CANADIAN WOMEN AS LEGAL PERSONS

HOW ALBERTA COMBINED JUDICIAL, EXECUTIVE AND LEGISLATIVE POWERS TO WIN FULL LEGAL PERSONALITY FOR ALL CANADIAN WOMEN

THE JUBILEE OF

Henrietta Muir Edwards and others v. *Attorney-General for Canada*[1]
decided October 18, 1929

OLIVE M. STONE*

Alberta was greatly influential in the development of the full legal status of women in Canada. The author discusses the state of laws concerning women prevailing before the landmark case Edwards *v.* Attorney-General for Canada, *providing a valuable historical perspective. American and British case law and statutes are compared with their Canadian counterparts, concluding with an overview of the legal development of the status of women in Western Canada.*

On October 18th, 1979, Alberta may justly celebrate fifty years of full legal personality for all Candian women, fought for and won by Albertans before the Privy Council in London in a judicial decision that decisively turned the prevailing current of authority, which was that women were not persons in the eyes of the law.

As all Albertans know, in *Edwards* v. *A-G for Canada*[2] the question was whether the 'qualified persons' whom the Governor-General should from time to time summon to the Canadian Senate under s. 24 of the British North America Act 1867 might include female persons. In an opinion read by Lord Sankey, (the Lord Chancellor of the day,) the Privy Council reversed the former finding of the Supreme Court of Canada[3] and contrary to a long line of previous decisions in the English courts[4] advised that the word 'persons' in

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1. [1930] A.C. 124.
2. The appeal was brought by five notable women of Alberta, headed by Judge Emily Murphy, and known as *The Alberta Five*. The other four were: (1) Mrs. Irene Parlby, a member of the Alberta legislature since 1918, appointed to the Alberta cabinet in August 1921 as Minister without Portfolio. She was the second woman cabinet minister within the British Empire, (the first by five months being Mrs. Mary Ellen Smith of British Columbia.) (2) Mrs. Louise McKinney, one of the first two women legislators in the British Empire, elected M.L.A. of Alberta in June 1917; (3) Mrs. Nellie McClung, elected M.L.A. of Alberta in 1921 and (4) Mrs. Henrietta Muir Edwards, Alberta Vice-President and convenor of laws for the Canadian National Council of Women. It is said to have been at Judge Murphy's insistence that *'the Five'* were listed in alphabetical order. There had been pressure to appoint Judge Murphy to the Senate since 1919. In 1927 Judge Murphy initiated a petition on behalf of *'the Five'* to the Canadian government that the Supreme Court of Canada be asked to decide under the Supreme Court Act, s. 60, whether the 'qualified persons' whom the Governor-General should from time to time summon to the Senate under s. 24 of the British North America Act 1867 might include female persons. The government agreed, and the ball was rolling.
3. *In the Matter of a Reference as to the meaning of the Word 'Persons' in Section 24 of the British North America Act 1867* [1928] S.C.R. 276.
4. Starting with *Chorlton* v. *Lings* (1868) L.R. 4 C.P. 374, through *Chorlton* v. *Kesseler* (1868) L.R. 4 C.P. 397; *Wilson* v. *Town Clerk of Salford* (1868) L.R. 4 C.P. 398; *Brown* v. *Ingram* (1868) 7 M. 281; the *Oldham Case* (1869) 1 O'M & H. 151; *The Queen* v. *Harrald* (1872) L.R. 7 Q.B. 361; *Stowe* v. *Jolliffe* (1874) L.R. 9 C.P. 734; *Beresford-Hope* v. *Sandhurst* (1889) L.R. 23 Q.B.D. 79; *De Souza* v. *Cobden* [1891] 1 Q.B.D. 687 and *Nairn* v. *University of St. Andrews* [1909] A.C. 147, amongst others. In *Hall* v. *Incorporated Society of Law Agents* (1901) 3 F. 1059, it was held that a woman could not become a law agent.

s. 24 of the British North America Act included members of either sex, and that therefore women having the qualifications set out in s. 23 of the Act might be summoned by the Governor-General to the Canadian Senate. The advice was based largely on the reasoning that the exclusion of women from public office in Canada was by no means so inveterate as it had become in England, and that a constitutional instrument such as the British North America Act should not be given "a narrow and technical construction, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs."[5]

Alberta's first act in celebration of this famous victory was to pass the Sex Disqualification (Removal) Act,[6] expressed to have retroactive effect to 1st September 1905, that is to the founding of the province. This provided:

> S.2(1) a person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society.

So sweeping a victory, against such a weight of authority, could only have been achieved because the legal groundwork had been well and carefully laid. This was done twelve years earlier by the Appellate Division of the Alberta Supreme Court in the case of *Rex* v. *Cyr* [7]. The anniversary of this momentous decision[8] is no less deserving of honour in the province that produced it than the Privy Council's advice in *Edwards* v. *A-G for Canada*. June 14, 1917 marks the day that the superior judges of Alberta[9] joined hands with the executive of the province and thrust the weight of judicial authority into the proposition that Albertan women were indeed full legal persons, and that whatever the courts of England might say, properly qualified Albertan women were legally capable of holding high public, including judicial, office.[10]

In 1916 the Province of Alberta had appointed the first two women magistrates in the British Empire. First came Mrs. Emily Murphy, who exercised jurisdiction in Edmonton, and she was followed in the same year by Mrs. Alice J. Jamieson, sitting in Calgary. *Rex* v. *Cyr*[11] concerned an appeal from a conviction for vagrancy. Two of the grounds advanced were (1) that the accused, being a woman, was not within the definition of a vagrant in the Criminal Code of Canada s. 238(a), and (2) that the magistrate who had convicted her, being a woman, was incompetent to exercise any such judicial office.[12] At first instance Scott J. had no difficulty in deciding that a female

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5. [1930] A.C. 124, 136.
6. S.A. 1936 c. 62
7. (1917) XII A.L.R. 320.
8. June 14th, 1917.
9. Harvey C.J., Stuart, Beek and Walsh JJ. of the Appellate Division, Alberta Supreme Court.
10. The decision was unknown to the writer (who does not have the advantage of an Albertan or even a Canadian background) until her attention was drawn to it by Dean W. F. Bowker, to whom this article is therefore in part due. Dean Bowker has also rescued the writer from other errors and omissions: only remaining mistakes are exclusively hers.
11. *Supra* n. 7.
12. Some two years later the newspapers noted the completion of the female triad when Miss Helena Barclay, (later Mrs. H. S. Hurlburt) defended a women defendant before Judge Murphy.

vagrant was just as clearly a vagrant within the meaning of the Criminal Code as a male vagrant, but on the second point he declared: "While I entertain serious doubt whether a woman is qualified to be appointed to that office, I am of opinion that the legality of such an appointment cannot be questioned or inquired into on this application"[13]. In other words he refused to consider a collateral attack on the validity of a judicial appointment arising from an appeal against conviction. On further appeal to the Appellate Division of the Alberta Supreme Court the judgment of Harvey C.J., Stuart, Beck and Walsh JJ., was delivered by Stuart J., who met the objection head-on, and in so doing fashioned from a squalid criminal appeal a cornerstone of Canadian legal history, based on which the status of Canadian women was to receive imperial recognition twelve years later.

He cited many of the ancient precedents of women who had held public office, and considered in detail not only the English decisions, but a contrary decision of the Supreme Court of the American State of Missouri in *State of Missouri ex rel. Crow A.-G.* v. *Hostetter,*[14] in which it had been held that a married woman was eligible for election as a county clerk under Art. 8 of the Constitution of 1875 of the State of Missouri. It was pointed out that by some provisions of that Constitution, some state offices must be held by 'male' citizens; others by a 'qualified voter', which had the same effect of excluding women. Since there was no provision of the Constitution or of the statute law of Missouri expressly requiring that the clerk of the county court be male, the 'general command of the organic law' applied to all offices including that under review, viz.,: "No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States and who shall not have resided in this state one year next preceding *his*[15] election or appointment." (Article 8 s. 12.) It was held that if the word *'his'* in this general command were to be interpreted as requiring the incumbent to be male, the provisions in the Constitution laying down that certain offices were to be held by males only would be wholly useless and "A construction of the Constitution which renders meaningless any of its provisions should not be adopted."[16] Moreover, "It is part of the general law of the state (and was before the time of the present Constitution) that where persons are referred to by words importing the masculine gender, females as well as males should be deemed included thereby, unless a contrary intent appears by the context or otherwise."[17] Also, said the court, "Women in Missouri have been licensed as attorneys at law by the supreme court. They have for years been recognized as eligible to office as notaries public. A woman now holds the responsible office of state librarian by appointment of the supreme court. Yet all of the laws under which such action has been taken display similar language to that in the law regarding clerks of courts from which the learned counsel for defendant seek to draw the inference that only males are eligible as such clerks."[18]

13. (1917) XII A.L.R. 320, 323.
14. (1898) 137 Mo. 636 and 38 L.R.A. 208.
15. Italics supplied.
16. *Supra* n. 14 at 217.
17. *Id.*
18. *Id.*

Apart from such references to the custom of the state, the Court did not discuss the question of women's (or of married women's) incapacity to hold office at common law, but the annotations in the L.R.A. report deploy most of the precedents advanced by counsel and rejected by the English Court of Appeal in *Chorlton* v. *Lings*[19] with some additions, and the conclusions start with the following acute and pregnant observations:

> It may be said to be the general doctrine now held both in England and America that women are ineligible to any important office except when made so by enactment. It is usually said that this is the common law of the subject. But it is somewhat startling to find that there is not a decision earlier than the present generation against their right. In the absence of any adjudication against them, the theory that they are incompetent at common law must be based on the fact that they did not actually hold office except in rare instances and that these instances were usually treated by the judges and law writers as exceptional. But there is quite an array of cases in which they did hold office and their right to do so was upheld.

The commentator thus drew attention to the fact that the position of women in England had not continued to improve since the days of alleged 'barbarism'. On the contrary, it had declined, and probably never to a trough deeper than that of the early years of the nineteenth century. Although there is considerable evidence that the Norman Conquest ushered in a notable decline in the status of women compared with the former Anglo-Saxon customs, the Wife of Bath of Chaucer's day is literary testimony to the further decline between the fourteenth and the nineteenth centuries.

In *Rex* v. *Cyr*[20] Stuart J. took account not only of the decision in *Missouri* v. *Hostetter*[21] but also of the learned annotatios to the Report, including the conclusions to them cited in part above, declaring:[22]

> It seems quite evident that there is much to support these statements, and much to throw doubt still upon the point whether there is any general rule of the English common law that women are incapable of holding an important public office.

The reasoning of Willes J. in *Chorlton* v. *Lings,* was found rather illogical, since "The actual holding of important offices by women was treated by him as 'exceptional'. All that means is surely that it was unusual but not absolutely illegal owing to entire legal incapacity."[23] The party political implications of *Chorlton* v. *Lings* were also explored: "After the extension of the franchise by the Reform Act of 1832 and the further extension in 1867 when Disraeli 'dished the Whigs' it was but natural that grave opposition should appear against a claim to the franchise by women, involving as it would an actual doubling of the extension."[24] Any declarations in *Chorlton* v. *Lings* with regard to the capacity or otherwise of women to hold public office were considered *obiter,* since the case was concerned only with the right to exercise the franchise. Having finally concluded that:[25]

> ... I feel disposed with great respect to the names of Willes J. and Lord Esher to say that in my opinion women were not legally disqualified by the common law of England in 1870, being the date as of which it was introduced here, from holding public office in the government of the country,

Stuart J. continued:[26]

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19. *Supra* n. 4.
20. *Supra* n. 7.
21. *Supra* n. 14.
22. XII A.L.R. 320, 332.
23. *Id.*
24. *Id.*, at 333.
25. *Id.*, at 334.
26. *Id.*

> And in any case even if Willes J. and Lord Esher were correct in their view we have still to remember that it is only so much of the common law of England as it stood in July 1870, as is applicable to this province that was introduced. In effect therefore what we are asked to say is that, because the advisers of the Crown in England up to 1870 apparently had thought for many years that a woman ought not to be appointed a justice of the peace even if she possessed the necessary property qualification which would be rather seldom, therefore the Crown and its advisers here, even if they are, for reasons which no doubt seem good to them, of opinion that a particular woman is a suitable and proper person to be appointed a justice of the peace, are nevertheless doing an illegal thing in appointing her.
> In my opinion in a matter of this kind the Courts of this province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England, in 1870. We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.

With a further glance to the south, Stuart J. pointed out that in the United States of America the courts had never hesitated to take the responsibility of declaring the common law, notwithstanding current English decisions, especially upon questions involving new conditions, and that to be binding on American Courts as evidence of what the common law is, "the English decisions rendered prior to the Revolution must be clear and unequivocal... Certainly upon the point involved here the English decisions are neither clear nor unequivocal."[27] He then delineated the important differences in conditions, the advances in the status of women achieved in Canada and spearheaded by the prairie provinces, and the approach of the Courts of Alberta to the reception of English common law, in terms so definitive that they are reproduced in full:[29]

> Now at a very early stage in the history of our law in the Territories it was recognized that women should be put in a new position. The disabilities of married women as to owning real property were removed as early as 1877; in fact as soon as legislation could be directed to the matter. In all the early ordinances, also there is evidence that it was considered necessary if women were not to vote or hold public office that it should be so expressly stated.[28] . . . Particular care was used to insert the word "male" in all clauses laying down the qualifications of voters and the qualifications for public elective offices, thus indicating the view that otherwise there would be a possibility of women being qualified. It is common knowledge that at a very early stage in our history women were admitted as members of the Law Society although none were actually called to the bar because they did not proceed with the examinations, and to the practice of medicine, as members of the College of Physicians and Surgeons. Then when we have our statutue of 1916 above referred to wiping out the *expressly enacted disqualification* of women in regard to the franchise under twenty-four statutes and ordinances I think we may take this as indicative, not of any intention that they should be disqualified in regard to offices not mentioned in those statues, but of the general sense of the community upon the subject of women's political status, and of an intention merely to annul disqualifications already expressly enacted in particular cases.
> I therefore think that applying the general principle upon which the common law rests, namely that of reason and good sense as applied to new conditions, this Court ought to declare that in this province and at this time in our presently existing conditions there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex. And in doing this I am strongly of opinion that we are returning to the more liberal and enlightened view of the middle ages in England and passing over the narrower and more hardened view, which possibly by the middle of the nineteenth century, had gained the ascendency in England."

This was the approach and this the decision that was finally to be vindicated twelve years later in *Edwards* v. *A.-G. for Canada*[30] and win for women throughout the common-law world a recognition of their rights in public law.

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27. *Id.*, at 335.
28. Citations omitted.
29. Except for citations omitted where indicated. The passage quoted is from (1917) XII A.L.R. 320, 335-6.
30. *Supra* n. 2.

Before examining the weight of authority against which the Appellate Division of Alberta so resolutely set its mind, it may be useful to examine another area in which the courts, the executive and the legislature of Alberta met, challenged and halted decisions reached by the English judges during the nineteenth century. This was an area of private law. In their pursuit of the ideal of unity of the family, which they sought to ensure by making wife and minor children totally dependent on the husband and father, the English courts decided that every married woman and every minor legitimate child was irrevocably fettered with the domicile of the husband and father.

