

New clause:

Hon. J. W. KIRWAN: This new clause is, I think, of greater importance than any other provision of the Bill. Its purpose is to provide that in all cases of divorce the court must first be satisfied that an effort has been made to conciliate the parties. It has been drafted with considerable care and patience, and I think it explains itself. I move an amendment—

That the following be added to stand as Clause 12:—(1) Before a petition for dissolution of marriage is filed, notice of intention to file the petition shall be lodged in the central office of the Supreme Court. (2) Such notice shall set out the names of the proposed petitioner and respondent, and the ground upon which a dissolution of the marriage is sought. (3) The proposed petitioner, on being required so to do, shall attend before a judge at a time and place to be appointed, and shall relate the circumstances under which relief is sought. If, after the judge has conferred with the proposed petitioner, such person still desires to proceed with the petition, the judge may issue the certificate referred to in Subsection (5) or adjourn the inquiry, and by summons require the proposed respondent to attend before him with a view to a reconciliation between the parties. (4) Where by reason of distance of residence of the proposed petitioner or respondent, or for other sufficient cause, it appears to a judge that the inquiry should be held at a place where he cannot conveniently attend, the judge may delegate his functions under this section to a resident magistrate. (5) A petition for dissolution of marriage shall not be filed unless it is certified in writing by a judge, or by a resident magistrate acting under authority delegated to him as aforesaid, that the petitioner has been heard under the provisions of this section, and that a reconciliation has not been effected. (6) All proceedings under this section shall be held in camera, and the parties shall attend in person and shall not be represented by any legal practitioner or agent. The record of such proceedings shall not be open to public inspection.

In drafting the new clause, I have had several interviews with the Solicitor General, who has gone to considerable trouble. I have discussed it with several lawyers. Two of the most respected lawyers in this State have said it will do good and cannot possibly do harm. On the other hand, one equally respected lawyer expressed the contrary view. The new clause may be objected to on the ground that it is an innovation, but unless we introduce innovations, there can be no reform. This is not such an innovation as it might appear to be at first

sight. Means to effect reconciliation, before the extreme step of divorce proceedings is taken, have been adopted in France. One of the lawyers I interviewed was educated in France and he informed me that it had worked well there. However, no records are kept of the preliminary proceedings and one cannot ascertain the number of cases in which reconciliation has been effected. The same idea is expressed in our industrial contracts—conciliation before arbitration. When conciliation is applied to an industrial contract, it is reasonable, before we sever the most serious contract anyone can undertake—the marriage contract—that the court should have evidence that an attempt has been made to reconcile the parties. We have heard of parties to a divorce subsequently remarrying. Surely such divorce was due to a misunderstanding or to a failure to bring the parties together. This principle also exists in legal procedure. In many cases, leave must be obtained to appeal, and this new clause practically amounts to leave to proceed in the divorce court. When persons seek divorce, reputable lawyers endeavour to reconcile the parties and, in many cases, successfully, but however persuasive a lawyer might be, he would not carry the same weight and influence as a Supreme Court judge. The procedure laid down is simple. A shrewd judge could impress upon the parties the gravity of the step contemplated and how it would affect their lives and the future of their children. In a large number of cases the judge would grant a certificate straight away, as for instance, in cases of insanity and desertion. But if, in only a percentage of cases, the parties could be reconciled, tremendous good would be the outcome. I have heard no sound argument against my proposal and I hope it will be adopted.

Hon. J. NICHOLSON: Many arguments may be advanced in favour of the new clause.

The Honorary Minister: Just as many against it.

Hon. J. NICHOLSON: There are many against it. One must recognise that, if reconciliations can be effected between couples who have become estranged, it is our duty to try to effect them. I am a lawyer, and there are various points at issue between Mr. Kirwan and myself. When we seek to introduce a principle which would represent a serious departure from the system of jurisprudence founded on old established practice—

Hon. J. W. Hickey: That is an argument in favour of an alteration.

Hon. J. NICHOLSON: When we begin to alter an established practice in law, one cannot tell how far-reaching the effect might be. Therefore, I hesitate to accept the new clause. I appreciate the motive underlying it.

Hon. J. W. Kirwan: If the hon. member were not a lawyer, he would accept it. Is not that so?

