PART II

CANADIAN DIVORCE LAW AND THE LAW OF OTHER COUNTRIES

I CANADA

1. *The Evolution of Canadian Divorce Law*

Although the Parliament of Canada enjoys exclusive jurisdiction over marriage and divorce by virtue of section 91, head 21 of the British North America Act of 1867, expressed in the words "Marriage and Divorce," the essence of Canadian divorce law is to be found in an intermingling of English and pre-Confederation colonial statutes that have undergone only limited amendment by the federal Parliament. The courts of eight of the provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia and Prince Edward Island) have the power to grant divorces *a vinculo matrimonii* (from the bonds of marriage), while those of Quebec and Newfoundland have not. In the Yukon and Northwest Territories, the courts also have authority to grant divorces. Parliamentary divorces are provided for persons domiciled in Quebec and Newfoundland, or whose domicile is uncertain. With the exception of the three Atlantic provinces, which have divorce law of their own enactment antedating Confederation, the divorce law administered by the courts of the provinces, other than Quebec and Newfoundland, is basically the same as the English divorce law as it was on July 15, 1870. The English law of that date was set out in *The Divorce and Matrimonial Causes Act* of 1857.

This complicated pattern and the predominance therein of nineteenth century English law has resulted from the piecemeal growth of Canada and the introduction of English law into the various colonies before they joined Confederation. In colonies of settlement, such as Nova Scotia, the common law of England and the then current existing English statute law became the law of the colony, while in colonies acquired by cession, such as Quebec, the existing laws of the territory, if there were any, continued in force until or unless expressly altered or repealed by the Crown.

In colonies of settlement, it was established by the eighteenth century that laws could be made only with the assent of an assembly in which the people were present either in person or by their representatives. Once a colony possessed its own legislature and made its own laws, statutes passed in England no longer automatically applied to the colony unless specifically stated to do so. While the Imperial Parliament could, and often did, legislate for the Empire as a whole and for certain specific colonies on particular occasions, Imperial legislation became applicable *prima facie* to the United Kingdom only and not the colonies. Any colony could, of course, adopt English law in whole or in part by legislative action and any law so instituted could be changed by the colonial legislature.

At the time of Confederation, section 129 of the British North America Act provided that the law then in force in the provinces of Upper and Lower Canada, Nova Scotia and New Brunswick should continue in force until and unless