1954

PROCEEDINGS

OF THE

THIRTY-SIXTH ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

WINNIPEG, MANITOBA

AUGUST 24TH TO 28TH, 1954

MIMEOGRAPHING AND DISTRIBUTING OF REPORTS

By resolution of the Conference the Commissioners who are responsible for the preparation of a report are also responsible for having the report mimeographed and distributed. Distribution is to be made at least three months before the meeting at which the report is to be considered.

Experience has indicated that from 60 to 75 copies are required, depending on whether the report is to be distributed to persons other than members of the Conference.

The local secretary of the jurisdiction charged with preparation and distribution of the report should send enough copies to each other local secretary so that the latter can give one copy to each member of the Conference from his jurisdiction. Three copies should be sent to the Secretary of the Conference and the remaining copies should be brought to the meeting at which the report is to be considered.

TABLE OF CONTENTS

CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

OFFICERS OF THE CONFERENCE, 1954-55

Honorary President.....G. S. Rutherford, Q.C., Winnipeg.

President.....L. R. MacTavish, Q.C., Toronto.

1st Vice-President.....H. J. Wilson, Q.C., Edmonton.

2nd Vice-President.....E. C. Leslie, Q.C., Regina.

Treasurer.....A. C. DesBrisay, Q.C., Vancouver.

Secretary.....D. M. Treadgold, Q.C., Toronto.

LOCAL SECRETARIES

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

British Columbia.....H. Alan Maclean, Q.C., Victoria.

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

Manitoba.....G. S. Rutherford, Q.C., Winnipeg.

New Brunswick.....E. B. MacLatchy, Q.C., Fredericton.

Newfoundland.....P. L. Soper, LL.B., St. John's.

Nova Scotia.....H. F. Muggah, Q.C., Halifax.

Ontario.....L. R. MacTavish, Q.C., Toronto.

Prince Edward Island.....J. O. C. Campbell, Q.C., Charlottetown.

Quebec.....Chas. Coderre, Q.C., 159 Craig St. West, Montreal.

Saskatchewan.....H. Wadge, Q.C., Regina.

COMMISSIONERS AND REPRESENTATIVES OF THE PROVINCES AND OF THE DOMINION

Alberta:

W. F. BOWKER, Q.C., LL.B., Dean, Faculty of Law, University of Alberta, Edmonton.

J. W. RYAN, Acting Legislative Counsel, Edmonton.

H. J. WILSON, Q.C., Deputy Attorney-General, Edmonton.
(*Commissioners appointed under the authority of the Statutes of Alberta, 1919, c. 31.*)

British Columbia:

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

G. P. HOGG, Legislative Counsel, Victoria.

H. ALAN MACLEAN, Q.C., Deputy Attorney-General, Victoria.
(*Commissioners appointed under the authority of the Statutes of British Columbia, 1918, c. 92.*)

Canada:

E. A. DRIEDGER, Q.C., Parliamentary Counsel, Department of Justice, Ottawa.

A. J. MACLEOD, Advisory Counsel, Department of Justice, Ottawa.

W. P. J. O'MEARA, Q.C., Assistant Under Secretary of State and Advisory Counsel, Ottawa.

Manitoba:

IVAN J. R. DEACON, Q.C., 212 Avenue Bldg., Winnipeg.

R. MURRAY FISHER, Q.C., LL.D., Deputy Minister of Municipal Affairs, Winnipeg.

ORVILLE M. M. KAY, C.B.E., Q.C., Deputy Attorney-General, Winnipeg.

G. S. RUTHERFORD, Q.C., Legislative Counsel, Winnipeg.
(*Commissioners appointed under the authority of the Revised Statutes of Manitoba, 1940, c. 223, as amended, 1945, c. 66.*)

New Brunswick:

C. L. DOUGHERTY, Q.C., 459 King St., Fredericton.

E. B. MACLATCHY, Q.C., Deputy Attorney-General, Fredericton.

JOHN F. H. TEED, Q.C., Royal Securities Bldg., Saint John.
(*Commissioners appointed under the authority of the Statutes of New Brunswick, 1918, c. 5.*)

Newfoundland:

H. P. CARTER, Q.C., Director of Public Prosecutions, St. John's.

C. J. GREENE, LL.B., Legal Assistant, Attorney-General's Department, St. John's.

H. G. PUDDESTER, Q.C., LL.B., Deputy Attorney-General, St. John's.

P. L. SOPER, LL.B., Legal Assistant, Attorney-General's Department, St. John's.

Nova Scotia:

HORACE E. READ, O.B.E., Q.C., Dean, Dalhousie University Law School, Halifax.

J. A. Y. MACDONALD, Q.C., Deputy Attorney-General, Halifax.

HENRY F. MUGGAH, Q.C., Legislative Counsel, 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, Q.C., Legislative Counsel, Toronto.

C. R. MAGONE, Q.C., Deputy Attorney-General, Toronto.

D. M. TREADGOLD, Q.C., Municipal Legislative Counsel, Toronto.
(*Commissioners appointed under the authority of the Statutes of Ontario, 1918, c. 20, s. 65.*)

Prince Edward Island:

J. O. C. CAMPBELL, Q.C., 294 Richmond St., Charlottetown.

F. A. LARGE, Q.C., Royal Bank Chambers, Charlottetown.

J. P. NICHOLSON, Crown Prosecuter, 90 Great George St., Charlottetown.

Quebec:

ROGER BISSON, Q.C., 329 Laviolette blvde., Three Rivers.

THOMAS R. KER, Q.C., 360 St. James St. West, Montreal.

HON. ANTOINE RIVARD, Q.C., Solicitor General, Quebec.

Saskatchewan:

E. C. LESLIE, Q.C., 504 Broder Bldg., Regina.

H. Wadge, Q.C., Legislative Counsel, Regina.

J. L. SALTERIO, Q.C., Deputy Attorney-General, Regina.

MEMBERS EX OFFICIO OF THE CONFERENCE

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

Attorney-General of British Columbia: Hon. Robert W. Bonner, Q.C.

Attorney-General of Canada: Hon. Stuart S. Garson, Q.C.

Attorney-General of Manitoba: Hon. Ivan Schultz, Q.C.

Attorney-General of New Brunswick: Hon. W. J. West, Q.C.

Attorney-General of Newfoundland: Hon. L. R. Curtis, Q.C.

Attorney-General of Nova Scotia: Hon. M. A. Patterson, Q.C.

Attorney-General of Ontario: Hon. Dana Porter, Q.C.

Attorney-General of Prince Edward Island: Hon. W. E. Darby, Q.C.

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

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

HISTORICAL NOTE

More than thirty years have passed since the Canadian Bar Association recommended that each provincial government 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 prepare model and uniform statutes. The subsequent adoption by many of the state legislatures of these statutes has 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 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 by statute for the 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 during the week preceding the annual meeting of the Canadian Bar Association, and at or near the same place. The following is a list of the dates and places of the meetings of the Conference:

1918. September 2, 4, Montreal.
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.
1946. August 22-24, 26, 27, Winnipeg.
1947. August 28-30, September 1, 2, Ottawa.
1948. August 24-28, Montreal.
1949. August 23-27, Calgary.
1950. September 12-16, Washington, D.C.
1951. September 4-8, Toronto.
1952. August 26-30, Victoria.
1953. September 1-5, Quebec.
1954. August 24-28, Winnipeg.

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 in that year. In 1941 both the Canadian Bar Association and the Conference held meetings, but 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 Government of Canada 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 the Bar of Quebec have attended each year, with the addition since 1946 of a representative of the Government of Quebec.

In 1950 the newly-formed Province of Newfoundland joined the Conference and named representatives to take part in the work of the Conference.

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 Canada, representatives are appointed and expenses provided for by order of the executive. The members of the Conference do not receive remuneration for their services. Generally speaking, the appointees to the Conference from each jurisdiction are representative of the various branches of the legal profession, that is, 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 which may or may not, as it wishes, act upon the recommendations of the Conference.

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. At the annual meetings of the Conference, 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 carried on by correspondence among the members of the executive and the local secretaries. Matters for the consideration of the Conference may be brought forward by a member, the Minister of Justice, the Attorney-General of any province, or the Canadian Bar Association.

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 for enactment. Examples of this practice are the Survivorship Act, section 39 of the Uniform Evidence Act dealing with photographic records and section 5 of the same Act, the effect of which is to abrogate the rule in *Russell* v. *Russell*, the Uniform Regulations Act, the Uniform Frustrated Contracts Act, and the Uniform Proceedings Against the Crown Act. In these instances the Conference felt it better to establish and recommend a uniform statute before any legislature 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 in 1944 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 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 all provinces and Canada appointed special representatives.

For a more comprehensive review of the history of the Conference and of uniformity of legislation, the reader is directed to an article by L. R. MacTavish, K.C., entitled "Uniformity of Legislation in Canada — An Outline" that appeared in the January, 1947, issue of the *Canadian Bar Review*, at pages 36 to 52. This article, together with the Rules of Drafting adopted by the Conference in 1948, was re-published in pamphlet form early in 1949. Copies are available upon request to the Secretary.

In 1950, as the Canadian Bar Association was holding a joint annual meeting with the American Bar Association in Washington, D.C., the Conference also met in Washington. This gave the members an opportunity of watching the proceedings of the National Conference of Commissioners on Uniform State Laws which was meeting in Washington at the same time. A most interesting and informative week was had.

A number of the Uniform Acts have been adopted as ordinances of the Northwest Territories in recent years. As a matter of interest, therefore, these have been noted in the Table appearing on pages 12 and 13.

D.M.T.

TABLE OF

The following table shows the model statutes prepared and adopted by the

Line	Title of Act	Conference	Adopted Alta.	B.C.	Man.	N.B.	Nfld.
1	Assignments of Book Debts	1928	1929	....	'29, '51*	1931	1950‡
2	Bills of Sale	1928	1929	....	1929	....	....
3	Bulk Sales	1920	1922	1921	'21, '51*	1927	....
4							
5	Conditional Sales	1922	....	1922	....	1927	....
6							
7	Contributory Negligence	1924	1937*	1925	....	1925	1951*
8	Corporation Securities Registration	1931	....	....	....	....	....
9	Defamation	1944	1947	....	1946	1952‡	....
10	Devolution of Real Property	1927	1928	....	....	1934†	....
11	Evidence	1941	....	....	....	....	....
12							
13	Foreign Affidavits	1938	1952	1953	1952	1950x	1954*
14	Judicial Notice of Statutes and						
15	Proof of State Documents	1930	....	1932	1933	1931	....
16	Officers, Affidavits before	1953	....	....	....	....	1954
17	Photographic Records	1944	1947	1945	1945	1946	1949
18	*Russell* v. *Russell*	1945	1947	1947	1946	....	....
19	Fire Insurance Policy	1924	1926	1925	1925	1931	1954‡
20	Foreign Judgments	1933	....	....	....	....	....
21	Frustrated Contracts	1948	1949	....	1949	1949	....
22	Interpretation	1938	....	....	1939‡	....	1951
23							
24	Intestate Succession	1925	1928	1925	1927‡	1926	1951
25	Landlord and Tenant	1937	....	....	....	1938	....
26	Legitimation	1920	1928	1922	1920	1920	——$
27	Life Insurance	1923	1924	1923	1924	1924	1931
28	Limitation of Actions	1931	1935	....	'32, '46‡	....	....
29	Married Women's Property	1943	....	....	1945	1951$	....
30	Partnership	....	1899°	1894°	1897°	1921°	1892°
31	Partnerships Registration	1938	....	....	....	....	....
32	Perpetuities and Accumulations						
33	re Pension Trusts	1954	....	....	....	....	....
34	Proceedings Against the Crown	1950	....	....	1951	1952†	....
35	Reciprocal Enforcement of Judgments	1924	1925	1925	1950	1925	....
36	Reciprocal Enforcement of Maintenance						
37	Orders	1946	1947	1946	1946	1951‡	1951‡
38	Regulations	1943	....	....	1945‡	....	....
39	Sale of Goods	....	1898°	1897°	1896°	1919°	....
40	Service of Process by Mail	1945	——$	1945	——$	....	....
41	Survivorship	1939	1948	1939	1942	1940	1951
42	Testators Family Maintenance	1945	1947‡	....	1946	....	....
43	Vital Statistics	1949	....	....	1951‡	1950	....
44	Warehousemen's Lien	1921	1922	1922	1923	1923	....
45	Warehouse Receipts	1945	1949	1945‡	1946‡	1947	....
46	Wills	1929	....	....	1936	1952‡	....
47	Conflict of Laws	1953	....	....	....	....	....

* Adopted as revised.

° Substantially the same form as Imperial Act (*See* 1942 Proceedings, p. 18).

$ Provisions similar in effect are in force.

MODEL STATUTES

Conference and to what extent these have been adopted in the various jurisdictions.

Line	Adopted							Remarks
	N.S.	Ont.	P.E.I.	Que.	Sask.	Can.	N.W.T.	
1	1931	1931	1931	....	1929	....	1948	Am. '31; Rev. '50
2	1930	....	1947	....	1929	....	1948‡	Am. '31 & '32
3	——$	....	1933	....	....	....	1948	Am. '21, '25, '39 & '49; Rev. '50
4								
5	1930	....	1934	....	....	....	1948‡	Am. '27, '29, '30, '33, '34 & '42; Rev. '47
6								
7	'26, '54*	....	1938*	....	1944*	....	1950*‡	Rev. '35 & '53
8	1933	1932	1949	....	1932	....	....	.....
9	....	....	1948	....	....	....	1949*‡	Rev. '48; Am. '49
10	....	....	....	....	1928	....	....	.....
11	....	....	....	....	....	....	1948*‡	Am. '42, '44 & '45; Rev. '45; Am. '51 & '53
12								
13	1952	'52, '54*	....	....	1947	1943	1948	Am. '51; Rev. '53
14								
15	....	....	1939	....	....	....	1948	Rev. '31
16	....	1954	....	....	....	....	....	.....
17	1945	1945	1947	....	1945	1942$	1948	.....
18	1946	1946	1946	....	1946	....	1948	.....
19	1930	1924	1933	....	1925	....	....	Stat. Cond. 17 not adopted
20	....	....	....	....	1934	....	....	.....
21	....	1949	1949	....	....	....	....	.....
22	....	....	1939	....	1943	....	1948*‡	Am. '39; Rev. '41; Am. '48; Rev. '53
23								
24	....	....	1944‡	....	1928	....	1949‡	Am. '26 & '50
25	....	....	1939	....	....	....	1949‡	Recomm. withdrawn '54
26	——$	1921	1920	——$	1920	....	1949‡	.....
27	1925	1924	1933	....	1924	....	....	.....
28	....	....	1939‡	....	1932	....	1948†	Am. '32, '43 & '44
29	....	....	....	....	....	....	1952†	.....
30	1911°	1920°	1920°	....	1898°	....	1948°	.....
31	....	....	....	....	1941†	....	....	Am. '46
32								
33	....	1954	....	....	....	....	....	.....
34	1951$	1952‡	....	....	1952‡	....	....	.....
35	....	1929	....	....	1924	....	....	Am. '25
36								
37	1949	1948‡	1951‡	1952$	1946$	....	1951†	....
38	....	1944‡	....	....	....	1950$	....	.....
39	1910°	1920°	1919°	....	1896°	....	1948°	.....
40	....	....	....	....	——$	....	....	.....
41	1941	1940	1940	....	1942	....	....	Am. '49
42	....	....	....	....	....	....	....	.....
43	1952‡	1948$	1950‡	....	1950$	....	1952	Am. '50
44	1951	1924	1938	....	1922	....	1948	.....
45	1951	1946‡	....	....	....	....	....	.....
46	....	....	....	....	1931	....	1952	Am. '53
47	....	1954	....	....	....	....	....	.....

x As part of Commissioners for taking Affidavits Act.
† In part.
‡ With slight modification.

MINUTES OF THE OPENING PLENARY SESSION

(TUESDAY, AUGUST 24TH, 1954)

10 a.m.–11 a.m.

Opening

The Conference assembled in the library of the Manitoba Law School, Law Courts Building, Winnipeg.

The President of the Conference, Mr. MacTavish, acted as chairman, introduced the new members and outlined the work of the meeting as set out in the Agenda (Appendix A, page 31).

The President then read a letter from Mr. Ker advising that he would not be able to attend the meeting and that it appeared unlikely that any representative would be able to attend on behalf of Quebec.

The President introduced the Honourable Ivan Schultz, Q.C., Attorney-General for Manitoba, who welcomed the members to Winnipeg and to the Province, and spoke of the success of the past work of the Conference and in particular of the substantial number of recommendations of the Conference that had been adopted in Manitoba.

The President expressed the pleasure of the members in the fact that Chief Justice E. K. Williams was present again this year and expressed the hope that the Chief Justice would attend as many of the sessions as possible and lend his assistance in the deliberations of the Conference.

Minutes of Last Meeting

The following resolution was adopted:

RESOLVED that the minutes of the 1953 annual meeting as printed in the 1953 Proceedings be taken as read and adopted.

Treasurer's Report

The Treasurer, Mr. DesBrisay, presented his report (Appendix B, page 34). Messrs. Ryan and Innis MacLeod were appointed auditors and the report was referred to them for audit and for report at the closing plenary session.

NOTE:—The report was actually presented on Wednesday, August 25th, when the Conference was considering The Reciprocal Enforcement of Maintenance Orders Act in plenary session.

Secretary's Report

The Secretary, Mr. Treadgold, presented his report (Appendix C, page 36).

Pamphlet Copies of Uniform Acts

The Conference considered the question of the printing of pamphlet copies of Uniform Acts raised in the Secretary's report and decided to take no action in the matter at this time.

Table of Model Statutes

The Secretary asked for comments of the members as to the form of the Table of Model Statutes appearing in each year's Proceedings and after discussion it was concluded that the Table was adequate in its present form but that it would be easier to read if the items were numbered at each end of each line in the Table.

Nominating Committee

The President named a committee, consisting of Messrs. O'Meara (chairman), Kay, Puddester, Read and Ryan, to make recommendations as to the officers of the Conference for 1954-1955 and to report thereon at the closing plenary session.

Publication of Proceedings

The following resolution was adopted:

RESOLVED that the Secretary be requested to prepare a report of the meeting in the usual style, to have the report printed and to send copies thereof to the members of the Conference, the members of the Council of the Canadian Bar Association and those others whose names appear on the mailing list of the Conference; and that the Secretary be requested to make arrangements to have the 1954 Proceedings printed as an addendum to the Year Book of the Canadian Bar Association.

