

by the marriage has been extinguished, but the status enjoyed by the parties thereto immediately before the marriage has not been fully restored. I would therefore consider that the expression "marriage and divorce" includes judicial separation, because the latter deals with the legal status of married persons and the effect of a judicial decree on that status. Putting it another way, one might say that the greater includes the less; if Parliament can say that pre-existing rights are fully restored, it can also say that they are only partially restored.

Dealing now with your second question, as I have indicated, jurisdiction to make laws in relation to "divorce" is in essence jurisdiction to make laws for the alteration of the legal status created by the marriage; the jurisdiction therefore extends to the abolition of the rights and obligations created by the marriage and the restoration of pre-existing rights. As I have already indicated, I think it must follow that these rights and obligations can be terminated in whole or in part.

It is the husband's duty to maintain the wife. If the marriage is dissolved, that obligation normally ceases because the relationship of husband and wife no longer exists. For the reasons I have indicated, I think that Parliament is competent to define the extent to which a dissolution of marriage alters the rights and obligations inherent in the marriage and therefore could provide for a continuation of the obligation to support. The remarks of Lord Atkin in *Hyman v. H.* (1929) A.C. 601, would support this line of argument. He there said at pp. 628-9:

"The necessity for such provisions is obvious. While the marriage tie exists the husband is under a legal obligation to maintain his wife. The duty can be enforced by the wife, who can pledge his credit for necessaries as an agent of necessity, if, while she lives apart from him with his consent, he either fails to pay an agreed allowance or fails to make her any allowance at all; or, if she lives apart from him under a decree for separation, he fails to pay the alimony ordered by the Court. . . . When the marriage is dissolved the duty to maintain arising out of the marriage tie disappears."

This view is also supported by the remarks of Crocket, J. in *McLennan v. McLennan* (1940) S.C.R. 335, and by the British Columbia Court of Appeal in *Rousseau v. Rousseau* (1920) 3 W.W.R. 384.

The same reasoning would apply to maintenance and custody of children. During marriage the husband is under a duty to maintain and provide for the education of the children of the marriage, and the husband and wife have joint custody. These are rights and obligations that arise out of the marriage relationship. A divorce, which terminates the marriage relationship, obviously interferes with these rights and obligations, and in my opinion Parliament's jurisdiction in relation to divorce would include jurisdiction to prescribe the extent to which these rights and obligations are to be abrogated or continued. In the *Reference re Adoption Act* (1938) S.C.R. 398, the Supreme Court of Canada upheld provincial legislation, but at page 402 Chief Justice Duff left the door open to federal legislation when he said that

"We are not concerned with any ancillary jurisdiction in respect of children which the Dominion may possess in virtue of the assignment to the Dominion Parliament by section 91 of the subject of Marriage and Divorce."

The division of property between divorced persons (apart from the question of support or maintenance), as well as such matters as marriage settlements, dower, homestead rights, the right of married women to own property and sue in their own names, etc., may well stand on a different footing. These matters do involve rights and obligations between husband and wife, but they seem to me to relate more to the property and civil rights of the parties to the marriage than to