I. THE RULE OF THE MARRIED WOMAN'S DEPENDENT DOMICILE

Having finally decided during the nineteenth century that every married woman was, whatever her actual circumstances, inescapably fettered with the domicile of her husband, the Privy Council added a further dimension to the rule by advising in *Le Mesurier* v. *Le Mesurier* in 1895 that "according to international law, the domicile for the time being of the married pair (meaning the domicile of the husband) affords the only true test of jurisdiction to dissolve their marriage."[31] For many years following this decision, the English courts resolutely refused to assume jurisdiction in divorce unless both parties were (meaning the husband was) domiciled in England.

The Matrimonial Causes Act 1857[32], contained no provision about the jurisdiction of the new divorce court to grant a divorce *a vinculo*. The ecclesiastical courts had based their jurisdiction on the residence of the respondent within the diocese of the ecclesiastical court, but of course the ecclesiastical courts had long previously been held to have no jurisdiction to grant a divorce *a vinculo*. In 1872 Lord Penzance said *obiter* in *Wilson* v. *Wilson*[33] that "the only fair and satisfactory rule to adopt on this matter of jurisdiction is to insist upon the parties in all cases referring their matrimonial differences to the courts of the country in which they are domiciled.... An honest adherence to this principle will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another."

The rule did not in fact have the effect Lord Penzance foresaw. In *Wilson* v. *Wilson* itself, the English and the Scottish courts had reached opposite conclusions as to the country in which the parties were, (by which they meant the husband was), domiciled, and many countries grounded jurisdiction in divorce not on domicile but on nationality.[34] In 1878 the Court of Appeal held by a majority in *Niboyet* v. *Niboyet*[35] that the courts of the jurisdiction in which the parties were resident had jurisdiction to dissolve their marriage. Unfortunately the decision seven years later in *Le Mesurier* was preferred, and much hardship was caused to married women in the pursuit of a theoretical family unity when no unity in fact existed.

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31. [1895] A.C. 517, 540.
32. An Act to amend the Law relating to Divorce and Matrimonial Causes in England, 1857 (U.K.) 20 & 21 Vict. c. 85.
33. (1872) L.R. 2 P & M. 435, 442.
34. See the attacks on the doctrine in *Indyka* v. *Indyka* [1968] 1 A.C. 33, by Lord Reid at 60 *et seq.* esp. 64, and by Lord Wilberforce at 94 *et seq.*
35. (1878) 4 P.D. 1, C.A.

It has never been seriously doubted that jurisdiction to grant judicial separation and lesser relief is based on residence of both parties within the jurisdiction.[36] The result of the rule was that if a husband deserted his wife and she was unable to trace his whereabouts (which is not unusual where husbands and fathers have not only deserted those whose dependence on them is exaggerated by the law, but have also failed in their financial obligations to those dependants and sometimes to the State as well) she became by operation of law unable to seek dissolution of the marriage. If (probably after the expenditure of much time and money) the wife was able to discover in which foreign country the husband had taken up permanent residence, that might but might not indicate the country in which she herself was domiciled[37] and in which she would have to launch any proceedings she sought for dissolution of marriage.

As late as 1921, in *Lord Advocate* v. *Jaffrey*[38] the House of Lords held, on an appeal from Scotland, that where because of his drunken and dissolute habits, the husband had been sent to Queensland, Australia, at the wife's expense and had committed adultery and bigamy there, nevertheless when the wife died she died domiciled in Queensland, which she had at no time visited and of whose laws she was probably totally ignorant.

Five years later on an appeal from Alberta, the Judicial Committee of the Privy Council pushed the misplaced 'logic' of the theory even further and advised in *Attorney-General for Alberta* v. *Cook*[39] that even where a wife had obtained a decree of judicial separation from her husband in the courts of Alberta, nevertheless her domicile continued to change at his whim, so that when his whereabouts were unknown she could not know where she was domiciled, and until this was ascertained no court could dissolve her marriage.

The parties concerned in this case were married in 1913. Four years later they went to the United States. In 1918 the wife moved to Alberta and she resided there continuously until the hearing of her divorce petition. The husband "drifted from one State of the American Union to another, then came to Calgary for a short time, and eventually left Alberta, going, as far as is known, to a logging camp in British Columbia".[40] Thereafter nothing was known of him. In November 1921 the wife was granted a judicial separation from her husband in the Supreme Court of Alberta, both spouses being then resident there and the husband having been served there. In 1922 the wife

36. *Armytage* v. *Armytage* [1898] P. 178 and other authorities cited in Dicey and Morris: *The Conflict of Laws* 9th edn. (1973) Rule 47(1). In Alberta the Supreme Court has jurisdiction in judicial separation, restitution of conjugal rights or applications for alimony where both parties are either domiciled in Alberta at the time of the commencement of the action, or had a matrimonial home in Alberta when cohabitation ceased or when the events occurred on which the claim for separation is based, or are resident in Alberta when the action is commenced: Domestic Relations Act, R.S.A. 1970 c. 113 s. 8. In England the jurisdiction of the magistrates' courts to grant relief short of divorce has always been based on residence, see *Lowry* v. *Lowry* [1952] P. 252, the Matrimonial Proceedings (Magistrates' Courts) Act 1960, sl(2) (3) and its replacement, the Domestic Proceedings and Magistrates' Courts Act, 1978, s. 30(1).

37. For purposes of this discussion the aberrational survival and revival doctrines of the domicile of origin are not considered.

38. [1921] A.C. 146.

39. [1926] A.C. 444.

40. Citation by Lord Merrivale *Id.* p. 447 from the judgment of Walsh J. at first instance in [1923] 1 W.W.R. 929.

instituted a suit for divorce in the courts of Alberta, giving the husband's last known residence as within that province. At first instance Walsh J. found ample evidence of cruelty, desertion and adultery by the husband sufficient to ground a divorce decree, but held that the action failed for lack of jurisdiction, since "The defendant, the husband, is not and never was domiciled in Alberta. Although the evidence of it is not entirely satisfactory I think there is enough to justify the conclusion that Ontario is his domicile of origin. There is nothing in the history of his movements since he left Ontario to justify a holding that he has acquired a new domicile. I think upon such evidence of it as I have that he is still domiciled in Ontario"[41]. Walsh J. found that the wife had indeed elected Alberta as her domicile "so far as she can" but he referred to the decision of the House of Lords in *Lord Advocate* v. *Jaffrey,* in which there were grounds for judicial separation but no such decree, and found that such members of the House as had expressed a view "seem to be opposed to the idea that a decree for judicial separation has the effect" of permitting a married woman to acquire her own domicile.[42] Accordingly he found he had no jurisdiction to free the wife from her legal incapacity although — indeed in this case largely because of the extent to which — its origin had long disintegrated in fact.

On the wife's appeal to the Appellate Division Scott C.J., Beck and Hyndman JJ.A. held that if a wife obtains a judgment for judicial separation she is thenceforward in a position to establish a domicile for all purposes independent of that of her husband; and that if she has done so the appropriate Court exercising jurisdiction within her domicle then has jurisdiction to grant her a divorce provided she is able to effect service (including substituted service) of notice of the action upon the husband. In agreeing with the majority Stuart J.A. was careful to add that, with a view to maintaining unity where possible,[43]

> it might not be unreasonable to declare that the spouse upon whose application or suit a decree of judicial separation had been made, who was therefore not at fault, should control the domicile of both. I do not wish my expression of opinion in favour of allowing this appeal to be taken as a precedent for deciding that a wife who has been judicially separated owing to her own misconduct at the suit of an innocent husband should be held, therefore, capable of acquiring a separate domicile even though afterwards the husband may have been guilty of misconduct. That is not the present case and I wish to keep such a case open for distinct decision if it ever arises. It seems to me that the difficulty as to a double domicile for purposes of divorce in case of judicial separation could in some such way as this be very properly and successfully avoided.

He also drew attention to the great advances recently made in both public and private law in the civil rights of women, married and unmarried. Beck J.A. referred *inter alia* to the views of Lords Haldane, Finlay and Cave in *Lord Advocate* v. *Jaffrey*[44] in support of the view that a decree of judicial separation did indeed liberate the wife sufficiently to enable her to establish a domicile, the courts of which might grant her a divorce *a vinculo*. However,

41. [1923] 1 W.W.R. 929-930.
42. *Id.* at 931. Lord Haldane at [1921] 1 A.C. 146, 152 and Lord Shaw at 168 were specifically cited.
43. XIX A.L.R. (1922-23) 769, 771-2.
44. [1921] 1 A.C. 146, 151, 155 and 158.

on appeal the Privy Council reversed the Appellate Division and, in the words of Lord Wilberforce 41 years later:[45]

> *Reversing the decision of the Supreme Court (whose judgment nevertheless contained some persuasive reasoning) a strong board held that 'a decree for judicial separation . . . does not enable a wife to obtain a domicile different from that of her husband and thus' (my italics) 'entitle her to sue for a divorce in a court other than that of the husband's domicile.' The injustice there existing was glaring since the husband, after separating from the wife, had drifted from one place to another and eventually disappeared, so that his domicile could not be ascertained.*

The Privy Council also made it clear that despite the federal jurisdiction in divorce, there could be no general Canadian domicile, domicile must be in one of the provinces or territories of Canada.

Fourteen months after the publication of the Privy Council's advice in *Attorney-General for Alberta* v. *Cook* the executive and legislature of the province publicly declared its view of such inequity by including in the Alberta Domestic Relations Act 1927[46] a subsection providing that a wife who was judicially separated had capacity to acquire "a new domicile distinct from that of her husband." The object of the provision was clearly to try to prevent injustice being inflicted in future at such cost on other women in Mrs. Cook's situation. Most textbooks seem to accept the proposition that the provision was *ultra vires* the Alberta legislature, as being legislation with respect to marriage and divorce, which is a matter within the exclusive federal jurisdiction under s. 91(26) of the British North America Act, 1867. I suggest it can be argued with at least equal strength that the question of a woman's right to be recognised by the courts of the country in which she has long been resident is a matter of fundamental civil rights within the province. When the law of marriage deprives one partner of all civil rights the question of the extent to and the manner in which civil rights may be restored to that partner involves a clear clash between "marriage and divorce" on the one hand and "property and civil rights within the province" on the other.

In England the common law rule evolved during the nineteenth century, which subjected every married woman to the domicile of her husband was, after much upheavel and many false starts, completely abolished by the Domicile and Matrimonial Proceedings Act, 1973, (U.K.) s. 1(1) which rejected many unsatisfactory palliatives previously in operation and now reads:

> Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

By s. 5(2) of the same Act jurisdiction in divorce exists on the basis not only of the domicile of either party within the jurisdiction but also on the basis of one year's habitual residence[47] of either party.

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45. *Indyka* v. *Indyka* [1969] 1 A.C. 33, 101. He might have added that, as so often happens when unjust laws are rigidly upheld, injustice is ruinously costly to those on whom it is imposed. Mrs. Cook and her family must have paid dearly in money alone for their attempts to rid her of a worthless husband.

46. S.A. 1927 c. 5, which received assent April 2, 1927, s. 10(b).

47. Distinguished from ordinary residence in *Cruse* v. *Chittum* [1974] 2 All E.R. 940 by Lane J., the emphasis being on the quality rather than the duration of the residence, and implying an intention to reside in the country rather than residence of a temporary or secondary nature.

In Canada a head-on collision between Alberta and England was in the meantime avoided by the enactment by the Federal Parliament in 1930 of the Divorce Jurisdiction Act,[48] which provided the model for the palliatives adopted in England between 1930 and 1973.[49] The Federal Act had only one substantive provision, which read:

> A married woman who either before or after the passing of this Act has been deserted by and has been living separate and apart from her husband for a period of two years and upwards and is still living separate and apart from her husband may, in any one of those provinces of Canada in which there is a court having jurisdiction to grant a divorce *a vinculo matrimonii*, commence in the court of such province having such jurisdiction proceedings for divorce *a vinculo matrimonii* praying that her marriage may be dissolved on any grounds that may entitle her to such divorce according to the law of such province, and such court shall have jurisdiction to grant such divorce provided that immediately prior to such desertion the husband of such married woman was domiciled in the province in which such proceedings are commenced.

The effect of this section, as of the corresponding statutes later enacted in England, was to grant the courts jurisdiction in divorce at the suit of a wife without acknowledging that any married woman had the capacity possessed by all other adult persons not subject to mental disability, to establish her domicile in the jurisdiction of her choice.

The Federal Divorce Act, S.C. 1968, which now occupies the whole ground of Canadian divorce law, provides by s. 5:

> (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if:
> (a) the petition is presented by a person domiciled in Canada; and
> (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least 10 months of that period.

and by s. 6(1) of the Act:

> For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

The facts that for so long domicile was the test of jurisdiction in divorce and that a married woman's domicile was by law dependent on that of her husband have, of course, emphasized to lawyers, and particularly those in practice before the courts, the importance of domicile in petitions for divorce. Domicile is, however, also important for other purposes, e.g., the law of succession to moveable property at death. Now that the fallacies of the common lawyers in respect of domicile have been finally disposed of in England, it may be expected that in Canada — and particularly in Alberta, which reacted with speed and emphasis to the Privy Council's rigidity — little more time will be lost in sweeping away this "last barbaric relic of a wife's servitude".[50]

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48. S.C. 1930 c. 15.
49. By the Matrimonial Causes Act 1937, an Act to amend the Law relating to Marriage and Divorce 1937 (U.K.) 1 Edw. 8 & 1 Geo 6 c. 57. s. 13, expanded by the Law Reform (Miscellaneous Provisions) Act, 1949, (U.K.) 12, 13-4, Geo 6 c. 100, consolidated in the Matrimonial Causes Acts 1950, 1965 and 1973 s. 46, now all happily repealed by the Domicile and Matrimonial Proceedings Act 1973 (U.K.) c. 45.
50. *Gray* (orse. Formosa) v. *Formosa* [1963] P. 259, 267, per Lord Denning M. R.

The enactment of a Canadian domicile removes one of the principal justifications for the importance attached to domicile, viz., that unlike nationality it indicates not only a jurisdiction but also a coherent system of applicable law. It also creates an anomalous situation whereby "a person newly immigrated to Canada may be domiciled in the country for the purpose of divorce whilst, if he has not yet determined which province he will settle in, he may retain his domicile of origin for other purposes."[51]

The Canadian Uniformity Conference adopted in 1962 a Uniform Domicile Act, which it was agreed should be passed simultaneously in every province. None appears yet to have passed it, and so far the Uniform Act has remained a dead letter.

II. THE ENGLISH PRECEDENTS ESTABLISHING THAT WOMEN, AND PARTICULARLY MARRIED WOMEN, WERE NON-PERSONS FOR PURPOSES OF PUBLIC LAW, AND SPECIFICALLY FOR THAT OF THE PARLIAMENTARY AND MUNICIPAL FRANCHISE.

In looking at a long line of judicial authority, stubbornly defended and long upheld, but eventually reversed by Parliament or by judicial decision because found to be unjust and impolitic, it is helpful to remember that these decisions were not reached by sophists or tyrants, but represented the genuine decisions informed by conviction of what was socially desirable held by some of the most gifted and learned men of their day. As they erred, so undoubtedly do we, and future generations will look back on today's decisions, priorities and convictions with a mixture of incredulity, outrage and amusement similar to that we feel when we look at past decisions, now admitted to have been mistaken. This is perhaps especially desirable when we consider the line of English authority establishing that women, and particularly married women, were non-persons in public law, particularly as regards their capacity to hold any public office and, by necessary extension, to vote for their legislative representatives.