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 1955 annual meeting of the Canadian Bar Association and at or near the same place.

MINUTES OF THE UNIFORM LAW SECTION

The following commissioners and representatives were present at the plenary sessions and at the sessions of this Section:

Alberta:

MESSRS. W. F. BOWKER and J. W. RYAN.

British Columbia:

MR. A. C. DESBRISAY.

Canada:

MESSRS. E. A. DRIEDGER and W. P. J. O'MEARA.

Manitoba:

MESSRS. I. J. R. DEACON, R. M. FISHER and G. S. RUTHERFORD.

New Brunswick:

MESSRS. R. D. MITTON and J. F. H. TEED.

Newfoundland:

MR. H. G. PUDDESTER.

Nova Scotia:

MESSRS. I. G. MACLEOD and H. E. READ.

Ontario:

THE HONOURABLE MR. JUSTICE F. H. BARLOW and MESSRS. L. R. MACTAVISH and D. M. TREADGOLD.

Saskatchewan:

MESSRS. E. C. LESLIE and H. WADGE.

FIRST DAY

(TUESDAY, AUGUST 24TH, 1954)

First Session

11 a.m.–12 noon

Hours of Sittings

The following resolution was adopted:

RESOLVED that this Section of the Conference sit from 9.30 a.m. to 12 noon and from 2 p.m. to 5 p.m. daily during this meeting.

Highway Traffic and Vehicles (Rules of the Road)

Mr. Driedger, on behalf of the special committee established re this matter, reported verbally that since very few comments had been received by the committee from the various provinces, it had not been possible to prepare a new draft in accordance with the resolution passed at the 1953 meeting (1953 Proceedings, page 19). After discussion the following resolution was adopted:

RESOLVED that Messrs. Driedger and Read and Mr. Justice Barlow prepare a new draft of the Rules of the Road from the material now available and circulate the new draft as soon as possible and that this subject-matter be given priority at the 1955 meeting.

Companies

Mr. O'Meara gave the following oral report on the progress with respect to a Uniform Companies Act:

"The Federal-Provincial Committee on Uniformity of Company Law in Canada has made considerable progress since the last meeting of this Conference. Members of the eight committees which were appointed at the last plenary meeting have had numerous sittings as a result of which their respective reports are now practically completed. It is hoped that these will be distributed to the members of the plenary committee early in September and that a further plenary meeting will be convened in Ottawa, probably during October of this year.

"Efforts were made to hold a meeting in plenary session in the late spring and again in the early autumn of this year, but it was found impossible to select a date which would be mutually suitable to all the delegates. Following the meeting scheduled for October next, at which the various committee reports will be considered in detail, it is hoped that the actual work of drafting some, at least, of the proposed uniform provisions will be undertaken."

Wills

Dr. Read presented an interim report of the special committee established with respect to the Uniform Wills Act (Appendix D, page 38).

As this report was in the form of an annotation of Part I of the current draft, no action was indicated at this meeting and the following resolution was adopted:

RESOLVED that the special committee established in 1953 with respect to the Uniform Wills Act (1953 Proceedings, page 17) be continued and report further at the next meeting.

Second Session

2 p.m.–5 p.m.

Trustee Investments

Mr. Teed presented the report of the New Brunswick Commissioners on the subject of Trustee Investments (Appendix E, page 73).

Consideration of the draft Act attached to the report of the New Brunswick Commissioners was commenced.

SECOND DAY

(WEDNESDAY, AUGUST 25TH, 1954)

Third Session

9.30 a.m.–12 noon

Trustee Investments—(concluded)

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

RESOLVED that the matter of Trustee Investments be referred to the British Columbia and New Brunswick Commissioners to consider whether there is a reasonable prospect of achieving uniformity in the matter, to study the matters upon which discussion arose at this meeting arising out of the content of the New Brunswick report, and to report, with recommendations, to the next meeting with or without a further draft Act as the Commissioners deem advisable.

Landlord and Tenant

Mr. Teed reported that the Attorney-General for New Brunswick had requested him to advise the Conference that the Uniform Landlord and Tenant Act adopted by New Brunswick in 1938 had not worked satisfactorily and that New Brunswick proposed to make substantial changes in its Act in the near future. It was also pointed out that the Act had been adopted only in two provinces and in the Northwest Territories.

Chief Justice E. K. Williams commented on the great differences in the laws of the provinces on the subject, which differences appeared to be unnecessary.

After some discussion the following resolution was adopted:

RESOLVED that the recommendation of the Conference that the Uniform Landlord and Tenant Act be adopted by the provinces be withdrawn and that a note to that effect be made in the Table of Model Statutes in the 1954 and future Proceedings.

Bulk Sales

Mr. Deacon presented the report of the Manitoba Commissioners on the Uniform Bulk Sales Act (Appendix F, page 80).

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

Fourth Session

2 p.m.–5 p.m.

The members of the Criminal Law Section attended this session of the Uniform Law Section to assist in the consideration of the Uniform Reciprocal Enforcement of Maintenance Orders Act and the Uniform Reciprocal Enforcement of Judgments Act.

Mr. MacTavish, the President, introduced Mr. J. A. MacAulay, Q.C., the President of the Canadian Bar Association. Mr. MacAulay welcomed the members of the Conference to Winnipeg and Manitoba on behalf of himself, Mr. B. V. Richardson, Q.C., the President of the Law Society of Manitoba, and Mr. W. B. Scarth, Q.C., the President of the Manitoba Bar Association. Mr. MacAulay further spoke of the valuable contributions made by the Conference since its inception in 1918.

Reciprocal Enforcement of Judgments
Reciprocal Enforcement of Maintenance Orders

Mr. MacTavish presented the report of the Ontario Commissioners on the Uniform Reciprocal Enforcement of Judgments Act and the Uniform Reciprocal Enforcement of Maintenance Orders Act (Appendix G, page 94).

Messrs. Magone and Read discussed these two Acts particularly with regard to the case of *Re Scott* referred to in the Ontario report, copies of the decision in which had been distributed to the members by the Secretary.

Mr. Teed referred to a problem he had raised in correspondence with the Secretary as to the effect of The Reciprocal Enforcement of Maintenance Orders Act in relation to certain alimony orders made in foreign jurisdictions.

Mr. Rutherford then referred to certain procedural matters under The Reciprocal Enforcement of Judgments Act which were dealt with in a report prepared by the Manitoba Commissioners (Appendix H, page 96).

After discussion the following resolution was adopted:

RESOLVED that the current drafts of the Uniform Reciprocal Enforcement of Judgments Act and the Uniform Reciprocal Enforcement of Maintenance Orders Act be referred to a committee, composed of Messrs. Read and Magone, for study having regard to the decision of the Supreme Court of Canada in the *Re Scott* case when it is given, the currency section, the question raised by Mr. Teed, and the matters dealt with in the Manitoba report, and for report at the next meeting after the decision in *Re Scott* has been given.

Procedure of Uniform Law Section

Mr. Rutherford presented the report of the special committee established in 1953 to report upon the organization and procedure of the Uniform Law Section (1953 Proceedings, page 25).

Consideration of the report and the recommendations contained therein was commenced.

It was moved, seconded and carried that a vote of thanks be tendered to the members of the committee, and in particular to its chairman, Mr. Rutherford, for the thorough and excellent report presented by the committee.

THIRD DAY

(THURSDAY, AUGUST 26TH, 1954)

Fifth Session

9.30 a.m.–12 noon

Procedure of Uniform Law Section—(concluded)

After further discussion of the report and recommendations the following resolution was adopted:

RESOLVED that the report of the special committee, as amended at this meeting, be adopted and that the principles set out in the amended report be approved for the general guidance of the Uniform Law Section, and that the report as so amended be printed in the 1954 Proceedings.

NOTE:—The amended report appears as Appendix I, page 102.

Bulk Sales—(continued)

Consideration of the report of the Manitoba Commissioners and of the draft Act attached thereto was continued.

Sixth Session

2 p.m.–5 p.m.

Bulk Sales—(concluded)

Consideration of the report and draft Act were continued and the following resolution was adopted:

RESOLVED that the draft Uniform Bulk Sales Act be referred to the British Columbia Commissioners for further study, particularly as to the question whether the definition of creditors should include all creditors or trade creditors only, and for report at the next meeting with their recommendations and a new draft Act.

FOURTH DAY

(FRIDAY, AUGUST 27TH, 1954)

Seventh Session

9.30 a.m.–12 noon

Legitimation

Mr. Rutherford presented the report of the Manitoba Commissioners on the Uniform Legitimation Act (Appendix J, page 111).

After discussion of the report and the draft Act attached thereto the following resolution was adopted:

RESOLVED that the draft Uniform Legitimation Act attached to the Manitoba report be referred to the Alberta Commissioners for the incorporation therein of the changes made at this meeting, for further study, and for report to the next meeting with a revised draft Act.

Eighth Session

2 p.m.–5 p.m.

Rule against Perpetuities, Application to Pension Trust Funds

Mr. DesBrisay presented the report of the British Columbia Commissioners with respect to the Application of the Rule against Perpetuities to Pension Trust Funds (Appendix K, page 119).

After consideration of the report of the British Columbia Commissioners and the draft Act attached thereto, and after consideration of section 63 of *The Conveyancing and Law of Property Act* of Ontario enacted in 1954, the following resolution was adopted:

RESOLVED that the draft Act attached to the report of the British Columbia Commissioners be referred back to them for revision, as a section to be enacted in appropriate provincial Acts, using the language of section 63 of *The Conveyancing and Law of Property Act* (Ontario); that copies of the section as so revised be sent by the local secretary for British Columbia to each of the other local secretaries for distribution by them to the members of the Conference in their respective jurisdictions; and that if the section as so revised is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1954, the section be recommended for enactment in that form.

NOTE:—Copies of the revised section were distributed under the above resolution on October 7th, 1954. No disapprovals were received. The section as adopted and recommended for enactment is set out as Appendix L, page 121.

Survivorship

Mr. Ryan presented the report of the Alberta Commissioners on the Uniform Survivorship Act (Appendix M, page 122).

After consideration of the report of the Alberta Commissioners the following resolution was adopted:

RESOLVED that, if two or more jurisdictions do not disapprove of the amendments by notice to the Secretary of the Conference on or before the 30th day of November, 1954, the following amendments be made to the Uniform Survivorship Act as set out at page 43 of the 1949 Proceedings:

1. Subsection 1 of section 2 is amended by striking out the figures and word "(2) and (3)" in the fourth line and substituting therefor the figures and word "(2), (3) and (4)".
2. Section 2 is further amended by adding thereto the following subsection:
   (4) Where a testator and a sole or sole surviving executor under the testator's will die at the same time or in circumstances rendering it uncertain which of them survived the other, and the will contains provisions with respect to personal representatives in case the executor had not

survived the testator, then, for the purposes of probate, the testator shall be presumed to have survived the executor.

NOTE:—Notices of disapproval were received by the Secretary from Alberta and Manitoba and the matter will therefore be placed on the 1955 Agenda for further consideration.

Amendments to Uniform Acts

Mr. Treadgold presented his report on Amendments to Uniform Acts (Appendix N, page 127).

After discussion of the report it was decided

(*a*) that no amendment was advisable with respect to the amendment to The Interpretation Act made by Saskatchewan;

(*b*) that the amendments made by New Brunswick to its Reciprocal Enforcement of Maintenance Orders Act should be referred for consideration to the special committee to which this Act had already been referred;

(*c*) that no amendments should be made to the Uniform Vital Statistics Act such as were made in Nova Scotia and Ontario unless a request for consideration of such amendments is received from the Vital Statistics Council of Canada;

(*d*) that the amendment made by New Brunswick to its Wills Act should be referred for consideration to the special committee charged with rewriting Part I of the Uniform Wills Act.

Innkeepers

In view of Mr. Muggah's absence from the meeting it was decided that the matter of a Uniform Innkeepers Act should remain on the Agenda for report by the Nova Scotia Commissioners at the 1955 meeting.

Judicial Decisions affecting Uniform Acts

Dr. Read presented his report on the Judicial Decisions affecting Uniform Acts (Appendix O, page 129).

After discussion the following resolutions were adopted:

RESOLVED that the case of *Herman* v. *Sit Hing Fung*, referred to in Dr. Read's report, be referred to the British Columbia Commissioners for report to the next meeting as to whether an amend-

ment to the Uniform Bulk Sales Act is indicated as a result of the case.

RESOLVED that the case of *MacDonald and MacDonald* v. *McNeill*, referred to in Dr. Read's report, be referred to the Nova Scotia Commissioners for report to the next meeting as to whether an amendment to the Uniform Contributory Negligence Act is indicated as a result of the case.

RESOLVED that the cases referred to in Dr. Read's report with respect to The Devolution of Real Property Act be referred to the Saskatchewan Commissioners for report to the next meeting as to whether any amendments to the Uniform Devolution of Real Property Act are indicated as a result of the cases.

RESOLVED that the case of *Short* v. *Public Trustee*, referred to in Dr. Read's report, be referred to the Alberta Commissioners for report to the next meeting as to whether an amendment to the Uniform Limitation of Actions Act is indicated as a result of the case.

RESOLVED that the cases referred to in Dr. Read's report with respect to The Reciprocal Enforcement of Judgments Act and The Reciprocal Enforcement of Maintenance Orders Act be referred for consideration to the special committee consisting of Dr. Read and Mr. Magone already established (see page 20) to consider these two Acts.

RESOLVED that the case of *Toronto Storage Company, Ltd.* v. *Dominion Acceptance Limited*, referred to in Dr. Read's report, be referred to the Ontario Commissioners for report to the next meeting as to whether an amendment to the Uniform Warehouse Receipts Act is indicated as a result of the case.

With respect to Dr. Read's report on Judicial Decisions affecting Uniform Acts presented at the 1953 meeting (1953 Proceedings, page 20), the provinces concerned reported verbally that the cases referred to in the report did not indicate any amendments to the Uniform Acts in question.

FIFTH DAY

(SATURDAY, AUGUST 28TH, 1954)

Ninth Session

9.30 a.m.–11 a.m.

Highway Traffic and Vehicles (Responsibility for Accidents)

After discussion it was agreed that this matter remain on the

Agenda for report by the Nova Scotia Commissioners at the 1955 meeting.

Highway Traffic and Vehicles (Title to Motor Vehicles)

After discussion of the subject and of the British Columbia report (1951 Proceedings, page 86), it was agreed that there was little likelihood at present of achieving uniformity in the law on the subject and that, as there was no apparent demand for uniformity, the subject be dropped from the Agenda.

Assignments of Book Debts
Bills of Sale
Conditional Sales

Mr. Treadgold presented the report of the Ontario Commissioners on these matters.

After discussion the following resolution was adopted:

RESOLVED that the report of the Ontario Commissioners on the Uniform Assignments of Book Debts Act, the Uniform Bills of Sales Act and the Uniform Conditional Sales Act, together with the draft Acts attached to the report, be referred to the Manitoba Commissioners for study, having regard to the decisions made at this meeting and the questions raised in the report, and to report thereon, with revised drafts of the three Acts if considered advisable, to the next meeting.

NOTE:—Due to limitations of time, only a small portion of the Ontario report was dealt with at this meeting. Therefore, and in view of the above resolution, the Ontario report and draft Acts attached thereto are not printed in these Proceedings. Copies may be obtained from the Secretary.

MINUTES OF THE CRIMINAL LAW SECTION

The following members were in attendance:

J. A. Y. MacDonald, Q.C., Deputy Attorney General, representing Nova Scotia.

H. W. Hickman, Q.C., Department of Attorney General, representing New Brunswick.

H. P. Carter, Q.C., Director of Public Prosecutions, representing Newfoundland.

C. R. Magone, Q.C., Deputy Attorney General, representing Ontario.

O. M. M. Kay, Q.C., Deputy Attorney General, representing Manitoba.

J. L. Salterio, Q.C., Deputy Attorney General, representing Saskatchewan.

H. J. Wilson, Q.C., Deputy Attorney General, representing Alberta.

H. A. Maclean, Q.C., Deputy Attorney General, representing British Columbia.

A. J. MacLeod, representing the Department of Justice.

Chairman—J. A. Y. MacDonald, Q.C.

Secretary—A. J. MacLeod, Esq.

Indentification of Criminals

It was pointed out to the meeting that R.C.M. Police criminal records are frequently not complete in so far as convictions within the jurisdiction of municipal police forces are concerned. The provincial representatives stated that they were prepared to ask the municipal police forces to complete conviction forms in this respect for all indictable offences if the R.C.M. Police are prepared to furnish forms listing the required information. The R.C.M. Police are to be asked to make their records available to persons who are nominated by the respective Departments of the Attorney General such as, wardens of gaols, probation officers, etc. The Secretary undertook to discuss the matter with the R.C.M. Police and to write to the provincial representatives before the next meeting.

Prisons and Reformatories Act

The particular matter for discussion under this Act was the question of the provisions therein that authorize the warden of a penitentiary to refuse admission to the institution of persons suffering from infectious disease or insanity. A letter from the Commissioner of Penitentiaries, in reply to representations made by the Commissioners as a result of discussions at the 1953 meeting, was considered but it was decided that further representations in this connection should be postponed until a revision of the Act is undertaken.

Criminal Statistics

Mr. W. A. Magill, Chief of the Judicial Section of the Dominion Bureau of Statistics, attended the meeting and explained the operation of his section. A general discussion was held with respect to the extent to which the provincial authorities and the Dominion Bureau of Statistics can best co-operate to ensure that accurate criminal statistics are available on a national scale. Mr. Magill undertook to consider the matter further, especially in connection with the simplification, of the forms that are distributed, at the present time, by the Bureau of Statistics, and a further discussion will be held at the 1954 meeting.

Use of Sound Equipment

A number of the provincial representatives reported in connection with the use of sound equipment for taking the evidence in criminal proceedings. The Nova Scotia representative reported that further experiments had been conducted in his Province and the results had been quite satisfactory. The Alberta representative stated that in his Province sound equipment is used, in some cases, as an aid to the Court stenographer. The Commissioners favoured an amendment to the Criminal Code that would permit evidence in criminal proceedings to be recorded in any manner that is authorized by provincial legislation in relation to civil proceedings in the Province. The Secretary indicated that this proposal would be dealt with on the first occasion when amendments to the new Criminal Code were being considered.

Visiting Forces (North Atlantic Treaty) Act

Flight Lieutenant Ward of the Judge Advocate General's Branch of the Department of National Defence attended the meeting. A discussion was held with respect to questions of practice and procedure for the waiver of jurisdiction by civil and military authorities, respectively, in respect of criminal offences and service offences. Draft Regulations in this connection were considered. The Regulations are to be revised in the Department of Justice and distributed to the provincial representatives for comment before the next meeting.

