1924

PROCEEDINGS

OF THE

SEVENTH ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION

IN CANADA

HELD AT

QUEBEC

2ND, 3RD, 4TH AND 5TH JULY, 1924

Conference of Commissioners on Uniformity of Legislation in Canada.

OFFICERS OF THE CONFERENCE.

Honorary President.....Sir James Aikins, K.C., Winnipeg, Manitoba.

President .....

Vice-President .....Isaac Pitblado, K.C., Winnipeg, Manitoba.

Treasurer .....Frank Ford, K.C., Edmonton, Alberta.

Corresponding Secretary..John C. Elliott, K.C., London, Ontario.

Recording Secretary.....John D. Falconbridge, K.C., Osgoode Hall, Toronto, Ontario.

Local Secretaries.

(*For the purpose of communication between the commissioners of the different provinces.*)

Alberta .....Walter S. Scott, K.C., Parliament Buildings, Edmonton.

British Columbia.....Avard V. Pineo, Parliament Buildings, Victoria.

Manitoba .....W. Randolph Cottingham, Parliament Buildings, Winnipeg.

New Brunswick.....J. D. Pollard Lewin, St. John.

Nova Scotia.....Frederick Mathers, K.C., Parliament Buildings, Halifax.

Ontario .....John C. Elliott, K.C., London.

Prince Edward Island...W. E. Bentley, K.C., Charlottetown.

Quebec .....Hon. Ed. Fabre Surveyer, Judges' Chambers, Superior Court, Montreal.

Saskatchewan .....Robert W. Shannon, K.C., Parliament Buildings, Regina.

Commissioners and Representatives of the Provinces of Canada for the Purpose of promoting Uniformity of Legislation.

Alberta:

FRANK FORD, K.C., Edmonton.
WALTER S. SCOTT, K.C., Edmonton.
HAROLD H. PARLEE, K.C., Edmonton.
(Commissioners appointed under the authority of the Statutes of Alberta, 1919, c. 31).

British Columbia:

JOSEPH N. ELLIS, K.C., 470 Granville Street, Vancouver.
AVARD V. PINEO, Parliament Buildings, Victoria.
J. STUART YATES, 416 Central Building, Victoria.
(Commissioners appointed under the authority of the Statutes of British Columbia, 1918, c. 92).
WILLIAM D. CARTER, K.C., Deputy Attorney-General, Victoria.

Manitoba:

ISAAC PITBLADO, K.C., Bank of Hamilton Building, Winnipeg.
HERBERT J. SYMINGTON, K.C., Lombard Building, Winnipeg.
W. RANDOLPH COTTINGHAM, Parliament Buildings, Winnipeg.
(Commissioners appointed under the authority of the Statutes of Manitoba, 1918, c. 99.)

New Brunswick:

WILLIAM B. WALLACE, K.C., St. John.
J. D. POLLARD LEWIN, St. John.
(Commissioners appointed under the authority of the Statutes of New Brunswick, 1918, c. 5.)

Nova Scotia:

FREDERICK MATHERS, K.C., Halifax.
J. LAYTON RALSTON, K.C., Halifax.
JOHN E. READ, Dalhousie University, Halifax.
(Commissioners appointed under the authority of the Statutes of Nova Scotia, 1919, c. 25.)

Ontario:

SIR JAMES AIKINS, K.C., Winnipeg, Manitoba.
FRANCIS KING, K.C., Kingston.
JOHN D. FALCONBRIDGE, K.C., Osgoode Hall, Toronto.
JOHN C. ELLIOTT, K.C., London.
(Commissioners appointed under the authority of the Statutes of Ontario, 1918, c. 20.)

Prince Edward Island:

WILLIAM E. BENTLEY, K.C., Charlottetown.

Quebec:

HON. ED. FABRE SURVEYER, Judges' Chambers, Superior Court, Montreal.

Saskatchewan:

ROBERT W. SHANNON, K.C., Regina.
DOUGLAS J. THOM, K.C., Regina.

PREFACE.

The independent action of the various provincial legislatures naturally results in a certain diversity of legislation. In some cases diversity is inevitable, as, for instance, when the province of Quebec legislates upon subjects within the purview of the Civil Code of Lower Canada and according to principles derived from the law of France, and the other provinces legislate upon similar subjects according to principles derived from the common law of England. In such cases the problem of securing uniformity is confined to the common law provinces. There are, however, many other cases in which no principle of either civil law or common law is at stake, with regard to which the problem of securing uniformity is the same in all the provinces. Both these classes of cases include subjects of legislation as to which it is desirable, especially from the point of view of merchants doing business in different parts of Canada, that legislation should be made uniform throughout the provinces to the fullest extent possible.

In the United States work of great value has been done by the National Conference of Commissioners on Uniform State Laws. Since the year 1892 these commissioners have met annually. They have drafted uniform statutes on various subjects, and the subsequent adoption of these statutes by many of the state legislatures has secured a substantial measure of uniformity. The example set by the state commissioners in the United States was followed in Canada when, on the recommendation of the Council of the Canadian Bar Association, several of the provinces passed statutes providing for the appointment of commissioners to attend an interprovincial conference for the purpose of promoting uniformity of legislation.

The first meeting of commissioners and representatives of the provinces took place at Montreal on the 2nd of September, 1918, and at this meeting the Conference of Commissioners on Uniformity of Legislation in Canada was organized.

Subsequent annual meetings have been held as follows:—

1919. August 26-29, Winnipeg.
1920. August 30-31, September 1-3, Ottawa.
1921. September 2-3, 5-8, Ottawa.
1922. August 11-12, 14-16, Vancouver.

1923. August 30-31, September 1, 3-5, Montreal.
1924. July 2-5, Quebec.

In 1919 the Conference considered and adopted a report on legislative drafting, containing a carefully prepared selection of extracts from books written by the leading authorities on the subject, and directing attention to many important rules to be observed by draftsmen of statutes.

In 1919 and 1920 the Conference secured the adoption of the Sale of Goods Act, 1893, and the Partnership Act, 1890, in those common law provinces which had not already adopted them; and these two codifying statutes are now in force in all the provinces of Canada except Quebec.

In 1920 the Conference revised and approved model uniform statutes respecting legitimation by subsequent marriage and bulk sales.

In 1921 the Conference revised and approved model uniform statutes respecting fire insurance policies and warehousemen's liens, and discussed the draft of a uniform life insurance act.

In 1922, in consequence of representations made by the superintendents of insurance and the insurers, the Conference reconsidered the model uniform statute respecting fire insurance policies, and approved it in a revised form. The conference also revised and approved a model uniform statute respecting conditional sales, and devoted much time to the consideration of the revised draft of an act respecting life insurance.

In 1923 most of the time of the meeting was devoted to an act respecting life insurance, which was approved in its revised form. The subjects of intestate succession and reciprocal enforcement of judgments were also discussed.

In 1924 the Conference again discussed the act respecting fire insurance policies, as revised in 1922, and made some additions to statutory condition 17, and revised and approved model uniform statutes respecting contributory negligence and reciprocal enforcement of judgments. The subjects of devolution of estates, intestate succession and defences to actions on foreign judgments were also discussed.

Other subjects which have been considered by the Conference or which have been referred to committees for report are: companies, wills, succession duties, mechanics' liens, workmen's compensation for injuries, the protection and property rights of married women, chattel mortgages and bills of sale, and trustees.

Statutes have been passed in some of the provinces providing both for contributions by the provinces towards the general expenses of the Conference and for payment by the respective provinces of the travelling and other expenses of their own commissioners. The commissioners themselves receive no remuneration for their services.

The appointment of commissioners or participation in the meetings of the Conference does not of course bind any province to adopt any conclusions reached by the Conference, but it is hoped that the voluntary acceptance by the provincial legislatures of the recommendations of the Conference will secure an increasing measure of uniformity of legislation.

The following table shows to what extent, if any, each model statute drawn by the Conference has been adopted by the provinces:

1920. Bulk Sales Act: adopted in Alberta (1922), British Columbia (1921), and Manitoba (1921).

1920. Legitimation Act: adopted in British Columbia (1922), Manitoba (1920), New Brunswick (1920), Ontario (1921), Prince Edward Island (1920), and Saskatchewan (1920). Provisions similar in effect are in force in Alberta, Nova Scotia, and Quebec.

1921. Warehousemen's Lien Act: adopted in Alberta (1922), British Columbia (1922), Manitoba (1923), New Brunswick (1923), Ontario (1924), and Saskatchewan (1922).

1922. Conditional Sales Act: adopted in British Columbia (1922).

1923. Life Insurance Act: adopted in Alberta (1924), British Columbia (1923), Manitoba (1924), New Brunswick (1924), Ontario (1924), and Saskatchewan (1924).

1924. Fire Insurance Policy Act.

1924. Reciprocal Enforcement of Judgments Act.

1924. Contributory Negligence Act.

J. D. F.

PROCEEDINGS.

PROCEEDINGS OF THE SEVENTH ANNUAL MEETING OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA.

The following commissioners or representatives were present at some of the sessions of the conference:

British Columbia:
MESSRS. ELLIS AND CARTER.

Manitoba:
MESSRS. PITBLADO AND COTTINGHAM.

New Brunswick:
MESSRS. WALLACE AND LEWIN.

Nova Scotia:
MR. READ.

Ontario:
SIR JAMES AIKINS AND MESSRS. KING, FALCONBRIDGE AND ELLIOTT.

Saskatchewan:
MESSRS. SHANNON AND THOM.

FIRST DAY.

Wednesday, 2nd July, 1924.

The Conference assembled at 10 a.m., at the Chateau Frontenac, Quebec, Mr. Pitblado, the vice-president, in the chair.

It having been announced that, owing to illness, Mr. Teed, the president of the Conference, would not be able to be present, the vice-

president was authorized to send a telegram to Mr. Teed expressing the sympathy of the Conference and its hope for his speedy recovery.

After an introductory address by the vice-president, it was resolved that the minutes of the annual meeting of 1923, as prepared by the recording secretary and printed, be taken as read and approved.

The corresponding secretary read some correspondence which he had had with Mr. R. Leighton Foster, Superintendent of Insurance of Ontario, on the subject of the Fire Insurance Policy Act, and it was resolved to invite Mr. Foster to appear before the Conference on either the 3rd or the 4th instant, at his convenience.

Mr. Shannon read the revised clauses (g) to (q) proposed to be added to condition 17 of the Fire Insurance Policy Act. (See Proceedings of the Conference, 1923, pp. 16-17; Proceedings of the Canadian Bar Association, 1923, pp. 426-427.) These clauses were then discussed clause by clause.

(*Appendix A.*)

At 1 p.m. the Conference adjourned.

AFTERNOON SESSION.

At 2.30 p.m. the Conference reassembled and resumed the discussion of the clauses proposed to be added to condition 17 of the Fire Insurance Policy Act. Mr. Shannon also read the report of the Saskatchewan commissioners on the Fire Insurance Policy Act. Further action was deferred until the Conference should hear from Mr. Foster.

(*Appendix A.*)

Mr. King read the report of the Ontario commissioners on a uniform contributory negligence act.

(*Appendix B.*)

At 5 p.m. the Conference adjourned.

SECOND DAY.

Thursday, 3rd July, 1924.

At 10 a.m. the Conference reassembled.

The draft uniform Contributory Negligence Act was read, and the principle approved. The draft was then discussed section by section, and revised.

Resolved by the Conference of Commissioners of Legislation in Canada that the draft of a model Act entitled "An Act to make uniform the law respecting the liability of the parties in an action for damages for negligence where more than one party is in fault," as revised at the present (1924) annual meeting of the Conference, be approved and adopted, and that this draft act be now recommended to the legislatures of the several provinces of Canada for enactment.

(*Appendix B.*)

Mr. Shannon read the report of the Saskatchewan commissioners submitting two draft statutes on devolution of estates and on intestate succession. (See Proceedings of the Conference, 1923, p. 18; Proceedings of the Canadian Bar Association, p. 428).

