REPORT OF WORKING PARTY ON THE LEGAL PRELIMINARIES TO MARRIAGE

THE REVEREND M. G. SMITH AND OTHERS*

1. The origin of the present practice in England and Wales:

People have long grown accustomed to thinking that before the creation of register offices, all marriages were solemnized in church and that the publication of banns on three several Sundays was the necessary and traditional preliminary to contracting a legal marriage in this country according to the rites and ceremonies of the Church of England. The working party which reported to the General Synod in 1988 did its best to dispel this fallacy.

> 'It may be supposed that the substantial evidence of wedding services being held in church implies that in past times most, if not all, citizens were married in this way. Social history does not indicate such uniformity'[1]

The Report quotes Lawrence Stone's conclusion that before the mid-eighteenth century marriage could be entered by a 'bewildering variety of ways';[2] to this may be added Baron Stowell's observation that before the passing of the Marriage Act, the old canon law required banns 'as a matter of regularity but not as a matter necessary to the validity of the marriage.'[3]

Lord Hardwicke's Marriage Act of 1753[4] marked a significant turning point. One aspect of that change was the statutory revision of the legal preliminaries to marriage. From 25 March 1754 banns had to be published on three several Sundays in order to ensure a minimum period of time during which any objection to the intended marriage might be made. This provision amended the rubric in the Book of Common Prayer which reads:

> 'First the Banns of all that are to be married together must be published in the Church three several Sundays or Holy-days, in the time of Divine Service, immediately before the Sentences for the Offertory.'

This rubric did no more than repeat the much older provincial canon drawn up to implement Innocent III's decretal *Cum inhibitio*. This decretal states that the clergy must give notice publicly of those who were to be married in church after an acceptable time and in the prescribed manner.[5]

The provincial constitution of Walter de Stapledon entitled *Matrimonium* defines the period of time as *semper tribus diebus Dominicis vel Festivis a se distantibus* (three several Sundays or Holy-days). This is glossed by Lyndwood as follows: *'ad minus ut videtur uno die intermedio'*[6] (at least one day

* Members of the Working Party: The Reverend M. G. Smith (Convenor); Caroline Chamberlain, D. A. Lush and Dr. P. M. Smith. The late Venerable David Walser was also a member.

1. *An Honourable Estate – a Report of a Working Party established by the Standing Committee of the General Synod of the Church of England,* (1988), p. 18.
2. L. Stone, *The Family, Sex and Marriage in England 1500-1800,* (Penguin 1979), p. 29.
3. *Wakefield v Wakefield* (1807) 1 Hag. Con. 403.
4. 26 Geo. 2, *cap.* 33.
5. *Extra,* 4. 3. 3. *'compentenli termino praefinito'.*
6. Lyndwood, *Provinciale seu Constitutiones,* (Oxford, 1679), lib, 4, tit, 1 de sponsalibus, c. 1, *Matrimonium,* gl. ad verb, *a se distantibus,* p. 271.

in between); a rule which might reduce the period of waiting at certain times of the year. The Calendar in the Book of Common Prayer provides that, in some years, at the beginning of May, the end of June and the end of September, two Holy-days can fall on either side of a Sunday. The Marriage Act abolished all such occasions of indecent haste![7]

After 1754 the ecclesiastical courts enforced a strict construction of the forms laid down in the Act; even to the extent of pronouncing a nullity where banns had been published on Christmas Day instead of a Sunday.[8] In addition to prohibiting enforcement of the canon law of pre-contract the Marriage Act introduced a further significant change in the old canon law. It severely limited the scope of the common licence.

For several hundred years before 1754 the bishop's or common licence was used not only to dispense with banns in order to reduce the period of time before which the marriage might lawfully take place but also to dispense a couple from the delay occasioned by a prohibited season. The fourth century Canons of Laodicea prohibit all marriages in Lent; in the 11th Century this was extended to cover other seasons of the Christian Year.[9] In England and Wales no marriage might be solemnized from Advent Sunday until after the octave of Epiphany, nor from Septuagesima until Low Sunday, nor from Rogation tide until Trinity Sunday without first obtaining a dispensation from the ordinary. For over twenty weeks of the year banns could not lawfully be published because, in the ordinary course of events, marriages could not be solemnized. That couples frequently had to take out a licence in order to avoid the prohibition can be seen by examining the extant records of any diocese in England and Wales which survive from the sixteenth and seventeenth centuries. As Gibson remarked:

> 'It is also certain that a distinction of *Times* hath been observed, as the Law of our Reformed Church'.[10]