New Criminal Code—Coming Into Force

The meeting recommended that, instead of the new Criminal Code being brought into force by proclamation, as required by section 752 thereof, the section in question should be amended to provide a fixed date for coming into force. This would dispense with the necessity of proving, in the case of each prosecution, that the new Act had been proclaimed in force, because the courts would be required to take judicial notice of the enactment of the statute fixing the date for coming into force of the Code. An alternative proposal was that section 8 (1) of the Regulations Act should be amended to provide that the publication of Regulations under that Act shall be judicially noticed. The Secretary undertook to place these recommendations before the Minister of Justice.

Juvenile Delinquents Act

The Secretary reported on the progress that he had been able to make in connection with a revision of this Act and a number of matters of principle were discussed. It was agreed that the work of revision should be continued in the Department of Justice and that, if possible, a draft of the revision should be distributed, before the 1954 meeting, for consideration.

Mr. H. Alan Maclean, Q.C., was appointed Chairman of the Criminal Law Section for 1954-55 and Mr. A. J. MacLeod was appointed Secretary.

MINUTES OF THE CLOSING PLENARY SESSION

(SATURDAY, AUGUST 28TH, 1954)

11 a.m.–11.30 a.m.

Report of Criminal Law Section

Mr. MacDonald, chairman of the Criminal Law Section, made an oral report on the work of the Section at this meeting.

Appreciations

The following resolutions were adopted unanimously:

RESOLVED that the Conference record its thanks to Mr. Fisher for his kindness in inviting the members and their guests to the reception at his home on Monday evening, August 23rd.

RESOLVED that the Conference record its thanks to Mr. Rutherford for his kindness in inviting the members and their guests to the reception at his home on Tuesday evening, August 24th.

RESOLVED that the Conference record its thanks to the Attorney-General and Government of Manitoba and the Manitoba Commissioners for the very enjoyable reception, dinner and dance tendered to the members and their guests at the Motor Country Club on Wednesday evening, August 25th.

RESOLVED that the Conference record its thanks to Messrs. Salterio, Leslie and Wadge for the reception tendered to the members and their guests on Thursday evening, August 26th.

RESOLVED that the Conference record its thanks to Mr. and Mrs. Deacon for their kindness in inviting the members and their guests to their home on Friday morning, August 27th, and on Sunday afternoon, August 29th.

Report of Auditors

The auditors reported that they had examined the books of the Treasurer and the Treasurer's report and had certified them as being correct. The Treasurer's report was then adopted.

Report of Nominating Committee

Mr. O'Meara, chairman of the nominating committee named by the President, presented the following report:

"We submit the following nominations for the officers of the Conference for the year 1954-1955:

Honorary President.....G. S. Rutherford, Q.C.
President.....L. R. MacTavish, Q.C.
1st Vice-President.....H. J. Wilson, Q.C.
2nd Vice-President.....E. C. Leslie, Q.C.
Treasurer.....A. C. DesBrisay, Q.C.
Secretary.....D. M. Treadgold, Q.C.

While the committee recommends re-election of this year's officers for a further term of one year, this is not to imply any suggestion that re-election for a second term should constitute a precedent, it being felt by the committee that in this respect complete discretion ought to be allowed to future nominating committees.

The report was adopted and those named were declared elected.

Close of Meeting

Mr. Fisher, on behalf of the members, thanked the President and the Secretary for their work during the past year and in making the meeting the success that it had been.

The President, Mr. MacTavish, then closed the meeting.

APPENDIX A

(*See page 14*)

AGENDA

PART I

OPENING PLENARY SESSION

1. Opening of Meeting.
2. Minutes of Last Meeting.
3. President's Address.
4. Treasurer's Report and Appointment of Auditors.
5. Secretary's Report.
6. Appointment of Nominating Committee.
7. Publication of Proceedings.
8. Next Meeting.

PART II

UNIFORM LAW SECTION

Amendments to Uniform Acts—Report of Mr. Treadgold (1951 Proceedings, page 17).

Assignments of Book Debts; Bills of Sale; Conditional Sales—Report of Ontario Commissioners (1953 Proceedings, page 22).

Bulk Sales—Report of Manitoba Commissioners (1953 Proceedings, page 22).

Companies—Report of Federal Representatives (1953 Proceedings, page 20).

Highway Traffic and Vehicles:

- Responsibility for Accidents—Report of Nova Scotia Commissioners (1948 Proceedings, page 25; 1952 Proceedings, page 17).
- Rules of the Road—Report of Special Committee (1953 Proceedings, page 19).
- Title to Motor Vehicles—Report of British Columbia Commissioners (1951 Proceedings, page 23; 1952 Proceedings, page 17).

Innkeepers—Report of Nova Scotia Commissioners (1952 Proceedings, page 24).

Judicial Decisions affecting Uniform Acts:
Report of Dr. Read (1951 Proceedings, page 21).
Provincial Reports on Dr. Read's 1952 Report (1953 Proceedings, page 20).

Legitimation—Report of Manitoba Commissioners (1951 Proceedings, page 21).

Procedure of Uniform Law Section—Report of Special Committee (1953 Proceedings, page 25).

Reciprocal Enforcement of Judgments—Reports of Manitoba Commissioners and Ontario Commissioners (1953 Proceedings, page 18).

Reciprocal Enforcement of Maintenance Orders—Reports of Manitoba Commissioners and Ontario Commissioners (1953 Proceedings, page 23).

Rule against Perpetuities, Application to Pension Trust Funds—Report of British Columbia Commissioners (1952 Proceedings, pages 23, 24; 1953 Proceedings, page 24).

Survivorship—Report of Alberta Commissioners (1953 Proceedings, page 22).

Trustee Investments—Report of New Brunswick Commissioners (1951 Proceedings, page 24).

Wills—Report of Special Committee (1953 Proceedings, page 17).

New Business.

PART III

CRIMINAL LAW SECTION

Canada Temperance Act—consideration of reports from Provinces concerned;

Criminal Code—consideration of the revised Criminal Code;

Criminal Statistics—discussion with representative of Dominion Bureau of Statistics re collection and recording of criminal statistics;

Juvenile Delinquents Act—consideration of draft Act prepared by A. J. MacLeod;

Sound Recording Equipment—consideration of reports from Provinces re use of sound recording equipment in courts;

Visiting Forces Acts and Regulations—discussion as to present Acts and regulations,

and such additional matters as may be introduced at the meeting.

PART IV

CLOSING PLENARY SESSION

1. Report of Criminal Law Section.
2. Appreciations, etc.
3. Report of Auditors.
4. Report of Nominating Committee.
5. Close of Meeting.

APPENDIX B

(*See page 14*)

TREASURER'S REPORT

1953–1954

RECEIPTS

Balance on hand August 19th, 1953 (on deposit in Barclays Bank (Canada))		$ 2,133.47
Contributions from Governments of:		
Canada for 1953 and 1954	$ 400.00	
British Columbia	200.00	
Manitoba	200.00	
Prince Edward Island	100.00	
Quebec	200.00	
Newfoundland	200.00	
Saskatchewan	200.00	
Ontario 1953 and 1954	400.00	
Nova Scotia	200.00	
New Brunswick	200.00	
Alberta	200.00	
		2,500.00
Bank Interest–Nov. 30, 1953	$ 15.80	
Bank Interest–May 31, 1954	20.68	
		36.48

DISBURSEMENTS

Clerical Assistance			$ 50.00
Secretary's Account			30.00
Exchange			.25
National Printers (1953) Limited—			
Printing proceedings 35th Annual Meeting 164 pages and cover—167 pages	$ 1,315.00		
Plain Manilla Envelopes	4.00		
Typing and checking envelopes	18.00		
Sales Tax 10%	133.70		
Mailing	24.58		
Express charge to Toronto	4.05		
			1,499.33

Noble Scott Co. Ltd.....		25.58
Cash in Bank August 20th, 1954		3,064.79
	$ 4,669.95	$4,669.95

A. C. DESBRISAY,
Treasurer.

August 20th, 1954.

Audited and found correct,

J. W. RYAN,
INNIS MACLEOD,
Auditors.

August 26th, 1954.

APPENDIX C

(*See page 15*)

SECRETARY'S REPORT
1954

Proceedings

The Proceedings of the 1953 meeting were prepared, printed and distributed in accordance with the resolution passed at that meeting (1953 Proceedings, page 15). The Proceedings were also as usual published as part of the Year Book of the Canadian Bar Association.

In accordance with the resolutions passed at the 1953 meeting (1953 Proceedings, page 15), I prepared and had published in the Proceedings a cumulative index of the Proceedings from 1918 to 1953 inclusive, and cumulative lists of the officers and members of the Conference from 1918 to 1953 inclusive. I also had printed on page 2 of the Proceedings a note setting out the procedure of the Conference with respect to the mimeographing and distribution of the reports.

Secretarial Assistance

The cost of secretarial assistance during the past year was $50, as shown in the Treasurer's report. This is the same amount as has been expended in each of the past few years.

Sales Tax

In accordance with a resolution of the Conference (1952 Proceedings, page 15), I applied for a remission of the sales tax paid in respect of the printing of the 1953 Proceedings. The remission was granted.

Pamphlet Copies of Uniform Acts

Early in the year Mr. Muggah suggested that it might be desirable to have perhaps 100 copies of each adopted Act run off separately for distribution to the members. He considered that this might be useful both to the members and for submission to interested parties who might assist in obtaining the adoption of the Uniform Acts. Upon receipt of this letter, I obtained information as to the probable cost of such a procedure which, of course, varies in direct proportion to the size of the Act. I then wrote to each local secretary to endeavour to get the views of the

members, as the officers of the Conference did not feel that they should take action involving an expenditure of this nature without getting the consensus of the members on the subject. The replies to my letters showed that many of the members had no firm views one way or the other and that of the remainder about half were in favour and half against. Therefore, no action was taken with regard to the three Acts and parts of Acts adopted at the last meeting and it might be desirable that the matter receive consideration at the present Conference.

Rules of Drafting

It is interesting to note that in 1953 our American counterpart, the National Conference of Commissioners on Uniform State Laws, adopted a revision of the rules of drafting followed by that Conference. The rules are considerably longer than the rules formerly adopted by that Conference and are in almost every respect consistent with the rules of our Conference adopted in 1949. An interesting discussion with respect to the new rules appears in the handbook of the Conference for 1953 at pages 151 to 160.

Uniformity in Civil Practice and Procedure

In a letter to the Editor appearing in the February, 1954, issue of *The Canadian Bar Review*, A. J. Meagher, Professor of Law, Dalhousie University, discusses the lack of uniformity in practice and procedure among the provinces of Canada. He ends up his letter by suggesting that the "Canadian Bar Association set up a section, or committee, on practice and procedure, having as its objective a programme of research leading to the preparation of a model code". He then suggests that the results of the research could be given to our Conference for incorporation in a model code of procedure.

Wills—Conflict of Laws

The members of the Conference will be interested in the favourable comments appearing in the April, 1954, issue of *The Canadian Bar Review* with respect to the revision of the conflict of laws part of the Uniform Wills Act, adopted at the 1953 meeting. These comments are made by Dr. John D. Falconbridge in an article at page 426 and by J. H. C. Morris in his review of the new edition of Dr. Falconbridge's Essays on the Conflict of Laws.

D. M. TREADGOLD,
Secretary.

APPENDIX D

(*See page 17*)

UNIFORM WILLS ACT

PART I

At the 1953 meeting of the Conference it was "Resolved that Part I of the draft Act attached to the Nova Scotia report be referred to a committee to revise and restate the substantive law on the subject and in particular to consider the desirability of including as separate Parts the law governing holograph wills and wills of members of the armed forces, mariners and seamen, the committee to be composed of Dr. Read as chairman, one of the New Brunswick Commissioners and one of the Ontario Commissioners, and to act in consultation with one of the Quebec representatives."—See 1953 Proceedings, p. 17.

Progress in the work of this Committee has been made to the extent of preparation of an annotation of Part I of the draft Act showing (*a*) corresponding Provincial enactments, and (*b*) cases interpreting and applying them up to April, 1954. This annotation is attached.

All commissioners are requested to suggest changes that they consider desirable in the substantive content of the draft Act and in its phrasing. Also, the Committee desires expressions of opinion concerning whether the Act should be broadened to include aspects of the law of wills not now contained in it. It is planned to begin work on holograph wills in the immediate future.

Members of the Committee are:

Ontario.....L. R. MACTAVISH, Q.C.
New Brunswick.....JOHN F. H. TEED, Q.C.
Quebec.....THOMAS R. KER, Q.C.

Respectfully submitted,

HORACE E. READ,
Chairman.

UNIFORM WILLS ACT (as revised in 1953), ANNOTATED

1. This Act may be cited as "The Wills Act". Short title

Annotation

(a) Corresponding Provincial Enactments:*

Provinces whose Wills Acts have identical sections are as follows: Nova Scotia; British Columbia; Manitoba; Alberta, and Saskatchewan.**

(b) Cases:

It has not been thought necessary to ascertain whether any cases have been decided under this section.

2. In this Act, "will" includes a testament, a codicil, an appointment by will or by writing in the nature of a will in exercise of a power and any other testamentary disposition. Interpretation

Annotation

(a) Corresponding Provincial Enactments:

Provinces, the Wills Acts of which have identical or very similar sections, are as follows: Prince Edward Island; Nova Scotia (with the addition of a "devise of the custody and tuition of any child"); British Columbia; Ontario; Manitoba; Alberta; Saskatchewan, and New Brunswick.

(b) Cases:

In the case *British and Foreign Bible Society* v. *Tupper* (1905) 37 S.C.R. 100 at page 117 it is laid down that: "The will of a man is the aggregate of his testamentary intentions, so far as they are manifested in writing, duly executed according to the statute. And as a will, if contained in one document, may be of several sheets, so it may consist of several independent papers, each so executed."

One of the leading cases on the topic of testaments and testamentary disposition is that of *Cock* v. *Cooke* [1866] L.R. 1 P & D 241, wherein, at page 243, Sir J. P. Wilde said: "It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary."

In *MacInnes* v. *MacInnes* [1935] S.C.R. 200, an "Employees Acceptance" of an Employees Savings and Profit-Sharing Fund Plan wherein disposition of property was made, to take effect after the death of the employee, was held invalid as being testamentary in nature and not made ln conformity with the Ontario Wills Act.

Instruments appearing *prima facie* to be testamentary are deemed testamentary until the contrary is shown. Thus, a document headed "Instructions to Executors" was treated as a codicil, being properly executed. *Re Dunlop* 35 O.W.N. 217; [1929] 1 D.L.R. 542.

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* In all cases refer to Schedule II attached hereto to find citations of sections of corresponding Provincial Acts.

** In all cases refer to Schedule I attached hereto to find citations for the various Provincial Enactments on wills.

A codicil is to be read with the will as together being one document. *Dickson* v. *Gross* (1852) 9 U.C.Q.B. 580. An instrument was admitted to probate as a will even though it was not entitled a will, contained no reference to death, appointed no executors, and contained words of present gift. *Re Moir* [1942] 1 D.L.R. 337. All Canada Digest cites *Re Purdue* on this point. [1943] 1 D.L.R. 46; *Murray* v. *Haylow* 60 O.L.R. 629.

s-will **3.** A person may by will devise, bequeath or dispose of all real and personal property, whether acquired before or after making his will, to which at the time of his death he is entitled, either at law or in equity, for an interest not ceasing at his death, including:

(*a*) estates *pur autre vie*, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;

(*b*) contingent, executory or other future interests in real or personal property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether he is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will;

try (*c*) rights of entry.

Annotation

(*a*) Corresponding Provincial Enactments:

Newfoundland—This Province has perhaps the widest section to be found in Canada. No direct mention is made of "estate pur autre vie" or "contingent interests" or "rights of entry", and the property disposable by will consists of ". . . property of any kind of the testator. . . described in a general manner. . . which he may have power to appoint in any manner he may think proper. . . ."

Section 14 takes care of property acquired after the making of the will, for the will is only to speak, as regards the property, as if it had been executed immediately before the death of the testator.

Nova Scotia—The section here is brief and to the point, and concerns "all real property and all personal property" which would devolve upon his heirs-at-law or representatives if there was no bequest or devise.

An amendment in 1940 added the proviso that no bequest or devise was to be invalid "solely by reason of the testator not leaving any heir-at-law or any next-of-kin". See section 30.

New Brunswick—The section here is similar, with minor variations in phrasing.

Prince Edward Island—The section here is similar but is very poorly drafted.

Ontario—The section here is similar in meaning, with different phrasing, and all disposable property is subject to *The Devolution of Estates Act* and *The Accumulations Act.*

The Devolution Act concerns devolution to personal representatives of the deceased. It deals with property vested in any person without a right to any other person to take by survivorship.

The Accumulations Act deals with rents and profits which are not to accumulate for longer than a stipulated time.

Alberta—The section is identical with the Uniform Wills Act.

British Columbia—Here the meaning is the same, but the section goes into a very long elaboration as to what is "real estate", "customary freehold", and "tenant right", which will pass to the heirs or legatees of the will. It also defines "estate pur autre vie" as either freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure.

(b) Cases:

While there are fairly wide degrees of difference in form, the difference in substance of the subject matter contained in the various Provincial statutes is in reality at a minimum. As a result, very little Canadian case law has arisen on this section, for the Courts will bend over backwards to avoid an intestacy; and if the testator definitely owns the property in question, then all in the Court's power will be done to see that it is properly disposed.

4. Subject to section 5, subsection (3), a will made by a person who is under the age of twenty-one years is not valid. Infant

Annotation

(a) Corresponding Provincial Enactments:

All the Provinces except Newfoundland have a similar section, with very little change in the language.

(b) Cases:

No case under this section has come before the Courts, so there is no judicial interpretation of it.

5. (1) A member of a naval, army, air, or marine force when in actual service, or a mariner or seaman when at sea or in course of a voyage, may make a will by a writing signed by him or by some other person in his presence and by his direction without further formality or requirement of the presence of or attestation or signature by a witness. Soldiers, etc.

(2) For purposes of this section, a member of a naval, military, air, or marine force is deemed to be in actual service after he has taken steps under the orders of a superior officer in view of and preparatory to joining forces engaged in hostilities.

(3) The fact that a member of a naval, military, air, or marine force, or a mariner or seaman, is under the age of twenty-one years at the time he makes his will does not invalidate it.