The draft Devolution of Estates Act was then discussed section by section.

(*Appendix C.*)

At 12.45 p.m. the Conference adjourned.

AFTERNOON SESSION.

At 2.30 p.m. the Conference reassembled and resumed the discussion of the draft Devolution of Estates Act.

At 4.45 p.m. the Conference adjourned.

THIRD DAY.

Friday, 4th July, 1924.

At 9.30 a.m. the Conference reassembled and resumed the discussion of the draft Devolution of Estates Act.

The draft was then referred again to the Saskatchewan commissioners for revision in the light of the discussion at the present meeting, with instructions to circulate a new draft in advance of the next meeting, and to report again to the Conference.

(*Appendix C.*)

Mr. Shannon read the draft Intestate Succession Act, which was then discussed section by section.

(*Appendix D.*)

(For comparative statement of the law of the several provinces, see Proceedings of the Conference, 1920, p. 54; Proceedings of the Canadian Bar Association, 1920, p. 358. For the decision of the Conference as to general principles, see Proceedings of the Conference, 1921, pp. 9, 27; Proceedings of the Canadian Bar Association, 1921, pp. 271, 289. For the decision that intestate succession and devolution of estates should be dealt with in separate statutes, see Proceedings of the Conference, 1923, p. 18; Proceedings of the Canadian Bar Association, 1923, p. 428.)

After discussion the draft Intestate Succession Act was referred again to the Saskatchewan commissioners for revision in the light of the discussion at the present meeting, with instructions to circulate a new draft in advance of the next meeting, and to report again to the Conference.

(*Appendix D.*)

At 12.45 p.m. the Conference adjourned.

AFTERNOON SESSION.

Friday, 4th July, 1924.

At 2.30 p.m. the Conference reassembled.

On the subject of the Bulk Sales Act, adopted by the Conference in 1920 (see Proceedings of the Conference, 1923, p. 15; Proceedings

of the Canadian Bar Association, 1923, p. 425), the Manitoba commissioners submitted a letter from Mr. E. K. Williams, K.C., convenor of the Canadian Bar Association committee on uniformity of legislation, together with certain correspondence and information.

(*Appendix E.*)

The matter was referred again to the Manitoba commissioners with instructions to consider the criticisms of the present act and the suggested amendments and to report in 1925 with recommendations.

Mr. Shannon reported on behalf of the Saskatchewan commissioners that they had the subject of chattel mortgages and bills of sale under investigation and would report at a later meeting. The matter was referred again to the Saskatchewan commissioners for report.

Dr. Wallace read the report of the New Brunswick commissioners on defences to actions on foreign judgments. Clauses 1, 2 and 3 having been received without discussion, some discussion took place on clause 4.

(*Appendix F.*)

At 4.10 p.m. the Conference adjourned.

EVENING SESSION.

Friday, 4th July, 1924.

At 8.15 p.m. the Conference reassembled.

It was resolved that the recording secretary be instructed to arrange with the Canadian Bar Association to have the report of the proceedings of the Conference published as an addendum to the report of the proceedings of the Association, the expenses of the publication of the addendum to be paid by the Conference. The secretary was also instructed to have the report of the proceedings published in pamphlet form and to send copies to the other commissioners.

The following resolution was adopted:—

Resolved, that the Conference is of opinion that regular contributions should be made by all the provinces to meet the general expenses of the Conference, and that the treasurer be instructed to write to each provincial Board of Commissioners asking it to obtain from its Government a contribution of $200, and to write to the Attorney-General of each province which has not appointed commissioners, asking for a contribution of $200.

After some further discussion of the report on defences to actions on foreign judgments, it was decided to consider the Reciprocal Enforcement of Judgments Act.

Dr. Wallace read the draft Reciprocal Enforcement of Judgments Act, as revised pursuant to the instructions of the Conference (Proceedings of the Conference, 1923, pp. 13, 14, 15; Proceedings of the Canadian Bar Association, 1923, pp. 423, 424, 425). The draft was discussed section by section.

(*Appendix G.*)

At 11.30 p.m. the Conference adjourned.

FOURTH DAY.

Saturday, 5th July, 1924.

At 9.30 a.m. the Conference reassembled.

The vice-president was requested to represent the Conference in making a statement before the Canadian Bar Association as to the work of the Conference.

The Conference then resumed the discussion of the Reciprocal Enforcement of Judgments Act.

Resolved by the Conference of Commissioners on Uniformity of Legislation in Canada that the draft of a model Act entitled "An Act to facilitate the Reciprocal Enforcement of Judgments and Awards," as revised at the present (1924) annual meeting of the Conference, be approved and adopted, and that this draft Act be now recommended to the legislatures of the several provinces of Canada for enactment.

(*Appendix G.*)

The subject of the reciprocal enforcement of judgments and orders throughout the British Empire having been again brought before the Conference (see Proceedings of the Conference, 1921, pp. 10-12, 17-18; Proceedings of the Canadian Bar Association, 1921, pp. 272-4, 279-80), the following resolution was adopted:

Resolved that in the opinion of the Conference the enactment of provincial legislation permitting the enforcement in any province of Canada of judgments or affiliation or maintenance orders given or made in courts outside of Canada is a matter of policy to be determined by the proper provincial authorities, and that if any province signifies its desire of enacting such legislation the Conference will be pleased to assist in the drafting of an act.

The subject of defences to actions on foreign judgments was referred to the Ontario commissioners with instructions to report on the law of the several provinces.

With respect to the draft Wills Act submitted in 1923 (Proceedings of the Conference, 1923, p. 45; Proceedings of the Canadian Bar Association, 1923, p. 455) a memorandum prepared by the Alberta commissioners was received, as well as a letter addressed to the Attorney-General of Manitoba. The subject was referred to the Nova Scotia commissioners for report.

(*Appendix H.*)

It was resolved that the following subjects should be considered in 1925 in the order named:

(1) Devolution of estates.
(2) Intestate succession.
(3) Wills.

Other subjects already referred to committees are:—

(4) Bulk sales.
(5) Defences to actions on foreign judgments.
(6) Chattel mortgages and bills of sale.

The consideration of mechanics' liens, succession duties, and the protection and property rights of married women, was postponed.

With regard to a uniform Companies Act, the Conference approved of the suggestion made in the concluding paragraph of the report submitted in 1923 (Proceedings of the Conference, 1923, p.

78; Proceedings of the Canadian Bar Association, 1923, p. 488), and referred the subject to the British Columbia commissioners accordingly.

The committees of the Conference charged with the preparation of reports were instructed to communicate with the chairman of the Canadian Bar Association's committee on Uniformity of Legislation, with a view of getting from him or through him from the local executive committees of the Association information and assistance, and, so far as practicable, to consult with members of the local bars.

It was resolved that the Conference request the Association's committee on Uniformity of Legislation to submit a report as to the law of the several provinces on the subject of trustees.

A tabular statement of the various subjects dealt with by the Conference from the time of its organization was read, and the Conference expressed its thanks to Mr. E. K. Williams, K.C., chairman of the Association's committee on Uniformity of Legislation, for preparing the statement.

The recording secretary was instructed to include in the proceedings a list of the model statutes approved by the Conference, showing to what extent, if any, each statute has been enacted by the provinces.

Officers were elected for the ensuing year as follows:
Honorary President—Sir James Aikins.
President—Mr. Teed.
Vice-president—Mr. Pitblado.
Treasurer—Mr. Ford.
Corresponding secretary—Mr. Elliott.
Recording secretary—Mr. Falconbridge.
(Subsequently the commissioners learned, with the deepest regret, of Mr. Teed's death, which took place a few days after the close of the Conference.)

It was resolved that the Conference should meet in 1925 four days (excluding Sunday) before the meeting of the Canadian Bar Association.

At 12.45 p.m. the Conference adjourned.

AFTERNOON SESSION.

Saturday, 5th July, 1924.

At 2.30 p.m. the Conference reassembled.

A telegram having been received from Mr. R. Leighton Foster that he would not be able to be present, Mr. Shannon submitted a fair copy of the revised clauses proposed to be added to condition 17 of the Fire Insurance Policy Act. The clauses were approved, as follows:—

(1) The words "Subject to the provisions hereinafter contained" were prefixed to clause (e) of condition 17.

(2) Clauses (g) to (q), as printed in Appendix A, were added to condition 17.

Resolved by the Conference of Commissioners on Uniformity of Legislation in Canada that the draft of a model Act entitled "An Act to make uniform the Law respecting Policies of Fire Insurance," as revised at the present (1924) annual meeting of the Conference, be approved and adopted, and that this draft act be now recommended to the legislatures of the several provinces of Canada for enactment.

(*Appendix A.*)

The Conference expressed its hearty appreciation of the hospitality extended to the members of the Conference by its honorary president, Sir James Aikins, and the pleasure it had been to them to have him taking part in the meeting.

At 3 p.m. the Conference was prorogued.

APPENDICES.

A. Fire Insurance Policy Act.
B. Contributory Negligence Act.
C. Devolution of Estates Act.
D. Intestate Succession Act.
E. Report on Bulk Sales Act.
F. Report on Defences to Actions on Foreign Judgments.
G. Reciprocal Enforcement of Judgments Act.
H. Report on Wills Act.

APPENDIX A.

REPORT OF COMMITTEE ON UNIFORM FIRE INSURANCE POLICY ACT.

At the last meeting of the Conference certain proposed amendments to condition 17 of The Fire Insurance Policy Act providing for an appeal, which will be found set forth on pages 16 and 17 of the Report of the Proceedings at that meeting, were referred to the Saskatchewan commissioners for redraft, after such consultation as might be deemed advisable, and certain principles were laid down for their guidance in the work. The Saskatchewan commissioners were also requested to further report at the next meeting of the conference as to the status of the present draft bill in the various provinces.

With regard to the provisions for appeal your committee consulted with Mr. E. K. Williams, K.C., chairman of the committee of the Bar Association on uniform law, which committee has obtained the services of a secretary and whose purpose is to co-operate with the commissioners in this Conference, and we now attach hereto a redraft which will serve at least as a basis for discussion.

As to the status of the present draft Act, it has not been adopted by any province. Ontario has, however, in its revised and consolidated Insurance Act of 1924, made use of the statutory conditions contained in the uniform Act with some alterations. The word "company" in these conditions has been replaced by the word "insurer" in conformity with the terminology employed throughout the Act. Other alterations are—transposing the word "fraudulently" and placing it before "omits" in the third line of condition No. 1; changing "articles themselves" in the last line of condition 6 to "article itself"; changing "seventy-five" to "sixty" in condition No. 8, clause (a); omitting "of the same class and character" after "insurance" in clause (c); omitting clause (a) of condition No. 9; substituting "actually paid by the insured" for "paid" in condition No. 10; retaining the old arbitration clause as condition No. 17; and omitting the words "within a reasonable time" in condition No. 19

and adding a provision requiring the work of repair or rebuilding to be commenced within thirty days after receipt of proofs of loss. The Act comes into force on the first day of January, 1925.

Respectfully submitted,

R. W. SHANNON.
D. J. THOM.

[The redrafted provisions for an appeal, as revised by the Conference, consist in the prefixing of the words "subject to the provisions hereinafter contained" to clause (e) of statutory condition 17, and the addition of clauses (g) to (q) to statutory condition 17.]

1924

The Fire Insurance Policy Act

As revised and approved by the Conference of Commissioners on Uniformity of Legislation in Canada, in July, 1924.

An Act to Make Uniform the Law respecting Policies of Fire Insurance.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of , enacts as follows:

SHORT TITLE.

1. This Act may be cited as *The Fire Insurance Policy Act.*

INTERPRETATION.