As the seventeenth century drew to its close there is evidence to show that licences were sought for other reasons and the correspondence of surrogates with diocesan registrars in the early eighteenth century shows that the moneyed classes looked to a common licence for escape from the unwelcome curiosity of their neighbours. It is doubtful however if there was any general relaxation of the rule governing the prohibited seasons. John Johnson wrote:

> 'no regular Clergy-man *Marries any* by *Banns* during the solemn Time of *Lent,* when good Christians ought to be engaged in more serious, and heavenly business, and even when a Licence comes and the case is somewhat extraordinary, yet he can scarce ever get his own consent to the doing so unagreeable a thing.'[11]

7. In the opinion of Henry Fox this was a good reason for opposing the Bill in the Commons, see *Parliamentary History,* XV, 70.
8. *King v The Inhabitants of Billingshurst* (1814) 3 M & S. 255. Unfortunately the name of the case is not given.
9. *Decretum Gratiani* C 33, q. 4 cc. 8-11 especially c.10 'Non oportet a Septuagesima usque in octavo Paschae, et tribus hebdomanibus ante festivitatem sancti Iohannis Baptistae, et ab Adventu Domini usque post Epiphaniam nuptias celebrare. Quod si factum fuerit, separentur'. See also, *Extra,* 2, 9,4; Lyndwood, *op. cit.,* lib. 4, tit. 3, de clandestina desp., c. 1, *Quia ex Contractibus,* gl. ad verb. *solemnizationem,* p. 274; Joseph Bingham, *Origines Ecclesiasticae: or the Antiquities of the Christian Church,* (London, 1722), vol. 9, pp. 337-338.
10. E. Gibson, *Codex Ecclesiastici Anglicani,* 2nd edit. (1763), I,430, note z.
11. J. Johnson, *The Clergy-man's Vade-Mecum,* 1st. edit., (1706), p. 160. There are some incumbents who still observe this rule in 1994.

The issue of licences provided a regular income for chancellors, registrars and the clergy appointed as surrogates. It was also a useful, albeit minor, source of revenue for the Crown because a stamp duty was levied on each document. There was certainly no incentive in such quarters to see so laudable and ancient a custom laid aside. Johnson fulminated against the extension of the prohibited seasons to include Advent and periods either side of Lent; he condemned those officers who insisted on a licence for those times, but there is no evidence to suggest that the practice had been discontinued before 1753. The Marriage Act did not specifically prohibit this ancient use: it simply ignored it. Refraining from marriage during the penitential seasons unless by common licence from the ordinary seems to have lapsed after 1754. It was still taken to be the practice in the letters patent granted to a new chancellor of the diocese of Exeter in 1820[12] but Baron Stowell makes no mention of it in any of his printed judgments in marriage cases. In his *magnum opus* Phillimore quotes Gibson *verbatim* on the subject but offers no comment whatsoever. It seems safe to conclude that, from 1754, the only use for a common licence was to dispense with the calling of banns.

Indeed it could be said that the legislation of 1753 completed a process begun in 1533 with the passing of the Ecclesiastical Licences Act. This confirmed to the Archbishop of Canterbury the power of granting faculties, dispensations, and licences as the pope had done before and as had been delegated to the archbishop as *legatus natus*. The Marriage Act expressly reserved the power, and the reservation has been repeated in subsequent legislation.[13] The Archbishop may grant a common licence for use in any diocese in England although it seems that, by convention, he exercises the power only in the diocese of Canterbury.[14] He may grant a special licence for the solemnization of matrimony at any convenient time or place in England and Wales.

Apart from the wording to be used when publishing banns and the place in Sunday worship when publication is to take place, the legal preliminaries to a marriage in church familiar to us are largely the creation of parliamentary legislation. The provisions of Lord Hardwicke's Marriage Act have been re-enacted in subsequent legislation and are still the law today. Today the Church of England performs the legal preliminaries that are required by the civil law, not by the canon law. 'The Church is privileged to act as regards preliminaries on its own authority'[15] and questions as to what does or does not constitute 'due publication' are determinable in the civil courts. It is not possible to gainsay the assertion of the Law Commission of 1973 that the question of preliminaries falls within the sphere of civil law.

Despite this appropriation by civil law, it is fair to say that the Church of England and the Church in Wales are unwilling to regard legal preliminaries solely in these terms. The preliminaries are perceived to be a procedure grafted, however unskilfully, on to a canon law root stock so that an understanding of the

12. 'And moreover he may grant . . . licences . . . for solemnizing matrimony without the publication of banns or at any season of the year otherwise prohibited.' Parliamentary Papers: *Ecclesiastical Courts Commission (1883)*, II, 676.
13. 26 Geo. 2 c.33 s.6; 6 & 7 Will. 4 c.85 s.1; 12, 13, & 14 Geo. 6 c.76 ss.5(b), 79(6).
14. However we have been shown a common licence issued by Archbishop Fisher to a couple in the Diocese of Exeter in July 1952.
15. P. M. Smith, 'I publish the Banns of Marriage', *Modern Churchman*, 12 (1969), p. 299.

purpose is to be found in more than the immediate issue concerning the status of the couple proposing to enter the state of matrimony. For a canonist there is a theological and pastoral aspect as well.

