Kenneth C. McKenzie

1945

PROCEEDINGS

OF THE

TWENTY-SEVENTH ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

MONTREAL, QUEBEC

AUGUST 23RD, 24TH, 25TH, 27TH AND 28TH, 1945

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CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

OFFICERS OF THE CONFERENCE, 1945-46

Honorary President.....Peter J. Hughes, K.C., Fredericton.

President.....W. P. Fillmore, K.C., Winnipeg.

Vice-President.....W. P. J. O'Meara, K.C., Ottawa.

Treasurer.....J. P. Runciman, Regina.

Secretary.....L. R. MacTavish, K.C., Toronto.

LOCAL SECRETARIES

Alberta.....H. J. Wilson, K.C., Edmonton.

British Columbia.....J. Pitcairn Hogg, K.C., Victoria.

Manitoba.....G. S. Rutherford, Winnipeg.

New Brunswick.....His Honour Judge J. Bacon Dickson, Fredericton.

Nova Scotia.....C. L. Beazley, K.C., Halifax.

Ontario.....Eric H. Silk, K.C., Toronto.

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

Quebec.....Charles Coderre, K.C., Montreal.

Saskatchewan.....J. P. Runciman, Regina.

Canada.....W. P. J. O'Meara, K.C., Ottawa.

COMMISSIONERS AND REPRESENTATIVES OF THE PROVINCES AND OF THE DOMINION

Alberta:

W. S. GRAY, K.C., Legislative Counsel, Edmonton.

H. J. WILSON, K.C., Deputy Attorney-General, Edmonton.

(Commissioners appointed under the authority of the statutes of Alberta, 1919, c. 31).

British Columbia:

A. C. DESBRISAY, K.C., 675 West Hastings St., Vancouver.

J. PITCAIRN HOGG, K.C., Legislative Counsel, Victoria.

HON. R. L. MAITLAND, K.C., Attorney-General, Victoria.

(Commissioners appointed under the authority of the statutes of British Columbia, 1918, c. 92).

Manitoba:

JOHN ALLEN, K.C., Deputy Attorney-General, Winnipeg.

W. P. FILLMORE, K.C., 303 National Trust Building, Winnipeg.

R. MURRAY FISHER, K.C., Deputy Municipal Commissioner, Winnipeg.

ANDREW MOFFAT, K.C., 941 Somerset Building, Winnipeg.

G. S. RUTHERFORD, Legislative Counsel, Winnipeg.

(Commissioners appointed under the authority of the Revised Statutes of Manitoba, 1940, c. 223, as amended, 1945, c. 66).

New Brunswick:

HIS HONOUR JUDGE J. BACON DICKSON, Fredericton.

J. EDWARD HUGHES, B.Sc., Senior Solicitor, Attorney-General's Department, Fredericton.

PETER J. HUGHES, K.C., Fredericton.

HORACE A. PORTER, K.C., Saint John.

(Commissioners appointed under the authority of the statutes of New Brunswick, 1918, c. 5).

Nova Scotia:

C. L. BEAZLEY, K.C., Legislative Counsel, Halifax.

THOMAS D. MACDONALD, Deputy Attorney-General, Halifax.

VINCENT C. MACDONALD, K.C., Dean, Dalhousie Law School, Halifax.

(Commissioners appointed under the authority of the statutes of Nova Scotia, 1919, c. 25).

Ontario:

HON. MR. JUSTICE F. H. BARLOW, Osgoode Hall, Toronto.

L. R. MACTAVISH, K.C., Municipal Legislative Counsel, Toronto.

JOSEPH SEDGWICK, K.C., Toronto.

ERIC H. SILK, K.C., Legislative Counsel, Toronto.

CECIL A. WRIGHT, K.C., Osgoode Hall Law School, Toronto.

(Commissioners appointed under the authority of the statutes of Ontario, 1918, c. 20).

Prince Edward Island:

W. E. BENTLEY, K.C., Charlottetown.

GORDON R. HOLMES, Charlottetown.

HON. F. A. LARGE, K.C., Attorney-General, Charlottetown.

GEORGE J. TWEEDY, K.C., Charlottetown.

Quebec:

C. S. LEMESURIER, K.C., Dean, Faculty of Law, McGill University, Montreal.

ALFRED TOURIGNY, K.C., 266 St. James Street, West, Montreal.

Saskatchewan:

ALEX. BLACKWOOD, K.C., Deputy Attorney-General, Regina

J. P. RUNCIMAN, Legislative Counsel, Regina.

DOUGLAS J. THOM, K.C., Regina.

Canada:

PAUL FONTAINE, K.C., Counsel, Department of Justice, Ottawa.

ROBERT FORSYTH, K.C., Senior Counsel, Department of Justice, Ottawa.

W. R. JACKETT, Counsel, Department of Justice, Ottawa.

W. P. J. O'MEARA, K.C., Assistant Under Secretary of State, Ottawa.

JOHN E. READ, K.C., Legal Adviser, Department of External Affairs, Ottawa.

MEMBERS EX OFFICIO OF THE CONFERENCE

Attorney-General of Alberta: Hon. Lucien Maynard, K.C.

Attorney-General of British Columbia: Hon. R. L. Maitland, K.C.

Attorney-General of Manitoba: Hon. J. O. McLenaghen, K.C.

Attorney-General of New Brunswick: Hon. J. B. McNair, K.C.

Attorney-General of Nova Scotia: Hon. J. H. MacQuarrie, K.C.

Attorney-General of Ontario: Hon. Leslie E. Blackwell, K.C.

Attorney-General of Prince Edward Island: Hon. Frederick A. Large, K.C.

Attorney-General of Quebec: Hon. Maurice Duplessis, K.C.

Attorney-General of Saskatchewan: Hon. J. W. Corman, K.C.

HISTORICAL NOTE

More than twenty-five years have elapsed since The Canadian Bar Association recommended that each provincial government should provide for the appointment of Commissioners to attend conferences organized for the purpose of promoting uniformity of legislation in the provinces.

This recommendation was based upon observation of the National Conference of Commissioners on Uniform State Laws, which has met annually in the United States since 1892 to draft model statutes. These Acts by subsequent adoption by many of the State Legislatures have resulted in a substantial degree of uniformity of legislation throughout the United States, particularly in the field of commercial law.

The seed of The Canadian Bar Association fell on fertile ground and the idea was soon implemented by most provincial governments and later followed by the remainder. The first meeting of Commissioners appointed under the authority of provincial statutes and of representatives from those provinces where no provision had been made for the formal appointment of Commissioners took place in Montreal on September 2nd, 1918, and there the Conference of Commissioners on Uniformity of Laws throughout Canada was organized. In the following year the Conference adopted its present name.

Since the organization meeting in 1918 the Conference has met 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.
1925. August 21, 22, 24, 25, Winnipeg.
1926. August 27, 28, 30, 31, Saint John.
1927. August 19, 20, 22, 23, Toronto.
1928. August 23-25, 27, 28, Regina.
1929. August 30, 31, September 2-4, Quebec.
1930. August 11-14, Toronto.
1931. August 27-29, 31, September 1, Murray Bay.
1932. August 25-27, 29, Calgary.
1933. August 24-26, 28, 29, Ottawa.

1934. August 30, 31, September 1-4, Montreal.
1935. August 22-24, 26, 27, Winnipeg.
1936. August 13-15, 17, 18, Halifax.
1937. August 12-14, 16, 17, Toronto.
1938. August 11-13, 15, 16, Vancouver.
1939. August 10-12, 14, 15, Quebec.
1941. September 5, 6, 8-10, Toronto.
1942. August 18-22, Windsor.
1943. August 19-21, 23, 24, Winnipeg.
1944. August 24-26, 28, 29, Niagara Falls.
1945. August 23-25, 27, 28, Montreal.

Due to war conditions the annual meeting of The Canadian Bar Association scheduled to be held in Ottawa in 1940 was cancelled and for the same reason no meeting of the Conference was held that year. Although in 1941 both The Canadian Bar Association and the Conference held meetings, in 1942 The Canadian Bar Association cancelled its meeting which was scheduled to be held in Windsor. The Conference, however, proceeded with its meeting. This meeting was significant in that the National Conference of Commissioners on Uniform State Laws in the United States was holding its annual meeting at the same time in Detroit which enabled several joint sessions to be held of the members of both Conferences.

It is interesting to note that since 1935 the Dominion Government has sent representatives to the meetings of the Conference and that although the Province of Quebec was represented at the organization meeting in 1918, representation from that Province was spasmodic until 1942, but since then representatives from Quebec have attended each year.

In most provinces statutes have been passed providing for grants towards the general expenses of the Conference and for payment of the travelling and other expenses of the Commissioners. In the case of provinces where no legislative action has been taken and in the case of the Dominion, representatives are appointed and expenses provided by order of the executive. The members of the Conference do not receive remuneration for their services. Generally speaking, the appointees to the Conference are representative of the various branches of the legal profession, drawn from the Bench, governmental law departments, faculties of law schools and the practising profession.

The appointment of Commissioners or representatives by a government does not of course have any binding effect upon the

government or legislature which may or may not, as it wishes, adopt the conclusions or recommendations of the Conference. However, it is only when the recommendations of the Conference are accepted and acted upon by the legislatures that uniformity of law can be achieved.

The primary object of the Conference is to promote uniformity of legislation throughout Canada or the provinces in which uniformity may be found to be practicable by whatever means are suitable to that end. The usual means are the annual meetings of the Conference, at which consideration is given to those branches of the law in respect of which it is desirable and practicable to secure uniformity. Between meetings the work of the Conference is forwarded by correspondence among the members of the executive and the local secretaries. The actual work of the Conference at its annual meetings consists largely in the preparation of model statutes which when completed are recommended to the legislatures for enactment.

While the primary work of the Conference has been and is to achieve uniformity in respect of subject matters covered by existing legislation, the Conference has nevertheless gone beyond this field in recent years and has dealt with subjects not yet covered by legislation in Canada which after preparation are recommended to the legislatures for enactment. Examples of this practice are the Commorientes Act, section 38 of the Uniform Evidence Act and the Uniform Regulations Act. In these instances the Conference has felt it better to establish and recommend a uniform statute before any legislature has dealt with the subject rather than wait until the subject had been legislated upon in several jurisdictions and then attempt the more difficult task of recommending changes to effect uniformity.

Another innovation in the work of the Conference was the establishment at the 1944 meeting of a section on criminal law and procedure. This proposal was first put forward by the Criminal Law Section of The Canadian Bar Association under the chairmanship of J. C. McRuer, K.C., at the Winnipeg meeting in 1943. It was there pointed out that no body existed in Canada with the proper personnel to study and prepare recommendations for amendments to the Criminal Code and relevant statutes in finished form for submission to the Minister of Justice. This discussion resulted in a resolution of The Canadian Bar Association that the Conference should enlarge the scope of its work to encompass this field. At the 1944 meeting of the Conference in Niagara Falls this recommendation was acted upon and a section constituted for this purpose, to which most

provinces and the Dominion appointed special representatives. The work of the Criminal Law Section was continued at the 1945 meeting in Montreal with an increased attendance.

Before the 1946 meeting is held it is likely that the joint publicity project of The Canadian Bar Association and the Conference will have been completed. The plans call for the distribution to every lawyer in Canada of a copy of the second edition of the pamphlet "Uniformity—Coast to Coast" and an accompanying letter from the President of the Bar Association.

L. R. MACT.

TABLE

The following table shows the model statutes prepared and adopted adopted by the Parliament of Canada

TITLE OF ACT		ADOPTED BY		
	Conference	Alberta	B.C.	Man.
Assignment of Book Debts	1928	1929		1929
Bills of Sale	1928	1929		1929
Bulk Sales	1920	1922	1921	1921
Commorientes	1939		1939	1942
Conditional Sales	1922		1922	
Contributory Negligence	1924	1937*	1925	
Corporation Securities Registration	1931			
Defamation	1944			
Devolution of Real Property	1927	1928		
Evidence	1941		'41, '42, '45†	'42, '45
Family Dependents	1945			
Fire Insurance Policy	1924	1926	1925	1925
Foreign Affidavits	1938			
Foreign Judgments	1933			
Interpretation	1938			1939†
Intestate Succession	1925	1928	1925	1927‡
Judicial Notice of Statutes and Proof of State Documents	1930		1932	1933
Landlord and Tenant	1937			
Legitimation	1920	1928	1922	1920
Life Insurance	1923	1924	1923	1924
Limitation of Actions	1931	1935		1932
Married Women's Property	1943			1945
Partnership xx		1899	1894	1897
Partnerships Registration	1938			
Reciprocal Enforcement of Judgments	1924	1925, am. 1935	1925	
Regulations	1943			1945‡
Sale of Goods xx		1898	1897	1896
Warehousemen's Lien	1921	1922	1922	1923
Warehouse Receipts	1945			
Wills	1929			1936

* Adopted as revised.

x As part of Evidence Ac

xx Included in table pursuant to 1942 Resolution (1942 Proceedings, p. 1 and passed in substantially the same form as the Imperial statut

MODEL STATUTES

by the Conference and to what extent, if any, these have been and the Legislatures of the Provinces.

ADOPTED BY							REMARKS
N.B.	N.S.	Ont.	P.E.I.	Que.	Sask.	Canada	
1931	1931	1931	1931	...	1929	. . .	Am. '31
....	1930	...	. .	....	1929	. . .	Am. '31 & '32
1927	....	.	1933	....	...	...	Am. '25 & '39
1940	1941	1940	1940	. .	1942	. . .	.....
1927	1930	. . .	1934	...	...	....	Am. '27, '29, '30 & '33
1925	1926	...	1938 *	....	1944	. . .	Rev. '34 & '35
....	1933	1932	. .	...	1932	....	.....
...	...	. .	...	. .	....	....	.....
1934 †	..	. .	....	.	1928	....	.....
1942 †	1945 †	'42, '45 †	....	.	'42, '45 †	'42, '43 †	Am. '44 & '45
....	....	....	....	. .	....	....	.....
1931	1930	1924	1933	....	1925	....	Stat. cond. 17 not adopted.
....	....	....	....	.. .	....	....	.....
....	....	....	....	..	1934	....	.....
....	....	....	1939		1943	....	Am. '39 & '41
1926	....	....	....	. .	1928	....	Am. '26
1931, am. 1934	....	..	1939 x	....	....	....	Am. '31
1938	..	. . .	1939	....	....	....	.....
1920	$	1921	1920	$	1920	....	.....
1924	1925	1924	1933	. . .	1924	....	.....
....	....	...	1939 ‡	.	1932	....	Am. '32
....	....	. . .	....	.. .	....	....	.....
1921	1911	1920	1920	. .	1898	....	.....
....	....	....	....	. .	1941 †	....	Am. '45
1925	....	1929	. .	....	1924	....	Am. '25
....	....	1944 ‡	....	. .	....	....	.....
1919	1910	1920	1919	. .	1896	....	.....
1923	. ..	1924	1938	. .	1922	....	.....
....	....	....	....	....	....	....	.....
....	....	....	....	....	1931	....	.....

† In part.

‡ With slight modifications.

$ Provisions similar in effect are in force.

PROCEEDINGS

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

The following Commissioners and representatives were present at some or all of the sessions of the Conference :

Alberta :

MESSRS. GRAY AND WILSON.

British Columbia :

MESSRS. DESBRISAY and HOGG.

Manitoba :

MESSRS. FILLMORE, FISHER and MOFFAT.

New Brunswick :

HIS HONOUR JUDGE DICKSON, MESSRS. J. E. HUGHES, P. J. HUGHES and PORTER.

Ontario :

HONOURABLE MR. BLACKWELL, HONOURABLE MR. JUSTICE BARLOW, MESSRS. MACTAVISH, SEDGWICK and SILK.

Prince Edward Island :

MESSRS. HOLMES and TWEEDY.

Quebec :

MESSRS. LEMESURIER AND TOURIGNY.

Saskatchewan :

MESSRS. BLACKWOOD, RUNCIMAN and THOM.

Canada :

MESSRS. FONTAINE, FORSYTH, JACKETT and O'MEARA.

SUMMARY OF PROCEEDINGS

Statement of Peter J. Hughes, K.C., representing the Conference of Commissioners on Uniformity of Legislation in Canada, presented to the Twenty-eighth Annual Meeting of the Council of The Canadian Bar Association at Montreal, Quebec, on Tuesday, August 28th, 1945.

The Conference of Commissioners on Uniformity of Legislation in Canada concluded its meetings this morning. The Dominion and all the Provinces, except Nova Scotia, were represented.

In conformity with the practice I have been directed by the Conference to present a statement of the matters dealt with at the meeting.

The Conference has again considered the draft Evidence Act, made certain changes and have recommended the draft for enactment.

One of the chief matters considered was the application of the rule in *Russell* v. *Russell* by which a husband is prohibited from giving evidence that he is not the father of his wife's child. That rule has seemed to us to shut out the evidence most applicable or available in the matter. We have drawn a section to permit such evidence to be given.

We have also recommended bills with respect to Family Dependents and to Partnerships Registration particularly requiring the registration of persons included in the partnership. We have also completed the Warehouse Receipts Act. We have given careful consideration to these several measures and we hope that they will be useful.

We have also given careful consideration to the Mechanics' Lien Act and have made certain recommendations but the consideration of this draft bill has not been completed and the bill will come up for further consideration next year.

SITTINGS

The Conference held the following Sessions :

First Session—
Thursday.....August 23rd.....10.00 a.m.—12.30 p.m.

Second Session—
Thursday.....August 23rd..... 2.30 p.m.— 4.00 p.m.

Third Session—
Thursday.....August 23rd..... 8.00 p.m.—10.30 p.m.

Fourth Session—
Friday.....August 24th.....10.00 a.m.—12.30 p.m.

Fifth Session—
Friday.....August 24th..... 2.30 p.m.— 4.00 p.m.

Sixth Session—
Friday.....August 24th..... 8.00 p.m.—10.30 p.m.

Seventh Session—
Saturday.....August 25th.....10.00 a.m.— 1.00 p.m.

Eighth Session—
Monday .....August 27th.....10.00 a.m.—12.30 p.m.

Ninth Session—
Monday .....August 27th..... 2.30 p.m.— 5.30 p.m.

Tenth Session—
Monday .....August 27th..... 8.00 p.m.—10.30 p.m.

Eleventh Session—
Tuesday.....August 28th.....10.00 a.m.—12.30 p.m.

MINUTES OF UNIFORM LAW SECTION

FIRST DAY

Thursday, August 23rd, 1945.

First Session

Opening.

The Conference assembled in the Library of the Faculty of Law, McGill University, which is located in Purvis Hall at the corner of Pine and Peel Streets, Montreal, Quebec.

Chairman.

Mr. Fillmore, the President of the Conference, occupied the chair and addressed the Conference briefly, outlining the work of the meeting as set out in the Agenda (Appendix A).

Minutes of Last Meeting.

The minutes of the 1944 meeting, as printed in the 1944 Proceedings, were taken as read and confirmed.

Treasurer's Report.

The report of the Treasurer, Mr. Runciman, was received and referred to Messrs. Hogg and MacTavish for audit and report.

Statement to Canadian Bar Association.

Mr. Peter J. Hughes was appointed the representative of the Conference to make a statement, if called upon, to the Council of The Canadian Bar Association on the work of the Conference at this meeting.

Press Representative.

Mr. Tourigny was appointed to act as Press Representative during this meeting.

Secretarial Assistance.

The following resolution was adopted:

RESOLVED that the Secretary be authorized to employ such secretarial assistance as he may require, to be paid out of the funds of the Conference.

Annual Grants.

The following resolution was adopted:

RESOLVED that the Treasurer communicate with each local secretary with a view to obtaining from the Government of Canada and of each Province a fixed annual grant of fifty dollars ($50.00) for the support of the Conference.

Report of Proceedings.

The Secretary was requested:

(i) to prepare a report of the proceedings of this meeting of the Conference, to have the report printed in pamphlet form and to send copies thereof to the members of the Conference;

(ii) to arrange with The Canadian Bar Association to have the report of the proceedings of the Conference printed as an addendum to any report of proceedings of the Association that may be published, the cost thereof to be paid by the Conference; and

(iii) to consult with the local secretaries with a view of sending copies of the printed report of the proceedings to local law associations or other interested bodies or persons in each jurisdiction in order to promote the work of the Conference among those indirectly concerned.

Hours of Sitting.

It was decided that the hours of sitting would be the same as those of the last meeting, namely, for the morning sessions—10.00 to 12.30; for the afternoon sessions—2.30 to 4.00; and for the evening sessions—8.00 to 10.30; and that no sitting would be held on Saturday afternoon or evening.

Next Meeting.

The following resolution was adopted:

RESOLVED that the next meeting of the Conference be held during the five days, exclusive of Sunday, before the next annual meeting of The Canadian Bar Association at or near the same place, and that if a meeting of the Bar Association is not held next year, a meeting of the Conference shall nevertheless be held if that course is at all practicable, in which event the time and place of the meeting shall be in the discretion of the President.

Publicity.

The Secretary, Mr. MacTavish, made a report on the proposed project of printing and distributing a second edition of the pamphlet "Uniformity—Coast to Coast" to all lawyers in Canada, to be accompanied by a letter from the President of The Canadian Bar Association, the cost thereof to be shared by the Conference and the Association.

The following resolution was adopted:

RESOLVED that Mr. Justice Barlow, the Vice-President for Ontario of The Canadian Bar Association, be appointed to discuss the matters mentioned in the Secretary's report with the Association and that if suitable arrangements are agreed upon, the Secretary be authorized to proceed with the project.

Evidence Act.

Mr. Fisher presented the report of the Manitoba Commissioners (Appendix B1).

Consideration of the proposed amendments was proceeded with.

Second Session

Evidence Act—(continued).

Upon completion of the consideration of the matters dealt with in the Manitoba Report, Mr. Justice Barlow presented the report of the Ontario Commissioners on the rule in *Russell* v. *Russell* (Appendix B2).

Consideration of the proposed amendment was proceeded with.

Third Session

Evidence Act—(continued).

Consideration of the proposed amendment was continued. After discussion it was decided to allow the matter to stand for further consideration later in the meeting.

Foreign Affidavits.

After discussion, instituted by Mr. O'Meara, the following resolution was adopted:

RESOLVED that should any Province not pass the model Uniform Evidence Act including clauses *c*, *d* and *e* of section 58 as set out on pages 90 and 91 of the 1941 Proceedings, it is recommended that the Foreign Affidavits Act, as set out on pages 50 and 51 of the 1938 Proceedings, be enacted.

Extraordinary Remedies.

The following resolution was adopted:

RESOLVED that the resolution on page 29 of the 1944 Proceedings be extended one year with a view to having the Alberta Commissioners prepare draft uniform rules respecting extraordinary remedies, similar in nature to the Alberta rules, for presentation to the next meeting of the Conference.

Family Dependents.

Mr. Fisher presented the report of the Manitoba Commissioners (Appendix C1).

Consideration of the report and the attached draft Uniform Act was commenced.

SECOND DAY

Friday, August 24th, 1945.

Fourth Session

Nominating Committee.

The President, Mr. Fillmore, named Messrs. Hogg, Peter J. Hughes, Runciman and Silk as a nominating committee to submit recommendations as to the officers of the Conference for the ensuing year.

Evidence Act—(continued).

Consideration of a proposed section 4*a* to abrogate the effect of the rule in *Russell* v. *Russell* was continued.

Family Dependents—(continued).

Consideration of the draft Uniform Act was continued.

Fifth Session

Treasurer's Report—(concluded).

The report of the Treasurer, Mr. Runciman, as received, was found to be in order and approved by the auditors, Messrs. Hogg and MacTavish (Appendix D).

The following resolution was adopted:

RESOLVED that the Treasurer's report as received and audited be adopted.

Family Dependents—(concluded).

Consideration of the draft Uniform Act was concluded.

The following resolution was adopted:

RESOLVED that the draft Uniform Testators Family Maintenance Act be referred back to the Manitoba Commissioners for incorporation therein of the amendments made at this meeting of the Conference and that the draft as so revised be included in this year's Proceedings (Appendix C2); that copies thereof be sent by the Manitoba Commissioners to all members of the Conference and that if the revised draft is not disapproved by two or more provinces by the 30th day of November, 1945, the Uniform Act be recommended to the Provincial Legislatures for enactment.

NOTE:—Copies of the revised draft were mailed to the members of the Conference on October 5, 1945. As no messages of disapproval were received by the Secretary by November 30, 1945, the Uniform Act is accordingly recommended for enactment as provided in the above resolution.

Service of Process by Mail.

The following resolution was adopted:

RESOLVED that the draft provision with respect to the service of process by mail be referred back to the British Columbia Commissioners for incorporation therein of the amendments made at the 1944 meeting of the Conference and that the draft as so revised be included in this year's Proceedings (Appendix E); that copies thereof be sent to all members of the Conference and that if the revised draft is not disapproved by two or more provinces or by the Dominion and one or more provinces by the 30th day of November, 1945, it be recommended to the Parliament of Canada and the Provincial Legislatures for enactment in appropriate statutes with whatever changes may be necessary in order to conform with the content.

NOTE:—Copies of the draft provision were mailed to the members of the Conference on November 20, 1945. As no messages of disapproval were received by the Secretary by November 30, 1945, the provision is accordingly recommended for enactment as provided in the above resolution.

Conditional Sales Act.

Mr. Gray presented the report of the Alberta Commissioners (Appendix F).

Consideration of the draft Uniform Act attached to the report was commenced.

Sixth Session

Conditional Sales Act—(continued).

Consideration of the draft Uniform Act was continued.

The following resolution was adopted:

RESOLVED that further consideration of the draft Uniform Act be deferred for the present, to be continued if time permits at the end of the Agenda.

Limitations (Enemies and War Prisoners) Act, 1945.

Mr. Jackett brought to the attention of the Conference the fact that the Parliament of the United Kingdom had passed this statute, being chapter 16, 8 and 9 George VI (Appendix G), and suggested that consideration might be given to the advisability of recommending the enactment of similar legislation in the provinces of Canada.

After discussion, the President named Messrs. Hogg, Peter J. Hughes and Silk as a committee to study the matter and report back to this meeting.

Evidence Act—(continued).

Consideration was given to the advisability of adding a clause to the proposed section abrogating the effect of the rule in *Russell* v. *Russell,* which would expressly protect the interests of children.

THIRD DAY

Saturday, August 25th, 1945.

Seventh Session

Warehouse Receipts Act.

The Conference took under consideration the revised draft of the Uniform Warehouse Receipts Act (1944 Proceedings, page 72) which had been tentatively approved at last year's meeting, but which had been subsequently objected to by the Manitoba and Ontario Commissioners.

Mr. Joseph A. Whitmore, Executive Secretary of the Canadian Warehousemen's Association, attended the Conference and made submissions in respect of the draft Act.

After Mr. Whitmore withdrew the Conference considered amendments to clause *b* of subsection 1 of section 7 and sections 21 and 22 and resolved that section 9 of the Ontario Act, with any necessary changes in language, be added to the model Act as subsection 3 of section 5.

The President named Messrs. DesBrisay, Fisher and Silk as a committee to draft the amendments already agreed to in principle for consideration by the Conference at the Monday afternoon session.

Partnerships Registration.

Mr. Runciman presented the report of the Saskatchewan Commissioners (Appendix H1).

FOURTH DAY

Monday, August 27th, 1945.

Eighth Session

Mechanics' Liens.

Mr. Fisher presented the report of the Manitoba Commissioners (Appendix J1). Consideration of the draft Uniform Act attached to the report was begun.

J. J. Mathews of Ottawa, Solicitor to the Housing Administration (Dominion), attended the Conference.

Several matters of principle were discussed and settled sufficiently to enable the draftsman to prepare a complete draft.

Partnerships Registration—(continued).

Consideration of the draft Uniform Act was continued.

Ninth Session

Warehouse Receipts—(concluded).

The drafting committee reported back. Thereupon consideration was given to the proposed amendments and after discussion the same were approved (Appendix K1).

The following resolution was adopted:

RESOLVED that the Uniform Warehouse Receipts Act be referred to the British Columbia Commissioners for incorporation therein of the amendments made at this meeting of the Conference and that the Act as so amended be included in this year's Proceedings (Appendix K2); that copies of the amendments be sent by the British Columbia Commissioners to all members of the Conference and that if the amendments are not disapproved by two or more provinces by the 30th day of November, 1945, the amendments, or the Uniform Act as amended, as the case may be, be recommended to the Provincial Legislatures for enactment.

NOTE:—Copies of the amendments were mailed to members of the Conference on November 20, 1945. As no messages of disapproval were received by the Secretary by November 30, 1945, the amendments or the Act as amended, as the case may be, are accordingly recommended for enactment by the above resolution.

Limitations (Enemies and War Prisoners) Act, 1945—(concluded).

After discussion it was decided to make no recommendation with respect to this subject matter, as it was considered advisable to leave the matter open for each jurisdiction to deal with as it deemed fit, free from any recommendation of the Conference.

Reciprocal Enforcement of Judgments.

In the absence of Mr. Read, who has special knowledge of the subject, it was by resolution referred back to the Dominion and Quebec representatives for report next year.

Reciprocal Enforcement of Maintenance Orders.

Mr. MacTavish presented a letter written by Judge Mott of the Toronto Family Court to the Deputy Attorney-General of Ontario which set out the difficulties of proper law enforcement under present conditions under which a husband in one jurisdiction with a maintenance order against him may move to another province and thereby evade responsibility under the order, even though he be well-to-do and his wife destitute.

It will be recalled that this matter was the subject of letters to the various provinces from the Under Secretary of State (Canada) indicating a request of the Government of the United Kingdom for enactment of legislation in the provinces of Canada in line with the Maintenance Orders (Facilities for Enforcement) Act, 1920, 10-11 Geo. V, c. 33.

After discussion the following resolution was adopted:

RESOLVED that Messrs. Hogg and Runciman prepare a Reciprocal Enforcement of Maintenance Orders Act and send copies thereof to all provincial Legislative Counsel as soon as possible and report thereon to the next meeting of the Conference.

Tenth Session

Partnerships Registration—(concluded).

Consideration of the draft Uniform Act was concluded.

The following resolution was adopted:

RESOLVED that the draft Uniform Partnerships Registration Act be referred back to the Saskatchewan Commissioners for incorporation therein of the amendments made at this meeting of the Conference and that the draft Act as amended be included in this year's Proceedings (Appendix H3); that copies of the amendments (Appendix H2) be sent by the Saskatchewan Commissioners to all members of the Conference and that if

the amendments are not disapproved by two or more provinces by the 30th day of November, 1945, the draft Act as so amended be recommended to the Provincial Legislatures for enactment.

NOTE:—Copies of the said amendments were mailed to the members of the Conference on October 23, 1945. As three messages of disapproval (Manitoba, Ontario and Saskatchewan) were received by the Secretary by November 30, 1945, the recommendation for enactment is accordingly withheld. Objection is taken to subsections 1 and 2 of section 13*a* as set out in Appendix H2 on the ground of indefiniteness.

FIFTH DAY

Tuesday, August 28th, 1945.

Eleventh Session

Mechanics' Liens—(concluded).

After further consideration of the draft Uniform Act the following resolution was adopted:

RESOLVED that the draft Uniform Mechanics' Lien Act be referred back to the Manitoba Commissioners for incorporation therein of the amendments made at this meeting, that copies of the new draft be sent as soon as possible to the members of the Conference and that this draft be considered at the next meeting of the Conference.

Evidence Act—(concluded).

After discussion it was decided to delete all words from the proposed section 4*a* designed to protect the interests of children and to have the section simply a provision having the effect of abrogating the rule in *Russell* v. *Russell.*

The following resolution was adopted:

RESOLVED that the Uniform Evidence Act be referred to the Manitoba Commissioners for incorporation therein of the amendments made at this meeting of the Conference and that the Act as so amended be included in this year's Proceedings (Appendix B3); that copies of the amendments be sent by the Manitoba Commissioners to all members of the Conference and that if the amendments are not disapproved by two or more provinces by the 30th day of November, 1945, the draft Uniform Act as amended be recommended for enactment.

NOTE:—Copies of the amendments were mailed to the members of the Conference on October 5, 1945. As no messages of disapproval were received by the Secretary by November 30, 1945, the draft Uniform Act as amended is accordingly recommended for enactment by the above resolution.

Conditional Sales—(concluded).

The following resolution was adopted:

RESOLVED that the further consideration of the new draft Uniform Act be set over to the next meeting of the Conference.

Nominating Committee—(concluded).

The report of the Nominating Committee was presented by Mr. Silk and was received and adopted. The report recommended the following officers:

Hon. President .....Peter J. Hughes, K.C., Fredericton.
President.....W. P. Fillmore, K.C., Winnipeg.
Vice-President..... ...W. P. J. O'Meara, K.C., Ottawa.
Secretary..... .....L. R. MacTavish, K.C., Toronto.
Treasurer..... J. P. Runciman, Regina.

Appreciation of J. C. Binnie.

The following resolution was adopted:

RESOLVED that the Secretary send J. C. Binnie, Esq., Secretary-Treasurer of The Canadian Bar Association, a letter expressing the appreciation of the Conference for his efforts on its behalf, particularly his suggestion of Purvis Hall as a meeting place and making the arrangements therefor and also his help in clarifying the difficult situation as to hotel accommodation. The Conference is grateful to Mr. Binnie, inasmuch as his excellent liaison work, performed *ex gratia*, assisted materially in the success of this meeting.

Appreciations of Hospitality.

The following resolution was adopted:

RESOLVED that the Conference greatly appreciates the courtesy and hospitality extended its members by the Honourable F. Philippe Brais, C.B.E., K.C., the Batonnier and the members of the General Council of the Bar of the Province of Quebec, the Batonnier and the members of the Council of the Bar of Montreal and Alfred Tourigny, K.C., and that the Secretary be authorized to send an appropriate letter of thanks to each.

Purvis Hall.

The following resolution was adopted:

RESOLVED that the Secretary be authorized to send letters to Dr. Earl Beach, Warden of Purvis Hall and C. S. LeMesurier, K.C., Dean of the Faculty of Law, McGill University, thanking them for making available the facilities of Purvis Hall to the Conference and that the Treasurer be authorized to issue a cheque for $40 to be distributed by Dean LeMesurier as a gratuity to those of the staff of Purvis Hall who have been put to additional work by reason of the Conference's meeting.

Henry G. Lawson, K.C.

The following resolution was adopted:

RESOLVED that the announcement of the death of Henry G. Lawson, K.C., of Victoria, British Columbia, a member of this Conference from 1925 to 1942, was received with deep sorrow and that an appropriate letter be sent to Mrs. Lawson.

President's Closing Remarks.

Mr. Fillmore addressed the Conference briefly, thanking the members for their co-operation and expressing his thanks to them for their vote of confidence in him by making him their presiding officer for another term.

(Conclusion of Meeting)

Frustrated Contracts.

This matter, which appeared on the Agenda under the heading "New Business", was not reached. As the time element is of considerable importance in relation to this subject the report of the Manitoba Commissioners is included in these Proceedings (Appendix L).

Attention is also directed to the two articles on the subject by John D. Falconbridge, K.C., Dean of Osgoode Hall Law School and a member of this Conference from 1918 to 1933, which appear in Parts 1 and 6, Volume 23 of the *Canadian Bar Review*, published in January and June-July, 1945, at pages 43 and 469. The Law Reform (Frustrated Contracts) Act, 1943, is set out on pages 56 to 58 of the Review.

MINUTES OF THE CRIMINAL LAW SECTION

The following were present at some or all sessions of the Section:

Honourable L. E. Blackwell, K.C., Attorney-General of Ontario;

Alexander Blackwood, K.C., Deputy Attorney-General of Saskatchewan;

Campbell DesBrisay, K.C., representing the Attorney-General of British Columbia;

His Honour Judge Bacon Dickson, representing the Attorney-General of New Brunswick;

Robert Forsyth, K.C., representing the Attorney-General of Canada;

G. Holmes, Esq., representing the Attorney-General of Prince Edward Island;

C. S. LeMesurier, K.C., Dean, Faculty of Law, McGill University, Montreal;

Andrew Moffat, K.C., representing the Attorney-General of Manitoba;

Joseph Sedgwick, K.C., Toronto, Ontario; and

H. J. Wilson, K.C., Deputy Attorney-General of Alberta.

FIRST DAY

Thursday, August 23rd, 1945.

Opening.

After the formal opening of the Conference the members of the Criminal Law Section withdrew to hold separate sessions.

Officers.

Mr. Wilson, Chairman of the Section, occupied the chair and Mr. Forsyth, Secretary of the Section, acted as Secretary.

Minutes of the Last Meeting.

The minutes of the 1944 Meeting of the Section, as printed in the Proceedings of the Conference, were taken as read and confirmed.

Habitual Criminals.

Mr. Wilson, for the Alberta Provincial Committee, presented a report on this matter.

After discussion, the following resolution was adopted:

RESOLVED that it be recommended that the Criminal Code be amended by adding the following part and that institutions separate from the present penal institutions be set up for the treatment of habitual criminals:—

PART X (A)

HABITUAL CRIMINALS

575A. In this Part unless the context otherwise requires, "Judge" means a judge having Criminal Jurisdiction in the Province, or a judge acting under Part XVIII of this Act.