2. In this Act, unless the context otherwise requires, the expression:

1. "Company" includes any corporation, or any society or association, incorporated or unincorporated, or any person or partnership, or any underwriter or group of underwriters, or the attorney in fact of any reciprocal or inter-insurance association, that undertakes or effects, or agrees or offers for valuable consideration to undertake or effect, a contract of insurance within the meaning of this Act;

2. "Contract" means an agreement whereby a company undertakes to indemnify the insured against loss of or damage to property in the province or in transit therefrom or thereto, caused by fire, lightning or explosion, and includes a policy, certificate, interim receipt, renewal receipt or writing evidencing

the contract, whether sealed or not, and a binding oral agreement;

3. "Policy" means an instrument containing all the terms of the agreement between the parties;

4. "Property" includes use and occupancy, rents, profits and charges where these are the subject matter of the insurance.

Term of Contract.

3. No contract shall be made for a term exceeding three years, or, in the case of a mercantile or manufacturing risk, whether on building or contents, or other property or interest, exceeding one year, but any contract may be renewed by the delivery of a renewal receipt or a new premium note.

Contents of Policy.

4. Every policy shall contain the name of the company, the address of the chief agency of the company in the province, the name of the insured, the name of the person or persons to whom the insurance money is payable, the premium or other consideration for the insurance, the subject matter of the insurance, the indemnity for which the company may become liable, the event on the happening of which such liability is to accrue and the term of the insurance.

Statutory Conditions.

5. (1) Subject to the provisions of sub-section (2) of this section and of section 6, the conditions set forth in the schedule to this Act shall be deemed to be part of every contract in force in , and shall be printed on every policy with the heading "Statutory Conditions."

(2) Where the subject matter of the insurance is exclusively rents, charges and loss of profits or any of them, the conditions numbered 3, 11, 12, 13, 15 and 19, as set forth in such schedule, shall not be part of such contract and need not be printed on the policy.

Variations.

6. (1) If a company desires to vary, omit or add to the statutory conditions or any of them, there shall be printed in conspicuous

type, not less in size than ten point, and in red ink immediately after such conditions, the proposed variations or additions or a reference to the omissions with these introductory words:—

"Variations in Conditions."

"This policy is issued on the above statutory conditions with the following variations, omissions and additions, which are, by virtue of *The Fire Insurance Policy Act,* in force so far only as they shall be held to be just and reasonable to be exacted by the company."

(2) No variation, omission or addition shall be binding on the insured, unless the foregoing provisions of this section have been complied with; and any variation, omission or addition shall be so binding only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.

CO-INSURANCE CLAUSE.

7. A policy may contain a co-insurance clause, in which case it shall have printed or stamped upon its face in conspicuous type and in red ink the words "This policy contains a co-insurance clause," and unless those words are so printed or stamped such clause shall not be binding upon the insured. Such clause shall not be deemed an addition to the statutory conditions or subject to the provisions of section 6.

USE OF RED INK.

8. No red ink shall be used in printing a policy except for the name, address and emblem of the company and the policy number and for the purposes mentioned in this Act.

RELIEF FROM FORFEITURE.

9. In any case where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance shall be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

Right to Recover Excess.

10. Where a company, having paid its share of the loss as determined by a reference under statutory condition number 17, is dissatisfied with the apportionment made by the referee or referees, it may, by action in a court of competent jurisdiction, recover from the other company or companies, in accordance with their respective liabilities, the amount, if any, which in the opinion of the court it has paid in excess of its just share of the loss.

Construction of Act.

11. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.

Coming into Force.

12. This Act shall come into force on the day of 192 .

SCHEDULE.

Statutory Conditions.

1. *Misrepresentation.*—If any person applying for insurance falsely describes the property to the prejudice of the company, or fraudulently misrepresents or omits to communicate any circumstance which is material to be made known to the company in order to enable it to judge of the risk to be undertaken, the contract shall be void as to the property in respect of which the misrepresentation or omission is made.

2. *Form of Contract.*—After application for insurance, if the same is in writing, it shall be deemed that any policy sent to the insured is intended to be in accordance with the terms of the application, unless the company points out in writing the particulars wherein it differs from the application, in which case the insured may, within two weeks from the receipt of the notification, reject the policy.

3. *Property not Insured.*—Unless otherwise specifically stated in the policy, money, books of account, securities for money, evidences of debt or title, and automobiles, tractors and other motor vehicles, are not insured.

4. *Risks not Covered.*—Unless otherwise specifically stated in the policy, the company is not liable for the losses following, that is to say:—

(*a*) For loss of or damage to property owned by any person other than the insured, unless the interest of the insured therein is stated in the policy;

(*b*) For loss or damage caused by invasion, insurrection, riot, civil commotion, military or usurped power;

(*c*) For loss due to the want, within the knowledge of the insured, of good and substantial chimneys; or caused by ashes or embers being deposited, with the knowledge and consent of the insured, in wooden vessels; or by stoves or stove-pipes being, to the knowledge of the insured, in an unsafe condition or improperly secured; or

(*d*) For loss of or damage to goods while undergoing any process in or by which the application of fire heat is necessary.

5. *Risks not Covered Except by Special Permission.* — Unless permission is given by the policy or indorsed thereon, the company shall not be liable for loss or damage occurring:—

(*a*) *Repairs.*—To buildings or their contents during alteration or repair of the buildings and in consequence thereof, fifteen days being allowed in each year for incidental alterations or repairs without such permission;

(*b*) *Inflammable Substances.*—While illuminating gas or vapour is generated, by the insured or to his knowledge, in the building insured or which contains the property insured, or while there is stored or kept therein by the insured or, to his knowledge, by any person under his control, petroleum or any liquid product thereof, coal oil, camphene, gasoline, burning fluid, benzine, naphtha, or any of their constituent parts (refined oil for lighting, heating or cooking purposes only, not exceeding five gallons in quantity, gasoline, if contained in a tightly closed metallic can free from leaks and not exceeding one quart in

quantity, or lubricating oil, not being crude petroleum nor oil of less specific gravity than is required by law for illuminating purposes, not exceeding five gallons in quantity, excepted), or more than twenty-five pounds weight of gunpower, dynamite or similar explosives;

(*c*) *Change of Interest.*—After the interest of the insured in the subject-matter of the insurance is assigned, but this condition is not to apply to an authorized assignment under *The Bankruptcy Act* or to change of title by succession, by operation of law, or by death;

(*d*) *Vacancy.*—When the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than thirty consecutive days or, being a manufacturing establishment, ceases to be operated and continues out of operation for more than thirty consecutive days.

6. *Explosion and Lightning.*—The company will make good loss or damage caused by lightning or by the explosion of coal or natural gas in a building not forming part of gasworks, whether fire ensues therefrom or not; and loss or damage by fire caused by any other explosion; but, if electrical appliances or devices are insured, any loss or damage to them caused by lightning or other electrical currents is excluded and the company shall be liable only for such loss or damage to them as may occur from fire originating outside the articles themselves.

7. *Material Change.*—Any change material to the risk, and within the control and knowledge of the insured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the unearned portion, if any, of the premium paid, and cancel the policy, or may notify the insured in writing that, if he desires the policy to continue in force, he must within fifteen days of the receipt of the notice pay to the company an additional premium, and in default of such payment the policy shall no longer be in force and the company shall return the unearned portion, if any, of the premium paid.

8. *Other Insurance.*—

(*a*) If the insured has at the date of this policy any other insurance on property covered thereby which is not disclosed to the com-

pany, or hereafter effects any other insurance thereon without the written assent of the company, he shall not be entitled to recover more than seventy-five per cent. of the loss in respect of such property; but if for any fraudulent purpose the insured does not disclose such other insurance, this policy shall be void;

(*b*) The company shall be deemed to have assented to such other insurance unless it dissents by notice in writing within two weeks after notice thereof;

(*c*) In the event of there being other insurance of the same class and character on the property herein described at the time of the happening of a loss in respect thereof, the company shall be liable only for payment of a ratable proportion of the loss or a ratable proportion of such amount as the insured shall be entitled to recover under clause (*a*) of this condition.

9. *Mortgagees and other Payees.*—

(*a*) In case this policy is assigned to a mortgagee or other creditor of the insured, if the company claims that no liability to the insured existed in respect of any loss or damage hereunder for which payment has been made to such mortgagee or creditor it shall to the extent of such payment be subrogated to the rights of the mortgagee or creditor under any securities for the debt held by him; or it may pay the debt in full and require an assignment of the claim or security. No such subrogation shall impair the right of the mortgagee or creditor to recover the full amount of his claim;

(*b*) Where the loss (if any), under a policy has, with the consent of the company, been made payable to some person other than the insured, the policy shall not be cancelled or altered by the company to the prejudice of the payee without reasonable notice to him.

10. *Termination of Insurance.*—(1) The insurance may be terminated:—

(*a*) Subject to the provisions of condition 9, by the company giving to the insured at any time fifteen days notice of cancellation by registered mail, or five days notice of cancellation personally delivered, and, if the insurance is on the cash plan, refunding the excess of paid premium beyond the *pro rata* premium for the expired time;

(*b*) If on the cash plan, by the insured giving written notice of termination to the company, in which case the company shall

upon surrender of this policy, refund the excess of paid premium beyond the customary short rate for the expired time.

(2) Repayment of the excess premium may be made by money, post office order or postal note or by cheque payable at par and certified by a chartered bank doing business in the province. If the notice is given by registered letter, such repayment shall accompany the notice, and in such case the fifteen days mentioned in clause (*a*) of this condition shall commence to run from the day following the receipt of the registered letter at the post office to which it is addressed.

11. *Salvage.*—After any loss or damage to insured property, it shall be the duty of the insured, when and as soon as practicable, to secure the insured property from further damage, and to separate as far as reasonably may be the damaged from the undamaged property, and to notify the company of the separation.

12. *Insurance on Goods Moved.*—If any of the insured property is necessarily removed to prevent damage or further damage thereto, that part of the insurance under this policy which exceeds the amount of the company's liability for any loss already incurred shall for seven days only, or for the unexpired term of less than seven days, cover the property removed, and any property remaining in the original location in the proportions in which the value of the property in the respective locations bears to the value of the property in them all; and the company will contribute *pro rata* towards any loss or expense connected with such act of salvage, according to the respective interests of the parties.

13. *Entry, Control, Abandonment.*—After any loss or damage to insured property, the company shall have an immediate right of access and entry by accredited agents sufficient to enable them to survey and examine the property, and to make an estimate of the loss or damage, and, after the insured has secured the property, a further right of access and entry sufficient to enable them to make an appraisement or particular estimate of the loss or damage, but the company shall not be entitled to the control or possession of the insured property, or the remains or salvage thereof, unless it accepts a part thereof at its agreed value or its value as appraised under condition 17 or undertakes replacement under condition 19, and

without the consent of the company there can be no abandonment to it of insured property.

14. *Who to Make Proof.*—Proof of loss must be made by the insured, although the loss is payable to a third person, except that, in case of the absence of the insured or his inability to make the same, proof may be made by his agent, such absence or inability being satisfactorily accounted for, or, in the like case or if the insured refuse to do so, by a person to whom any part of the insurance money is payable.

15. *Requirements after Loss.*—Any person entitled to claim under this policy shall:—

(*a*) Forthwith after loss give notice in writing to the company;

(*b*) Deliver, as soon thereafter as practicable, a particular account of the loss;

(*c*) Furnish therewith a statutory declaration declaring:—

that the account is just and true;

when and how the loss occurred, and if caused by fire, how the fire originated, so far as the declarant knows or believes;

that the loss did not occur through any wilful act or neglect or the procurement, means or connivance of the insured;

the amount of other insurances, and names of other insuring companies;

all liens and incumbrances on the property insured;

the place where the property insured, if moveable, was deposited at the time of the fire;

(*d*) If required and if practicable, produce books of account, warehouse receipts and stock lists and furnish invoices and other vouchers verified by statutory declaration and furnish a copy of the written portion of any other policy. The evidence furnished under this clause shall not be considered proofs of loss within the meaning of conditions 18 and 19.

16. *Fraud.*—Any fraud or wilfully false statement in a statutory declaration, in relation to any of the above particulars, shall vitiate the claim of the person making the declaration.