Annotation

(a) Corresponding Provincial Enactments:

The corresponding section of British Columbia is worth being noticed: "Any member of the naval, military, or air force of Canada, or of Great Britain, or any of the British Dominions, or an ally of Canada under the age of twenty-one years, shall, during the continuance of any war in which Canada is engaged, have the same capacity to make a will or testamentary disposition. . . ."

The Wills Act of Newfoundland has no provision for soldiers. In Prince Edward Island and New Brunswick no provision is made for an infant soldier.

(b) Cases:

Section 5, subsection (1) appears to cover part of the definition the courts had given to the word "soldiers" both in England and Canada, viz:

In *Drummond* v. *Parish* 3 Curt 522, the word "soldiers" was interpreted to include officers and surgeons.

From the decision in *Re Stanley*, 85 L.J.P. 222; [1916] P. 192, the word "soldier" includes a nurse employed by the War Office under contract.

In *Re Rowson* [1944] 2 A.E.R. 36, a member of the Women's Aux. Air Force was held to be a soldier and in actual service.

The words "actual service" were interpreted to mean "active service"—the New Brunswick case of *Re McNeil* (1918) 45 N.B.R. 479. In bonis Hiscock [1901] P. 78, and *Gartward* v. *Knee*, the words "in actual service" were said to be equivalent to "on an expedition." A soldier is on an expedition if he has taken a step towards joining the forces in the field; for instance, if he goes into barracks under orders with a view to embarkation, or if an order to mobilize has been issued to the battalion to which he belongs. In the same way, actual military service does not cease until the full conclusion of the operations.

In the case of a member of the merchant navy, mariner or seaman, actual service has been interpreted to mean "while carrying on operations at sea." The words "at sea" appear to be equivalent to "on maritime service"; it also includes "while the testator is returning home." Thus, wills made on board a vessel, on a river, or in a port have been held valid within section 11 of the English Act dealing with soldiers' wills. In *Re Wingham* [1948] 2 A.E.R. 908, it was held that a nuncupative will made when the testator was in training for operational duties was valid.

Execution of will

6. (1) Subject to section 5, subsection (1); to section 6, subsections (2) and (3), and to section 7, a will is validly executed only where:

(*a*) it is in writing;

(*b*) it is signed by the testator or some other person in his presence and by his direction;

(*c*) the testator makes or acknowledges his signature in the presence of two or more witnesses present at the same time; and

(*d*) two or more witnesses subscribe the will in the presence of the testator.

Holograph will

(2) A testator may make a valid holograph will wholly by his own handwriting and signature, without formality and without the presence, attestation, or signature of a witness.

Annotation

(a) Corresponding Provincial Enactments:

The following Provincial Wills Acts have identical or similar provisions:

Nova Scotia—Section 6 of the Uniform Act is similar to section 6 of the Nova Scotia Wills Act, except that the Nova Scotia Act provides that the signature of the testator or his nominee must appear at the "foot or end therof"; which is dealt with in section 7 of the Uniform Wills Act.

Newfoundland— Section 1 of the Newfoundland Wills Act contains provisions relating to execution similar to those found in sections 6 and 7 of the Uniform Wills Act. Note, however, that under the Newfoundland Act it is required that the testator sign the will in the presence of two witnesses; that is to say, acknowledgment of his signature by the testator is not sufficient.

Ontario—Section 11(1) of the Ontario Act is identical to section 6(1) of the Uniform Wills Act, except as to the signature of testator being required to be at the "foot or end thereof." *Re Craig* [1939] 1 D.L.R. 688.

Prince Edward Island— Section 72(1) of the P.E.I. Probate Act is identical to section 6(1) of the Uniform Wills Act.

New Brunswick—Section 5(1) of the New Brunswick Act provides for execution in terms quite similar to those of section 6(1) of the Uniform Wills Act, except that there is no provision for testator's or his nominee's signature at the "foot or end thereof", and that such signature may still constitute valid execution if it can be collected from surrounding circumstances that it was placed where it is with intent to validate the will.

Manitoba—Section 6 of the Manitoba Wills Act is identical to section 6 of the Uniform Wills Act.

Saskatchewan—Section 6 of the Saskatchewan Wills Act is identical to section 6 of the Uniform Wills Act.

Alberta—Sections 5 (*a*) and (*b*) of the Alberta Wills Act contain provisions identical to those found in section 6 of the Uniform Wills Act.

British Columbia—Section 6 of the British Columbia Wills Act is identical to section 6 of the Uniform Wills Act, except that it contains the phrase "at the foot or end thereof."

(b) Cases:

Subsection (1)

(*a*) A gift which is in its nature testamentary can be made effectually only by a valid will. *Hill* v. *Hill* (1904) 8 O.L.R. 710.

The validity of a testamentary document insofar as its execution is concerned depends entirely upon its compliance with the statutory requirements in that behalf in force at the time of its execution. *Re McGibbon: Royal Trust Co.* v. *Baxter* [1931] 2 W.W.R. 86; 25 Alta. L.R. 321; 2 D.L.R. 586.

If the intention that a document should be the testator's will can be discerned, the form or want of form of the writing itself does not affect its character as a will. *Re Mitchell Estate* [1924] 1 D.L.R. 1039 (Manitoba).

An unfinished document in respect of which testamentary capacity has not been proven will not be admitted to probate. *Re Gilbert* (1877) 17 N.B.R. 525.

The use of ditto signs was held to be writing and the will not avoided for that cause. *Murray* v. *Haylow* [1927] 3 D.L.R. 1036.

(*b*) As to the signature of the testator being affixed by means of another person guiding his hand, there would appear to be a conflict of judicial opinion. In the case of *Newcombe* v. *Evans* (1918) 43 O.L.R. 1, the Court held such procedure effectuated a valid execution; while in the case of *Peden* v. *Abraham* (1912) 3 W.W.R. 265, the British Columbia Court held such procedure ineffectual. See also *Re Gibson* [1939] 1 D.L.R. 591.

In order for the testator to direct another person to sign on his behalf, the testator must see and be mentally cognizant of that person. *Peden* v. *Abraham* supra. Where a person signed a will for and at the direction of the testatrix, and did so in an adjacent room but testatrix could look through an open doorway and see the signing, this was held within her presence. *Sigouin* v. *Gervais* [1953] O.W.N. 655. One who signs for a testator may sign either the testator's or his own name, *Re Deely and Green* [1930] 1 D.L.R. 603.

(*c*) It would appear that no acknowledgment is sufficient unless at the time the witnesses either saw or might have seen the testator's signature. *McNeil* v. *Cullen* (1905) 35 S.C.R. 510, 36 N.S.R. 482; *Re Walterhouse Estate* (1922) 65 D.L.R. 670. *Re Michnik* [1954] 4 D.L.R. 521.

(*d*) The witnesses need not sign in each others presence, but both must be present for testator's signing or acknowledgment. *Rose* v. *Bouch* (1908) 1 Alta. L.R. 263. The witnesses' presence in the same room as the testator is not sufficient; he must have been able to see them and to have understood the act. *Doe D. Violette* v. *Therriau* (1877) 17 N.B.R. 389; see also *Re Wozciechowiecz* [1931] 4 D.L.R. 585. Initials of witnesses are sufficient. *Re Dunlop* 35 O.W.N. 217. A properly executed attestation clause raises a presumption that the formal requirements of the Wills Act have been observed, so that unbelieved evidence of the witnesses that their signatures were forged will not avoid the will. *Re Gardner* [1935] O.R. 71; [1935] 1 D.L.R. 308. Witnesses must sign

after testator. *Gingras* v. *Gingras* [1948] S.C.R. 339. See also *Re White* [1948] 1 D.L.R. 572, Nova Scotia case on execution by paralytic testator; *Re Moir* [1942] 1 D.L.R. 337.

Subsection (2)

The fact that a will wholly written and signed by the testator in his own handwriting was also witnessed did not prevent its being a valid holograph will. *Re Eames* [1934] 3 W.W.R. 364.

A letter or several letters wholly written and signed in the handwriting of the deceased will be admitted to probate as a holograph will if they disclose testamentary intention and identify the beneficiaries. *Re Bradshaw* [1935] 1 D.L.R. 167; *Re Swords* [1929] 3 D.L.R. 564; *Re Mitchell Estate* [1924] 1 D.L.R. 1039.

It would appear that so long as the instrument is wholly the work of the testator and signed by him, whether it be written by pen and ink or printed or typewritten or painted or engraved or lithographed, it is a valid holograph will. *Re Nesbitt Estate* [1933] 3 W.W.R. 171.

It is questionable whether a valid will not in holograph form can be effectually revoked by a writing in holograph form expressing the intention of revoking. *Re McGibbon: Royal Trust Co.* v. *Baxter* [1931] 2 D.L.R. 586. See also: *Re Smith* [1948] 2 W.W.R. 55; *Re Michnik* [1945] 4 D.L.R. 521; *Re Griffiths* [1945] 3 W.W.R. 46; *Re Williamson* [1940] 3 W.W.R. 120; *Re Rigden* [1941] 1 W.W.R. 566; *Re Scott* [1938] 4 D.L.R. 786; All Canada Digest.

Place of signature

7. (1) So far only as regards the position of the signature of the testator or the person signing for him under section 6, subsection (1), clause (*b*), a will is valid if the signature is so placed at or after or following or under or beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.

(2) A will is not affected by the circumstance that,

(*a*) the signature does not follow or is not immediately after the foot or end of the will; or

(*b*) a blank space intervenes between the concluding words of the will and the signature; or

(*c*) the signature is placed among the words of a testimonium clause or of a clause of attestation, or follows or is after or under a clause of attestation, either with or without a blank space intervening, or follows or is after or under or beside the name of a subscribing witness; or

(*d*) the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or

(*e*) there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.

(3) The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with sections 5, 6, and 7 does not give effect to a disposition or direction that is underneath or that follows the signature or to a disposition or direction inserted after the signature was made.

Annotation

(a) Corresponding Provincial Enactments:

Newfoundland—There is no corresponding section.

Nova Scotia—The section here is similar, except insofar as the last words of subsection (1) are concerned, where reference is made to "... the writing signed *in* his will...."

New Brunswick—The section is similar.

Prince Edward Island—The section is similar in meaning but, again, poorly drafted.

Ontario—The section is similar in meaning in a long section.

Alberta—The section is identical.

British Columbia—The section is similar in meaning, but there is no breakdown into subsections.

(b) Cases:

The statute law in the various provinces is so closely allied that the little case law on the subject can be reasonably applied to any of the provincial statutes in respect to any prospective interpretation.

The case of *Re Moir* [1942] 1 D.L.R. 337 (Alta.) where there was a holograph will of two pages, with the signature at the end of the first page, lays down the proposition that the section dealing with place of signature applies with equal force to the execution of holograph wills: "The Court must be satisfied that the whole of the testamentary document... was written by the signer thereof before the signature was made, and that the whole of the dispositive part thereof may be fairly read, no matter in what sequence, as preceding and leading up to the signature...." This statement of law can be applied to all wills and need not be restricted solely to holograph wills.

A British Columbia case, *Re DeGruchy* (1941) 56 B.C.R. 271, holds that the signature of the testator on the back of a printed form of will, under the words "will of", with the witnesses signing in the usual place under the testimonium, is a valid signature.

A Quebec case outlines the ordinary form of signature in a holograph will as being the surname of the testator preceded or followed by his Christian names (*Lauzon* v. *Duplessis* 46 Rev. Leg. 331). This proposition can be applied to all wills.

Another Quebec case holds that a will in the English form is void if signed by someone on behalf of the testator after his death (*Ex p. Roy* 40 Que. P.R. 311).

An Alberta case, *Re Cottrell* [1951] 4 D.L.R. 600, precludes any alteration of a will unless in the form prescribed by the Act. (Wills Act R.S.A. c. 210, s. 17.) This allows the alteration of a duly attested will by a codicil in the alternative form permitted under the Act, but it does not allow the alteration of an attested will by changes written and initialled by the testator. The testator and the witnesses must sign these alterations.

Execution of will exercising power of appointment

8. A will made in accordance with this Act is, as respects its execution and attestation, a valid execution of a power of appointment by will, notwithstanding that it has been expressly required that a will in exercise of the power be executed with some additional or other form of execution or solemnity.

Annotation

(a) Corresponding Provincial Enactments:

Most of the Provinces start their respective sections as follows: "No appointment made by will in exercise of any power shall be valid unless the same be executed. . . .", or words to that effect.

New Brunswick adds to its own section the priviledge granted to soldiers.

(b) Cases:

In *Re Chichester: Pelham* v. *Chichester* [1946] 1 A.E.R. 722, it was held that a power of appointment may be exercised by a nuncupative will.

Publication

9. A will made in accordance with this Act is valid without further publication.

Annotation

Section 9 of the Uniform Wills Act forms no problem in any of the Provinces, for it is identical throughout the whole Dominion.

Incompetency of witness

10. If a person who attested the execution of a will was, at the time of execution, or afterward becomes incompetent as a witness to prove the execution, the will is not on that account invalid.

Annotation

(*a*) Corresponding Provincial Enactments:

Section 10 is identical in the Provincial Acts, with the exception of a slightly different wording in some of the Acts.

Gift to attesting witness

11. (1) If the execution of a will is attested by a person to whom or to whose then wife or husband a beneficial devise, legacy, estate, interest, gift or appointment of or affecting real or personal property, except charges and directions for payment of

debt, is by the will conveyed, given, or made, the conveyance, gift or appointment is void so far only as it concerns the person so attesting, or the wife or the husband of a person claiming under any of them; but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

(2) Where the will is sufficiently attested without the attestation of the person whose attestation is within subsection (1), or where no attestation is necessary, the conveyance, gift or appointment is not void under that subsection.

Annotation

(a) Corresponding Provincial Enactments:

Section 11(1) is basically the same throughout the country, with slight deviations: e.g., where the Uniform Wills Act refers to "a beneficial devise, bequest or appointment"; also, the phrase "or a person claiming under any of them" is omitted.

Newfoundland (note: this information was taken from the 1916 Newfoundland Consolidated Statutes, and they have quite recently been revised, but that revision was not available) does not have the exception of a witness who benefits by a "charge or direction for payment of debt" as is contained in the Uniform Wills Act.

Section 11(2)—Two Provinces have omitted this section from their Acts—Ontario and British Columbia. No British Columbia case was found on this point, but there is an Ontario case (*Re Bush* [1943] 1 D.L.R. 74) which holds (Urquhart J.) that a gift to a witness is void even if there are enough witnesses without the signature of the beneficiary witness. This would seem to be the logical result of the omission of that section; and so, it may be assumed that if the same case were to arise in British Columbia, the same result would ensue.

It is also to be noted that whereas the Uniform Wills Act provides for the case where a witness marries a beneficiary, by including in section 11(1) "to whose then wife" so as not to invalidate the gift (*Thorpe* v. *Bestwicke* 6 Q.B.D.), the Provinces of Alberta, Saskatchewan, Manitoba, and New Brunswick were the only Provinces to include this phrase in their Acts.

(b) Cases:

Two problems may arise under this section which are not covered by this section (i.e., the language in this section), nor are they covered by any Canadian case law.

1. The first problem is the case of three (or more) witnessing beneficiaries. Under section 11(1) they are all still competent to prove the execution, and then under section 11(2) the will is sufficiently attested without the attestation of the third witness whose attestation is within section 11(1); and so, the gift to the third witness is void. The problem then is obvious: Which witness is the third witness?

2. The second problem arises in the attestation of codicils, and while no Canadian case could be found, the English case of

Gurney v. *Gurney* (1855) 3 Drew 208 (61 E.R.) demonstrates the extent to which a witness is competent to take, even if he has witnessed the same document. In that case the beneficiary witnessed a codicil which republished the will of the testator, which will had given the witness a legacy but which the witness to the codicil did not attest. Vice-Chancellor Kindersly held that while the attestor of any will which thereby gave a gift to the witness shall render the gift void, the attestation referred to the same testamentary document under which the witness took, and in this case the witness took, not by the codicil which he attested but by the will. In other words, the beneficiary pointed to the will and said: "I claim under the will. . . . I did not attest the will and, therefore, the gift is not void.", and the Court agreed with his argument.

This case naturally raises the further question of: What would be the result if the witness beneficiary had witnessed the will under which he took but had not witnessed the codicil which republishes the will? The answer to this question is found in the case of *In Re Trotter* [1899] 1 Ch. 764, where a witness beneficiary witnessed the will, did not witness the first codicil, but did witness the second codicil. The Court held that because the witness could point to one of the codicils under which he took but which he did not attest, the gift would not be void.

It is debatable whether these decisions would be followed in Canada, but they might well be, and they are not provided for in our statute or case law (except perhaps where the Ontario case of *Re South* [1933] O.W.N. 750 lays the groundwork for so deciding, for in that case a bequest was made to X, who was dead at the time of the making of the will, so the gift was held to be a bequest to X's son Y, who attested the will. The Court held that the gift was good because Y did not take by the will but took by section 36(1) of the Ontario Wills Act 1927, which, in such circumstances, gave the gift to the beneficiary's next-of-kin). The point is: Do we want to rephrase our section 11 to conform to the decisions or to avoid them?

Creditor as witness to prove execution

12. Where by a will real or personal property is charged with a debt, and a creditor or the wife or husband of a creditor whose debt is so charged attests the execution of the will, the person so attesting, notwithstanding such charge, is a competent witness to prove the execution of the will or its validity or invalidity.

Annotation

(a) Corresponding Provincial Enactments:

With the exception of the Province of Newfoundland, section 12 of the Uniform Wills Act is the same throughout Canada. The reason it does not appear in the Newfoundland Act is because in the Newfoundland section corresponding to section 11(1) of the Uniform Wills Act no exception is made for "charges and directions for the payment of debt."

Executor as witness to prove execution

13. A person is not incompetent as a witness to prove the execution of a will, or its validity or invalidity, solely because he is an executor.

Annotation

(a) Corresponding Provincial Enactments:

Section 13 of the Uniform Wills Act has been universally adopted by the Provinces, with no case bearing on that point.

Revocation by marriage

14. A will is revoked by the marriage of the testator, except where,

(*a*) there is a declaration in the will that it is made in contemplation of the marriage; or

(*b*) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor or administrator of the testator, or to the persons entitled to the estate of the testator if he died intestate.

Annotation

(a) Corresponding Provincial Enactments:

Newfoundland—The section here has no provision for clause (*a*), a declaration that the will is made in contemplation of marriage; and in clause (*b*) the next-of-kin are governed by the *Distribution Act.*

Nova Scotia—Here the section is almost identical, with the exception of an additional subsection: "Where the wife or husband of the testator elects to take under the will by an instrument in writing signed by such wife or husband and filed, within one year after the testator's death, in the Court of Probate in which probate of such will is taken or sought to be taken."