575B. Where a person is convicted of an indictable offence committed after the passing of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be an habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion by reason of his criminal habits and mode of life, that it is expedient for the protection of the public, may pass a further sentence ordering that he be detained for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be an habitual criminal.

575C. (1) A person shall not be found to be an habitual criminal unless the judge or jury as the case may be, finds on evidence,

(a) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the passing of this Part, and that he is leading persistently a criminal life; or

(b) that he has on a previous conviction been found to be an habitual criminal and sentenced to preventive detention.

(2) In any indictment under this section it shall be sufficient after charging the crime, to state that the offender is an habitual criminal.

(3) In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or

is found guilty by the judge or jury as the case may be, unless he thereafter pleads guilty to being an habitual criminal, the judge or jury shall be charged to enquire whether or not he is an habitual criminal and in that case it shall not be necessary to swear the jury again.

(4) A person shall not be tried on a charge of being an habitual criminal unless

(a) the Attorney General of the Province in which the accused is to be tried consents thereto; and

(b) not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried and to the offender and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

575D. Without prejudice to the right of the accused to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a criminal life.

575E. A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, and the provisions of the Criminal Code relating to an appeal from a conviction for an indictable offence shall be applicable thereto.

575F. Where a person has been sentenced, whether before or after the passing of this Part, to penal servitude of five years or upwards, and has been sentenced to preventive detention under this Part, the Crown may at any time commute the whole or any part of the residue of the sentence to a sentence of preventive detention under this Part.

575G. (1) The sentence of preventive detention shall take effect immediately on the conviction of a person on a charge that he is an habitual criminal.

(2) Persons undergoing preventive detention shall be confined in a prison or part of a prison set apart for that purpose.

(3) Persons undergoing preventive detention shall be subjected to such disciplinary and reformative influences as may be prescribed by the prison regulations, and shall be employed on such work as may be best fitted to make them able and willing to earn an honest livelihood on discharge.

575H. (1) The minister of Justice shall, once at least in every three years during which a person is detained in custody

under a sentence of preventive detention, review the condition, history and circumstances of that person with a view to determining whether he should be placed out on licence, and if so, on what conditions.

(2) The provisions of the Ticket of Leave Act, being chapter 197 of the Revised Statutes of Canada, 1927, and amendments thereto, shall apply to such habitual offenders and to any licence granted under the provisions of this section.

Murder.

Mr. Wilson suggested an amendment to section 259(c) of the Code, the matter having arisen out of the judgment of O'Halloran J. in *Rex* v. *Harrison*, 84 C.C.C. 78.

After consideration, the following resolution was adopted:

RESOLVED that it be recommended that clause c of section 259 of the Criminal Code be repealed and the following substituted therefor:

> (c) If the offender means to cause death or being reckless as to whether death ensues or not means to cause such bodily injury as is known to the offender to be likely to cause death to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed.

SECOND DAY

Friday, August 24th, 1945.

Imprisonment.

Mr. Forsyth pointed out that section 122(2) of the Code appeared to be inconsistent with section 1056(a). The matter was referred to Messrs. Blackwood and Moffat for study and report.

Juries.

Mr. Forsyth pointed out that by reason of the operation of section 945(4) of the Code, great inconvenience was occasioned where juries were kept together over night in cases of rape. The following resolution was adopted:

RESOLVED that it be recommended that subsection 4 of section 945 of the Code be repealed and the following substituted therefor:

> 4. Murder.—Such direction shall be given in all cases where the accused is charged with murder or treason.

Lotteries.

Mr. Forsyth then referred to section 236 of the Code and mentioned particularly the lotteries now being conducted for charitable purposes. He suggested that before the prosecution under this section could be instituted the consent of the Attorney General of the Province should be obtained. The meeting was opposed to the suggestion.

Gaming Houses.

Mr Forsyth pointed out that under section 641(3) of the Code all gaming instruments, etc., were to be forfeited to the Crown for the public use of Canada, but that such property is very often and quite properly claimed by the Province. After consideration, the following resolution was adopted:

RESOLVED that it be recommended that subsection (3) of section 641 of the Code be amended by striking out the words "for the public use of Canada" and the words "in the right of the Province" substituted.

Automobiles.

Mr. Wilson referred to section 285 of the Code and suggested that an additional offence be added thereto similar to the careless driving section of the Ontario Highway Traffic Act. The meeting agreed that no such action was necessary.

Identification of Criminals.

Mr. Forsyth then referred to the Identification of Criminals Act and suggested that the scope of the Act should be extended to include persons arrested under the Extradition Treaty or the Fugitive Offenders Act. The matter was referred to Mr. DesBrisay for study and report.

Archambault Report.

Mr. DesBrisay brought up the question as to whether or not the recommendations of the Archambault Report on penitentiaries should be implemented. It was decided that this was not the function of this Section and it was agreed that Mr. Wilson would refer to the matter at a meeting of the Council of The Canadian Bar Association.

Commencement of Sentences.

Mr. Forsyth suggested that the provisions with respect to the commencement of sentences should be set forth clearly in the Code rather than in the Penitentiaries Act. The matter was referred to Judge Dickson and Mr. Holmes for study and report.

Part Payment of Fines.

Mr. LeMesurier proposed that a measure be recommended whereby fines could be paid in instalments. It was decided to take no action.

Evidence.

Mr. Sedgwick suggested that certain amendments should be made to the Evidence Act, especially with respect to evidence which may be adduced in divorce cases. The matter was referred to the Ontario Provincial Committee for report at next year's meeting.

Infanticide.

Mr. Blackwood presented the report of the Saskatchewan Provincial Committee on the advisability of introducing legislation in Canada in conformity with the English Infanticide Act.

After discussion, the following resolution was adopted:

RESOLVED that the report on infanticide be referred back to the Saskatchewan Provincial Committee for incorporation in the proposed amendment of the Code of the amendments agreed upon at this meeting and that such draft be submitted to the next meeting.

Part XV of Code.

Mr. DesBrisay, for the British Columbia Provincial Committee, presented its report on the revision of Part XV of the Code.

THIRD DAY

Saturday, August 25th, 1945.

Part XV of Code—(continued).

The discussion on the report of the British Columbia Provincial Committee on Part XV of the Code was continued.

The following resolution was adopted:

RESOLVED that the report of the British Columbia Provincial Committee on the revision of Part XV of the Code be referred back to the Committee for further revision, in light of the views expressed at this meeting, for submission at next year's meeting.

Imprisonment—(continued).

Messrs. Blackwood and Moffat then presented a draft amendment designed to remove the inconsistencies between section 122(2) and section 1056(a).

After consideration, the draft amendment was referred back to Messrs. Blackwood and Moffat for reconsideration.

FOURTH DAY

Monday, August 27th, 1945.

Fraud.

Mr. Wilson suggested that consideration should be given to the fraud sections of the Code, especially with respect to the sale of securities. After discussion, the following resolution was adopted:

RESOLVED that the fraud sections of the Code, especially as they apply to the sale of securities, be referred to Messrs. Blackwell and Sedgwick and the Ontario Provincial Committee for report at the next meeting.

Information and Complaint.

Mr. Forsyth suggested that the term "Information and Complaint" was ambiguous and obsolete and that a more simple expression such as "Complaint" should be used, especially in connection with summary offences. The following resolution was adopted:

RESOLVED that consideration be given to the expression "Information and Complaint", with the view of recommending a more satisfactory expression. The matter was referred to the British Columbia Provincial Committee for report at the next meeting.

Mr. Forsyth pointed out that section 710(5) and section 721A were ambiguous and apparently intended to refer to offences where, by the statute creating them, a heavier penalty is imposed for a second offence. The matter was referred to the British Columbia Provincial Committee for revision.

Part XV of Code—Trials de novo.

Mr. Wilson referred to the provisions of Part XV of the Code relative to trials de novo and voiced his disapproval of such

trials as they led to many abuses. The matter was referred to the British Columbia Provincial Committee for report at the next meeting.

Mr. Forsyth stated that he considered that offences under Part XV should be limited to minor offences which are not ordinarily considered crimes, such as failure to file returns under the Income Tax Act, common assault and other offences which are not really of a criminal nature. He considered that these should be known as minor offences and triable by justices of the peace, and that all other offences should be removed from Part XV and placed under Part XVI. Mr. Forsyth proposed that offences should be divided into four classes, as follows:

(1) Minor offences triable under Part XV.

(2) All other offences now triable as summary conviction matters, together with offences mentioned in section 773. These offences should be termed indictable offences and should, at the option of the Crown, be tried summarily. This would remove them from the jurisdiction of Part XV and place them under Part XVI. The accused, so far as choosing his forum is concerned, would be in no worse position than at present.

(3) All other indictable offences, except those mentioned in section 583, would be triable under Part XVI only with the consent of the accused.

(4) Offences mentioned in section 583 would be triable as at present provided. Mr. Forsyth was requested to develop this suggestion more fully and to report thereon at the next meeting of the Section.

Part XVI of Code.

Mr. Moffat, on behalf of the Manitoba Provincial Committee, presented the report, being a redraft of Part XVI of the Code.

FIFTH DAY

Tuesday, August 28th, 1945.

Part XVI of Code—(continued).

Consideration of the Manitoba Provincial Committee report was continued. Upon completion of the discussion, the following resolution was adopted:

RESOLVED that the redraft of Part XVI of the Code be referred back to the Manitoba Provincial Committee for reconsideration and redraft along the lines agreed upon at this meeting, and that they report thereon at next year's meeting.

Penalties.

Mr. Blackwood for the Saskatchewan Provincial Committee presented the report on the penalty sections of the Code.

Mr. Forsyth suggested that before the report be discussed consideration should be given to the advisability of having one penalty section in the Code to which all offences should be referable. He considered that four or five sets of penalties might be established and every offence be punishable under one of these. It would lead to uniformity and would dispose of the present unsystematic method of prescribing penalties.

The suggestion was agreed to in principle and the matter referred to the Saskatchewan Provincial Committee for study and report at next year's meeting.

Nominating Committee's Report.

The report of the Nominating Committee, composed of Judge Dickson and Mr. DesBrisay, was presented by Judge Dickson and was received and adopted. The report recommended the following officers for the ensuing year:

Chairman	H. J. Wilson, K.C., Edmonton.
Secretary	Robert Forsyth, K.C., Ottawa.

Report of Proceedings.

The following resolution was adopted:

RESOLVED that the minutes of the proceedings of the Section be printed in the annual volume of Proceedings of the Conference.

APPENDIX A

AGENDA

PART I

GENERAL

1. Approval of Minutes of Last Meeting.
2. President's Address.
3. Treasurer's Report.
4. Appointment of Auditors.
5. Report of Auditors.
6. Appointment of Representative to make Statement to The Canadian Bar Association.
7. Appointment of Nominating Committee.
8. Report of Nominating Committee.
9. Appointment of Press Representative.
10. Secretarial Assistance.
11. Publication of Proceedings.
12. Hours of Sitting.
13. Next Meeting.
14. Annual Grants.
15. Special Matters arising from Last Meeting:
    (a) Report of the Secretary on the further distribution of the pamphlet "Uniformity—Coast to Coast" (1944 Proceedings, pages 24 and 32).
    (b) Report of the Committee on the Revision of the Constitution (1944 Proceedings, pages 22 and 30).

PART II

UNIFORM LAW SECTION

1. Conditional Sales Act—Alberta Commissioners (1944 Proceedings, page 24).
2. Evidence Act. Consideration of the Report of the Joint Committee of the Manitoba Bar Association and the Law Society of Manitoba—Manitoba Commissioners.
3. Extraordinary Remedies—Alberta Commissioners (1944 Proceedings, page 29).
4. Family Dependents—Manitoba Commissioners (1944 Proceedings, page 32).

5. Mechanics' Liens—Manitoba Commissioners (1944 Proceedings, page 31).
6. Partnerships Registration—Saskatchewan Commissioners (1944 Proceedings, page 31).
7. Reciprocal Enforcement of Judgments—Dominion and Quebec Representatives (1944 Proceedings, page 25).
8. Service of Process by Mail—British Columbia Commissioners (1944 Proceedings, pages 25 and 26).
9. Soldiers' Divorces—Ontario Commissioners (1944 Proceedings, Page 31).
10. Warehouse Receipts Act—British Columbia Commissioners (1944 Proceedings, page 25).
11. New Business—The Secretary has received notice of the following suggestions:
    (a) Law Reform (Frustrated Contracts) Act, 1943 (United Kingdom). Mr. Rutherford.
    (b) Trustee Acts. Permissible trustee investments. Mr. Rutherford.

PART III

CRIMINAL LAW SECTION

1. Report of Mr. DesBrisay and the British Columbia Provincial Committee on the revision of Part XV of the Criminal Code (1944 Proceedings, page 38).
2. Report of Mr. Allen and the Manitoba Provincial Committee on the recodification of Part XVI of the Criminal Code (1944 Proceedings, page 33).
3. Report of Mr. Sedgwick and the Ontario Provincial Committee on the recodification of Part XVIII of the Criminal Code (1944 Proceedings, page 33).
4. Report of Mr. Blackwood and the Saskatchewan Provincial Committee on the revision of the penalty provisions of the Criminal Code (1944 Proceedings, page 35), and on the matter of the anomalies in section 1081 of the Criminal Code (1944 Proceedings, page 37).
5. Report of Mr. Sedgwick as to whether the Criminal Code contains adequate provisions for allowing a prisoner to appear and elect to a further charge under subsection 4 of section 662 (1944 Proceedings, pages 35 and 36).
6. Report of Mr. Blackwood and the Saskatchewan Provincial Committee on the advisability of introducing legislation

in Canada in conformity with the English Infanticide Act (1944 Proceedings, page 36).

7. Report of Mr. Wilson and the Alberta Provincial Committee on the matter of legislation dealing with habitual criminals such as is in force in England, the State of New York and other states in the United States (1944 Proceedings, page 37).

8. New Business.

APPENDIX B1

THE MODEL EVIDENCE ACT

Report of the Manitoba Commissioners
on
Recommendations of a Joint Report by the Rules and Statutes Committee of the Manitoba Bar Association and the Legislation Committee of the Law Society of Manitoba
respecting the above Act

Part of the above-mentioned joint report deals with matters purely local, i.e. pertaining to Manitoba only; such as the numbering of the sections in the proposed Manitoba amending Act. In such matters, the Conference is not interested. There are other matters in the joint report that the Manitoba Commissioners do not desire either to recommend or submit for consideration. We are submitting, along with this report, a number of copies of the joint report. We have, however, given careful consideration to the same, and set out below those of the recommendations contained therein that we desire to submit for consideration. Where, in our judgment, the recommendation is one that should be favourably considered by the Conference we have so indicated.

1. We submit for consideration that part of the joint report dealing with section 6 of the model Act. It is therein recommended that section 6 be divided into two subsections to read as set out in paragraph 6 of the joint report. A reference is made in the joint report to the views of Mr. Justice Bergman as set out in a letter to the Attorney-General dated 7th February, 1944. The paragraph in that letter dealing with this matter reads as follows:

> "2. I consider the repeal of sections 7 and 8 of the present Act and the substitution therefor of the proposed new section 7 to be a retrograde step. I have never been able to see any logical reason for excusing a witness in a divorce action from answering questions tending to show that he has committed adultery where it is directly in issue, but compelling him to answer such questions if asked in any other form of action. It is capable of great abuse. See, for example, what was sought to be done in the case of *Einfeld* v. *Einfeld* (1939), 47 Man. 25, and which would have been permissible under the proposed new section 7. See

also *Biss* v. *Biss* (1942), 1 W.W.R. 224. I am also of the opinion that the dropping of the words 'and compellable' is a mistake. Why should a party to a divorce action, or the husband or wife of such party, not be compellable to give evidence on such matters as the time and place of the marriage, domicile, etc., which have nothing to do with adultery. This whole question was canvassed very fully before the present sections 7 and 8 were passed in 1935, and the Commissioners have not had the benefit of the very full submission which was made at that time to the Attorney-General and to the Legislative Counsel."

2. We submit and recommend to the Conference the correction of an error in the second line of section 9 of the model Act, as mentioned in paragraph 7 of the joint report, i.e., the substitution of the word "of" for the word "or". We also submit that the word "nor" in the same line should be "or", the negative force of the word "not" near the beginning of the same line applying both to "party" and "employee". The phrase might also be written "being neither a party nor an employee, etc." For the same reason the word "nor" at the beginning of the fourth line should be "or".

3. We submit for consideration paragraph 8 of the joint report recommending that sections 13 and 14 of the model Act be omitted. Mr. Justice Bergman's views, to which reference is made in the report, were expressed in the above-mentioned letter to the Attorney-General as follows:

> "4. I am very certain that the proposed new section 14 is bad legislation. It was carefully considered when the present Act was passed in 1933 and was rejected at that time. This provision is apparently borrowed from Ontario, and the effect of it is stated in *4 C.E.D.* (*Ont.*), p. 716, to be as follows:
>
> > 'In England the rule in such cases is one of practice merely—permitting the jury to believe the uncorroborated statement of the surviving person. The Ontario statute has been said to be merely declaratory of the common law; but it has done more than declare the law, it has changed what was before a practice or maxim of prudence, into an unyielding rule of law preventing the court from acting on uncorroborated evidence'.
>
> See also *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128.
>
> The reports contain cases in which this arbitrary statutory rule has prevented justice being done. The rule

at present prevailing in this province is much sounder. It enables the court to do justice without having its hands tied by an arbitrary statutory rule of evidence, while it also contains all the necessary safeguards. See *McKinnon* v. *Shanks* (1916), 26 Man. 427; *Sparrow* v. *Royal Trust Company* (1932), 40 Man. 211; *Shumardo* v. *Toronto General Trusts Corporation* (1941), 49 Man. 82. I am convinced that you will not find a single member of the Bar who has given the matter any thought who favours this change. It is too high a price to pay for uniformity to introduce legislation which is demonstrably unsound."

4. We submit for consideration paragraph 9 of the joint report dealing with section 17 of the model Act, except that the word "or" should appear at the end of the proposed paragraph (a), and the words "then may be administered" in the third and fourth lines of the proposed paragraph (b) should be dropped as redundant.

5. We submit and recommend to the Conference the changes suggested in paragraphs 10 and 11 of the report referring to subsection (1) of section 18 and to subsection (1) of section 20 of the model Act.

6. With respect to paragraph 12 of the report dealing with section 26 of the model Act, we do not care to recommend or submit the changes proposed by the joint committee; but in view of the notes to section 982 of the Criminal Code, found on page 1236 of Tremeear's Criminal Code (Fifth Edition), we recommend that an additional subsection be added to section 26 of the model Act as follows:

> (3) Similarity of the name of the witness with that of the person named in the certificate shall be *prima facie* proof of the identity of the witness with the person so named.

7. With respect to paragraph 13 of the joint report, dealing with section 27 of the model Act, we do not care to recommend the change proposed by the joint committee but submit for consideration a change in section 27 of the model Act whereby it would be divided into two subsections with other changes as follows:

> 27. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the court proves adverse, the party may by leave of the court cross-examine him and may prove that the witness made at some other time a statement inconsistent with his present testimony.

(2) Before such proof is given the circumstances of the statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make the statement.

8. With respect to paragraph 14 of the joint report, dealing with section 28 of the model Act, the only part of the suggested changes that we desire to submit and recommend is that there be added to that section two additional subsections as follows:

(3) Foreign law shall be pleaded where any rule or statute so requires; and in all cases it shall be the function of the court, and not of the jury, to determine such laws when brought in question.

(4) All courts and officers acting judicially shall take judicial notice of the signature of any of the judges of any court in Canada where such signature is appended or attached to any judicial or official document.

Subsection (3) above proposed is a consolidation of the latter part of subsection (1) and of subsection (2) of section 27 of the present Manitoba Evidence Act. Subsection (4) above proposed is adapted from subsection (1) of section 28 of the present Manitoba Evidence Act. Consideration, however, should be given to the question as to whether the proposed subsection (4) overlaps subsection (2) of section 39 of the model Act.

9. With respect to paragraph 25 of the joint report, dealing with section 56 of the model Act, we submit and recommend this proposal with this change—that we recommend that section 56 of the model Act become subsection (6) of section 51 of the model Act.

10. With respect to paragraph 26 of the report, relating to section 58 of the model Act, the only change which we are prepared to submit and to recommend is that the words "foreign country" in the fourth line of that section be changed to "foreign state", which latter expression is defined in paragraph (h) of section 2 of the model Act.

11. For the reasons mentioned in paragraph 10 above, we recommend that the words "foreign country", where they appear in the fifth line of subsection (2) of section 39 of the model Act, and in the sixth line of subsection (1) of section 63 of the model Act, be changed to read "foreign state".

12. In the joint report it is suggested, among other changes, that in sections 58 and 63 of the model Act, the word "dominion", which is defined in paragraph (f) of section 2, be used in place

of the longer phrases used therein; as it might appear to cover all that is covered by the longer phrases. We submit this proposal for consideration without making any recommendation.

DATED at Winnipeg this 25th day of June, 1945.

W. P. FILLMORE,
R. M. FISHER,
G. S. RUTHERFORD,
Manitoba Commissioners.

THE RULES AND STATUTES COMMITTEE of the Manitoba Bar Association in conjunction with the LEGISLATION COMMITTEE of the Law Society of Manitoba has considered the proposed amendments to the Manitoba Evidence Act and reports as follows:

1. In the proposed amendments there are numerous sections which are the same as or substantially similar to sections in the existing Act and none of these sections will be referred to unless there is some point arising in connection therewith.

2. The Evidence Act is an important Act and is frequently in use. The proposed amendments are very comprehensive and if the existing Act is amended in the manner suggested, it will mean that we have a patched-up Act with such unsatisfactory numbering as Section 60A, 60B, 60C, etc. The Committee recommends that instead of amending the existing Act in the manner suggested, the Act should be repealed and a new Act enacted.

3. While a great deal can be said for having adequate definitions in any Act, the Committee is of the opinion that there is a point beyond which words can be over-defined. In the interpretation of some of the sections of the proposed Act, it is necessary to consider as many as three lengthy definitions, adding to the difficulty of interpretation.

4. The Committee is of the opinion that the word "both" where it appears in subsection (f) of Section 2 the second time is unnecessary and that the definition of the word "Dominion" in this section would be clearer if the word "both" were omitted.

5. The Committee is of the opinion that the proper place for the heading "Part I" is before and not after Section 3, and that it should be inserted before Section 3 and Section 3 should be changed to read: "This Part applies to all proceedings, etc."

6. Sections 7 and 8 of the proposed Act were considered at length by the Committee and in conjunction therewith the Com-

mittee also considered Mr. Justice Bergman's views thereon as contained in a letter written by him to the Attorney General dated February 7, 1944. The Committee is of the opinion that Sections 7 and 8 in the present Act are much more satisfactory than Section 7 of the Proposed Act and would recommend that Section 7 of the Proposed Act be changed to read as follows:

> "7. (a) The parties to an action instituted in consequence of adultery and their husbands and wives shall be competent and compellable to give evidence in the action.
>
> (b) No witness in any action whether a party thereto or not shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same action in disproof of the alleged adultery."

7. There seems to be an error in the use of the word "or" in the second line of Section 10. It would appear that the first part of Section 10 should read:

> "A written report or finding of facts prepared by an expert not being a party to the action nor an employee *of* a party except for the purpose of making such report or finding, etc."

8. Sections 14 and 15 of the Proposed Act which are new sections were carefully considered by the Committee and the Committee also had the benefit of Mr. Justice Bergman's views on these sections. The Committee is unanimously of the opinion that the hands of the Court should not be tied by statutory enactments of this kind, and that the ramifications of the sections may be found to be so wide and arbitrary that the sections should not be enacted.

9. A considerable discussion took place on proposed Section 18 dealing with the mode of administering an oath. After the subject had been canvassed fully, it was agreed that the Committee should recommend that the proposed Section 18 should be a combination of the proposed Section 18 (a) and Section 14 (2) of the existing Act, thus making the section read as follows:

> "18. An oath may be administered to any person
>
> (a) while such a person holds in his hand a copy of the Old or New Testament, without requiring him to kiss the same;

(b) where such person objects to being sworn in that manner or declares that the oath so administered is not binding upon his conscience, then it may be administered in such manner and form and with such ceremonies as he declares to be binding."

10. The Committee is of the opinion that the letters "A. B." should be deleted from Section 19, as in actual practice, the name of the witness is never made any part of the oath.

11. The Committee is of the opinion that the letters "A.B." should be eliminated from the affirmation in Section 20, and that the word "(you)" should be inserted after the letter "I" and after the word "me" in the form of affirmation.

12. The Committee is of the opinion that Section 26 of the proposed Act is not nearly as satisfactory as Section 21 of the existing Act, and that although the apparent purpose of the proposed new Act is to facilitate proof and render it less expensive, actually this object is better attained by the existing section. The Committee recommends that the proposed Section 26 be replaced by Section 21 of the existing Act with the addition of the words "or by the deputy of the officer" in subsection (1) so that the section will read as follows:—

"26. (1) A witness may be asked whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the conviction may be proved by production of a certificate containing the substance and effect only of the conviction, omitting the formal part of the charge and conviction, purporting to be signed by the officer having the custody of the records of the Court in which the offender was convicted *or by the deputy of the officer*.

(2) The identity of such witness with the person named in the certificate, if the name is the same, shall, until the contrary be shown, be assumed.

(3) For the Certificate of Conviction a fee of one dollar and no more may be demanded or taken."

13. Section 27 of the proposed Act was carefully considered by the Committee and it was agreed that the existing Section 18 was more satisfactory and the Committee recommends that the said Section 18 should be substituted for the proposed Section 27.

14. The proposed Section 28 was studied and discussed thoroughly. The Committee was very much of the opinion that the proposed section is much narrower than Section 26 of the existing Act. This Section 28 appears under a heading "Judicial Notice and Proof of State Documents". It seems to the Committee that all matters relating to judicial notice should be grouped under this heading. In spite of this, the Committee found that Section 61C referred to judicial notice under certain laws and statutes; proposed Section 61D referred to judicial notice to be taken of signatures of Judges; and Section 61E referred to judicial notice of official positions, etc. The Committee is of the opinion that Section 61C should be added to the proposed Section 28 as subsection (3); that Section 61D should be added as subsection (4); and that Section 61E should be added as subsection (5). The Committee also recommends certain changes in subsection (1) of the proposed Section 28, and that in view of the suggested changes, certain changes should be made in subsection (2) of the proposed Section 28. The Committee recommends that proposed Section 28 read as follows:—

"28. (1) Judicial notice shall be taken of:

(a) all Imperial, Federal and Provincial State documents;

(b) all State documents of any British Possession;

(c) the laws of the United States of America or any State, Territory, Possession or Protectorate thereof.

(2) The provisions of this section shall apply in respect of any Dominion and shall also apply in respect of acts and ordinances enacted or made before as well as to those enacted or made after the enactment of this section.

(3) Foreign law shall be pleaded where any rule or statute so requires and in all cases it shall be the function of the Court, and not of the jury, to determine such laws when brought in question.

(4) (a) all Courts and officers acting judicially shall take judicial notice of the signature of any of the Judges of any Court in Canada, in the Province and in every other Province and Territory in Canada, where such signature is appended or attached to any judicial or official document;

(b) the members of The Board of Transport Commissioners for Canada and of The Municipal

and Public Utility Board shall be deemed Judges for the purpose of this Section.

(5) No proof shall be required of the handwriting or official position of, nor as to the authenticity of any seal used by any person or court certifying to the truth of any copy of or extract from any writing, or to any matter or thing as to which he or it is by law authorized or required to certify."

15. In view of the suggested changes in Section 28 of the proposed Act, the Committee recommends that Section 29, subsections (1) and (2) be omitted; that subsection (3) of the proposed Section 29, be made subsection (1); that subsection (4) of the proposed Section 29 be subsection (2) and that the reference to British Possession in the proposed subsection (3) be eliminated so that as subsection (1) of Section 29 it will read as follows:-

"(1) The existence and the whole or any part of the contents of any state document of a foreign state may be proved in any of the following modes:

(a) By the production of a copy thereof or an extract therefrom, purporting to be printed by or for or by the authority of the legislature, government, King's printer, government printer, or other official printer of the foreign state;

(b) By the production of a copy thereof or an extract therefrom, whether printed or not, purporting to be certified as a true copy or extract by the minister or head, or the deputy minister or deputy head, of any department of government of the foreign state, or by the custodian of the original document or the public records from which the copy or extract purports to be made, or purporting to be an exemplification of the state document under the Great Seal or other state seal of the foreign state."

16. The Committee cannot understand the nature of the orders referred to in the proposed Sections 32 and 33 which are new legislation, and, in any event, the Committee is of the opinion that in view of the changes recommended in the proposed Sections 28 and 29, Sections 32 and 33 are unnecessary.

17. The Committee considered at some length the proposed Section 39 relating to evidence of judicial proceedings and came to the conclusion that the terms and set-up of Section 35 of the existing Act were far more satisfactory than the proposed Section

39, and it would recommend that Section 35 of the existing Act be retained with the substitution of the word "action" for the word "proceedings."

18. In several places throughout the proposed Act, there seems to be a tendency to require notice before a document can be presented at the trial. Subsection (3) of the proposed Section 40 is new and was carefully considered by the Committee. The Committee was of the opinion that subsection (3) should be omitted but felt that if it was decided that it should be retained its application should be limited so it would not apply to undefended actions.

19. In subsection (4) of Section 41 of the proposed Act dealing with bank books, there is a reference to giving notice to a customer of a Bank by addressing the notice to the Bank. While the definition of "Bank" in Section 2 includes a branch, agency and office of a Bank, the Committee considered that it was not at all clear as to the branch of the Bank to which the notice might be sent. The Committee felt that the notice should be sent to the branch or agency at which the books or records referred to in the subsection were kept. The Committee is therefore of the opinion that the last clause of subsection 4 should be changed to read:—

> "the notice may be given by addressing the same to the Bank at the branch where the said books or records are situate."

20. In subsection (2) of Section 42 of the proposed Act there is again a requirement that at least ten days' notice is to be given before Letters Probate etc., or certified copy can be used at a trial. This subsection is not contained in the existing Act. The Committee is of the opinion that it is unnecessary and undesirable and that it should be deleted from the proposed Act.

21. Subsection (1) of Section 43 also contains a provision for giving ten days' notice. The Committee is not in favour of this and also thinks that the words "Land Registry Office" are restrictive and do not necessarily include a Land Titles Office and so far as this Province is concerned the references to Registry of the Supreme Court and Registry of the County Court are not apt. The Committee would recommend that this subsection be changed to read as follows:—

> "(1) In any action where it would be necessary to produce and prove an original instrument, deed, document, register or plan which has been deposited, filed, kept or registered in any Land Registry or Land Titles

Office or in any public office or Court in the Province, in order to establish the instrument, deed, document, register or plan and the contents thereof, the party intending to prove the original instrument, deed, document, register or plan may give in evidence as proof of the original instrument, deed, document, register or plan, a copy thereof certified by the proper officer of the office where the same is so deposited, filed, kept or registered, under his hand and seal of office."

The Committee further recommends that in view of the proposed change in the said Section 43, subsection (1) that proposed subsection (2) of Section 43 should be changed to read as follows:

"(2) A copy certified pursuant to this section shall be sufficient evidence of the original instrument, deed, document, register or plan, and of its validity and contents, without proof of the signature or seal of office of the officer so certifying, and without proof that the instrument, deed, document, register or plan was so deposited, filed, kept or registered, but proof by such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular."

22. As regards subsection (2) of Section 44, the Committee was of the opinion that it is very seldom that during the course of any proceeding an Order made by the Judge is actually drawn up and completed. In view of this, the Committee feels that all the clerk should be required to do is to give the public officer a receipt for the original instrument and would recommend that subsection (2) should be changed to read:—

"(2) Where an order is made that the original be retained, a receipt for the original entitled in the action and signed by the Clerk of the Court shall be delivered to the public officer and the exhibit shall be retained in Court and filed."

23. Subsection (1) of Section 51 of the proposed Act is substantially the same as subsection (1) of Section 52 of the existing Act. In the proviso to subsection (1) of Section 51, however, the words "or if he is without the Province" which appear in the fourth line of the proviso of the existing Section 52(1) have been omitted. The Committee is of the opinion that these words should be retained, as if the maker of the statement is without the Province, that fact should be sufficient without it being necessary to show that it is not reasonably practicable to procure his attendance.

24. The Committee is of the opinion that the Evidence Act is not the proper place for Section 54A unless there is some good and sufficient reason which is not presently apparent for it being put into the Evidence Act. The Committee is of the opinion that the proper place for this provision is in The King's Bench Act and The County Courts Act respectively.

25. The Committee is of the opinion that Section 54B properly forms part of Section 51. If it is not put in Section 51, then there is the possibility that it will be overlooked. The Committee would recommend that this section be made a proviso to Section 51, following immediately after subsection (5) of Section 51 and reading as follows.

"Provided that nothing in this section shall

(a) prejudice the admissibility of any evidence which would apart from the provisions of this section be admissible; or

(b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this section had not been passed."

26. The Committee is of the opinion that Section 57 should be numbered Section 57, subsection (1) and that proposed Section 60 should be made subsection (2) of Section 57, as the proposed Section 60 refers to Section 57. It also recommends that the opening part of proposed Section 57 and subsections (a), (d) and (e) thereof should be changed to read as follows:—

"57 (1) Oaths, affidavits, affirmations or statutory declarations administered, sworn, affirmed or made *in any other Dominion* before:

(a) a Judge, a Magistrate or an Officer of a Court of Justice or a Commissioner authorized to administer oaths in the Courts of Justice *of such Dominion;*

(d) Officers of the Canadian Diplomatic, Consular and representative services exercising their functions *in any Dominion outside of Canada,* including in addition to the diplomatic and consular officers mentioned in paragraph (c), High Commissioner, Permanent Delegates, Acting High Commissioners, Acting Permanent Delegates, Counsellors and Secretaries;

(e) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners exercising their functions *in any Dominion outside of Canada.*"

The Committee feels that as the definition of the word "Dominion" in the proposed Act is quite comprehensive, that word should be used instead of referring to "any other Province or any other part of His Majesty's Dominions or any foreign country." To incorporate the proposed Section 60 in Section 57 as subsection (2) it should be changed to read:—

"(2) Any document purporting to be signed by a person referred to in this section, and

(a) in the case of a person referred to in clause (b) or (f) of this section, purporting to have impressed thereon or attached thereto the seal required by the said clause (b) or (f);

(b) in the case of a person referred to in clause (c), (d) or (e) of this section, purporting to have impressed thereon or attached thereto his seal of office if any, in testimony of the oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of the signature, or seal and signature, or of his official character."

27. The Committee recommends that the opening part of proposed Section 60A should be changed to read:—

"No defect, and no irregularity in any affidavit", etc.

28. The reference to the Supreme Court in Section 60D is not apt and the Committee also thinks that the word "Dominion" should be used instead of referring to "other Province of Canada, United Kingdom, British Dominion, Colony or Possession or foreign country" so that the opening part of subsection (1) would read:—

"60D (1) Where, upon application by motion for this purpose, it is made to appear to the Court of King's Bench or a Judge thereof, or to a County Court Judge, that any Court or Tribunal of competent jurisdiction in any other Dominion has duly authorized, by commission, order or other process the obtaining of testimony in or in relation to any action pending in or before such Court or Tribunal of any witness out of the jurisdiction thereof, etc."

29. If the recommendations of the Committee are adopted, then it would seem that the proposed Section 61A relating to uniform interpretation should be dropped.

30. For the reasons hereinbefore given, the Committee is of the opinion that Sections 61C, 61D and 61E should be added to proposed Section 28.

31. The Committee is of the opinion that the words "prima facie" should be added before the word "evidence" in the fourth lines of proposed Sections 61H and 61I, the sixth line of Section 61J, and the third line of Section 61K.

32. The Committee is not in favour of the proposed change to Section 63 of the existing Act under which Officers of His Majesty's Forces would be authorized to take affidavits within the Province. There is no real difficulty in getting affidavits, completed within the Province before those presently authorized to take affidavits, and the Committee feels that the power to take affidavits conferred upon Officers of His Majesty's Forces should be confined entirely to the taking of affidavits outside the Province.

All of which is respectfully submitted.

APPENDIX B2

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

SOLDIERS' DIVORCES

RULE IN RUSSELL v. RUSSELL

REPORT OF ONTARIO COMMISSIONERS

In March, 1943, a letter from the Secretary of the Wartime Legal Services Committee (Ontario) of The Canadian Bar Association to the Attorney General for Ontario requested an amendment to the Ontario Evidence Act to provide that the rule in *Russell* v. *Russell*, [1924] A.C. 687, should not apply to actions instituted in consequence of adultery where one of the parties was a member of His Majesty's Forces on active service outside the Dominion of Canada. This letter was referred to the Conference at the 1943 meeting and after discussion the following resolution was passed:

> "RESOLVED that the matter of the rule in *Russell* v. *Russell* be referred to the Ontario Commissioners for study and report at the next meeting and that in such study consideration should be given to abrogating the rule in favour not only of members of the armed forces but all persons."