2. The preliminaries to marriage; the canon law purpose:

The first purpose of such preliminaries was to be satisfied that no impediment exists which would invalidate the marriage. That was part of the express purpose of the decretal *Cum inhibitio*. Anyone who wished, and had valid reasons, might allege an impediment and the clergy themselves ought to find out if any impediment exists.[16] This aim was understood both in theory and in practice in the English Church. The 102nd and 103rd Canons of 1604 required the taking of security and the swearing of an oath and the evidence of the consent of parents or guardians before the issue of a licence. The Marriage Acts appear to have relieved the clergyman of a legal duty to enquire into impediment save that of residence and correct names.[17] Presumably it was considered that publication with a decent interval of time would be effective. As Lord Ellenborough observed:

> 'The object of the statute in the publication of banns was to secure notoriety, to apprize all persons of the intention of the parties to contract marriage.'[18]

With the introduction of marriage before a registrar, the law has tended to move away from notoriety as the desirable way of discovering an impediment to marriage. Lord Penzance made clear that the Matrimonial Causes Act 1857 so modified the procedure laid down in the Civil Marriages Act 1836[19] that marriage by notice before a registrar was analogous to marriage by licence and that the party (under the pains and penalties of perjury) was responsible for swearing that he or she had the required consents. He declared that all case law based on the procedure applied to banns had no further relevance to marriages contracted before a registrar.[20]

The bulk of suits of nullity on the grounds of undue publication had been brought in order to release a party from a marriage contracted while under age. This led judges to imply that publication was solely for the benefit of parents or guardians. Lord Penzance even doubted if a marriage could be annulled on the grounds of undue publication if there was no one in existence who had a legal right of dissent or assent.

Earlier in the century a very different view prevailed. Baron Stowell was clearly of another opinion. Marriage, he observed, was to be entered into with all public notoriety and performed in a public place.

> 'The public at large, the relations, the parties themselves have an interest in it. They may receive very important information of the conduct and character of the parties who are going to enter into this contract for life: there may be persons well acquainted with the particulars, whether of his or her conduct, which may alter the resolution of either of the parties themselves.'[21]

16. *'ut intra illum qui voluerit & valuerit, legitimum impedimentum opponat, & ipsi presbyteri nihilominus investigent, utrum aliquod impedimentum obsistat'.*
17. But Canon B33 implies otherwise.
18. *supra King v The Inhabitants of Billingshurst* (1814), 257.
19. 19 & 20 Vict., *cap.* 119 and 6 & 7 Will. 4, *cap.* 85.
20. *Holmes v Simmons* (1868), L.R. 1 P. & D. 523; 18 L.T. 771.
21. *Frankland v Nicholson* (1805) M. & S. 260.

Stowell's reasoning has in mind the teaching on marriage in the Book of Common Prayer; that it is 'not to be enterprized nor taken in hand, unadvisedly, lightly, or wantonly.' It is no part of the publication of banns to make match-makers or match-breakers out of the parishioners at large, but Baron Stowell presupposes a wider context for the publication of banns than that which served solely to establish that no legal impediment exists.

Indeed, so long as the Church is concerned with the preliminaries to marriage in the context of worship it is quite impossible to divest them of all theological and pastoral significance. They cannot be considered apart from the wider context of the ministry of the Church of England and the Church in Wales to the nation as a whole. Many would argue that 'coming to church to hear your banns called' is a practice rooted in that nexus of relationships which makes up a local community; and that the parish church is still a principal node, or meeting point, in that community. They would say that this is still true in the countryside and that it is not unknown in an urban setting. Because the practice is one of the bonds of community grounded in a locality, they would claim that the abolition of banns will further undermine the precarious and vulnerable state of our social fabric. Liturgical scholars are starting to explore the social anthropology of Arnold van Gennap and to see in the rites connected with marriage, and that includes the preliminaries to it, a preservation of the 'deep structures' of initial rites of passage necessary in all human societies.[22]