New Brunswick—The section here is similar.

Prince Edward Island—Here the section is similar, with the exception that their section 80, subsection 2(a) says the marriage is to take place within one month after the making of the will.

Ontario—There are here the similar two provisions, with the property going, in default of appointment, to those under the *Devolution of Estates Act* entitled as the testator's next-of-kin. There is also an additional third subsection, with the same meaning as the one found in the Nova Scotia Act.

Alberta—The section here is identical.

British Columbia—Here the section is similar but is governed by the *Administration Act,* which says that the property shall not pass, in default of the power of appointment, to "a husband or widow. . . or to any of the next-of-kin as the Court shall consider expedient."

The absence of a declaration that the will was made in contemplation of marriage in the Newfoundland Act, along with the additional provision in Nova Scotia, and Ontario regarding the election of either husband or wife to take under an instrument in writing, provide points

which are in conflict with the proposed Uniform Wills Act. Such provisions, along with the minor one in Prince Edward Island whereby the marriage must take place within one month after the making of the will, if the section is to be valid, should be resolved.

(b) Cases:

Damphousse v. *Damphousse* [1943] O.W.N. 349 merely states that the Wills Act does not have the effect of making irrevocable a will made in contemplation of marriage but merely prevents the operation of the common-law rule by which a testator's will was revoked by marriage.

15. A will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances. No revocation by presumption

Annotation

(a) Corresponding Provincial Enactments:

The wording of all the Provincial Statutes is almost identical with that of the Uniform Wills Act, except that "alteration" is used instead of "change" in the phrase "change in circumstances".

(b) Cases:

While the sections are identical in wording, which is convenient for uniform interpretation, the generality of the section has produced a fair amount of case law. Both *Re Nam Sing* (1912) 1 W.W.R. 472, a British Columbia decision, and *Hunter* v. *McDonald* (1875) 9 N.S.R. 527 hold that where a will is shown to have been in the custody of the testator and is not found at his death, the presumption arises that it was destroyed by the testator for the purpose of revoking it. This presumption is weakened if the testator did not have the custody of the will (*Unwin* v. *Unwin* (1914) 6 W.W.R. 1186 (B.C.)). However, a Manitoba case, *Re Nesbitt* [1933] 3 W.W.R. 171, decided before adoption of the Uniform Wills Act, carries the presumption of non-production even further by saying that if a will has been made and cannot be found at the death of the deceased, it has been revoked. No mention is made of the custody of the testator. This, however, is in clear conflict with the latest authority, *Re Moore* [1941] 2 D.L.R. 112, which states the law that no presumption arises in favour of the revocation of a will by reason of its non-production after the testator's death if the will is not shown to have last been in the possession of the testator.

A Manitoba case before adoption of the Uniform Wills Act holds that a person propounding a lost will has a continual burden of proof that the will is in fact lost and was not destroyed by the testator with the intention of putting an end to it (*Sigurdson* v. *Sigurdson* [1935] 4 D.L.R. 529).

16. A will or part of a will is revoked only by, Revocation in general

(*a*) marriage, as provided by section 14; or

(*b*) another will executed in accordance with sections 5, 6, and 7; or

(*c*) a writing declaring an intention to revoke and executed in accordance with sections 5, 6, and 7; or

(*d*) burning, tearing or otherwise destroying it by the testator or by some person in his presence and by his direction with the intention of revoking it.

Annotation

(a) Corresponding Provincial Enactments:

The various sections are identical in phrasing or similar in meaning.

(b) Cases:

While the statute law in the various provinces is almost identical, the generality of the different subsections has been the cause of much litigation.

(*a*) The subsection on marriage has seen the least litigation and is fairly well outlined in annotation to the section regarding revocation by marriage.

(*b*) Subsection (*b*) dealing with another will executed in accordance with all formalities has a fair amount of case law which can be used for a general indication of the way the Courts would construe the Uniform Wills Act.

DeLack v. *Newton* [1944] O.W.N. 517 lays down the fairly obvious rule that an attempted revocation by a subsequent will not properly executed, and by destruction in the absence of the testator, is not a valid revocation.

Re Smith [1948] 2 W.W.R. 1069 says that a holograph will is "another will" within the Act and thus can revoke a prior will.

An Ontario case states that if dispositions are clearly and carefully made in one will, and indefinite and ambiguous in a subsequent instrument, then there will be no revocation (*Farrell* v. *National Trust* (1914) 17 D.L.R. 382).

Re Molson (1910) 21 O.L.R. 289 states that the statement in a later testamentary document that it is the last will and testament of the testator has of itself no revocatory force or effect.

There can be a total revocation of a prior will only if the latter one expressly or in effect revokes the former, or the two be incapable of standing together. *Re Daigle* [1918] 2 W.W.R. 910 (Alta.). This can be seen in *Re Allen* [1935] 1 W.W.R. 584 (Alta.), where in the first instrument the testator disposed of his entire estate, and by a subsequent will disposed of the entire estate excepting certain properties. The testator revoked all wills, and the Court held that there was an intestacy as to the excepted property. Again, in *Re Snow* [1932] 1 W.W.R. 473 (Man.), a testator, in a subsequent testamentary paper containing a general revocatory clause, dealt with specific property only, and it was held that the testator did not intend to revoke his former will and that both documents should be admitted to probate.

If a will has been revoked for the purpose of making a fresh will, and if no fresh will is made, then the original will is not revoked. *Re Colville* [1932] 1 D.L.R. 47 (B.C.).

(*c*) *Re Morrison* [1942] 1 D.L.R. 273 (Ontario) states the circumstances under which an intention to revoke may be inferred.

A mere statement of the testator that he has cancelled the will is not evidence of an effective revocation, but it is admissible as showing the state of mind and intention of the testator. (*Campbell* v. *Lindsay* (1925) 29 O.W.N. 6).

(*d*) This subsection defining "burning, tearing or otherwise destroying" has caused a considerable amount of litigation. The various Provincial Courts have placed different interpretations on the meaning of these three words.

Bell v. *Matthewson* (1920) 48 O.L.R. 364 states that there is no "burning, tearing or otherwise destroying" within the meaning of the Act when the testator writes "cancelled" across the end of the will with all the appropriate signatures and witnesses. However, a New Brunswick case, *Re Drury* (1882) 22 N.B.R. 318, holds that a will which is found, after the testator is dead, with a seal cut out when there is no evidence of sealing and a few pencil marks drawn through the signatures, then it comes within the meaning of "tearing" in the Act. *Re Anderson* [1933] 1 D.L.R. 581 holds that the expression "or otherwise destroying" is intended to cover acts "eiusdem generis" with burning, and cutting is "eiusdem generis" with tearing. A fairly recent Nova Scotia case *Re Witham* [1938] 3 D.L.R. 142, holds that where a will was found with certain paragraphs cut out, that portion of the will which remained, which in itself constituted a complete and intelligible will, should be admitted to probate.

Two Ontario cases, *Campbell* v. *Lindsay* (1925) O.W.N. 86, and *Re James* (1927) O.W.N. 110, hold that where a testator becomes insane after the execution of the will and continues insane until his death, the burden of showing that the will was destroyed while he was of sound mind lies on the party setting up the revocation, and in the absence of evidence as to the date of destruction, the contents of the will may be admitted to probate.

NOTE:—In the case of *In re Gillespie Estate* [1953] 8 W.W.R. (NS) 593, a question arose as to whether a holograph will made and signed, as provided in subsection (2) of section 6, could revoke a formal will in view of the provisions of section 16. Mr. Justice Campbell decided that a holograph will could revoke a formal will, and no exception is taken to this decision. The judgment, however, alludes to the fact that section 16 might be made a little more clear. Subsection (1) of section 6 refers to a formal will as being "executed", whereas subsection (2) of section 6 refers to a holograph will as being "made and signed". In the above-mentioned case an attempt was made to distinguish between "execution" and "making and signature". A question arises as to whether it would not be better drafting to refer, in section 16, both to the "execution" of a formal will and the "making and signature" of a holograph will. This might be done by adding to clause (*b*) of section 16 the words: "including a holograph will made and signed as provided in subsection (2) of section 6."

Execution of alterations

17. (1) Unless an alteration that is made in a will after its execution is executed in accordance with sections 5, 6, and 7, the

alteration has no effect except to invalidate words or meanings that it renders no longer apparent.

(2) An alteration that is made in a will after its execution is validly executed when the signature of the testator and subscription of witnesses are made,

(*a*) in the margin or in a part of the will opposite or near to the alteration; or

(*b*) at the front or end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Annotation

(a) Corresponding Provincial Enactments:

All the Provinces have similar provisions.

(b) Cases:

The Ontario case of *Re Anderson* [1933] O.R. 131 held that if mutilation was to be deemed an alteration, leaving the papers as found to constitute a will, it ought to have complied with section 23 of the Ontario Wills Act, which is similar to 17 above.

In the English case of *Re Itter: Dedman* v. *Godfrey* [1950] 1 A.E.R. 68, where words in a will had been obliterated so as no longer to be apparent, it was held that the word "apparent" means apparent on the face of the will, and words discovered only by the application of infra red photograph are not apparent within the meaning of this section.

In the *Estate of Zimmer* (1924) 40 T.L.R. 502, the testator obliterated words in his will, and other words were written over the obliterated words. It was held that where words in a will had been obliterated by a testator so as no longer to be apparent and other words had been written over the erasure, those words would not be admitted to probate because they are not duly attested, and applying the doctrine of dependent relative revocation, extrinsic evidence may be received to find what the original words were if the court is satisfied that their obliteration was referable wholly and solely to the testator's intention to substitute the other words for them.

The Alberta case of *Re McGibbon* [1931] W.W.R. 86, and *Re Cottrell Estate* [1951] 2 W.W.R. 247, held that although in Alberta an attested will can be altered by a holograph codicil properly drawn up as such, yet an obliteration of an attested will by obliterations and interlineations is not effectual unless the alterations have been signed not only by the testator but also by the witnesses.

Where a will contains obliterations, additions, or other alterations, evidence must, if possible, be produced to show when they were made. *In the Goods of Hindmark* (1866) 1 P. & D. 307. For this purpose declarations of the testator with regard to his testamentary intentions made before the date of the will are admissible.

In the Goods of Adamson (1875) 3 P. & D. 253, it was held that the fact that a date earlier than the date of the will is annexed to alterations is not alone sufficient to show that they were made before execution.

In *Re Reid* [1946] 3 D.L.R. 410, a testator directed that certain lots be conveyed to a daughter subject to "the payment by her of any outstanding taxes assessed against the said land." She had previously purchased these lots from the father and there was a balance owing thereon. There were also arrears of taxes. It was held that the testator intended to cancel the balance owing on the lots subject to the payment of taxes by the daughter. The duty of the executors was to convey the lots to the daughter with the taxes accrued against it. The Court presumed that an unattested alteration had been made after the execution of the will.

Revival

18. (1) A will or part of a will which has been in any manner revoked is revived only by re-execution or by a codicil that has been executed in accordance with sections 5, 6, and 7, and shows an intention to revive the will or part that was revoked.

Partial revival

(2) Unless an intention to the contrary is shown, when a will which has been partly revoked is revived, the revival does not extend to the part that was revoked before the revocation of the whole.

Annotation

(a) Corresponding Provincial Enactments:

All the Provinces have similar sections.

(b) Cases:

(1) The case of *MacDonnell* v. *Purcell* (1894) 23 S.C.R. 101 gave some explanation of subsection (1) of this section in the light of the decision of the English case of *In the Goods of Steel* (1866) 1 P. & D. 575. *MacDonnell* v. *Purcell* held that for a revival by a codicil of revoked will, the intention to revive must appear on the face of the instrument. Before the passage of the English Wills Act, the mere execution of a codicil referring to a will was sufficient to effect a revival, but under the Act more is required. There must not only be a reference to the will that is to be revived, but also a direct intention to revive, or else a disposition of property inconsistent with any other inference, or expressions showing with reasonable certainty such an intention. In the English case of *Re Morden* [1944] 2 A.E.R. 397, a codicil not expressly reviving a revoked will was held to show sufficient intention to revive the will.

In *Lord Walpole* v. *Lord Orford* (1797) 3 Ves. 402, it was held that a codicil reviving a revoked will thereby revokes a will intermediate in date between the first revoked will and the codicil, and inconsistent with the first will.

In Theobald on Wills, 8th edition, it was pointed out that a will which had been revoked by a subsequent will was not revived by an erroneous reference to it in codicil.

(2) Where a specific gift has been revoked, a codicil republishing the will will not have the effect of reviving that part of the will which adeemed the gift, *Drinkwater* v. *Falconer* (1755) 2 Ves. Sen. 626.

In *Re Perdue* [1943] 1 D.L.R. 46, a Manitoba case, it was held that a will, including a codicil, may be revived by a duly executed codicil

showing an intention to revive the same. Where a second codicil to a will revoked a gift made in a first codicil, a third codicil making changes in the wording of the gift as contained in the first codicil (which codicil was referred to by date), it was held that the second codicil revived the gift in the first codicil, notwithstanding that the third codicil confirmed and republished the will and codicils as amended.

Subsequent conveyances, etc.

19. A conveyance of or other act relating to real or personal property comprised in a devise or bequest made or done subsequently to the execution of the will does not prevent operation of the will with respect to an estate or interest that the testator had power to dispose of by will at the time of his death.

Annotation

(a) Corresponding Provincial Enactments:

Alberta—Section 19 of the Alberta Act is identical with section 19 of the Uniform Wills Act.

British Columbia—Section 21 of the British Columbia Wills Act is couched in terms identical to those found in section 19 of the Uniform Wills Act, except that the devise or bequest in the will is avoided if the subsequent conveyance or act revokes the will.

Manitoba adopted the Uniform Act in 1936.

New Brunswick adopted the Uniform Act in 1952.

Newfoundland—Section 13 of the Newfoundland Act varies from section 19 of the Uniform Act only in that it states that no conveyance or act "made or done subsequently to the re-execution of a will. . . ." shall avoid the operation of a will. The inclusion of the term "re-execution" would appear to be of questionable value. The Newfoundland Act contains the proviso respecting revocation mentioned with regard to Nova Scotia.

Nova Scotia—Section 23 of the Nova Scotia Wills Act covers the ground of section 19 of the Uniform Wills Act, with the proviso that the will is avoided if the subsequent conveyance or act is a revocation of the will.

Ontario—Section 25 of the Ontario Wills Act is to the same effect as section 23 of the Nova Scotia Wills Act.

Prince Edward Island—Section 85 of the Prince Edward Island Probate Act is identical in effect with the Nova Scotia section.

Saskatchewan adopted the Uniform Act in 1931.

(b) Cases:

A specific gift fails where the subject matter thereof has never come into existence. *Hefferman* v. *McNab* (1902) 1 O.W.R. 165.

A specific gift may be adeemed by the property being sold or conveyed after the date of the will. Ademption means simply the taking away of the benefit by the act of the testator. *Re Tracy* (1913) 25 O.W.R. 413.

The case of *Re Clowes* [1893] 1 Ch. 214 is authority for the rule that where a testator devises land to a devisee and then sells that land and

takes back a mortgage to secure the purchase price, the benefit of the mortgage does not pass to the devisee. The reasoning would appear to be that such sale and conveyance are *de facto* a revocation of the devise. *Re Dods* (1901) 1 O.L.R. 7; *In Re Church* [1923] S.C.R. 642.

An interesting illustration of this doctrine at work may be seen in the case *Re Calvert Estate* [1928] 3 W.W.R. 42, where the testator sold land, then, in his will, bequeathed the balance due under the agreement of sale to a legatee. After the will was made the purchaser withdrew from the agreement and executed a quit claim deed back to the testator. It was held this adeemed the gift and the legatee had no claim against the land. To the like effect is *Re Ferguson* (1911) 18 Man. R. 532. The Ferguson case held that section 19 preserves only the legal estate devised by a will, so that where the testator has, after making the will, entered into an agreement to sell the devised land, the devisee does not take purchase money that remains unpaid at the time of the death of the testator. See contra: *Hicks* v. *McClure* [1922] 3 W.W.R. 285, 64 S.C.R. 361.

It would appear that in order for the doctrine of ademption to apply, the subject matter of the gift under the will and that under the subsequent gift *inter vivos* must be *eiusdem generis*. *Re Bicknell* (1919) 46 O.L.R. 416.

Where the assets of the deceased testator are not sufficient to pay all legacies, the rule is that general legacies abate first and proportionately, specific legacies having priority in this respect. *Lindsay* v. *Waldbrook* (1897) 24 O.L.R. 604; *Re Waddell Estate* 29 N.S.R. 19; *Re Cowan* [1932] 1 D.L.R. 771; 40 Man. R. 221.

It would seem that ademption is regarded as a "revocation by alteration of estate." *Re Tracy* (1913) 25 O.W.R. 413. See also *Re Barnard* (Man.) [1948] 2 W.W.R. 879.

Will speaking from death

20. Except when a contrary intention appears by the will, a will speaks and takes effect with respect to the real and personal property of the testator as if it had been executed immediately before the death of the testator.

Annotation

(a) Corresponding Provincial Enactments:

Identical sections are contained in all of the Provincial Wills Acts.

(b) Cases:

In the case of *Beddington* v. *Baumann* [1903] A.C. 13, Halsbury, L.C., in directing his attention to the corresponding section in the English Wills Act, said: "... you are remitted by virtue of the 24th section... to the moment of death to show what it is that is being disposed of."

The rule laid down in section 20 is a rule of construction and has its most frequent application to cases involving property acquired between the date of the will and the date of death, and applying the rule, after acquired property will pass under the will. *Re Aussant* [1917] 3 W.W.R. 655; In *Re Willis* [1911] 2 Ch. 563; *Re MacFarlane* [1947] O.W.N. 6.

The Courts would seem to be making practical application of the observation of Lord Esher, M.R., who said, in *Turner* v. *Mellard* 30 Ch. D. 390: ". . . when a testator has executed a will in solemn form, you must assume that he did not intend to make it a solemn farce. . . ."

It can readily be seen that the application of this rule of construction will occasionally pervert the testator's intentions. Perhaps one of the most striking examples of this is found in *Chapman* v. *Perkins* [1905] A.C. 106. There, the testator provided by his will that any son or daughter who married a person closer than third cousins would forfeit his or her share in his estate. A daughter married a first cousin between the date of the will and the testator's death. It was held that the will spoke from the death of the testator, and the forfeiture would consequently apply only to prohibited marriages after the testator's death. The daughter took her share of the estate.