At the 1944 meeting of the Conference, the matter was further discussed, and the following resolution passed:

> "RESOLVED that the rule in *Russell* v. *Russell* be referred back to the Ontario Commissioners for study and report at the next meeting in the light of the resolution adopted by the Conference at the last meeting."

I.

While the reference speaks of the "rule in *Russell* v. *Russell*, [1924] A.C. 687" there is difficulty in stating that so-called rule with exactness. Customarily it is said to mean that neither a husband nor wife can give evidence to show non-access of the other spouse for the purpose of bastardizing offspring born after the marriage. By the approval which a bare majority of the House gave to a statement of Lord Mansfield in *Goodright* v. *Moss* (1777), 2 Cowp. 591, the rule might be so stated. Difficulty, however, lurks in the phrase "for the purpose of bastardizing" and later cases, for example, *Ettenfield* v. *Ettenfield* (1940) P.96 at 110 speak of the rule that evidence which "tends to bastardize"

off-spring cannot be given by either spouse. Even so, the "rule" as stated is clearly "wrong" since there are cases, such as a previous House of Lords decision, *The Poulett Peerage*, [1903] A.C. 395, where evidence given by a husband with that tendency—and for that very purpose—was received. It is true that there the child was conceived before marriage. Hence in the *Ettenfield* case we have the qualification of the rule made (p. 110) to the effect that evidence is inadmissible if it bastardize "a child *conceived* and born in wedlock". Is this the same rule or a different one?

Further, however, while *Russell* v.*Russell* was concerned with statements "tending to bastardize", and purported to be very tender of the right of a child to be considered legitimate, there was much talk of the "sanctity of married life" (Lord Finlay) and the "sanctity of married intercourse" (Lord Birkenhead). Apparently, if one stresses the latter, and ignores the purported regard for legitimacy, the rule can be so twisted that it will forbid evidence of a husband or wife showing access in order to make a child legitimate. Certainly this is the view of the English Court of Appeal in *Ettenfield* v. *Ettenfield* [1940] P.96 at 110, for there the latest statement of the rule is clear: "The rule that evidence cannot be given by either spouse tending to bastardize *or legitimatize* a child conceived and born during wedlock is absolute."

A rule which, aimed against bastardizing, can be so stated as to prevent legitimatizing, and which is subject to the exceptions, difficulties and endless explanations we shall examine later, is on its face suspect. There is little doubt that practically its chief impact is in the field of divorce where it prevents a husband from testifying, for example, that he was in China for ten years, during which time his wife had five children. That is the immediate cause of the suggestion to ameliorate the rule in favour of soldiers, etc., on active service. Clearly to prevent a soldier from testifying himself as to his whereabouts during the time his wife has been producing children will cause additional expense and hardship on many wronged husbands. While it has never been denied that a husband may, in divorce or other proceedings, present evidence of a third person as to his (the husband's) non-access, if our courts are going to pay any attention to the fact that a soldier on active service may have slipped home via bomber during his service overseas (see Urquhart J. in *Hare* v. *Hare* [1943] 2 D.L.R. 215 revd. in [1943] 3 D.L.R. 579) it is apparent that with the advance of air travel the only way in which evidence of non-access—to be successful—can be given, is by the husband himself—or by his personal bodyguard.

While, therefore, the divorce situation of non-access is the most pressing, it is clear that we must also consider the situation of evidence of "access", and in addition consider whether in other cases, e.g., bastardy and filiation proceedings in which a married woman is concerned, the "rule" should be retained, restated, modified or abolished.

At the outset we may state the conclusions at which we have arrived. We believe that the "rule" against spouses testifying as to "access" or "non-access" should be abolished completely, in all cases, and for all purposes. As the question is one of "competency" only this leaves untouched any rules regarding burden of proof, degree of proof or corroboration. All these matters are now adequately covered by existing law. Thus, a presumption of legitimacy is not lightly overcome and needs more than a mere balance of probabilities. (See Phipson, Evidence, 8th Ed. p. 663.) Most statutes regarding filiation orders require corroboration of the mother's evidence, etc. With these we are not concerned. Our concern is only with the question of competent evidence.

Feeling as we do concerning the "rule" and the desirability not only of abolishing it in divorce cases generally, but in all cases where a person is otherwise a competent witness, it follows that we would certainly be in favour of any lesser form of abolition either confined to divorce or to soldiers' divorces, etc.

Our reasons for this sweeping declaration against a rule which because it has the support of the House of Lords (although by a three to two decision and contrary to three Lords Justices of Appeal and the trial judge in the same case—to say nothing of the jury which believed the evidence of non-access) are shortly as follows:

1. From a purely legal standpoint *Russell* v. *Russell* was wrongly decided because—

(a) there never had been in existence any such principle, there enunciated, as applicable to divorce;

(b) while for some one hundred and fifty years there had been cases dealing, in much the same sweeping language as *Russell* v. *Russell*, with evidence of non-access, they were all cases involving declarations concerning legitimation or bastardy; even as so applied they were historically wrong and ignored the true origin of the rule because of the "sonorous utterance" (Wigmore's Evidence, 3rd Ed. s. 2063) of Lord Mansfield in *Goodright* v. *Moss* (1777), 2 Cowp. 591, which was not only a mere dictum but demonstrably an invention of Lord Mans-

field's, and for this reason, on purely legal grounds, we think there is no reason to accept the post-1777 cases on legitimacy and to reject the reasoning of the earlier cases;

(c) the decision in *Russell* v. *Russell* was contrary to all accepted views at the time it was given, and in light of the many exceptions and efforts to avoid the application of the rule in later cases, it is clear that many judges are opposed to its extension and follow it only because of the rule of *stare decisis*—many have indicated their dislike and have suggested legislative change; no writer of repute known to us on the subject of evidence is in favour of it and Wigmore, in particular, makes a devastating attack upon it.

2. From the standpoint of policy as opposed to binding precedent we are opposed to the rule because,—

(a) it ignores the cardinal rule that all logically relevant evidence should be admitted unless some consideration of compelling importance demands its exclusion; we see none;

(b) the rule is totally incapable of any rational or sound explanation; it has been supported as based on preventing "bastardization" and on "sanctity of married intercourse", both of which have been and are violated by many types of evidence in every divorce action;

(c) the rule seems to have confused presumptions and burden of proof with competency;

(d) in the so-called regard for the rights of the child born during marriage it has unnecessarily, we think, ignored or defeated the equally important rights of a wronged spouse by forbidding him recourse because of a rule of evidence which is highly artificial;

(e) the "rule" itself has called forth exceptions which are hard to reconcile and manifest no consistent principle; either the exceptions are wrong or the main "rule"; it seems to us that the rule cannot or should not live with the exceptions, or the exceptions with the rule; the effort to create exceptions continues, and parties are put to inordinate expense and litigation over matters which should be fundamentally pure questions of fact;

(f) the necessity of putting a husband to the expense of obtaining a third party's evidence to prove non-access seems to us indefensible; further, it is doubtful whether,

with increased speed of travel, such evidence is ever capable to-day of proving non-access and if not the rule denies all effective proof of non-access; certainly the "best evidence" is, at present, ignored.

We have set out below an outline of our reasons for reaching these conclusions, based largely on the case law of England and this country. Needless to say the citations are by no means exhaustive.

II.

There is no question that the decision of the House of Lords in *Russell* v. *Russell* revolutionized divorce practice in England. Up to the time of this decision, it was admitted, even by the majority members of the House, that husbands had constantly given evidence of non-access in divorce proceedings.

[See Sir Douglas Hogg, K.C. (later Lord Hailsham) in argument at p. 695: "Ever since it has been possible for the parties to give evidence in matrimonial suits evidence as to sexual intercourse having taken place or not having taken place has been given without exception."

Lord Birkenhead at p. 702 admitted as trial judge he had himself admitted the evidence, although without argument.

Lord Finlay at p. 716 refers to the statement from the Court of Appeal that in the opinion of Lord Hannan, Lord St. Helier and others in the Divorce Court the evidence was properly admissible. And see p. 718, where he suggests that the rush of business in the Divorce Court prevented consideration of the question—a suggestion which Lord Sumner resented at p. 736 on the ground that judges in that court were vigilant in checking admissibility.

Lord Dunedin at p. 729 indicates that after the last war "it was found convenient" to allow a husband to say he had left England on such a day, did not return until such a day and found his wife had had a child. He indicated this "saved time and trouble" but said "the facts could equally well have been proved by other witnesses in the regiment". This is a sanguine hope but not completely justified in view of rapid transit.

Lord Sumner indicates at p. 733 that the wide rule suggested by the majority had never been applied in the one hundred and fifty years since Lord Mansfield stated it and for fifty years has not been acted upon in Divorce Courts (pp. 735-6).

Lord Carson, having himself practised in the Divorce Courts, agreed with the view that it had never been applied to divorce proceedings (p. 752).]

When one considers the unanimous views of the Court of Appeal and the trial judge in the *Russell* case, it is apparent that the decision is supported by three judges only (Lords Birkenhead, Finlay and Dunedin) as against six (Lords Sumner and Carson, Lord Sterndale M.R., Warrington and Scrutton L.JJ., and Hill J.). This seems fairly conclusive, that the decision can only be considered as revolutionary so far as divorce practice is concerned.

What then caused the change? A close examination of the majority judgments in the House of Lords indicates that they did little more than give their approval to the dictum of Lord Mansfield in *Goodright* v. *Moss* (1777) 2 Cowp. 591, as representing a general rule of English law. It is remarkable that none of the majority in the House of Lords examined anything prior to the case. Both Lords Birkenhead and Finlay say (pp. 697, 707) that Lord Mansfield "laid down the law" in that case as follows:

> "The law of England is clear that the declarations of a father or mother cannot be admitted to bastardize the issue born after the marriage . . . as to the time of birth, the father and mother are the most proper witnesses to prove it. But it is a rule founded on decency, morality and policy that they shall not be permitted to say after marriage, that they had no connection and therefore that the offspring is spurious; more especially the mother, who is the offending party. That point was solemnly determined by the Delegates."

This dictum—for it had no bearing on the point in issue, the time of birth—is accepted by the House as a rule which had always existed in England. The very solemnity of the utterance, the great prestige of Lord Mansfield, combined to win it support. As a matter of fact, however, it had no support at the time it was uttered and was a pure invention of Lord Mansfield who either ignored the reasoning of the earlier cases or intentionally purported to create new law contrary to the existing precedents. It is remarkable that the House of Lords—with the exception of Lord Sumner, who dissented—did not even examine the authorities, nor the basis for such a sweeping statement.

The vagaries of the case law on this subject, and the manner in which the original reasoning of the case was completely changed by the mere dictum of Lord Mansfield is clearly stated in 8 Wigmore Evidence, 3rd Ed. s. 2063. The pre-Lord Mansfield

cases were argued in *Russell* v. *Russell* as proof—and the proof seems conclusive—that a spouse could testify, even in filiation cases as to non-access. These cases are completely ignored by the majority but Lord Sumner confirms the analysis of Wigmore at p. 737 to the effect that originally the only objection to preventing testimony by a husband or wife was the artificial rule of disqualification of a husband or wife to testify for or against the other—a rule totally devoid of meaning to-day, and a rule which had nothing whatever to do with evidence of non-access, being directed to evidence of every kind. As the husband was under obligation to support a child born during marriage the wife's evidence of non-access was also believed to tend to relieve him of liability and it thus fell under the common law ban of evidence of an interested party. As late as 1734 this was the *sole* objection to receiving the evidence of a wife in filiation proceedings regarding the child born to the wife during marriage. See *Rex* v. *Reading* (1734), Cas. Temp. Hard. 79. In that case Lord Hardwicke had to deal with an objection to the reception of the wife's evidence of non-access based *solely* on the ground that "she is not competent . . . . to exonerate her husband of the charge and burden of this child." The interesting part of the judgment is the clear recognition that the wife was quite competent to prove the adulterous intercourse, but the Court felt it would be dangerous to allow the wife to be sole witness "to discharge the husband of the burden of his (the child's) maintenance". In other words, some forty years before Lord Mansfield, the necessity of the case had broken down the artificial disqualification notion and merely required some additional evidence in support of the mother's in order to relieve the husband. There is not a word of "morality, decency or public policy" in these early cases. The whole attention is, as Lord Sumner indicated (p. 738), on the husband's interest in keeping the child. No attention is paid to the child's "interest in not being bastardized". This line of cases continued until 1807 when in *Rex* v. *Luffe*, 8 East 193, the same reasoning was used by Lord Ellenborough.

With the dictum of Lord Mansfield the road was paved for one of those strange quirks of the common law system. A mere dictum—a "single utterance"—had the effect of overthrowing a clear line of authorities. Not only that, but in succeeding cases, the earlier cases were explained as meaning the wife was incompetent to testify. So in *Rex* v. *Kea* (1809), 12 East 132, the decision in *Rex* v. *Reading* was explained on this basis. Other cases—all dealing with direct issues of legitimacy where the order made directly affected the status of the child—followed.

One can understand how the statement gathered weight with each repetition. It is more difficult to understand the House of Lords refusing to deal with the original cases and their reasoning, particularly as there were doubts expressed on the doctrine and reference made to the correct early rule as late as 1856. See Wood V.-C. in *Legge* v. *Edmonds*, 25 L.J. Ch. 125, cited by Wigmore and by Lord Sumner in his dissenting speech in *Russell* v. *Russell*.

By the time *Russell* v. *Russell* arose for decision there had been so many decisions in which the *Rex* v. *Kea* perversion of the earlier doctrine had been applied to filiation cases—that is to exclude rather than to require corroboration—that it was admitted to be the law in that type of case by counsel and by all members of the House. Once the perversion of the earlier reasoning was accepted as the true basis for its exclusion, it is perhaps easy to see how that rule should be extended to exclude a parent's testimony in all cases. The point is, however, that it had not been so extended until *Russell* v. *Russell* and even if filiation cases had proceeded on an erroneous basis, it is submitted that there was, as Lords Sumner and Carson maintained, no reason for extending a rule which was so demonstrably without fundamental basis or the dignity of antiquity.

In this country there is clear evidence of the limits on the so-called Mansfield rule. In an early case, *Ryan* v. *Miller* (1861), 21 U.C.Q.B. 202, (being an action for seduction of a daughter against the defendant, the daughter, at the time of the birth of the child, being married to X) the Court did say the daughter could not testify as to non-access of her husband. In *Evans* v. *Watt* (1883), 2 O.R. 166, that case was overruled. The *Evans* case concerned a child born shortly after marriage and the husband and wife gave evidence of non-access before marriage. Even though to-day, under *Russell* v. *Russell* such evidence would be admissible (see *The Poulett Peerage*, [1903] A.C. 395) the understanding of the Ontario courts at this time was clear. Armour J. in admitting the evidence, at p. 172 said:

> "The most of the cases on the subject which I have met with are cases in which the child was a party to the litigation and its status was directly in question, and the residue of the cases are bastardy cases in which the status of the child was directly affected. But in this case the status of the child cannot be at all affected by this litigation. I think therefore that the cases I have referred to cannot be held to govern this case nor can *Ryan* v. *Miller* be held to govern it, for the case was decided, in my opinion, on the

erroneous supposition that the cases to which I have referred govern a case like this, and was therefore erroneously decided."

In *Mulligan* v. *Thompson* (1892), 23 O.R. 54, an Ontario Court went further. In this case (also a seduction action) both the conception and birth of the child occurred after marriage. The husband and wife both testified as to non-access, the parties being separated by mutual agreement. As Rose J. stated at p. 60, "Illegitimacy of the child is not in issue in this action . . . the finding of the jury is no evidence regarding illegitimacy in any other proceeding." And after a review of the authorities he stated, "There is no case against the reception of such evidence in an action like the present, except *Ryan* v. *Miller* which . . . is not a binding authority."

We believe that on authority alone there was no justification for the majority decision in *Russell* v. *Russell.* Further, in view of the early case law in which, save for disqualification of a wife or husband for or against the other party, we do not believe there was any continuity of "policy" even as regards legitimation cases.

It is true that in *The Poulett Peerage* case, [1903] A.C. 395, the House of Lords spoke of the general rule against evidence of non-access. It did so however only to refuse to follow it—and in a case directly raising an issue of legitimacy and succession. This case involved the legitimacy of a child born six months after marriage. Lord Halsbury, in a vigorous judgment, said it would be a "gross perversion" of the "principle" to say the husband could not testify as to pre-marital non-access. It would be an "outrage to common sense". We respectfully agree. But the evidence did "bastardize" a child born during marriage, and if the husband's virtue should be capable of vindication in such a case, as Lord Halsbury thought, why not the husband's interest in his marriage in any other case. We believe this earlier House of Lords decision to favour our view that the "rule" has no logical foundation.

In examining the exceptions to a rule which is stated to be without exception in *Russell* v. *Russell* it is apparent that many English courts follow the principle simply because of the rule of *stare decisis.* As English courts are notoriously uncritical in their discussion of binding authority it is not surprising that there has not been more outright criticism. See however Langton J. in *Farnham* v. *Farnham,* [1937] P. 49, who clearly thought that there was no necessity or reason for the House of Lords' decision. See also Goddard L.J. in *Ettenfield* v. *Ettenfield,*

[1940] P. at p. 111, who spoke of inability to explain rules of law and suggested a remedy by legislation. Other instances could be multiplied.

Perhaps the most significant for our purposes is the following statement of Fisher J.A. in *Hare* v. *Hare*, [1943] 3 D.L.R., 579, 581, O.W.N. 324, 326:

> "Before parting with this appeal I would like to add that *Russell* v. *Russell* appears to me to go so far beyond the real requirement of public policy under the circumstances, that it in fact works a real injustice in more than half the cases in which it is invoked and the Legislature ought seriously to consider an amendment to confine the application of the rule strictly to cases where the parentage of the infant is directly in issue."

With this statement we are, respectfully, in full accord, save that we fail to see any reason for retaining the rule in any case. Once recognize the evidence, it should be available whereever evidence is required.

III.

So far we have examined the "rule" largely on the basis of early precedent. It remains to consider our reasons for believing that apart from precedent, the rule should be abrogated.

1. The whole trend in the law of evidence has been towards the abolition of exclusionary rules and the goal of admitting all logically relevant evidence. Rules disqualifying witnesses from interest whether in civil or criminal matters are now gone. Privileges are being reduced in an effort to ascertain the truth. No one can deny that the evidence of a husband or wife on questions of non-access is undoubtedly the best possible evidence on a matter which from earlier times was regarded as peculiarly within the knowledge of such parties. It was indeed because of this "necessity" that the early disqualification for interest was abandoned in such a case as *Rex* v. *Reading, supra.*

We can do no better in this connection than to reproduce the following extract from Lord Sumner's speech in *Russell* v. *Russell* at p. 748:

> "My Lords, my own view is that in the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to truth. To ordain that a Court should decide upon the relevant facts and at the same time that it should not hear

> some of those relevant facts from the person, who best knows them and can prove them at first hand, seems to me to be a contradiction in terms. It is best that truth should out and that truth should prevail. *With this, if the mattter were one of first impression and we were free to lay down an ideal procedure, I think all must agree.* As it is, the rule in *Goodright's Case* exists and must be applied, but only when it is applicable."

Our task is to determine the "ideal procedure". We are bound neither by *Goodright's* "rule" nor *Russell* v. *Russell.*

2. Is there any countervailing reason for excluding relevant evidence? The "rule" of *Russell* v. *Russell,* adopting Lord Mansfield's dictum, is said to be based on "decency, morality and policy." These words were subjected to the closest scrutiny by Lord Sumner in the *Russell* case (p. 743 et seq.) with the result that he found them entirely barren. "Policy" means nothing save contrary to law. "Decency" is offended every day in divorce and nullity actions if one refers to the unsavoury evidence. If it does not, and refers to the "indecent" conduct of a spouse in telling such things, what can this mean? Nothing prevents a husband from getting third persons so to testify. Why is this not "indecent"? Nothing forbids a husband from saying he saw his wife *in flagrante delicto.* Is this indecent?

As Lord Sumner states at p. 743:

> "If it had been feasible for the petitioner to have given evidence of 'non-access' by the mouth of some third person, some chambermaid or spy, ... that the child was not his and that nothing had taken place between the spouses that could have made it his, he could have taken his proceedings and called this evidence, and if he failed to obtain his decree it would not have been decency or morality or the bastardizing of the child that would have defeated him but the incredulity of the jury. If, on the other hand, the evidence which his case required, was merely something 'tending to prove non-access', as for example absence from home, then a well-to-do man, able to afford the search for and the production of the evidence of third persons to prove it, would get his decree; but a labourer, who had roamed the country in search of work and could only prove his absence from home by his own evidence, would find his mouth closed on a vital point and would remain tied to an unfaithful wife and bound to maintain another's child in the name of a rule founded upon public policy."

One might well agree with Wigmore that "these high-sounding 'decencies' and 'moralities' are mere pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it." (8 Wigmore, s. 2064.)

In an endeavour to particularize, the courts have referred to the "rule" being designed to protect the "sanctity of married intercourse". On the other hand, it has been said that the prevention of "bastardization of issue" is the real object of the "rule". The stupid part of the rule is that with its exceptions both grounds have been violated. In *The Poulett Peerage,* [1903] A.C. 395, Lord Halsbury made much of the sanctity of marriage lying behind the rule. He therefore felt able to avoid the rule by taking evidence of non-access before marriage to show a child born after marriage was illegitimate. If this be so, as Lord Sumner pointed out in the *Russell* case, the object of the rule cannot be to prevent bastardizing children. Further, the cases, well established, like *Warren* v. *Warren,* [1925] P. 107; *Roast* v. *Roast,* [1938] P.8; *Frampton* v. *Frampton,* [1941], P. 24; *Purdy* v. *Purdy,* [1944] 3 D.L.R. 718 (Man.), where an admission of a wife that a named person, other than her husband, was the father of her child was received in evidence, seems clearly to "tend to bastardize" the child, as Hodson J. pointed out in *Frampton* v. *Frampton, supra.* To allow it, because it is merely an admission of adultery and does not of necessity imply non-access has worried judges, and could only be accepted, as it has been, because of a belief that the courts have taken a wrong step in the first place. So long as such statements are received, talk of "bastardization" cannot be the reason for the rule.

On the other hand, if one begins to speak of the "sanctity of marriage" he is in trouble. As Lord Sumner said in the *Russell* case (p. 746), "the sanctity of married intercourse passed into the limbo of 'lost causes and impossible loyalties' in 1857." Let anyone concerned with this "policy" read the judgment of Pilcher J. in *Clarke* v. *Clarke,* [1943] 2 All E.R. 540, a nullity action involving fecundation *ab extra.* Although a child was born of the marriage a nullity decree on the ground of the impotence of the woman was granted. It may still possibly be argued that the child by virtue of such decree was rendered illegitimate. See comment (1944), 22 Can. Bar Review 464, at p. 468. No one questioned the competence of the spouses to testify. In all actions for nullity and suits based on cruelty, the most minute examinations are made of married intercourse. How then can the

sanctity of such be the basis of a rule which "prejudices the decorum" of a court "by making it plain that the court is being kept in the dark on a material part of the case, while leaving the sanctity of matrimonial intercourse to be the subject of prurient curiosity and malicious gibes as before". (Lord Sumner in *Russell* case at p. 746.)

As the Editor of the *Canadian Bar Review* stated (15 Can. Bar Review at p. 41) "it is rather strange that the concurrence of two grounds, neither sufficient in itself, seems to form the basis of the rule. It is probably on this ground that the rule has been referred to [by Lord Sumner] as a 'taboo' rather than a principle."

As an illustration of the hopelessness of finding—or following—principle, compare *Farnham* v. *Farnham*, [1937] P. 49, a nullity case in which the husband petitioned for a decree on the ground that the wife was *frigida quoad hunc*. The wife had a child and testified that she had it by X. Where does this evidence fit? The effect is both to bastardize a child *and* to violate the sanctity of the marriage bed. It was, however, admitted. Langton J. recognized that in admitting the evidence he was bastardizing a child born after marriage contrary to the dictum of Lord Mansfield. He contented himself by finding that the House of Lords did the same thing in *The Poulett Peerage, supra.* One can, it is true, make verbal differences between this case and *Russell* v. *Russell,* but any distinction must be artificial. See, for example, the New Zealand Court in *G.* v. *G.,* [1934] N.Z.L.R. 246, refusing to allow a break in the *Russell* v. *Russell* rule in a nullity case, and compare *Burgess* v. *Burgess,* [1937] P. 60 *contra.* See also 15 Can. Bar Rev. 40.

We believe that the inability of the courts to make any sound exposition of policy which is not capable of being shattered by situations where the rationalization of the courts themselves has been broken is sufficient to support our view that the rule is a highly artificial one with nothing but high-sounding phrases for its support.

3. We believe that the "rule" has become confused with an entirely unrelated subject—namely presumptions or burden of proof. No one can have any quarrel with the presumption in favour of legitimacy—a presumption which only the clearest preponderance of evidence should satisfy. The cases are clear on this. This has nothing to do with competency of evidence. In the *Russell* case a jury was convinced beyond a reasonable doubt of the truth of the husband's claim.

The confusion with presumption is clearly shown, moreover, by the decisions in *Mart* v. *Mart,* [1926] P. 24; *Stafford* v. *Kidd,*

[1937] 1 K.B. 395. In these cases Bateson J. and a Divisional Court respectively held that when parties are living apart under a deed of separation there is no presumption of legitimacy, and therefore evidence of non-access is admissible by the spouses. As was stated in a 1940 decision, the 1926 decision had, since 1926, "been uniformly followed in the Divorce Division". [See *Ettenfield* v. *Ettenfield,* [1940] P. 96 at 103.] The courts analogized to the case of a judicial decree of separation in which there is no presumption of legitimacy.

These cases not only show a confusion of presumption and competency; they also serve to indicate the inability to discover a principle and the eagerness of courts to evade the *Russell* strictures. *Mart* v. *Mart* depended not only on finding that separation by agreement was the equivalent of judicial separation, but, more important, that in judicial separation cases, evidence of non-access by a spouse could be given. On both of these points the Court of Appeal held in *Ettenfield* v. *Ettenfield,* [1940] P. 96, that *Mart* v. *Mart* and *Stafford* v. *Kidd* were wrong. To the Court of Appeal the rule of *Russell* v. *Russell* was still without exception and 'absolute". It therefore applied to cases of judicial separation—apparently because th case had never come up, or been mentioned in the *Russell* case. Granting, however, that the presumption of illegitimacy existed under judicial separation there was clearly no need to prove non-access to establish illegitimacy and adultery. But, says the court, the "rule" applies to rebutting the presumption. A wife, judicially separated, may rebut the presumption of illegitimacy "but she must do it by evidence other than her own". How this rule fits the principle is even more a mystery. It does not "tend to bastardize"—it legitimates. It surely cannot offend the sanctity of intercourse, because by judicial decree there should have been none, and the law presumes there has been none to the extent of saying the children are presumed illegitimate. If this decision and the "rule" in *Russell* v. *Russell* are capable of logical consistency we fail to understand consistency. These decisions are chiefly interesting as showing another fifteen years of divorce practice partially freed from the shackles of *Russell* v. *Russell,* only to have them replaced in the case of voluntary separation and reincarnated as applied to judicial separation. We believe these cases alone support our view of the desirability for legislation abolishing the "rule".

There is, however, one matter of substance. In view of the presumption in favour of legitimacy, Lord Dunedin in the *Russell* case felt that to permit the introduction of evidence of non-access might well be to allow a husband an opportunity for unparalleled

perjury in cases where corroboration was not possible and no means were open to ascertain the truth. One can imagine as he did, a husband testifying to the use of birth control measures at all times, etc. Outside the fact that such cases will be rare, we must confess that we are not overly impressed with the difficulty. In view of the heavy onus in such cases, we cannot imagine a decree being given in such a case where there is the slightest doubt either as to a husband's forgetfulness or as to the efficiency of his methods. The jury seemed to have no difficulty on the facts of *Russell* v. *Russell*. In this country where juries in such cases are much rarer we believe a judge's own experience should prevent the catastrophic results Lord Dunedin envisages. As Lord Sumner pointed out in the same case "the suggestion is rather one for melodrama than for the disillusioned minds of those who know the Divorce Court" (p. 748). On this aspect of the case—what we believe the only point of substance that can be argued in favour of retaining the rule—we are content to quote again from Lord Sumner in the *Russell* case (p. 748):

> "Every enlargement of the classes of competent witnesses and of admissible questions is accompanied by a certain amount of perjury. Such is the unregenerate nature of man, but judges and juries are not wholly unaware of it, and are the best protection we have. After all, a great many witnesses are honest and a good many perjurers are transparent, and *quoad ultra* we must hope for the best. The law has gone too far and too long in the direction of admitting all material testimony to warrant a latter-day extension of an archaic rule against the admissibility of material evidence, for fear lest a few scoundrels might try, peradventure, with occasional success, to get the better of counsel, jury and judge, to say nothing of the Court of Appeal and of your Lordships."

4. The "rule" undoubtedly places great emphasis on the child's interest rather than the husband's or wife's. This, as we saw, is quite contrary to the early law. In so doing it seems to be ignored that the husband has a very definite interest in preserving the "sanctity of the marriage" or in breaking the bonds if that sanctity is violated. In *The Poulett Peerage* [1903] A.C. 395, Lord Halsbury vehemently supported evidence which bastardized a child born after marriage by allowing evidence of non-access before marriage. Lord Halsbury did this by insisting on the husband proving his virtue as a bachelor. Likewise the very case envisaged by Lord Sumner in the *Russell* case as likely to arise, has since been decided, namely, whether on a charge of incest,

declarations by the wife can be put in evidence that the "daughter", with whom the husband is charged with having committed incest, is not his daughter. Faced with the necessity of "bastardizing" or invading the "sanctity of married intercourse" at the expense of a man's claim to freedom and to a defence to a criminal charge, the law permitted the evidence to be given. See *Rex* v. *Carmichael* [1940] 1 K.B. 630. Similarly in *Farnham* v. *Farnham*, [1937] P. 49, already referred to, Langton J. permitted evidence bastardizing a child born during marriage since he did not believe "a man's rights . . . . [should] ever be taken from him by a mishap of this character". The mishap was a child born to his wife during marriage, the wife being *frigida quoad hunc*. We believe this to be sound. And if sound, why should a husband's right to be free of an unfaithful wife be jeopardized by a technical rule of evidence? It is strange that nullity, criminal defences and bachelor virtue are of more importance than a claim to be free from the care of an illegitimate child of an adulterous wife. Yet this is exactly what the *Russell* rule seems to require. As Lord Carson said in that case (p. 754), there was a husband who had convinced a jury that he had not had connection with his wife and that the wife was guilty of adultery. Yet the majority held that the law of England gave him no relief and bound him to his wife because "he is not allowed to give evidence which he alone is capable of giving."

A rule which can work such an injustice does not commend itself to us when considering legislative change.

5. We have already had occasion to deal with some of the "exceptions" to the "rule" which indicate to us that the two cannot live together. We merely recapitulate here those already considered and add others not mentioned:

(a) The peculiar rule allowing bastardization of children conceived prior to marriage: *The Poulett Peerage*, [1903] A.C. 395.

(b) Cases like *Warren* v. *Warren*, [1925] P. 107; *Roast* v. *Roast*, [1938] P. 8; *Frampton* v. *Frampton*, [1941] P. 24; *Purdy* v. *Purdy*, [1944], 3 D.L.R. 817 (Man.), in which "the ingenuity of practitioners" [Goddard L.J. in *Ettenfield* v. *Ettenfield*, [1940] P. 103] found a way of mitigating the rigours of the "rule" by allowing declarations bastardizing children to be used merely as an admission of adultery. This is pure lawyers' technique. It is satisfactory for a wife to say: "Jno. Smith is the father of my child". If she says, "My husband is not the father.

He could not be because I only had connection with Jno. Smith", the statement is inadmissible. This, surely, is pure nonsense. It would even exclude the possibility of examining the wife as to the first statement. The opportunities for "wood-shedding" and "coaching" is too obvious to comment on.

(c) Nullity cases which require evidence bastardizing issue: *Farnham* v. *Farnham*, [1937] P. 49; *Burgess* v. *Burgess*,]1937] P. 60. And see *Jackson* v. *Jackson*, [1939] P. 172.

(d) The short-lived exception of the voluntary separation cases and the stranger sequel with respect to judicial separation by their over-ruling in *Ettenfield* v. *Ettenfield*, [1940] P. 96.

(e) Evidence of non-access to afford a defence to a criminal charge: *Rex* v. *Carmichael*, [1940] 1 K.B. 630.

(f) Declarations have been allowed in, but only as part of the *res gesta*. (As this phrase is almost meaningless it can always be resorted to in order to let in something you want to admit.) *The Aylesford Peerage* (1885), 11 App. Cas. 1.

(g) In some Canadian filiation cases, where a married woman has applied for an order, the courts have used a number of devices to escape a rule which they felt was manifestly unfair and wrong.

In *Dodd* v. *Wilcox* [1935] 4 D.L.R. 797, [1936] 1 W.W. R. 98 (B.C.CO.Ct.), a child was born to a married woman in February, 1934. The husband obtained a final decree for divorce in October, 1934. In March, 1935, the former wife commenced proceedings under The Children of Unmarried Parents Act against her co-respondent in the divorce court. On the ground that the woman was not a wife when her testimony was given—that "it would be a tragic thing for the child's welfare if a so-called rule of evidence is to deprive it of all remedy under the law"—and because the court felt that a section of the Act which said a married mother within the Act was competent to testify as to paternity had abrogated the rule in *Russell* v. *Russell*, evidence of the "wife" bastardizing the off-spring was allowed.

In a recent Saskatchewan case, *Rex ex rel McAuley* v. *Andrews* (1944), 82 Can. C.C. 320, a similar result was reached in the case of a wife of a soldier on active service who was held to be a "single"

woman within the meaning of the Act. The Magistrate merely said it would be absurd to say the child of a married woman was provided for under the Act if the woman could not herself give evidence of paternity as being someone other than her husband.

One may agree with the result, but in the absence of express and clear statutory provision abrogating the rule, the result is not infrequently likely to be contrary. For example, see *Thomas* v. *Ryan*, [1937] 4 D.L.R. 729, appld. in [1938] 2 D.L.R. 272, where the Nova Scotia court refused to follow *Dodd* v. *Wilcox* and distinguished another Nova Scotia case, *Huntsport* v. *Pulsifer*, [1933] 4 D.L.R. 518, on the ground that the statute in the latter was capable of conferring a "right" to testify. See also *Re Brown & Argue* (1925), 57 O.L.R. 297. These cases particularly show the necessity for general statutory provision allowing evidence of paternity by a wife, if only to make clear a legislative policy which the application of *Russell* v. *Russell* bids fair to negative.

6. While it has frequently been said that no great hardship is caused by the rule in *Russell* v. *Russell* since the evidence of a third party can almost always be obtainable we cannot agree. Even if it were always obtainable, we can see no reason for compelling an honest man who may be without funds going to the necessity of buying evidence which he himself can give. There is no doubt that the "rule" works in favour of the wealthy at the expense of the poor as the minority in *Russell* v. *Russell* pointed out. Further, the fact is that such evidence is quite clearly *not* always available. *Russell* v. *Russell* was just such a case. Further, while the old rule, that a child could never be bastardized unless there was proof that the husband was "beyond the seas", is now gone, we are, as indicated in *Hare* v. *Hare*, faced with a period when space and time have been annihilated by air travel. Formerly testimony of a third person that a man resided in Australia for a year might well lead to the conclusion that he was not the father of a child born to his wife at the end of that year. To-day it is possible that the husband has been home a dozen times. Who can testify to this save the husband himself? In other words, nearly every case is approaching the stage where the *only* person who can testify is the one person eliminated by the rule in *Russell* v. *Russell*. On this practical ground, alone, we believe the rule should be changed by statute.

IV.

Bearing in mind the fact that Children of Unmarried Parents Acts, and the like, usually require corroboration of a mother's evidence and that the burden of proof in legitimacy and divorce

cases is high, we accordingly recommend that the following section 7a be added to the Commission's draft Uniform Evidence Act:

> 7a. Subject to the provisions of section 6, a married person shall be competent to give evidence to prove or disprove that sexual intercourse took place with the other party to the marriage at any time or times before or during the marriage notwithstanding that such evidence may be given with the object or the result of bastardizing or legitimating, or may tend to bastardize or legitimate any child born during the marriage.

C. A. WRIGHT.

Toronto, June 27th, 1945.

WE CONCUR:

F. H. BARLOW

L. R. MACTAVISH

E. H. SILK.

APPENDIX B3

AMENDMENTS TO THE UNIFORM EVIDENCE ACT

(1941 Proceedings, Page 65)

AUTHORIZED AT THE 1945 MEETING OF THE CONFERENCE

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1. A new section 5 as follows:

"5. Without limiting the generality of section 4, a husband or wife may, in an action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage."