Chorlton v. *Lings*[52] is by general consent the first decision in this particular line of authority. The case arose from the claim of Mary Abbott, an unmarried woman aged 21, that she was entitled to be registered as a voter under the Representation of the People Act 1867[53] s. 3, which provided that 'every man' should, in and after the year 1868, be entitled to be registered as a voter, and when registered to vote for a member or members to serve in Parliament for a borough, provided he was 'of full age and not subject to any legal incapacity.' Lord Brougham's Act of 1850 'For shortening the Language used in Acts of Parliament' had provided that: "Words importing the masculine gender shall be deemed and taken to include females unless the contrary is expressly provided." Apart from her sex, it was agreed that Mary Abbott had in all respects complied with the requirements of the Registration Acts, and the appeals of 5,346 other women were consolidated with hers. The argument of counsel for the appellant[54] cited numerous precedents of women both occupying public office and voting for those who would impose taxes and fill other public functions. The Court of Common

51. *Power on Divorce* (3rd ed) *(1976) by Christine Davies, Vol. 1 p. 281, n. 5.
52. (1868) L.R. 4C.P. 374, and see *supra* n. 4.
53. (U.K.) 30 & 31 Vict. c. 102.
54. Coleridge, Q.C., (Dr. Pankhurst with him).

Pleas unanimously held that no woman had the right to vote in parliamentary elections. Bovill C.J. said: "It is quite unnecessary to consider the general question of whether it is desirable that women should possess the franchise of voting at the election of Members of Parliament. What we have to determine is, whether by law they now possess that right."[55] The fact that "for several hundred years, no instance is to be found of the exercise by women of any such right" was "alone sufficient to raise a very strong presumption against the existence of the right in point of law."[56] The undoubted precedents, mainly from early times, "not only of women having voted, but also of their having assisted in the deliberations of the legislature" were dismissed as "instances of comparatively little weight, as opposed to uninterrupted usage to the contrary for several centuries," since "what has been commonly received and acquiesced in as the law raises a strong presumption of what the law is."[57] Nor could Lord Brougham's Act effect so fundamental a change as to confer on women a capacity to vote which, if they ever possessed, they had lost by desuetude over the centuries. Willes, Byles and Keating JJ. agreed and in lengthy concurring judgments added that, since the Reform Act 1832 expressly limited voting rights to males, that Act and subsequent amendments of it "expressly excluded" the words "every man" from including any woman in the right to exercise the Parliamentary franchise. Willes J. thought the fact that the Countess of Pembroke had been hereditary sheriff, and that women had held the offices. among others, of an overseer of the poor and of a constable, were also exceptional examples of obscure offices exercised in remote parts of the country by women when no qualified man could be found. However, he drew attention to the weakness of the legal position when he said: ". . . the right must now be considered 'extinct', or perhaps, inasmuch as in our system there is no negative prescription against a law, it may be more correct to say that the right never existed."[58]

In the following year, the Municipal Corporation (Election) Act 1869[59] specifically provided in s. 9 that: ". . . wherever words occur which import the masculine gender the same shall be held to include females for all purposes connected with and having reference to the right to vote in the election of councillors, auditors and assessors." Nevertheless in *The Queen* v. *Harrald*[60] the Divisional Court of the Queen's Bench unanimously held that the Act could not validate the vote in municipal elections of a married woman living apart from her husband and occupying a house and paying rates as a single woman, and that the vote of a woman who was single when her name was put on the register of burgesses, but who married just before voting in the election, was probably invalid. Cockburn C.J. declared: "It is quite certain that, by the common law, a married woman's status was so entirely merged in that

55. *Supra* n., 52 at 382.
56. *Supra* n., 52 at 383.
57. *Id.*
58. (1868) L.R. 4 C.P. 374, 391, a statement stigmatized as inconsistent in itself in [1909] A.C. 147, 155 and "rather illogical" by Stuart J. of the Appellate Division of the Supreme Court of Alberta in (1917) XII A.L.R. 320, 332.
59. 32 & 33 Vict. c. 55.
60. (1872) L.R. 7 Q.B. 361.

of her husband that she was incapable of exercising almost all public functions," and "it seems quite clear that this statute" (viz., the Municipal Corporation (Election) Act, 1869) "had not married women in its contemplation."[61] Mellor J., agreeing, declared that "marriage is at common law a total disqualification, and a married woman, therefore, could not vote." He also found that the Municipal Corporation (Election) Act s. 9[62] "only removes the disqualification by reason of sex, and leaves untouched the disqualification by reason of status. So the Married Woman's Property Act[63] as to this leaves the status of a married woman untouched."[64] After the lapse of more than a century it is only possible to endorse, with respect, the view of Stuart J. of the Appellate Division of the Alberta Supreme Court[65] that this was "in some respects a remarkable case. It reveals how reluctant the English Courts were to extend political rights to women", and his conclusion that "I doubt if a better example of the express words of a statute being whittled down by judicial interpretation could be discovered."[66]

In the course of argument in *The Queen* v. *Harrald,* Mr. Herschell, counsel arguing for the married women's incapacity, advanced the argument that: "A married woman is not a person in the eye of the law. She is not *sui juris.*"[67] This may well be the origin of the title "the person cases." *Beresford-Hope* v. *Sandhurst*,[68] also arose under local government Acts, specifically the Municipal Corporations Act 1882, and the Local Government Act 1888, which created the office of County Councillor. Lady Sandhurst stood for election and received a majority of the votes cast. Both the Divisional Court of the Queen's Bench and a strong Court of Appeal unanimously held that she was incapable of standing for public office because she was a woman, and that because votes in her favour had been thrown away her defeated opponent had been duly elected. Lord Esher described himself as having "a stronger view than some of my brethren" and reiterated that "by neither the common law nor the constitution of this country, from the beginning of the common law until now can a woman be entitled to exercise any public function."[69] He purported to rely on the judgment of Willes J. in *Chorlton* v. *Lings* "and a more learned judge never lived." He ignored the decision of the Court of King's Bench as recently as 1788[70] that a woman could hold the office of overseer of the poor, as well as the more ancient precedents. The other members of the Court, Lord Coleridge C.J., Cotton, Lindley and Fry L.JJ., preferred to base their decisions on interpretation of the statutes, and specifically on sections 11 and 63 of the Act of 1882,[71] the relevant parts of which read:

s. 11 (2) A person shall not be qualified to be elected or to be a councillor unless he —

61. *Id.*, at 362.
62. *Id.*, at 363.
63. The first such English statute, 33 & 34 Vict. c. 93, which in the anomalous form in which it finally emerged from mutilation and partial sterilisation in the House of Lords, came into operation on 9th August 1870, the date of its passing.
64. *Id.*
65. In *Rex* v. *Cyr* (1917) XII A.L.R. 320, 329.
66. *Id.*, at 330.
67. *Supra* n. 60 at 362.
68. (1889) L.R. 23 Q.B. D. 79.
69. *Id.*, at 95.
70. *Rex* v. *Stubbs* (1788) 2 T.R. 395.
71. Municipal Corporations Act 1882 (U.K.) 45 & 46 Vict. c. 50.

(a) Is enrolled and entitled to be enrolled as a burgess; or . . .
(b) Provided that every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor; which last-mentioned qualification for being elected shall be alternative for and shall not repeal or take away any other qualification . . ."

s. 63 For all purposes connected with and having reference to the right to vote at municipal elections words in this Act importing the masculine gender include women."

Since by the Act of 1869 s. 9 women had been granted the right to vote for councillors, the argument was that s. 11(2)(a) of the 1882 Act, replacing the Act of 1869, qualified them to be elected, and Lord Coleridge C.J. agreed that: "If that argument stood alone, I cannot deny that, in my minnd, there would be a very strong case."[72] However, he and the other members of the Court held that what would seem to be a clear provision was nullified by the effect of s. 63. In the words of Fry L.J. "I regard that 63rd section as ascertaining, both affirmatively and negatively, the rights which have been conferred upon women; ascertaining them affirmatively by express statement, and ascertaining them negatively by necessary implication."[73] Thus the words "purposes connected with and having reference to the right to vote at municipal elections" were held to exclude any purposes connected with and having reference to the right to be elected at municipal elections, on the principle of *expressio unius est exclusion alterius,* despite the clear provision of s. 11 that qualification to vote imported qualification to be voted for.

In the following year Lord Esher had an opportunity once more to emphasize that his views on the total incapacity for public office of every woman were even more extreme than those of his brethren. In *De Souza* v. *Cobden*[74] the Court of Appeal of Lord Coleridge C.J., Lord Esher M.R. and Fry L.J., held that a single woman who had been elected a member of a county council under the Municipal Corporations Act 1882 had become liable to the penalties prescribed under the Act when she sat and voted on five occasions as a member of the council, after twelve months had elapsed without any proceedings being taken to question the validity of her election.

Lord Esher declared:[75]

I take a stronger view in this case than that taken by the other members of the Court; and, as it is stated that the case may go to the House of Lords, I think it as well that I should express that view.... It has been decided in the case of *Beresford* v. *Lady Sandhurst* that the Act only enables male persons, being qualified as required, to become members. The grounds of that decision were these: The words used in the enactment with regard to the qualification of councillors are words which prima facie include men only, but which, by Lord Brougham's Act, will include women, unless the context or the subject-matter shows that it cannot have been intended that they should be included. The whole of the Court thought that the context of the Act contained matter which negatived the supposition that the words were intended to include women, because the Act expressly mentions women when it is intended to include them. Sect. 63 of the Municipal Corporations Act, 1882, expressly provides that, for purposes connected with the right to vote at municipal elections, words in the Act importing the masculine gender shall include women. That was the view of the Court. I went further, and thought that, apart from s. 63, it appeared from the subject-matter that women were not intended to be included. I think so still. The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well-recognised custom to the contrary has become established, as in the case of overseers of the poor; and, of course, if women are specially mentioned in an Act of Parliament, they will be qualified. Therefore, in my opinion, whether the context of the words be looked at or the subject-matter, the notion that the Act intends women to be elected or to act as county councillors is negatived. If women are not qualified by the Act, as I have already said, they are clearly not qualified at common law, and therefore they are altogether incapable of being elected.

72. *Supra* n. 68 at 92.
73. Id., at 99.
74. [1891] 1 Q.B.D. 687.
75. *Id.*, at 690-691.

If Lord Esher was unable to persuade his brethren on the English Court of Appeal that it was politic to express his denial of legal personality to any woman in such robust terms, his views carried even less weight in the Supreme Court of the American State of Missouri in *State of Missouri ex rel. Crow A.G.* v. *Hostetter*.[76] The English precedents were there ignored in the decision (but not the annotations to it) that married women were eligible for election as county clerks under Art. 8 of the Constitution of 1875 of the State of Missouri.[77]

In 1909 the current of English decisions was followed, with some references to Scottish authorities, by the Scottish Court of Session, and from there an appeal was made to the British House of Lords in *Nairn* v. *University of St. Andrews*.[78] Their Lordships affirmed the decision of the Scottish court that women graduates were not 'persons' for the purpose of voting for a Parliamentary representative for the University.[79] The point was argued by Miss Macmillan and Miss Simson, two graduates of Scottish universities, assisted by John Mair, of the Scottish Bar. Lord Robertson pointed out that: "We had not the assistance of counsel, but fortunately the question is not difficult."[80] Although the women arguing the case cited various precedents both in England and in Scotland for the discharge of public functions by women, principally from the 15th to the 18th centuries, the decision of the Supreme Court of Missouri in *Missouri* v. *Hostetter* was not brought to the attention of their Lordships.[81] The principal thrust of the argument was concerned with the interpretation of the English statutes of 1868, 1881 and 1889.

This was the state of the common law, in which the English courts had in effect held that undisputed ancient rights had fallen into desuetude by comparatively recent custom, and in which they had also so modified recent statutes as to make them mean the opposite of what appeared, when the question arose for decision for the first time in Canada in 1917 in the case of *Rex* v. *Cyr*[82] before the Courts of Alberta, and the Appellate Division refused to follow the English authorities.[83]

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76. (1898) 137 Mo. 636 and 38 L.R.A. 208.
77. Considered *supra* text to nn. 14-15.
78. [1909] A.C. 147.
79. Within the meaning of s. 27 of the Representation of the People (Scotland) Act, 1868: "Every person whose name is for the time being on the register . . . shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act." There was no dispute that the appellants, five women graduates of the University of Edinburgh, had rightly had their names enrolled on the general council of that university.
80. [1909] A.C. 147, 164.
81. It is unlikely that this was because the case was not argued by legal counsel. Before about 1950 it was comparatively rare for Commonwealth or American precedents to be cited in the English courts and even more rare for the Bench to pay them serious attention. There was in fact profuse citation of precedents in the argument in this case. *Missouri* v. *Hostetter* was also a decision on the interpretation of a constitutional statute of an American State.
82. (1917) XII A.L.R. 320, 323.
83. Considered supra in text to notes 7-28.

III. CHANGES IN WOMEN'S RIGHTS SINCE 1868 JUSTIFYING A REASSESSMENT OF FORMER AUTHORITIES ON THEIR LEGAL STATUS IN PUBLIC LAW

A. *Private Property Rights in Western Canada, especially Alberta*

The first of the federal Canadian legislation to which Stuart J. referred in *Rex* v. *Cyr*, as justifying a re-assessment of women's status, was the North-West Territories Act, 1875[84] which was brought into operation on 7th October 1876.[85] This Act contained six sections, ss. 48-53, affecting the legal capacity and status of married women throughout the territories, part of which were later to become the provinces of Saskatchewan and Alberta. The provision specifically referred to by Stuart J. was s.48, to the effect that a married woman should in future hold and enjoy for her separate use, free during her lifetime from any estate or claim of her husband or any claim as tenant by the curtesy, any real estate she owned at or acquired during marriage, and the rents, issues and profits of such estate but 'without prejudice, and subject to the trusts of any settlement affecting the same'. Her receipt alone was to be a discharge for any rents, issues and profits and she was declared liable on any contract made by her respecting her real estate.[86] The following section provided that a married woman's wages and personal earnings and any acquisitions from them, any profits derived from her separate occupation or trade or from any literary, artistic or scientific skill, and all investments from such earnings, should be as freely at her disposal and free from claims by her husband as if she were a *feme sole*. By s. 50 a married woman could conduct her own independent banking account, but s. 51 allowed deposits made in such an account in fraud of her husband's creditors to be followed by them. By s. 52, a husband ceased to be liable for his wife's prenuptial debts or for any debts she incurred during marriage in respect of her own separate employment or business. Section 53 gave a married woman the right to sue and be sued, separately and in her own name, in respect of her separate property.

The provisions regarding a married woman's personal property were expanded in 1890 by an Ordinance of the Northwest Territories,[87] s. 2 of which

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84. 38 Vict. c. 49.