17. *Reference.*—If any difference arise as to the value of the property insured, the property saved or the amount of the loss:—

(*a*) The question at issue shall, whether the right to recover on the policy is disputed or not and independently of all other questions, be submitted to a single referee to be chosen by the company and the insured, or if they cannot agree on one person then to two referees, one to be chosen by each party;

(*b*) The referees shall select a competent and disinterested person to be a third referee or umpire;

(*c*) In case either party fails to name a referee within seven clear days after being served with written notice so to do, or in case the referees fail to agree upon an umpire within fifteen days after their appointment, or in case a referee or umpire refuses to act, unreasonably delays in acting, or is incapable of acting or dies, a judge of a superior, county or district court having jurisdiction in the county or district in which the loss happened may make the necessary appointment, on the application of the insured or of the company;

(*d*) The referees shall be entitled to judge the value of the property insured, the property saved or the amount of the loss, from their own knowledge, inspection or examination or from such other sources of information as they may in their discretion deem proper; and shall be entitled to hear on any question of law any party or his counsel, to take the opinion of counsel and (or) to refer any question of law, by stated case or otherwise, to the court for its decision;

(*e*) Subject to the provisions hereinafter contained, the award in writing of a single referee, or of any two where an umpire is appointed, shall, if the company is liable for the loss, be conclusive as to the amount of the loss and the proportion to be paid by the company. Where the full amount of the claim is awarded the company shall pay the costs of the reference; where the amount awarded does not exceed the sum offered by the company in settlement, the insured shall pay such costs; in other cases the costs shall be in the discretion of the referees who may apportion the same as to them shall seem just;

(*f*) If the property is insured in more than one company, the question at issue shall be dealt with as between the insured and all the companies, and in such cases the provisions of clauses (*a*), (*b*), (*c*), (*d*), and (*e*), shall apply with the following qualifications:—

i. all the companies shall unite in the choice of a single referee or a referee to represent the companies, and if any company neglects or refuses to so unite within four clear days after being served with notice to do so, any other company may apply to a judge of a superior, county or district court having jurisdiction in the county or district in which the loss happened, who may accordingly make the appointment;

ii. notice under clause (*c*) shall be given to or on behalf of all the companies, and for the purposes of paragraph i. notice under clause (c) may be given by or on behalf of any company or companies to the other or others of them;

iii. the award shall determine the proportions to be paid by and recoverable from the companies respectively; but shall be without prejudice to the right of any of the companies to claim against the other or others that the amount of its liability is less than the proportion awarded.

iv. where costs are to be paid by the companies, they shall be borne by them in proportion to the amounts of their respective liabilities.

(*g*) The insured or any company interested may appeal from any award on any grounds to the highest court of original jurisdiction in the province, and the appeal may be heard by a judge thereof;

(*h*) The court may hear evidence, either *vive voce* or by affidavit, upon any question raised on the appeal, and may confirm or amend the award, or may remit it with directions to the referee or referees for further consideration, or may appoint a new referee or new referees and remit the award with directions to the referee or referees so appointed, or may otherwise deal with the award as may seem advisable, and shall upon such appeal have power to draw inferences of fact and to decide all questions of fact as well as of law, and shall have absolute discretion as to costs;

(*i*) Every referee shall, on the written request of the insured or of any company interested and within fifteen days from the receipt of such request, state by certificate in writing:

i. the extent to which he has proceeded upon his own knowledge, inspection or examination of the property insured, and the other sources of information, if any, to which he has had recourse;

ii. the reasons for his determination, if any, of the proportions of the loss to be paid by and recoverable from the companies respectively;

iii. any question of law raised by the parties and his decision thereon.

(*j*) The appeal shall be by way of motion, and notice of motion shall be served on all interested parties within thirty days from the date of the delivery of a copy of the award to the appellant, and shall be returnable not less than ten clear days from the date of service;

(*k*) The notice of motion shall set out concisely the nature of the relief sought and the grounds therefor;

(*l*) The motion shall be set down for hearing according to the practice of the court, and at the time of setting it down the appellant shall file with the proper officer of the court the notice of motion, any certificate obtained under clause (i) hereof, any evidence or notes of evidence taken by or before the referee or referees, or a copy thereof, and all documents filed or used as exhibits or copies thereof;

(*m*) The judges of the court or a majority of them may from time to time make rules not inconsistent herewith to regulate the practice and procedure relating to appeals and may from time to time amend or repeal them;

(*n*) On any appeal all matters of practice or procedure not provided for herein or in the rules made hereunder shall be governed by the general rules of the court;

(*o*) If an award is remitted, the award made upon such remission shall within ten days from the making thereof be filed in court by the referee or referees and any party may give notice of the filing thereof. The court may, upon the application of any of the parties, to be made within thirty days from the date of service upon or by him of such notice, confirm or amend the award, and the award so confirmed or amended shall be conclusive between the parties;

(*p*) The time for doing any act provided to be done in connection with an appeal may, whether before or after the expiry of such time, be extended by any judge of the court appealed to, upon such terms as to costs or otherwise as may seem just;

(*q*) No decision or order of the court shall be subject to appeal, and, except as herein provided, there shall be no appeal from or proceedings had to impeach or set aside any award.

18. *When Loss Payable.*—The loss shall be payable within sixty days after completion of the proofs of loss, unless the contract provides for a shorter period.

19. *Replacement.*—The company, instead of making payment, may within a reasonable time repair, rebuild or replace the property damaged or lost, giving written notice of its intention so to do within fifteen days after receipt of the proofs of loss.

20. *Action.*—Every action or proceeding against the company for the recovery of any claim under or by virtue of this policy shall be absolutely barred unless commenced within one year next after the loss or damage occurs.

21. *Agency.*—Any officer or agent of the company who assumes on behalf of the company to enter into a written agreement relating to any matter connected with the insurance shall be deemed *prima facie* to be the agent of the company for the purpose.

22. *Waiver.*—No condition of this policy shall be deemed to have been waived by the company, either in whole or in part, unless the waiver is clearly expressed in writing signed by an agent of the company.

23. *Notice.*—Any written notice to the company may be delivered at or sent by registered post to the chief agency or head office of the company in this province or delivered or so sent to any authorized agent of the company therein. Written notice may be given to the insured by letter personally delivered to him or by registered letter addressed to him at his last post office address notified to the company, or, where no address is notified and the address is not

known, addressed to him at the post office of the agency, if any, from which the application was received.

24. *Subrogation.*—The company may require from the insured an assignment of all right of recovery against any other party for loss or damage to the extent that payment therefor is made by the company.

APPENDIX B.

REPORT OF COMMITTEE ON A UNIFORM CONTRIBUTORY NEGLIGENCE ACT.

1. In accordance with the reference made to them, reported on pages 17 and 18 of the Report of Proceedings of the 1923 meeting of the Conference (Canadian Bar Association Proceedings, 1923, pages 427-8), the Ontario commissioners have prepared and submit herewith a draft uniform bill to provide for the division of loss in cases of contributory negligence.

2. The action of the Conference followed the recommendation of the Canadian Bar Association in September last (Proceedings, 1923, pages 104-119.) The proposal has now received such further approval from members of the bench and bar that a bill to give it effect in Ontario, introduced by the Attorney-General at the recent session of the Ontario Legislature, has already been made law (Ontario Statutes, 1924, chapter 32).

3. Your committee could not see its way to submit that bill to the Conference as a model, and preferred to follow more closely the broad and general terms of the Maritime Conventions Act, which has been interpreted without difficulty and applied satisfactorily in admiralty actions ever since its enactment. That precedent also accounts for provisions (a) and (b) of section 2, which might perhaps be safely omitted.

4. There is also submitted with this report a paper read by one of your committee to the Ontario Bar Association on March 21st, 1923, in which the whole subject is dealt with; and a perusal of this paper will at least explain the matter fully to any commissioners who have not had occasion to compare the present involved, illogical

and often unsatisfactory treatment of these cases by our common law with the more equitable methods applied in admiralty and in the civil law of Quebec.

Respectfully submitted,

FRANCIS KING,

On behalf of the Ontario Commissioners.

Kingston, June 2nd, 1924.

1924

The Contributory Negligence Act

As revised and approved by the Conference of Commissioners on Uniformity of Legislation in Canada, in July, 1924.

An Act to make Uniform the Law respecting the Liability of the Parties in an Action for Damages for Negligence where more than one party is in fault.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of ————, enacts as follows:

1. This Act may be cited as *The Contributory Negligence Act.*

2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:

(*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and

(*b*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

3. In actions tried with a jury the amount of damage, the fault, if any, and the degrees of fault shall be questions of fact for the jury.

4. Unless the judge otherwise directs the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage.

5. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.

6. This Act shall come into force on the day of 2 .

A PROPOSAL FOR THE DIVISION OF LOSS IN CONTRIBUTORY NEGLIGENCE CASES.

(A paper read to the Ontario Bar Association at its Annual Meeting in March, 1923, by its President, Francis King, K.C., Kingston.)

If negligence ordinarily entails liability for the amount of the loss occasioned, why does not contributory negligence entail only a liability to contribute to the amount? Why is it that if A suffer through the combined negligence of A and B, A bears the loss and B escapes entirely? Why should B not contribute to the settlement of the loss if he contributed to the cause?

Questions such as these, stated perhaps just as crudely and baldly and prompted by the same doubt as to the fairness and desirability of our common law rule concerning contributory negligence have led many an unsuccessful plaintiff to make remarks expressive of his dissatisfaction and have required elaborate explanations from the solicitor as to the distinction which sometimes must be drawn between legal rules and the principles of abstract justice. Such questions have bothered many a jury, and many a juryman sworn to do his duty has conscientiously kept them or some of them more easily and more prominently in mind than the written questions committed to the foreman before the jury left the court-room. These questions, too, stated with greater clearness and accuracy, have had their influence upon argument in every negligence action, and they are perhaps primarily responsible for the gradual refinement and elaboration of the common law contributory negligence rule by judges who have endeavoured to apply this rule with as much fairness as possible to the claims of erring litigants.

Mann should not pay for damages resulting from his servant's driving at excessive speed, for Davies should not have left his donkey hobbled in the road and exposed improperly to danger. Davies was guilty of contributory negligence. Yes, say the judges, that may be so, but we think Mann should pay if by the exercise of ordinary care

his servant, who was driving at a "smartish pace," could have avoided the hobbled donkey. So, if we interpret Davies v. Mann as the court looked at it in Radley v. London and North Western Railway Company, Davies recovered damages notwithstanding his contributory negligence; or, if we look at the case as the court seems to have viewed it in Cayzer v. Carron Company, Davies recovered because while there was contributory negligence in fact, there was none in law. In law t was not a cause of the collision—at least not proximate enough to ɔe so considered.

Taking this idea and looking at it one way or the other the courts ɔroceeded to apply it with impartiality to plaintiff and defendant ılike, with the result that notwithstanding the negligence of A, B .s defendant would be liable for the whole loss, or as plaintiff would ɔe unable to recover, if he could with ordinary care have avoided the ccident. The step from this was easy to the cases where negligence ɔrior in point of time was held not to have contributed; and the hunt or the ultimate negligence was now on. This search has been complicated by questions as to the propriety of the phrase "ultimate negligence" and by decisions that negligence might remain ultimate, ecause continuing, although in fact originally antecedent: and it has ecome necessary to submit to the jury a large number of questions ı the hope of keeping their noses to the trail in the effort to locate ıe culprit. In some of the later cases the questions submitted to the ıry have run as high as nine or ten in number requiring considera-on in turn as to whether the defendant could have avoided the results ' the plaintiff's contributory negligence, and then whether the plain-ff could still have done something to avoid the accident after the ɔfendant's final negligence became apparent to him. Logically we ight well continue the inquiry *ad infinitum,* for the "last chance" avoid the accident has become a phrase frequently used, and the arch for the proximate cause in this special sense is tending more ıd more to exclude from consideration all the other contributory uses which might fairly be thought to entail a share of the liability.