2. The present section 5 to become section 7A.

3. The following to be substituted as section 6, for the present section 6:

"6. No witness in any action whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same action in disproof of the alleged adultery."

4. The word "or" in the second line of section 9 to be corrected to read "of".

5. The letters "A.B." (indicating a name) in sections 18 and 20 to be deleted.

6. A new section 27 to be substituted for the present section 27 as follows:

"27. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the Court proves adverse, the party may by leave of the Court cross-examine him and may prove that the witness made at some other time a statement inconsistent with his present testimony.

(2) Before such proof is given the circumstances of the statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make the statement."

7. Section 56 to become subsection (6) of section 51 as follows:

"(6) Nothing in this section shall,—

(a) prejudice the admissibility of any evidence which would apart from the provisions of this section be admissible; or

(b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this section had not been passed."

8. The words "foreign country" where they appear in sections 39, 58 and 63, to be altered to read "foreign state".

APPENDIX B4

DRAFT UNIFORM EVIDENCE ACT

(as amended at the 1944 and 1945 Meetings of the Conference)

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 "Evidence Act." **Short title**

INTERPRETATION

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

(a) "Action" includes any civil proceeding, inquiry, arbitration and a prosecution for an offence committed against a statute of the Province or against a by-law or regulation made under the authority of any such statute, and any other prosecution or proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of the Province; **"Action"**

(See Alta. Sec. 2 (a): Man. Sec. 2 (e): Ont. Sec. 1 (a): Sask. Sec. 26).

(b) "Bank" means a bank to which the Bank Act (Canada) applies; and includes a branch, agency and office of a bank; **"Bank"**

(B.C. Sec. 36: Sask. Sec. 26).
(See 42 Vic. c. 11 s. 9: Man. Sec. 2 (a): Ont. Sec. 29 (1).

(c) "British possession" means any dominion of His Majesty heretofore or now existing or hereafter constituted exclusive of the United Kingdom of Great Britain and Northern Ireland, and of Canada; **"British possession"**

(Proceedings 1931 p. 66 (altered): B.C. Sec. 28 (altered): N.B. Sec. 59 (1) (a) (2) (altered)).
(See Man. Sec. 2 (b).

(d) "Court" includes a judge, arbitrator, umpire, commissioner, police magistrate, stipendiary magistrate, justice of the peace or other officer or person having by law or by consent of parties authority to hear, receive and examine evidence; **"Court"**

(Alta. Sec. 2 (b) (altered): Ont. Sec. 1 (b) (altered).
(See Man. Sec. 2 (c): N.B. Sec. 2 (b): N.S. Sec. 2 (c): Sask. Sec. 26).

"Document" (e) "Document" includes books, maps, plans, drawings and photographs;

(Evidence Act, 1938—Imperial).

"Dominion" (f) "Dominion" includes kingdom, empire, republic, commonwealth, state, province, territory, colony, possession, and protectorate heretofore or now existing or hereafter constituted; and, where parts of a dominion are under both a central and a local legislature, includes both all parts under the central legislature and each part under a local legislature;

(1931 Proceedings, p. 66 (altered): B.C. Sec. 28 (altered): N.B. Sec. 59 (1) (b) (2) (altered)).

"Federal" (g) "Federal" as applied to state documents, means of or pertaining to Canada;

(1931 Proceedings, p. 66: B.C. Sec. 28: Man. Sec. 31 (1) (a): N.B. Sec. 59 (1) (c)).

"Foreign State" (h) "Foreign State" includes every dominion heretofore or now existing or hereafter constituted other than the United Kingdom of Great Britain and Northern Ireland, Canada, and a British possession;

(1931 Proceedings, p. 66 (altered): B.C. Sec. 28 (altered): N.B. Sec. 59 (1) (d) (2) (altered)).

"Imperial" (i) "Imperial" as applied to state documents, means of or pertaining to the United Kingdom of Great Britain and Northern Ireland, as at present constituted, and any former kingdom which included England, whether known as the United Kingdom of Great Britain and Ireland or otherwise;

(1931 Proceedings, p. 66: B.C. Sec. 28: N.B. Sec. 59 (1) (e).) (See Man. Sec. 2 (d)).

"Imperial Parliament" (j) "Imperial Parliament" means the Parliament of the United Kingdom of Great Britain and Northern Ireland, as at present constituted, and that of any former Kingdom which included England, whether known as the United Kingdom of Great Britain and Ireland or otherwise;

(1931 Proceedings, p. 66: B.C. Sec. 27: N.B. Sec. 58 (2)).

"King's Printer" (k) "King's Printer" includes government printer or other official printer;

(1931 Proceedings, p. 66: B.C. Sec. 28: N.B. Sec. 59 (1) (f)).

(l) "Legislature" includes any legislative body or authority competent to make laws for a dominion; "Legislature"

(1931 Proceedings, p. 66: B.C. Sec. 28: N.B. Sec. 59 (1) (g)).

(m) "Provincial" as applied to state documents, means of or pertaining to any province, colony or territory which, or some portion of which, forms part of Canada: and "Province" when used in respect of federal or provincial state documents, shall have a corresponding meaning; "Provincial

(1931 Proceedings, p. 66: B.C. Sec. 28: Man. Sec. 31 (1) (b): N.B. Sec. 59 (1) (h)).

(n) "State document" includes: "State document"

(i) any Act or ordinance enacted or made or purporting to have been enacted or made by a legislature,

(ii) any order, regulation, notice, appointment, warrant, licence, certificate, letters patent, official record, rule of court, or other instrument issued or made or purporting to have been issued or made under the authority of any Act or ordinance so enacted or made or purporting to have been enacted or made, and,

(iii) any official gazette, journal, proclamation, treaty, or other public document or act of state issued or made or purporting to have been issued or made;

(1931 Proceedings, p. 66: B.C. Sec. 28: Man. Sec. 31 (1) (c): N.B. Sec. 59 (1) (i)).

(o) "Statement" includes any representation of fact, whether made in words or otherwise; "Statement"

(Evidence Act, 1938—Imperial).
(Man. Sec. 54 (1) (b)).

(p) "Statutory declaration" or "solemn declaration" means a solemn declaration in the form and manner provided in the Canada Evidence Act. "Statutory declaration"

(Evidence Act, 1938—Imperial).

NOTE: To be adapted to the requirements of such provinces as adopt Section 20 hereof.

COMPETENCY OF WITNESSES AND PRIVILEGES

3. A person shall not be incompetent to give evidence by reason of crime or interest. Crime or interest

(See 6 and 7 Vic. c. 85: Alta. Sec. 4: B.C. Sec. 4: Can. Sec. 3: Man. Sec. 4: N.B. Sec. 3: N.S. Sec. 36: Ont. Secs. 3 and 4: P.E.I. Sec. 3: Sask. Sec. 29).

Parties to action and their husbands or wives competent and compellable.

4. The parties to an action and the persons on whose behalf the same is brought, instituted, opposed or defended, and their wives or husbands, shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of themselves or of any of the parties.

(See 16 and 17 Vic. c. 83 (1): Alta. Sec. 6: B.C. Sec. 8 (part): Can. Sec. 4 (1): Man. Sec. 5: N.B. Sec. 4 (1) and 10: N.S. Sec. 37 (part): Ont. Sec. 5: P.E.I. Secs. 5 and 10: Sask. Sec. 30 (1)).

Evidence as to intercourse

5. Without limiting the generality of section 4, a husband or wife may, in an action, give evidence that he or she did or did not have sexual intercourse with the other party to the marriage at any time or within any period of time before or during the marriage.

(See 1945 Proceedings, page 25).

Evidence as to adultery

6. No witness in any action, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same action in disproof of the alleged adultery.

(See 1945 Proceedings, page 25).

Communications made during marriage

7. A husband shall not be compellable to disclose any communication made to him by his wife during the marriage, nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.

(Alta. Sec. 9: Ont. Sec. 8).
(See 16 and 17 Vic. c. 83 (2): B.C. Sec. 9: Can. Sec. 4 (3): Man. Sec. 9: N.B. Secs. 6 and 11: N.S. Sec. 40: P.E.I. Sec. 9: Sask. Sec. 31).

Witness defined

8. (1) In this section "witness" includes a person who, in the course of an action is examined *viva voce* on discovery or who is cross-examined upon an affidavit made by him, or who answers any interrogatories or makes an affidavit as to documents.

(Man. Sec. 6 (1) (3) (altered)).

Incriminating questions

(2) A witness shall not be excused from answering any question or producing any document upon the ground that the answer to the question or the production of the document may tend to criminate him, or may tend to establish his liability to an action at the instance of the Crown or of any person.

Answer not receivable against witness

(3) If, with respect to any question, or the production of any document, a witness objects to answer or to produce

upon any of the grounds mentioned in subsection 2, and if, but for this section or any Act of the Parliament of Canada, he would have been excused from answering the question, or from producing the document then, although the witness is by reason of this section or by reason of any Act of the Parliament of Canada compelled to answer or produce, the answer so given or the document so produced shall not be used or receivable in evidence against him in any proceeding to enforce any Act of the Province by the imposition of punishment by fine, imprisonment or other penalty or in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in the giving of such evidence.

(Ont. Sec. 6 (altered)).
(See 46 Geo. 3 c. 37: Alta. Sec. 7: B.C. Sec. 5: Can. Sec. 5: Man. Sec. 6: N.B. Secs. 7 and 8: N.S. Sec. 49: P.E.I. Sec. 6: Sask. Sec. 32).

EXPERT EVIDENCE

Number of witnesses limited

9. Where it is intended by any party to an action to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than three of such witnesses may be called by either side to give opinion evidence on any issue in the action without the leave of the Court.

(Ont. Sec. 9 (altered)).
(See Alta. Sec. 10: Can. Sec. 7: Man. Sec. 24: Sask. Sec. 43).

When writt report of expert admissible.

10. A written report or finding of facts prepared by an expert not being a party to the action nor an employee of a party except for the purpose of making such report or finding nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the co-operation of several persons acting for a common purpose, shall, in so far as the same may be relevant, be admissible when testified to by the person or one of the persons making such report or finding, without calling as witnesses the persons furnishing the information and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party.

(Standardization of Statutes enacted by several of the United States of America vide B.C. Commissioners' Report, 1939 Proceedings, pages 71 and 72).

Expert furnishing informatio may be cr examined.

11. Any person who has furnished information on which such report or finding is based may be cross-examined by the adverse party, but the fact that his testimony is not obtainable

shall not render the report or finding inadmissible unless the court finds that substantial injustice would be done to the adverse party by its admission.

(Standardization of Statutes enacted by several of the United States of America vide B.C. Commissioners' Reports, 1939 Proceedings, pages 71 and 72).

'arty offering eport shall ive notice o adverse arty

12. Such report or finding shall not be admissible unless the party offering it shall have given notice to the adverse party a reasonable time before trial of his intention to offer it together with a copy of the report or finding or so much thereof as may relate to the controversy and shall also have afforded him a reasonable opportunity to inspect and copy any records or other documents in the offering party's possession or control on which the report or finding was based and also the names of all persons furnishing facts upon which the report or finding was based, except that it may be admitted if the court finds that no substantial injustice would result from the failure to give such notice.

(Standardization of Statutues enacted by several of the United States of America vide B.C. Commissioners' Reports 1939 Proceedings, pages 71 and 72).

CORROBORATIVE EVIDENCE

reach of romise of arriage

13. The plaintiff in an action for breach of promise of marriage shall not obtain a verdict or judgment unless his or her testimony is corroborated by some other material evidence in support of the promise.

(Alta. Sec. 11: Man. Sec. 22: Ont. Sec. 10: P.E.I. Sec. 7).
(See 32 and 33 Vic. c. 68 (2): B.C. Sec. 8 proviso: P.E.I. Sec. 7 proviso: Sask. Sec. 38).

ctions by against presenta- ves of a ceased rson

14. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not on his own evidence obtain a verdict, judgment or decision, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

(Alta. Sec. 12 (altered): Ont. Sec. 11 (altered)).
(See B.C. Sec. 11: N.S. Sec. 37 (part): P.E.I. Sec. 11).

ctions by against natics

15. In an action by or against a lunatic so found or an inmate of a lunatic asylum, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment, or decision on his

own evidence, unless such evidence is corroborated by some other material evidence.

(Alta. Sec. 13: B.C. Sec. 10: Ont. Sec. 12: P.E.I. Sec. 12).

Evidence of child

16. No action shall be decided upon the evidence of a child of tender years given under the authority of section 23 unless such evidence is corroborated by some other material evidence.

(See Alta. Sec. 19 (2): B.C. Sec. 6 (part): Can. Sec. 16 (2): Man. Sec. 23 (2): Sask. Sec. 37 (2)).

Oaths and Affirmations

Who may administe oaths

17. (1) Every Court shall have power to administer or cause to be administered an oath or affirmation to every witness who is called to give evidence before the Court.

(Man. Sec. 11 (1) (altered): Ont. Interpretation Act. Sec. 23 (1)).
(See 14 and 15 Vic. c. 99 s. 16: B.C. Sec. 26: Can. Sec. 13: N.B. Sec. 13: N.S. Sec. 51: P.E.I. Sec. 14: Sask. Sec. 40).

Certificat

(2) Where an oath, affirmation or declaration is directed to be made before a person, he shall have full power and authority to administer it and to certify to its having been made.

(Section held over from draft uniform sections of Interpretation Act—vide 1934 Proceedings, page 25).
(Man. Sec. 12: Ont. Interpretation Act Sec. 23 (4)).

Mode of administe oath

18. An oath may be administered to any person—

(a) while such person holds in his hand a copy of the Old or New Testament, without requiring him to kiss the same;

(Man. Sec. 13: Ont. Sec. 13 (part): Ont. Commissioners for Taking Affidavits Act Sec. 11).
(See 9 Ed. 7, c. 39, s. 2: Alta. Sec. 15 (part): B.C. Sec. 25 (part)).

(b) in such manner and form and with such ceremonies as he declares to be binding on his conscience.

(Man. Sec. 14 (2) (altered)).
(See 9 Ed. 7 c. 39: Alta. Sec. 15: Ont. Sec. 13 (part): Sask. Sec. 41).

Form of oath

19. (1) Where a person is about to give evidence, the oath may be in the following form:

I (you) swear that the evidence to be given by me (you) shall be the truth, the whole truth, and nothing but the truth. So help me (you) God.

(Man. Sec. 14 (altered). See 1945 Proceedings, page 25).

Idem

(2) Where a person is about to swear an affidavit or deposition, the oath may be in the following form:

I (you) swear that the contents of this affidavit or deposition are true. So help me (you) God.

(Man. Sec. 58 (2) (part) (altered). See 1945 Proceedings, page 25).

Solemn declaration

20. Any person authorized by this Act to administer oaths or to take affidavits in any matter, may receive the solemn declaration of any person making the same before him, in the form following, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:—

I, A.B., solemnly declare that (state the fact or facts declared to), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me

at this day of A.D. 19 .

(Canada Evidence Act, Section 36).
(Man. Sec. 55).

Affirmation instead of oath

21. (1) If a person called or desiring to give evidence objects on grounds of conscientious scruples to take an oath, or is objected to as incompetent to take an oath, the person may make the following affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.

Effect

(2) Where a person makes such an affirmation, his evidence shall be taken and have the same effect as if taken under oath.

(Can. Sec. 14).
(See 51 and 52 Vic. c. 46: Alta. Sec. 18: B.C. Sec. 24 and 58: Man. Sec. 15 (1): N.B. Sec. 14: N.S. Sec. 50: Ont. Sec. 14: P.E.I. Sec. 13: Sask. Sec. 41).

Affirmation by deponent

(3) If a person required or desiring to make an affidavit or deposition in an action or on an occasion where or touching a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, refuses or is unwilling on grounds of conscientious scruples to be sworn, the court, or other officer or person qualified to take affidavits or depositions shall permit the person, instead of being sworn, to make his affirmation

in the words following, viz: "I solemnly affirm . . ."; which affirmation shall be of the same force and effect as if the person had taken an oath in the usual form.

(Can. Sec. 15).
(See Man. Sec. 58 (2): Ont. Sec. 14 (2)).

Effect of disbelief in oath

22. Where an oath has been administered and taken, the fact that the person to whom it was administered and by whom it was taken did not at the time of taking the oath believe in the binding effect of the oath shall not, for any purpose, affect the validity of the oath.

(51 and 52 Vic. c. 46, sec. 3 (altered): Man. Sec. 17 (altered)).

Evidence of child

23. In any action where a child of tender years is tendered as a witness, and the child does not, in the opinion of the Court, understand the nature of an oath, the evidence of the child may be received, though not given upon oath, if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(See Alta. Sec. 19 (part): B.C. Sec. 6 (part): Can. Sec. 16 (1): Man. Sec. 23 (1): Sask. Sec. 37 (part)).

Examination and Evidence of Witnesses

Evidence of mute

24. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible.

(Alta. Sec. 20: B.C. Sec. 22: Can. Sec. 6: Man. Sec. 25: Sask. Sec. 39).

Cross-examination as to previous statements in writing

25. A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the matter in question, without the writing being shown to him; but if it is intended to contradict him by the writing, his attention shall, before the contradictory proof is given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; and the Court may require the production of the writing for the Court's inspection, and may thereupon make such use of it for the purposes of the trial or proceeding as the Court may think fit.

(See Alta. Sec. 22: B.C. Sec. 16: Can. Sec. 10: Man. Sec. 19: N.B. Sec. 17: N.S. Sec. 47: Ont. Sec. 16: P.E.I. Sec. 17: Sask. Sec. 35).

Cross-examination as to previous oral statements

26. If a witness, upon cross-examination as to a former statement made by him relative to the matter in question, and inconsistent with his previous evidence, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it; but before the proof is given the circumstances of the supposed statement sufficient to designate the particular occasion shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

(See Alta. Sec. 23: B.C. Sec. 17: Can. Sec. 11: Man. Sec. 20: N.B. Sec. 16; N.S. Sec. 46: Ont. Sec. 17: P.E.I. Sec. 16: Sask Sec. 34).

Examination as to previous conviction

27. (1) A witness may be asked whether he has been convicted of any offence, and upon being so asked, if he either denies the fact or refuses to answer, the conviction may be proved.

How conviction proved

(2) A certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction, purporting to be signed by the officer having the custody of the records of the Court in which the offender was convicted, or by the deputy of the officer, shall, upon proof of the identity of the witness as the offender, be sufficient evidence of the conviction, without proof of the signature or of the official character of the person appearing to have signed the certificate.

(Alta. Sec. 24 (altered): B.C. Sec. 18 (altered): Man. Sec. 21 (1) (altered): Ont. Sec. 18 (altered)).

(See Can. Sec. 12: N.B. Sec. 18: N.S. Sec. 48: P.E.I. Sec. 18: Sask. Sec. 36).

Adverse witnesses

28. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may contradict him by other evidence, or if the witness in the opinion of the Court proves adverse, the party may by leave of the Court cross-examine him and may prove that the witness made at some other time a statement inconsistent with his present testimony.

Idem

(2) Before such proof is given the circumstances of the statement sufficient to designate the particular occasion shall be mentioned to the witness and he shall be asked whether or not he did make the statement.

(See 1945 Proceedings, page 25).

JUDICIAL NOTICE AND PROOF OF STATE DOCUMENTS

Judicial notice

29. (1) Judicial notice shall be taken of:

(a) All Acts of the Imperial Parliament:

(b) All Acts of the Parliament of Canada:

(c) All ordinances made by the Governor in Council of Canada:

(d) All ordinances made by the Governor in Council; Lieutenant-Governor in Council, or Commissioner in Council of any Province, colony, or territory which, or some portion of which, forms part of Canada, and all Acts and ordinances of the Legislature of or other legislative body or authority competent to make laws for any such Province, colony, or territory:

(e) All Acts and ordinances of the Legislature of or other legislative body or authority competent to make laws for any of His Majesty's dominions.

Application in respect of His Majesty's dominions

(2) The provisions of this section shall apply in respect of His Majesty's dominions at any time heretofore existing or hereafter constituted, as well as to those now existing, and shall also apply in respect of Acts and ordinances enacted or made before as well as to those enacted or made after the enactment of this section.

(Proceedings 1931, page 66 (altered): B.C. Sec. 27 (2) (3) (altered)).
(See Man. Secs. 26 and 27: N.B. Sec. 58: N.S. Sec. 9A).

Proof of Imperial state documents

30. (1) The existence and the whole or any part of the contents of any Imperial state document may be proved in any of the following modes:

(a) In the same manner as the same may from time to time be provable in any court in England;

(b) By the production of a copy of the *Canada Gazette* or a volume of the Acts of the Parliament of Canada purporting to contain a copy of or an extract from the same or a notice thereof;

(c) By the production of a copy thereof or an extract therefrom purporting to be printed by or for or by authority of the King's Printer for Canada or for any Province of Canada;

(d) By the production of a copy thereof or an extract therefrom purporting to be certified as a true copy or extract by the minister or head or by the deputy minister or deputy head of any department of the Imperial Government;

(e) By the production of a copy thereof or an extract therefrom purporting to be certified as a true copy or extract by the custodian of the original document or the public records from which the copy or extract purports to be made.

(Man. Sec. 31 (2)).

Federal or provincial state documents

(2) The existence and the whole or any part of the contents of any federal or provincial state document may be proved in any of the following modes:

(a) By the production of a copy of the *Canada Gazette* or of the official gazette of any Province or of a volume of the Acts of the Parliament of Canada or of the Legislature of any Province purporting to contain a copy of the state document or an extract therefrom or a notice thereof;

(b) By the production of a copy thereof or an extract therefrom purporting to be printed by or for or by authority of the King's Printer for Canada or for any Province;

(c) By the production of a copy thereof or an extract therefrom, whether printed or not, purporting to be certified as a true copy or extract by the minister or head, or the deputy minister or deputy head, of any department of government of Canada or of any Province, or by the custodian of the original document or the public records from which the copy or extract purports to be made, or purporting to be an exemplification of the state document under the Great Seal of Canada or of any Province.

(Man. Sec. 31 (3)).

State documents of British possession or foreign state

(3) The existence and the whole or any part of the contents of any state document of a British possession or foreign state may be proved in any of the following modes:

(a) By the production of a copy thereof or an extract therefrom, purporting to be printed by or for or by the authority of the legislature, government, King's Printer, government printer, or other official printer of the British possession or of the foreign state;

(b) By the production of a copy thereof or an extract therefrom, whether printed or not, purporting to be

certified as a true copy or extract by the minister or head, or the deputy minister or deputy head, of any department of government of the British possession or of the foreign state, or by the custodian of the original document or the public records from which the copy or extracts purports to be made, or purporting to be an exemplification of the state document under the Great Seal or other state seal of the British possession or of the foreign state.

(Man. Sec. 31 (4)).

Proof of copy or extract

(4) It shall not be necessary to prove the signature or official position of the person by whom any copy or extract which is tendered in evidence under this section purports to be certified, or to prove that the original document or the public records from which the copy or extract purports to be made were deposited or kept in the custody of the person so certifying; and where a copy or extract which is tendered in evidence under this section purports to be printed by or for or under the authority of a legislature or government, or of a King's Printer, government printer, or other official printer, it shall not be necessary to prove the authority, status, or official position of the legislature or government or of the King's Printer, government printer, or other official printer.

(Proceedings 1931, page 66 (altered): B.C. Sec. 28 (2) to (6) (altered): Man. Sec. 31 (5) (altered): N.B. Sec. 59 (2) to (6) (altered)).

(See Alta. Sec. 26 et seq: Can. Sec. 17 et seq: N.B. Secs. 50, 51, 52 and 53: N.S. Secs. 3 et seq. 9 and 9A: Ont. Sec. 20 et seq: P.E.I. Secs. 21, 30 and 34: Sask. Sec. 3 et seq).

Evidence of Other Public and Corporation Documents

Books and documents

31. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Statute exists which renders its contents provable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence, if it is proved that it is a copy or extract or if it purports to be certified to be a true copy or extract by the officer to whose custody the original has been entrusted without any proof of the signature or of the official character of the person appearing to have signed the same and without further proof thereof.

(See 14 and 15 Vic. c. 99 s. 14: Alta. Sec. 34: B.C. Sec. 31 (1): Can. Sec. 25: Man. Sec. 34 (1): N.S. Sec. 14: Ont. Sec. 28: P.E.I. Sec. 27: Sask. Sec. 17).

Official documents

32. Where an original document, by-law, rule, regulation, or proceeding, or any entry in any register or other book, of any corporation created by charter or by or under any Statute of Canada or of any Province thereof is of so public a nature as to be admissible in evidence a copy of the document, by-law, rule, regulation or proceeding or of the entry purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk, or secretary thereof, shall be admissible in evidence without proof of the seal of the corporation, or of the signature or of the official character of the person appearing to have signed the same, and without further proof thereof.

(Ont. Sec. 25 (altered)).

(See 8 and 9 Vic. c. 113: Alta. Sec. 31: B.C. Sec. 30: Can. Sec. 24: Man. Secs. 34 (1) and 36: N.B. Secs. 28, 40, 72 and 73: N.S. Sec. 11: P.E.I. Sec. 31: Sask. Sec. 11).

Order signed by Secretary of State

33. An order in writing signed by the Secretary of State of Canada, and purporting to be written by command of the Governor General shall be admissible in evidence as the order of the Governor General, without any proof that the person signing the same is the Secretary of State of Canada or of the signature of such person, and without further proof thereof.

(B.C. Sec. 33: Can. Sec. 30 (1): N.S. Sec. 7: Ont. Sec. 23 (part): P.E.I. Sec. 22: Sask. Sec. 8).

Order signed by Provincial Secretary

34. An order in writing signed by the Provincial Secretary and purporting to be written by command of the Lieutenant-Governor shall be admissible in evidence as the order of the Lieutenant-Governor, without any proof that the person signing the same is the Provincial Secretary or of the signature of such person, and without further proof thereof.

(N.S. Sec. 8 (altered)).

(See Ont. Sec. 23 (part): Sask. Sec. 9).

Copies printed in Canada or Official Gazette

35. All copies of official and other notices, advertisements, and documents printed in the *Canada Gazette* or the Official Gazette of the Province or of any other province of Canada shall be *prima facie* evidence of the originals, and of the contents thereof.

(B.C. Sec. 34: Can. Sec. 30 (2): N.B. Sec. 55: N.S. Sec. 10: Ont. Sec. 24: P.E.I. Sec. 22: Sask. Sec. 10).

Entries in books kept in public offices

36. A copy of an entry, or a statement of the absence thereof, in any record, document, plan, book or paper belonging to or deposited or kept in any office or department of the Government of Canada or of the Province or of any other

Province of Canada or in the office of any commission, board or other branch of the public service of Canada or of the Province or of any other Province of Canada shall be admissible as evidence of the entry, and of the matters, transactions and accounts therein recorded, or of the absence thereof respectively, if it is proved by the oath or affidavit of an officer of the office or department or of the commission, board or other branch of any such public service that

(a) the record, document, plan, book or paper was at the time of the making of the entry, or during the time covered by the statement, one of the ordinary records, documents, plans, books or papers kept in such office or department, commission, board or other branch of any such public service;

(b) the entry was made, or in the case of its absence would have been made in the usual and ordinary course of business of such office or department, commission, board or branch; and

(c) such copy is a true copy thereof or such statement of absence a true statement.

(Can. Sec. 26 (altered)).
(See Alta. Sec. 33: B.C. Sec. 35: Man. Sec. 33: N.B. Sec. 57: N.S. Sec. 13: Ont. Sec. 27: P.E.I. Sec. 22: Sask. Sec. 12 (1)).

Privilege in case of official documents

37. Where a record, document, plan, book or paper is in the official possession, custody or power of a member of the Executive Council of the Province, or of the head of a department of the public service of Canada or of the Province, if the deputy head or other officer of the department has the record, document, plan, book or paper in his personal possession, and is called as a witness, he shall be entitled, acting herein by the direction and on behalf of the member of the Executive Council or head of the department, to object to produce the record, document, plan, book or paper on the ground that it is privileged; and the objection may be taken by him in the same manner, and shall have the same effect, as if the member of the Executive Council or head of the department were personally present and made the objection.

(Alta. Sec. 32 (altered): N.B. Sec. 56 (altered): Ont. Sec. 26 (altered): P.E.I. Sec. 29 (altered): Man. Sec. 32).

Business defined

38. (1) In this section "business" includes every kind of business, profession, occupation, calling or operation of an institution, whether carried on for profit or not.

Business records as evidence

(2) A record in any business of an act, condition or event, shall, in so far as relevant, be admissible in evidence if the custodian of the record or other qualified person testifies to its identity and the mode of its preparation, and to its having been made in the usual and ordinary course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

(1939 Proceedings, pages 73 and 74).

Definitions "person"

39. (1) In this section,—

(*a*) "person" includes,

(i) the government of Canada and of any province of Canada and any department, commission, board or branch of any such government,

(ii) a corporation, and

(iii) the heirs, executors, administrators or other legal representatives of a person; and

"photographic film"

(*b*) "photographic film" includes any photographic plate, microphotographic film and photostatic negative and "photograph" shall have a corresponding meaning.

Where print admissible in evidence

(2) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement, document, plan or a record or book or entry therein kept or held by any person,—

(*a*) is photographed in the course of an established practice of such person of photographing objects of the same or a similar class in order to keep a permanent record thereof; and

(*b*) is destroyed by or in the presence of the person or of one or more of his employees or delivered to another person in the ordinary course of business or lost,

a print from the photographic film shall be admissible in evidence in all cases and for all purposes for which the object photographed would have been admissible.

Discretionary powers of Court

(3) Where a bill of exchange, promissory note, cheque, receipt, instrument, agreement or other executed or signed document was so destroyed before the expiration of six years from,—

(*a*) the date when in the ordinary course of business either the object or the matter to which it related ceased to

be treated as current by the person having custody or control of the object; or

(*b*) the date of receipt by the person having custody or control of the object of notice in writing of any claim in respect of the object or matter prior to the destruction of the object,

whichever is the later date, the court may refuse to admit in evidence under this section a print from a photographic film of the object.

Where subs. 3 not to apply

(4) Where the photographic print is tendered by a government or the Bank of Canada, subsection 3 shall not apply.

Proof

(5) Proof of compliance with the conditions prescribed by this section may be given by any person having knowledge of the facts either orally or by affidavit sworn before a notary public and unless the court otherwise orders, a notarial copy of any such affidavit shall be admissible in evidence in lieu of the original affidavit.

(1944 Proceedings, pages 25 and 27).

EVIDENCE OF JUDICIAL PROCEEDINGS

Justice deferred

40. (1) In this section "justice" means justice of the peace and includes two or more justices if two or more justices act or have jurisdiction, and also a magistrate, a police magistrate, a stipendiary magistrate and any person having the power or authority of two or more justices of the peace.

Exemplification or certified copy as evidence

(2) Evidence of any proceeding or record in, of or before any court of record in the United Kingdom, or the Supreme or Exchequer Courts of Canada, or any court of record or any justice or coroner in the Province or in any British possession, or any court of record of any foreign state, may be made in any action by an exemplification or certified copy thereof, purporting to be under the seal of the Court or under the hand and seal of the justice or coroner as the case may be, without any proof of the authenticity of the seal or of the signature of the justice or coroner, or other proof; and if the Court, justice or coroner has no seal, and so certifies, then the evidence may be made by a copy purporting to be certified under the signature of a judge or presiding justice of the Court, or of the justice or coroner, without any proof of the authenticity of the signature or other proof.

(B.C. Sec. 29 (altered): N.S. Secs. 16 and 17 (altered)).
(See Alta. Secs. 35 and 37: Can. Sec. 23: Man. Secs. 27, 33 and 35: N.B. Sec. 61: Ont. Secs. 30, 31 and 32: Sask. Secs. 19 and 20).

NOTARIAL DOCUMENTS OF QUEBEC

Notarial acts in Quebec

41. (1) A copy of a notarial act or instrument in writing made in the Province of Quebec, before a notary and filed, enrolled or enregistered by the notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his possession as such notary or prothonotary, shall be admissible in evidence in the place and stead of the original, and shall have the same force and effect as the original would have if produced and proved.

(Alta. Sec. 38: Man. Sec. 37: Ont. Sec. 33).
(See B.C. Sec. 37 (part): Can. Sec. 27: N.B. Sec. 49: N.S. Sec. 28 (1): Sask. Sec. 18 (part)).

Proof may be rebutted

(2) The proof by such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary.

(Alta. Sec. 39: Man. Sec. 38: Ont. Sec. 34).
(See B.C. Sec. 37 (part): Sask. Sec. 18 (part)).

Notice to adverse party

(3) No copy of a notarial act or instrument, as provided in this section shall be received in evidence upon any trial unless the party intending to produce the same has, before the trial, given to the party against whom it is intended to be produced reasonable notice of such intention and the reasonableness of the notice shall be determined by the Court, but the notice shall not in any case be less than ten days.

(B.C. Sec. 37 (2)).
(See Can. Sec. 28: N.B. Sec. 49: N.S. Sec. 28 (2)).

BANK BOOKS

Copies of entries

42. (1) Subject to the provisions of this section, a copy of an entry in any book or record kept in a bank shall in all actions to which the bank is not a party be received as *prima facie* evidence of the entry, and of the matters, transactions, and accounts therein recorded.

Reception in evidence

(2) A copy of an entry in such book or record shall not be received in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the bank, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the bank or its successor, and that the copy is a true copy, and such proof

may be given by the manager or accountant or a former manager or accountant of the bank or its successor, and may be given orally or by affidavit.

Compulsion to produce or appear

(3) A bank or officer of a bank shall not, in any action to which the bank is not a party, be compellable to produce any book or record the contents of which can be proved under this section, or to appear as a witness to prove the matters, transaction, and accounts therein recorded, unless by order of the Court made for special cause.

Order to inspect and copy

(4) On the application of any party to any action the Court may order that the party be at liberty to inspect and take copies of any entries in the books or records of the bank for the purposes of the action. The person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and, if it is shown to the satisfaction of the Court that the person cannot be notified personally, the notice may be given by addressing the same to the bank.

Costs

(5) The costs of any application to a Court under or for the purpose of this section, and the costs of anything done or to be done under an order of a Court made under or for the purposes of this section, shall be in the discretion of the Court, which may order the costs or any part thereof to be paid to any party by the bank where they have been occasioned by any act or omission of the bank. Any such order against a bank may be enforced as if the bank were a party to the action.

(Alta. Sec. 34A: B.C. Sec. 36: Man. Sec. 45: N.S. Sec. 17A: Sask. Sec. 26).

(See 42 Vic. c. 11: Can. Sec. 29: N.B. Sec. 37: Ont. Sec. 29: P.E.I. Sec. 30).

WILLS

Proof of letters probate or letters of administration

43. (1) Letters probate * of a will, or letters of administration with a will annexed, or a copy thereof certified under the seal of the Court of the Province in which the probate or letters of administration were granted, shall be admissible as evidence of the original will and of the death of the testator without any proof of the authenticity of the seal of the Court or of the signature of the officer of the Court purporting to certify to the same, but the Court may, upon due cause shown upon affidavit, order the original will to be produced in evidence or may direct such other proof of the original will as under the circumstances appears necessary or reasonable for testing

the authenticity of the alleged original will and its unaltered condition and the correctness of the prepared copy.

(Man. Sec. 46 (1) (altered): N.S. Sec. 23 (1) (altered): Sask. Sec. 25 (2) (altered)).

(See. Alta. Secs. 46 and 47: B.C. Secs. 38 and 39: N.B. Sec. 65: Ont. Secs. 42, 43 and 44: P.E.I. Secs. 24 and 25).

Notice

(2) Letters probate * of a will or letters of administration with a will annexed, or a copy thereof certified as aforesaid, shall not be received in evidence upon any trial, without the leave of the Court, unless the party intending to produce the same has, at least ten days before the trial, given to the party against whom it is intended to be produced notice of such intention.

(See Alta. Sec. 42: B.C. Sec. 38: N.B. Sec. 65: N.S. Sec. 24 Ont. Sec. 43).

Where will proved elsewhere than in province

(3) This section shall apply to letters probate * of a will or letters of administration with a will annexed where the will is proved elsewhere than in the Province, provided that the original will has been deposited and the letters probate * or letters of administration with will annexed granted in a court having jurisdiction over the proof of wills and administration of the estates of intestates or the custody of wills.

(Man. Sec. 46 (2): N.S. Sec. 23 (2) (altered): Sask. Sec. 25 (altered)).

(See Alta. Secs. 46, 47, 48: B.C. Secs. 38 and 39: N.B. Sec. 65: Ont. Secs. 42, 43 and 44).

* To be adapted to the practice in each Province.

REGISTERED INSTRUMENTS

Notice to be given

44. (1) In any action where it would be necessary to produce and prove an original instrument, deed, document, register or plan which has been deposited, filed, kept or registered in any Land Registry Office, Registry of the Supreme Court, or Registry of the County Court or in any public office or Court in the Province, in order to establish the instrument, deed, document, register or plan and the contents thereof, the party intending to prove the original instrument, deed, document, register or plan may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends at the trial or other proceeding to give in evidence, as proof of the original instrument, deed, document, register or plan, a copy thereof certified by the registrar of the office where the same is so deposited, filed, kept or registered, under his hand and seal of office.