Others wish to go further and argue that any change in the present procedure will have a deleterious effect upon the pastoral work of the Church. The Law Commission's conclusions, namely that legal preliminaries should be reduced to a uniform procedure applicable to all and that the publication of banns was unlikely to be a good way of disclosing impediments, were opposed in the General Synod. The Synod put forward the following arguments against the abolition of the calling of banns:

1. that universal civil preliminaries will lead eventually to the introduction of compulsory civil marriage;
2. that there was insufficient evidence to suggest that the clergy failed to fulfil their duties;
3. that banns were no less effective than a notice on a board in a register office and, in a country village, far more effective;
4. that clergy were generally more available than registrars who only worked office hours;
5. that the common licence procedure was flexible and reliable.[23]

The working party of General Synod which produced *An Honourable Estate* whole-heartedly endorsed these arguments and added some of its own. It stressed the opportunity provided for offering pastoral care:

> 'It is our view that the Church should not be seeking to reduce the opportunities that it has to welcome and help couples preparing for marriage . . .Couples benefit from the present system since they are able to deal with the legal requirements and with the arrangements for their wedding service together. If they wish to be married in the Church of England all these matters can be dealt with in one place.

22. Kenneth Stevenson & Brian Spinks, *The Identity of Anglican Worship*, (1991), pp. 103-115.
23. General Synod Report Misc. 25.

> A couple are able at the time they fix the date of the proposed marriage to settle dates for the publication of banns and for further sessions for the preparation for marriage. The introduction of universal civil preliminaries would involve couples making separate arrangements for the preliminaries and for their wedding service. We see no strong argument for such a change. . .'[23]

3. Is there any pressure for change?:

One might be tempted to say that a difference of approach in explaining the need to publish banns of marriage may be expressed in terms of Ellenborough and Penzance v Stowell, with members of the Law Commission holding an opinion influenced by the former and members of the General Synod closer to the understanding of the latter. It is a good example of the difference of approach students of the temporal law and students of the canon law may have on a particular issue. The approach expressed by Baron Stowell is an older and conservative one but it cannot be assumed that students of the canon law are necessarily averse to change. As Chancellor Coningsby observed in his personal view of *An Honourable Estate:*

> 'it would be foolish to think that there are no theological problems, no social problems and no practical problems.'[24]

The Report of the Ecclesiastical Law Society's working party on marriage after divorce indicates that the debate on marriage will continue because the problems connected with it will not go away.[25] This Report is concerned solely with legal preliminaries and, even here, in the practical problems of publishing banns, there seems to be a pressure for a change in the law.

We wish to emphasize the word 'seems to be pressure'. Despite the fact that we are nearly two decades into a technological revolution providing ever more sophisticated facilities for the storage and retrieval of information, we are dependent on anecdotal evidence which is fragmentary, and far from consistent. It is clear, however, that mobility in the population, the widespread practice of cohabitation, the grouping of parishes, the declining number of clergy has caused a growing number to question the point of publishing banns. It is seen by some to be a tiresome and meaningless formality. Readers of the *Church Times* were invited to give their opinions; some responded; here are some extracts from letters received:

> 'my daughter's husband has not lived at home (South Wales) permanently since going to university and his banns were called in London at a church into which parish he had only just moved.'
>
> (East Sussex)

> 'Of all the fees I charge, I find this the most scurrilous . . . because the thing is a legal fiction. . . it is probable in most urban parishes that scarcely 1 in 10 of the names read out will mean anything to anyone in church that day.'
>
> (West Yorkshire)

23. *op. cit.*, p. 74.
24. Ecc. L.J. (3) 14.
25. Ecc. L.J. (11) 359-368.

> 'Where the couples' contacts with the church they are married in may lead to evangelism, I have never heard of anyone converted by going to hear their banns read.'
>
> (South East London)

> 'Another airman on the station [where I officiate] has elected to marry in a register office because the Church procedures are 'too much hassle'. They are equally a tedium for the clergy.'
>
> (East Anglia)

We are not wholly dependent upon anecdotal evidence; there are statistics supplied by the Office of Population Censuses and Surveys. Those covering the period 1980-1990 are set out in an appendix. They show that the publication of banns is by far and away the commonest legal preliminary in the Church of England and the Church in Wales. The figures lend strong support to the argument that no change in the law is needed. The figures also show that between 1980 and 1990 there was a 21% increase in the number of common licences granted and nearly 175% increase in special licences. The number of superintendent registrar's certificates more than trebled. In 1980 the percentage of weddings not preceded by banns was 5.5% of the total number solemnized in church. By 1990 that had risen to 9.72%. As percentages these figures are not very significant but the sharp increase in the number of special licences and superintendent registrar's certificates is noteworthy and lends support to the contention that there is a growing number of situations in which couples cannot be accommodated by the publication of banns.