85. By s. 78 of the Act it was to come into force on the date named by the Governor General by Proclamation. Proclamation (RG 68, Vol. 985, pp. 67-68, liber 36) of 7th October 1876 brought the Act into operation on that date. (No copy of the Proclamation appeared to be available in Alberta, and a copy was obtained from the Archives branch of the Public Archives of Canada.) The Act was amended generally by the North-West Territories Act Amended, 1877, 40 Vict. c. 7, but those amendments did not affect the sections concerning married women, which were first re-enacted unchanged by the North-West Territories Act 1880, [43 Vict. c. 25,) ss. 57-62. Shorn of the provision regarding real property, they became the North-West Territories Act, 1886, (49 Vict. c. 50,) ss. 36-40. The provisions regarding married women's real property were re-enacted with elaborations in The Territories Real Property Act, 1886, (49 Vict. c. 26, which became c. 49 in the Revised Statutes) ss. 8-9 of which abolished dower and curtesy, and s. 13 declared that a married woman should, in respect of land, have all the rights and be subject to all the liabilities of a *feme sole*.

86. The Act was further clarified by Ordinance No. 6 of 1886: "To facilitate the conveyance of real estate by married women" s. 2 of which declared "that every married woman of the full age of 21 years might by deed convey her real estate and convey, release or extinguish every interest or power therein..." as fully and effectively as she could do if she were a *feme sole.*" By s. 3, such conveyances already made were retroactively validated.

87. No. 2 of 1890.

provided that: "A married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise but shall in respect of the same have all the rights and be subject to all the liabilities of a *feme sole*."

Dean W. F. Bowker points out, in his article on *Reform of the Law of Dower in Alberta*[88] that the existence of common law dower has generally been considered inconsistent with a land registration system, since it imposes an invisible encumbrance on the title. Thus the Territories Real Property Act, 1886, which introduced a Torrens System of land registration, also abolished dower and curtesy,[89] and the Territories' system of land titles was inherited by the province of Alberta upon its formation in 1905. The inequity of depriving a wife of all rights in respect of land held by her husband was particularly apparent in the pioneering conditions then prevailing in the area, in which most pioneer wives struggled shoulder to shoulder with their husbands on the untamed land in the harshness of frontier life. It was in similar conditions, of husband and wife working alongside each other in the fields, that the Germanic tribes first introduced systems of community of gains centuries ago as a reaction against the Roman system of unfettered administration by the *pater familias* and agnatic descent of real property. Modern versions of these systems of community of gains have worked their way through the laws of Spain, France, and Mexico to become established in eight of the southern and western States of the American Union.

In a situation in which married women had few, if any, opportunities to earn money outside their homes, married women's separate property was no substitute for rights of any kind in or arising from the land registered or recorded in the man's name alone, but on which both wife and children also worked to exhaustion. The rules of the two systems applied to women in completely different situations. Married women's separate property still bears the marks of its origin amongst the very rich, and was designed to broaden rights of inheritance and succession to female as well as male descendants of property-owning ancestors and to allow women to administer their own property even after marriage. Community of gains gave husband and wife equal rights in property acquired during the marriage, although until recently the rights of management and administration were vested in the husband alone during the marriage. Rights of dower at common law fell far short of this, and resolved themselves into the right of a widow, if she survived her husband, to receive for her life one-third of the income of land of which her husband had during his lifetime held the fee, as administered by his heir, so that in the words of Lord Simon of Glaisdale,[90] the widow at common law 'looked like a pensioner of the heir rather than a partner of the ancestor.' Moreover, from the Statute of Uses 1535, and particularly by the *Dower Uses* of *Bridgeman's Conveyances* disseminated during the seventeenth century, there were various expedients by which the widow's right to dower could be defeated. In 1833 the Dower Act specifically permitted a husband to bar his wife's right to dower either by deed or will. In the meantime, over the period

88. 1 *Alberta Law Review* (1955-61) 501, 502.

89. ss. 8-9; see also *supra* n. 85.

90. In his Presidential lecture to the Holdsworth Club of the Faculty of Law at the University of Birmingham: "*With all my Worldly Goods*' (1964) p. 8. As Sir Jocelyn Simon, he was at that time President of the Probate, Divorce and Admiralty Division of the High Court.

from the seventeenth century, equity had evolved the settlement to a married woman's separate use which, because it enabled land and personal property to be dealt with together, served better the more sophisticated needs not only of the landed classes, but of the richest of the merchants with whom they increasingly intermarried. Both dower and curtesy, (the corresponding but far greater right of a husband in his wife's land, which included the rights of management and administration normally associated with ownership,) were abolished in England by the Administration of Estates Act, 1925, s. 45.[91] This abolition took effect in England as part of a comprehensive scheme of reform of the law of real property. It included the introduction over a restricted area of a system of land registration, but it also abolished the Rules of Inheritance to land, assimilated succession to real and personal property, and equalized the rights of succession of any surviving spouse, male or female, and of all children, male and female.

When the province of Alberta was founded in 1905 controversy arose over the denial to the farmer's wife of any rights in the land on which she might have worked alongside her husband, in whom sole ownership was vested. The anomaly was magnified by the emergence of a 'land boom', in which women complained that their home any morning might be sold or mortgaged by night-fall without hope of redress. Some commentators see in this controversy "the first faint traces of what might be termed a movement for women's rights."[92] Almost 75 years later the decision of the Supreme Court of Canada in *Murdoch* v. *Murdoch*,[93] may have had a similar effect. This decision again denied a hard-working rancher's wife, who had for long periods managed land alone during her husband's absence, any rights in the land bought partly with her money, partly with money made available by her parents, but in the sole name of a brutal husband.

Ten years after the foundation of the province of Alberta, and in response to women's complaints, the Married Woman's Home Protection Act[94] was passed in 1915. The effect of the Act was summarized in a dissenting judgment by Ives J. in *Overland* v. *Himelford*:[95]

> ... it created no right of property in the wife. It gave her only a right of filing a caveat which forthwith clouded the title and prevented the husband from dealing with the land, insofar as registration was required, from the moment the caveat was lodged.

The effect of the married women's caveat under the Act was to block any transfer, mortgage, encumbrance, lease or other instrument made by or on behalf of the husband purporting to affect the land comprising the homestead, which was defined in s. 2 as "the house and buildings occupied by such married woman as her home at the time of the filing of such caveat, or which has been occupied by such married woman as her home within six months prior to the time of the filing of such caveat, and the lands, premises and appurtenances thereto occupied thereby or enjoyed therewith." The Act

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91. An Act to Consolidate Enactments relating to the Administration of the Estates of Deceased Persons 1925 (U.K.) 15 Geo 5, c. 23.
92. Catherine Cleverdon, *The Woman's Suffrage Movement in Canada* (1950), p. 67.
93. [1975] 1 S.C.R. 423. The decision was that of Martland, Judson, Ritchie and Spence JJ., Laskin J. dissenting. The fact that costs follow the cause meant that the lump sum the wife subsequently obtained on divorce was almost entirely swallowed up by the costs of her unsuccessful property action.
94. 1915, S.A., c. 4, assented to April 17.
95. [1920] 2 W.W.R. 481 at p. 490.

thus prevented dealing, without the wife's consent, with any property forming the home of legal owner's wife.

Two years later, in 1917, the Act was replaced by the Dower Act, 1917,[96] which defined the homestead in greater detail, stated that any disposition of it by a married man, should be 'null and void' unless made with his wife's written consent, provided that no married man could change his residence without his wife's written consent, and gave the wife on her husband's death a life estate in the homestead prevailing over any disposition of it by his will or devolution by the law of intestacy. By s.7 the wife's separate acknowledgement of any consent given was also required. This was the position at the time of the decision in *Rex* v. *Cyr.*

After another two years the Dower Act Amendment Act 1919[97] *inter alia* provided that the absence of the wife's written consent to a disposition should render it null and void only "in so far as it may affect the interest of the said wife in such homestead under this Act," and by s. 5 abolished the need for the wife's separate acknowledgment of her written consent and empowered a judge of the Supreme Court to dispense by order with any consent of the wife to any proposed disposition if the husband and wife were living apart and the judge considered the dispensation fair and reasonable under the circumstances. A new s. 9(b) added to the Act provided that if the wife had executed a contract for the sale of property or joined in the execution of it with her husband, or given written consent to the execution, and the purchaser had wholly or partly performed his part of the bargain, she should, in the absence of fraud by the purchaser, be deemed to have consented to the sale.

By the Dower Act Amendment Act 1926[98] the words inserted in 1919 to the effect that absence of the wife's written consent to any disposition of the home should make it null and void only "in so far as it may affect the interest of the said wife in such homestead under this Act" were again deleted. After some uncertainty as to the effect of the deletion, the Dower Act Amendment Act 1942[99] by s. 2 substituted for the words "null and void" the words "absolutely null and void for all purposes." After more litigation, a fresh Dower Act was passed in 1948,[100] the long title to which read: "An Act respecting the interests of Married Persons in each other's Homesteads." The explanatory note to the Act pointed out that, by making dispositions without the consent of the spouse absolutely null and void for all purposes, the Act partially defeated the purposes of the Land Titles Act by giving rise to uncertainty of title and creating an unregistered interest in land which frequently cannot be discovered and which may override a title obtained in reliance on the register. Accordingly, such dispositions were prohibited under penalty instead of being rendered void. The history of the legislation and the litigation arising from it is considered in detail by Dean W. F. Bowker in his article in the Alberta Law Review.[101] He concludes that the conflict between the two objects, certainty of title and protection for the owner's spouse, is still unresolved and that further amendment is desirable.

96. 1917, S.A. c. 14, operative from May 1st, 1917.
97. 1919, S.A. c. 40, operative on May 17, 1919.
98. S.A. 1926, c. 9.
99. 1942, c. 51.
100. 1948, c. 7.
101. 1 *Alberta Law Review* (1955-61) 501, *supra* n. 88.

The Act of 1948 is still in operation with very minor amendments.[102] It chronicled the advance in the status of women by extending its protection to the spouse of the landowner, whether husband or wife, but it has been rightly pointed out that it is much more closely related to the Homestead Acts current in the United States than to any common law dower. One can only wonder at the state of public information and opinion that still makes it politically expedient to link a spouse's occupation rights in the home, a veto on dispositions, and a lifetime tenancy on the death of the owner, with the common law right to dower, which was merely a right to a third of the profits of land administered and managed by others, with whose conduct the dowager had no right to interfere.

B. *Private Property Rights in England*

In England, the extension of property rights to women, and particularly married women, has been slow and painful, subject to innumerable setbacks and false trails. The first provisions about married women's property were made when judicial divorce *a vinculo* was introduced in 1857. The Matrimonial Causes Act of that year[103] not only provided for the revival of the divorced woman's legal capacity, but in ss. 25-26 it made provisions for the separate property and legal capacity of the married woman judicially separated from her husband, and by s. 21 it made provisions for the protection order in favour of the deserted wife. These were the only amendments of the common law and equitable rules affecting married women's property as at 15th July 1870 'received' by Alberta in 1905.

The first Married Women's Property Act, in the form in which it passed the House of Commons, would have accomplished for England much of what was attained only twelve years later, when the Married Women's Property Act 1882[104] was enacted. In 1870, the House of Lords insisted on whittling down the provisions, so that the Married Women's Property Act 1870[105] applied only to the earned income of a married woman and to personal property which devolved upon her on intestacy, or up to a value of £200 in money bequeathed to her by will. An amendment Act of 1874 removed some of the more glaring anomalies of the remnants left after their Lordships' ministrations.

The passage of the Act in 1870 is probably closely linked with the publication in 1869 of John Stuart Mill's *The Subjection of Women*, the main theme of which was that the legal position of women, and especially of married women, was an extension of slavery. Although published only in 1869 the work had been completed several years earlier, and its main arguments, at least, were fairly well known in influential circles before publication.[106] A. V. Dicey, in the chapter of Married Women's Property legislation in his *Law and Public Opinion in England during the Nineteenth Century*[107] suggests

102. See R.S.A. 1970, c. 114.

103. 20 & 21 Vict. cap. LXXXV, first amended by 22 & 23 Vict. cap. LXI.

104. 45 & 46 Vict. c. 75. The Act of 1882 has been substantially amended, but never repealed. In 1978 the provisions still in operation were ss. 10, 11 and 17.

105. 33 & 34 Vict. c. 93.

106. See Norman St. John-Stevas: *Women in Public Law*, Ch. 11 of *A Century of Family Law* (1957) ed. R. Graveson and R. Crane.

107. (1905), 2nd edn. 1914 reprinted last in 1962. The full title is: *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*. Lecture XI on *Judicial Legislation* has as part II: *The Effect of Judge-made Law on Parliamentary Legislation*, which considers "though in the merest outline, the history, during the nineteenth century, of the law as to the property of married women."

that it was when social conditions changed sufficiently to enable women, married or single, for the first time to earn money in excess of what was needed for their bare subsistence, that the movement for married women's separate property arose. The passage of the first general Elementary Education Act[108] in the same year as the first Married Women's Property Act is also more than accidental.

In his *History of the Law of Married Women's Property*[109] C. S. Kenny suggests that probably no wife of a member of the House of Lords at the time was without property settled 'to her separate use', and that in refusing to allow separate property for the wives of other men without a specific settlement, the peers were insisting upon maintaining one law for the rich and another for the poor. It seems, however, that this may not have been the situation. When Lord Randolph Churchill, second son of the Duke of Marlborough, married in 1874 the American Jeanette (Jennie) Jerome, the negotiations over the settlements were bitter and protracted. Lord Randolph was totally dependent financially on his father, who was in straightened circumstances (for a Duke responsible for the upkeep of Blenheim Palace). The bride's father had incurred heavy losses in the stock market. Eventually, he settled £3,000 a year on the couple and the Duke added £1,000 a year, but the lawyers involved, and the Duke on their advice, insisted that on marrying a member of the English aristocracy, even though not himself a peer,[110] and discarding her American nationality, the bride must discard any notion of having as her own property what her father was to make available on her marriage. Even the minimal annual allowance payable to her, which was all her father was able to reserve to his daughter, was denounced as intruding upon 'the English custom' that the wife must be financially utterly dependent on her husband, even although three-fourths of their income came from her parents.[111] When ducal advisers were so adamant that on marriage a woman, of whatever rank, must be stripped of all financial resources save those at the whim of her husband, advisors of lesser peers would be unlikely to show more flexibility.

In England married women's property was firmly entrenched from 1882, despite restrictive judicial interpretation, which was met from time to time by remedial legislation.[112] The first considerable movement to extend a

108. 33 & 34 Vict. c. 75

109. (1898)

110. The title was honorary. Just before his marriage Lord Randolph gained a seat in the House of Commons, and he became a prominent politician whose career was cut short by his death from syphilis.

111. See Ralph G. Martin's *Jennie: The Life of Lady Randolph Churchill: The Romantic Years 1854-1895.* At 88 he quotes letters to this effect from the lawyers involved in the negotiations.