(2) A copy certified pursuant to this section shall be sufficient evidence of the original instrument, deed, document, register or plan, and of its validity and contents, without proof of the signature or seal of office of the Registrar, and without proof that the instrument, deed, document, register or plan was so deposited, filed, kept or registered, unless the party receiving the notice, within four days after its receipt, gives notice that he disputes the validity or contents of the original instrument, deed, document, register or plan. Where validity disputed

(3) The cost attending any production or proof of the original instrument, deed, document, register or plan shall be in the discretion of the Court. Cost

(See Alta .Sec. 49: B.C. Secs. 40 and 42: N.B. Secs. 28, 32, 62, 63, 70 and 71: N.S. Secs. 20, 21, 22, 24 and 25: Ont. Secs. 46, 47 and 48: P.E.I. Secs. 42, 43 and 44: Sask. Sec. 21 (1)).

45. (1) Where a public officer produces upon a subpoena an original instrument, deed, document, register or plan, it shall not be deposited in court, unless otherwise ordered, but if a copy thereof or of a part thereof is needed for subsequent reference or use, the copy, certified under the hand of the officer producing the instrument, deed, document, register or plan or otherwise proved, shall be filed as an exhibit in the place of the original; and the officer shall be entitled to receive in addition to his ordinary fees, the fees for any certified copy, to be paid to him before it is delivered or filed. When certified copies admissible

(N.S. Sec. 23 (1)).

(2) Where an order is made that the original be retained, the order shall be delivered to the public officer, and the exhibit shall be retained in Court and filed. When original to be retained

(Alta. Sec. 50: Ont. Sec. 49).
(See B.C. Sec. 50).

Mercantile Documents and Telegrams

46. (1) A party desiring to give in evidence a telegram, letter, shipping bill, bill of lading, delivery order, receipt, account, or other written instrument used in business or other transactions, may give notice to the opposite party, ten days at least before the trial or other proceeding in which the proof is intended to be adduced, that he intends to give in evidence as proof of the contents a writing purporting to be a copy thereof and in the notice shall name some convenient time and place for the inspection thereof. Notice to be given

Inspection

(2) The copy may then be inspected by the opposite party, and shall without further proof be accepted and taken in lieu of the original as *prima facie* evidence of the contents of the original unless the party receiving the notice within four days after the time mentioned for such inspection gives notice that he intends to dispute the correctness or genuineness of the copy at the trial or proceeding, and to require proof of the original, and the cost attending any production or proof of the original shall be in the discretion of the Court.

(Alta. Sec. 51: Man. Sec. 48 (1): Ont. Sec. 50).
(See B.C. Sec. 43: N.B. Secs. 35 and 36: N.S. Sec. 31: Sask. Sec. 27).

Miscellaneous Provisions as to Documents and Evidence

Newspaper

47. The production of a printed copy of a newspaper in any action shall be *prima facie* evidence that any notice or advertisement contained therein was inserted, advertised and published in that newspaper by the person by whom, or in whose behalf, or in whose name, the notice or advertisement purports or appears to be inserted, advertised or published.

(B.C. Sec. 48).

Attesting witness

48. It shall not be necessary to prove, by the attesting witness, an instrument to the validity of which attestation is not requisite.

(Alta. Sec. 53: Man. Sec. 49 (1): Ont. Sec. 51).
(See B.C. Sec. 44: Can. Sec. 32 (1): N.B. Sec. 19: N.S. Sec. 33: P.E.I. Sec. 19).

Handwriting comparison

49. Comparison of a disputed writing with any writing proved to the satisfaction of the Court to be genuine, shall be permitted to be made by a witness; and the writing and the evidence of witnesses respecting the same may be submitted to the Court or jury as evidence of the genuineness or otherwise of the writing in dispute.

(Alta. Sec. 54: B.C. Sec. 45: Can. Sec. 8: Man. Sec. 50: N.B. Sec. 20: N.S. Sec. 34: Ont. Sec. 52: P.E.I. Sec. 20: Sask. Sec. 42).

Court may impound

50. Where a document is received in evidence the Court admitting the same may direct that it be impounded and kept in such custody for such period and subject to such conditions as may seem proper or until the further order of the Court.

(Alta. Sec. 55: Ont. Sec. 53).
(See B.C. Sec. 46: Can. Sec. 33: Man. Sec. 51).

51. The provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any other statute or law. Construction of Act

(Alta. Sec. 57 (altered)).
(See B.C. Sec. 50: Can. Sec. 34: Man. Sec. 30: N.B. Secs. 44 and 54: Sask. Sec. 47).

HEARSAY EVIDENCE CONTAINED IN DOCUMENTS

52. (1) In any action where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say— Statements made in documents

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statement; or

(b) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(ii) if the maker of the statement is called as a witness in the action:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any action, the court may at any stage of the action, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence— Court may admit

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

Exception

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

When statement admissible

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

Discretion of Court

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the action is with a jury, the Court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

(Man. Sec. 52).

Application

(6) Nothing in this section shall,—

(a) prejudice the admissibility of any evidence which would apart from the provisions of this section be admissible; or

(b) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this section had not been passed.

(Man. Sec. 54 (2). See 1945 Proceedings, page 25).

Weight to be given statement

53. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by section 52,

regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

Corroboration

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by section 52 shall not be treated as corroboration of evidence given by the maker of the statement.

(Man. Sec. 53).

Manner of proof

54. Subject as hereinafter provided, in any action an instrument to the validity of which attestation is requisite may, instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive; provided that nothing in this section shall apply to the proof of wills or other testamentary documents.

Presumption in an action

55. In any action there shall, in the case of a document proved, or purporting, to be not less than twenty years old, be made any presumption which immediately before the commencement of this Act would have been made in the case of a document of like character proved, or purporting, to be not less than thirty years old.

Rules of Court

56. It is hereby declared that section of the (Supreme Court) Act, and section of the (County Court) Act, (which relate to the making of rules of court) authorize the making of rules of court providing for orders being made at any stage of any action directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose.

NOTE: It may be found more convenient to insert this section in the Acts of the province referred to in the body of the section.

AFFIDAVITS AND DECLARATIONS

By whom administered in the province

57. An oath, affidavit, affirmation or statutory declaration for use in the Province may be administered, sworn, affirmed or made within the Province before:

(a) a judge of any Supreme Court or County Court in the Province;

(b) a justice of the peace, stipendiary magistrate, or police magistrate in the Province within his jurisdiction;

(c) the registrar of the Supreme Court or of any County Court within the Province;

(d) a commissioner for taking affidavits within the Province;

(e) a notary public appointed for the Province;

and every such officer shall designate his office below his signature to the jurat on an affidavit, affirmation or statutory declaration administered, sworn, affirmed or made before him.

(See B.C. Sec. 55: Man. Sec. 56: Ont. Interpretation Act Sec. 23: Ont. Commissioners for Taking Affidavits Act Secs. 8 and 9).

NOTE: Each province may make such variations or additions in Section 57 as may be required by local conditions.

By whom administered outside the province

58. Oaths, affidavits, affirmations or statutory declarations administered, sworn, affirmed or made in any (other) Province or in any other part of His Majesty's dominions or in any foreign state, before:

(a) a judge, a magistrate or an officer of a Court of Justice or a commissioner authorized to administer oaths in the Courts of Justice of such part of His Majesty's dominions or of such country;

(b) the mayor or chief magistrate of any city, borough, or town corporate certified under the seal of such city, borough or town corporate;

(c) Officers of any of His Majesty's diplomatic or consular services exercising their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls-general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls-general, acting consuls, acting vice-consuls and acting consular agents;

(d) Officers of the Canadian diplomatic, consular and representative services exercising their functions in any foreign country, or in any part of His Majesty's dominions outside of Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (c), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;

(e) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners exercising their functions in any foreign country or in any part of His Majesty's dominions outside of Canada;

(f) a notary public and certified under his hand and official seal; or

(g) a commissioner authorized by the laws of the Province to take such affidavits,

shall be as valid and effectual and shall be of the like force and effect to all intents and purposes as if the oath, affidavit, affirmation or statutory declaration had been duly administered, sworn, affirmed or made in the Province before a commissioner for taking affidavits therein, or other competent authority of the like nature.

(Ont. Sec. 38: Man. Sec. 57: Sask. Sec. 45).

Proof of oath

59. Any document purporting to be signed by a person referred to in section 58, and

(a) in the case of a person referred to in clause (b) or (f) of that section, purporting to have impressed thereon or attached thereto the seal required by the said clause (b) or (f);

(b) in the case of a person referred to in clause (c), (d) or (e) of that section, purporting to have impressed thereon or attached thereto his seal of office if any,

in testimony of the oath, affidavit, affirmation or statutory declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of the signature, or seal and signature, or of his official character.

(Alta. Sec. 43 (re-drawn)).
(See B.C. Sec. 57: Sask. Sec. 45 (2): N.S. Sec. 52 (2): Ont. Sec. 39).

Irregularity in form

60. No defect, by misdescription of parties or otherwise in the title or jurat of any affidavit, and no other irregularity in the form of any affidavit, affirmation or statutory declaration shall be an objection to its reception in evidence, if the Court before or to whom it is tendered thinks proper to receive it; and the Court may direct a memorandum to be made on the document that it has been so received.

(B.C. Sec. 59).
(See Alta. Sec. 44: Man. Sec. 60: Ont. Sec. 40).

Administration of oaths

61. Where by an Act of the Legislature, or by a rule of the Legislative Assembly, or by an order, regulation or commission made or issued by the Lieutenant-Governor in Council, under a law authorizing or requiring the taking of evidence under oath, evidence under oath is authorized or required to be taken, or an oath is authorized or directed to be made, taken, or administered, the oath may be administered and a certificate of its having been made, taken, or administered may be given by anyone authorized by the Act, rule, order, regulation, or commission to take the evidence or by anyone authorized to take affidavits under this Act having authority or jurisdiction within the place where the oath is administered.

(Man. Sec. 12 (altered): B.C. R.S. 1936, c. 1. s. 31 (altered)).
(Ont. Interpretation Act Sec. 23: N.S. R.S. c. 1, Sec. 23 (30)).

Military records

62. The production of a certificate in writing signed or purporting to be signed,—

(a) by the Adjutant-General, Deputy Adjutant-General, or officer in charge of records, Militia Service, Department of National Defence, in the case of a member of His Majesty's Military Forces; or

(b) by the Naval Secretary, Naval Service, Department of National Defence, in the case of a member of His Majesty's Naval Forces; or

(c) by the officer in charge of records, Air Service, Department of National Defence, in the case of a member of His Majesty's Air Forces; or

(d) by an officer of His Majesty's Naval, Military or Air Forces, authorized so to sign, in the case of a member of any of His Majesty's Forces,

stating that the person named in the certificate was a member of any of His Majesty's Forces, and that he has been officially reported as dead or presumed to be dead, if it appears on the face of the certificate that the person signing is qualified as prescribed in paragraph (a), (b), (c) or (d), as the case may be, shall be sufficient proof of the death of such person and of all facts stated in the certificate for any purpose to which the authority of the Legislature of extends, and also of the office, authority and signature of the person giving or making the certificate, without any proof of his appointment, authority or signature.

(Amendment to Sec. 58 Alberta Evidence Act adapted in pursuance of correspondence with Department of Justice, Ottawa).
(Man. Sec. 47: Ont. Sec. 45).

POWERS UNDER FOREIGN COMMISSIONS

Jurisdiction of Courts

63. (1) Where, upon application by motion for this purpose, it is made to appear to the Supreme Court or a judge thereof, or to a County Court judge, that any Court or tribunal of competent jurisdiction in any other Province of Canada or in the United Kingdom or in any British dominion, colony or possession, or in a foreign state has duly authorized, by commission, order or other process, the obtaining of testimony in or in relation to any action pending in or before the foreign Court or tribunal, of any witness out of the jurisdiction thereof, and within the jurisdiction of the Court or judge so applied to, the Court or judge may order the examination of the witness accordingly, and in a manner and form directed by the commission, order, or other process; and may, by the same order or a subsequent order, command the attendance of any person named therein for the purpose of being examined, or the production of any writings or other documents mentioned in the order; and give all such directions as to the time, place, and manner of the examination and all other matters connected therewith as may appear reasonable and just; and the order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by the same Court or judge in an action pending in the Court or before the judge.

Expenses of witness

(2) Every person whose attendance is so ordered shall be entitled to the like conduct-money and payment for expenses and loss of time as upon attendance at a trial in the Court.

When witnes compellable

(3) Every person examined under such commission, order or other process as aforesaid shall have the like right to refuse to answer questions which, in an action pending in the Court by which, or by a judge whereof, the order for examination was made, the witness would be entitled to refuse to answer; and no person shall be compelled to produce at the examination any writing or document which he would not be compellable to produce at the trial of such an action.

Authority to administer oath

(4) Where the commission directs, or the instructions of the Court accompanying the same direct, that the persons to be examined shall be sworn or shall affirm before the commissioner or other person, the commissioner or other person shall have authority to administer an oath or affirmation to the person to be examined as aforesaid.

(B.C. Sec. 49 (altered)).

(See 6 and 7 Vic. c. 82: Alta. Sec. 52: Can. Sec. 41 et seq. : Man. Sec. 79: N.B. Secs. 23 and 24: N.S. Secs. 55 to 60: Ont. Sec. 55: Sask. Sec. 46).

UNIFORM CONSTRUCTION

Uniform interpretation

64. 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.

REPEAL

Repeal

65. The following Acts are hereby repealed, viz:—

. . . . . .

COMING INTO FORCE

Coming into force

66. This Act shall come into force in whole or in part upon dates to be fixed by one or more proclamations of the Lieutenant-Governor in Council.

APPENDIX C1

THE TESTATORS FAMILY MAINTENANCE ACT REPORT OF THE MANITOBA COMMISSIONERS

At the 1944 meeting of the Conference a draft uniform Act was tentatively adopted and printed in the Proceedings but it was resolved that the draft Act should be referred back to the Manitoba Commissioners for further consideration and the incorporation therein of the amendments made at the 1944 meeting, the Manitoba Commissioners to report thereon at the next meeting.

The Manitoba Commissioners have carefully examined the draft as printed in the Proceedings. In doing this they had the very great advantage of the assistance of Messrs. H. S. Scarth, K.C., and F. M. Burbidge, K.C., both of whom were members of the committee of the Manitoba Bar Association which prepared the first draft submitted to the Conference. Messrs. Scarth and Burbidge kindly sat in with the Manitoba Commissioners while they were considering the draft Act. Since they had made an exhaustive study of the subject, their suggestions were invaluable.

We have decided to recommend a few changes in the draft as printed. These are found in section 2, subsection (2) of section 6, subsection (1) of section 7, section 8, subsection (2) of section 9, subsection (1) of section 12, section 13, and the addition of a new section 14. We append hereto a draft with the recommended changes made therein. In order that these may be plainly apparent, we have italicized all changes made in the draft as printed in the Proceedings of the 1944 Conference. The changes made in section 2, subsection (2) of section 6, subsection (1) of section 7, and section 8 are of a formal character and will, we think, require no comment.

As will be noted, we have suggested the addition of a new subsection (2) to section 9. In view of the provisions of section 13, we felt that there was a possibility that solicitors might feel that they could not safely advise clients who were executors of estates to distribute any portion of the estate until the lapse of six months. This would be unfortunate and would hold up the closing out of many estates where there would be no possibility of any claim being made. We suggest, therefore, that it is advisable to add the proposed new subsection (2) to section 9.

Subsection (1) of section 12 was discussed at length and several suggested changes considered but the only change finally adopted for recommendation to the Conference was the addition

of the words stating that His Majesty shall be bound. Since the provisions of subsection (1) of section 12 might in some cases involve the refund of succession duties already collected, it was felt that this addition was necessary, particularly because of the rule that His Majesty is not bound except by express words—a rule which is embodied in the Interpretation Acts of several of the provinces and is included in the uniform Interpretation Act.

It was decided that subsection (2) of the present section 13 had no place in that section since subsections (1) and (3) relate to the time within which applications may be filed, while subsection (2) relates to the effect of an application. Section 13 has therefore been cut down by the omission of subsection (2).

Subsection (2) with a certain addition, to which reference will now be made, has been suggested as a new section 14. The added words in the new section 14 are those in paragraph (b) thereof, namely, "in so far as the question of limitation is concerned". These words were in the original draft submitted to the Conference and were struck out. They appear in the New Zealand section from which the provision was taken. With deference to the views of those who thought otherwise at the 1944 Conference, the Manitoba Commissioners feel that these words should be restored. A situation might arise where an application having been made by one dependant, the judge would decide that he would not proceed with the matter until other dependants who might wish to claim had been notified. This he could do under paragraph (a) of the proposed new section 14. The judge might then order a notice to be served on other dependants. It is quite conceivable that this order would be made and the notice served near the end of the period of six months. Some of the other dependants so served might then decide that they wished to become parties to the application but if it were not for the provisions of the proposed paragraph (b) of the new section 14 they might then be met with the argument that under section 13 their application could not be made.

The only other change in the draft printed in the 1944 Proceedings is a change in the numbers of the sections from 14 to 19 to read from 15 to 20.

DATED at Winnipeg this twenty-fifth day of June, 1945.

W. P. FILLMORE,

R. M. FISHER,

G. S. RUTHERFORD.

Manitoba Commissioners.

AN ACT TO AUTHORIZE PROVISION FOR THE MAINTENANCE OF CERTAIN DEPENDANTS OF TESTATORS

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of , enacts as follows:

1. This Act may be cited as "The Testators Family Maintenance Act".

2. In this Act,

(a) "child" includes a child lawfully adopted by the testator, and also a child of the testator en ventre sa mere at the date of the testator's death;

Imp. sec. 5.

(b) "dependant" means the wife, husband or child of the testator;

N.S. sec. 33 (1). See Imp. Act sec. 1 (1) and Ont. sec. 1 (b).

(c) "executor" includes an administrator with the will annexed;

(d) "judge" means a judge of . . . . . ;

(e) *"will" includes a codicil.*

(Note:—Paragraph (e) will be required only in provinces in which this does not appear in the provincial Interpretation Act).

3. (1) Where a person (hereinafter called the testator) dies leaving a will, and without making therein adequate provision for the proper maintenance and support of his dependants, or any of them, a judge on application by or on behalf of such dependants, or any of them, may, in his discretion and taking into consideration all the circumstances of the case, order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants, or any of them.

(N.Z. Sec. 33 (1)).

(2) The judge may make suspensory orders. New.

(See *Welch* v. *Mulock* (1924) N.Z.L.R. 673; In re Birch (1929) N.Z.L.R. 463; Can. Bar Review, Vol. 18, p. 461).

(3) The judge may refuse to make an order in favour of any person if his character or conduct is such as, in the opinion of the judge, to disentitle him to the benefit of an order under this Act.

(N.Z. sec. 33 (2)).

(4) Notwithstanding the provisions of The Devolution of Estates Act (Manitoba), where a testator dies intestate as to part of his estate, a judge may make an order affecting that part of his estate in respect of which he died intestate in the same manner as if the will had provided for distribution of that part as on an intestacy.

(See Sask. sec. 2 (3); Ont. sec. 2 (1); Imp. sec. 1 (1)).

4. An application under this Act may be made by originating notice of motion. New.

5. The judge in making an order for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit; and may, in his discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as to him seems proper, with payment of an allowance sufficient to provide such maintenance and support.

(Sask. sec. 8 (1): N.Z. sec. 33 (1); see Ont. sec. 2 (1)).

6. (1) The provision for maintenance and support ordered by the judge may be out of the income or the corpus of the estate of the testator, and may be by way of

(a) an amount payable annually or otherwise;

(b) a lump sum to be paid or held in trust; or

(c) certain property to be transferred or assigned, either absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant,

as the judge deems fit.

(2) Where a transfer of property is ordered, the judge may give all necessary and proper directions for the execution of the transfer either by the executor or such other person as the judge may direct, or may *make* a vesting order.

(Sask. sec. 8 (3)).

7. (1) Where a judge has ordered payments, or has ordered a lump sum to be invested for the benefit of a dependant, or has made any other provision for the future maintenance and support of a dependant, the judge *at any subsequent date* may

(a) enquire whether the party benefited by the order has become possessed of, or entitled to, any provision for his proper maintenance or support;

(b) enquire into the adequacy of such provision; and

(c) discharge, vary or suspend the order, or make such other order as is just in the circumstances.

(N.Z. sec. 33 (13)).

(See In re Birch (1929) N.Z.L.R. 463; *Welch* v. *Mulock* (1924) N.Z.L.R. 673; In re Collins (1927) N.Z.L.R. 746)).

(2) Where a suspensory order has been made, a judge at any subsequent date may order,

(a) payments to be made to a dependant; or

(b) the increase, decrease or variation of any payments being made to a dependant. New.

8. A judge *at any time may,*

(a) fix a periodic payment or lump sum to be paid by any legatee or devisee to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested;

(b) relieve such portion from further liability; and

(c) direct,

(i) in what manner such periodic payment shall be secured, and

(ii) to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

(N.Z. sec. 33 (6)).

9. (1) Where an application is made and notice thereof is served on the executor or trustee of the estate of the testator, he shall not, after service of the notice upon him, proceed with the distribution of the estate until the court has disposed of the application; and the estate, or such portion thereof as is comprised in, or affected by, the application shall be held subject to the provisions of any order that may be made.

(Sask. sec. 15).

(2) *Notwithstanding any other provision of this Act an executor or trustee may, until notice of an application is served upon him, proceed with the distribution of the estate.*

10. The judge may accept such evidence as he deems proper of the testator's reasons as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision as the case may be, for a dependant, including any statement in writing signed by the testator and dated; and in estimating the weight, if any, to be attached to such statement, the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(Sask. sec. 8 (6); Imp. sec. 1 (7)).

11. The incidence of any provision for maintenance and support ordered shall, unless the judge otherwise determines, fall rateably upon the whole estate of the testator, or, in cases where the authority of the judge does not extend to the whole estate, then to that part to which the authority of the judge does or can be made to extend; and the judge may relieve any part of the testator's estate from the incidence of the order.

(Sask. sec. 10; N.Z. sec. 33 (4) , (5)).

12. (1) Where an order is made under this Act, then for the purposes of enactments relating to succession duties the will shall be deemed to have had effect from the testator's death as if it had been executed with such variations as may be necessary to give effect to the provisions of the order; *and His Majesty shall be bound by the provisions of this section.*

(Sask. sec. 13 (1); N.Z. sec. 34 (1) , (2).)

(2) The judge may give such further directions as he deems fit for the purpose of giving effect to the order, but no larger part of the estate shall be set aside or appropriated than is sufficient at the date of the order to produce by the income therefrom the required amount.

(Sask. sec. 13 (2)).

(3) A certified copy of every order made under this Act shall be filed with the registrar of the court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be endorsed on or annexed to the copy of the original letters probate or letters of administration with the will annexed in the custody of the registrar.

(Sask. sec. 13 (3)).

13. (1) *Subject to subsection (2), no application for an order under section 3 may be made except within six months from the grant of probate of the will or of administration with the will annexed.*

(2) *A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.*

14. *Where an application for an order under section 3 is made on behalf of any dependant,*

(*a*) *it may be treated by the judge as; and*

(*b*) *in so far as the question of limitation is concerned, shall be deemed to be,*

an application on behalf of all persons who might apply.

15. A dependant for whom provision is made pursuant to this Act shall not anticipate the same; and no mortgage, charge or assignment of any kind of or over such provision, made before the order of the judge, shall be of any force, validity or effect.

(Sask. sec. 16; N.Z. sec. 33 (12)).

16. An appeal shall lie to the Court of Appeal (Manitoba) from any order made under this Act. New.

(NOTE:—This section may be dropped in provinces where not required).

17. An order or direction made under this Act may be enforced against the estate of the testator in the same way and by the same means as any other judgment or order of the court against the estate may be enforced; and a judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found to be entitled.

(Sask. sec. 20).

18. (1) No order shall be made that has the effect of reducing the interest of a husband or wife in the estate of a testator to an amount that, in the opinion of the judge, is less than the share to which the husband or wife would have been entitled under the provisions of The Dower Act (Manitoba), should he or she elect to take under the provisions of that Act. New.

(2) The benefits given the husband or wife of a testator by an order under this section shall be in lieu of the share given him or her under The Dower Act, and thereafter he or she, except as to a life estate in the homestead, shall have no rights under The Dower Act. New.

(NOTE:—The provinces will vary as required).

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

20. This Act shall come into force on assent.

APPENDIX C2

AN ACT TO AUTHORIZE PROVISION FOR THE MAINTENANCE OF CERTAIN DEPENDANTS OF TESTATORS

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of , enacts as follows:

1. This Act may be cited as "The Testators Family Maintenance Act."

2. In this Act,

(a) "child" includes a child lawfully adopted by the testator, and also a child of the testator en ventre sa mere at the date of the testator's death;

Imp. sec. 5.

(b) "dependant" means the wife, husband or child of the testator;

(N.Z. sec. 33 (1)).

(See Imp. Act sec. 1 (1) and Ont. sec. 1 (b)).

(c) "executor" includes an administrator with the will annexed;

(d) "judge" means a judge of . . . .;

(e) "order" includes suspensory order;

(f) "will" includes a codicil.

(NOTE:—Paragraph (f) will be required only in provinces in which this does not appear in the provincial Interpretation Act).

3. (1) Where a person (hereinafter called the testator) dies leaving a will, and without making therein adequate provision for the proper maintenance and support of his dependants, or any of them, a judge on application by or on behalf of such dependants, or any of them, may, in his discretion and taking into consideration all the circumstances of the case, order that such provision as he deems adequate shall be made out of the estate of the testator for the proper maintenance and support of the dependants, or any of them.

(N.Z. sec. 33 (1)).

(2) The judge may make an order, herein referred to as a suspensory order, suspending in whole or in part the administration of the testator's estate, to the end that application may be made

at any subsequent date for an order making specific provision for maintenance and support. New.

(See *Welch* v. *Mulock* (1924) N.Z.L.R. 673; In re Birch (1929) N.Z.L.R. 463; Can. Bar Review, Vol. 18, p. 461).

(3) The judge may refuse to make an order in favour of any person if his character or conduct is such as, in the opinion of the judge, to disentitle him to the benefit of an order under this Act.

(N.Z. sec. 33 (2)).

(4) Notwithstanding the provisions of The Devolution of Estates Act (Manitoba), where a testator dies intestate as to part of his estate, a judge may make an order affecting that part of his estate in respect of which he died intestate in the same manner as if the will had provided for distribution of that part as on an intestacy.

(See Sask. sec. 2 (3); Ont. sec. 2 (1); Imp. sec. 1 (1)).

4. An application under this Act may be made by originating notice of motion (or summons). New.

5. The judge in making an order for maintenance and support of a dependant, may impose such conditions and restrictions as he deems fit, and may, in his discretion, make an order charging the whole or any portion of the estate, in such proportion and in such manner as to him seems proper, with payment of an allowance sufficient to provide such maintenance and support.

(Sask. sec. 8 (1); N.Z. sec. 33 (1); See Ont. sec. 2 (1)).

6. (1) The judge may order that the provision for maintenance and support be made out of the whole or any portion of the estate and out of income or corpus or both, and may be by way of

(a) an amount payable annually or otherwise;

(b) a lump sum to be paid or held in trust; or

(c) particular property to be transferred or assigned, either absolutely or in trust or for life, or for a term of years to or for the benefit of the dependant,

as the judge deems fit.

(2) Where a transfer or assignment of property is ordered, the judge may give all necessary and proper directions for the execution of the transfer or assignment either by the executor or such other person as the judge may direct, or may make a vesting order.

(Sask. sec. 8 (3)).

7. Where an order has been made under this Act a judge at any subsequent date may

(a) enquire whether the party benefited by the order has become possessed of, or entitled to, any other provision for his proper maintenance or support;

(b) enquire into the adequacy of the provision ordered; and

(c) discharge, vary, or suspend the order, or make such other order as he deems fit in the circumstances.

(N.Z. sec. 33 (13)).

(See In re Birch (1929) N.Z.L.R. 463; *Welch* v. *Mulock* (1924) N.Z.L.R. 673; In re Collins (1927) N.Z.L.R. 746).

8. A judge at any time may,

(a) fix a periodic payment or lump sum to be paid by any legatee or devisee to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested;

(b) relieve such portion from further liability; and

(c) direct,

(i) in what manner such periodic payment shall be secured, and

(ii) to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

(N.Z. sec. 33 (6)).

9. Where an application is made and notice thereof is served on the executor or trustee of the estate of the testator, he shall not, after service of the notice upon him, proceed with the distribution of the estate until the judge has disposed of the application.

(Sask. sec. 15).

10. The judge may accept such evidence as he deems proper of the testator's reasons as far as ascertainable, for making the dispositions made by his will, or for not making provision or further provision as the case may be, for a dependant, including any statement in writing signed by the testator; and in estimating the weight, if any, to be attached to such statement, the judge shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

(Sask. sec. 8 (6); Imp. sec. 1 (7)).

11. The incidence of any provision for maintenance and support ordered shall, unless the judge otherwise determines, fall rateably upon the whole estate of the testator, or, in cases where the jurisdiction of the judge does not extend to the whole estate, then to that part to which the jurisdiction of the judge extends, and the judge may relieve any part of the testator's estate from the incidence of the order.

(Sask. sec. 10; N.Z. sec. 33 (4), (5)).

12. For the purposes of enactments relating to succession duties, where an order is made under this Act, the will shall be deemed to have had effect from the testator's death as if it had been executed with such variations as may be necessary to give effect to the provisions of the order and His Majesty shall be bound by the provisions of this section.

(Sask. sec. 13 (1); N.Z. sec. 34 (1), (2)).

13. A judge may give such further directions as he deems fit for the purpose of giving effect to an order.

(Sask. sec. 13 (2)).

14. A certified copy of every order made under this Act shall be filed with the registrar of the court out of which the letters probate or letters of administration with the will annexed issued, and a memorandum of the order shall be endorsed on or annexed to the copy of the original letters probate or letters of administration with the will annexed in the custody of the registrar.

(Sask. sec. 13 (3)).

15. (1) Subject to subsection (2), no application for an order under section 3 may be made except within six months from the grant of probate of the will or of administration with the will annexed.

(2) A judge may, if he deems it just, allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application.

16. Where an application for an order under section 3 is made by or on behalf of any dependant,

(a) it may be dealt with by the judge as; and

(b) in so far as the question of limitation is concerned, it shall be deemed to be

an application on behalf of all persons who might apply.

17. Where a testator, in his lifetime bona fide and for valuable consideration, has entered into a contract to devise and

bequeath any property real or personal and has by his will devised or bequeathed such property in accordance with the provisions of the contract such property shall not be liable to the provisions of an order made under this Act except to the extent that the value of the property in the opinion of the judge exceeds the consideration received by the testator therefor.

(Sask. sec. 9).

18. No mortgage, assignment, or charge of any kind of or upon an anticipated provision shall be of any force, validity or effect.

(Sask. sec. 16; N.Z. sec. 33 (12)).

19. An appeal shall lie to the Court of Appeal (Manitoba) from any order made under this Act. New.

(NOTE:—This section may be dropped in provinces where not required).

20. An order or direction made under this Act may be enforced against the estate of the testator in the same way and by the same means as any other judgment or order of the court against the estate may be enforced; and a judge may make such order or direction or interim order or direction as may be necessary to secure to the dependant out of the estate the benefit to which he is found to be entitled.

(Sask. sec. 20).

21. (1) No order shall be made that has the effect of reducing the interest of a husband or wife in the estate of a testator to an amount that, in the opinion of the judge, is less than the share to which the husband or wife would have been entitled under the provisions of The Dower Act (Manitoba), should he or she elect to take under the provisions of that Act. New.

(2) The benefits given the husband or wife of a testator by an order under this Act shall be in lieu of the share given him or her under The Dower Act, and thereafter he or she, except as to a life estate in the homestead, shall have no rights under The Dower Act. New.

(See *Saskatoon* v. *Shaw* (1945) 1 D.L.R. 353).

(NOTE:—The provinces will vary as required).

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

23. This Act shall come into force on assent.

APPENDIX D

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

TREASURER'S REPORT

FOR YEAR 1944-45

RECEIPTS		
Cash in Bank August 15, 1944	$794.13	
Contributions from—		
Saskatchewan	50.00	
Nova Scotia	50.00	
Alberta	50.00	
Manitoba	50.00	
New Brunswick	50.00	
Ontario	50.00	
Prince Edward Island	50.00	
British Columbia	50.00	
Subscription from the Department of the Secretary of State of Canada	50.00	
Bank Interest	12.50	
DISBURSEMENTS		
Secretarial Expenses		$ 45.00
National Printers Limited, Ottawa		387.38
Noble Scott Company Limited, Toronto		11.61
Bank commission on money orders		1.40
Exchange on cheques received		1.70
		447.09
Balance—Cash in Bank		809.54
	$1,256.63	$1,256.63

J. P. RUNCIMAN,
Treasurer.

Regina, August 17, 1945.

Audited and found Correct,

J. P. HOGG,
L. R. MACTAVISH,
Auditors.

Montreal, August 24, 1945.

APPENDIX E

SERVICE OF PROCESS BY MAIL

NOTE: It is intended that this provision be inserted in appropriate statutes and rules. Changes necessary to fit the context should be made.

1. In addition to any other method of service, a writ of summons (or as the case may be) may be served upon a defendant or other person to be served by sending to him a true copy thereof (or a certified or sealed copy thereof as the case may be) by registered post in an envelope upon which there is written "Deliver to addressee only. If not delivered within days return to (address of sender)"; and the service shall be deemed to be sufficient if the post office receipt therefor purporting to be signed by the defendant or other person to be served is produced as an exhibit to the affidavit of service which may be in the form set out in the Schedule.

2. A document that has been served under this section shall be deemed to have been served on the day of the date of the receipt that purports to be signed by the person to be served.

SCHEDULE

AFFIDAVIT OF SERVICE

(Style of Cause)

I ..... of ..... in the Province of ..... make oath and say:

I did on the ..... day of ..... 19 ...., send to the above-named defendant (or as the case may be) by registered post a true copy of (description of document to be served) here unto annexed and marked exhibit A in an envelope addressed to him at..... and upon which there was written:— "Deliver to addressee only. If not delivered within.....days return to (address of sender)", and hereunto annexed and marked Exhibit B is the post office receipt of the defendant therefor.

SWORN before me .....

APPENDIX F

THE CONDITIONAL SALES ACT
REPORT OF THE ALBERTA COMMISSIONERS

At the 1943 meeting of the Conference the following resolution was passed: "Resolved that the Alberta Commissioners inquire into the reasons why the draft Uniform Conditional Sales Act has not been adopted generally and report thereon at the next meeting of the Conference." Pursuant to that resolution, the Alberta Commissioners made a report (1944 Proceedings, page 47). The Uniform Act of 1922 has only been adopted by British Columbia, New Brunswick, Nova Scotia and Prince Edward Island, while Manitoba has no Conditional Sales Act.

The following resolution was passed at the 1944 meeting (Proceedings, page 24): "Resolved that the Uniform Conditional Sales Act be referred to the Alberta Commissioners to redraft in the light of modern conditions and the experience gained since the adoption of the Uniform Act in 1922."

The Uniform Act will be found in the 1922 Proceedings at page 40. The Conference has from time to time approved amendments to it.

Section 3 was amended as to subsection (1) in 1929 (Proceedings, pages 16 and 49) by the insertion of the words following the word "seized" in line 9 of the draft Act, now submitted down to the word "provision" in the third last line.

Subsection (2) of the same section was amended in 1930 (Proceedings, page 87) and 1933 (Proceedings, page 17). The first amendment inserted the words "or within ten days after" before the word "delivery", and the second one changed "twenty" to "thirty" days as the time within which filing must be made after the signing of the agreement.

Section 3 was again amended in 1933 (Proceedings, page 17) by providing for either the agreement or a copy to be filed.

Section 11(3) was amended in the same way in 1933; subsection (6) was amended in 1929 (Proceedings, page 50) by declaring that the residence of a buyer corporation shall be the City of .....

Section 12 was amended at the 1934 Conference (Proceedings, pages 16 and 46) by the adoption of the draft of the British Columbia Commissioners as revised by the Conference.

The Alberta Commissioners submit a new draft Uniform Act based on the Uniform Act of 1922 and incorporating changes and additions made by different Provincial Legislatures.

Section 2 is the same as section 2 of the Uniform Act of 1922, and section 3 is the same as section 3 as amended by the Conference in 1929.

Under the original section 3(1) failure to register rendered the provision of a conditional sale agreement, whereby the property in the goods remained in the seller, void as against subsequent purchasers or mortgagees for valuable consideration and without notice and also as against creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment, execution or attaching order under which the goods might have been seized. It was held by the Courts in various provinces that a trustee in bankruptcy, a liquidator, etc., were not purchasers under the foregoing provisions and that the provision was not void as against them.