What we cannot know for certain is the frequency with which the present law is flouted. We have been given specific evidence of a situation where the law has to be broken for the system to work at all. Hearsay speaks of other cases where the law is flouted by appealing to the principle of pastoral care; the self-same principle cited in *An Honourable Estate* as a reason for keeping the law unchanged.

A large part of the irritation stems from the rules governing residence and the parish church in which the wedding ceremony may be held. This is a separate but connected issue to which we shall return later. The question to be addressed first is this: do all these social changes make the publication of banns less likely to reveal impediments to a lawful marriage? The answer has to be: increasing mobility makes for growing anonymity. As the law stands at present, it is next to impossible for a clergyman, or a registrar for that matter, to assess whether or not the couple before him are concealing an impediment. The congregation listening to the names called in church, or, in the case of a predominantly elderly group, straining to hear them, has frequently no idea who the couples are. The members of the working party which produced *An Honourable Estate* appear still to assume that the couple seeking to be married are living in the same parish. This is very often not the case. Banns have to be called in a second parish and it is at this point that irritation is felt most strongly. The couple are frequently known to no one; the pastoral contact is minimal at best and meaningless at worst. If it does lead to a couple having further contact with that parish it is more likely to be for reasons in no way dependent on the requirement to have their banns published. There was a time when some incumbents insisted on attendance at

worship for six months as a preliminary to inclusion on the electoral roll of the parish in which neither party had a right to be married by virtue of residence. Perhaps this still happens but the present criterion for assessing the Parochial Share, with some dioceses making use of the numbers on an electoral roll as a part of the formula for calculating the amount, has created a powerful disincentive. A rejoinder is that, in other cases, there still is a point of contact in as much as it gives the people concerned a reason to attend worship; they are expected to come once to hear their banns called. Admittedly this does take place in certain localities but the pattern is not consistent even in the same part of the country. Couples are under no obligation to attend the church when their banns are called; frequently they do not do so.

Increasing mobility makes for growing anonymity: this problem affects registrars and clergy alike. The Government has recognized this fact. In the White Paper published in 1990 and now, apparently, laid aside, it proposed to give both to registrars and to clergy of the Church of England and Wales a statutory power to call for documentary evidence of the age, identity and marital status of those who are marrying.[27] In welcoming this idea and in specifically seeking this statutory power for the clergy, the General Synod is not being entirely consistent. It is accepting implicitly the Ellenborough/Penzance view of the purpose of legal preliminaries because if the clergyman can call for documentary proof before publication then what is left to be discovered by publishing? If the reply is consanguinity and affinity then, in one respect, the law already discourages the use of banns for this purpose for where a relationship is one specified in Part II Schedule I of the Marriage Act 1949, and now made lawful by the Marriage (Prohibited Degrees of Relationship) Act 1986, banns cannot be called. The General Synod has indicated that it believes there are other considerations and presumably it would really prefer the criteria of canon law.

If one cannot be certain that the publication of banns always serves the purpose intended by the Marriage Act nor the primary purpose intended by the old canon law then a defence must rest on the other criteria, for canon law must reflect the theology of the Christian Church. Members of an Erastian Church can agree with Roman Catholics that canon law governs 'the public life of the faith community'.[28]

It is worth asking, what might be lost if no legal preliminaries ever need be conducted in a public place before an assembly of worshippers? The answer may well be: the Church's teaching that the parties who contract a marriage enter a new and distinctive relationship not only with each other but also with society at large. Baron Stowell seems to have had this in mind in the case of *Frankland v Nicholson:*

> 'marriage is a contract by which the relation of parties to the public is materially altered.'

The social dimension of marriage is not mentioned specifically in the Book of Common Prayer to which Canon B 30(2) refers but the prominence given to bringing up children 'in the fear and nurture of the Lord' strongly implies it. The Alternative Service Book (1980) puts the social aspect in plain terms:

27. White Paper (January 1990) para. 3.15.
28. James A. Coriden, *An Introduction to Canon Law,* (Paulist Press 1991), p.4.

> 'In marriage husband and wife belong to one another and they begin a new life together in the community.'

Publication of banns serves to emphasise the communal significance of marriage; it is not a purely private contract.