Now, when you walk carelessly across a street, ignoring or ignorant the approach of a rapidly moving street-car, and when the motor-ın of the car has failed to ring his bell or apply the brakes, and by ıson of your phlegmatic disposition or the perversity of your nature, perhaps, for other causes, you have failed to jump or run clear of ɔ approaching danger as you might have done, some jury may have decide in the result whether the car driver could have avoided you

after learning that you were slow, pig-headed, or apparently deaf or blind, or whether, on the other hand, you could have and should have been more brisk in your movements after finding that the car was being driven by a careless motorman. An elaborate set of questions would be submitted to the jury to elicit their opinions on the various points, and they would be asked to name the damages. They may or may not answer the questions, except the last, intelligently and consistently, and they will probably fix the damages in answer to the last question without regard to the effect of their various opinions already expressed, and with regard only to what they think should be done if the matter were to be settled in the way this paper proposes.

All this comes about because of the effort to make the best of the common law rule without abandoning it for something better. A must suffer the whole loss, say the courts, or else B must. We cannot make them share it. Is this condition of things in which the parties to the action gamble upon counsel understanding and interpreting the case, upon the jury understanding and interpreting the questions and upon the court understanding and interpreting the answers, at all preferable to a condition in which contributory negligence formed an absolute bar to recovery? And to return to our first question, why when both parties have failed to do their full duty should the whole expense and loss necessarily fall upon one of them only?

Some familiarity with the rule of the maritime law which divides the loss, and a comparison of this with the similar rule in force under the jurisprudence of the Province of Quebec, had thrown this problem into a strong light in the mind of the writer, and he had already determined to make it the subject of some remarks to the Ontario Bar Association, and had in fact already outlined the substance of this paper when he learned that a member of the Legislative Assembly of Ontario had just introduced a bill at the present session (1923) designed to cut the Gordian Knot by statute and make plaintiff and defendant share the results of their negligence. The fact that the bill is meeting with some support, and may quite probably go to the legal committee of the House and become the subject of an intelligent and illuminating debate, even if it does not become law, does not deter the writer, and it in fact encourages him to proceed as first intended and to outline briefly a system which he has thought might be adopted in Ontario with advantage.

This is the rule in force in all the courts of Canada in cases of collision between ships where there is fault on each side, and in a slightly modified form it is the rule in all contributory negligence cases in the Province of Quebec. Let us examine it first in its maritime relation.

Perhaps the earliest mention of the rule for the division of loss may be found in the Book of Exodus, Chap. XXI., vv. 35-36, where we find it laid down in these words: "If one man's ox hurt another's, that he die, then they shall sell the live ox and divide the money of it; and the dead ox also they shall divide." Compare the laws of Alfred: "If an ox wounds another man's ox and it die, let them sell the live ox and have the worth in common and also the flesh of the dead one." According to Marsden in his work on collisions at sea, the Mosaic law has been cited in support of the Admiralty rule. Somewhat jocularly Mr. Marsden refers to a case in the seventeenth century where a seaman, seeing a ship that had been in collision, says to her crew, "I think, brothers, you have been bulling it somewhere." This may be a very fanciful reference, and the origin of the rule is, of course, clouded in some obscurity, but we find it in various forms in the laws of Wisby and other codes of Northern Europe, in the Consolato del Mare, in the Ordonnance de la Marine of Louis XIV., and in almost every code of maritime law since the Middle Ages, the earliest being the code of Oleron, attributed to the twelfth century. The division, it is true, is not made in equal shares in all these codes, and the rule is applied in a variety of forms, appearing sometimes to be based upon the idea of general average. As applied originally in marine cases the underlying principle seems to have been that the collision was a peril of the sea—a common misfortune to be borne by all parties. Then when the idea of negligence in navigation received more consideration the judges found difficulty. There is no record earlier than the seventeenth century of a sentence of the English Admiralty dividing the loss, and it is in 1789 that the rule is for the first time recorded as expressly applied to a case where both ships were in fault (the "Petersfield" and the "Judith Randolph," cited in Hay v. LeNeve, 2 Shaw's App. Cas. 395). Gradually the rule which had frequently been termed *rusticum judicium,* or *judicium rusticorum,* because of its arbitrary method of compromise and because it was sometimes applied to cases where the cause of collision was uncertain, came to be applied only to cases of "both to blame," and Lord Stowell, then Sir William Scott, so limited and stated the

rule in the Woodrop case in 1816, and his dictum, in which he divided collisions into four classes and declared that the loss is to be divided where both ships are at fault, has been constantly quoted and accepted ever since.

The Merchant Shipping Act of 1854 by its reference to breaches of the statutory navigation regulations interfered with the operation of this rule for division of loss, but the Merchant Shipping Amendment Act of 1862 set this right, and in 1873 the Judicature Act, Sec. 25, subsec. 9, extended the operation of this Admiralty rule to all the courts in all cases arising out of collision between two ships where both are at fault. In Canada the rule prevailed from the first introduction of Admiralty practice, and in 1880 its operation in collision cases was extended to all the courts (see Canada Shipping Act R.S.C. 1906, ch. 113, sec. 918, and see also Shipman v. Finn, 32 O.L.R. 329, in which the late Chancellor Boyd had inadvertently applied the common law rule in a short judgment dictated at the conclusion of a trial at Napanee where the parties had failed to realize that the rule of the maritime law was now of general application in collision cases in all the courts).

This was the so-called fifty-fifty rule which has come in for adverse criticism from judges familiar with the common law and accustomed to examination of the problems and possibilities of contributory negligence cases. The epithet *judicium rusticorum* was again applied by Chancellor Kent (3 Kent's Comm. 231). Lord Denham, C.J., said of it: "It is an arbitrary provision of the law of nations not dictated by natural justice, nor possibly, quite consistent with it," and later on Lord Selborne expressed a similar opinion (7 App. Cas. 799). The rule narrowly escaped abolition when the bill which became the Judicature Act was introduced in the House of Lords by Lord Chancellor Selborne, and it was a letter from the Registrar of the Admiralty Court outlining the argument for the rule derived from figures in concrete cases that proved most effective in preventing the Lord Chancellor's intentions from being carried out. On the other hand Lindley, L.J., in the famous Bernina case (12 P.D. 58-59), said: "Why in such a case the damages should not be apportioned I do not profess to understand." Lord Blackburn thought the rule tended to avoid interminable litigation (7 App. Cas. 819). Perhaps on the whole the chief objection to the rule was the very fact that it was arbitrary in its nature, and that where there was a marked degree of difference in the quantum of negligence on both sides the fifty-fifty division seemed unfair.

But the Maritime Conventions Act, 1911 (Great Britain), and 1914 (Canada, excepting the Great Lakes and Upper St. Lawrence), has changed all that by providing for division in proportion to the degree of fault. An International Convention for the Unification of Certain Rules of Law in regard to Collision, was signed at Brussels on September 23, 1910, and the statutes above mentioned embodied and enacted the principal provisions of the convention. Sec. 2, subsec. 1, of the Canadian Act is as follows:

"Where, by the fault of two or more vessels damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that:

(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally and

(b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed; and

(c) nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law, or as affecting the right of any person to limit his liability in the manner provided by law."

Comments of the judges called upon to apply this legislation are interesting. Mr. Justice Bargrave Deane, in the Rosalia, [1912] P. 109, had the first decision to make in 1912. He said at page 113:

"This is the first case arising under the new Act, and therefore I have to start the new practice. I have never heard in the common law of the principle which has now come upon us as a sudden blow, but we must obey the Act of Parliament, and the way in which I shall deal with this case is this: as the initial fault was in the Rosalia I shall order her to pay 60 per cent. and the Woodmere the other 40 per cent."

The learned judge probably erred in applying the test of time if Lord Sumner was right in his statement of the proper method of applying the law in the Peter Benoit, 13 Asp. M.C., where he declares at page 208:

"The conclusion that it is possible to establish different degrees of fault must be a conclusion proved by evidence, judicially arrived at, and sufficiently made out. Conjecture will not do; a general leaning in favour of one ship rather than of the other will not do: sympathy for one of the wrongdoers, too indefinite to be supported by a reasoned judgment, will not do. The question is not answered by deciding who was the first wrongdoer, nor even of necessity who was the last. The Act says, 'having regard to all the circumstances of the case.' Attention must be paid not only to the actual time of the collision and the manœuvres of the ships when about to collide, but to their prior movements and opportunities, their acts, and omissions. Matters which are only introductory, even though they preceded the collision by a short time, are not really circumstances of the case, but only its antecedents, and they should not directly affect the result. As Pickford, L.J., observes: 'The liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault.' She must be in fault as regards the collision. If she was in fault in other ways, which had no effect on the collision, that is not a matter to be taken into consideration."

A wide range of choice in the proportionate divisions is shown in the cases. Taking simply those reviewed by the Local Judge in Admiralty at Vancouver in his first case after the passing of the Canadian Act in 1914, C.P.R. v. SS. Belridge, 20 Ex. Ct. R. at 403, we find him mentioning the Rosalia (*supra*) at 60 per cent. and 40 per cent., the Bravo (1912), 12 Asp. M.C. 311, at four-fifths and one-fifth, the Counsellor, [1913] P. 70, at two-thirds and one-third, the Cairnbahn (1913), 12 Asp. M.C. 455, equally apportioned, the Llanelly (1913), 12 Asp. M.C. 485, and the Umona (1914), 12 Asp. M.C. 527, at three-fourths and one-fourth, the Ancona, [1915] P. 200, at two-thirds and one-third, the Kaiser Welhelm II. (1915), T.L.R. 615, equally apportioned, and the Peter Benoit (*supra*). In the Belridge case the damages were divided equally.

It may safely be said that the statute takes care well enough of one of the principal objections to the fifty-fifty rule. Clause (a) of the first subsection of section 2 permits the application of that rule and an equal division of damages where this appears to be the fair solution; while the main provision of this subsection enables the judge to make due allowance for differences in the degree of fault on the respective sides.

At the instance of the Dominion Marine Association and through

the instrumentality of the writer the application of the Canadian Act was excluded from the waters upon which the navigation rules of 1916 are in force, namely, the Great Lakes and their connecting and tributary waters, and the St. Lawrence River as far down as Montreal. The reason for this action was that these especial rules had been enacted for the waters named as the result of a long battle with the authorities at Ottawa to obtain absolute uniformity in the sailing regulations on both sides of the international boundary line and because Canadian vessel owners thought it desirable to have similar identity of rule in all collision cases in the courts of both countries, as these cases so frequently involved both flags. It is doubtful whether the limitation of the scope of the Act was well advised. The request to leave well alone was natural, and the Government's acquiescence was natural also, as the result sufficiently satisfied the International Convention. It may well be, however, that notwithstanding the continuance of the fifty-fifty rule on the United States side of the Great Lakes, Canadian vessel owners may soon determine to seek to make the application of the statute general throughout Canada.

Turning now to the special form of this rule applied in the Province of Quebec, we do not find it in the Civil Code, where common law practitioners of Ontario would expect to look for it. Article 1053 seems to be the nearest approach to it:—

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill."

The rule is found, however, in a series of decisions of the Quebec courts. One may look at C.P.R. v. Frechette, which went to the Privy Council. It is reported in 18 Canadian Railway Cases, 251, and in 22 D.L.R. 356. The headnote in the report first mentioned is this:—

"By the law which prevails in the Province of Quebec in actions for negligence where both parties have been in fault damages are awarded proportionate to the degree in which the respective parties are to blame; where, however, the sole effective cause of an accident is the plaintiff's own negligence he is not entitled to recover any damages."

Lord Atkinson, who delivered the final judgment, explains the difference between the law of Quebec and the law of England in relation to contributory negligence, and points out more accurately perhaps than the headnote quoted, that in Quebec a deduction is made, on account of the plaintiff's contributory negligence, from the amount

which the defendant would otherwise have been called upon to pay. In Montreal Tramways v. McAllister, 51 D.L.R. 429, also decided by the Judicial Committee, Lord Dunedin points out this peculiarity of the Quebec law. The jury in this case found the damages $6,000, but reduced them to $2,400 on account of the plaintiff's contributory negligence (pp. 430, 431). The Supreme Court of Canada has dealt with the rule in a number of cases, and perhaps for the first time in Price v. Roy, 29 S.C.R. 494. It is interesting to note the remark of Mr. Justice Girouard in that case:—

"C'est donc le cas de faute commune et de diviser le dommage souffert selon la jurisprudence hautement équitable de la province de Québec."