The words inserted by the Conference at the 1929 Conference from "and" in line 9 to "provision" in the third last line were first enacted by the British Columbia legislature in that year. This amendment makes the provision as to the property being void against the persons mentioned, a trustee in bankruptcy, etc., but only "for the purpose of enforcing the rights of such creditors and not otherwise". The effect of these words was considered by Robertson J. of the British Columbia Supreme Court in the following case:—

In re Lytton Canneries Ltd., 19 C.B.C. 283. Mr. Justice Robertson said at page 285: ". . . . But it will be noticed that the amendment provides that it is for the purpose of enforcing the rights of 'such creditors' and these words 'such creditors' refer to creditors of the buyer who at the time of becoming creditors had no notice of the provision and who subsequently obtained judgment or an attaching order or issued execution. There must be therefore in every case a creditor who comes within these requirements. . . . . However I am of opinion that the words for the purpose of enforcing the rights of such creditors govern the whole of the amendment and as there were no such creditors as above mentioned the provisions in the conditional sales agreement are good against the trustee. . . . . ."

It will thus be seen that the protection given the trustee in bankruptcy is much more limited than that given purchasers.

Subsection (2) of section 3 of the original Uniform Act was amended by the Conference of 1930 by inserting in the second

line of the draft the words "or within ten days after" and this and other subsections of section 3 were amended by the Conference by providing for the filing of either the orginal agreement or a copy.

Section 4 of the draft Act introduces a special provision exempting manufactured goods from registration in certain circumstances. This section, in some form or other, is in the Ontario, Saskatchewan and Alberta Acts but, it should be pointed out, was rejected by the 1930 Conference (Proceedings, page 13).

Section 5 dealing with motor vehicles also is not in the 1922 Uniform Act but has been enacted by Saskatchewan and in somewhat similar terms, in British Columbia. The Saskatchewan section has been adopted in the draft Act and provides for two registrations, one at a central point (Regina) and also in the registration district where the buyer resides, while the British Columbia Act makes registration in the office of the Commissioner of Provincial Police at Victoria effective without any other registration.

Sections 6 and 7 dealing with goods purchased outside a Province and brought into the Province are not in the 1922 Uniform Act but have been in substance enacted by Alberta and Saskatchewan and also in Ontario where the substance of the two sections is incorporated in one section, 10. The Alberta and Saskatchewan sections have been adopted with the addition of similar provisions to those contained in section 3(1) as to the right of vendors who have not registered their agreements as against trustees in bankruptcy, etc.

Section 6 deals with agreements made outside the Province with respect to goods permanently removed into the Province and section 7 deals particularly with contracts made in the Province of Quebec under which the vendor, under the civil code, has a right to revendication, etc., under certain circumstances.

It is, we think, well settled that where an agreement is made outside a Province and the goods are brought into a Province, they remain subject to the right of the vendor under the foreign law and that the ordinary registration provisions of the Province would not apply.

Cline v. *Russell*, 2 A.L.R. 79; *Sawyer-Massey* v. *Boyce*, 1 Sask. L.R. 230; *Re Hudson Fashion Shop* (1926) 1 D.L.R. 199, 205, 206. Presumably section 10 of the Ontario Act was passed as a result of the decision in the last-mentioned case. See *Farley and Grant* (1936) 1 D.L.R. 57.

The corresponding Alberta sections 11 and 12 and the Saskatchewan sections 17 and 18 were enacted in 1930.

The validity of section 10 of the Ontario Act was, in effect, attacked in *In re Meredith* 11 G.B.R. 405, a judgment of Registrar Reilley. In this case goods were sent to Ontario under a contract made in Quebec, and the right of revendication was asserted. The Registrar upheld the validity of the section and said at page 409: "To my mind the error herein appears to have arisen in confusing the substantive rights under the contract with the enforcement of the remedies arising thereunder where the terms of the contract are to be interpreted according to the law of the contract while the only remedies available are those of the *lex sitae*. . . . . Section 10 supra does not presume to interfere with the substantive rights of the parties as determined by the terms of the contract, but it does directly presume to interfere with the remedial rights thereunder. It does not say that no revendication rights were acquired but it does say, very definitely, that those rights shall not be enforceable in the Province of Ontario."

Section 8 deals with renewal statements. There is no provision in the Uniform Act providing for renewal statements but similar sections have been enacted in Alberta, Ontario and British Columbia. The Ontario section was enacted by an amendment passed in 1938, chapter 5, section 3. A provision of this nature seems desirable as without it a person examining the record would not know the true position of a conditional sale agreement which may have been filed ten years before and is still in force for the full amount in so far as the record shows.

Section 9 deals with rectification of omissions to register for which no provision is made in the Uniform Act but has been made in the Alberta, British Columbia and Saskatchewan Acts, which provisions relate to both the omission to register the original agreement or copy and to the omission to register a renewal. The British Columbia provision was adopted by the Statutes of 1937, chapter 11, section 3.

The Ontario provision for extension of time for filing was enacted by chapter 14, section 1, of 1941, and appears to refer only to renewal statements and not to cover late filing of the original agreement or copy.

Sections 10, 11 and 12 of the draft Act are the same as in the Uniform Act of 1922.

Section 13 deals with defects, errors and omissions. This section goes a good deal beyond the section of the Uniform Act and the Ontario Act. Subsection (1) is the same as in those Acts and

subsection (2) has been adopted from the British Columbia Act. Subsection (2) was inserted in the British Columbia Act by chapter 11, section 2 of the 1937 Statutes.

Section 14 "Seller's duty to furnish particulars" is adopted from the Uniform Act, section 8. Section 6 of the Ontario Act is substantially the same.

Section 15 "Buyer's duty to give notice of sale, mortgage or removal of goods", is the same as in the Uniform Act and as adopted by British Columbia as section 10.

Section 16 "Redemption and resale where seller retakes possession" is the same as in the Uniform Act and as adopted by British Columbia as section 11. Section 7 of the Ontario Act is substantially the same but does not contain the provisions of subsection (2) of the draft Act.

Section 17 "Memorandum of Satisfaction" is the same as in the Uniform Act and does not differ substantially from the Alberta, Ontario and Saskatchewan sections. Subsection (2) does not appear in the section in the Acts of the other Provinces mentioned.

Section 18 deals with goods subject to a conditional sale agreement which are affixed to realty and replaces section 12 of the Uniform Act which reads as follows:

> "12. If the goods have been affixed to realty they shall remain subject to the rights of the seller as fully as they were before being so affixed, but the owner of such realty, or any purchaser, lessee, mortgagee, or tenant, or other encumbrancer thereof, shall have the right as against the seller to redeem the goods upon payment of the amount owing on them."

It was found that a similar section, 6 of the Ontario Act, gave no protection to the lien holder as against a bona fide purchaser of the realty. *Hoppe* v. *Manners* 66 O.L.R. 587 (1931). Subsequently the Conference considered a revision of the section in the years 1931, 1933 and 1934. See Proceedings of 1933 at page 92 and of 1934 at pages 16 and 46. The new section as adopted by the Conference of 1934 will be found at page 46 of the Proceedings of that year and is included as section 18 in the draft Act.

The remaining sections of the draft, 19 to 23, are the same as in the Uniform Act and the Schedule is as adopted by the Conference in 1934 (Proceedings, page 50).

As pointed out above, the Provinces of Nova Scotia, New Brunswick and Prince Edward Island have adopted the Uniform

Act of 1922 but I have not had an opportunity of examining any amendments which may have been made by those Provinces since the adoption of the Uniform Act

DATED at Edmonton, the 28th day of July, 1945.

W. S. GRAY,

For the Alberta Commissioners.

AN ACT TO MAKE UNIFORM THE LAW RESPECTING CONDITIONAL SALES OF GOODS

(Assented to , 19)

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 Conditional Sales Act".

INTERPRETATION

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

(a) "Buyer" means the person who buys or hires goods by a conditional sale, or any successor in interest of such person;

(b) "Conditional sale" means—

(i) any contract for the sale of goods under which possession is or is to be delivered to the buyer and the property in the goods is to vest in him at a subsequent time upon payment of the whole or part of the price or the performance of any other condition, or

(ii) any contract for the hiring of goods by which it is agreed that the hirer shall become, or have the option of becoming, the owner of the goods upon full compliance with the terms of the contract;

(c) "Goods" means all chattels personal other than things in action or money, and includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale;

(d) "Proper officer" means the officer with whom bills of sale and chattel mortgages are registered or filed;

(e) "Registration district" means the registration district for bills of sale and chattel mortgages;

(f) "Seller" means the person who sells or lets to hire goods by a conditional sale, or any successor in interest of such person.

(Uniform Act 1922 Proceedings, s. 2).

~~REQUISITES~~ AS AGAINST CERTAIN PERSONS

3. (1) After possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property in the goods remains in the seller shall be void as against subsequent purchasers or mortgagees claiming from or under the buyer in good faith, for valuable consideration and without notice, and as against creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer might have been seized, and, for the purpose of enforcing the rights of such creditors but not otherwise, shall be void as against a credit or suing on behalf of himself and other creditors, and as against an assignee for the general benefit of creditors, and as against a trustee under the Bankruptcy Act of the Dominion, and as against a receiver of the estate and effects of the buyer, and as against a liquidator of a corporation under the Winding-up Act of the Dominion or under any Statute of the Province in a compulsory winding-up proceeding, without regard to whether or not the creditor so suing had at the time of becoming a creditor notice of the provision or whether or not the assignee, trustee, receiver, or liquidator at the time of his appointment had notice of the provision, and the buyer shall, notwithstanding such provision, be deemed the owner of the goods unless the ~~requirements of~~ this Act are complied with.

(Uniform Act as amended 1929 Proceedings, pp. 49).

(2) ~~Such~~ provision shall be evidenced by a writing signed prior to or at the ~~time~~ of or within ten days after delivery of the goods, by the buyer or his agent, giving a description of the goods by which they may be readily and easily known and distinguished, and stating the amount unpaid of the purchase price or the terms and conditions of the hiring, and the writing or a true copy thereof shall be filed within thirty days after it has been signed, with the proper officer of the registration district in which the buyer resided at the time of the making of the conditional sale, or, in case his residence is outside the Province, of the district where the goods are delivered.

(Uniform Act as amended 1930 Proceedings, p. 87 and 1933, p. 17).

(3) If the buyer resides in one registration district and the goods are delivered to him in another, an original of the writing or a true copy thereof shall be filed in the district in which the delivery is made as well as in that of the buyer's residence.

(Uniform Act as amended 1933 Proceedings, p. 17).

(4) If the goods are after delivery removed by the buyer into another district, an original of the writing or a true copy thereof shall, within twenty days after such removal has come to the knowledge of the seller, be filed in the district into which the goods are removed.

(Uniform Act as amended 1933 Proceedings, p. 17).

(5) Every such agreement or a true copy thereof shall upon every such registration be accompanied by an affidavit of the seller or his agent stating that the writing annexed thereto truly sets forth the agreement entered into between the parties and that the agreement was entered into bona fide and not for the purpose of protecting the goods mentioned therein against the creditors of the buyer.

(Alberta, s. 3 (2); Sask., s. 3 (3)).

(6) In case the buyer is a corporation, the residence of that buyer shall for all purposes of this section be deemed to be in the City of

(Uniform Act as amended 1929 Proceedings, p. 50).

(7) In the case of a contract for the sale to a railway, street railway or inter-urban railway company of rolling stock, the foregoing provisions of this section shall not apply if the contract or a copy of it is, within thirty days of its execution, filed in the office of the Registrar of Companies of the Province in which the head office or chief agency in Canada of the company is situated.

(Uniform Act with "Registrar of Companies" substituted for "Provincial Secretary").

Manufactured Goods

4. Registration shall not be required in the case of a sale of manufactured goods, of the value of fifteen dollars or over, which, at the time of the actual delivery thereof to the buyer, have the manufacturer's or vendor's name painted, printed or stamped thereon or plainly attached thereto by a plate or similar device; provided that the manufacturer or vendor, being the seller of such goods, keeps an office in the Province of where inquiry may be made and information procured concerning the sale of such goods; and provided further that the manufacturer or vendor or his agent does, within five days after receiving a request so to do made to him either in person or by registered letter, furnish to any applicant therefor a statement of the amounts, if any, paid thereon and the balance remaining unpaid. The person so inquiring shall if such inquiry is by letter give a name and post office address to which a reply may be sent; and it shall be sufficient if the required information is given by regis-

tered letter deposited in the post office within the said five days addressed to the person inquiring at his proper post office address, or where a name and address is given, addressed to such person by the name and at the post office so given.

(Alberta, s. 8; Sask., s. 12; Ont., s. 2 (5)).

MOTOR VEHICLES

5. (1) When the subject of a conditional sale is a motor vehicle within the meaning of The Act, the writing evidencing the sale or a true copy thereof, authenticated as required by subsection (3) of section 3, shall be registered, within thirty days from the time of the actual delivery of the vehicle, in the office of the registration clerk for chattel mortgages in the registration district of and in the registration district in which the buyer resides if that is a district other than the registration district of .

(2) Except as mentioned in subsection (1), the provisions of section 3 shall not apply to such sale.

(3) No motor vehicle, the subject of a sale evidenced by a conditional sale agreement registered as required by this section, shall be removed out of the Province of without the written consent of the seller.

(4) Any person violating the provisions of subsection (3) shall be liable to a penalty not exceeding one hundred dollars.

(B.C., s. 3 (8); Sask., s. 4).

BRINGING GOODS INTO PROVINCE

6. In the event of the permanent removal into the Province of goods of the value of fifteen dollars or over, subject to an agreement, made or executed without the Province, that the right of property or right of possession in whole or in part shall remain in the seller notwithstanding that the actual possession of the goods passes to the buyer, then unless—

(a) the agreement contains such a description of the goods, the subject of the conditional sale, that the same may be readily and easily known and distinguished;

(b) a copy thereof and of the affidavits and instruments relating thereto, proved to be a true copy by the affidavit of some person who has compared the same with the originals, is filed in the office of the registration clerk of the district to which the goods and chattels are removed, within thirty days after the seller has received notice of the place to which the goods have been removed,

the seller shall not be permitted to set up any right of property or right of possesson in or of the said goods as against subsequent purchasers or mortgagees claiming from or under the buyer in good faith, for valuable consideration and without notice, and as against creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized, and, for the purpose of enforcing the rights of such creditors but not otherwise, the provision shall be void as against a creditor suing on behalf of himself and other creditors, and as against an assignee for the general benefit of the creditors, and as against a trustee under the Bankruptcy Act of the Dominion, and as against a receiver of the estate and effects of the buyer, and as against a liquidator of a corporation under the Winding-up Act of the Dominion or under any Statute of the Province in a compulsory winding-up proceeding, without regard to whether or not the creditor so suing had at the time of becoming a creditor notice of the provision or whether or not the assignee, trustee, receiver, or liquidator at the time of his appointment had notice of the provision, and the buyer shall, notwithstanding such provision, be deemed the owner of the goods.

(Alberta, s. 11; Sask., s. 17; Ont., s. 10).

7. When a contract has been made without the Province with reference to goods not then within the Province, by which under the law governing the contract the vendor has, upon default in payment of the price or the insolvency of the purchaser, a right of revendication or a preference for the price of the goods sold or a right to a dissolution of the sale and to resume possession of the goods notwithstanding the possession of the purchaser, and the goods are brought into the Province, the vendor shall not be permitted to set up the right of revendication, the preference for the price or, except in the case of an agreement which complies with the terms of section 6, and is registered as thereby required, the right to a dissolution of the sale and to resume possession of the goods, as against subsequent purchasers or mortgagees claiming from or under the buyer in good faith for valuable consideration, and as against creditors of the buyer who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized, and, for the purpose of enforcing the rights of such creditors but not otherwise, as against a creditor suing on behalf of himself and other creditors, and as against an assignee for the general benefit of creditors, and as against a trustee under the Bank-

ruptcy Act of the Dominion, and as against a receiver of the estate and effects of the buyer, and as against a liquidator of a corporation under the Winding-up Act of the Dominion or under any Statute of the Province in a compulsory winding-up proceeding, and the buyer shall, notwithstanding such provision, be deemed the owner of the goods.

(Alta., s. 12; Sask., s. 18; Ont., s. 10).

RENEWAL STATEMENTS

8. (1) The seller under any such agreement, proviso, or condition as is mentioned in section 3 or 6, shall not be permitted to set up any such right of property or right of possession as against any such purchaser or mortgagee as is mentioned in section 3 or 6 or as against creditors of the buyer or an assignee, trustee, receiver or liquidator as mentioned in section 3 or 6, after the expiration of three years from the filing of the writing unless within the said three years a statement of the amount still due for principal and interest on the conditional sale and of all payments made on account thereof is registered in the office of the registration clerk of the registration district where the property is then situate, with an affidavit of the seller or of one of several sellers or of the assignee or of one of several assignees or of their assigns or of the agent of the seller or sellers or of the assignee or one of several assignees or of their assigns, duly authorized for that purpose, as the case may be, stating that such statements are true and that the said conditional sale or writing was not kept on foot for any fraudulent purpose or to defeat, delay or prejudice the creditors of the buyer, which statement and affidavit shall be regarded as one instrument.

(2) A further statement in accordance with the provisions of subsection (1) duly verified as required thereby shall be filed in the office of the registration clerk of the district where the goods are then situate within three years after the date of the filing of the statement required by subsection (1), and thereafter within each succeeding period of three years from the date of the registration of the last preceding annual statement, otherwise a seller shall not be permitted to set up any right of property or possession as against any such purchaser, mortgagee or creditor or against an assignee, trustee, receiver or liquidator as aforesaid.

(Alta., s. 4; Ont., s. 3b; B.C., s. 4).

RECTIFICATION OF OMISSIONS

9. A judge of the Supreme Court or a judge of the District Court having jurisdiction in the district within which the original

or copy of any writing, agreement, statement or affidavit is required to be registered or filed pursuant to any of the provisions of this Act, upon being satisfied that the omission to register or file the same within the prescribed time or that any omission or mis-statement in any such writing, agreement, statement or affidavit was accidental or due to inadvertence or impossibility in fact, may in his discretion order that the omission or mis-statement be rectified in the register or may extend the time for registration, subject always to the rights of third persons accrued by reason of the omission, and subject further to such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct.

(Alta., s. 10; Sask., s. 13; B.C., s. 8a; Ont., s. 3b (5) as to renewal statements).

Sales to Traders

10. If the goods are delivered to a trader or other person and the seller expressly or impliedly consents that the buyer may resell them in the course of business, and such trader or other person resells the goods in the ordinary course of his business, the property in the goods shall pass to the purchasers notwithstanding the other provisions of this Act.

(Uniform Act 1922 Proceedings, s. 4).

Delivery of Copy of Writing to Buyer

11. The seller shall deliver a copy of the writing to the buyer within twenty days after the execution thereof, and if, after request, he neglects or refuses to do so a Judge of the County (or District) Court of the county (or district) in which the buyer resided when the contract was made may, on summary application, make an order for the delivery of such copy.

(Uniform Act, s. 5; Ont., s. 3).

Index Book

12. The proper officer shall make an entry of every writing of which a copy is filed in his office under this Act in an index book to be kept for that purpose.

(Uniform Act, s. 5; Ont., s. 4).

Defects, Errors and Omissions

13. (1) An error of a clerical nature or in an immaterial or non-essential part of the copy of the writing, which does not mislead, shall not invalidate the filing or destroy the effect of it.

(Uniform Act, s. 7; B.C., s. 8; Ont., s. 5).

(2) A defect or irregularity in the execution or attestation of an original writing or copy thereof evidencing a conditional sale or a renewal statement shall not invalidate the same, nor shall any defect, irregularity, or omission in the affidavit accompanying a renewal statement as provided by section 8 invalidate any provision of the conditional sale, or the filing of the original writing or copy or the renewal statement, unless in the opinion of the Court or Judge before whom the matter is heard such defect, irregularity, or omission has actually misled or was likely to mislead some person whose interests are affected by the conditional sale.

(Uniform Act, s. 7; Ont., s. 5; B.C., s. 8 (2)).

SELLER'S DUTY TO FURNISH PARTICULARS

14. (1) The seller shall, within five days after the receipt of a request from any person proposing to purchase the goods or from any actual or intending creditor of the buyer or from any other interested person, accompanied by a sufficient amount in money or postage stamps to pay the postage on a reply by registered letter, furnish particulars of the amount remaining due to the seller and the terms of payment, and in default he shall be liable, on summary conviction, to a penalty not exceeding fifty dollars.

(2) The person making the request shall give a name and post office address to which a reply may be sent, and it shall be sufficient if the information is given by registered letter, postage prepaid, deposited in a post office within the prescribed time addressed to the name and post office address so given.

(Uniform Act s. 8; Ont., s. 6).

BUYER'S DUTY TO GIVE NOTICE OF SALE, MORTGAGE OR REMOVAL OF GOODS

15. (1) Except for temporary purposes for a period of not more than thirty days, the buyer shall not remove the goods into another registration district unless he has, at least ten days before such removal, given the seller personally or by registered mail written notice of the place to which the goods are to be removed and the approximate time of the intended removal.

(2) The buyer shall not, prior to complete performance of the contract, sell, mortgage, charge, or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage, charge, or otherwise dispose of same, has notified the seller in writing, personally or by registered mail, of the name and address of such person, not less than ten days before such sale, mortgage, charge, or other disposal.

(3) In case the buyer removes the goods or disposes of his interest in them contrary to the foregoing provisions of this section, the seller may retake possession of the goods and deal with them as in case of default in payment of all or part of the purchase price.

(Uniform Act, s. 9).

REDEMPTION AND RESALE WHERE SELLER RETAKES POSSESSION

16. (1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem the same within that period by paying or tendering to the seller the balance of the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.

(2) When the goods are not redeemed within the period of twenty days, and subject to the giving of the notice of sale prescribed by this section, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.

(3) If the price of the goods exceeds thirty dollars and the seller intends to look to the buyer for any deficiency on a resale, the goods shall not be resold until after notice in writing of the intention to sell has been given to the buyer.

(4) The notice shall contain,—

(a) a brief description of the goods; and

(b) an itemized statement of the balance of the contract price due and the actual costs and expenses of taking and keeping possession up to the time of the notice; and

(c) a demand that the amount as stated in the notice shall be paid on or before a day mentioned, not less than five days from the delivery of the notice, if it is personally delivered, or not less than seven days from the mailing of the notice, if it is sent by mail; and

(d) a statement that, unless the amount as stated in the notice is paid within the time mentioned, the goods

will be sold either at private sale or advertised and sold by public auction.

(5) The notice may be given by personal delivery to the buyer or by mailing it by prepaid registered mail addressed to the buyer at his last known address.

(6) The notice may be given during the twenty days mentioned in subsection (1).

(7) This section shall apply notwithstanding any agreement to the contrary.

(Uniform Act, s. 10; Ont., s. 7).

MEMORANDUM OF SATISFACTION

17. (1) Upon payment or tender of the amount due in respect of the goods or performance of the conditions of the sale, and upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller shall sign and deliver to the person demanding it a memorandum in writing stating that his claims against the goods are satisfied, and such memorandum shall be accompanied by an affidavit of execution of an attesting witness, and may on payment of the prescribed fee be registered.

(2) If for ten days after receipt of such demand the seller unreasonably fails to mail or deliver the required memorandum, he shall be liable for all damages suffered by the demandant in consequence of his default.

(3) Upon registration of such memorandum the proper officer with whom the writing evidencing the conditional sale agreement or copy thereof is filed under the provisions of section 3 shall enter satisfaction upon the writing or copy so filed.

(Uniform Act, s. 11, as amended 1933 Proceedings, p. 18; Alta., s. 18; Ont., s. 11; Sask., s. 6).

GOODS AFFIXED TO REALTY

18. (1) In this section,—

(a) "Affixed", as applied to goods, means erected upon or fixed or annexed to land in such a manner and under such circumstances as to constitute fixtures;

(b) "Building" includes any structure, erection, mine or work built, erected, or constructed on or in any land;

(c) "Building materials" includes any goods which become so incorporated or built into a building that

their removal therefrom would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building (apart from the value of the goods removed); but shall not include goods which are severable from the land merely by unscrewing, unbolting, unclamping, uncoupling, or some similar method of disconnection; and shall not include machinery installed in a building for use in the carrying on of any industry, where the only substantial damage that would necessarily be caused to the building in removing the machinery therefrom (apart from the value of the machinery removed) is that arising from the removal or destruction of the bed or casing on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;

(d) "Goods" means all chattels personal capable of being affixed to land.

(2) This section shall not apply in respect of building materials and shall cease to apply in respect of any goods otherwise within the scope of this section upon their becoming affixed to land in such a manner as to constitute building materials.

(3) Subject to the provisions of this section, and notwithstanding the provisions of The (Land Registry Act) where possession of goods has been delivered to the buyer, and where the goods have been affixed to land, they shall remain subject to the rights of the seller as fully as they were before being affixed.

(4) In addition to compliance with the provisions of section 3, and not later than twenty days after the commencement of the affixing of the goods to the land, there shall be filed in the (Land Registry Office) of the land registration district within which the land is situate a notice in Form 1, setting out,

(a) the name and address of the seller;

(b) the name and address of the buyer;.

(c) a description of the goods by which they may be readily and easily known and distinguished;

(d) the amount unpaid on account of the purchase price or under the terms and conditions of the hiring; and

(e) a description of the land to which the goods are affixed or are to be affixed, sufficient for the purpose of identification in the (Land Registry Office).

The notice shall be signed by the seller or his agent, either before or after the goods are affixed to the land. There shall be attached to the notice a copy of the writing evidencing the conditional sale agreement, together with an affidavit of the seller or his agent in Form 2 verifying the notice. Upon the deposit of the notice and affidavit in the (Land Registry Office) accompanied by the payment of the prescribed fee, the Registrar shall file the notice and make a reference to it by entry in the proper register against the title of the parcel of land to which the notice relates; or, if the title has not been registered, the Registrar shall file the notice and make an entry of its particulars in an index to be kept in his office, to be known as the "Conditional Sales Index".

(5) The filing of a notice in the (Land Registry Office) pursuant to this section shall be deemed actual notice of the existence and provisions of the conditional sale agreement to which the notice relates to every person who is an owner of the land described in the notice or any interest in the land, or who is a purchaser, lessee, mortgagee, or other encumbrancer of the land or any interest in the land, whether or not he is registered in the books of the (Land Registry Office) as such owner, purchaser, lessee, mortgagee, or encumbrancer, and whether or not he became such owner, purchaser, lessee, mortgagee, or encumbrancer before or after the filing of the notice.

(6) The seller shall not be entitled to retake possession of or to remove from the land the goods so affixed unless he has given to each registered owner of the land within the meaning of (section 2 of The Land Registry Act) a notice in writing of his intention to retake possession of and to remove the goods, and each person so notified has for a period of twenty days after the giving of the notice to him, or for such longer period as any Judge of the (County or District) Court may fix on cause shown to his satisfaction, failed to pay the amount due and payable on the goods. The notice shall be signed by the seller or his agent and shall set out the name and address of the seller, the name and address of the buyer, a description of the goods, the total amount owing and the amount presently due and payable on them, and a description of the land to which the goods are affixed; and shall contain a demand that the amount so due and payable shall be paid on or before a day mentioned, not less than twenty days after the giving of the notice pursuant to this subsection, and a statement of the intention to take possession of and to remove the goods unless the amount due and payable thereon is paid within the time mentioned. The notice to any person for the purposes of this subsection may be given by the delivery of the notice to him personally or by mail-

ing it by prepaid registered mail addressed to him at his last known address, and where the notice is so mailed it shall be deemed to be given to the person to whom it is addressed at the time when it should reach its destination in the ordinary course of mail. The notice may in any case be given by such form of substituted service as any Judge of the (County or District) Court may direct. Every person having any interest in the land, whether registered or not, shall have the right as against the seller to pay the amount so due and payable within the time mentioned in the notice; and thereupon the goods shall, subject to any remaining rights of the seller under the conditional sale, remain affixed to the land.

(7) The seller on becoming entitled to take possession of and to remove the goods from the land shall exercise his right of removal in such a manner as will cause no greater damage or injury to the land or to the other personal property situate thereon, or put the owner, lessee, or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

(8) Upon the receipt of a certificate of discharge in Form 3, signed by the seller and accompanied by an affidavit of execution of an attesting witness, or signed by the agent of the seller and accompanied by an affidavit of the agent verifying his signature and stating that he is the duly authorized agent of the seller in that behalf; or, where a memorandum of satisfaction has been filed pursuant to section 17, upon the receipt of a copy thereof certified by the proper officer in whose office the memorandum was filed; and upon payment of the prescribed fee, the Registrar in whose office a notice has been filed under the provisions of this section shall cancel the entry of the same on the register or in the Conditional Sales Register, as the case may be. In case of a partial discharge, the form of the certificate may be varied accordingly; and the Registrar shall cancel the entry in respect only of the goods and land to which the partial discharge extends. Cancellation of the entry may also be made by the Registrar in any case, upon the application of the registered owner of the land, if after such notice to the seller as the Registrar may direct, the seller fails to show cause to the satisfaction of the Registrar why the entry should not be cancelled. A fee of one dollar shall be payable for cancellation of the entry of a notice under this section. Upon the cancellation in whole or in part by the Registrar of the entry of a notice pursuant to this subsection, the provisions of subsections (3) and (5) shall cease to apply in respect of the goods and land to which the cancellation extends.

(Uniform Act, s. 12, as amended Proceedings 1934, p. 46; B.C., s. 13).

ASSIGNMENT

19. A valid assignment of a lien note or conditional sale agreement shall transfer the assignor's rights of property in the goods therein comprised, his right of seizure, removal, and sale, and all other rights which he possesses for enforcement of the security.

(Uniform Act, s. 13).

EVIDENCE

20. Copies of any instrument filed under this Act certified by the proper officer shall be received as *prima facie* evidence of the contents of the original instrument and of its execution according to the purport of the copy and the officer's certificate shall also be *prima facie* evidence of the date and hour of filing.

(Uniform Act, s. 14).

FEES

21. For services under this Act the proper officer shall be entitled to the following fees:—

1. For each registration, including stamping original or duplicate (if any) with registration stamp, cents;

2. For searching each name, cents;

3. For each certificate or abstract of search, cents;

4. For copies of documents, including certificate thereof, every 100 words, cents.

(Uniform Act, s. 15).

CONSTRUCTION OF ACT

22. 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.

(Uniform Act, s. 16).

COMING INTO FORCE

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

(Uniform Act, s. 17).

SCHEDULE

FORM 1

NOTICE OF CONDITIONAL SALE AGREEMENT

(Section 18 (4)).

Notice is hereby given pursuant to section 18 of The Conditional Sales Act respecting a certain conditional sale agreement

referred to in a writing duly signed for filing pursuant to the provisions of section 3 of that Act, of which writing a true copy is attached hereto.

The following are the facts with respect to the said conditional sale agreement:—

(a) The name and address of the seller are.....

(b) The name and address of the buyer are.....

(c) The following is a description of the goods.....

(d) The amount now unpaid on account of the purchase price (or under the terms and conditions of the hiring) is.....

(e) The following is a description of the land to which the goods are affixed or are to be affixed ....

Dated this day of , 19 .

.....

(Signature of buyer, or seller, or agent.)

.....

Witness

FORM 2

AFFIDAVIT VERIFYING NOTICE

(Section 18 (4))

I of ,

(occupation), make oath and say:—

1. I am the seller named in the notice hereto annexed (or I am the duly authorized agent in that behalf of the seller named in the notice hereto annexed, and I have a full knowledge of the facts set out therein).

2. The statement of facts set out in the said notice is true and correct.

.....

(Signature).

Sworn before me, etc.

FORM 3

Certificate of Discharge.

(Section 18 (8)).

I hereby certify that the conditional sale agreement of which a notice dated the day of , 19 , was filed

under the provisions of section 18 of The Conditional Sales Act in the (Land Registry Office) at in the Province of as No. , against the following described land,—

is wholly discharged (or is discharged in part as follows (here state the description of goods in respect of which conditional sale agreement is discharged, and the description of the land to which those goods are affixed).)

Dated this day of , 19 .

.....

(Signature).

.....

Witness.

(Uniform Act 1934 Proceedings, p. 50).

APPENDIX G

THE LIMITATION (ENEMIES AND WAR PRISONERS) ACT, 1945.

CHAPTER 16

An Act to provide for suspending the operation of certain statutes of limitation in relation to proceedings affecting persons who have been enemies or have been detained in enemy territory. [28th March, 1945.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Suspension of limitation period where party was an enemy or detained in enemy territory.

1. (1) If at any time before the expiration of the period prescribed by any statute of limitation for the bringing of any action any person who would have been a necessary party to that action if it had then been brought was an enemy or was detained in enemy territory, the said period shall be deemed not to have run while the said person was an enemy or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, or from the date of the passing of this Act, whichever is the later :

Provided that, where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply, so far as that person is concerned, to actions arising in the course of that business.

(2) If it is proved in any action that any person was resident or carried on business or was detained in enemy territory at any time, he shall for the purposes of this Act be presumed to have continued to be resident or to carry on business or to be detained as the case may be, in that territory until it ceased to be enemy territory, unless it is proved that he ceased to be resident or to carry on business or to be detained in that territory at an earlier date.

(3) If two or more periods have occurred in which any person who would have been such a necessary party as aforesaid was an enemy or was detained in enemy territory, those periods shall be treated for the purposes of this Act as one continuous such period beginning with the beginning of the first period and ending with the end of the last period.

nterpretation.

2. (1) In this Act the following expressions have the meanings hereby respectively assigned to them that is to say:—

"action" means civil proceedings before any court or tribunal and includes arbitration proceedings;

"enemy" means any person who is, or is deemed to be, an enemy for any of the purposes of the Trading with the Enemy Act, 1939, except that in ascertaining whether a person is such an enemy the expression "enemy territory" in section two of the said Act shall have the meaning assigned to that expression by this section;

& 3 Geo. 6. 89.

"enemy territory" means:—

(*a*) any area which is enemy territory as defined by subsection (1) of section fifteen of the Trading with the Enemy Act, 1939;

(*b*) any area in relation to which the provisions of the said Act apply, by virtue of an order made under subsection (1A) of the said section fifteen, as they apply in relation to enemy territory as so defined; and

(*c*) any area which, by virtue of Regulation six or Regulation seven of the Defence (Trading with the Enemy) Regulations, 1940, or any order made thereunder, is treated for any of the purposes of the said Act as enemy territory as so defined or such territory as is referred to in the last foregoing paragraph;

"statute of limitation" means any of the following enactments, that is to say,—

& 3 Geo. 6. 21. the Limitation Act, 1939,

& 10 Vict. 93. section three of the Fatal Accidents Act, 1846,

& 44 Vict. 42. section four of the Employers' Liability Act, 1880,

& 2 Geo. 5. 46. section ten of the Copyright Act, 1911,

& 2 Geo. 5. 57. section eight of the Maritime Conventions Act, 1911,

& 15 Geo. 5. 22. Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Act, 1924,

& 18 Geo. 5. 21. subsection (1) of section thirteen of the Moneylenders Act, 1927,

& 23 Geo. 5. 34. Article 29 of the First Schedule to the Carriage by Air Act, 1932,

& 25 Geo. 5. 41. section one of the Law Reform (Miscellaneous Provisions) Act, 1934,

Edw. 8 & Geo. 6, c. 57. subsection (1) of section seven of the Matrimonial Causes Act, 1937.

(2) References in this Act to any person who would have been a necessary party to an action shall be construed as including references to any person who would have been such a necessary party but for the provisions of section seven of the Trading with the Enemy Act, 1939, or any order made thereunder.

(3) References in this Act to the period during which any person was detained in enemy territory shall be construed as including references to any period immediately following the period of such detention during which that person remained in enemy territory.

(4) Subsection (2) of section fifteen of the Trading with the Enemy Act, 1939 (which provides that a certificate of a Secretary of State shall, for the purposes of proceedings under or arising out of that Act, be conclusive evidence of certain matters affecting the definition of "enemy territory") shall apply for the purposes of any action to which this Act relates.

(5) References in this Act to any enactment or to any Defence Regulation shall be construed as referring to that enactment or Regulation as amended by any subsequent enactment or Defence Regulation.

Application to the Crown.

3. This Act shall apply to proceedings to which the Crown is a party, including proceedings to which His Majesty is a party in right of the Duchy of Lancaster and proceedings in respect of property belonging to the Duchy of Cornwall.

Application to Scotland.

4. In the application of this Act to Scotland—

(*a*) for subsection (1) of section one the following subsection shall be substituted:—

"(1) If, during any period of less than ten years prescribed by any of the enactments hereinafter referred to as the period within which any action or diligence must be raised or executed or on the expiry of which any limitation on the mode of proof in any action becomes operative or any obligation is extinguished, any person who would have been a necessary party to such action or who was a party to such obligation was an enemy or was detained in enemy territory, the period so prescribed shall be deemed not to have run while the said person was an enemy or was so detained and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained or from the date of the passing of this Act whichever is the later:

Provided that where any person was only an enemy as respects a business carried on in enemy territory, this section shall only apply so far as that person is concerned to actions or obligations arising in the course of that business.