There is a point to be noticed in respect of section 20. The section expressly states that the will speaks from the death of the testator in respect of *property* contained in the will. In respect of other matters the rule would seem to be that *prima facie* the will speaks from the date of its execution. *Re Karch* (1921) 50 O.L.R. 509; 64 D.L.R. 541.

A contrary intention of the testator, if expressed in the will, has the effect of displacing section 20. *Re Stewart* [1918] 2 W.W.R. 1090, 42 D.L.R. 512; *Re Thompson* (1919) 45 O.L.R. 520.

See also: *Re O'Donnell* [1946] 1 D.L.R. 218; *Re Skule* [1950] 3 D.L.R. 494; *Re McEwen* [1941] 2 D.L.R. 54; *Re Holland*, 57 Man. R. 415.

Lapsed and void devises

21. Except when a contrary intention appears by the will, real property or an interest therein that is comprised or intended to be comprised in a devise that fails or becomes void by reason of the death of the devisee in the life-time of the testator, or by reason of the devise being contrary to law or otherwise incapable of taking effect, is included in the residuary devise, if any, contained in the will.

Annotation

(a) Corresponding Provincial Enactments:

Newfoundland—This Province has no corresponding section.

Ontario—The meaning is the same, with the exception that there is no mention of "interest therein" after "real property"—it is merely "such real estate as is comprised or intended to be comprised in any device. . . ."

(b) Cases:

Re Philp [1953] 1 D.L.R. 88 (Ontario)—T gives property but does not name the object of his bequest, hence the property falls into the residue.

Re Foss [1940] 4 D.L.R.—Here T gave "my property, both real and personal, to my wife to have and to hold to her heirs and assigns forever. After my wife's death the property shall be divided equally between the heirs." It was held that the wife took the property absolutely in fee simple and might dispose of it as she saw fit.

Inclusion of leaseholds in general devise

22. Except when a contrary intention appears by the will, a devise of,

(*a*) the land of the testator; or

(*b*) the land of the testator in a place or in the occupation of a person mentioned in the will; or

(*c*) land described in a general manner; or

(*d*) land described in a manner that would include a leasehold estate if the testator had no freehold estate which could be described in the manner used,

includes the leasehold estates of the testator or any of them to which the description extends, as well as freehold estates.

Annotation

(a) Corresponding Provincial Enactments:

The section is the same throughout Canada, with a few minor differences:

1. The Newfoundland Act refers to a "general devise of property of any kind of the testator" and not, as in the Uniform Wills Act, to merely "a general devise of the land." Furthermore, in the Newfoundland Act subsection (*d*) of the Uniform Wills Act is omitted.

2. The British Columbia Act provides (where the Uniform Wills Act provides only for the "leasehold estate" in subsection (d)) for "the customary copyhold or leasehold estate". The "customary copyhold" was an ancient form of tenure in manorial England which is not found anywhere in Canada.

(b) Cases: None.

Exercise of general power of appointment by general gift

23. (1) Except when a contrary intention appears by the will, a general devise of,

(*a*) the real property of the testator; or

(*b*) the real property of the testator in any place or in the occupation of a person mentioned in the will; or

(*c*) the real property described in a general manner,

includes any real property or any real property to which the description extends, that he has power to appoint in any manner he thinks proper and operates as an execution of the power.

(2) Except when a contrary intention appears by the will, a bequest of,

(*a*) the personal property of the testator; or

(*b*) personal property described in a general manner,

includes any personal property, or any personal property to which the description extends, that he has power to appoint in any

manner he thinks proper and operates as an execution of the power.

Annotation

(a) Corresponding Provincial Enactments:

The Provinces have similar provision.

(b) Cases:

General Power—The effect of section 29 of the Wills Act of Ontario is to put property over which the testator has a general power of appointment in the same position as his own property. Clear language of the testator is required to raise the inference under section 29 that a contrary intention is shown by the will. In the Ontario case of *Re Tidy*, [1949] 2 D.L.R. 302, the testator was a purchaser of real estate and the author of the terms of conveyance vesting it in his son to hold such uses as the testator, by deed or will, might approve. The will contained a general devise to the executor with a direction to the executor to transfer the residue of "my estate" to a trustee for the son's benefit for life with remainder over. It was held that under the circumstances, the fact that the testator referred to the property in the will as his property and dealt with it as his own was not sufficient to infer an intention not to exercise the power and that, therefore, under section 29, the general devise operated as an execution of the power.

Special Power—The Prince Edward Island case of *Sharp* v. *Eastern Trust Company* [1949] 1 D.L.R. 557 exemplifies this second aspect of power of appointment.

In order to exercise a special power of appointment, there must be a sufficient expression or an indication of intention to exercise it. In general, a reference either to the power or to the property subject to the power constitutes a sufficient indication for that purpose. From the case cited above, where a will, in which it was alleged the testatrix exercised special power of appointment which she had over certain lands, under two settlements, contained no reference to the powers or to the lands, and the testatrix also had property of her own, so that the provisions of the will could be carried out without the property subject to the powers, it was held that from these circumstances and others, including the fact that under the will persons not mentioned in the settlement were given benefits, and the discretionary powers given to the trustees were contrary to those given the trustees of the settlements, the testatrix had no intention of exercising the special powers, and she did not in fact do so.

Validity of Power of Appointment—It was held that a power of appointment over moveables may be exercised by a will valid according to the law of the domicile, notwithstanding that it does not comply with the requirements of the Wills Act of Ontario.

The following was the opinion expressed in *Re Woods* [1947] 1 D.L.R. 386: "In the absence of any language contained in the will implying that a foreign testator intended to import the Ontario law into his will as a rule of construction, section 29 of the Wills Act should be read as a statutory provision imported into every general power of appointment to which the law of Ontario has application, and every such appointment

should read as if the instrument creating the power of appointment by will contained the provision of that section."

Respecting immoveables in Ontario, a different consideration arises. The power to appoint by will given, the will over immoveables must be taken to mean a power to appoint by will lawful in form to pass an interest in realty within Ontario. The *lex situs* must govern. Where lands are devised to be sold without restriction, they are thereby made personal estate. *In Re Rain* 26 Ch. D. 601. On the other hand, where land is devised to trustees with a power to convert, or with an absolute discretion to convert or not, the property remains unconverted until the power of discretion is exercised, *Re Ryson* [1910] 1 Ch. 750.

The following cases:

Re Spooners Trust 2 Sim (N.S.) 129; 61 E.R. 287
Re Martin [1901] 1Ch. 314
Re White Trust [1952] O.W.N. 748
Re McNeil [1920] 1 W.W.R. 523
Pemberton v. *Lewis* [1917] 3 W.W.R. 791
Re Asp [1924] 2 W.W.R. 1089

hold that an ineffectual exercise of the power to appoint does not exclude the effect of this section because an ineffectual exercise of the power of appointment is not an expression of a contrary intention within the meaning of the section.

"The division of powers of appointment into general and special is not exhaustive or exclusive. A power may be general for some purpose and not for others, as in cases arising under the Wills Act." This quotation is from 25 Halsbury 511 and 545. A power which is general in the sense that the donee may appoint any person, including himself or his executors or administrators, may be limited or qualified if, for example, it can be exercised only through the medium of his will, *Re Jones Estate* [1948] 2 W.W.R. 927 (Manitoba).

In *Re Creighton Estate* [1950] 2 W.W.R., a decision based upon *Lambert* v. *Thwaites* (1866) L.R. 2 Ex. 151, it was held that the existence of a power of appointment does not prevent the vesting of the property until and in default of the execution of the power. The exercise of the power will divest the estate, but until the power is exercised, it remains vested in those who are to take in default of appointment.

In the Ontario case of *Re Stapleton* [1938] 3 D.L.R. 410, it was explained that by the Ontario Wills Act, R.S.O. 1937, s. 39, a general devise or bequest operates as an execution of a general power of appointment unless a contrary intention appears by the will. An unnecessary direction in a will was held, on the facts of the above case, not to indicate the contrary intention mentioned in the section. The testator, in his will, empowered his wife to dispose of half of his estate. In case the wife survived the sister of the testator, she was further empowered to dispose of the estate devised to the sister by the testator. Wife survived testator; but during the latter's life-time, the wife, in her will, disposed of all her property and added: "I direct that the provisions of my will shall be taken as being exercised in pursuance of the powers of appointment over half the net estate." The Court held that these words were unnecessary and there was no contrary intention.

Re Near [1938] 3 D.L.R. 20. The testatrix, in exercise of a power of

appointment given to her under her husband's will, inserted the words: "it is my desire" following a gift of money in her will. It was held that the words did not create a trust unless the intention to create a trust was clear, nor did the words constitute a condition attached to the gift. Hence, the desire of the testatrix that money should be used in the purchase of annuities was held to be inoperative and ineffectual.

Devise without words of limitation

24. Except when a contrary intention appears by the will, where real property is devised to a person without words of limitation, the devise passes the fee simple or other the whole estate that the testator had power to dispose of by will in the real property.

Annotation

(a) Corresponding Provincial Enactments:

Identical sections are to be found in the Provincial Wills Acts.

(b) Cases:

The rule of construction found in section 24 is one which the Courts have long followed. The principle involved is clearly stated by Middleton, J., in *Re Miller* (1914) 6 O.W.N. 665, in these words: ". . . the tendency of all the later cases is against the attempt to cut down an absolute estate to a life estate, unless the testator's intention is clear beyond peradventure." To the like effect are the following: *Re Youngberg* [1922] 1 W.W.R. 168; 62 D.L.R. 710; *Re Cooper* [1921] 3 W.W.R. 76; 61 D.L.R. 315; *Nova Scotia Trust Co.* v. *Smith*; *Re Smith* [1933] 6 M.P.R. 205; *Re Sexton* [1920] 19 O.W.N. 139, *Re Robinson* [1930] 2 W.W.R. 609; [1931] 1 D.L.R. 289.

Where, however, the will clearly shows a contrary intention, the Courts will not hesitate to enforce that intention and will declare the devisee has only a life estate. *Re Maltman* [1927] 1 D.L.R. 417. See also: *Re Jackson* [1940] 1 D.L.R. 283; *Doherty* v. *Doherty* [1936] 2 D.L.R. 180.

Devise to "heir"

25. Where real property is devised to the heir or heirs of the testator or of another person and no contrary or other intention is signified by the will, the words "heir" and "heirs" mean the person or persons to whom the beneficial interests in the real property would go under the law of the Province in the case of intestacy.

Annotation

(a) Corresponding Provincial Enactments:

Identical sections are to be found in the Provincial Wills Acts.

(b) Cases:

The purpose of this section would seem to be to give to the words "heir" or "heirs" the meaning "statutory heir" and "statutory heirs" and so avoid the confusion resulting from the use of common-law meanings. One result of this is that consideration of the common-law

doctrine of primogeniture is now unnecessary. *Wolff* v. *Sparks* 29 S.C.R. 585.

The language used in this section is not precise enough to exclude the *Rule in Shelley's case.* See *Van Grutten* v. *Foxwell* [1897] A.C. 658; *Atkinson* v. *Purdy* 43 N.S.R. 274.

Prima facie the words "heir" and "heirs" designate those who would take upon intestacy. *Re Cust* (1910) 13 W.L.R. 102; 2 Alta. L.R. 351; *Re Ferguson* (1897) 28 S.C.R. 38, but the testator's widow is not included in the description "heirs". *Re Woodworth* (1861) 5 N.S.R. 101; *Re Benjamin* (1931) 3 M.P.R. 5.

Meaning of "die without issue", etc.

26. (1) Subject to subsection (2), in a devise or bequest of real or personal property,

(*a*) the words,

(i) "die without issue", or

(ii) "die without leaving issue", or

(iii) "have no issue"; or

(*b*) other words importing either a want or failure of issue of a person in his lifetime or at the time of his death or an indefinite failure of his issue,

mean a want or failure of issue in the lifetime or at the time of death of that person, and unless a contrary intention appears by the will, do not mean an indefinite failure of his issue.

(2) This Act does not extend to cases where the words defined in subsection (1) import,

(*a*) if no issue described in a preceding gift be born; or

(*b*) if there be no issue who live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to that issue.

Annotation

(*a*) Corresponding Provincial Enactments:

Newfoundland—Here the meaning is the same, with, however, an elaboration of "contrary intention": "by reason of such person having a *prior quasi estate tail,* or of a preceding gift being without any implication arising from such words, a limitation of *quasi estate tail* to such person or issue."

Nova Scotia—The meaning here is similar, but "contrary intention" is due to a "prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue or otherwise."

Prince Edward Island—The section is similar in meaning, with the same elaboration of "contrary intention" as is found in the Nova Scotia section.

Ontario—Here the section is similar in meaning, with again the

same elaboration of "contrary intention" as is found in the Nova Scotia section.

Alberta—The section here is identical.

British Columbia—Here the section is similar in meaning, with again the same elaboration of "contrary intention" as is found in the Nova Scotia section.

(b) Cases:

In a recent case, *Re Kennedy* [1950] 1 W.W.R. 151, it was held that a legacy which never vested in the legatee because of her failure to observe certain conditions precedent went to the grandchildren who were born alive after the death of the testator.

In *Re Hill* [1943] O.W.N., the word "issue" is taken to include grandchildren.

Unlimited devise to trustees

27. Where real property is devised to a trustee without express limitation of the estate to be taken by him, and the beneficial interest in the real property or in the surplus rents and profits is,

(*a*) not given to a person for life; or

(*b*) is given to a person for life but the purposes of the trust may continue beyond his life,

the devise vests in the trustee the fee simple or other the whole legal estate that the testator had power to dispose of by will in the real property and not an estate determinable when the purposes of the trust are satisfied.

Annotation

(a) Corresponding Provincial Enactments:

This section is contained in the Acts of all the Provinces in substantially the same form (in most it is not sectionated), with the exception of Newfoundland, where there is not a siimilar section.

(b) Cases: None.

Devise to trustees otherwise than for a term

28. Except when there is devised to a trustee or executor expressly or by implication an estate for a definite term of years absolute or determinable or an estate of freehold, a devise of real property to a trustee or executor passes the fee simple or other the whole estate or interest that the testator had power to dispose of by will in the real property.

Annotation

(a) Corresponding Provincial Enactments:

All the Provinces except Newfoundland have a corresponding section. In British Columbia the words "other than or not being a presentation to a Church" are imposed upon the real estate which is being devised to a trustee or executor.

(b) Cases: None.

29. Unless a contrary intention appears by the will, where a person to whom real property is devised for what would have been, under the law of England, an estate tail or an estate in quasi entail dies in the lifetime of the testator, leaving issue who would be inheritable under the entail if such estate existed, and any such issue are living at the time of the death of the testator, the devise does not lapse but takes effect as if the death of that person had happened immediately after the death of the testator. Devises of estate tail

Annotation

(a) Corresponding Provincial Enactments:

Newfoundland—No similar provision of general import, but section 17 would appear to have the effect of preventing a lapse of a devise of any interest to a child or other issue of the testator.

(b) Cases:

On its face this section would appear to operate so as to prevent the lapse of a devise which is couched in language which, at common law, would have created an estate tail. If this is so, there appear to be difficulties in its application. The situation in Nova Scotia will illustrate the problems. By virtue of section 5 of the Real Property Act, R.S.N.S. 1923, Ch. 140, estates tail are abolished, and any estate which would have been an estate tail is declared to be a fee simple estate. Thus, in Nova Scotia, the provisions of section 29, if they are to operate at all, must do so in respect of fee simple estates. If they do operate, what effect is to be given to the Survivorship Act (1921 N.S. Ch. 11)? This latter Act declares that where two or more persons die in the same disaster, the younger is assumed to have died last, except that the order of death can be assumed to be such as will validate a gift over.

Of course, section 29 is declared to be operative only in the absence of a contrary intention in the will, but if there is no contrary intention in the will, the provisions may be susceptible to application of the *Rule in Shelley's Case;* that is, the words "heir" or "heirs" are not words of purchase creating any estate, but words of limitation delimiting the estate to the donee of the gift. It would thus appear to follow that the provisions of this section might be defeated by application of *Van Grutten* v. *Foxwell* [1897] A.C. 658.

It would also appear that the question whether the children of the devisee were living at the date of the will is of some importance. If they were, the gift can be construed as a gift to the devisee and his children jointly; if they were not, the *Rule in Wild's Case* applies, and the testator is not presumed to have intended a benefit to the children whom he did not know, but the words are construed as words of limitation only, and the devisee takes an entailed estate, which is converted into an estate in fee simple under the statute in Nova Scotia. See on this aspect of the problem: Bailey on Wills, 3rd edition, page 220.

It may be that the intention to prevent lapse as expressed in section 29 should be rephrased.

Gifts to issue predeceasing testator

30. Where a person dies in the lifetime of a testator, either before or after the testator makes the will, and that person,

(*a*) is a child or other issue, or a brother or sister of the testator to whom, either as an individual or as a member of a class, is devised or bequeathed an estate or interest in real or personal property not determinable at or before his death; and

(*b*) leaves issue any of whom is living at the time of the death of the testator,

the devise or bequest does not lapse but, except when a contrary intention appears by the will, takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisable if he had died intestate and without debts immediately after the death of the testator.

Annotation

(a) Corresponding Provincial Enactments:

Newfoundland—Here there is no express mention of death "before" the making of the will, and no express mention of the distribution of the property—an intestacy must be assumed.

Nova Scotia—This section concerns itself only with an "estate tail, or for an estate in quasi tail" and is restricted solely to a devise of real property.

Prince Edward Island—Here, as in the Nova Scotia section, the devise is only for an "estate tail" or an "estate in quasi entail"; thus referring solely to devises of real property. Also, there is no mention of distribution by the rules of intestacy—it must be assumed.

(b) Cases:

The cases on this section are quite numerous but concern themselves mostly about whether there is a "contrary intention" expressed or implied in the facts of the case.

Some of the Ontario cases concern themselves with lapses in gifts to issue, and *Re Branchflower* [1945] O.W.N. 636, held that where the legacy has been saved from lapse and the legatee dies intestate, the next-of-kin who take the legacy are to be ascertained as of the date of death of the beneficiary and not of the testator.

In *Re Case* [1947] O.W.N. 711 it is held that where the section operates to prevent a lapse, the gift passes to the personal representatives of the deceased beneficiary, not to the issue or next-of-kin.