This sentiment apparently appeals to some minds in the Western Provinces of Canada, as the writer has learned since embarking on this discussion that inquiry has been made from Alberta having in view the possible introduction of amending legislation there such as that now introduced in Ontario.

The Bill now before the Ontario House provides in brief terms that contributory negligence on the part of a person injured shall not be a bar to recovery by him or by any person entitled under the Fatal Accidents Act, but that the contributory negligence shall be taken into account in assessing the damages, and the damages shall be awarded in proportion to the degree in which each party was in fault. It also contains a general provision similar to that in the Maritime Conventions Act that where it is not possible to establish the degrees of fault the defendant shall be liable for half the damages; and there is a further very important provision introducing a feature not yet discussed in this paper, namely, that all these actions shall be tried by a judge without intervention of a jury.

It was not the purpose of this paper to advocate or discuss the withdrawal of this subject from the jury. This is a step further than the writer is yet ready to go, but it is submitted that the enactment of this or some similar measure designed to divide the damages would have advantages outweighing to a considerable extent any disadvantages that may be mentioned. For instance, it would save counsel the trouble, often useless, of studying and comparing an innumerable series of contributory negligence cases in the search for some "on all fours" with his own and in which the battledore and shuttlecock game with the "ultimate negligence" had allowed it to fall just as he thinks it should with reference to his own client. It would save

the jury the trouble of trying to understand the meaning and application of the many questions submitted for consideration and answer, and would save them, too, from the risk of answering questions in such a way as to defeat their real intentions about the verdict. At the same time it would prevent the frequent occurrence of a series of considered answers followed by a final one nominally fixing the actual damage, but actually naming the amount the jury thinks the plaintiff should get. It would save the courts, below and above, the trouble of trying to interpret and reconcile the jury's answers: and it would save the actual litigants from the common error that the law is administered without regard to common sense, and give them a decision they could readily understand—presumably a desirable thing. It may be said, too, that so long as the law provides for the sharing of the loss only by parties who have actually caused or contributed to it, the results should be eminently fair and satisfactory.

Prominent among the few objections to the proposal are:—

(1) the fact that we would be abandoning a good old common law doctrine which has been the subject of a tremendous amount of study and labour, and is now almost worthy of a text book devoted to its sole consideration, and

(2) the fact that all the jurisprudence on the subject would have to be scrapped.

The first objection mentioned is so ultra conservative in its nature that it is not likely at present to invite popular acceptance; and the second, on a moment's consideration, becomes an argument in favour of the change.

APPENDIX C.

REPORT OF COMMITTEE ON UNIFORM ACTS RESPECTING DEVOLUTION OF ESTATES AND INTESTATE SUCCESSION.

To the Conference of Commissioners on Uniformity of Legislation in Canada.

Gentlemen,—

At the last meeting of the Conference the Commissioners approved of the proposal, made by the Saskatchewan Commissioners in 1922, that a uniform Act should be drawn to provide for the devolution of estates in cases of testacy as well as intestacy, and should contain provisions relative to the powers of personal representatives in cases of testacy as well as intestacy. They also suggested for the consideration of the Saskatchewan Commissioners the incorporation in a separate measure of the provisions contained in the draft Intestate Succession Act submitted by those Commissioners (Appendix D to the Proceedings of 1923).

Your committee has followed the direction to include testacy as well as intestacy, and has adopted the suggestion that the subject matter should be divided, devolution of estates and intestate succession being quite different topics. Accordingly two draft uniform Acts have been prepared and are herewith submitted, one dealing with the devolution of real estate and the other with intestate succession.

R. W. SHANNON.
D. J. THOM.

Regina, May 10, 1924.

BILL.

No. of 192 .

An Act to make Uniform the Law respecting the Devolution of Estates of Deceased Persons.

[*Assented to* 192 .]

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of enacts as follows:—

SHORT TITLE.

1. This Act may be cited as *The Devolution of Estates Act.*

INTERPRETATION.

2. In this Act, unless the context otherwise requires:—

(1) "Issue" includes all lawful lineal descendants of the ancestor.

R.S. Nova Scotia ch. 140, s. 1; R.S. Sask. ch. 73, s. 2.

(2) "Lunatic" includes an idiot and a person of unsound mind.

R.S. Ont. ch. 119, s. 2.

DEVOLUTION OF REAL ESTATE UPON PERSONAL REPRESENTATIVES.

3. (1) Real estate to which a deceased person was entitled for an interest not ceasing on his death shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his personal representative from time to time as if it were personal estate vesting in him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3) This section applies only in cases of death after the commencement of this Act.

Imp. Act 60 and 61 Vict. ch. 65, s. 1; B.C. 1921, ch. 26, s. 26; R.S. Man. ch. 54, s. 21; R.S. Ont. ch. 119, s. 3(1); R.S. Sask. ch. 73, s. 3(1); and see R.S. Alta. ch. 133, s. 109.

PERSONAL REPRESENTATIVE TO HOLD AS TRUSTEE.

4. Subject to the powers, rights, duties and liabilities hereinafter mentioned, the personal representative of a deceased person shall hold the real estate as trustee for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

Imp. Act s. 3(1); B.C. s. 27(1); Man. s. 21(3); Ont. s. 3(1); Sask. s. 3(1).

RULES OF LAW TO APPLY.

5. All enactments and rules of law relating to the effect of probate or letters of administration as respects personal estate and as respects the dealing with personal estate before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as the same are applicable, as if that real estate were personal estate vesting in them, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court of
or a judge thereof, to sell or transfer real estate.

Imp. Act. s. 2(2); B.C. 1921, ch. 26, s. 27(2); Man. s. 21(4); Ont. s. 4; Sask. s. 4; and see R.S.A. ch. 143, s. 2(*e*).

ADMINISTRATION OF REAL ESTATE.

6. In the administration of the assets of a deceased person his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs and expenses and with the same incidents, as if it were personal estate.

Imp. Act s. 2; B.C. 1921. ch. 26, s. 27(3); Man. s. 21(5); Ont. s. 5; and Sask. s. 5; see Alta. s. 2(*e*).

POWERS OF SALE.

7. (1) The personal representative may sell the real estate for the purpose not only of paying debts but also of distributing the estate among the persons beneficially entitled thereto, whether there

are or are not debts, and in no case shall it be necessary that the persons beneficially entitled shall concur in any such sale except where it is made for the purpose of distribution only.

(2) Subject to the provisions hereinafter contained, no sale of real estate for the purpose of distribution only shall be valid as respects any person beneficially interested unless he concurs therein.

(3) Where, in the case of such a sale, a lunatic is beneficially interested, or where there are other persons beneficially interested whose consent to the sale is not obtained by reason of their place of residence being unknown, or where in the opinion of a judge of the Court of it would be inconvenient to require the concurrence of any persons beneficially interested, the judge may, upon proof satisfactory to him that such sale is in the interest and to the advantage of the estate of the deceased and the persons beneficially interested therein, approve such sale on behalf of such lunatic and nonconcurring persons, and any such sale made with such approval shall be valid and binding upon such lunatic and nonconcurring persons.

(4) The acceptance by an adult of his share of the purchase money, in the case of a sale by the personal representative which has been made without the concurrence required by subsection (2), shall be a confirmation of the sale as to him.

(5) Where an infant is interested no sale shall be valid without the written consent or approval of the Official Guardian (or, where there is no Official Guardian, of the proper officer), which he is hereby authorized to give, or, in the absence of such consent or approval without an order of a judge of the Court of

Ont. ss. 19(1) and 21; Sask. ss. 9 and 11; and see Man. s. 25.

DISTRIBUTION IN SPECIE.

8. The personal representative shall have power, with the concurrence of the adult persons beneficially interested, with the approval of the Official Guardian (or other proper officer) on behalf of infants and, in the case of a lunatic, with the approval of a judge of the Court of , if any infants or lunatics are so interested, to convey, divide or distribute the estate of the deceased person, or any part thereof, in specie among the persons beneficially interested according to their respective shares and interests therein.

Ont. s. 21(3); Sask. s. 11(3).

REAL ESTATE DISTRIBUTED.

9. Real estate which has been conveyed by the personal representative to a person beneficially entitled thereto shall continue to be liable to answer the debts of the deceased so long as it remains vested in such person, or in any person claiming under him not being a purchaser in good faith and for value, as it would have been if it had remained vested in the personal representative, and in the event of a sale thereof in good faith and for value by such person beneficially entitled he shall be personally liable for such debts to the extent to which such real estate was liable when vested in the personal representative, but not beyond the value thereof.

Ont. s. 24(2).

OTHER POWERS OF PERSONAL REPRESENTATIVE.

10. (1) The personal representative shall have power from time to time subject to the provisions of any will affecting the property:

(*a*) To lease for any term not exceeding one year.

(*b*) To lease, with the approval of the Court of or a judge thereof, for a longer term.

(*c*) To raise money by way of mortgage for the payment of debts and, with the approval of the Court or a judge, for the erection, repair, improvement or completion of buildings, or the improvement of lands.

(2) Where infants or lunatics are concerned, the approval required by section 7 shall be required in the case of a mortgage under clause (*c*) of subsection (1) of this section.

Ont. s. 25; Sask. s. 15.

CONSTRUCTION OF ACT.

11. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.

COMING INTO FORCE.

12. This Act shall come into force on the day of 19 .

APPENDIX D.

(For report, see Appendix C.)

BILL

No. of 192 .

An Act to make Uniform the Law relating to the Distribution of Estates of Intestates.

[*Assented to* 192 .]

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of enacts as follows:—

SHORT TITLE.

1. This Act may be cited as *The Intestate Succession Act.*

INTERPRETATION.

2. In this Act, unless the context otherwise requires:

(1) "Estate" includes both real and personal estate.

(2) "Issue" includes all lawful lineal descendants of the ancestor.

INTESTATE LEAVING WIDOW.

3. (1) If an intestate dies leaving a widow and one child, one-half of his estate shall go to the widow.

R.S. Alta. ch. 143, s. 3(*b*); R.S. Sask. ch. 73, s. 16(1).

(2) If he leaves a widow and children, one-third of his estate shall go to the widow.

Alta. s. 3(*a*); R.S. Man. ch. 54, s. 4; R.S. Ont. ch. 119, s. 30; Sask. s. 16(2); (as to personalty) R.S.B.C. ch. 4, s. 95(1); R.S.N.B. ch. 161, s. 2; R.S.N.S. ch. 140, s. 6; and P.E.I. 1873, ch. 23, s. 10.

(3) If a child has died leaving issue and such issue is alive at

the date of the intestate's death, the widow shall take the same share of the estate as if such child had been living at that date.

Alta. s. 3(*f*); Sask. ch. 16(3).

LEAVING ISSUE.

4. If an intestate dies leaving issue, his estate shall be distributed, subject to the rights of the widow, if any, *per stirpes* among his issue.

Alta. s. 4; Man. s. 4; Ont. s. 30; Sask. s. 16(3); (as to personalty) B.C. s. 95(1); N.B. s. 2; N.S. s. 6; and P.E.I. s. 10.

WIDOW AND NO ISSUE.

5. (1) If an intestate dies leaving a widow but no issue his estate, where the net value thereof does not exceed $20,000, shall go to his widow.

(2) Where the net value exceeds $20,000 the widow shall be entitled to $20,000, and shall have a charge upon the estate for that sum with legal interest from the date of the death of the intestate.

(3) Of the residue of the estate after payment of the said sum of $20,000 and interest one-half shall go to the widow and one-half to those who would take the estate, if there were no widow, under section 6, 7 or 8 as the case may be.

