4. *A Note on Judicial Separation*

Parliament has jurisdiction over judicial separation as well as over the dissolution of marriage. Judicial separation has been defined as "divorce without the right to remarry". Lord Buckmaster in the case of Hyman v. Hyman (1929 A. C. 601) has provided the classic description. He said:

> "Judicial separation, which has been the subject of much learned and mighty censure, is nothing but enforcing through the order of the court an arrangement which the parties could—were they willing—equally effect for themselves, it merely makes in the form and with the force of a decree an arrangement for the parties to live apart."

The law concerning judicial separation in Canada has been determined by the same processes that established the law on dissolution of marriage. British Columbia and the Prairie provinces thus base their law of judicial separation on the law of England as it was on November 19, 1858 and July 15, 1870. The exception is Alberta which in 1927 passed an Act purporting to govern judicial separation. The legislature acted on the assumption that the subject was one of civil rights. Judicial separation clearly affects the rights and obligations resulting from the marriage status and thus falls within federal jurisdiction. Hence the validity of this provincial legislation is doubtful. The provisions of the *Alberta Act*, however, are not dissimilar to those in force in the other Prairie provinces.

The English law is founded on the English Act of 1857 already mentioned. The grounds provided in the English Act are adultery, cruelty, and desertion without just cause for two years or more. However, that Act provided that relief could also be granted on principles which, in the opinion of the court "are as nearly as may be conformable to those followed by the English Ecclesiastical Courts before 1857." Thus the grounds may be somewhat wider than those actually enumerated. Alberta and Saskatchewan have by statute widened the former grounds for judicial separation adding (i) desertion constituted by the fact that a spouse has failed to comply with an order for restitution of conjugal rights; and (ii) sodomy or bestiality or attempts to commit either offence.

In Nova Scotia and Newfoundland the substance of the English law of 1857 also provides the legal basis for judicial separation. In the latter province, the Supreme Court has all the powers exercised by the English Ecclesiastical Courts prior to 1832 and this includes competence in actions for judicial separation. Nova Scotia has conferred on its divorce courts the jurisdiction to grant separations in accordance with principles and practices of the English courts in 1866. In New Brunswick the law dates back to an Act of 1791 and the grounds for a separation are the same as those for divorce with the addition of desertion.

Thus in seven provinces there is a degree of uniformity in the law providing for judicial separation. The exceptions are Ontario, Prince Edward Island and Quebec. Prince Edward Island seems to have no grounds specified at all for the granting of judicial separation, and the Courts of Ontario have held they do not possess the jurisdiction to grant relief in this field. They base their contention on the wording of the *Divorce Act (Ontario)*, 1930, which provided for the dissolution and annulment of marriage only, and not for matrimonial causes generally. Consequently, in Ontario there is no law of judicial separation