112. The Married Women's Property Act 1893, (56 & 57 Vict. c. 63.) in ss. 1 and 2 enlarged the married woman's freedom and liability in contract and litigation, and s. 3 overruled judicial decisions to the contrary and declared that the Wills Act 1837, s. 24, applied to married women as to all other adults, so that a woman whilst married could lawfully dispose of property that came into her possession only subsequently on her husband's death. The Act of 1907, (7 Edw. 7 Ch. 18) also enlarged her powers to deal with property real and personal and her rights in respect of settlements. These were the major advances before 1917. The Law Reform (Married Women and Tortfeasors) Act 1935 repealed ss. 1-5 of the Act of 1882, and replaced the Married Woman's separate property simply by her property, which she owned, administered, managed and disposed of just as any adult man and any adult unmarried woman might do. It also abolished a husband's liability for his wife's torts, reaffirmed in the face of the 1882 Act by the House of Lords in *Edwards* v. *Porter* [1925] A.C. 1,

(cont'd)

woman's property rights generally and to increase a wife's rights to property owned by her deceased husband took place in the reforms of the law of succession that were part of the massive reform of English property law after the war of 1914-1919, culminating in the statutes of 1925. The Administration of Estates Act, 1925, abolished the Rules of Inheritance to land, which had excluded women if any male relative existed; assimilated the rules of succession to property real and personal; equalized the rights of children, male and female; and gave the surviving spouse, whether widow or widower, equal rights in the property of the first to die. This preference for the surviving spouse was taken further by the Intestates Estates Act, 1952 and subsequent legislation.[113] The Act of 1952 also gave the surviving spouse the right to claim the former matrimonial home in settlement or part settlement of her or his intestate share.[114]

Not until the war of 1939-45 did the law of England move to protect the right of occupation of a married woman or man in property owned by or leased by the other spouse. The destruction of millions of dwellings, the cessation of construction during the war, the disruption of marriages by wartime separation, and the scarcity value of remaining homes, all united to pose grave problems of women and children deprived of a roof over their heads by the person the law considered the Head of the Household. The first move took place during the war in respect of protected (or statutory) tenancies, and established that the right of occupation granted to the tenant (usually the husband) by the Landlord and Tenant Acts, (later replaced by the Rent Acts,) extended to the tenant's wife and minor children, so that a husband could not, by surrendering his right of occupation to the landlord, succeed in having his wife evicted from the premises.[115] Judicial attempts to grant occupation rights to the deserted wife of the freeholder, valid even against the husband's trustee in bankruptcy, were foredoomed to failure, since not only did they offend the ancient common law principle that 'debts must be paid before gifts can be made', but they created grave anomalies in favour of the deserted wife as against the wife whose husband succeeded in locking or forcing her out of the premises by his conduct, or disrupted the marriage by any means

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discussed *post*. Not until 1962 was s. 12 of the Act of 1882 repealed. This was a limping provision, reflecting the fact that Parliament had passed Married Women's Property Acts but no corresponding Married Men's Property Acts. The dire predictions of the consequences if a husband and wife were allowed to sue each other in tort, as permitted by the Law Reform (Husband and Wife) Act 1962, have not yet been fulfilled. The Married Women's Property Act 1964, ch. 19 is a one-clause Act required to overrule a line of judicial decisions that any savings made by a married woman from a housekeeping allowance provided by her husband belonged exclusively to the husband, although the money had been provided for joint purposes in the first place. See O. M. Stone: 27 *Modern Law Review* (1964) 576.

113. The Family Provision Act 1966 (U.K.) c. 35, s. 1, as amended by the Family Provision (Intestate Succession) Order S.I. No. 916 of 1972, and the Inheritance (Provision for Family and Dependants) Act 1975, (U.K.) c. 63. The Act of 1952 was based largely on the Report of the *Committee on the Law of Intestate Succession* (Cmnd. 8310 of June 1951). This Committee took a random sample of wills proved, and recommended that devolution on intestacy should in general follow the provisions made by those who made wills. This approach was highly practical but raises some problems.

114. By Sched. 2 to the Act.

115. The most outstanding of a number of Court of Appeal decisions were: *Brown* v. *Draper* [1944] 1 K.B. 309; *Old Gate Estates* v. *Alexander* [1950] 1 K.B. 311 and *Middleton* v. *Baldock* [1950] 1 K.B. 657. They were expressly excluded from the House of Lords decision in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, and have never been doubted.

other than desertion. When the abortive nature of these misguided attemts was confirmed by the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth*[116] the Matrimonial Homes Act 1967 (U.K.) c. 75 provided more effective means[117] for enforcing the right of occupation of the spouse without legal title. Only in 1978 has the English Law Commission pubished a draft Matrimonial Homes (Co-Ownership) Bill,[118] designed to ensure *inter alia*, the spousal consent to disposition of the homestead that Alberta first achieved in 1915.

C. *Changes in Other Areas of Private Law Affecting Women in Alberta and in England*

In Alberta, after the decision of the Appellate Division in *Rex* v. *Cyr*,[119] the first Married Women's Act of the province,[120] enacted in 1922, declared succinctly in s. 2 that:[121]

> A married woman shall be capable of acquiring, holding and disposing of or otherwise dealing with all classes of real and personal property, and of contracting, suing and being sued in any form of action or prosecution as if she were an unmarried woman.

In the light of this provision, and against the background of the previous legislation applying in the North-West Territories, a majority of the Appellate Division of the Alberta Supreme Court in *Quinn* v. *Beales*[122] reversed[123] the decision of the court below and held that a husband could no longer be liable in damages for his wife's tort of slander. Harvey C. J. considered that this result followed from ss. 52-53 of the North-West Territories Act, 1875, and pointed to subsequent divergences between the legislation in the two countries. Beck J. A. examined in detail the historical evolution of the law within the North-West Territories and subsequently in the province of Alberta, and concluded that in the state of the post-1922 legislation in Alberta: "there is now no such thing in this jurisdiction as the separate estate of a married woman in the traditional and historical sense of that expression, and that now if the word 'separate' is used it can be used only in the sense of *individual*, in respect of the property of a wife as well as that of a husband".[124]

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116. [1965] A.C. 1175.
117. Too effective for some judges, see e.g. the comments made in *Miles* v. *Bull* [1969] 1 Q.B. 258; *Watts* v. *Waller* [1973] Q.B. 153 and — most dramatically — *Wroth* v. *Tyler* [1974] Ch. 30, and the discussion thereof by the Law Commission for England and Wales in Law Com. 86 paras. 2.74 - 2.89. Until the Police Forces can be induced to intervene in matrimonial disputes, there is still no immediately effective remedy against the spouse who manages to lock or force the other out of the premises.
118. Part of Law Com. 86, being the Third Report of the English Law Commission on Family Property: *The Matrimonial Home (Co-ownership and occupation rights) and Household Goods.*
119. *Supra* n. 7
120. R.S.A. 1922 c. 214
121. More elaborate provisions were made in the Married Women's Act, 1936, still in operation as amended.
122. [1924] 3 W.W.R. 337.
123. By a majority consisting of Harvey C.J., Stuart, Beck and Hyndman, JJ.A., Clarke J.A., dissenting, would have followed English law as laid down by the Court of Appeal (subsequently to be affirmed by a majority of the House of Lords in *Edwards* v. *Porter [1925] A.C. 1.)*
124. [1924] 3 W.W.R. 337, 344.

In England, however, only nine days later,[125] when the House of Lords held that a husband was not liable for property obtained by his wife through fraudulent misrepresentation, the majority[126] did so on the ground that the fraud was directly connected with a contract and therefore expressly exempted under the provisions of the Married Women's Property Act, 1882, s. 1(2). This was because the wife had impliedly warranted that she had her husband's authority to borrow the money on his behalf, thus connecting her fraud with a contract. The minority of Lord Birkenhead L. C. and Lord Cave,[127] whilst agreeing that the husband was not liable in this case, would so have held on the ground that a husband's liability at common law for his wife's torts had been abolished entirely by s. 1(2) of the Married Women's Property Act, 1882.[128] Despite the fact that married women now held, managed and controlled their property, had contractual capacity and could sue and be sued, a husband's liability for his wife's torts continued in England until expressly abolished by the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 3.[129] The delayed legislative abolition followed the absurdity of the decision in *Newton* v. *Hardy*,[130] in which Mrs. Newton sued for damages from both Mr. and Mrs. Hardy for Mrs. Hardy's alienation of Mr. Newton's affections from herself. Adultery between Mr. Newton and Mrs. Hardy was admitted, but the action failed for lack of evidence that it was the woman, rather than the man, who initiated the liaison. On Mr. Hardy's contingent liability, Swift J. said:[131]

> ... If indeed it is the law it may be that some day the Legislature will see fit to intervene, at any rate to some extent, because you have got in this case this Gilbertian situation: a woman who is sued because it is said she has seduced another woman's husband; if she has done that in fact she has done her husband the greatest wrong that a wife can possibly do; she has outraged every sense of matrimonial propriety and decency; she has ruined her husband's married life; but, according to our law, he has to pay for that — *he* has to pay ....

D. *The Authority and Responsibilities of a Woman in Respect of Her Children*

1. *At Common Law as at 15th July 1870*

(a) *The Presumption of Legitimacy* — The presumption that children born

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125. Judgment in *Edwards* v. *Porter* [1925] A.C. 1 was given on 31st October 1924; that in *Quinn* v. *Beales* on 22 October 1924.

126. Of Lords Finlay, Atkinson and Sumner.

127. Both invoked the judgment of Fletcher Moulton L. J. in *Cuenod* v. *Leslie* [1909] 1 K.B. 880, 888 on the wording of the Matrimonial Causes Act, 1857, s. 26. In the words of Lord Birkenhead: "I think that the powerful and subtle reasoning of Fletcher Moulton L. J. in *Cuenod* v. *Leslie* is unanswerable: it has at least never been answered, not even in these proceedings."

128. The wording is: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract *or in tort*, or otherwise in all respects as if she were a feme sole, and *her husband need not be joined with her* as plaintiff or defendant, *or be made a party* to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceedings shall be her separate property; *and any damages or costs recovered against her* in any such action or proceeding *shall be payable out of her separate property, and not otherwise.*"

129. This was also the Act that in s. 2 abolished the idea of a married woman's 'separate' property. By legislation a married woman thereafter simply held property, just like any other adult, male or female. The title to the Act may have been accidental, but seems strongly symbolic. Liability and responsibility are essential components of all legal rights. See also n. 112 *ante*.

130. (1933) 149 L.T. 165

131. *Id.*, at 168

to a married woman were the children of her husband was very strong and could be rebutted only by proof that the husband had no access to the wife at the probable time of conception. From the 1880's, because of the antagonism between Protestant and Roman Catholic societies caring for abandoned, destitute and orphaned children, decisions about such children and who was responsible for them started to come before the House of Lords and other higher courts. The insistence by the courts that the mother's husband had sole authority in respect of the children born to his wife, of whom he was manifestly not the father,[132] started to bring into disrepute both the almost irrebutable presumption of legitimacy and the sole authority of the father during his lifetime over all his children, however young. Nevertheless the effects of this were seen only after 1870.

(b) *Parental Rights were Paternal Rights*

At common law parental rights were exclusively paternal rights, and these rights were inalienable by mere agreement. After the father's death his authority vested in the testamentary guardian (so-called, although he might be appointed by deed as well as by will) he had appointed. Only if the father had appointed no testamentary guardian or had appointed the mother and the mother was unmarried was she the guardian of her own minor child, except that:

(1) After 1839 by statute the mother might apply to the Court of Chancery which might, in its discretion, grant her custody of any child under the age of seven years and access to any minor child;

(2) The Court of Chancery, acting under the prerogative of the Crown as *parens patriae*, might intervene as between the father and his minor children, but in practice would do so only if either (i) the father had been guilty of such gross moral turpitude that the court would not enforce his rights, or (ii) he had abdicated his authority and allowed others to bring up the child and (usually) settled property on the child, or (iii) he was attempting to take the child beyond the jurisdiction of the court.[133]

(3) On divorce or nullity or judicial separation the court had jurisdiction exceeding any exercised before 1857 to make orders with respect to the "custody, maintenance and education" of the children of the marriage, including power (which was and is hardly ever exercised) to declare such children wards of the Court.

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132. e.g. *Barnardo* v. *McHugh* [1891] A.C. 388, also known as Jones's case or Roddy's case; *Barnardo v. Ford* [1892] A.C. 326, also known as Gossage's case. In November 1885 William T. Stead, the American journalist, Bramwell Booth of the Salvation Army and others were prosecuted for the abduction of and assault on Eliza Armstrong, a girl of 13 years, bought from her mother for £5. The defendants alleged the mother was explicitly told that the child was intended for a brothel abroad. She was drugged and shipped to France (unharmed and under full protection) to prove the ease with which this could be done. Booth was discharged, but Stead and others were imprisoned for abduction of the child from her father. After the trial clear evidence was obtained that the child was illegitimate and the mother's husband was not her father. See H. Begbie, *2 William Booth: Founder of the Salvation Army* (1920) Ch. IV: "The Purity Crusade"; St. John Ervine, *2 God's Soldier: General William Booth* (1934) 644, 646. In the meantime the Criminal Law Amendment Act was passed in August 1885 raising the age of consent to sixteen years and permitting those on criminal charges to give evidence in their own behalf. It is said that Stead and Booth were the first to do so.

133. See *Re Agar-Ellis* (1883) 24 Ch. D. 317. Although this case was heard only in 1883 and led to a change in the English Law in 1886, it represents English law as it was on 15th July, 1870.

(4) If a child had left home and was supporting himself or herself, and was above the 'age of discretion' (sixteen years for a girl and fourteen for a boy) the common law courts would not compel the child to return to the father, although equity might exercise authority until the child reached the full age of twenty-one if it considered this for the welfare of the child. Not until 1875 did equity prevail over the common law in England, and in Alberta special legislation was required.

(c) *There Were No Parental Rights Over Illegitimate Children*

At common law the putative father had no rights in respect of his illegitimate child[134] and there seems to be only one reported case in England in which a putative father succeeded in obtaining custody of the child who had been made a ward of the Court.[135] Similarly the mother had no rights or authority in respect of the child.[136]

2. *Modifications in Western Canada Before 1905 of English Laws as at 15th July 1870*

(a) Authority to Assent to The Marriage of a Minor

An Ordinance of the North-west Territories of 1878[137] provided in s. VIII:

> The father, if living, of any person under twenty-one years of age (not being a widower or widow) or if the father is dead, then the mother of the minor, or if the mother[138] is dead, then the lawfully-appointed guardian or the acknowledged guardian who may have brought up, or for three years immediately preceding the intended marriage supported or protected the minor, shall have authority to give consent to such marriage.

This contrasts with the English Marriage Act, 1753,[139] s. XI, (last amended before 1870 by the Act of 1836[140]) which in s. X confirmed that consents required after that section came into operation were as previously, and authorized all those whose consent was required to forbid the issue of a secular marriage certificate, with or without a licence). This English law in respect of consents laid down in the Act of 1753 provided as follows:

> [And it is hereby further enacted, That all Marriages solemnized by Licence, after the said twenty-fifth Day of March one thousand seven hundred and fifty-four, where either of the Parties, not being a Widower or Widow, shall be under the Age of twenty-one Years, which shall be had without the Consent of]
>
> the Father of such of the Parties, so under Age (if then living) first had and obtained, or if dead, of the Guardian or Guardians of the Person of the Party so under Age, lawfully appointed, or one of them; and in case there shall be no such Guardian or Guardians, then of the Mother (if living and unmarried) or if there shall be no Mother living and unmarried, then of a Guardian or Guardians of the Person appointed by the Court of Chancery; [shall be absolutely null and void to all Intents and Purposes whatsoever].