(4) In this section "net value" means the value of the estate after payment of the charges thereon and the debts, funeral expenses and expenses of administration including succession duty.

Imp. Act 53 and 54 Vict. ch. 29, ss. 1, 2 and 4; Ont. s. 12; see Alta. s. 3(*c*); B.C. s. 95(3); Man. s. 5; N.B. s. 2; N.S. s. 6; P.E.I. s. 10; and Sask. s. 17.

NEITHER WIDOW NOR ISSUE.

6. If an intestate dies leaving no widow or issue, his estate shall go to his father and mother in equal shares, if both are living, but if either of them is dead the estate shall go to the survivor.

Alta. s. 6; Man. s. 5; N.S. ss. 2 and 6; see B.C. s. 95(4); N.B. s. 2; Ont. s. 30; P.E.I. s. 10; and Sask. s. 19.

NO WIDOW, ISSUE OR PARENT.

7. If an intestate dies leaving no widow or issue or father or mother, his estate shall go to his brothers and sisters in equal shares,

and, if any of his brothers or sisters be dead, the children of such deceased brother or sister shall take the share their parent would have taken, if living;

Provided that where the only persons entitled are children of deceased brothers and sisters, they shall take per capita.

Alta. s. 7; Man. s. 12; Sask. s. 21.

WHERE ESTATE GOES TO NEXT OF KIN.

8. If an intestate dies leaving no widow, issue, father, mother, brother or sister or children of any deceased brother or sister, his estate shall go to his next of kin.

Alta. s. 8(1); Man. s. 12; Sask. s. 22.

9. The estate of a woman dying intestate shall be distributed in the same proportions and in the same manner as the estate of a man so dying, the word "husband" for the purposes of this section being substituted for the word "widow," the word "her" for the word "his," the word "she" for the word "he" and the word "her" for the word "him" where such words respectively occur in sections 3, 4, 5, 6, 7, 8 and 13.

Man. s. 15; Sask. s. 35; see Ont. s. 29(1).

DISTRIBUTION AMONG NEXT OF KIN.

10. In every case where the estate goes to the next of kin it shall be distributed equally among the next of kin of equal degree of consanguinity to the intestate and those who legally represent them; but in no case shall representation be admitted among collaterals after brothers' and sisters' children.

Imp. 22 and 23 Car. 2, ch. 10, ss. 3 and 4; see B.C. s. 95(4); Ont. s. 30; Man. s. 12; Sask. s. 16(4) and s. 22; and N.B. s. 2; and N.S. s. 4(4) (as to real property).

DESERTION AND ADULTERY.

11. (1) If a wife has left her husband and is living in adultery at the time of his death or if she has at any time lived in adultery with another man and such adultery has not been condoned, she shall take no part of her husband's estate.

Alta. s. 3(*d*); Sask. s. 36; see Imp. Act 13 Ed. 1, ch. 34, and R.S.O. ch. 70, s. 9, as to dower.

(2) If a husband has left his wife and is living in adultery at the time of her death, or if he has at any time lived in adultery with another woman and such adultery has not been condoned, he shall take no part of his wife's estate.

Alta. s. 3(*e*); Sask. s. 37.

No Distinction of Half Blood.

12. For the purposes of this Act degrees of kindred shall be computed according to the rules of the civil law; and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree.

Alta. s. 8(2) and (3); Man. s. 8; N.S. s. 1; Sask. s. 38.

Posthumous Births.

13. Descendants and relatives of the intestate begotten before his death but born thereafter shall inherit as if they had been born in the lifetime of the intestate and had survived him.

Alta. s. 2(*a*); Man. s. 8; N.S. s. 15(1); Sask. s. 39(1); and R.S.B.C. ch. 108, s. 21, as to real estate.

Advances to Children.

14. (1) If any child of a person who has died wholly intestate has been advanced by the intestate by portion and the same has been so expressed by the intestate in writing or so acknowledged in writing by the child, the value of such portion shall be reckoned, for the purposes of this section only, as part of the estate of such intestate distributable according to law; and, if such advancement is equal or superior to the amount of the share of the estate which such child would be entitled to receive as above reckoned, then such child and his descendants shall be excluded from any share in such estate.

Alta. s. 5; Man. s. 7; N.S. ss. 8, 9 and 10; Ont. s. 28(1); Sask. s. 40(1); see B.C. s. 95(2); and P.E.I. s. 10.

(2) If such advancement is not equal to such share such child and his descendants shall be entitled to receive so much only of the estate of the intestate as is sufficient to make all the shares of the children in such estate and advancement to be equal as nearly as can be estimated.

Ont. s.28(2); Sask. s. 40(2); B.C. s. 95(2).

(3) The value of any real or personal estate so advanced shall be deemed to be that which has been expressed by the intestate or ac-

knowledged by the child in any instrument in writing, otherwise such value shall be estimated according to the value of the estate when given.

N.S. s. 11; Ont. s. 28(3); Sask. s. 41.

(4) The maintaining or educating or the giving of money to a child without a view to a portion or settlement in life shall not be deemed an advancement within the meaning of this Act.

Ont. s. 28(4); Sask. s. 42.

ESTATE UNDISPOSED OF BY WILL.

15. All such estate as is not devised by will shall be distributed as if the testator had died intestate and had left no other estate.

Man. s. 13; N.S. s. 18; Sask. s. 43.

NO DOWER OF CURTESY.

16. No widow shall be entitled to dower in the land of her deceased husband dying intestate and no husband shall be entitled to an estate by the curtesy in the land of his deceased wife so dying.

R.S.A. ch. 134, ss. 4 and 5; Man. ss. 19 and 20; Sask. s. 44.

ILLEGITIMATE CHILDREN.

17. Illegitimate children shall inherit from the mother as if they were legitimate, and they shall inherit through the mother, if dead, any real or personal estate which she would have taken, if living, by gift, devise or descent from any other person.

R.S. Alta. ch. 143, s. 9(4); Sask. s. 45; see Ont. s. 27(1).

SUCCESSION TO ILLEGITIMATES.

18. If an intestate, being an illegitimate child, dies leaving no widow or issue, the whole of such intestate's estate, real and personal, shall go to his mother.

R.S. Alta. ch. 143, s. 9(2); Sask. s. 46.

CONSTRUCTION OF ACT.

19. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.

COMING INTO FORCE.

20. This Act shall come into force on the day of 19 .

APPENDIX E.

RE BULK SALES ACT.

Commissioners on Uniformity of Legislation for the Province of

Dear Sirs,—

The Committee of the Canadian Bar Association on Uniformity of Legislation has endeavoured to do some work for the purpose of assisting, primarily, the Manitoba Commissioners to whom the question of Bulk Sales was referred and, secondarily, of assisting the Commissioners at large.

We are now enclosing you, addressed to your local secretary, copies of correspondence emanating from the Department of the Attorney-General for Ontario and forwarded to the writer by Mr. John D. Falconbridge, K.C., together with a statement of the history of The Bulk Sales Acts in the various Provinces and we believe all the case law on the subject.

It was hoped to give a summary of the effect of all the amendments and of the case law to enable the matter to be dealt with more fully, but owing to the fact that the meeting is being held earlier than usual this year and press of work the Committee of the Bar Association regrets that it has been unable to effect more along this line.

We trust that this will be of some assistance to the Commissioners for your Province.

Yours faithfully,

E. K. WILLIAMS,

Convenor of Canadian Bar Association Committee on Uniformity of Legislation.

APPENDIX F.

REPORT ON DEFENCE TO ACTION UPON FOREIGN JUDGMENTS.

To the Conference of Commissioners on Uniformity of Legislation in Canada:

The New Brunswick Commissioners having been instructed by the Conference to consider and report on the defences which should be permitted on an action upon a Foreign Judgment report as follows:—

1. It is a well-known principle that although Foreign Courts may assume jurisdiction and pronounce valid judgments they cannot lay down rules for the rest of the world. The judgments of Foreign Courts must fulfil the conditions which the Comity of Nations demand before an international validity can be asserted.

2. There are five conditions one at least of which is by the English law required to be satisfied before Foreign Judgments can be recognized. These five conditions are as follows:—

(1) That defendant is a subject of the foreign country in which the judgment has been obtained, or
(2) That defendant was a resident of a foreign country when the action commenced, or
(3) That defendant in the character of plaintiff has selected the forum in which the action was heard or judgment sued on was obtained, or
(4) That defendant had voluntarily appeared, or
(5) That defendant had contracted to submit himself to the forum in which the judgment was obtained.

3. It must also be borne in mind that an action on a Foreign Judgment pronounced in an action of a penal nature will not lie and in case of any question arising the Court called upon to enforce the

Foreign Judgment is not bound by the view adopted by the Foreign Court and further although the burden of proof lies on him who impeaches a Foreign Judgment such a judgment obtained by fraud or misrepresentation cannot be enforced and this defence can, therefore, be raised.

4. As to what defence can be raised on Foreign Judgments your Committee have not deemed it advisable to draft an Act, but suggest the following:—

"In any action now pending or hereafter to be instituted in any Court in this Province on a Foreign Judgment where the defendant was not personally served with the original process or first proceeding in the suit within the jurisdiction of the Court where the said Judgment may be obtained and has not voluntarily appeared or otherwise submitted himself to the jurisdiction of the Foreign Court it shall be competent for the defendant to enter into the subject matter of such Foreign Judgment and to avail himself of any matter of law or fact which would have been available as a defence had the action on which such Judgment was had and obtained been originally brought and prosecuted in any of the Courts of this Province. Provided always that this act shall not deprive the defendant from raising any defence to an action on a Foreign Judgment to which by law he is now entitled, also provided that such defence or defences may be pleaded in like manner as required by the course and practice of the Court in which the action on such Foreign Judgment is brought, any law, usage or custom to the contrary notwithstanding."

Respectfully submitted,

W. B. WALLACE.
M. G. TEED.
J. D. P. LEWIN.

St. John, N.B., May 29, 1924.

APPENDIX G.

1924

The Reciprocal Enforcement of Judgments Act

As revised and approved by the Conference of Commissioners on Uniformity of Legislation in Canada, in July, 1924.

An Act to facilitate the Reciprocal Enforcement of Judgments and Awards.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of , enacts as follows:

SHORT TITLE:

1. This Act may be cited as *The Reciprocal Enforcement of Judgments Act.*

INTERPRETATION.

2.—(1) In this Act, unless the context otherwise requires:

"Judgment" means any judgment or order given or made by a court in any civil proceedings, whether before or after the passing of this Act, whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if the award has, in pursuance of the law in force in the province or territory where it was made, become enforceable in the same manner as a judgment given by a court therein.

"Judgment creditor" means the person by whom the judgment was obtained, and includes the executors, administrators, successors and assigns of that person;

"Judgment debtor" means the person against whom the judgment was given, and includes any person against whom the judgment is enforceable in the place where it was given;

"Original court" in relation to any judgment means the court by which the judgment was given;

"Registering court" in relation to any judgment means the court in which the judgment is registered under this Act.

(2) Subject to rules of court, any of the powers conferred by this Act on any court may be exercised by a judge of the court.

ENFORCEMENT IN THIS PROVINCE OF JUDGMENTS OBTAINED IN OTHER PROVINCES OR TERRITORIES OF THE DOMINION OF CANADA.

3.—(1) Where a judgment of any superior, county or district court has been obtained outside this province in any other province or territory of the Dominion of Canada to which this Act applies, the judgment creditor may apply to the ———— Court of this province at any time within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may, subject to the provisions of this Act, order the judgment to be registered accordingly.

(2) Reasonable notice of the application shall be given to the judgment debtor in all cases in which he was not personally served with process in the original action or did not appear or defend or otherwise submit to the jurisdiction of the original court. In all other cases the order may be made ex parte.

(3) The judgment may be registered by filing with the registrar (*or other proper officer*) of the registering court an exemplification or a certified copy of the judgment, together with the order for such registration, whereupon the same shall be entered as a judgment of the registering court.