In *Re South* [1933] O.W.N. 750, a legacy was left to a sister, who predeceased the testator, leaving issue. Two members of this class were witnesses of the will. It was held that such witnesses were not barred from their share in the legacy to their mother as they took under this section and not under the will.

A Manitoba case, *Re Rake* [1938] 1 D.L.R. 191, holds that where a person had been married to two daughters of the deceased, each of whom had predeceased the testator, then he was entitled to claim through both daughters as though each had survived the testator.

An Ontario case, *Re MacMurray* [1950] O.W.N. 681, holds that in a class gift to brothers, where the class is to be ascertained at the time of the testator's death, brothers who predecease the testator are entitled to be in the class.

A good deal depends on the intention of the testator as construed from the will. Thus, in *Re Sheardown* [1951] 3 D.L.R. 323 (Man.), where the testator showed an intention that "issue" should be restricted to mean children only, then, where a named beneficiary had died before the will was made, leaving children who predeceased the testator, but they left children, such grandchildren did not take the share of the deceased beneficiary.

The same meaning may be retained in this section if it is amended to put the emphasis on brevity and read as follows:

"Where any person, being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of the testator, dies in the lifetime of the testator, leaving issue, and any such issue of such person is living at the time of the death of the testator, such devise or bequest does not lapse but takes effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will." See: *Re Perry* [1941] 2 D.L.R. 690 Ontario—two brothers, one dead a long time, the other not mentioned.

The object of section 36 of the Act is to prevent the lapse of a testamentary gift to a child or other issue, or brother or sister, who have predeceased the testator, and in the case of a gift to such a person who, to the knowledge of the testator, predeceased him, the Court is not stopped from inquiring whether some other person may not really have been intended to be the recipient of the gift.

Re Cummings [1938] 3 D.L.R. 611 (Ontario). An illegitimate son (Legitimation Act, R.S.O. 1937, c. 216) is legitimated by subsequent marriage of his parents and thereby stands on the same footing as brother with the other children born in lawful wedlock. Thus, property bequeathed by such a son to his half-brother, who predeceased him, passes to the issue and next-of-kin of the half-brother, and does not escheat to the Crown as "bona vacantia" on the common-law theory that an illegitimate person is not capable of having relations, except his wife and children and those claiming under them.

Illegitimate children

31. Except when a contrary intention appears by the will, an illegitimate child is entitled to take, under a testamentary gift by or to his mother or to her children or issue, the same benefit as the child would have been entitled to if legitimate.

Annotation

(a) Corresponding Provincial Enactments:

New Brunswick and Alberta have a provision to the same effect as

that in the Uniform Wills Act, except that they refer to every illegitimate child "of a woman" where the Uniform Wills Act refers only to illegitimate children. The Provinces of Newfoundland, Prince Edward Island, British Columbia, Nova Scotia, and Ontario have no similar provision in their Act.

(b) Cases:

The common-law rule is applied in *Re Millar* [1937] O.R. 382 that illegitimate children do not take under a bequest to "children" or "issue", or such phrases, unless they come within Lord Cairn's exceptions.

Primary liability of mortgaged land

32. (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by his will disposes of an interest in freehold or leasehold property which, at the time of his death, is subject to a mortgage, and the deceased has not, by will, deed or other document, signified a contrary or other intention, the interest is, as between the different persons claiming through the deceased, primarily liable for the payment or satisfaction of the mortgage debt; and every part of the interest, according to its value, bears a proportionate part of the mortgage debt on the whole interest.

(2) A testator does not signify a contrary or other intention within subsection (1) by a,

(*a*) general direction for the payment of debts or of all the debts of the testator out of his personal estate or his residuary real or personal estate, or his residuary real estate; or

(*b*) charge of debts upon that estate,

unless he further signifies that intention by words expressly or by necessary implication referring to all or some part of the mortgage debt.

(3) Nothing in this section affects a right of a person entitled to the mortgage debt to obtain payment or satisfaction either out of the other assets of the deceased or otherwise.

(4) In this section, "mortgage" includes an equitable mortgage, and any charge whatsoever, whether equitable, statutory or of other nature, including a lien or claim upon freehold or leasehold property for unpaid purchase money and "mortgage debt", has a meaning similarly extended.

Annotation

(a) Corresponding Provincial Enactments:

The Provinces of Nova Scotia, Alberta, British Columbia, Prince Edward Island, New Brunswick, and Newfoundland do not have a corresponding section in their Acts.

(b) Cases:

In *Re Fordam* v. *Grey* [1921] 91 L.J. ch. 48, it was held that a codicil confirming a will which contains a specific devise of real estate upon trust to sell and to discharge out of the proceeds, mortgage debts secured thereon, does not keep alive mortgage debts which have been discharged by the testator.

In *Stewart* v. *Denton* (1785) 4 Doug. 219, *Barry* v. *Harding* (1844) 1 J. & Lat. 489, it was held that a specific legatee has the right to have his specific legacy freed from the debts and liabilities of the testator existing at his decease.

In *Knight* v. *Davis* (1833) 3 My & K 358, it was held that if the testator has pledged the legacy, whether for his own debt or not, the legatee is entitled to compensation. This principle was carried forward in *Re Broadwood* 80 L.J. (1910) Ch. 202, and it was added that the legatee is entitled to compensation out of the fund primarily liable, and the measure of compensation is the loss to him at the date when he is entitled to receive the legacy.

Re Broadbert (1931) 40 O.W.N. 402. In this case the testatrix directed in her will that her assets be converted into money, and after the payment of all her debts and testamentary expenses, that the residue be paid over to a Women's Club. Her husband died, and in his will he left her all his real estate and requested that on her death it should pass to his son. She then executed a codicil devising this property which she had received from her husband to her son, and then she confirmed her will in all other respects. The property of the husband contained a barn which was in need of repairs. The testatrix instructed her son to make the necessary repairs, which was done to the amount of $1,154.00. Testatrix died before the amount was paid. It was held that the Ontario section had no application as the farm upon which these repairs were done was not charged with the payment of this account, and section 5 of the Devolution of Estates Act, had no application because the testatrix, by her will, had expressly provided first for the payment of her debts and then given her residuary estate to the Women's Club. The Court found that the testatrix had no separate estate at the time of her decease and, also, there was plain direction by her will that all her just debts were to be paid before distribution of her estate should take place. They, therefore, directed the executors to pay the cost of repairs before handing the residue to the Women's Club. The land upon which the barn stood was the property of the testator until her death and was not charged with the payment of this account.

Executor as trustee of residue

33. (1) Where a person dies after this Act takes effect, having by will appointed a person executor, the executor is a trustee of any residue not expressly disposed of for the person or persons, if any, who would be entitled to it in the event of intestacy, unless it appears by the will that the person so appointed executor was intended to take the residue beneficially.

(2) Nothing in this section affects or prejudices a right to which the executor, if this Act had not been passed, would have

been entitled, in cases where there is not a person who would be so entitled.

Annotation

(a) Corresponding Provincial Enactments:

Section 33 appears in the Acts of Manitoba, Saskatchewan, Alberta, and New Brunswick, but is not present in any of the other Acts.

(b) Cases: None.

SCHEDULE I

Legislation in the ten Canadian Provinces relating to Wills is as follows:

Alberta	R. S. Alberta (1942) Chapter 210, Vol. 3, pp. 2889 to 2897.
British Columbia	R. S. British Columbia (1948) Chapter 365, Vol. 4, pp. 5311 to 5321.
Manitoba	R. S. Manitoba (1940) Chapter 234, Vol. 3, pp. 3562 to 2572.
New Brunswick	N. B. Statutes (1950) Vol. 2, Chapter 172, pp. 483 to 492.
Newfoundland	Consolidated Statutes of Newfoundland (1916), Chapter 118 at page 1216, volume 2.
Nova Scotia	R.S.N.S. Chapter 146, Vol. 2, p. 1226; as amended by Nova Scotia Laws, 1934 Ch. 34; 1940 Ch. 25; 1941 Ch. 32.
Ontario	R. S. Ontario (1950) Chapter 426, Vol. 4, pp. 1305 to 1315.
Prince Edward Island	Revised Statutes of P.E.I. (1951), Chapter 124, Part Three, Sections 70 to 95, inclusive, found at pp. 1028 to 1033.
Quebec	No research into Quebec law has been conducted.
Saskatchewan	R. S. Saskatchewan (1940) Chapter 110, Vol. 1, pp. 1120 to 1129.

SCHEDULE II

CORRESPONDING SECTION OF:

Sections of Uniform Act	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario
1	1	1	1	1	..
2	..	..	..	..	..
3	3	3	3	3	8
4	5	4	4	4	10
5	9	6	5	5	13
6	6	5 (*a*) & (*b*)	6	6	11(1)
7	7	7	7	7	11(2)
8	8	8	8	8	12
9	10	9	9	9	14
10	11	10	10	10	15
11	12	11	11	11	16
12	13	12	12	12	17
13	14	13	13	13	18
14	16	14	14	14	20
15	17	15	15	15	21
16	18	16	16	16	22
17	19	17	17	17	23
18	20	18	18	18	24
19	21	19	19	19	25
20	20	20	20	20	26(1)
21	23	21	21	21	27
22	24	22	22	22	28
23	25	23	23	23	29
24	26	24	24	24	30
25	..	25	25	25	31
26	26	26	26	26	32
27	29	21	27	27	34
28	28	28	28	28	33
29	30	29	29	28	35
30	31	30	30	30	36
31	..	31	31	31	..
32	..	..	32	33	37
33	..	32	33	34	..

SCHEDULE II—*Continued*

CORRESPONDING SECTION OF:

Sections of Uniform Act	Nova Scotia	New Brunswick	Prince Edward Island	New-foundland
1	1	..	..	..
2	..	..	..	..
3	3	2	70(1)	14 & 15
4	4	3	71	2
5	9	5	..	..
6	6	5(1)	72(1)	1
7	7	6	70(2)	..
8	8	5(1)	73	3
9	10	8	75	4
10	11	9	76	5
11	12	10	77	6
12	13	11	78	..
13	14	12	79	7
14	18	13	80(1)	8
15	19	14	81	9
16	20	15	82	10
17	21	15	83	11
18	22	16	84	12
19	23	18	85	13
20	24(1)	19	86(1)	14
21	25	20	87	..
22	26	21	88	15
23	27	21	89	15
24	28	23	90	..
25	..	24	..	..
26	29	25	91	16
27	30	26	93	..
28	30	24	92	..
29	31	28	94	17
30	31	30	94	17
31	..	30	..	..
32	..	..	..	..
33	..	..	32	..

APPENDIX E

(*See page 18*)

TRUSTEE INVESTMENTS

Report of New Brunswick Commissioners

At the 1951 Conference a very full report by the Alberta Commissioners dealing with the matter of trustee investments was received and discussed and the provisions of Schedule "E" to such report (being draft uniform provisions respecting such investments) were considered. After discussion the matter was referred to the New Brunswick Commissioners to prepare a further draft in the light of the decisions made and views expressed.

The New Brunswick Commissioners were not prepared to submit such draft at the 1952 Conference. The 1951 report of the Alberta Commissioners and such notes of the discussions thereon as were available have since been considered. There has also been considered a report and recommendations of the British Columbia section on administration of civil justice made at the annual meeting of the Canadian Bar Association held in Vancouver in September, 1952.

From the information so received, and from other sources, a draft of provisions respecting Trustee Investments has been prepared for consideration, which draft is attached hereto as Appendix A. It takes the form of suggested amendments to the Trustee Acts of the various provinces.

This matter is so fully reported on by the Alberta Commissioners in 1951 and so fully dealt with in the 1951 discussion on such report, that it is not considered necessary in this report to discuss at length any particular provisions of the draft attached as Appendix A hereto. However, as the draft attached contains some material which apparently was not considered in 1951, there is indicated therein by way of note, the source from which its various provisions have been taken. The indication of the source does not, however, necessarily mean that the provisions have been so taken verbatim.

Dated the 30th day of July, A.D. 1953.

Respectfully submitted,

J. F. Teed,
New Brunswick Commissioner.

Appendix A

AN ACT TO AMEND THE TRUSTEE ACT

Sections..... of *The Trustee Act* are repealed and the following substituted therefor:

Interpretation:

1. In this Act and in any order made hereunder,

"securities'

(*a*) "securities" includes stock, debentures, bonds and shares.

Investments:

2. A trustee having money in his hands, which it is his duty, or which it is in his discretion to invest at interest, may in his discretion, and if such investments in all other respects are reasonable and proper, invest the same in,

Government issues

(*a*) securities of the Government of Canada, the Government of any Province of Canada, any municipal corporation in any Province of Canada, the Government of the United Kingdom and the Government of the United States of America;

(1951 Alberta Report)

Government guarantees

(*b*) securities, the payment of the principal and interest of which is guaranteed by the Government of Canada, the Government of any Province of Canada, any municipal corporation in any Province of Canada, the Government of the United Kingdom or the Government of the United States of America;

(1951 Alberta Report)

Payable out of taxes

(*c*) securities issued for school, hospital, irrigation, drainage or other like purposes, which are secured by or payable out of rates or taxes levied under the law of any Province of Canada, on property in such Province, and collectable by or through a municipal corporation in which such property is situate;

(1951 Alberta Report, S. 60(*b*) Dom. Ins. Act as enacted in 1950)

Secured by Government payments

(*d*) bonds, debentures or other evidences of indebtedness of a corporation that are secured by the assignment to a trustee of payments that the Government of Canada, or the Government of any Province of Canada has agreed to make, if such payments are sufficient to meet the interest on all such bonds, debentures or other evidences of indebtedness outstanding as it falls due and also to meet

the principal amount of all such bonds, debentures or other evidences of indebtedness upon maturity;

(S. 60(*g*) Dom. Ins. Act as enacted 1950)

(*e*) bonds, debentures and other evidences of indebtedness, Bonds of certain Canadian corporations

(i) of any Canadian corporation that has earned and paid (1) a dividend in each of the five years immediately preceding the date of investment at least equal to the specified annual rate upon all of its preferred shares or (2) a dividend in each year of a period of five years ended less than one year before the date of investment upon its common shares of at least four per centum of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;

(S. 60(*j*) Dom. Ins. Act as enacted 1950)

(*f*) first mortgage, charge or hypothec upon real estate in Canada, provided the loan does not exceed sixty per cent of the value of the property at the time of the loan, as established by competent and independent valuation; Mortgages

(1951 Alberta Report, S. 60(*m*) & (*b*) Dom. Ins. Act as enacted 1951)

(*g*) guaranteed trust or investment certificates of a trust company incorporated under the laws of the Dominion of Canada, or of any Province of Canada and approved by the Lieutenant-Governor in Council; Guaranteed trust certificates

(1951 Alberta Report)

(*h*) bonds, debentures or other evidences of indebtedness of a loan or like corporation, Approved loan, etc., companies

(i) that has power to lend money upon mortgages, charge or hypothec of real estate,

(ii) that has a paid-up non-returnable capital stock amounting to at least $500,000,

(iii) that has a reserve fund amounting to not less than twenty-five per centum of its paid-up capital,

(iv) the stock of which has a market value that is not less than seven per centum in excess of par value thereof,

(v) that has satisfied the Lieutenant-Governor in Council that it is keeping strictly within its legal powers in relation to borrowing and lending and has been

declared by Order of the Lieutenant-Governor in Council to be an approved corporation;

(1951 Alberta Report s. 3)

Shares of preferred stock

(*i*) preferred shares of any Canadian corporation that has paid,

(i) a dividend in each of the five years immediately preceding the date of investment at least equal to the specified annual rate upon all of its preferred shares, or

(ii) a dividend in each year of a period of five years ended less than one year before the date of investment upon its common shares of at least four per centum of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;

(S. 60(*k*) Dom. Ins. Act as enacted 1950)

Shares of common stock

(*j*) fully paid common shares of Canadian corporation that in each year of a period of seven years ended less than one year before the date of investment, has paid a dividend upon its common shares of at least four per centum of the average value at which the shares were carried in the capital stock account of the corporation during the year in which the dividend was paid;

Provided that in case of investment under clause (*i*) or (*j*) not more than thirty per centum of the common shares and not more than thirty per centum of the total issue of shares of any corporation shall be purchased by any trustee, and no corporation which is a trustee shall invest in its own shares;

(S. 60 (*l*) Dom. Ins. Act enacted 1950)

Other approved corporations

(*k*) securities of a corporation which fails to comply with the requirements of clause (*c*), (*d*), (*e*), (*g*), (*h*), (*i*), (*j*) or (*k*), but which has satisfied the Lieutenant-Governor in Council that,

(i) it is keeping strictly within its legal powers in relation to borrowing and lending,

(ii) its securities are in all respects fit and proper investments for trustees,

(iii) its paid-up capital reserved and revenues are such

that its securities are as fully secured as other investments authorized by this section,

and which securities have been declared by Order of the Lieutenant-Governor in Council to be approved securities for investment by trustees.

(1951 Alberta Report s. 4)

Bank and other depositary

3. A trustee may, pending the investment of any trust moneys, deposit the same during such time as is reasonable in the circumstances in any chartered bank of Canada, or in any approved trust company, loan corporation or any other like depositary which has by Order of the Lieutenant-Governor in Council been approved as such depositary.

(1951 Alberta Report s. 2, cl. (*f*); Ontario Statute amending Trustee Act 1952)

Revocation of approved corporation or approved securities

4. The Lieutenant-Governor in Council may at any time revoke any Order in Council, or the approval made or given under clause (*g*), (*h*) or (*k*) of section 2 or under section 3, but such revocation shall not affect the propriety of investments made before the revocation.

(1951 Alberta Report s. 5)

Deposits

5. Where a trustee deposits trust moneys as authorized in section 3, he shall require the account in the bank or other depositary ledger to be opened and kept in the name of the trustee for the particular trust estate for which it is held and the deposit receipt or pass book shall not be transferable by endorsement or otherwise.

(1951 Alberta Report s. 6(*a*))

Investments to be in trustee's name

6. Where a trustee invests in securities, other than bonds or other evidences of indebtedness which cannot be so registered, he shall require the securities to be registered in the name of the trustee for the particular trust estate for which the securities are held, and the securities shall be transferable only on the books of the corporation in his name as trustee for such trust estate.

(1951 Alberta Report s. 6(*b*))

Instrument creating the trust

7. (1) The powers by this Act relating to trustee investments are in addition to the powers conferred by the instrument, if any, creating the trust.

(2) Nothing in this Act relating to trustee investments authorizes a trustee to do anything which he is in express terms forbidden to do or to omit to do anything which he is in express terms directed to do by the instrument creating the trust.