4. Retention of banns in one parish only:

If there is, or will be, a growing number of couples who cannot be catered for with integrity within the present legal provisions then a compromise suggests itself. Why not retain the publication of banns as a legal requirement only in the church where the couple are to be married, or in the church in a group of parishes where banns have to be called under the provisions of the Pastoral Measures? Banns could still be called at the other church or churches if the minister thought it appropriate but it would cease to be a legal requirement and no fee would be charged. This change in the law would go some way to removing what many see as a pointless exercise and an irritating intrusion into the flow of the liturgy or other act of worship. It would also seem sensible to amend the law governing due publication to make it possible to publish the banns at the beginning or end of the principal service on a Sunday morning whatever form that service takes. It is common-sense to take into account the changing patterns of worship which make due publication in accordance with the rubric in the Book of Common Prayer difficult if not impossible and it would bring to an end the present situation where the law is often disregarded.

If a clergyman were to be given the statutory power to call for documentary evidence of age, identity and marital status it would no longer be necessary for a clerk in holy orders to publish the banns if he is present. With the spade-work having been done already it should be possible for anyone conducting the service to publish the banns and sign the banns book. This change would be of particular assistance to parishes where lay folk conduct worship regularly.

There does not seem to be any merit in changing the present method of publication. As a form of celebrating something in the life of the community, the suggestion that use could be made of the parish notice board has nothing to commend it. There is, today, a practical objection. In the case of register offices, it is true to say that few people bother to visit one simply to look at the notice board but register offices do have at least a regular number of hours during the week when they are open and someone is in attendance. This is no longer true of many churches. A number of parochial church councils heed the advice of insurance companies and police crime prevention officers by keeping their buildings locked. Locking the church often includes locking the door to the porch where notices are displayed. The alternative is to affix a notice board to an outside wall or to erect one on the curtilage or in the churchyard. But these are no longer safe from the attention of vandals.[29]

Confining the publication of banns to the church in which the marriage is to take place raises the issue of residence. Here we touch on a delicate pastoral problem where the requirement of the law may be at variance with the wishes of

29. The Government White Paper (1990) para. 3.11 proposed abolition of the requirement that notices of intention to marry be posted in register offices. The Working Party looked at the suggestion that for banns should be substituted a simplified form of publication in a local newspaper as a means of fulfilling legal preliminaries but rejected it on the theological and liturgical grounds given above.

the individual. The territorial parish with its origins deep in local history, is, in some sense, a preserver of community. It helps to root society in its locality for, by their very nature, communities traditionally have had their embodiment in a given geographical area. It is right that the Church should remind individuals nurtured in a society which encourages them to think of themselves as separate, self-subsistent entities that true human fulfilment is to be found in relationships with fellow humans in community; and that obligations and duties are as important as rights; indeed the former are the only assured guarantees of the latter. It is proper that the Church in the name of community and of theology should, by its rules of residence, resist requests to be married in a particular church solely on the grounds of personal preference.

It is arguable, too, that a residence requirement acknowledges the presence of the local Family of God gathered for worship, exercising its calling in mutual support and service. The existing law extending residence to include those on the electoral roll of the parish where they worship but do not reside acknowledges that teaching. This theological message suffers dilution when ministering to those who seek only a church ceremony but it is not thereby extinguished. As Archbishop Ramsey said: 'A Church that lives to itself will die by itself'; by treating parishioners in the same way as committed members, the Church bears witness to the truth that it exists for the benefit of those who are not its members and that it wants to invite them into the Kingdom of God.

The irony is that the present rules of residence may, and do, prevent a couple from being married in a church where they have some sense of belonging either because one or both grew up in the place, or the parental home is there, either because the parents have always lived there or because the parents have retired to that place. This situation has come about not only through social mobility but also through the practice of cohabitation for several years before deciding to get married. Faced with a request to marry in a church where the couple do not qualify to be on the electoral roll and where cohabitation has fixed their residence elsewhere, incumbents are faced with a choice either of obeying the law and refusing the request, or of flouting the law, or of recommending the couple to seek an archbishop's licence.

If an incumbent abides by the present law he runs the risk of doing the very thing which advocates of the *status quo* want to prevent. To quote again from *An Honourable Estate:*

> 'It is our view that the Church should not be seeking to reduce the opportunities that it has to welcome and help couples preparing for marriage.'

The thought of an incumbent flouting the law is a disturbing one. Enough people are concerned with clerical disobedience without wishing to encourage it to happen. However minor the infringement it is not wise to give the impression that the law may always be disregarded at the discretion of an individual clergyman, nor is it right for the Church to be seen to be conniving in accepting a false claim to have a residence qualification as a preliminary to taking a solemn life-long vow.

This leaves the remedy of seeking a special licence. As the statistics show this is the course taken by more people in recent years. We know that this power is exercised responsibly with an annual review of the guide-lines employed. It is a valuable privilege not lightly to be set aside and one would not wish to see that

happen. The grant of a special licence is still the most flexible way for a couple seeking to be married in a donative or in a proprietary or parish chapel or for persons normally domiciled aboard. It is difficult for officers working in Westminster to be consistent in the face of the variety of circumstances they called upon to assess. Reversals of policy are thought to take place from time to time to the bewilderment of some who thought the precedents were clear but the fact that no ground-swell of complaint exists is ample testimony to the fairness with which the system operates at present.