4. No judgment shall be ordered to be registered under this Act if it is shown to the registering court that

(*a*) The original court acted without jurisdiction, or

(*b*) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

(*c*) The judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court; or

(*d*) The judgment was obtained by fraud; or

(*e*) An appeal is pending, or the judgment debtor is entitled and intends to appeal, against the judgment; or

(*f*) The judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason would not have been entertained by the registering court; or

(*g*) The judgment debtor would have a good defence if an action were brought on the original judgment.

5. Where a judgment is registered under this Act:

(*a*) The judgment shall, as from the date of the registration, be of the same force and effect, and subject to the provisions of this Act, proceedings may be taken thereon, as if it had been a judgment originally obtained or entered up in the registering court on the date of the registration;

(*b*) The registering court shall have the same control and jurisdiction over the judgment as it has over judgments given by itself.

(*c*) The reasonable costs of and incidental to the registration of the judgment (including the costs of obtaining an exemplification or certified copy thereof from the original court, and of the application for registration) shall be recoverable in like manner as if they were sums payable under the judgment, such costs to be first taxed by the proper officer of the registering court, and his certificate thereof endorsed on the order for registration.

6. In all cases in which registration is made upon an ex parte order, notice thereof shall be given to the judgment debtor within one month after such registration. Such notice shall be served in the manner provided by the practice of the registering court for service of writs of process, or of notice of proceedings. No sale under the judgment of any property of the judgment debtor shall be valid if made prior to the expiration of the period fixed by section 7 or such further period as the court may order.

7. In all cases in which registration is made upon an ex parte order, the registering court may on the application of the judgment debtor set aside the registration upon such terms as the court may think fit. Such application shall be made within one month after the judgment debtor has notice of the registration, and the applicant shall be entitled to have the registration set aside upon any of the grounds mentioned in section 4.

POWER TO MAKE RULES OF COURT.

8. Rules of court may be made for regulating the practice and procedure (including costs) in respect of proceedings of any kind under this Act.

APPLICATION OF THE ACT.

9.—(1) Where the Lieutenant-governor is satisfied that reciprocal provision has been or will be made by any other province or territory of the Dominion of Canada for the enforcement within that province or territory of judgments obtained in any superior, county or district court of this province, the Lieutenant-governor may, by order in council, direct that this Act shall apply to that province or territory, and thereupon this Act shall apply accordingly.

(2) An order in council under this section may be varied, or revoked by a subsequent order.

10. Nothing herein contained shall deprive any judgment creditor of the right to bring an action for the recovery of the amount of his judgment instead of proceeding under this Act.

11. This Act shall be so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.

12. This Act shall come into force on the ——— day of ———— 192 .

APPENDIX H.

MEMORANDUM AS TO UNIFORM WILLS ACT PREPARED BY THE ALBERTA COMMISSIONERS.

(For draft Wills Act, see Proceedings of the Conference, 1923, p. 45; Proceedings of the Canadian Bar Association, 1923, p. 455.)

1. Section 2(*e*) of the draft. The words "disposition by will and testament" should be deleted as unnecessary.

2. Section 11. The word "then" is inserted at the beginning of this section (to whose *then* wife or husband) to conform with the decision in Thorpe v. Bestwick, 6 Q.B.D., 311, to the effect that the marriage after attestation of the beneficiary to a witness does not affect the gift.

The proviso to this section is added to meet the case of Ranfield v. Ranfield, 32 L.J.C.H., 668, which held that the section without this proviso has the effect of disentitling the attesting witness, although his attestation may be surplusage.

It should be observed that under the existing law, if one of two joint tenants attests, the other joint tenant takes the whole, and that if a tenant for life attests the party in remainder takes immediately by anticipation, and that when there is a devise or legacy to a class and one of the members of the class is incapable of taking, the shares of the other members of the class are increased.

Attention is especially directed to the case of Aplin v. Stone, 1904] 1 Ch. 543, where the gift was to Ellen or her children. Ellen's husband attested the will and the Court held that the gift did not go to her children, but that there was intestacy as to Ellen's share. It would perhaps seem more proper that when a gift is made to Ellen or her children that her children should take upon Ellen being rendered incapable of taking.

Additional subsections covering these points are appended in case should seem advisable that these principles of law should be set out in the Act.

"(2) Whenever such devise, legacy, gift or appointment is given or made to the person so attesting as joint tenant with another or others, such latter person or persons shall take the whole of the property devised, bequeathed, given or appointed.

"(3) Whenever such devise, legacy, gift or appointment is given or made to a person as a member of a class, the other members of the class shall take the whole of the property devised, bequeathed, given or appointed.

"(4) Whenever such devise, legacy, gift or appointment is given or made to the person so attesting for a particular estate or interest and to another or others upon the determination of that interest, such other or others shall take by anticipation the property devised, bequeathed, given or appointed.

"(5) Whenever such devise, legacy, gift or appointment is given or made to the person so attesting and to another or others in the alternative, such other or others shall take the property devised, bequeathed, given or appointed."

It will be noted that the last suggested subsection sets aside the decision given in the case of Aplin v. Stone cited above.

3. Section 14. It will be observed that (*b*), (*c*) and (*d*) are reproductions of section 1 of Lord Kingsdown's Act. The Ontario provision referred to in the note to section 14 is a reproduction of section 2 of the same Act. It is now thought that this Ontario provision should be included in the model Act. In that event it would perhaps be better to have a subsection to that effect. Or if it is decided to retain (*a*) of section 14 as it stands, it would be even better to remove (*a*) from the first subsection and insert a subsection as follows:—

"Every will, whether made within or without the Province, by a British subject whatever was the domicile of the testator at the time of making the same or at the time of his death, shall, as regards personal property, be held to be well executed for the purpose of being admitted to probate in this Province, if the same is made according to the form required by this Act."

It is further suggested that perhaps it would be as well to insert a further subsection in the following words:—

"If there be no testamentary law relative to forms in the place where the will was made, then the will shall be held to be well executed if it is made in a reasonable form."

As to this point, see Stokes v. Stokes, 78 L.T. 50 and 67 L.J. 55, a case of a will made in the Congo Free State.

The insertion of sections 14 and 15 of this Act in the case of the Provinces other than British Columbia and Manitoba, seems to me to demand a statement of the general law as to the testing of the formal validity of a will.

I here reproduce section 14 with amendments covering all the points which I have raised.

"14. (1) No will shall, as regards real estate situate in Alberta, be held to be well executed unless the same is made according to the form required by this Act.

"(2) Subject to the following subsections of this section, no will shall, as regards chattels real in Alberta, be held to be well executed unless the same is made according to the form required by this Act.

"(3) Subject to the following subsections of this section, no will of personal property (other than chattels real) shall be held to be well executed unless the same is made according to the form required by the law of the testator's domicile at the time of his death.

"(4) Every will made outside of the Province by a British subject whatever was the domicile of the testator at the time of making the same or at the time of his death, shall, as regards personal property, be held to be well executed for the purpose of being admitted to probate in this Province if the same is made according to the forms required either—

(*a*) By the law of the place where the testator was domiciled when the same was made; or

(*b*) By the law of the place where the will was made;

(*c*) By the law then in force in that part of His Majesty's Dominions where he had his domicile of origin.

"(5) If there be no testamentary law relative to forms in the place where the will was made, then the will shall be held to be well executed if it is made in a reasonable form.

"(6) Every will, whether made within or without the Province, by a British subject, whatever was the domicile of the testator at the time of making the same or at the time of his death, shall, as regards personal property, be held to be well executed for the purpose of being admitted to probate in this Province, if the same is made according to the form required by this Act."

4. Section 15. This section is a reproduction of section 3 of Lord Kingsdown's Act. This section differs from the preceding two sec-

tions of the Act in not referring to the will of a British subject. See, In the goods of Groos, 1904, P.D. 269. It might be well for the sake of clarity to insert after the words " No will " the words " whether of a British subject or of a foreigner."

5. Section 16. In the first line of this section I would insert the words " if then domiciled in Alberta " after the words " marriage of the testator," so that the section would run—" Every will shall be revoked by the marriage of the testator, if then domiciled in Alberta, except in the following cases—- "

This is undoubtedly the English law and I think it might well be made clear.

Quoting again from Dicey's Conflict of Laws at p. 737:—" English courts, therefore, in effect hold that the question whether or not a marriage operates as the revocation of a will which has been made by either husband or wife before marriage, must be determined by the law of the country where he is domiciled at the moment of the marriage."

6. Section 19. This is in effect a copy of section 21 of the English Act. The words " or in some other part of the will " occur in Ontario and Saskatchewan and probably elsewhere. " Or some other part of the will " is printed in the contemporaneous Queen's Printer copies in the reprints in Jarman and Theobald and in the first edition of the Statutes Revised, but in the second edition of the Statutes Revised " at the end of some other part of the will " is printed.

7. Section 33. There is a printer's error in the first line of this section—" of " should be " or." The section is more or less a reproduction of section 33 of the English Wills Act, but the ending of the English section is as follows:—

" any such issue of such person shall be living at the time of the death of the testator such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator unless a contrary intention shall appear by the will."

These words raised many questions. In the first place the wording leaves it doubtful whether the issue of the legatee alive at the time of the death of the testator need or need not be the same issue that was in existence when the legatee died in order to exclude the lapse under this section. To remedy this want of clearness the draft Act has the

words—" any of the issue of such person " instead of the words of the English Act—" any such issue of such person."

Inasmuch as the English Act renders the property devised, etc., the absolute property of the pre-deceased devisee it was therefore disposable by the will of the latter. (See Johnson v. Johnson, 3 Hare, 159) and was liable to estate duty, etc., both upon the death of the testator and upon the previous death of the devisee. (See In re Scott, 1901 1 K.B., 228.) The wording in the draft section renders such property no longer disposable by the will of the pre-deceased devisee or legatee, but it does not prevent the double liability to duty, etc. Furthermore the Act does not apply to a devise, etc., to a person as a member of a class (See In re Harvey's Estate, 1893 1 Ch. 567) ; nor does it apply to an appointment by will made in pursuance of a limited power.

It seems to me that in all these cases the result is that there is a disappointment of the testator's intention. I would therefore propose striking out the words " but shall take effect as if such person had died intestate immediately after the death of the testator, unless a contrary intention appears by the will " and insert instead of them the following words " but shall, unless a contrary intention appears by the will, take effect as if it had been made directly to the persons, amongst whom and in the shares in which his estate would have been divisible if he had died intestate and without debts immediately after the death of the testator."

At the end of the first line I would add the words " Either as a *persona designata* or as a member of a class."

I would further suggest that the words " devised or bequeathed " should be deleted and the words " devised, bequeathed or appointed by will " be substituted therefor, and the insertion of the words " nor such appointment fail " after the words " such devisee or bequest shall not lapse."

For convenience, the section containing the suggested amendments is here reproduced :—

"33. Where any person being the child or other issue of the testator to whom, either as a *persona designata* or as a member of a class, any real estate or personal property is devised, bequeathed or appointed by will, dies in the lifetime of the testator leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse nor such appointment fail, but shall, unless a contrary intention appears by the will,

take effect as if it had been made directly to the persons amongst whom and in the shares in which his estate would have been divisible if he had died intestate and without debts immediately after the death of the testator."

8. Section 35. Inasmuch as it is very doubtful whether in some of the provinces there is any such person as an heir, I would suggest that the words "the heir or devisee to whom such property descends or is devised" occurring in the first subsection be changed to "the person or persons to whom such property descends, or the devisee thereof."

This section embodies the effect of The Real Estate Charges Acts of the Imperial Parliament—1854, 1867 and 1877.

(9) Section 36. Instead of the words "who would be entitled thereto in the event of intestacy in respect thereof" it might be better to say "who would be entitled under . . . to any residue of the testator's estate not expressly disposed of."

This section is a reproduction of The Executors' Act of 1830, 11 Geo. IV. and 1 Wm. IV., ch. 40. It may be that it would be better to remove this section and place it in The Intestate Succession Act, now being drafted by the Saskatchewan Commissioners.

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA.

INDEX.