Hon. J. NICHOLSON: Being a lawyer, I may detect dangers which are not apparent to the layman. There are other grounds against the new clause. Before proceedings could be started, it would be necessary for a notice to be filed. That would mean bringing the parties before a judge or magistrate and would entail an increase in cost. Now one of the things that a lawyer does abhor is any increase in costs.

Hon. J. J. Holmes: Not if he is getting them.

Hon. J. NICHOLSON: There has actually been an effort by the legal fraternity, not only here but in the Old Country, to make applications of this nature cheaper instead of more expensive. The new clause will have a diametrically opposite effect to those admirable desires.

Hon. J. W. Kirwan: Could not anyone give notice of intention?

Hon. J. NICHOLSON: Yes, but when a husband and wife have become estranged, what is the position?

Hon. J. W. Kirwan: Would not the court have a printed form?

Hon. J. NICHOLSON: The court may or may not. When a couple become estranged, the lawyer for the time being is a doctor to them. If a reconciliation could be effected, I admit a good thing would be accomplished. Every decent lawyer endeavours to bring about a reconciliation at all times. The question is, would the proposed inquiry before the judge be more beneficial than interviews the parties would have through their respective lawyers. A great deal can be said in support of the suggestion made by Mr. Kirwan, that the fact of the parties being summoned before a judge might have some influence, but if the parties are determined not to live together again—

Hon. J. W. Kirwan: No harm will be done.

Hon. R. J. Lynn: Would any good be done?

Hon. J. NICHOLSON: It is questionable whether any actual good would be done. It would mean a certain amount of delay and added expense and departing from what is the established procedure which has been observed for many years past, and it would be a most serious thing to make that departure without going more thoroughly into the matter.

Hon. J. J. HOLMES: I cannot support the amendment. I do not think it is the duty of a supreme court judge to get mixed up in a quarrel between husband and wife. The hon. member referred to our arbitration courts, but the judge in an arbitration court does not decide that a certain man will have to work with a certain employer or vice versa. He merely decides the hours and the rates of pay. No judge has ever yet attempted to dictate that an employer should employ a certain individual or that an individual must work for a particular employer. In this case a judge will be asked to make a husband live with his wife when the wife has no longer any desire to live with her husband. With all due respect to the profession to which the hon. member, who is responsible for the Bill, belongs, I desire to say that there are lawyers and lawyers. My experience is that all are anxious to earn all the fees they can and the proposed amendment will add to the costs. Leave will be obtained to appeal and that will go through the lawyer, and the lawyer will charge a fee for it. Then there is the cost to the State. Every time the Supreme Court is set in motion some expense is incurred on the part of the State.

Hon. A. SANDERSON: As one who has tried to preserve some consistency in dealing with this measure, I would like to say that if the amendment provided for the parties appearing before a judge before their marriage, it would be an innovation which would have beneficial results. The hon. member who introduced the

Bill wants to frame it on the English system. I want it to go through on the Australian system. Can the hon. member tell me whether there is such a provision in any of the Australian States?

Hon. J. Nicholson: There is not.

Hon. A. SANDERSON: The hon. member replies very confidently. I asked him about another aspect of the Australian legislation but he did not know anything about it. I am inclined to favour this proposal. It cannot do any harm and it may do some good, but so far as I am personally concerned, I have nothing but contempt for the Bill as it stands and for the way, inside and outside the House, and particularly inside the House——

Mr. CHAIRMAN: The hon. member cannot discuss the Bill as a whole.

Hon. A. SANDERSON: This is in accordance with the remainder of the discussion of the Bill. The proposed new clause is another innovation which, if we were at liberty to redraft or reconsider it, as applying to the whole of Australia, would demand the most careful consideration. How does the hon. member attempt to justify the clause? He says it is taken from France, where it is in operation. Is that to appeal to Western Australia or to Australia? Are the conditions in France socially, religious, and national, similar to ours? What weight does the fact that it is in existence in France carry with us?

Hon. J. W. Kirwan: If it does good there it will do good here.

Hon. H. J. Saunders: Why waste time?

Hon. A. SANDERSON: I am not going to waste any more time. I have put my views before the Committee and we can deal with the matter elsewhere. So far as the amendment is concerned I do not propose to vote for or against it. The arguments used on this most important question have not been edifying and have not helped to put the House in the strong position which it should always maintain.