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134. *In re M* [1955] 2 Q.B. 479 (C.A.)
135. *In re Aster* [1955] 1 W.L.R. 465
136. *In re Ann Lloyd* [1841] 3 M. & G. 546. The common law rule was reversed in *R.* v. *Nash* (1883) 10 Q.B.D. 454, (C.A.), but that was after 1870. It would have been impossible to give the mother authority in respect of her illegitimate child when she had none, in the presence of the father, over her legitimate child. *R.* v. *Nash* was decided just before statute in 1886 gave the mother actual rights in respect of her legitimate child.
137. No. 9, assent granted 2nd August 1878. The provision was re-enacted unaltered in Ordinance No. 7 of 1881.
138. In the revised ordinances of 1888, c. 29, s. 9 this phrase became: "or if both parents are dead . . ."
139. Lord Hardwicke's Act, 1753, c. 33
140. An Act for Marriages in England, 1836, c. 85, which first introduced secular marriage by certificate of the Superintendent Registrar of Births, Marriages and Deaths, and by s. XLIV was declared to be part of the Births, Marriages and Deaths Registration Act, c. 86.

In other words, before 1905, in the North-west Territories so far as consent to a minor's marriage was concerned, the mother ranked next after the father and before the lawfully-appointed guardian, who was also flanked for the first time by an acknowledged guardian or foster-parent.

(b) *Mother and Illegitimate Child*

From 1901 the North-west Territories moved to establish a legally-recognized relationship with rights of succession to property between the mother and her extra-marital child. The Ordinance respecting the Devolution of Estates, 1901,[141] provided that in the distribution of the personal property of any woman dying intestate her illegitimate child should be entitled to the same rights as if legitimate, and that on the death intestate without issue of an illegitimate child the mother should be entitled to any personal property owned by the child at the date of his death. In 1903, another Ordinance[142] in respect of the Support of Illegitimate Children broke away from the English tradition of the Bastardy Acts and provided that if the mother had, while pregnant or within six months after the child's birth, declared the child's paternity by affidavit, the father of the illegitimate child should be liable for the cost of food, clothing, lodging or other necessaries supplied to any child born out of lawful wedlock who was not then residing with the reputed father and maintained by him as a member of his family. It further provided that where the person suing for the value of the necessaries was the mother of the child or someone to whom she had become accountable for them, there must be evidence of paternity independent of that given by her. The need for independent evidence was in line with the common law rule, but its inclusion in this Ordinance made it clear that the mother was among those entitled to recover the cost of necessaries by civil action, and was not confined, as in England, to the quasi-criminal affiliation proceedings, which were not even classified as domestic proceedings until 1959, and have always been and still are available only before magistrates, with criminal appeal procedure.

3. *Modifications in Western Canada After 1905 and After Rex v. Cyr*

(a) Mother and Illegitimate Child

The above provision of 1903 was re-enacted in 1922.[143] In 1923 the Children of Unmarried Parents Act was passed,[144] including similar provisions, which were repealed by the Child Welfare Act, 1944.[145] The Act in respect of Illegitimate Children appears to have been repealed only in 1942.[146] The Child Welfare Act, 1944, included provisions for affiliation proceedings in ss. 108-129, which were repeated in the revision of 1955[147] Part

141. No. 13 of 1901. The Ordinance was repealed by the Intestate Succession Act, S.A. 1920, c. 11, and replaced by the general provision that: "Illegitimate children shall be entitled to take property from or through their mother as if they were legitimate." This was amended by the Intestates Estates Act, 1928, S.A., c. 17, s. 17, and again by the Intestate Succession Amendment Act, 1970, c. 60.

142. S.A. 1903, c. 9

143. R.S.A. 1922, c. 218

144. S.A. 1923, c. 50, as am. S.A. 1928; c. 20, S.A. 1939, c. 90.

145. S.A. 1944, c. 8, s. 130

146. It is included in a list of repealed statutes.

147. R.S.A. 1955, c. 39

III and again in Part IV of the Act of 1966,[148] which was replaced by the Maintenance and Recovery Act, 1967.[149]

(b) *Mother and Legitimate child*

Four years after its foundation, the Alberta legislature turned its attention to children, and passed the Children's Protection Act,[150] described as 'An Act for the protection of neglected and dependent children'. After another four years, the legislature passed the first Alberta Infants Act,[151] which marked an important stage in the evolution of legal recognition of the mother in respect of her children.

(i) *Guardianship*

The Infants Act, 1913, provided for the guardianship of children in substantially the same terms as English legislation then recently enacted. The father had a right to appoint a guardian for his child to act after his own death, such a disposition of the child's custody and education was to prevail against the claims of all others, as guardian in socage or otherwise, and the guardian might recover custody of the infant from any person who wrongfully removed or detained him, together with damages for the use and benefit of the infant.[152] However, this rule was mitigated by s. 23(1) of the Act, which provided:

> On the death of the father of an infant, the mother if surviving, shall be the guardian of the infant, either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father.

Section 23(2) empowered the Supreme Court or the District Court to appoint a guardian or guardians to act jointly with the mother where no guardian had been appointed by the father, or if the person the father had appointed was dead or refused to act. By s. 23(3) the mother of an infant was, for the first time, empowered to appoint by deed or will a guardian for her unmarried infant child to act after the death of herself and the father, and the first move towards equality was made *post mortem* in providing that if guardians were appointed by both parents they should act jointly. By s. 23(4) the mother was given a more limited authority in that she might provisionally nominate some fit person or persons to act after her death as guardian(s) of the infant jointly with the father. After the mother's death, if it were shown that the father was for any reason unfitted to be the sole guardian of his children, the court might confirm the appointment or make such other order in respect of the guardianship as might be deemed just. Section 23(5) provided that if guardians were unable to agree upon a question affecting the welfare of an infant they might apply to the court for direction and the court might make such order as it deemed proper.

Section 24 empowered the court to appoint a guardian "upon the application of an infant, or of any one on its behalf, when it is made to appear that the infant has no parent or lawful guardian or that such parent or lawful guardian is not a fit and proper person to have the guardianship of the infant". By s. 25 testamentary guardians and those appointed by order of letters of guardianship were equated with trustees for purpose of removal by

148. Child Welfare Act, S.A. 1966, c. 13
149. S.A. 1967, c. 67, s. 59
150. S.A. 1909, c. 12
151. S.A. 1913 (2nd session), c. 13
152. *Id.*, s. 3

the Supreme Court, or the District Court, and it was expressly provided that a guardian might by leave of the court resign his office upon such terms and conditions as might be deemed just.

As regards guardianship, the provisions of 1913 were, ten years after the decision in *Rex* v. *Cyr*, drastically amended to accord greater status to the child's mother by the Domestic Relations Act, 1927,[153] which abolished the feudal concepts of guardianship in socage, by nature and for nurture, and by s. 61 established the rules in relation to the guardianship of minors that still apply in Alberta,[154] viz; that unless otherwise ordered by the Court,[155] the father and mother of an infant are jointly guardians of such infant, and the mother of an illegitimate child is the child's sole guardian.[156] Both parents are given equal power to appoint a testamentary guardian to act after his or her own death jointly with the surviving parent or the guardian appointed by him or her. The power of the court to appoint a guardian to act jointly with either parent or the guardian appointed by either parent was confirmed, as was the power of the court, on the application of an infant or of any one on its behalf, to appoint a guardian for an infant who had no parent or lawful guardian or whose parent or lawful guardian was not a fit and proper person to have guardianship.[157] Provisions about removal of guardians and their right to resign their office were also re-enacted.

(ii) *The Authority of Guardians*

The Act of 1913 had a separate part concerned with the authority of guardians, under which s. 26 provided that, unless otherwise limited, the authority of a guardian included the authority:

(a) to act for and on behalf of the infant;
(b) to appear in any court and prosecute or defend any action or proceedings in the infant's name; and
(c) to have the charge and management of the infant's estate, real and personal, on giving the security required, or when the court had dispensed with security, have the custody of the infant's person and the care of his education.

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153. S.A. 1927, c. 5

154. Now by the Domestic Relations Act, R.S.A. 1970, c. 113

155. This wording did not involve the difficulties imported by the wording of the English Guardianship of Infants Act, 1925, s. 1, which in an effort to ensure that the welfare of the infant should be the first and paramount consideration in all cases provided that: "Where in any proceedings *before any court* . . . the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . . " This meant that the rule applied when the matter came before the court and no earlier, and that at all earlier times by common law the father decided. Not until 1973 was an amendment attempted. On the other hand, Alberta and most other Canadian provinces have no statutory provision that the child's welfare is paramount, and in October, 1977, it was still possible for a provincial judge in a custody case in Alberta to declare that: "There are three factors to be considered. The first is the paternal common law right . . . " *Ashpole* v. *Ashpole* [1978] A.R. 322, 324 per Moshansky J.

156. The introduction by the 1913 Act of adoption, (not introduced in England until the Adoption of Children Act, 1926), was of great assistance to the poverty-stricken unmarried mothers of many illegitimate children. Unfortunately the widespread adoption of illegitimate children generated a euphoria about adoption that screened the remaining hardship to unmarried mothers, forced by financial need to relinquish their children to strangers.

157. Now Domestic Relations Act, R.S.A. 1970, c. 113 s. 42

The Act of 1927 included all matters concerned with guardianship, the authority of guardians and custody of an infant in Part IX of the Act under the general heading of *Guardianship*. Under this heading, by s. 74, the guardian was declared entitled to:

(a) the custody and control of the infant;
(b) control his education;
(c) the possession and control of lands of the infant and the receipt of the rents and profits thereof;
(d) the management of goods, chattels and personal estate of such infant;
(e) act for and on behalf of the infant;
(f) appear in any Court and prosecute and defend any action or proceedings in the infant's name.

By the Domestic Relation Act, 1941,[158] s. 74 of the Act was amended to read:

(1) Unless otherwise ordered by the Court, every guardian of the estate of an infant shall, except where such guardian is the Official Guardian, furnish such security if any as may be ordered by the Court.
(2) Except where the authority of a guardian appointed or constituted by virtue of this Act is otherwise limited, every such guardian during the continuance of his guardianship, —
  (a) shall have authority to act for and on behalf of the infant;
  (b) may appear in court and prosecute or defend any action or proceedings in the infant's name;
  (c) shall after furnishing such security as the Court under the provisions of this section may require have the care and management of his estate, real and personal, including the right to receive any moneys due and payable to the infant and to give a release in respect thereof;
  (d) shall have the custody of his person and the care of his education.

In *Read* v. *Allan*[159] the Appellate Division of the Alberta Supreme Court held that the combined effect of s. 74 and of the fact that every married woman was joint guardian with her husband of their child(ren) was to remove the former legal incapacity of a married woman living with her husband to act as next friend for her infant child, and such a married woman was allowed to act as next friend for her infant daughter under Rule 92.[160]

Again Alberta re-affirmed the status before the law and in the courts of Albertan women, even if married, when in 1975 Mrs. Ethel Unsworth of the Attorney-General's Department was appointed, in addition to other continuing duties, to succeed Mr. Alexander Hogan as *amicus curiae* for children in disputed custody cases before the Supreme Court and District Courts in the

158. S.A. 1941, c. 104
159. [1948] 2 W.W.R. 1018
160. A contrary decision was, however, reached by the District Court of Ontario in *Gagnon* v. *Stortini* (1974) 4 O.R. (2d) 270, 17 R.F.L. (1975) 180. In 1974 the Ontario Law Reform Commission recommended abolition of the disability (Report on Family Law Part IV, Family Property Law, p. 180), and the Family Law Reform Act S.O. 1975, c. 41, provided by s. 1(3)(b) that "a married woman is capable of acting as guardian *ad litem* or next friend as if she were an unmarried woman". See now Family Law Reform Act, S.O. 1978, c. 2, s. 65(3)(b).

province. The complete change that had taken place in the social climate in the intervening years and the extent to which women's role in the judicial as well as the other areas of constitutional power had been accepted, were demonstrated by the fact that such an appointment was by then considered a matter of routine, and attracted minimal comment.

In England the Guardianship of Infants Act, 1925,[161] provided that "The mother of an infant shall have the like powers to apply to the court in respect of any matter affecting the infant as are possessed by the father", and a *Practice Note* of 1928[162] carried a notification that the special cases in which a married woman might act as next friend or guardian *ad litem* included those in which a married woman was authorized to institute and defend proceedings in the name of a person of unsound mind and in which a mother sought to act as next friend of an infant child upon an application under the Act. The *Annual Practice* for 1926 emphasized[163] that this was a special case departing from the general principle that: "It has not been the practice in the Ch. D. to allow a married woman to act as next friend or guardian *ad litem*." Not until 1947 was a rule added to Order 16 of the Supreme Court Rules[164] providing: "Nothing in Rule 16 or 17 of this Order shall prevent a married woman acting as next friend or guardian." By 1976 the note in the *Supreme Court Practice*[165] stated simple that: "A married woman can act as next friend and guardian *ad litem*."

(iii) *Custody of Minor Children*

The Alberta Infants Act, 1913, in s. 2 provided that the Supreme Court might, on the application of the mother of an infant, who might apply without a next friend, make such order as the court saw fit regarding the custody of the infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes of the mother as well as those of the father, and might alter, vary or discharge such order on the application of either parent, or after the death of either parent, of any guardian appointed under the Act. It was explicitly enacted that no order for custody of or access to an infant might be made in favour of a mother against whom adultery had been established by judgment in an action for criminal conversation or for alimony. The Act of 1913 also provided for the first time that if a parent was found to have abandoned or deserted a child or had "otherwise so conducted himself that the court should refuse to enforce his right to the custody of the infant" the court might in its discretion refuse to restore the child's custody to the parent. If the court ordered that a child be returned tothe parent it might also to the parent to repay the whole or any part of the cost properly incurred by a third party in bringing up the child, and if the parent had abandoned or deserted his child or allowed the child to be brought up by another person at that person's expense so as to satisfy the court that the parent was unmindful of his parental duties, the burden was squarely placed on the parent to satisfy the court that it would be for the child's welfare to be returned to him. In any case in which the court decided that the child should not be returned to his parent "and the infant is being brought up in a different religion to that in which the parent

161. S.2
162. [1928] W.N. 8
163. Under 0.16, r. 16, p. 250
164. R.S.C. 1947, Ord., 16, r. 17 A
165. Order 80, r. 3, Part I, p. 1211

has a legal right to require that the infant should be brought up" the court might make such order as it thought fit "to secure that the infant be brought up in the religion in which the parent has a legal right to require that the infant should be brought up". However, nothing in the Act was to interfere with or affect the power of the court to consult the wishes of the infant in considering what order ought to be made, or "diminish the right which any infant now possesses to the exercise of its own free choice". There must at the time have been and may still be great uncertainty as to the precise legal position in respect of religious upbringing.

By s. 9 of the Act of 1913 the rules of equity were declared to prevail in question *(sic)* relating to the custody and education of infants. This means in fact that equity might, in its discretion, intervene between a father or the lawfully-appointed guardian and the child, and might overrule the wishes of the child who had attained the common-law age of discretion (sixteen years for a girl and fourteen for a boy).