So far residence has been looked at in terms of the many cases where couples are living right away from the parish church in which they wish to be married. There is another class of cases which have resulted from the Church's own policy of pastoral reorganisation. Marriages in united benefices and parishes held in plurality have led to much unease in some dioceses because under the provisions of the Pastoral Measure 1983 (Schedule 3, para. 14), a bishop may give directions whereby a person living in one parish may marry in the parish church of another in the same benefice. People would appear to be hearing conflicting legal advice in such cases. In one diocese this provision may be interpreted as conferring a right upon all persons residing in a united benefice to select any one of the parish churches for the wedding. In another diocese the view is that the word 'benefice' does not appear in the Marriage Act and that there is no such entitlement.

Another problem may arise in parishes where there is a parish centre of worship but no parish church. The Pastoral Measure s.29(3) provides that a person resident in such a parish may marry in the parish church of any immediately adjoining parish. This permission can cause resentment and, in a number of instances, has led centres of worship to seek full parish status. In a united benefice the preference for one parish church above the others may be resented by the parishes deprived of fees.[30]

Cases arising out of pastoral reorganisation are affected by topography; what can be a pressing problem in one diocese is virtually unheard of in another. These cases do not admit of an easy solution for if a rigorous legal interpretation is adopted it will be only too easy, locally, to bend the rules: on the other hand, ignoring the problem will do nothing to diminish the resentment. If financial grievance is at the heart of the resentment one partial solution presents itself for which there a sound, albeit ancient, precedent. It could be required that in cases of this nature the parochial fees be paid to the parish in which the person resides.[31]

5. Extension of the common licence:

On community and on theological grounds there is no argument for suggesting that the residence requirement be abandoned. In all normal cases a couple should be encouraged and expected to be married in the parish church of both or one of them after banns have been published. Principles are at stake here which the residence rule safeguards. Nor is it wise to suggest a drastic change in

30. It is worth pointing out that it will be not only the parochial fees prepared by the Church Commissioners under the Ecclesiastical Fees Measure 1986 that are at issue here. Organists, bellringers, vergers and choirs all stand to lose, not to mention the collection plate!

31. Johnson, *op. cit.*, p.159, where he takes it for granted that fees are due to the woman's parish church whether she is married there or not. This was certainly the custom in the diocese of Canterbury; see Canterbury Consistory Court, *Jones v Cheesman* (1674), Kent Record office PRC 44/1.

the law simply to accommodate a social practice like cohabitation which may not necessarily turn out to be permanent. Having said this, one has to acknowledge that if the general public wants a greater choice in the place where they may get married then it would be wise for the Church of England to anticipate that wish by providing a simpler and less expensive way of processing those cases where a dispensation from the rules of residence is needed in the name of pastoral care.

We suggest that this might be achieved by a greater use of the bishop's or common licence. It would require legislation because, at present, this licence can only dispense from banns. A change in the law could build upon the distinction which seems to exist already between the definition of residence for the purpose of calling banns and for granting a licence. 'Usual place of residence for fifteen days immediately before the grant of the licence' (M A 1949 s.15) would appear to be a less stringent requirement than that applied to banns which requires the parish to be that 'in which one of the parties resides'. The Faculty Office has stated its opinion that for a common licence the 'usual place of residence' does NOT require a physical presence.[32]

It would be possible to enlarge the scope of 'usual place of residence' to include the usual place of residence of the parents or present or former legal guardians, reaffirming, at the same time, that marriage after licence is a privilege and not a right and may be refused by the licensing authority.

All diocesan registrars were asked questions about the common licence: twenty-eight replied. Their replies indicate:

1. the procedure for granting a common licence is well-tested and works smoothly;
2. a chancellor's appointment of surrogates, on the recommendation of the diocesan bishop, ensures that this officer is more accessible locally and that there is no shortage of suitable candidates;
3. it is fully understood that the grant of a licence is a privilege and not a right;
4. despite some exceptions there is a fair measure of consistency in the exercise of that discretion;
5. matters to do with issuing licences makes up a small percentage of a registrar's work-load.

When registrars were asked for their reaction to an extension of the scope of a common licence, seventeen were not in favour and could see no reason for change. The question was put to them in general terms in order to gauge instinctive reaction and alarm was expressed by several at the thought of a flood of applications to be married in the 'pretty' or 'photogenic' churches with all the inequity and resentment this might arouse. Eleven registrars were in favour of extending the scope and five strongly supported the suggestion.