The enactments hereinbefore referred to are—

the Act of Parliament of Scotland, 1579 cap. 21,

the Act of Parliament of Scotland, 1669 cap. 14,

the Act of Parliament of Scotland, 1695 cap. 7,

section thirty-seven of the Bills of Exchange (Scotland) Act, 1772,

section four of the Employers' Liability Act, 1880,

section one of the Public Authorities Protection Act, 1893,

section ten of the Copyright Act, 1911,

section eight of the Maritime Conventions Act, 1911,

Rule 6 of Article III of the Schedule to the Carriage of Goods by Sea Act, 1924,

subsection (1) of section thirteen of the Moneylenders Act, 1927,

Article 29 of the First Schedule to the Carriage by Air Act, 1932;"

(*b*) in subsection (3) of section one after the words "necessary party" there shall be inserted the words "or was a party to such obligation".

5. In the application of this Act to Northern Ireland, the expression "statute of limitation" means any enactment (whether of the Irish Parliament or of the Parliament of the United Kingdom or of the Parliament of Northern Ireland) in force in Northern Ireland at the date of the passing of this Act under which a period is prescribed as the period within which any action to which such enactment relates is required to be brought, but does not include any enactment prescribing a period within which any criminal proceedings, or any proceedings to recover any penalty imposed as a punishment for a criminal offence, or any proceedings before a court of summary jurisdiction must be brought.

6. (1) This Act may be cited as the Limitation (Enemies and War Prisoners) Act, 1945.

(2) This Act shall be deemed to have had effect as from the third day of September, nineteen hundred and thirty-nine.

APPENDIX H1

REGISTRATION OF PARTNERSHIPS
REPORT OF THE SASKATCHEWAN COMMISSIONERS

At the meeting of the Conference held in August, 1944, the following Resolution was adopted:

> RESOLVED that the drafting of amendments to the Uniform Partnerships Registration Act having for their purpose the controlling of the assumption of partnership and trade names and the prohibition of the use of names found to be objectionable, be referred to the Saskatchewan Commissioners for report at the next meeting.

There is some legislation on the subject in British Columbia, Manitoba, New Brunswick, Nova Scotia and Saskatchewan. There is none in the other provinces.

BRITISH COLUMBIA.

The Provincial Coat of Arms Act (R.S.B.C., 1936, c. 227) contains the following provision, enacted by chapter 41 of the statutes of 1940:

> "2a.—(1) No person shall, for the purpose of denoting either himself or a group of persons, assume or use or continue to use any name, designation, title, or device that indicates or tends to indicate, or that is reasonably susceptible of the interpretation, that he or such group is connected with or established or supported by any Government, or has authority from or exercises any function of any Government, if in fact he or it is not connected with or established or supported by such Government, or in fact has no authority from, or does not exercise any function of, any Government.
>
> "(2) For the purposes of this section, 'Government' includes the Government of Great Britain and Northern Ireland, and the Government of the Dominion of Canada and the Government of any Province thereof, and the Government of any other Dominion, Colony, or Province, and the Government of any foreign State and any Military, Naval, or Air Force maintained by any such Government; and also the governing authority of any city, town or municipality, and of any board or corporation constituted for the purpose of exercising duties of a public nature.

"(3) Registration under the 'Partnership Act', under a name of the nature described in subsection (1), shall not be a defence to any prosecution under this section".

MANITOBA.

Section 82 of The Partnership Act (R.S.M., 1940, c. 159) provides as follows:

"82.—(1) Where any declaration under sections 48, 51 or 52 or any certificate under section 65 is presented for filing at the office of the prothonotary or deputy clerk of the Crown and pleas which contains a name, style or firm, or partnership name or firm, as the case may be, which is the same as or is liable to be confounded with or closely resembles that contained in any declaration or certificate previously filed in any such office, the prothonotary or deputy clerk of the Crown and pleas shall not receive or file it: Provided that nothing in this section shall prevent the filing of a declaration or certificate containing a name, style or firm or partnership name or firm, composed in whole or in part of the proper names or some of them of the persons constituting the partnership or the filing of a declaration under section 52, containing a person's own name, with a word or phrase indicating a plurality of members in the concern.

"(2) Notwithstanding the provisions of subsection (1), the prothonotary or deputy clerk of the Crown and pleas may receive and file the declaration or certificate if he is satisfied upon evidence by affidavit or otherwise that the partnership previously registered has been dissolved or is no longer carrying on business".

NOTE:—The Manitoba Act provides for local registration. There is no provision for central registration.

NEW BRUNSWICK.

The following sections were added to The Partnership Act (R.S.N.B., 1927, c. 155) at the 1945 session:

"81. The Governor-in-Council may by order prohibit the use of any partnership, business or trade name which he deems objectionable on grounds of public policy or for other reason.

"82. Every person who uses any partnership, business or trade name the use whereof has been prohibited under the provisions of the preceding section shall be guilty of an offence

and liable on summary conviction to a penalty not exceeding fifty dollars for every day he uses such name and in default of payment thereof to imprisonment for a term not exceeding six months".

NOTE:—The New Brunswick Act provides for local registration. There is no provision for central registration.

NOVA SCOTIA.

Section 4 of The Registration of Partnerships' Act (R. S. N. S. 1923, c. 205), as amended by chapter 38 of the statutes of 1939, contains the following provisions:

"(2) No partnership shall be registered under a name identical with that of any other subsisting partnership or company incorporated or unincorporated or so nearly resembling the same as to be calculated to deceive except in a case where such subsisting partnership or company is in the course of being dissolved and testifies its consent in such manner as the registrar requires; provided that this subsection shall not apply to a partnership which carries on business under the name or names of one or more of the partners.

"(3) Except with the consent of the Governor in Council no partnership shall be registered under a name which contains the word 'Royal' or 'Imperial' or which, in the opinion of the registrar, suggests or is calculated to suggest the patronage of His Majesty or of any member of the Royal Family or connection with His Majesty's Government or any department thereof".

NOTE:—The Nova Scotia Act provides for central registration. There is no provision for local registration.

SASKATCHEWAN.

The Partnership Act (R. S. S. 1940, c. 283) contains the following provision, enacted by chapter 81 of the statutes of 1941:

"52a. (1) No person or firm shall adopt as part of his or its business or firm name any of the following words, namely: 'Imperial', 'Crown', 'King's', 'Queen's', 'Empire', 'Royal', 'Dominion', 'Canadian', 'Saskatchewan', 'Co-operative', 'Pool', or words of similar import.

"(2) No person or firm shall adopt a business or firm name identical with that used by any other person or firm or so nearly resembling the same as to be calculated to deceive. This subsection shall not apply to a firm which carries on business in the name or names of one or more of the partners.

"(3) Registration after this section comes into force of a business or firm name shall not be a defence to a prosecution under this section".

NOTE:—The Saskatchewan Act requires both local and central registration.

The Resolution covers two matters, namely:

(1) Control of assumption of partnership and trade names;

(2) Prohibition of the use of names found to be objectionable.

As to No. 1,—Should the control of assumption of names be effected by (a) a direct prohibition against the assumption of names implying governmental connection or support and of names resembling other partnership or trade names; or (b) delegation of power of control to some central authority?

We have reached the conclusion and suggest that the Act should contain the prohibition, thus placing the onus on the partnership or person desiring to assume a partnership or trade name, and would suggest the adoption of a provision such as section 52a of the Saskatchewan Act, above set forth.

In our opinion such a provision would be preferable to one delegating the power of control. The Uniform Act requires both local and central registration of certificates. If the power of control were to be delegated, the delegation would no doubt be to a central authority and all certificates presented at the various registration offices would have to be forwarded to the central authority for approval of the proposed name before local registration of the certificate. In our opinion that would be a cumbersome procedure.

As to No. 2,—If No. 1 were dealt with, as suggested, by a direct prohibition coupled with a penalty in case of violation and a further penalty (per diem) in case of continued violation after conviction, then No. 2 could be confined in its scope to prohibition of continuation of the use of names registered before the coming into force of the new provisions and found to be objectionable; and in such case it appears that a provision somewhat along the lines of section 81 of the New Brunswick Act,

above set forth, would be suitable. In all probability this power of prohibition, if used at all, would be seldom used, but it might prove to be a useful provision.

Our proposed amendments to the Uniform Act are set forth in the schedule hereto.

The words italicized in the proposed subsection (2) of section 14 do not come within the scope of the Resolution, but we recommend their inclusion.

Respectfully submitted,

D. J. THOM,

J. P. RUNCIMAN.

Regina, Saskatchewan,
July 25, 1945.

SCHEDULE

UNIFORM PARTNERSHIPS REGISTRATION ACT

(1938 Proceedings—Appendix A)

Draft of Proposed Amendments

1. The following sections are inserted after section 13: New sections 13a and 13b

"13a.—(1) No firm within the scope of this Act and no person within the scope of section 10 shall adopt as part of its or his firm or business name any of the following words, namely: 'Imperial', 'Crown', 'King's', 'Queen's', 'Empire', 'Royal', 'Dominion', 'Canadian', 'Provincial', (*name of province*), 'Co-operative', 'Pool', or words of similar import. Use of certain words and names prohibited

"(2) No such firm or person shall adopt a firm or business name identical with that registered and in use by any other firm or person or so nearly resembling the same as to be calculated to deceive. This subsection shall not apply to a firm which carries on business in the name or names of one or more of the partners.

"(3) Registration after this section comes into force of a firm or business name shall not be a defence to a prosecution under this section.

"13b. The Lieutenant-Governor in Council may by order prohibit continuation of the use, after a specified date, of any firm or business name heretofore registered if he deems the use of the name to be objectionable because of the inclusion therein of any of the words mentioned in subsection (1) of section 13a or Power to prohibit use of objectionable names

words of similar import, or because of the name being identical with a name previously registered and in use by any other firm or person or so nearly resembling the same as to be calculated to deceive".

Section 14 amended

2. Section 14 is amended by inserting after paragraph (b) the following paragraphs:

"(c) violates any of the provisions of section 13a; or

"(d) fails to comply with an order made under section 13b".

3. Section 14 is further amended by adding thereto the following subsection:

"(2) In addition to any fine imposed on conviction *for failure to register a certificate in the manner and within the time prescribed by this Act or* for violation of any of the provisions of section 13a or for failure to comply with an order made under section 13b, the convicting magistrate or justice of the peace shall order the offender to *register the certificate in the manner prescribed by this Act or to* cease the use of the name adopted in violation of section 13a or to comply with the order of the Lieutenant-Governor in Council, as the case may require, within a specified period not exceeding seven days, and if such person fails to comply with the order of the police magistrate or justice of the peace such person shall from time to time be liable on summary conviction to a further fine of not less than twenty-five dollars nor more than five hundred dollars for every day during which such failure continues or to imprisonment for not more than thirty days or to both fine and imprisonment".

APPENDIX H2

AMENDMENTS TO THE UNIFORM PARTNERSHIPS REGISTRATION ACT (1938 PROCEEDINGS, PAGE 21) MADE AT THE 1945 MEETING OF THE CONFERENCE.

1. Section 10 is amended by adding thereto the following subsection:

"(4) No corporation shall register a certificate under this section".

2. The following sections are inserted after section 13:

"13a.—(1) For the purposes of this section 'Government' includes the Government of Great Britain and Northern Ireland, the Government of the Dominion of Canada, the Government of any province thereof, the Government of any other dominion, colony or province, the Government of any foreign state and any Naval, Military or Air Force maintained by any such Government, and also the governing authority of any city, town or municipality, and of any board or corporation constituted for the purpose of exercising duties of a public nature.

"(2) No firm within the scope of this Act and no person within the scope of section 10 shall register any name, designation, title or device that indicates or tends to indicate or is reasonably susceptible of the interpretation that such firm or person is connected with or established or supported by any Government or has authority from or exercises any function of any Government.

"(3) No such firm or person shall register a firm or business name identical with that registered and in use by any other firm or person or used by any company within the province, or so nearly resembling the same as to be likely to deceive.

"(4) Subsection (3) shall not apply to a firm that carries on business in the name or names of one or more of the partners.

"13b.—(1) Where a name is registered contrary to the provisions of section 13a the Court of , upon application by the Attorney General or an interested person, may order that the name be struck off the register.

"(2) An application under subsection (1) may be made by originating notice."

3. Section 14 is amended by inserting after paragraph (b) the following paragraph:

"(c) violates any of the provisions of subsection (4) of section 10 or section 13a".

APPENDIX H3

DRAFT UNIFORM PARTNERSHIPS REGISTRATION ACT
(as amended at the 1945 meeting of the Conference)

An Act to make uniform the law respecting the Registration of Partnerships.

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 Partnerships Registration Act".

Interpretation

2. In this Act, unless the context otherwise requires

(a) "carry on business" and words of like import, in respect of a partnership, meaning the doing of any act for the promotion or execution of any purpose for which the partnership is formed; and, in respect of a person within the scope of section 10, mean the doing of any act for the promotion or execution of any purpose of his business;

(b) "firm" means the persons who have entered into partnership with one another;

(c) "partnership" means the relation which subsists between persons carrying on business in common with a view to profit;

(d) "proper officer" means the officer designated as such in section 20;

(e) "registered" means filed in accordance with the provisions of this Act, and "register" has a corresponding meaning;

(f) "registration district" means the district designated as such in section 20.

Application of Act

3. (1) This Act applies only to persons engaged in businesses carried on for trading, manufacturing or mining purposes.

Exempt from application

(2) This Act shall not apply to:

(a) A partnership formed out of the province unless the firm has a warehouse, office or place of business in the province or an agent resident therein;

(b) A person otherwise within the scope of section 10 unless he has a warehouse, office or place of business in the province, or an agent resident therein;

(c) A limited partnership under the provisions of (Part III of "The Partnership Act");

(d) A limited liability partnership under the provisions of (section 103 of the "Mineral Act" or section 76 of the "Placermining Act"). (Consider local exceptions for the various provinces.)

Application in respect of partnerships and persons registered under former Act.

(3) Every firm within the scope of this Act and every person within the scope of section 10 carrying on business in the province at the time of the coming into force of this Act and being immediately before that time duly registered in the manner prescribed therefor in the Act repealed (in part) by this Act, shall be deemed to be duly registered under this Act; and all certificates, declarations, or other documents filed under that Act shall be deemed to be certificates duly filed under this Act to the like extent and effect as if they were in the form of certificate prescribed by this Act corresponding thereto, and the provisions of this Act shall apply in respect of that firm or person accordingly.

Duty of members to register certificate of partnership.

4. (1) The members of every firm carrying on any of the businesses mentioned in section 3(1) shall cause a certificate of partnership to be registered within two months after the time the firm commences to carry on business in the province, or in the case of a firm carrying on business in the province at the time of the coming into force of this Act within two months after that time.

Contents of certificate.

(2) The certificate shall be in Form A and shall be signed personally by each member of the firm and shall set forth the full name, address and occupation of each partner, the firm name, the principal place of business of the firm in the province, and the time during which the partnership has subsisted; and shall state that the persons named therein are the only members of the firm.

Duty of members to register certificates of change in partnership.

5. (1) Whenever any change takes place in the membership or name of a firm which is registered under this Act a certificate of the change in Form C shall be registered within two months after the time the change takes place.

Contents of certificate.

(2) The certificate, in case of a change in the firm name, shall set forth the change; and, in the case of a change in the

membership shall be signed by each continuing and incoming member personally and shall set forth the full name, address, and occupation of any retiring member, of each continuing member and of each incoming member.

Certificate of dissolution.

(3) Upon the dissolution of a partnership registered under this Act, any or all of the persons who composed the firm may sign a certificate of dissolution in Form D setting forth the dissolution of the partnership.

Form and verification of certificates.

6. (1) Any certificate may be in one document, or it may consist of two or more counterparts, each of which may be signed by one or more of the members.

(2) The statements contained in a certificate shall be verified by the statutory declaration of one of the members, which declaration shall be in Form B, and shall be annexed to the certificate.

Manner of registration of certificates (Form A).

7. (1) Registration of a certificate in Form A shall be effected by filing it in the office of the proper officer of the registration district in which is situate the principal place of business of the firm in the province, accompanied by a copy of the certificate and payment of the prescribed fees.

Manner of registration of certificates (Forms C & D).

(2) Registration of a certificate in Form C or D shall be effected by filing it in the office in which the certificate of partnership was registered, accompanied by a copy thereof and payment of the prescribed fees.

Binding effect of certificates.

8. The statements made in any certificate in Form A or Form C registered in respect of any partnership shall not be controvertible by any person who signed the certificate.

Idem.

9. Where a person has signed a certificate (Form A or Form C) stating that he is a member of a firm, and the certificate has been registered, that person shall for all purposes be deemed to be and to continue to be a member of the firm until

(a) a certificate in Form C is registered showing that he has ceased to be a member of the firm; or

(b) a certificate in Form D is registered showing that the partnership has been dissolved; or

(c) a certificate signed by him stating that he is not a member of the firm is registered by being filed in the office in which the certificate (Form A or Form C) so signed by him was registered.

Proviso.

Provided that any person who has given notice in writing that he is not a member of the firm shall have the right to establish that he is not a member of the firm as against the person or persons to whom the notice was given, with respect to transactions had after the notice was given.

Duty of person carrying on business under a name other than his own to register certificate.

10. (1) Every person who carries on business otherwise than as a member of a firm and who in that business uses as his business name some designation other than his own name, or uses as his business name his own name with the addition of the words "and company" or any word or abbreviation indicating a plurality of persons, shall sign and register a certificate of his business name in Form E within two months after the time when he commences so to carry on business, or, in the case of a person carrying on business at the time of the coming into force of this Act, within two months after that time.

Contents of certificate.

(2) The certificate shall be in Form E and shall set forth the full name, address, and occupation of the person so carrying on business, his business name, his principal place of business in the province, the time during which his business has subsisted; and shall state that he is engaged in business by himself under that business name.

Manner of registration certificates (Form E).

(3) Registration of the certificate (Form E) shall be effected by filing it in the office of the proper officer of the registration district in which is situate the principal place of business in the province of the person by whom it is signed, accompanied by a copy thereof and payment of the prescribed fees.

Corporation not to register.

(4) No corporation shall register a certificate under this section.

Copy of certificates to Provincial Secretary

11. (1) Whenever a certificate is registered under this Act the proper officer shall transmit forthwith to the Provincial Secretary the copy thereof.

(2) The Provincial Secretary upon receipt of the copy shall publish the certificate in the (Royal) Gazette.

Duty of officers.

12. (1) The proper officer with whom a certificate under this Act is registered shall number the said certificate and enter it in two alphabetical index books as follows:

(a) In one of such books, hereinafter called the "Firm Index Book" he shall enter in alphabetical order the styles of the respective firms, or the business names used, in respect of which certificates have been registered with him and

opposite each entry shall place the number of the certificate pertaining to such firm, and the date of registration thereof;

(b) In the other of such books, hereinafter called the "Individual Index Book", he shall enter in alphabetical order the names of the respective members of each of such firms and shall place opposite each entry the name of the firm of which the person is a member, the number of the certificate pertaining to such firm, and the date of registration thereof.

(2) The Provincial Secretary shall keep similar indexes of all certificates, copies of which are forwarded to him, and shall file said copies.

(3) Where counterparts are registered, each counterpart shall bear the same number as the first counterpart filed with the addition of consecutive alphabetical lettering after the numbering on all counterparts subsequently filed.

Searches.

13. Upon payment of the prescribed fees, any person shall have access to and be entitled to inspect the index books of any proper officer and of the Provincial Secretary, containing any records or entries of certificates registered under the provisions of this Act; and no person shall be required, as a condition of his right thereto, to disclose the name of the person in respect of whom such access or inspection is sought; and every proper officer and the Provincial Secretary, shall, upon request accompanied by payment of the prescribed fees, produce for inspection any document so registered in his office.

"Government" —meaning of.

14. (1) For the purposes of this section "Government" includes the Government of Great Britain and Northern Ireland, the Government of the Dominion of Canada, the Government of any province thereof, the Government of any other dominion, colony or province, the Government of any foreign state and any Naval, Military or Air Force maintained by any such Government, and also the governing authority of any city, town or municipality, and of any board or corporation constituted for the purpose of exercising duties of a public nature.

Registration not to indicate Government support.

(2) No firm within the scope of this Act and no person within the scope of section 10 shall register any name, designation, title or device that indicates or tends to indicate or is reasonably susceptible of the interpretation that such firm or person is connected with or established or supported by any Government or has authority from or exercises any function of any Government.

Registered name.

(3) No such firm or person shall register a firm or business name identical with that registered and in use by any other firm or person or used by any company within the province, or so nearly resembling the same as to be likely to deceive.

Where one or more partners.

(4) Subsection (3) shall not apply to a firm that carries on business in the name or names of one or more of the partners.

Unlawful registration.

15. (1) Where a name is registered contrary to the provisions of section 14 the Court of , upon application by the Attorney General or an interested person, may order that the name be stuck off the register.

Application by originating notice.

(2) An application under subsection (1) may be made by originating notice.

Penalty for contravention of Act.

16. Every person who,

(a) fails to register any certificate in the manner and within the time prescribed by this Act;

(b) knowingly makes any false statement in any certificate signed or registered by him under this Act; or

(c) violates any of the provisions of subsection (4) of section 10 or section 14,

shall be guilty of an offence and liable on summary conviction to a fine not exceeding five hundred dollars.

Stay of legal proceedings.

17. (1) Subject to the provisions of sections 18 and 19 while any firm or person is in default in registering any certificate required to be registered by this Act, the rights of the defaulter under or arising out of any contract in relation to the business in respect of which the certificate was required to be registered shall not be enforceable by action or other legal proceedings either in the firm or business name or otherwise.

(2) Subsection (1) of this section shall not apply to a trustee in bankruptcy, an assignee for the general benefit of creditors, a bailiff or officer of the court.

Extension of time for filing a certificate by a person required to file one.

18. (1) In the case of a person required to register any certificate under this Act, a judge of the . . . . . Court, in his discretion either *ex parte* or otherwise and upon such terms and conditions as he may direct, and whether or not the time limited for compliance with the provisions of this Act has expired, may, from time to time by order

(a) extend the time for registering a certificate;

(b) permit one or more counterparts of a certificate to be registered without the other or others;

(c) provide for the correcting of any omission or misstatement in any certificate or declaration registered arising from accident, inadvertence or other sufficient cause; and

(d) permit the registration of a certificate signed otherwise than in accordance with the provisions of sections 4 and 5, when signed on behalf of a principal who has given special written authority in this connection to the actual signer, or when a party who should have signed personally has died without so signing.

(2) Any order so made, or a certified copy thereof, shall be annexed to the document to which the order relates, and appropriate entries with respect thereto shall be made in the index books.

Power of judge to grant relief.

19. The judge may by order grant relief against any of the disabilities mentioned in section 17, but before granting such relief the judge may direct such service or such publication of notice of the application as he may see fit; nor shall relief be given in respect of any contract if any party to the contract prove to the satisfaction of the judge that, if this Act had been complied with, he would not have entered into the contract.

Registration districts and offices.

20. For the purpose of registering certificates, each . . . . . in the province shall be a registration district, and the . . . . . whose office is situated within a registration district shall be the proper officer for the registering of certificates in that registration district.

(NOTE:—In each province a subsection should be inserted here making appropriate provision as to the effect of changes in the judicial or other districts on which registration districts are based).

Fees.

21. The Lieutenant-Governor in Council from time to time may prescribe fees payable under this Act.

Repeal.

22. "The Registration of Partnerships Act" being chapter of the Revised Statutes of is hereby repealed.

(NOTE:—In provinces where registration of partnerships provisions form part of the Partnerships Act, the necessary change will have to be made in this section).

Construction of Act.

23. 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.

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

FORM A

(Section 4(2))

CERTIFICATE OF PARTNERSHIP

Province of

Registration District.

We, of in the County of and Province of (occupation), and of in the County of and Province of (occupation), hereby certify :

(NOTE:—Include all the members of the partnership even if one or more partners sign counterparts.)

1. That we have carried on (or intend to carry on) trade and business as at in the County of , (or at the following places in the province, naming them), in partnership, under the firm name of .

2. That the principal place of business in the Province is (or will be) at in the County of .

3. That the said partnership has subsisted since or will go into effect on the day of , 19 .

4. That we are (or have been since the said day) the only members of the firm.

Witness our hands at this day of , 19 .

FORM B

(Section 6)

STATUTORY DECLARATION

I, , of
in the County of and Province of
(occupation), hereby solemnly declare that :

1. I am one of the partners signing the foregoing certificate.

2. All of the statements contained in the foregoing certificate are true.

3. The signatures A, B, and C subscribed to the said certificate are to my actual knowledge the signatures of A, B, and C, members of the said firm of and the other signatures D, E, and F are in my belief, though not to my actual knowledge, genuine.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of "The Canada Evidence Act".

Declared before me at

in the day of
this of
19 .

A Commissioner, etc.

FORM C

(Section 5(1))

CERTIFICATE OF CHANGE IN FIRM NAME OR MEMBERSHIP OF PARTNERSHIP

Province of

Registration District.

We, of
in the County of and Province of
(occupation), and of
in the County of and Province of
(occupation), hereby certify :

(NOTE.—Include all the members of the partnership here, even if one or more partners sign counterparts.)

1. That our partnership has been registered under the firm name of .

2. That the firm name has now been changed to .

3. That the membership of our partnership has been changed in the following manner :

Retiring Partners (if any).

Name	Address	Occupation

Incoming Partners (if any).

Name	Address	Occupation

4. That the present membership is:

Name	Address	Occupation

Witness our hands at this
day of 19 .

(NOTE:—Use statutory declaration provided in Form B with this form.)

(NOTE:—This form must be signed by all continuing and incoming partners.)

(NOTE:—If there is no change in the partnership name, omit paragraph 2.)

FORM D

(Section 9)

Province of
Registration District.

I, , of
in the County of , and Province of
(occupation), do hereby certify :

1. That I was formerly a member of a partnership registered in the office of
under the firm name of

2. That the following were the names of the partners :

Names of Partners.

3. That the partnership was dissolved on the
day of 19 .

Witness my hand at , the
day of 19 .

FORM E

(Section 10)

Province of

Registration District

I, , of
in the County of , and Province of
(occupation), hereby certify :

1. That I am carrying on trade and business as
at , in the County of .
(or at the following places in the Province, naming them).

2. That the business is carried on under the business name and style of .

3. That the principal place of business in the Province is at , in the County of .

4. That the said business has subsisted since the day of 19 .

5. That I am engaged in business by myself, under the business name and style set out above.

Witness my hand at , this
day of , 19 .

APPENDIX J

MECHANICS' LIENS

Report of The Manitoba Commissioners

At the 1943 session of the Conference the following resolution was passed:

> "Resolved that the Provincial Mechanics' Lien Acts be studied by the Manitoba Commissioners with a view to the preparation of a draft Uniform Act and report next year."

The Manitoba Commissioners have made a study of provincial Mechanics' Lien Acts. The Acts of Prince Edward Island and Nova Scotia were not available to us, and we believe that Quebec has no comparable legislation. The British Columbia statute is radically different in many respects from those Acts of other provinces which we examined. We felt that owing to most of the other common law provinces having at present statutes largely similar in character, these statutes would form the most suitable basis for a Uniform Act. We have therefore, in what we have drafted, followed in large measure the statutes of New Brunswick, Ontario, Manitoba, Saskatchewan, and Alberta.

We have also had available to us The Unifom Mechanics' Lien Act prepared by the National Conference of Commissioners on Uniform State Laws of the United States of America. It contains certain provisions not to be found in the Canadian statutes examined by us, such as the provisions for service of notices by lienholders without registration of their claims, and the filing of bonds by contractors in order to relieve the real property of owners of liability for liens. We have not thought it advisable to adopt these provisions, and have made little use of the Model Act of the United States Commissioners. It should be noticed in this connection that the Model Act was adopted in only one state—Florida; and that, at the 1943 Conference of the United States Commissioners, it was withdrawn, and is no longer being recommended for adoption. It is indicated to us that there was a strong feeling that a Uniform Mechanics' Lien Act could not be successfully adopted in the U.S.A.

We regret that, owing to heavy pressure of other duties, we have been unable to complete a draft of an entire Uniform Act. Realizing that we would be unable to do so, we have pre-

pared the first part of the draft, dealing with the characteristics and priorities of liens, and such matters as the retention by the owner of a percentage of the contract price. The next following parts would deal with registration and enforcement. We also feel that the part of the Act which we have covered contains those sections the principles of which are most likely to give rise to discussion. Therefore if the Conference can dispose of these sections at this meeting, material progress will have been made.

Referring to the draft submitted we now call attention to several matters :

1. We have given two alternative definitions for "improvement". In that section which confers the lien, in most of the Acts examined, there is a long list of structures, work upon which gives rise to the lien. We thought it advisable to shorten the section by reference to an "improvement" as is done in the Alberta Act, and then define "improvement". The first of the alternative definitions contains a long list of structures in the manner now followed in most of the Acts. We felt however that this was not satisfactory and in the second of the alternatives we have attempted to frame a definition that would meet the requirements. We recommend the adoption of the second of the alternatives, but realize that the wording of this will have to be most carefully considered.

2. The next point to note is an important difference between the present Manitoba and Ontario Acts. The present Manitoba Act contains subsection (2) of section 4 as follows:

> "(2) The lien, upon registration as hereinafter provided shall arise and take effect from the date of the commencement of the work or service, or from the placing of the materials, as against purchasers, chargees or mortgagees under instruments, registered or unregistered."

and subsection (1) of section 11 as follows:

> "11. (1) The lien created by this Act shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making such payments or after registration of the lien as hereinafter provided."

Ontario has subsection (1) of section 13, as follows:

> "13. (1) The lien shall have priority over all judgment executions, assignments, attachments, garnishments, and

receiving orders recovered, issued or made after such lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of such lien to the person making such payments or after registration of a claim for such lien as hereinafter provided, and in the absence of such notice in writing or the registration of a claim for lien all such payments or advances shall have priority over any such lien."

This Ontario subsection is much similar to subsection (1) of section 11 of Manitoba but the last clause in the Ontario subsection is not in the Manitoba subsection.

In the old case of *Robock* v. *Peters*, 13 M.R. 124, the late Chief Justice Killam held that, as between liens and payments made under mortgages registered after the lien arises, but before registration or other notice thereof, subsection (2) of section 4 governs, and the lien took priority from the date when it first arose. He held that section 11 of the the Manitoba Act applied only to advances made subsequently to the taking effect of the lien under conveyances or mortgages *otherwise having precedence.* It should be noted here that the inclusion of the final clause in the Ontario subsection (1) of section 13 makes it stronger than the Manitoba subsection (1) of section 11. Also Ontario has nothing comparable to the Manitoba subsection (2) of section 4. Some doubt however has been thrown on the decision of Chief Justice Killam by words used by Mr. Justice (now Chief Justice) Robson in *Dziadus* v. *Sloan* (1943) 3 W.W.R. 449. The Alberta section 7 is somewhat similar to Manitoba subsection (2) of section 4 omitting the latter part thereof.

It becomes necessary to choose which shall have priority in a case of this kind, the lien or the mortgage payment made without notice and before registration of the lien. We have chosen to follow Ontario in the draft submitted. We have retained, as subsection (1) of section 4, the provision as to when the lien arises, following the Alberta section. In subsection (3) of section 4 we have followed the principle in subsection (1) of section 13 of the present Ontario Act. This point should be fully discussed.

3. Another difference between the Manitoba and Ontario Acts is in respect of liens on the fee simple when the estate primarily subject to the lien is leasehold. Under the Manitoba Act, section 5, the owner of the fee simple must consent in writing before his interests can be charged. Under the Ontario section 7, if the lienholder gives notice to the owner and the latter fails within ten days to object, the fee simple may be charged. Sas-

katchewan follows Manitoba. New Brunswick and Alberta follow Ontario, and the British Columbia provision more nearly resembles that of Ontario. The Manitoba Commissioners have however in this case, in the draft submitted, followed the provision now in effect in their own province. The proper principles should be settled by the conference.

4. In subsection (3) of section 14 of the draft we have omitted the words "when the lien is claimed by the wage earner" that appear in most of the statutes. These words appear to us to be ambiguous, as we believe the subsection is dealing with a contract which is never completed, and not with one which is merely not fully complete at the time the lienholder registers his claim.

5. We should perhaps mention that in some provinces registration is essential before action can be brought on the lien, while in other provinces this is not the case. While that part of the Act which we have drafted, and now submit for consideration, does not cover either registration or enforcement of liens, we would advise that in our opinion registration should be an essential prerequisite to the enforcement of the lien. It is our present intention so to provide if the drafting of the balance of the Act should be referred back to us. We would, however, be glad to have an expression of the opinion of the conference.

6. Provisions which we thought advisable to omit altogether are, firstly, that set out in subsection (2) of Ontario section 3, and in subsection (2) of New Brunswick section 4, and in subsection (2) of Alberta section 4; and, secondly, that contained in Alberta section 8.

All of which is respectfully submitted,

W. P. FILLMORE
R. M. FISHER
G. S. RUTHERFORD

Manitoba Commissioners.

Winnipeg, Manitoba
August 4, 1944.

THE UNIFORM MECHANICS' LIEN ACT

1. This Act may be cited as "The Mechanics' Lien Act".

INTERPRETATION

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

(a) "contractor" means a person contracting with, or employed directly by, the owner or his agent for the doing of any work or the furnishing of material for any of the purposes mentioned in this Act;

(b) "highway" includes highway, road, road allowance, street, lane, thoroughfare, bridge, subway, pier, ferry, square, and public place, dedicated to the public use;

(c) "improvement" includes building, bulkhead, wall, bridge, trestlework, dam, canal, lock, tunnel, subway, wharf, pier, ferry, viaduct, aqueduct, embankment of stream, ditch, culvert, drain, sewer, fountain, fishpond, vault, mine, well (including gas and oil well), gas or oil pipeline, road, roadbed, way, sidewalk, pathway, railway, airport, the towers, poles, lines, and equipment, of power transmission or distributing systems, the poles, lines, and equipment, of telephone and telegraph systems, the towers and equipment of radio or wireless receiving and transmitting stations, harbour, dock, boom, arboreal or other plantation, and all structures, erections, excavations, and fabrics, made, built, constructed, erected, extended, enlarged, repaired, improved, formed, dug, or excavated, by means of, or with the aid of, human skill and human, animal or mechanical labour;

(alternative)

(c) "improvement" means anything constructed, erected, built, or placed, on or in land except a thing that is not attached to, or intended to be or become part of, the realty;

(d) "judge" means a judge of the County Court of the County Court district in which the property affected by a lien is situated;

(e) "labourer" includes every labourer, workman, servant, mechanic, wage earner, or other person, employed in any kind of labour whether employed under a contract of service or not;

(f) "making" includes constructing, erecting, fitting, altering, improving, and repairing;

(g) "material" includes every kind of movable property and without restricting the generality of the foregoing, includes machinery;

(h) "owner" includes any person, firm, association, body corporate or politic, including a municipal corporation, having any estate or interest in land upon, or in respect of, which work is done or material is furnished, at whose request, express or implied, and,

(i) upon whose credit, or
(ii) upon whose behalf, or
(iii) with whose privity and consent, or
(iv) for whose direct benefit,

any work is done or material is furnished, and all persons claiming under him, them or it, whose rights are acquired after the work in respect of which a lien is claimed is begun or the material furnished has been begun to be furnished;

(i) "person" includes a body corporate or politic, a firm, partnership or association;

(j) "registrar" includes a district registrar;

NOTE:—This para. will require to be varied in each province and name of proper official substituted.

(k) "registry office" includes a land titles office;

NOTE:—This para. will have to be varied in each province as may be necessary.

(l) "sub-contractor" means a person not contracting with or employed directly by the owner or his agent for the performance of work, but contracting with, or employed by, a contractor, or under him by another sub-contractor, but does not include a labourer;

(m) "wages" means money earned by a labourer for work done, whether by time or piece work or otherwise;

(n) "work" includes the doing of work and the performance of services upon, or in respect of, and the furnishing of material for, any improvement, and also includes the breaking of any land or the clearing thereof of timber or scrub.

(N.B. 2: Ont. 1: Man. 2: Sask. 2: Alta. 2: B.C. 2).

3. (1) Unless he signs an express agreement to the contrary, and in that case subject to section 5, any person who does, or causes to be done, any work upon, or in respect of, or furnishes any material to be used in making, an improvement on any land for an owner, contractor, or sub-contractor, shall, by virtue there-

of, and subject as herein otherwise provided, have a lien for the price of the work or material, or for so much thereof as remains due to him, upon the estate or interest of the owner in the improvement and in the land occupied or benefited thereby or enjoyed therewith, or upon or in respect of which the work is done, or upon which the material is furnished, as such estate or interest exists at the time the lien arises, or at any time during its subsistence.