In the Act of 1927 all the provisions regarding custody were subsumed under the general heading of 'Guardianship'. By s. 66 the courts were empowered, on pronouncing a judgment for judicial separation or a decree nisi or absolute for divorce, to declare the parent, by reason of whose misconduct such decree had been made, unfit to have the custody of the children (if any) of the marriage, and in such case the parent so declared unfit would not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children. Such declarations might also be revoked. This provision now appears in the current Domestic Relations Act, s. 44. The link between marital misconduct and unfitness as a parent is no longer considered necessarily applicable in all cases, and some broadening of the wording to enable such a finding to be made in respect of any parent may be desirable. Even then, however, it is probable that declarations of unfitness would remain as rare in Alberta as they are in England.

In Australia it is now provided[166] that "Subject to any order of a court for the time being in force, each of the parties to a marriage is a guardian of any child of the marriage who has not attained the age of 18 years and those parties have the joint custody of the child," but this is qualified by a provision that: "On the death of a party to a marriage in whose favour a custody order has been made in respect of a child of the marriage, the other party to the marriage is entitled to the custody of the child only if the court so orders on application by that other party and, upon such an application, any other person who had the care and control of the child at the time of the application is entitled to be a party to the proceedings." Such a provision would seem very desirable. Both in Alberta and in England, short of a finding of a parental unfitness (which is so rare as to be almost unknown) the only safeguard against what may be a traumatic upheaval for a child on the death of a parent with legal custody is for that parent immediately to make a will appointing a testamentary guardian to act on her or his death. Such a guardian will then at least have *locus standi* to contest a demand by a surviving parent, who might be a total stranger to the child, that the child be uprooted from his home and surroundings to live with that surviving parent. The forgotten parent is probably by now married to or cohabiting with another sexual partner, and possibly has children from that union. The other parent of those children may well resent the arrival of the partner's child from a former

166. Australian Family Law Act, No. 53 of 1975, s. 61(1) and (4)

union, and in any circumstances the welfare of the bereaved child is insufficiently assured by leaving total discretion with a surviving parent who may have long been estranged.

The present provisions relating to custody of or access to a child in Alberta may be unduly restrictive.[167] The only persons who may apply under the Domestic Relations Act are the mother or father of an infant or the infant himself, who may apply with a next friend. Although others interested might be able to bring the matter before the Supreme Court under the Judicature Act[168], it seems doubtful if, should the child have a living parent, he could even in theory make an application on his own behalf contrary to the wishes of the surviving parent, and of course if the child is under fourteen years of age such an application would be highly improbable. The result is that applications are now commonly made for guardianship when all that is required is custody of or access to the child, as for example in *Adams* v. *McLeod*.[169] This concerned an extra-marital child of less than three years old whose mother died when he was less than four months old. He had no parents and no guardian and therefore no-one except the child himself was empowered under the section to apply for his custody. The maternal grandmother and a maternal aunt applied under s. 42 of the Act for Letters of Guardianship, but it was clear that the only issue was their wish to have custody of the child transferred to them from those who had cared for the child since the day after the mother's death. At first instance Judge Legg (of the District and Surrogate Courts) thought that the child should remain where he was, and since the *de facto* custodians had made no application for guardianship they were advised to and did put in such an application. The Supreme Court made no comment on the procedure adopted. A most disturbing aspect of this case was that when the Appellate Division of the Supreme Court of Alberta reversed the finding of Judge Legg they twice refused a stay pending appeal to the Supreme Court of Canada. The result was that this child, aged 25 months, was on May 11th, 1977, removed from the care of the people with whom he had lived for the preceding 21 months and transferred to the care of a grandmother and an aunt who were strangers to him. Only in March of the following year, when the Supreme Court of Canada upheld the decision at first instance and found that the Alberta Appellate Division had been mistaken in reversing it, was the child once again transferred to those from whose care he had been removed ten months previously.

The current Act provides, as do the corresponding Acts in most of the provinces of Canada, that in making an order for custody of or access to a child the court shall have regard to the welfare of the infant, the conduct of the parents and the wishes of the mother as well as the father. There is no specific provision that the welfare of the child is the first and paramount consideration. The conduct of the parents is also not directly related, as it well might be, to the child, and it might surely be appropriate that the wishes of the child should be consulted in suitable cases as well as those of the father and mother.

At present ony when an order is in existence may the guardian appointed by a deceased parent as well as either living parent apply for alteration, variation or discharge of that existing order.

167. Domestic Relations Act, R.S.A. 1970, c. 113, s. 46
168. R.S.A. 1970, c. 193, s. 15
169. (1978) 84 D.L.R. (3d) 440

E. *The Development of Women's Public Law Rights in Western Canada*

As will be seen, the decision in *Rex* v. *Cyr* was reached in Alberta at a time when the women of all four Western provinces of British Columbia, Alberta, Saskatchewan and Manitoba had achieved the provincial franchise in 1916; the more fiercely-contested franchise of Ontario was gained in 1917, and in the same year (and two years before women over the age of 30 who were, or were the wives of, householders, were reluctantly granted the Parliamentary franchise in England)[170] the federal parliamentary franchise was obtained by all Canadian women. It is to the development of these rights in public law in Western Canada, the last and most reluctantly-conceded rights in the emancipation of women, that reached their climax in Canada at the very time that the Appellate Division of the Alberta Supreme Court delivered its momentous judgment in 1917, that I now turn.

1. *Manitoba*

In Manitoba,[171] as early as 1887,[172] an Act to amend the Manitoba Municipal Act, 1886,[173] provided in s. 7 for owners of real property, whether men or women, to have the franchise in municipal elections. This was done by amending the principal Act to substitute for the word 'he' the word 'they' and to add the words "of either sex".[174] Nineteen years later, by another amendment of 1906 to the Municipal Act, the amendment was varied so as to restrict the municipal franchise to unmarried women and widows, and to bestow on married men a municipal franchise in respect of freehold land or tenancies held by their wives.[175] The stir caused by this disfranchisement appears to have been sufficient to induce the government to attempt to rectify its mistake in the following year by a further amendment[176] introduced without debate, repealing the previous amendment and restoring the municipal franchise to Manitoba's married women landowners or tenants. The hasty retreat appears to have quietened only temporarily the movement for a wider franchise for women in provincial elections.

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170. By the Representation of the People Act, 1918 (7 & 8 Geo. 5 c. 64) s. 4. By the Parliament (Qualification of Women) Act, 1918 (8 & 9 Geo. 5 c. 47) it was provided that women were not disqualified by sex or marriage from membership of the House of Commons, and their right to hold other public offices (including membershipof the Civil Service) was granted by the Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo. 5 c. 71). Not until the Representation of the People (Equal Franchise) Act, 1928 was full and equal Parliamentary franchise obtained, and even after the passage of the Sex Disqualification (Removal) Act, 1919, the House of Lords held that a peeress in her own right was not entitled to sit in the House of Peers: *Viscountess Rhondda's Claim* [1922] A.C. 339, re-affirming the decision in the *Countess of Rutland's Case* (1605) 6 Co. Rep. 52b. This decision was not reversed until the passage of the Peerage Act, 1963, c. 48, s. 6.

171. Formed in 1870 from part of the territories of the former Rupert's Land and North-Western Territory on their admission to the Canadian Union. See the Manitoba Act of the Canadian Federal Parliamant, 33 Vict., c. 3, which received assent 12th May, 1970.

172. 50 Vict., c. 10

173. 49 Vict., c. 53

174. *Id.*, s. 108, as am. 50 Vict., c. 10

175. 5-6 Edw. VII c. 51, s. 2 amending R.S.M. 1902, c. 116, s. 58 by striking out the words "male or female" . . . and substituting therefor the words "men, unmarried women or widows", also by inserting after the word "right" . . . the words in brackets "(or in the case of married men, held by their wives)", also by inserting after the word "right" . . . the words "or whose wives are", also by inserting after the word "are" . . . the words "or whose wives are."

176. The Municipal Act Amendment Act, 1907, 6-7 Edw. VII, c. 27, s. 1, restoring the original wording of the Municipal Act, R.S.M. 1902, c. 116, s. 58

By the Manitoba Public Schools Act of 1890[177] women, even if married, who were householders, owners or tenants,[178] were entitled to vote for and to become trustees of the public schools, and the word 'teacher' was defined as including a female as well a male teacher.

After the change of provincial government following the general election in August 1915, Manitoba was, by a short head, the first province in Canada to recognise women's rights to exercise the franchise in provincial elections, by an Act[179] that received assent on January 28th, 1916, and provided that the word 'person' in the Election Act was to be qualified by the words: "male or female, married or unmarried." A Manitoba Act of 1917[180] made Manitoba women landowners eligible for municipal offices, and further Acts of 1918[181] and 1919[182] equalised the franchise between men and women in that province.

2. *North-West Territories*

In the remaining North-West Territories during the period 1885-1905, an Ordinance of 1885,[183] to amend and consolidate the Municipalities Ordinance of 1884[184] confirmed the qualifications for the municipal election previously laid down, viz., all residents were entitled to vote at the first election, but residents were defined as male British subjects over 21 years of age who had been either freeholders or householders for three preceding months. Male British subjects over 21 years of age assessed on the Municipality Assessment Roll "either in their own right or in right of their wives" for three hundred dollars and upwards were qualified to vote at subsequent elections. Additional qualifications for councillors were residence in the municipality and a higher property qualification.[185] On the other hand, the School Ordinance of 1884[186] provided that: "Any person whether male or female of the full age of 21 years, not an alien or an unenfranchised Indian, who had . . . possession in his or her own right of any land" of the value of $100 or who occupied and cultivated unpatented Dominion lands, or was a joint tenant or tenant in common of an unexpired lease with at least one year to run of land to an annual rental value of at least $20 had "the right to vote in all matters connected with such school district and is an elector." The qualifications for school trustees were the same as for voters, but with a higher property qualification and, for example, those in contractual relationships with the school district were excluded. The Ordinance of 1885 to amend and consolidate this Ordinance[187] amended the wording to read that an elector was a

177. 53 Vict. c. 38, which became c. 127 of the R.S.M. 1891.

178. There remained another entitlement restricted to males, viz., 'any person entered on the assessment roll as a farmer's son.'

179. S.M. 1916 c. 36

180. An Act to amend the Municipal Act, 7 Geo. V, 1917, c. 57, s. 3 of which amended s. 52 of the principal Act to add the words "or females" after "males".

181. An Act to amend the Public Schools Act, 8 Geo. V, 1918 c. 67, by s. 4 extended capacity to the wife or husband of any ratepayer, and by s. 6 to the wife or husband of other persons with the required property qualification.

182. An Act to amend the Municipal Act, 9 Geo. V, 1919, c. 59, substituted for "landowners' sons" "landowners' sons and daughters", and added "or their wives or husbands (as the case may be)" to the qualifications of "owners" and "tenants".

183. No. 2 of 1885, ss. 1(9), 10, 11, 12, 18, 19, 20 and 21.

184. No. 4 of 1884

185. The property qualifications were reduced by Ordinance No. 7 of 1886, ss. 1 and 2.

186. O.N.W.T. 1884, no. 5, s. 12

187. O.N.W.T. 1885, no. 3, s. 10

man or unmarried woman[188] with "possession in his, or in right of his wife, or her own right" of land or tenancy to the same value as previously. In 1894 another amendment and consolidation of the Municipal Ordinance of the Territories[189] provided in s. 12 that "all men, unmarried women and widows over 21 years of age who have been owners or householders within the municipality for a period of not less than twelve months next preceding the day of voting" should be entitled to vote at first and (by s. 14) subsequent elections, but by s. 4 only "natural born or naturalized subjects of Her Majesty and males of the full age of 21 years, able to read and write, not subject to any disqualification under this Ordinance", and with the necessary property qualifications were eligible for municipal office.

3. *Alberta And Saskatchewan*

Such was the position of women in public life in 1905 when the provinces of Alberta and Saskatchewan were created. Eleven years later, on March 14th, 1916, both Alberta and Saskatchewan amended their provincial Election Acts to include all persons, male or female, over the age of 21 years; but while assent was given to Saskatchewan statute[190] on that day, making this the second province to emancipate its women, the Equal Suffrage Act of Alberta[191] received assent only on April 19, making Alberta the third province to provide for women's suffrage. Various other Acts passed in Saskatchewan in the same year confirmed women's suffrage in elections for cities, towns and villages.[192]

4. *British Columbia*

In British Columbia the franchise in municipal affairs was extended to women holders of land, whether married or unmarried, in 1873[193] but it appears not to have been exercised until early in 1875,[194] and the British Columbian women were not entitled to hold municipal office. In 1884 women with property qualifications and wives of men so qualified were empowered to

188. Although by the Federal Act of 1875 s. 48, married women were declared entitled in future to hold their real property as their separate estate, the Act appears to have had no retroactive validity in respect of women already married when the Act was brought into operation in 1876. Their land would already have vested in their husbands, and presumably it was thought too anomalous to magnify the distinction between such women and those entitled to their own land despite a later wedding ceremony by giving the latter and not the former rights to vote for and even become school trustees.

189. The Municipal Ordinance, O.N.W.T. 1894, no. 3, Part II: *Elections*.

190. An Act to amend the Statute Law, S.S. 1916, c. 37, s. 1 of which amended the Saskatchewan Election Act to include all persons, male or female, over the age of 21. By an oversight, however, the Legislative Assembly Act was not amended to permit the election of women until the passage of the amending Act, S.S. 1917, c. 5.

191. An Act to provide for Equal Suffrage, S.A. 1916, c. 5

192. City Act, S.S. 1916, c. 18; Town Act, S.S. 1916, c. 19; Village Act, S.S. 1916, c. 20

193. S.B.C. 1873, c. 5, ss. 1 and 2. See also R.S.B.C. 1877, c. 129, s. 22: "Any male or feme sole of the full age of twenty-one years, being a freeholder, householder, free miner, pre-emptor, or leaseholder for a term of not less than two years, resident in a municipality, shall be entitled to vote at the first municipal election; but no such *feme sole* shall be qualified to sit or vote as a Councillor." By s. 23 at subsequent elections ratepayers male or female of the full age of 21 years rated upon the assessment roll or holding a licence for and carrying on business within the municipality for three calendar months next preceding the making up of the voters' list were entitled to vote.

194. See Catherine Cleverdon, *op. cit.* n. 92, citing the *Daily Colonist* of August 1st, 1937, to this effect, adding that only three exercised their vote in January, 1875.

vote for school trustees[195] and these rights were re-affirmed in the new Act passed in 1885.[196] In 1895 women with the appropriate property qualifications became eligible as school trustees[197] and in 1896 the wives of qualified men also became eligible, with the proviso that the wife of a serving trustee could not also serve as trustee.[198] In 1912 British Columbia passed an Act enabling women to practise law, both as solicitors and barristers,[199] and in 1916 it became the fourth province to extend the provincial franchise to women with an Act that received assent on May 31st,[200] but whose operation was suspended until March 1st, 1917, when the Women's Suffrage Act, 1916,[201] was to come into operation. In fact the operation was further delayed because of delay in receiving election returns from overseas, and another Act was necessary in 1917[202] before British Columbian women could become effective provincial voters and eligible as provincial Members of the Legislative Assembly. In the same year another revision of the Municipal Elections Act removed all disabilities from women serving as city officials.[203]

In 1917 British Columbia followed Alberta in appointing a woman judge to the Juvenile Court in the person of Helen Gregory MacGill, and in January, 1918, Mrs. Mary Ellen Smith won the seat formerly occupied by her deceased husband in the provincial legislative assembly. Three years later, in 1921, she became the first woman cabinet minister in the British Empire, but it was many years before British Columbia elected a woman representative to Ottawa.