Hon. J. CORNELL: I agree that the proposed new clause is an innovation and a novel one at that. In British speaking countries we know that the rule of the road is to keep to the left. In France the traffic is all on the right side of the road. What is moral in French countries is immoral in British countries; so that there is no analogy between conditions as they exist in France and in England. Just as it is the function of those vitally interested and their parents to bring about a marriage, so it is also the function of the parents and friends to bring about a reconciliation between the disaffected parties. If the friends of the parties desiring divorce cannot bring about reconciliation, I fail to see how the court is going to do it. Personally I do not think it is for us to insert such a provision in the Bill. I will oppose it.

Hon. J. W. HICKEY: I will vote for the provisions of the new clause. In this instance Mr. Holmes objects to any attempt at reconciliation; yet I have heard the hon. member advocate conciliation before arbitration.

Hon. J. J. Holmes: I would wipe out the Arbitration Court altogether.

Hon. J. W. HICKEY: The hon. member declared that he was not prepared to drag down the divorce court to the level of the Arbitration Court. In almost every divorce case in Australia the judge makes some attempt to bring the parties together. If the judges are prepared to do that to-day, without special warrant, surely it is not wrong to give them legal power to do it. Mr. Kirwan's amendment merely contemplates that an attempt at conciliation shall be one of the first acts. No one is better qualified than the judge himself to bring about a reconciliation between the parties. Mr. Nicholson holds that the lawyer is best qualified of all, but it seems to me the lawyer is not so well fitted for the task as is the judge. Provision is made that all proceedings shall be held in camera, and that the parties shall appear in person and not be represented by counsel. It will not then be necessary for any person petitioning for divorce to consult a legal practitioner. Under the amendment it will be quite possible to go to the court without consulting a legal practitioner at all. These provisions will bring about a much needed reform.

Hon. A. J. H. SAW: The amendment seems to me somewhat unnecessary. Divorce in this country can only be obtained for very serious reasons, and, with the exception of adultery, those reasons must have been in operation for a considerable time. In these circumstances the person seeking relief is not likely to have undertaken his quest lightly. That being so, I do not believe that any intervention in the way of reconciliation by a judge will be productive of much good, whereas, on the other hand, it will cause delay, which means expense. I do not know that the efforts of the judges at reconciliation are likely to be crowned with success. Very often, indeed, it is to the interests of both husband and wife that those efforts should not be successful. Chiefly on the ground of delay and expense, I cannot support the amendment.

Hon. H. MILLINGTON: I cannot support the amendment. It sets out specifically that before a petition is filed this provision must have been complied with. I object to its mandatory character. If it were permissive it would have much to recommend it. As it is, in many cases it would be merely so much cumbersome machinery.

Hon. J. W. Kirwan: It might take not more than two minutes.

Hon. H. MILLINGTON: But it is mandatory that the parties shall avail themselves of this section before they proceed in the usual way. I object to that. In most cases that come before the court efforts at reconciliation have been made previously. On the other hand, there are many cases where a person would absolutely refuse conciliatory measures and where it would be waste of time to ask a judge to go through all that is set out in the proposed new clause. My objection to it is its mandatory nature.

The HONORARY MINISTER: There are many points against the proposed new clause. It will mean added expense to those who want to secure a divorce. On the question of publicity my opinion is that the less the public know about these divorce cases, the better. This proposed new clause will, I feel certain, cause greater publicity to be given to them than is the case at present.

Hon. J. W. Kirwan: Not at all.

The HONORARY MINISTER: There is already enough published about these matters without making it possible for further details to be given. In the matter of reconciliation

I should not say that a divorce would be taken unless on very serious grounds. If there be a possibility of a judge reconciling two parties, one of whom had taken steps to secure a divorce on very serious grounds, I do not think any reconciliation would be lasting. It would be wiser that it should not take place.

Hon. E. M. CLARKE: When persons are married, they are married in a church and also before a court, as it were. I hold the opinion that this is a simple contract between two parties. Are there not scores of cases where two parties go to a court and nothing in the world will reconcile them, but after they have heard a word or two from the judge and heard each other, a case is frequently settled out of court? If the proposed new clause will only bring about the reconciliation of a few unhappily married people, it will be a good thing. If it were not for innovation we should be stagnant for ever. This may do a lot of good, and it should do no harm whatsoever. There is always a certain amount of expense attached to divorce proceedings. When a person wants a separation the first thing he does is to go to a lawyer, and that legal practitioner is paid a fee for the advice he gives. I am sure the measure is well worthy of a trial.