We consider our suggestion a modest extension and one which would go a long way to remove the most frequent problem encountered with regard to residence. We express a preference for the common licence rather than for banns because it removes responsibility from the local incumbent in situations which

32. *Anglican Marriage in England and Wales: a Guide to the Law for Clergy*, 1992, s.5.6; cf. Garth Moore: 'It is however worth noting that residence is a condition precedent to the publication of banns, and that residence does not occur simply by leaving a suitcase in the parish.' *An Introduction to English Canon Law*, Oxford, 1967, p.87.

could be pastorally embarrassing. We have in mind cases where a family might want to take advantage of the location of a weekend cottage or second home and has no intention of being included on the electoral roll. Not being involved in the local community, such families are often blissfully unaware of the resentment their intention can cause. We also consider that a surrogate for marriage licences is in a better position to assess the local pastoral implications while, at the same time, retaining a certain detachment.[33]

It is true that a greater burden will be placed on the shoulders of a surrogate as well as on the shoulders of his superiors but, as C. A. A. Pearce rightly points out in his study of the role of a vicar-general and his surrogates, an element of discretion is already present in the way common licences are granted now. Mr Pearce also draws attention to the fact that a surrogate is already an inferior ecclesiastical judge so our suggestion does no more than extend a jurisdiction which already exists.[34]

It may be objected that the suggestion is an encroachment on the rights of the Archbishop of Canterbury: it need not be. There is no reason why the Archbishop should not retain a concurrent jurisdiction as he does at present in the case of the common licence. He would retain sole jurisdiction for marriages solemnized in all places of worship other than parish churches; for all persons living and working abroad, especially in other countries of the European Community; even for all persons living in the United Kingdom but in different provinces. Europeans working in this country could also be catered for by a special licence since there seems to be some doubt whether such persons can claim legally to reside in this country. An archbishop's licence is 'special'; there will always be special situations for which it is designed.

Up till now, the Church of England has responded to changes in this field of law proposed by others. We should like to think that the time is right for the Church to make proposals of it own; proposals which will preserve what is still of value in existing law and custom but offering, at the same time, a positive adaptation of them in response to the changes taking place in our society.

6. Conclusions of the Working Party

1. The publication of banns is no longer the best way to uncover legal impediments to marriage.
2. In publishing banns canon law is concerned with more than the enquiry into legal impediment; there is a theological and social dimension which should never be ignored.
3. We consider that the publication of banns should be retained but suggest that the law be modified in order to take account both of social behaviour and the varieties of modern liturgical practice. We suggest, therefore,
   a. publication of banns in the parish church where the marriage is NOT to be solemnised should cease to be a legal requirement;
   b. publication should still be in the manner prescribed at present but flexibility permitted both as to the form of the act of worship and as to the person authorised to publish.

33. It would be understood that a surrogate did not handle applications for his own church or churches. If this proposal were to include the Church in Wales then it may be thought necessary to exclude the incumbent of Hawarden from this extension of the grant of the common licence.
34. C. A. A. Pearce, 'The roles of the Vicar-general and Surrogate in the Granting of Marriage Licences', 2 Ecc.L.J. 28-36.

4. Residence should continue to be the principal criterion when determining the parish church in which a marriage may be solemnised but social change should be acknowledged by a wider discretionary power of dispensation. We suggest that the use of the common licence be extended to enable the homes of parent(s) or present, or former, legal guardian(s) to qualify as the place of residence.
5. The special licence should be retained in order to provide, as it does now, a dispensation for special situations.

Appendix: Extracts from tables of MARRIAGE AND DIVORCE STATISTICS (FM2 series) 1980-1990

Nature of Preliminaries in marriages solemnized in Church of England and Church in Wales.

Year	Total for C. of E. & C. in W.	Banns	Common Licence	Special Licence	Supt. Registrar's Certificate
1980	123,400	116,615	5,186	1,223	376
1981	118,435	111,595	5,011	1,445	384
1982	116,978	109,524	5,310	1,651	493
1983	116,854	109,570	5,107	1,651 [sic]	526
1984	117,506	109,920	5,140	1,775	668*
1985	116,378	108,329	5,155	1,911	983
1986	117,804	109,122	5,410	2,198	1,074
1987	121,293	111,859	5,582	2,571	1,281
1988	118,423	108,165	5,902	2,978	1,378
1989	118,956	107,557	6,434	3,445	1,520
1990	115,328	104,095	6,275	3,360	1,579‡

* 3 Not stated
‡ 19 Not stated