5. *Ontario (Upper Canada)*

As early as 1850 the Common Schools Act of Upper Canada[204] (which became the province of Ontario on Confederation in 1867) permitted women

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195. An Act to amend the Public Schools Act, 1879, S.B.C. 1884, c. 27, amending s. 23 to read: "Any householder or freeholder resident in any school district for a period of six months previous to the election, and the wife of any such householder or freeholder, shall be entitled to vote at any school meeting held in such district and for the election of trustees: Provided Chinese and Indians shall not vote."

196. Public School Act, S.B.C. 1885, c. 25, s. 19

197. British Columbia Public School Act Amendment Act, S.B.C. 1895, c. 48, s. 4, amending s. 9 of the Amendment Act, S.B.C. 1892, c. 40, to the principal Act, S.B.C. 1891, c. 40.

198. Public School Act Amendment Act, S.B.C. 1896, c. 42, s. 5, again amending s. 40 of the principal Act.

199. An Act to remove the disability of women so far as relates to the study and practice of the law, S.B.C. 1912, c. 18

200. The Provincial Elections Act Amendment Act, S.B.C. 1916, c. 20, s. 2 of which amended s. 4 of the British Columbia Provincial Elections Act by inserting after the word 'male' the words 'or female'.

201. No. 76 of 1916, s. 2 of which provided that "it shall be lawful for females to have their names placed upon the register of voters for an electoral district, and to vote at any election of members to serve in the Legislative Assembly, upon the same terms, in the same manner, and subject to the same conditions as males; and thereafter females shall be capable of being elected as members of the Legislative Assembly upon the same terms, in the same manner, and subject to the same conditions as males. By s. 2(2) the register of voters could be amended to record a woman's change of name on marriage. The Act and the Prohibition Act were both the subject of a referendum to voters under the provisions of the Prohibition and Woman Suffrage Referendum Act, c. 50 of 1916. 43,619 votes were cast in favour of women's suffrage and 18,604 against.

202. The Provincial Elections Act Amendment Act, 1917; Statutes of British Columbia 1917 c. 23 replacing the Woman's Suffrage Act.

203. The Municipal Act Amendment Act, S.B.C. 1917, c. 45, ss. 6-9, amending ss. 16-19 of the principal Act.

204. 13 & 14 V., c. 48, Consolidated Statutes of Upper Canada 1959, c. 64, ss. 9 and 17

freeholders or householders to vote for trustees of the Common Schools, but there is evidence that little use was in fact made of the opportunity.[205] Attempts to extend the municipal franchise to women during the 1870s and repeated attempts to gain for them the provincial franchise in the 1880s were unsuccessful, but in 1882[206] unmarried women with the necessary property qualifications were given the right to vote on municipal by-laws and in 1884 the full municipal franchise was extended to them.[207]

In the 1860s a Toronto widow, Mrs. Emily Howard Stowe, found it impossible to enter medical school in Canada, and was therefore forced to obtain her medical training at the Women's New York Medical School, from which she graduated in 1868. She and later her daughter, Dr. Augusta Stowe-Gullen, played a prominent part in first opening further eduction to women and later in general suffrage activities. In 1883 the Ontario Medical College for Women was established and in the following year the motion for the admission of women to the University of Toronto was passed, and took effect in 1886.[208] By 1906 the entry of women to the general schools was sufficiently established for the Ontario Medical College for Women to be closed. In 1892 three women were elected for the first time to the School Board, which then employed 460 women and 40 men teachers, and in the same year the Law Society of Ontario was for the first time permitted to admit women to practise law as solicitors.[209] In 1895 they were also permitted to act as barristers.[210]

Although Ontario was extremely active in the women's suffrage movement from the 1880s onwards, not until 1917,[211] after the women of four provinces had obtained the vote in provincial elections, were the rights of Ontario women similarly recognised.

6. *Federal Canada*

At the federal level women's suffrage became entangled in the war years with party politics, when a wartime federal election crystallised from a possibility into an accomplished fact, and the collection of votes from those serving in the forces overseas had to be arranged. The question of British nationality and naturalization also loomed large and particularly affected women, who at that time might acquire British nationality by marrying a British subject or, if already British, lost that nationality automatically on

205. Catherine Cleverdon, op. cit. p. 22, citing I. Harper *et at.*, *3 Women's Suffrage* 831 and A. Stowe-Gullen, *90 Scrap Books*. This is just one more example of the importance of custom as well as law or rule in what actually happens.

206. Municipal Amendment Act, S.O. 1882, c. 23, s. 15

207. Municipal Amendment Act, S.O. 1884, c. 32, ss. 3 and 4

208. The Act respecting the University of Toronto was also amended by a statute of 1884, c. 45, s. 2 of which made qualified assistant teachers (and not only headmasters of schools) eligible for appointment to the Senate.

209. An Act to Provide For the Admission of Women to the Study and Practice of Law, S.O. 1892, c. 32

210. An Act to Amend the Act to provide for the Admission of Women to the Study and Practice of Law, S.O. 1895, c. 27

211. S.O. 1917, c. 6: The Election Law Amendment Act, s. 3 of which amended the Ontario Election Act s. 14 by providing that: "A woman shall be entitled to be entered on the voters' list and to vote in the same manner and upon the same qualifications as a man." See: Catherine L. Cleverdon op. cit. and J. Garner, *The Franchise and Politics in British North America 1977-1867* (1969) ch. 12.

marrying a foreigner.[212] There seems to have been minimal discussion of the basic question; the desirability of continuing to exclude all women, on the ground of sex alone, from a voice in their own government. Discussions focussed on the degree to which the traditional exclusion should be reduced, and the manner in which this should be done. On September 20, 1917, two statutes extending the federal suffrage to women received assent. The Military Voters Act[213] provided that all British subjects, male or female, Indian or other, who had participated actively in any branch of the Canadian armed services, had the right to vote at any general election held during the war or prior to demobilization. The primary purpose of the Act was to enfranchise male members of the forces under the age of 21 years, but in introducing the Bill the Minister of Justice pointed out[214] that it also proposed to do away with any distinction of sex as regards those engaged in the Canadian forces, so that a not inconsiderable number of women nurses would be enfranchised. The Wartime Elections Act[215] amended the Dominion Elections Act only insofar as it applied to any general federal election held during the war or before demobilization, and provided:[216]

> Every female person shall be capable of voting and qualified to vote at a Dominion election in any province or in the Yukon Territory, who, being a British subject and qualified as to age, race and residence, as required in the case of a male person in such province or in the Yukon Territory, as the case may be",[217] is "the wife, widow, mother, sister or daughter of any person, male or female, living or dead, who is serving or has served without Canada in any of the military forces, or within or without Canada in any of the naval forces, of Canada or of Great Britain in the present war . . . ."

The number of women actively serving in the armed forces in the war of 1914-1919 was not large, and the operative criterion for women's capacity to vote in a federal election under the Act was relationship by blood or affinity with those serving in the armed forces. It has been pointed out that the right was less that of the women voting than that of the many men and few women

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212. This situation was changed in Canada by the Canada Citizenship Act, S.C. 1946, c. 15. In Great Britain the Aliens Act of 1844 initiated a series of statutes culminating in the British Nationality and Status of Aliens Act, 1914, that clearly subjected every married woman by force of British law to the nationality laws of her husband. Some amelioration of the situation took place in Great Britain in 1933 by provisions that:
    (a) a British subject who married an alien husband no longer automatically lost her British nationality unless the law of her husband's nationality recognized her as a national by reason of her marriage, and
    (b) the wife of a man who ceased to be British no longer automatically lost her British nationality unless she acquired some other nationality by virtue of its acquisition by her husband.

    The British Nationality Act, 1948, still provides, however, as federal Canadian law no longer does, that the foreign woman who marries a British subject is, on application and on taking the oath of allegiance, absolutely entitled as of right to be registered as a citizen. There has, of course, long existed a flourishing market in marriages for nationality purposes.
213. S.C. 1917, c. 34
214. *Debates: House of Commons: Dominion of Canada*, Session 1917, Vol. V, 4406, per the Hon. C. J. Doherty. Catherine L. Cleverdon, *The Woman Suffrage Movement in Canada* 122, describes the Act as 'the opening wedge for women in the federal field.'
215. S.C. 1917, c. 39. See *Debates: House of Commons: Dominion of Canada*, Session 1917, Vol. VI, pp. 5415-5880. The Bill was very contentious, as demonstrated by the length of the debates before its passage.
216. By s. 33A inserted in the Dominion Elections Act, S.C. 1908, c. 26
217. By this provision provincial control over age, race and residence qualifications for voters was maintained.

serving in the forces to enfranchise women related to them by blood or marriage. This resulted in discrimination against women from Western Canada, which had pioneered equal suffrage,[218] because by s. 154(g) of the Dominion Elections Act, as amended by the Act of 1917, nobody might vote[219] who was a "naturalized British subject who was born in an enemy country and naturalized subsequent to the 31st day of March, 1902."[220] By s. 154(h) a similar prohibition applied to "Every naturalized British subject who was born in any European country (whether or not the sovereign or government thereof is in alliance with His Majesty in the present war) whose natural language, otherwise described as 'mother tongue', is a language of an enemy country, and who was naturalized subsequent to the 31st day of March 1902," unless the person concerned was serving or had served with the Canadian armed forces, was a member of a Canadian legislature, was either a Syrian or Armenian Christian, or was a woman qualified under s. 33A of the Act.[221] Immigrants to Canada who might be considered citizens of any of the Central Powers were also not accepted as members of the Canadian Armed Forces.[222] Since most of the immigration after 1902 from Central and Eastern Europe had been to Western Canada, it was these immigrants and the women related to them who were excluded from the suffrage.

Following the women's suffrage at both the provincial and the federal level, however imperfectly applicable, in 1921 the province of Alberta appointed the second woman cabinet minister in the British Empire to its provincial government, in the person of Mrs. Irene Parlby.[223] Two years earlier, in 1919, the first conference of the Federated Women's Institutes of Canada, under the chairmanship of Mrs. Emily Murphy (one of Alberta's two women magistrates) passed a resolution requesting Sir Robert Borden, the Prime Minister, to appoint a woman to the Senate. The movement gathered strength, and in 1921 the Montreal Women's Club specifically asked the Prime Minister (by the then Mr. Arthur Meighen) to name Mrs. Emily Murphy to the next vacancy in the Senate. The Prime Minister replied that in the opinion of the Law Officers of the Crown, under the British North America Act 1867, no woman was eligible for appointment to the Senate. After Mr. W. L. MacKenzie King became Prime Minister, Mrs. Murphy personally approached him on the matter in 1922 on the death of a senator, but nothing

218. *Debates: House of Commons: Dominion of Canada*, Session 1917, Vol. VI: See the Hon. Frank Oliver, 5554-7; Onesiphore Turgeon, 5558-9; George E. McCraney, 5559-5564; J. H. Sinclair, 5566-8; Sir Wilfred Laurier, 5574-5575; W. A. Buchanan, 5582; Hon. George P. Graham, 5590-2; Arthur B. Copp, 5611; Mr. Martin, 5612-4; and Charles Murphy, 5619. Also Catherine Cleverdon, op. cit. 118-130.

219. With certain exceptions, not relevant to this paper.

220. Grotesquely described in the sideline to the statute as 'Naturalized enemy aliens'.

221. The concept of a 'natural language' seems only less bizarre than that of language as a test of loyalty to a Royal house, many members of which spoke German at least in parity with English.

222. See statement of the Prime Minister of the day, Sir Robert Borden, *Debates: House of Commons: Dominion of Canada*, Session 1917, Vol. VI, 5577.

223. Later one of the *'Alberta Five'* in the litigation on the qualifications of women as 'persons' for purposes of appointment to the Canadian Senate; see *supra* n. 2. She had been a member of the Alberta provincial legislature since 1918, and her appointment to the Cabinet in August 1921 as Minister without Portfolio followed only five months after the first such appointment was made within the British Empire by British Columbia, which on March 24, 1921, appointed Mrs. Mary Ellen Smith, (a member of its legislature since January 1918,), to be Minister without Portfolio.

further was done until, in 1927, Mrs. Murphy successfully initiated a petition to the Canadian government by herself and four other women, thereafter known as '*The Alberta Five*'.[224] The petition was to the effect that the Supreme Court of Canada be asked to decide under the Supreme Court Act, s. 60, whether in the British North American Act, 1867, s. 24[225] the 'qualified persons' whom the Governor General should from time to time summon to the Senate might include female persons.

In *In the Matter of a Reference as to the meaning of the Word 'Persons' in Section 24 of the British North America Act 1867*[226] the Supreme Court of Canada, consisting of Anglin C. J. C. and Duff, Mignault, Lamont and Smith JJ., unanimously held that 'female persons' were not included as 'persons' under the Act. Anglin C. J. C. thought the authority of *Chorlton* v. *Lings*[227] conclusive both as to the incapacity of women at common law to exercise such public functions as those of a member of the Canadian Senate, and on the express exclusion of women by the terms of s. 23 of the Act[228] from the class of 'qualified persons' within the meaning of s. 24 of the Act. Duff J. preferred to base his decision on the precedents of pre-1840 Legislative Councils.

Timing was probably all-important in this whole matter. Not only was the British North America Act enacted in 1867 at something near the nadir of women's legal status and capacity in the English-speaking world, but in 1922, under the misogynous leadership of Lord Birkenhead, the House of Lords had ruled in *Viscountess Rhondda's Claim*[229] that despite the passage of the Sex Disqualification (Removal) Act 1919, a Peeress in her own right remained at common law incapable of sitting with her Peers in their Legislative House. Nevertheless, the appeal to the Privy Council of the *Alberta Five* resulted in the resounding success of *Henrietta Muir Edwards and others v. Attorney-General for Canada*.[230]

Judge Murphy was never summoned to the Canadian Senate, but in 1930 Senator Cairine Wilson and in 1935 Senator Iva Fallis were summoned and took their seats. From 1920 to 1945 five women sat in the federal House of Commons: Miss Agness Macphail from Ontario, Mrs. Martha L. Black from the Yukon Territory, Mrs. Dorise Nielsen and Mrs. Gladys Strum from Saskatchewan, and Mrs. Cora T. Casselman from Alberta.

Today it is no longer remarkable, but a matter of routine, that woman occupy positions throughout the range of the public services, and it is no longer interesting to chronicle the first woman to achieve any particular success. For new developments today we look elsewhere. But in the great battles for women's emancipation, Western Canada, and Alberta in particular, were in the forefront and carried the standard for less favoured women elsewhere to see and follow. This is cause for celebration.

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224. *Supra*, n. 2
225. "The Governor General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate. . . ."
226. [1928] S.C.R. 276, and see *ante* n. 3.
227. (1868) L.R. 4 C.P. 374, *ante* n. 4.
228. "The qualifications of a senator shall be as follows: (1) He shall be of the full age of thirty years: (2) . . . " There is no explicit requirement that 'He shall not be a woman'.
229. [1922] 2 A.C. 339. The position was only reversed in 1963 by Peerage Act, 1963, c. 48, s. 6.
230. [1930] A.C. 124, sometimes called the *Persons*, case.