Hon. J. W. KIRWAN: It seems to me that the Honorary Minister has not read the proposed new clause or grasped the intention of it. The main purpose is to if possible settle proceedings by reconciliation before any publicity is given to them, or before the matter goes into open court. In the drafting of the clause special attention was paid to making sure that the proceedings would not, as far as possible, be made public. It is always more difficult to effect a reconciliation between two parties after the case has been published in the papers, and people are talking about it. There is nothing cumbersome about the proposal. A letter merely has to be sent to the court intimating that proceedings will be taken. How much will a lawyer charge for preparing a notice of intention to file a petition or to take divorce proceedings? Would not even a fee of 10s. 6d. be an extravagant charge? If a reconciliation be effected as would be done in many cases, all further costs would stop, so that this proposal would make divorce proceedings very much cheaper than they are at present. There has not been one sound argument advanced against the proposal. No matter how serious may be the offence committed by one party or the other, there is always abroad a spirit of forgiveness, and it frequently happens also that there are faults on both sides. I am sure that a shrewd common-sense judge, with a knowledge of the world, talking with two people in camera, would undoubtedly have a good influence in the direction of settling the difficulty. In cases where this would be of no effect no harm could be done. Further, I think this would tend to lessen the number of divorces.

Hon. H. STEWART: I intend to support the proposal, and I think that Mr. Kirwan has effectually answered all the arguments used against it. The preliminary examination provided for here is quite a simple one and cannot be expensive. I hope a division will be called for. I may say that I have paired with Mr. Miles in the event of the Committee dividing.

Hon. H. MILLINGTON: My objection to the proposed new clause is that it is mandatory. The heading is "Preliminary inquiry." It should surely be "Compulsory preliminary inquiry." I would prefer to give persons both the ordinary method of procedure to follow, and the proposed new method of procedure if they desired to take it. In certain cases it would be a farce for people to go before a judge, who would conduct a preliminary inquiry, because nothing would induce them to make up their differences. There are cases, however, where this would possibly have a good effect. If the new clause could be re-drafted, and it were made optional for persons to adopt this form of procedure, I would be prepared to support it, but I will vote against it as it stands.

Hon. J. W. KIRWAN: The new clause provides that in every case the petitioner must appear before a judge, and I do not think that is asking too much when an important proceeding of this nature is to be taken. No doubt in a number of cases the appearance before the judge would be a mere matter of form, but it is no hardship to require the petitioner to make that appearance. The whole of the machinery provided by the new clause will not be compulsorily brought into operation. That will take place only when the judge is of opinion that some good might result.

Hon. J. W. HICKEY: I appreciate Mr. Millington's objection, for I recognise that compulsion in any respect saps the strength of any reform. It is quite possible that in some cases the bringing of the petitioner before a judge would be a mere farce. On the other hand, a married couple of whom one is petitioning for divorce will not, except in the rarest of cases, voluntarily approach a judge with a view to conciliation. A third party, however, can often bring together two who are at variance; and I believe a judge would frequently find a way out of the difficulty. I hope Mr. Millington will not persist in his objection.

Hon. J. J. HOLMES: The point raised by the Honorary Minister appeals to me—that by the new clause we shall be giving additional publicity to divorce proceedings, through the filing of the notice of intention to file a petition for divorce. Further, under the clause the petitioner is to be enabled to wave the magic wand before the judge without reference to the respondent, who will not be present to hear what is said of him or her. Mr. Millington's point is also important. Why should we compel people who have absolutely decided on proceeding for divorce to incur the unnecessary expense of a preliminary inquiry from which no good can result?

Hon. A. H. PANTON: I oppose the amendment. One factor which appears to have been overlooked is that, as a rule, both parties to a marriage are not suing for divorce. To ask a judge to bring about a reconciliation would be in many cases to ask him to do the impossible. I oppose the amendment also because I do not like to see our legal procedure overburdened with the cost of preliminary proceedings, which represent a serious disability in the matter of industrial arbitration, for example. With regard to the exclusion of legal practitioners from the preliminary proceedings under this clause, we know that the same restriction applies to

proceedings in the Arbitration Court, in connection with which, however, all the evidence is, as a rule, prepared by lawyers. My fear is that the passing of the new clause may lead to the growing up of a lot of divorce bush lawyers, who will only lead the parties astray.