(N.B. 6 (1): Ont. 5 (1): Man. 4 (1), 5 (1): Sask. 4 (1), 7 (1): Alta. 6 (1): B.C. 6, 7).

(2) Save as herein provided, the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

(N.B. 10: Ont. 9: Man. 7: Sask. 9: Alta. 13 (1): B.C. 8).

(3) Save as herein provided, where the lien is claimed by any other person than the contractor, the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or sub-contractor or other person for whom the work or service has been done or the materials have been furnished.

(N.B. 11: Ont. 10: Man. 8: Sask. 10: Alta. 13 (2).)

(4) No lien shall exist for a claim less than twenty dollars.

(Man. 4 (1): B.C. 21).

(5) Material shall be deemed to be furnished to be used within the meaning of this Act when it is delivered either on the land upon which it is to be used, or on such land or in such place in the immediate vicinity thereof as is designated by the owner or his agent, or by the contractor or sub-contractor.

(N.B. 6 (1): Ont. 5 (1): Alta. 6 (2).)

(6) Where material furnished to be used as set out in subsection (1) is incorporated in an improvement, the lien shall attach as herein provided, notwithstanding that the material may not have been delivered in strict accordance with subsection (5).

(N.B. 6 (2): Ont. 5 (2): Alta. 6 (3).)

4. (1) The lien shall arise on the date of the beginning of the work or the furnishing of the first material.

(Ont. 7 (3) (a): Man. 4(2): Alta. 7).

(2) The lien shall have priority over all judgments, executions, attachments, garnishments, and receiving orders, recovered, issued, or made, after the lien arises.

(N.B. 14 (1): Ont. 13 (1): Man. 11 (1): Sask. 13 (1).)

(3) The lien, upon registration, shall have priority over all claims under conveyances, mortgages and other

charges, and agreements for sale of land, registered or unregistered, made by the owner after the lien arises: Provided that a mortgage, conveyance, charge, or agreement for sale which is registered after the lien arises, but before registration of the lien, shall have priority to the extent of any payments or advances made thereunder before the person making such payments or advances has received notice in writing of his lien from the holder thereof.

(N.B. 14 (1): Ont. 13 (1): Man. 11 (1): Sask. 13 (1): Alta. 11 (1).)

(4) Where the land upon, or in respect of, which the work is done, or material is furnished, is encumbered by a mortgage or other charge registered before a lien arises, the mortgage shall have priority over the lien only to the extent of the value of the land at the time the lien arose.

(N.B. 8 (3): Ont. 7 (3): Man. 5 (3): Alta. 11 (1) (2): B.C. 9 (2).)

(5) Where the owner has an estate or interest in the land as purchaser under an agreement for sale and the purchase money, or part thereof, is unpaid, the vendor shall have priority over the lien only to the extent of the value of the land at the time the lien arose.

(N.B. 8 (4): Ont. 7 (4): Man. 11 (2): Sask. 13 (2): Alta. 11 (3).)

(6) Except where otherwise provided herein, no person entitled under this Act to a lien on property, or to a charge on moneys, shall have any priority over, or preference to, another person of the same class entitled under this Act to a lien or charge on the property or moneys; and each class of lienholder, except where otherwise provided herein, shall rank *pari passu* for their several amounts, and the proceeds of any sale shall, subject as aforesaid, be distributed among the lienholders *pro rata*, according to their several classes and rights.

(N.B. 14 (2): Ont. 13 (2): Man. 11 (3): Sask. 13 (3).)

5. This Act shall not apply to a highway or to any work done or caused to be done thereon by a municipality.

(N.B. 3: Ont. 2: Alta. 3: B.C. 3).

NOTE:—If the Interpretation Act of each province does not contain a sufficiently inclusive definition of "municipality" such additional or other words or expressions as may be requisite may be substituted for the word "municipality" in section 6 or a definition of "municipality" may be included in section 2. This section may be omitted in provinces where the title to highways is vested in the Crown.

6. Where work is done or material is furnished in respect of the land of a married woman, or of land in which she has an interest or an inchoate right of dower, with the privity and consent of her husband, he shall, for the purpose of creating a lien under this Act, be conclusively presumed to be acting as her agent, as well as for himself, in respect of such part of the work as is done, or of the material as is furnished, before the person doing the work or furnishing the material has actual notice to the contrary; and likewise and to the same extent a wife under similar circumstances shall be conclusively presumed to be acting as the agent of her husband as well as for herself for the purpose of creating a lien under this Act.

(N.B. 7: Ont. 6: Sask. 5: Alta. 9: B.C. 5).

7. No agreement shall deprive any person not a party thereto and otherwise entitled to a lien under this Act, of the benefit of the lien.

(N.B. 5; Ont. 4: Man. 3: Sask. 6: Alta. 5).

8. Every agreement, oral or written, express or implied, by any labourer that this Act shall not apply or that the remedies provided by it shall not be available for his benefit, shall be null and void.

(N.B. 4 (1): Ont. 3 (1): Sask. 3: Alta. 4 (1): B.C. 4 (1).)

9. (1) Where the estate or interest upon which the lien attaches is leasehold, if the lessor consents thereto in writing, his estate or interest shall also be subject to the lien.

(N.B. 8 (1): Ont. 7 (1): Man. 5 (2): Sask. 7 (2): Alta. 10 (1).)

(2) No forfeiture or attempted forfeiture of a lease on the part of a lessor, or cancellation or attempted cancellation of a lease, except for non-payment of rent, shall deprive any person otherwise entitled to a lien under this Act of the benefit of the lien; and that person may pay any rent due or accruing due and the amount so paid may be added to his claim.

(N.B. 8 (2): Ont. 7 (2): Alta. 10 (2).)

10. (1) A payment made for the purpose of defeating or impairing a claim for a lien under this Act shall be null and void.

(Sask. 15).

(2) A conveyance, mortgage, or charge, of or on land given to a person entitled under this Act to a lien on that land in payment of, or as security for, the lien, whether given before or after the lien arises, shall, as against any other person entitled under this Act to a lien on the same land, be deemed to be fraudulent and void.

(Ont. 13 (3).)

11. Where any property upon which a lien arises is wholly or partly destroyed by fire any money received or receivable by an owner or by a prior mortgagee or chargee, by reason of insurance thereon, shall take the place of the property so destroyed and shall, after satisfying any prior mortgage or charge in the manner and to the extent set out in subsection (4) of section 4, be subject to the claims of all persons for liens to the same extent as if the moneys were realized by a sale of the property in an action to enforce a lien.

(N.B. 9: Ont. 8: Man. 6: Sask. 8: Alta. 12: B.C. 12.)

12. (1) During the existence of a lien no part of any material affected thereby shall be removed to the prejudice of the lien.

(N.B. 16 (1): Ont. 15 (1): Man. 13 (1): Sask. 16 (1): Alta. 18 (1): B.C. 17).

(2) Material actually delivered to be used for the purpose set out in section 3 shall be subject to a lien in favour of the person furnishing it until it is placed in the improvement, and it shall not be subject to execution or other process to enforce any debt other than for the purchase money thereof due to the person furnishing the same.

(N.B. 16 (2): Ont. 15 (2): Man. 13 (3): Sask. 16 (3): Alta. 18 (2).)

(3) The judge before whom any proceedings are brought may direct the sale of any material or authorize its removal, and may make such order as to the costs of, and incidental to, the application and order as he deems just.

(N.B. 16 (3): Ont. 15 (3): Man. 13 (2): Sask. 16 (2): Alta. 18 (3).)

13. (1) The person primarily liable upon a contract under or by virtue of which a lien may arise shall, as the work is done, or the material is furnished, under the contract, retain for a period of thirty days after the completion or abandonment of the work done or to be done under the contract, twenty per centum of the value of the work done and of the material furnished to be used, irrespective of whether the contract or sub-contract provides for partial payment or payment on completion of the work.

(N.B. 12 (1): Ont. 11 (1): Man. 9 (1): Sask. 11 (1): Alta. 14 (1).)

(2) The value mentioned in subsection (1) shall be calculated on the basis of the contract price, or, if there is no specific contract price, then on the basis of the actual value of the work or material.

(N.B. 12 (1): Ont. 11 (1): Man. 9 (1): Sask. 11 (1): Alta. 14 (1).)

(3) Where the contract price or actual value exceeds fifteen thousand dollars the amount to be retained shall be fifteen per centum instead of twenty per centum.

(N.B. 12 (2): Ont. 11 (2): Man. 9 (1): Alta. 14 (2).)

(4) The lien shall be a charge upon the amount directed, by this section, to be retained, in favour of lienholders whose liens are derived under persons to whom the moneys so required to be retained are respectively payable.

(N.B. 12 (3): Ont. 11 (3): Man. 9 (2): Sask. 11 (1): Alta. 14 (3).)

(5) All payments up to eighty per centum as fixed by subsection (1), or up to eighty-five per centum as fixed by subsection (3), made in good faith by an owner to a contractor, or by a contractor to a sub-contractor, or by one sub-contractor to another sub-contractor, before notice in writing of the lien is given by the person claiming the lien to the owner, contractor, or sub-contractor, as the case may be, shall operate as a discharge *pro tanto* of the lien.

(N.B. 12 (4): Ont. 11 (4): Man. 9 (3): Sask. 11 (2): Alta. 14 (4).)

(6) Payment of the percentage required to be retained under this section may be validly made so as to discharge all liens or charges under this Act in respect thereof

(a) on the expiration of the thirty days mentioned in this section, if the lien has not been registered as provided herein; and

(b) on the expiration of the (years)(months) (days) mentioned in section 25 if action has not been begun within that period as mentioned in that section.

(N.B. 12 (5): Ont. 11 (5): Man. 9 (4): Sask. 11 (3): Alta. 14 (5).)

14. (1) Every labourer whose lien is for wages shall, to the extent of..... days' wages, have priority over all other liens derived through the same contractor or sub-contractor to the extent of, and on, the twenty per cent or fifteen per cent, as the case may be, directed by section 13 to be retained and to which the contractor or sub-contractor through whom the lien is derived is entitled; and all such labourers shall rank thereon *pari passu.*

(N.B. 15 (1): Ont. 14 (1): Man. 12 (1): Sask. 14 (1): Alta. 17 (1).)

(2) Every labourer shall be entitled to enforce a lien in respect of an uncompleted contract.

(N.B. 15 (2): Ont. 14 (2): Man. 12 (2): Sask. 14 (2): Alta. 17 (2).)

Note:—In the Man. and Sask. Acts the above is the extent of this section but in Alta., Ont. and N.B. the following additional words are added, or words to the following effect:

"and, notwithstanding anything to the contrary in this Act, may serve a notice of motion on the

proper parties returnable in not less than four days after service thereof before a judge, that the applicant will on the return of the motion ask for judgment on his claim for lien, registered particulars of which shall accompany the notice of motion duly verified by affidavit".

(3) Where a contract is not completed the percentage aforesaid shall be calculated on the value of the work done by the contractor or sub-contractor by whom the labourer is employed, having regard to the contract price, if any.

(N.B. 15 (3): Ont. 14 (3): Man. 12 (3): Sask. 14 (3): Alta. 17 (3).)

(4) Where a contractor or sub-contractor makes default in completing his contract, the aforesaid percentage shall not, as against a labourer claiming a lien, be applied by the owner or contractor to the completion of the contract or for any other purpose, or to the payment of damages for the non-completion of the contract by the contractor or sub-contractor, or in payment or satisfaction of any claim against the contractor or sub-contractor.

(N.B. 15 (4): Ont. 14 (4): Man. 12 (4): Sask. 14 (4): Alta. 17 (4).)

(5) Every device by an owner, contractor, or sub-contractor adopted to defeat the priority given by this Act, to a labourer for his wages shall be null and void.

(N.B. 15 (5): Ont. 14 (5): Man. 12 (5): Sask. 14 (5): Alta. 17 (5): B.C. 18).)

15. If an owner, contractor, or sub-contractor, makes a payment to any person entitled to a lien under section 3 for, or on account of, a debt justly due to him for work done or material furnished to be used as in that section mentioned for which the owner, contractor, or sub-contractor, is not primarily liable, and within three days thereafter gives written notice of the payment to the person primarily liable or his agent, the payment shall be deemed to be a payment on his contract generally to the person primarily liable, but not so as to affect the percentage to be retained by the owner as provided by section 13.

(N.B. 13 (1): Ont. 12 (1): Man. 10: Sask. 12: Alta. 15).

16. Subject to subsection (2) of section 3, a sub-contractor shall be entitled to enforce his lien notwithstanding the non-completion or abandonment of the contract by a contractor or sub-contractor under whom he claims.

(N.B. 13 (2): Ont. 12 (2): Alta. 16).

APPENDIX K1

AMENDMENTS TO THE UNIFORM WAREHOUSE RECEIPTS ACT AS SET OUT IN THE 1944 PROCEEDINGS PAGES 72 TO 80, AUTHORIZED AT THE 1945 MEETING OF THE CONFERENCE

1. (1) Clause *d* of section 2 is amended by striking out the word "assignee" at the end thereof and by inserting in lieu thereof the word "transferee", so that the said clause will now read as follows:

"(d) 'holder', as applied to a negotiable receipt, means a person who has possession of the receipt and a right of property therein, and, as applied to a non-negotiable receipt, means a person named therein as the person to whom the goods are to be delivered or his transferee."

(2) Clause *f* of the said section 2 is amended by striking out all the words after the article "the" in the third line and by inserting in lieu thereof the words "holder thereof", so that the said clause will now read as follows:

"(*f*) 'non-negotiable receipt' means a receipt in which it is stated that the goods therein specified will be delivered to the holder thereof."

2. (1) Subclause *i* of clause *d* of subsection 1 of section 3 is amended by striking out the words "person by whom or on whose behalf the goods are deposited, or to another named person" in the second and third lines and inserting in lieu thereof the words "holder thereof", so that the said subclause will now read as follows:

"(*i*) that the goods received will be delivered to the holder thereof, or"

(2) The said section 3 is further amended by adding thereto the following subsection:

"(5) Subject to the provisions of this Act, a warehouse receipt issued by a warehouseman, when delivered to the owner or bailor of the goods or mailed to him at his address last known to the warehouseman, shall constitute the contract between the owner or bailor and the warehouseman; provided that the owner or bailor may within twenty days

after such delivery or mailing notify the warehouseman in writing that he does not accept such contract and thereupon he shall remove the goods deposited subject to the warehouseman's lien for charges and if such notice is not given then the said warehouse receipt so delivered or mailed shall constitute the contract."

3. (1) Subclause *i* of clause *b* of subsection 1 of section 7 is amended by adding at the end thereof the word "and", so that the said subclause will now read as follows:

"(*i*) satisfying the warehouseman's lien, and"

(2) Subclause *ii* of clause *b* of subsection 1 of the said section 7 is struck out.

(3) Subclause *iii* of clause *b* of subsection 1 of the said section 7 is renumbered to read "*ii*".

4. Section 21 is amended by inserting at the commencement thereof the words "The goods covered by" and by inserting at the end thereof the words "but the transfer shall not effect or bind the warehouseman until he is notified in writing thereof", so that the said section will now read as follows:

"21. The goods covered by a non-negotiable receipt may be transferred by the holder by delivery to a purchaser or donee of the goods of a transfer in writing executed by the holder, but the transfer shall not affect or bind the warehouseman until he is notified in writing thereof."

5. (1) Clause *b* of subsection 1 of section 22 is amended by adding at the end thereof the words "or to give notice in writing to the warehouseman of the transfer", so that the said clause will now read as follows:

"(*b*) the right to deposit with the warehouseman the transfer or a duplicate thereof or to give notice in writing to the warehouseman of the transfer."

(2) Subsection 2 of the said section 22 is struck out and the following substituted therefor:

"(2) The transferee acquires the benefit of the obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt upon,—

(*a*) deposit of the transfer of the goods; or

(*b*) giving notice in writing of the transfer and upon the warehouseman having a reasonable opportunity of verifying the transfer."

(3) Subsection 3 of the said section 22 is struck out.

6. Clause *a* of section 23 is amended by striking out the article "the" in the sixth line, so that the said clause will now read as follows:

"(a) such title to the goods as the person negotiating the receipt to him had or had ability to transfer to a purchaser in good faith for valuable consideration, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of receipt had or had ability to transfer to a purchaser in good faith for valuable consideration; and".

APPENDIX K2

The Uniform Warehouse Receipts Act as amended at the 1945 Meeting of the Conference.

AN ACT TO MAKE UNIFORM THE LAW RESPECTING WAREHOUSE RECEIPTS

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 Warehouse Receipts Act. Short title.

2.—In this Act, Interpretation of expressions

(*a*) "action" includes counterclaim and set-off;

(*b*) "fungible goods" means goods of which any unit is, from its nature or by mercantile custom, treated as the equivalent of any other unit;

(*c*) "goods" includes all chattels personal other than things in action and money;

(*d*) "holder", as applied to a negotiable receipt, means a person who has possession of the receipt and a right of property therein, and, as applied to a non-negotiable receipt, means a person named therein as the person to whom the goods are to be delivered or his transferee;

(*e*) "negotiable receipt" means a receipt in which it is stated that the goods therein specified will be delivered to bearer or to the order of a named person;

(*f*) "non-negotiable receipt" means a receipt in which it is stated that the goods therein specified will be delivered to the holder thereof;

(*g*) "purchaser" includes mortgagee and pledgee;

(*h*) "receipt" means a warehouse receipt;

(*i*) "to purchase" includes to take as mortgagee or a pledgee;

(*j*) "warehouse receipt" means an acknowledgment in writing by a warehouseman of the receipt for storage of goods not his own;

(*k*) "warehouseman" means a person who receives goods for storage for reward.

Form of receipts.

3.—(1) A receipt shall contain the following particulars:

(*a*) the location of the warehouse or other place where the goods are stored;

(*b*) the name of the person by whom or on whose behalf the goods are deposited;

(*c*) the date of issue of the receipt;

(*d*) a statement either:

(i) that the goods received will be delivered to the holder thereof, or

(ii) that the goods will be delivered to bearer or to the order of a named person;

(*e*) the rate of storage charges;

(*f*) a description of the goods or of the packages containing them;

(*g*) the signature of the warehouseman or his authorized agent; and

(*h*) a statement of the amount of any advance made and of any liability incurred for which the warehouseman claims a lien.

(2) Where a warehouseman omits from a negotiable receipt any of the particulars set forth in sub-section (1) he shall be liable for damage caused by the omission.

(3) No receipt shall by reason of the omission of any of the particulars set forth in sub-section (1) be deemed not to be a warehouse receipt.

(4) A warehouseman may insert in a receipt, issued by him, any other term or condition that

(*a*) is not contrary to any provision of this Act; and

(*b*) does not impair his obligation to exercise such care and diligence in regard to the goods as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

Contract constituted.

(5) Subject to the provisions of this Act, a warehouse receipt issued by a warehouseman, when delivered to the owner or bailor of the goods or mailed to him at his address last known to the warehouseman, shall constitute the contract between the owner or bailor and the warehouseman; provided that the owner

or bailor may within twenty days after such delivery or mailing notify the warehouseman in writing that he does not accept such contract and thereupon he shall remove the goods deposited subject to the warehouseman's lien for charges and if such notice is not given then the said warehouse receipt so delivered or mailed shall constitute the contract.

Negotiable a non-negotiat receipts.

4.—Words in a negotiable receipt limiting its negotiability shall be void.

Marking of duplicate receipts.

5.—(1) No more than one receipt shall be issued in respect of the same goods except in case of a lost or destroyed receipt, in which case the new receipt, if one is given, shall bear the same date as the original, and shall be plainly marked on its face "Duplicate".

Liability when not so marked.

(2) A warehouseman shall be liable for all damage caused by his failure to observe the provisions of sub-section (1) to any person who purchases the subsequent receipt for valuable consideration, believing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt.

Effect of duplicate receipts.

(3) A receipt upon the face of which the word "duplicate" is plainly marked is a representation and warranty by the warehouseman that it is an accurate copy of a receipt properly issued and uncancelled at the date of the issue of the duplicate.

Marking of non-negotial receipts.

6.—(1) A warehouseman who issues a non-negotiable receipt shall cause to be plainly marked upon its face the words "non-negotiable", or "not negotiable."

Failure to mark.

(2) Where a warehouseman fails to comply with sub-section (1), a holder of the receipt who purchases it for valuable consideration believing it to be negotiable may, at his option, treat the receipt as vesting in him all rights attaching to a negotiable receipt and imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable, and the warehouseman shall be liable accordingly.

Duty to deliver.

7.—(1) A warehouseman in the absence of lawful excuse, shall deliver the goods referred to therein:

(*a*) in the case of a negotiable receipt, to the bearer thereof upon demand made by the bearer and upon the bearer

(i) satisfying the warehouseman's lien,

(ii) surrendering the receipt with such indorsements as are necessary for the negotiation of the receipt, and

(iii) acknowledging in writing the delivery of the goods; and

(*b*) in the case of a non-negotiable receipt, to the holder thereof upon the holder

(i) satisfying the warehouseman's lien, and

(ii) acknowledging in writing the delivery of the goods.

Failure to deliver.

(2) Where a warehouseman refuses or fails to deliver the goods in compliance with sub-section (1), the burden shall be upon the warehouseman to establish the existence of a lawful excuse for his refusal or failure.

Delivery on presentation of a negotiable receipt.

8.—Where a person is in possession of a negotiable receipt that has been duly indorsed to him or indorsed in blank, or by the terms of which the goods are deliverable to him or his order or to bearer, if delivery is made in good faith and without notice of any defect in the title of that person the warehouseman is justified in delivering the goods to that person.

Negotiable receipts must be cancelled on delivery of goods.

9.—(1) Except as provided in section 19, where a warehouseman delivers goods for which he has issued a negotiable receipt and fails to take up and cancel the receipt, he shall be liable, for failure to deliver the goods, to anyone who purchases the receipt in good faith and for valuable consideration, whether he acquired title to the receipt before or after delivery of the goods by the warehouseman.

Negotiable receipts to be marked on delivery of part of goods.

(2) Except as provided in section 19, where a warehouseman delivers part of the goods for which he has issued a negotiable receipt and fails either to take up and cancel the receipt, or to place plainly upon it a statement of what goods or packages have been delivered, he shall be liable, for failure to deliver all the goods specified in the receipt, to any one who purchases the receipt in good faith and for valuable consideration, whether the purchaser acquired title to the receipt before or after the delivery of any portion of the goods.

Lost or destroyed receipts.

10.—Where a negotiable receipt has been lost or destroyed a judge of the Court upon application after notice to the warehouseman by the person lawfully entitled to possession of the goods may upon satisfactory proof of such loss or destruction order the delivery of the goods upon the giving

of a bond with sufficient sureties to be approved in accordance with the practice of the court to indemnify the warehouseman against any liability, cost or expense he may be under or be put to by reason of the original receipt remaining outstanding; and the warehouseman shall be entitled to his costs of the application.

Warehouseman has reasonable time to determine validity of claims.

11.—Where a warehouseman has information that a person other than the holder of a receipt claims to be the owner of or entitled to the goods he may refuse to deliver the goods until he has had a reasonable time not exceeding ten days, to ascertain the validity of the adverse claim or to commence interpleader proceedings.

Conclusiveness of negotiable receipt.

12.—A negotiable receipt shall in the hands of a holder who has purchased it for valuable consideration be conclusive evidence of the receipt by the warehouseman of the goods therein described as against the warehouseman and any person signing the same on his behalf, notwithstanding that the goods or some part thereof may not have been so received unless the holder of the negotiable receipt has actual notice at the time of receiving same, that the goods have not in fact been received.

Description of goods in receipt.

13.—Where goods are described in a receipt merely by a statement,

(*a*) of certain marks or labels on the goods or on the packages containing them;

(*b*) that the goods are said by the depositor to be goods of a certain kind; or

(*c*) that the packages containing the goods are said by the depositor to contain goods of a certain kind,

or by a statement of import similar to that of clause (a) (b) or (c) the statement shall not impose any liability on the warehouseman in respect of the nature, kind or quality of the goods, but shall be deemed to be a representation by the warehouseman either that the marks or labels were in fact on the goods or packages or that the goods were in fact described by the depositor as stated, or that the packages containing the goods were in fact described by the depositor as containing goods of a certain kind, as the case may be.

Liability for care of goods

14.—A warehouseman shall be liable for loss of or injury to goods caused by his failure to exercise such care and diligence in regard to them as a careful and vigilant owner of similar goods would exercise in the custody of them in similar circumstances.

Co-mingled goods and warehouseman's liability therefor.

15.—Where authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade; and in that case the holder of the receipts for the mingled goods shall own the entire mass in common, and each holder shall be entitled to such proportion thereof as the quantity shown by his receipt to have been deposited bears to the whole.

Attachment or levy upon goods for which a negotiable receipt has been issued.

16.—Where goods are delivered to a warehouseman by the owner or person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter while in the possession of the warehouseman, be levied under an execution, unless the receipt is first surrendered to the warehouseman.

Negotiable receipt must state charges for which lien is claimed.

17.—Where a negotiable receipt is issued for goods, the warehouseman shall have no lien on the goods, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed.

Perishable and hazardous goods.

18.—(1) Where goods are of a perishable nature, or by keeping will deteriorate greatly in value, or injure other property, the warehouseman may give such notice as is reasonable and possible under the circumstances to the holder of the receipt for the goods if the name and address of the holder is known to the warehouseman or if not known to him then to the depositor, requiring him to satisfy the lien upon the goods, and to remove them from the warehouse, and on the failure of such person to satisfy the lien and remove the goods within the time specified in the notice, the warehouseman may sell the goods at public or private sale without advertising.

(2) The notice referred to in sub-section (1) may be given by sending it by registered letter post addressed to the person to whom it is to be given at the person's last known place of address and the notice shall be deemed to be given on the day following the mailing.

(3) If the warehouseman after a reasonable effort is unable to sell the goods, he may dispose of them in any manner he may think fit, and shall incur no liability by reason thereof.

(4) The warehouseman shall from the proceeds of any sale made pursuant to this section, satisfy his lien and shall hold the balance in trust for the holder of the receipt.

19.—Where goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of pursuant to the provisions of section 18, the warehouseman shall not be liable for failure to deliver the goods to the holder of the receipt. Effect of sale.

20.—(1) A negotiable receipt may be negotiated by delivery in either of the following cases: Negotiation of negotiabl receipts by delivery an by indorsement.

(*a*) where, by the terms of the receipt the warehouseman undertakes to deliver the goods to the bearer; or

(*b*) where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a named person, and that person or a subsequent indorsee has indorsed it in blank or to bearer.

(2) Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer the receipt may be negotiated by the bearer indorsing the same to a named person, and in that case the receipt shall thereafter be negotiated by the indorsement of the indorsee or a subsequent indorsee, or by delivery if it is again indorsed in blank or to bearer.

(3) Where, by the terms of a negotiable receipt, the goods are deliverable to the order of a named person, the receipt may be negotiated by the indorsement of that person.

(4) An indorsement pursuant to sub-section (3) may be in blank, to bearer or to a named person and if the indorsement is to a named person, the receipt may be again negotiated by indorsement in blank, to bearer or to another named person and subsequent negotiation may be made in like manner.

21.—The goods covered by a non-negotiable receipt may be transferred by the holder by delivery to a purchaser or donee of the goods of a transfer in writing executed by the holder, but the transfer shall not affect or bind the warehouseman until he is notified in writing thereof. Transfer of receipts.

22.—(1) A person to whom the goods covered by a non-negotiable receipt is transferred acquires, as against the transferor, Rights of p son to who receipt has transferred

(*a*) the title to the goods; and

(*b*) the right to deposit with the warehouseman the transfer or duplicate thereof or to give notice in writing to the warehouseman of the transfer.

Idem.

(2) The transferee acquires the benefit of the obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt upon,—

(*a*) deposit of the transfer of the goods; or

(*b*) giving notice in writing of the transfer and upon the warehouseman having a reasonable opportunity of verifying the transfer.

Rights of a person to whom a receipt has been negotiated.

23.—A person to whon a negotiable receipt is duly negotiated acquires

(*a*) such title to the goods as the person negotiating the receipt to him had or had ability to transfer to a purchaser in good faith for valuable consideration and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of receipt had or had ability to transfer to a purchaser in good faith for valuable consideration; and

(*b*) the benefit of the obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him.

Transfer of negotiable receipt without indorsement.

24.—Where a negotiable receipt is transferred for valuable consideration by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears and the negotiation shall take effect as of the time when the indorsement is made.

Warranties on sale of receipt.

25.—A person who for valuable consideration negotiates or transfers a receipt by indorsement or delivery, including one who assigns for valuable consideration a claim secured by a receipt, unless a contrary intention appears, warrants:

(*a*) that the receipt is genuine;

(*b*) that he has a legal right to negotiate or transfer it;

(*c*) that he has no knowledge of any fact that would impair the validity of the receipt; and

(*d*) that he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a receipt the goods represented thereby.

26.—The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfil their respective obligations. Indorser not guarantor.

27.—The validity of the negotiation of a receipt is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake or duress to intrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor without notice of the breach of duty, or fraud, mistake or duress. When negotiation not impaired by fraud, mistak or duress.

28.—Where a person having sold, mortgaged or pledged goods that are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged a negotiable receipt representing goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for valuable consideration and without notice of the previous sale, mortgage or pledge, shall have the same effect as if a previous purchaser of the goods or receipt had expressly authorized the subsequent negotiation. Subsequent negotiation

29.—Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of a purchaser for value in good faith to whom the receipt has been negotiated, whether the negotiation be prior or subsequent to the notification to the warehouseman who issued the receipt to the seller's claim to a lien or right of stoppage in transitu and the warehouseman shall not deliver the goods to an unpaid seller unless the receipt is first surrendered for cancellation. Negotiation defeats vendor's lien.

30.—The provisions of this Act do not apply to receipts made and delivered prior to ..... Application existing receipts.

31.—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. Construction

APPENDIX L1

MEMORANDUM TO THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

FRUSTRATION OF CONTRACTS

This is a subject that, in 1943, we mentioned informally to the Secretary as possibly being one to which the Conference might give attention. In the issue of *The Canadian Bar Review* for January, 1945, there is a very interesting article by Dean Falconbridge in which he deals quite exhaustively with the subject. Anyone interested who has not read the article will find therein full information on the matter. In his opening remarks the author suggests that the subject be taken up by this Conference. This is our excuse for now bringing the matter to your attention. A brief review of the subject may be in order at this time.

The general rule first laid down on this subject is found in *Taylor* v *Caldwell,* 3 B. and S. 826. A music hall was hired for a series of concerts. Before any payment of rent was made, and before any concerts were given, the building was destroyed by fire.

The case above mentioned ensued and Blackburn, J., in his judgement said:

> "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construted as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor".

In 1903 and 1904 three cases were decided which arose out of sudden cancellation of the coronation of King Edward VII. Various people had rented rooms, seats, etc., overlooking the route of the coronation procession, with a view to witnessing the same; and in some cases deposits had been paid in advance. The points at issue were—

(*a*) whether the deposits could be recovered by the lessee; and

(*b*) whether the balance of the rental could be recovered by the lessor.

The three cases above mentioned were *Blakely* v *Muller*, 83 L. T. R. 90; *Krell* v *Henry* (1903) 2 K.B. 740; *Chandler* v *Webster* (1904) 1 K. B. 493.

The last mentioned case is the best known. The court decided that the maxim "the loss lies where it falls" applied, and that the contracts were frustrated and the parties released from their obligations *as from the time of the abandonment of the coronation procession.*

Hence

(*a*) a deposit paid by a lessee before the abandonment could not be recovered by him;

(*b*) a lessor could not recover by action a balance payable where his right to sue accrued *after* the abandonment of the procession ("the subsequent impossibility does not affect rights already acquired");

(*c*) a lessor could recover by action a balance due and payable *before* the abandonment of the procession (and, therefore, where his right to sue occurred *before* the abandonment).

For nearly forty years the rule applied in the three above mentioned cases stood as the law. It was finally specifically overruled by the House of Lords in the case of *Fibrosa, etc.* v *Fairbairn, etc.*, (1942) 2 All E. R. 122.

Although the rule had stood so long and it was suggested that it should not now be disturbed, Viscount Simon, the Lord Chancellor said:

> "If the view which has hitherto prevailed in this matter is found to be based upon a misapprehension of legal principles, it is of great importance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law may be erected on a false foundation".

The case was heard by seven judges, viz: Viscount Simon and Lords Atkin, Russell of Killowen, MacMillan, Wright, Roche and Porter. The decision to overrule *Chandler* v *Webster* was unanimous.

The circumstances were that an English firm in July, 1939, contracted to make machinery and to deliver it to a Polish firm c.i.f. Gdynia in Poland. On September 23rd, 1939, Gdynia was occupied by the enemy. The Polish firm had already paid a thousand pounds on account of the purchase price, and sued to recover it. The court of first instance and the Court of Appeal followed *Chandler* v *Webster* and held that moneys paid before the frustration could not be recovered. The House of Lords said that the Polish firm must be allowed to recover the money paid as the consideration therefor had wholly failed.

With regard to a provision in the contract that a "reasonable extention of time" for delivery should be granted if despatch of machinery was hindered or delayed by any cause beyond reasonable control, including war, the House of Lords said that this referred only to a temporary impossibility of performance and had no relation to a prolonged period occasioned by the existing war.

The rule in *Taylor* v *Caldwell* was not overruled. The court said that in *Chandler* v *Webster* the Court of Appeal had not correctly applied the rule in *Taylor* v *Caldwell.*

The Lords also noted that the result of the rule followed by them in this case would not always be entirely fair to all parties since the party who has to return the money may have incurred expenses in connection with the partial carrying out of the contract. Their Lordships said, however, that this was a matter for the Legislature to rectify.

The editorial note to this case contains some important comment as follows:

> "It is important to note the limitations of the decision of the House made herein. The only sums recoverable are those paid for a consideration which has wholly failed. A partial failure of consideration is insufficient except in the case where the contract is severable and there has been a total failure of consideration as to one or more of the severed parts. English law does not provide for restitution and, therefore, the sum recovered in such a case is not subject to any deduction in respect of part-performance of the contract upon the party of the other party thereto. The result is not completely just in a pecuniary sense nor ideally perfect as part of an equitable system of law. It can be made so only by legislation and the Law Revision Committee has recommended an amendment of the law in this respect."

It is interesting to note that in the *Fibrosa* case it is stated that the rule in *Chandler* v *Webster* never prevailed in Scotland.

Furthermore, in a very illuminative article in Volume 21 of *The Canadian Bar Review* at page 32 it is stated that that rule would never have been law in Quebec; and that the rule in the *Fibrosa* case would be in accord with the law of that province.

Consequent on the decision in the *Fibrosa* case the Parliament of the United Kingdom enacted The Law Reform (Frustrated Contracts) Act, 1943, set out with notes in Volumn 36 of Halsbury Statutes at page 50.

Two paragraphs from the editors' Preliminary Note may be quoted:

> "The Law Reform (Frustrated Contracts) Act, 1943, which came into force on August 5, 1943, does not deal in any way with the general law of impossibility of performance or frustration as a cause of the discharge of contracts. It makes certain provisions as to what shall happen once a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract. The Act applies whether the contract was made before or after the commencement of the Act provided that the time of discharge of the contract is on or after July 1, 1943, but the new rules do not apply to contracts already discharged before that date (s.2(1)). The Act applies to contracts to which the Crown is a party in like manner as to contracts between subjects (s.2(2)). There are certain contracts to which the Act does not apply at all, and special provision is made in regard to contracts containing express provisions as to frustration (s.2(3)–(5))."
>
> "Briefly, s. 1, which is the substantive section of the Act, does three things. It first provides that money paid or payable before discharge of a contract on the ground that it has become impossible of performance, or has been otherwise frustrated shall be recoverable or cease to be payable. It then introduces two further rules in regard to contracts discharged for the above reasons. The first provides that the Court may allow expenses incurred before frustration in performance of the contract by the party to whom money was paid or recovered, in the case of moneys payable before that date. The second imposes a duty on a party to a contract who has received a valuable benefit thereunder before its discharge to pay for it. In relation to the application of these rules s. 1(4) governs the calculation of expenses, and s.1(5) deals with sums payable by way of insurance. The Act does

not determined what is the time at which the contract is discharged and this is governed by common law, see the notes to s. 1, post."

Cases respecting frustration of contracts, particularly by reason of war, have arisen, and will no doubt continue to arise. For example, see *Robbins* v *Wilson & Cabeldu Limited* (1944) 3 W.W.R. 625. Mr. D. M. Gordon, in volume 23 of *The Canadian Bar Review*, at page 165, comments on the Robbins case, and in the same volume, at page 253, Mr. Raphael Tuck has further comment thereon.

In view of the *ratio decidendi* in that case it is probable that even if the new English Act had been in force in British Columbia the judgment would not have been different. Nevertheless, it is suggested that important issues may arise where it would be advantageous to have a uniform law in Canada on this subject, probably following closely the text of the English statute.

Respectfully submitted,

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R. M. FISHER

G. S. RUTHERFORD

Manitoba Commissioners.

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