Hon. J. W. KIRWAN: With regard to Subclause 6 of the new clause, it is only fair to say that the Parliamentary Draftsman, in order to make it perfectly certain that the preliminary proceedings should not come before the public, added to that subclause the words "The record of such proceedings shall not be open to public inspection." Those words, owing to an accident, do not appear upon the Notice Paper; but I read them out when moving the new clause. My purpose is that an attempt should be made to stay proceedings before any publicity is given to the matter. Mr. Holmes's objection was that the judge who undertook the attempt at conciliation might subsequently be influenced thereby in the trial of the case in open court.

Hon. J. J. Holmes: I never said anything of the kind. I said that the judge would hear the petitioner in the absence of the respondent.

Hon. J. W. KIRWAN: The judge would simply hear from the petitioner that he intended to proceed for divorce, and the reasons why. Then it would rest with the judge to decide as to summoning the respondent. If the judge thought there was no chance of reconciliation, he would issue his certificate straight away, and the matter would be decided. However, it by no means necessarily follows that the judge who heard the preliminary proceedings would subsequently hear the divorce proceedings in court. That would be a matter for arrangement between the judges.

Hon. H. STEWART: There is one point which has not been brought clearly before the Committee. Under Subclause 3 of the proposed new clause, the petitioner shall first appear before a judge. There is no need to make an effort at conciliation in such circumstances as Mr. Millington and some other members have in mind. If the grounds for divorce were so well established, the petitioner would simply appear before the judge and the certificate would be granted without the respondent being called upon to appear.

New clause put and negatived.

Clauses 8, 9—agreed to.

Clause 10—Ante-nuptial incontinence a ground for dissolution of marriage.

Hon. J. J. HOLMES: I move an amendment—

That after "any" in line 1 of Subclause 1, the words "wife or" be inserted.

The amendment aims at extending equal consideration to the wife as to the husband. If we wish to convince the women that we can legislate justly in their behalf without them being represented in Parliament, we should place the wife on the same footing as the husband in laws of this kind. There has been one set of legislation for the man, and one for the woman. Either man has put himself on the pedestal or woman has done it for him. Whence the authority came, I do not know.

Hon. J. Cornell: I do not think the hon. member is too serious.

Hon. J. J. HOLMES: I am serious. The hon. member can go back to the time of the flood and find no distinction there. Noah's instructions were to take himself and his wife and enter the ark. There was no first class for him and second class for his wife.

Hon. J. NICHOLSON: I have no objection to the amendment, and the churches all are in accord with it. The representative of one church said he thought what was sauce for the goose was sauce for the gander.

Amendment put and passed.

Hon. J. J. HOLMES: I move an amendment—

That after "that" in line 3 of Subclause 1, the words "her or" be inserted.

Hon. J. CORNELL: I understood Mr. Nicholson desired the clause to apply to a woman who became pregnant to a man and then married another man. I think the clause goes so far as any petitioner for a divorce would go, and so far as any judge would consider this a ground for divorce. As a man of the world, I hold the amendment will do something for which we shall probably be sorry and which we shall be unable to rectify later on.

Hon. J. J. HOLMES: The effect of the clause, if amended, would be that if a woman was pregnant to one man and married another, her husband would have the right to obtain divorce. Surely the hon. member will admit the justice of giving the wife the same privilege. If she finds that some other woman is pregnant by her husband, she should have the right to divorce. The woman would have much more difficulty to prove her case against the husband than the husband would have to prove his case against the wife. The husband could say, "It is not mine," but the wife could not say to the husband, "It is yours." I am surprised to hear Mr. Cornell's objection.

Hon. J. CORNELL: Under the existing law, a woman who is pregnant can avail herself of the Bastardy Act, and can restrain the man concerned from leaving the State. A man heretofore has had no protection if he married a woman who was pregnant to another man.

Hon. J. J. Holmes: This is not a question of leaving the State.

Hon. J. CORNELL: There is a limit to Mr. Nicholson's proposal, but not so to Mr. Holmes's.

[The Deputy President resumed the Chair.]

Progress reported.

BILLS (4)—FIRST READING.

1, Traffic.
2, Wheat Marketing.
3, Anzac Day.
4, Slaughter of Calves Restriction.

Received from the Assembly and read a first time.

BILL—MENTAL TREATMENT ACT AMENDMENT.

Returned from the Assembly without amendment.

House adjourned at 6·17 p.m.