(1951 Alberta Report s. 7)

Variation of investments

8. (1) A trustee in his discretion, from time to time may,

(*a*) call in any trust funds invested in any other securities than those authorized by this Act and invest the same in any securities authorized by this Act; and

(*b*) vary any investments authorized by this Act for others of the same nature.

Liability of trustee

(2) No trustee shall be liable for any breach of trust by reason only of his continuing to hold an investment which has ceased to be one authorized by the instrument of trust or by the general law.

(1951 Alberta Report s. 8)

Exchange of securities

9. (1) Where a trustee holds securities in which he has properly invested under the provisions of this Act, he may concur in any scheme or arrangement,

(*a*) for the reconstruction of the company, or for the winding-up or sale or distribution of the assets of the company;

(*b*) for the sale of all or any part of the property and undertaking of the company to another company;

(*c*) for the amalgamation of the company with another company;

(*d*) for the release, modification or variation of any rights, privileges or liabilities attached to the securities, or any of them,

in like manner as if he were entitled to such securities beneficially, with power to accept any securities of any denomination or description of the reconstructed or purchasing or new company in lieu of or in exchange for all or any of the first-mentioned securities.

Liability of trustee

(2) The trustee shall not be responsible for any loss occasioned by any act or thing so done in good faith, and may retain any securities so accepted as aforesaid for any period for which he could have properly retained the original securities.

(1951 Alberta Report s. 9)

Assignment of right to exchange securities

10. If any conditional or preferential right to subscribe for any securities in any company is offered to a trustee in respect of any holding in the company, he may, as to all or any of the securities, either exercise the right and apply capital money subject to the trust in payment of the consideration, or renounce the right, or assign for the best consideration that can be reasonably obtained, the benefit of the right or the title thereto to any person, including any beneficiary under the trust, without being respon-

sible for any loss occasioned by any act or thing so done by him in good faith, but the consideration for such assignment shall be held as capital money of the trust.

(1951 Alberta Report s. 10)

Consent to change of investment

11. The powers conferred by sections 9 and 10 shall be exercisable subject to the consent of any person whose consent to a change of investment is required by law or by the instrument, if any, creating the trust.

(1951 Alberta Report s. 11)

APPENDIX F

(*See page 19*)

BULK SALES ACT

REPORT OF THE MANITOBA COMMISSIONERS

At the 1953 Conference the current draft of the Uniform Bulk Sales Act prepared by the Ontario Commissioners and the Federal Representatives was referred to the Manitoba Commissioners for a complete study of the principles contained therein in collaboration with the Commercial Law Section of The Canadian Bar Association, and to report thereon, with a revised draft if considered advisable, to the next annual meeting.

The Manitoba Commissioners, after study of representations made from several sources as to the existing legislation respecting bulk sales, prepared a memorandum in the form of a questionnaire, setting out thirteen specific points on which the opinion of the Commercial Law Section was sought. An ample number of copies of this memorandum and of a covering letter were sent to the Dominion Chairman of the Commercial Law Section with a request that copies be sent to each provincial subsection and that the consenus of their replies be sent to the Manitoba Commissioners by May 1st. A copy of the memorandum is attached as a schedule to this report.

Only one complete reply was received from the Commercial Law Section. That was from Mr. Catzman of the Ontario subsection. Brief memoranda were received from New Brunswick and Alberta, but these did not refer to the questionnaire and seem to have been prepared without reference to it. The Manitoba Commissioners had also sent a copy of the questionnaire to the Legislation Committee of The Manitoba Bar Association, and a helpful reply was received from it.

With the aid of the comments that were received, the Manitoba Commissioners gave further consideration to the matters mentioned in the questionnaire previously prepared and came to a conclusion on all but question No. 2 (for which see the schedule to this report).

We leave question No. 2 for the decision of the Conference. We are, however, inclined to the view that,

(a) as to voluntary conveyances, the matter should be left to be dealt with under 13 Elizabeth I, c. 5; and

(b) as to conveyances in extinguishments of debt, the Act

should deal with them in a manner similar to the provisions of subsection (1) of section 11 of the draft Act attached hereto, respecting the case where a buyer has received or taken possession of stock in bulk.

As a result of our conclusions we have prepared a new draft, a copy of which is hereto attached. It is based on the draft presented by the Ontario Commissioners and Federal Representatives. Except as hereinafter indicated we have not, in the new draft, changed the former one. We have not suggested any drafting changes. Such changes as have been made were made in an effort to deal with the policy matters to which reference is made in our questionnaire. The changes are as follows:

1. In section 2, clauses (*b*), (*c*), (*e*), (*f*), (*g*), (*h*), (*i*) and (k) are new.
2. Subsection (2) of section 4 is new.
3. Subsection (2) of section 5 is new, the remaining subsections in the former draft being renumbered.
4. Subsection (5) is a redraft of former subsection (4).
5. Section 6 is entirely new, the remaining sections of the former draft being renumbered.
6. Subsections (2) to (7) of section 7 (section 6 in former draft) are new, and subsection (1) is made subject to these new subsections.
7. In subsection (1) of section 9 (section 8 in former draft) the words "proved as required by section (2)" are substituted for the words "as shown by the written statement".
8. In subsection (1) of section 4 and in subsection (3) of section 9 the word "bankrupt" is substituted for the words "authorized assignor", and the word "trustee" for the words "authorized trustee".
9. Subsection (2) of section 10 (section 9 in former draft) is new and subsection (1) is made subject to the new subsection.

Dated at Winnipeg the 23rd day of June, 1954.

I. J. R. DEACON,

R. M. FISHER,

G. S. RUTHERFORD,

Manitoba Commissioners.

SCHEDULE

MEMORANDUM PREPARED BY THE MANITOBA COMMISSIONERS RE THE BULK SALES ACT.

1.—(1) See definition of "sale". Since this includes, among others matters, a "conveyance", it would appear that the Act may now apply to chattel mortgages and real property mortgages. Should the Act so apply?

(2) If in your opinion the Act should apply to real property mortgages and chattel mortgages, should it apply to any other type of security given?

2. Should the Act apply to voluntary conveyances of stock in bulk, or conveyances thereof in extinguishment of debt?

3. See definition of "stock", which includes among other things, the goods, etc., with which a person carries on business. To what extent should the Act apply to sales of fixtures or machinery, whether or not in use by the vendor at the time of sale?

4. Solvent debtors may wish to sell part of their assets—e.g., sale by a large chain store corporation of one of its units. Would you consider it advisable to have a provision that a judge, on being satisfied that a proposed sale is advantageous and will not impair the debtor's ability to pay creditors in full, may exempt the sale from the provisions of the Act, and impose terms as to disposition of the proceeds?

5. Should the Act apply to

(*a*) sale of a partnership interest in a business; or

(*b*) sale of an interest in a business by the sole proprietor?

6. Should the definition of "stock" include

(*a*) leases;

(*b*) accounts receivable;

(*c*) choses in action;

(*d*) franchises;

(*e*) patents;

(*f*) good will;

(*g*) other intangible assets?

7. See definition of "creditor". Should this definition be worded to limit "creditor" to trade creditors and exclude personal liabilities of vendor such as debts secured on the residence or a private automobile or other purely personal debts having no relation to the business?

8. Should the waivers of creditors to which clauses (*b*) and (*c*) of section 6 of the uniform Act refer be obtained from both sixty per centum in number and amount of secured creditors and also sixty per centum in number and amount of unsecured creditors instead of sixty per centum in number and amount of all creditors as the Act now requires?

9. See subsection (4) of section 5 of the uniform Act. Should the allowable deposit or cash payment be changed to be a percentage of the sale price but not exceeding a stated maximum amount in dollars?

10. See section 9 of uniform Act. Where there is a surplus, should the trustees' fees be deducted from the surplus or be payable by creditors as is at present the case?

11. Should notice of a proposed bulk sale be mailed by the vendor to all his trade creditors and published in the official provincial gazette a fixed time before the sale and if so, how long before the sale?

12. Should the vendor in sending out to creditors the form of consent be required to name therein a proposed trustee?

13. Should the Act be amended to provide for the appointment of inspectors by the creditors, as under the Bankruptcy Act?

Dated at Winnipeg this 21st day of December, 1953.

I. J. R. DEACON,

R. M. FISHER,

G. S. RUTHERFORD,

Manitoba Commissioners.

AN ACT RESPECTING BULK SALES

HER 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 Bulk Sales Act".

Definitions

2. In this Act,

(*a*) "affidavit" includes a statutory declaration;

(*b*) "buyer" means a person who acquires stock in bulk or an interest therein under a sale in bulk;

(*c*) "creditor" means a person to whom a seller is indebted, whether or not the debt is due, for stock, trade fixtures, goods, wares, merchandise, chattels, money, or services, furnished for the purpose of enabling the seller to carry on a business, and includes a surety and the endorser of a promissory note or bill of exchange who has given the security or endorsement for that purpose and who would, upon payment by him of the debt, promissory note, or bill of exchange, in respect of which the suretyship was entered into or the endorsement was given, become a creditor of the seller;

(*d*) "proceeds of the sale" includes the purchase price or consideration payable to the seller, or passing from the buyer to the seller, on a sale in bulk, and the moneys realized by a trustee under a security, or by the sale or other disposition of any property, coming into his hands as the consideration, or part of the consideration, for the sale;

(*e*) "sale", whether used alone or in the expression "sale in bulk", includes a transfer, conveyance, pledge, charge, mortgage, barter, or exchange, and an agreement to sell, transfer, convey, pledge, charge, mortgage, barter or exchange; but does not include,

(i) a mortgage of real property, or

(ii) a chattel mortgage, unless it affects substantially the entire stock of the seller, or

(iii) a floating charge given to secure the bonds or debentures of a corporation, or

(iv) a security for indebtedness given to a bank in the ordinary course of business, or

(v) a security given for a past due indebtedness;

(*f*) "sale in bulk" means a sale,

(i) out of the usual course of business or trade of the seller, of stock or part thereof, or

(ii) of substantially the entire stock of the seller, or

(iii) of an interest in the business of the seller;

(*g*) "sell" has a meaning similar to "sale";

(*h*) "seller" means a person who sells stock in bulk or an interest therein to another person by a sale in bulk, for a valuable consideration;

(*i*) "stock" means,

(i) a stock of goods, wares, merchandise, or chattels, ordinarily the subject of trade and commerce, or

(ii) the goods, wares, merchandise, or chattels, in which a person trades, or that he produces, or that are the output of a business,

and includes,

(iii) leases,

(iv) accounts receivable,

(v) choses in actions.

(vi) franchises,

(vii) patents.

(viii) goodwill,

(ix) trade fixtures, and

(x) other assets,

appertaining to, or with which a person carries on, a business;

(*j*) "stock in bulk" means a stock, or part thereof, that is the subject of a sale in bulk;

(*k*) "trade fixtures" means the fixtures, machinery, and other chattels, other than stock, with which a person carries on a business;

(*l*) "trustee" means a trustee under the *Bankruptcy Act* (Canada) appointed for the bankruptcy district wherein the stock of the seller or a part thereof is located, or the seller's business or a part thereof is carried on, at the time of the sale in bulk thereof, or a person named as trustee by the seller or by his creditors in their written consent to a sale in bulk, or a person appointed as a trustee under subsection (2) of section 8.

Persons to whom this Act applies

3. This Act applies only to sales in bulk by,

(*a*) persons who, as their ostensible occupation or part thereof, buy and sell goods, wares, or merchandise, ordinarily the subject of trade and commerce;

(*b*) commission merchants;

(*c*) manufacturers; and

(*d*) proprietors of hotels, rooming houses, restaurants, motor vehicle service stations, oil or gasoline stations, or machine shops.

Scope of Act

4. (1) Nothing in this Act applies to or affects,

(*a*) a sale by an executor, administrator, receiver, assignee, or trustee for the benefit of creditors, a trustee under the *Bankruptcy Act* (Canada), a liquidator or official receiver, a public official acting under judicial process, or a trader or merchant selling exclusively by wholesale; or

(*b*) an assignment by a trader or merchant for the general benefit of his creditors.

Sale of part only of stock

(2) Where a seller proposes to sell a part only of his stock, he may apply to a judge of the County (Division) Court for the County (District) in which that part of the stock is located for an order exempting the sale from the application of this Act; and the judge, if he is satisfied that the proposed sale,

(*a*) is not a sale of substantially the entire stock of the seller; and

(*b*) is advantageous to the seller and will not impair his ability to pay his creditors in full,

may make the order; and thereafter this Act shall not apply to the sale.

Statement of creditors

5. (1) Except as otherwise provided in this Act, a buyer of stock in bulk, before paying to the seller any part of the purchase price or giving a promissory note or security for the purchase price or part thereof or executing a transfer, conveyance, or encumbrance of property, shall demand of and receive from the seller, and a seller of stock in bulk shall furnish to the buyer, a written statement in Form 1 verified by the affidavit of the seller or his authorized agent or, if the seller is a corporation, by the affidavit of an officer, director, manager, or authorized agent, of the corporation.

Where no creditors shown

(2) On the furnishing of the statement, if it shows that the seller has no creditors, the buyer may pay the purchase price to the seller and section 11 does not apply.

(3) Where the affidavit is made by an agent of the seller or, if the seller is a corporation, by an officer, director, manager, or authorized agent, of the corporation, the affidavit shall state that the deponent has a personal knowledge of the facts sworn to. Affidavit of agent, etc.

(4) The statement shall show the names and addresses of the creditors of the seller and the amount of the indebtedness or liability due, owing, payable, or accruing due, or to become due and payable, by the seller to each of the creditors. Contents of statement

(5) A buyer, before obtaining the statement, may pay to the seller on account of the purchase price a sum not exceeding 5 per cent of the purchase price or $500, whichever is the lesser amount. Payment on account

(6) From and after the furnishing of the statement and affidavit, no preference or priority shall be obtainable by any creditor of the seller in respect of the stock in bulk or the proceeds of sale thereof by attachment, garnishment proceedings, contract or otherwise. No preference or priority

6. (1) Where the amount to be realized from a proposed sale in bulk is not sufficient to pay in full all creditors of the seller, he shall, Notice to creditors

(*a*) at least twenty days before the sale, send by mail with postage prepaid, to each of his creditors; and

(*b*) publish in an issue of the (*official provincial Gazette*) the publication date of which is at least twenty days before the sale,

a notice to his creditors and all others whom it may concern, setting forth the particulars required by subsection (2).

(2) The notice required by subsection (1) shall state, Contents of notice

(*a*) the intention of the seller to make the sale, and the date and place and all other particulars thereof;

(*b*) whether the creditors will be paid in full on or before the completion of the sale;

(*c*) that, if the creditors will not be paid in full on or before the completion of the sale, a written consent to the sale or a written waiver of the provisions of this Act is requested;

(*d*) that, if creditors sufficient as to number and amount of their claims do not waive the provisions of this Act but consent to the sale, the creditors who consent may, in their consents, name a trustee as provided in section 8; and

(*e*) the name of a person suggested by the seller as a suitable trustee.

Prerequisites of completion of sale

7. (1) Subject to subsections (2) to (7), before the completion of a sale in bulk,

(*a*) the claims of the creditors of the seller, as shown by the written statement, shall be paid in full; or

(*b*) the seller shall produce and deliver to the buyer a written waiver in Form 2 of the provisions of this Act, other than the provisions contained in section 5, from creditors of the seller representing not less than 60 per cent in number and amount of the claims exceeding $50 as shown by the written statement; or

(*c*) the seller shall produce and deliver to the buyer the written consent thereto of creditors of the seller representing not less than 60 per cent in number and amount of the claims exceeding $50 as shown by the written statement.

Notice to creditors

(2) Before the completion of a sale in bulk, the seller shall give notice in writing by mail to each of his secured creditors, requiring ~~him~~ the creditor, within twenty days of the mailing of the notice, to deposit with the seller an affidavit stating therein the full particulars of his security, the date when it was given, and the value at which he assesses it.

Failure to value security

(3) Where a creditor fails, within the time fixed, to value his security and deposit an affidavit as required under subsection (2), the indebtedness owing to him for which the security was given shall not be included in reckoning the number and amount of the claims in respect of which waivers or consents are required under sub-section (1).

Failure to value, or excess valuation

(4) Where a creditor,

(*a*) fails, within the time fixed, to value his security and deposit an affidavit as required by subsection (2); or

(*b*) values his security at more than the amount of the indebtedness secured thereby,

no consent from him, in respect of the secured indebtedness, is required under clause (*c*) of subsection (1).

Valuation at less than debt

(5) Where a creditor values his security at less than the amount of the debt secured thereby, only the difference between the value at which he assesses the security and the amount of the indebtedness secured thereby shall be included in reckoning the

amount of the claims in respect of which waivers or consents are required under subsection (1).

Judicial order assessing security

(6) The seller, or any other creditor who is not satisfied with the valuation placed by a creditor on his security, may apply to a judge of the County (Division) Court for the County (District) in which the security is located for an order assessing the value of the security; and the judge, on such evidence as to him seems sufficient, may asses the value of the security and make an order declaring that, for all purposes of this Act, the value of the security is fixed at the amount stated in the order.

Time limit on application

(7) An application under subsection (6) ~~must~~ be made within thirty days of the date of the mailing of the notice to which subsection (2) refers.

When proceeds of sale to be paid over to trustee

8. (1) Where a sale in bulk is completed with the written consent of the creditors of the seller under clause (*c*) of subsection (1) of section 7, the buyer shall pay, deliver, or convey, the entire proceeds of the sale to the person named as trustee by the creditors in the written consent or, if no trustee is named therein, to the trustee named by the seller or appointed under subsection (2), to be dealt with as provided by section ~~9~~.

Appointment of trustee by judge

(2) Upon the application of a person interested, if the creditors of the seller in their written consent to a sale in bulk have not named a trustee and the seller has not named one, a judge of the County (Division) Court of the County (District) in which the seller's stock or a part thereof is located, or the seller's business or trade or a part thereof is carried on, at the time of the sale in bulk thereof, shall by order appoint a trustee and fix the security, if any, to be given by him.

Distribution of proceeds of sale

9. (1) Where the proceeds of the sale are paid, delivered, or conveyed, to a trustee under section 8, the trustee shall be a trustee for the general benefit of the creditors of the seller and shall distribute the proceeds of the sale among the creditors of the seller in proportion to the amounts of their claims proved as required by subsection (2), and such other creditors of the seller as file claims with the trustee ~~in accordance with~~ the *Bankruptcy Act* (Canada).

Idem

(2) The distribution shall be made in like manner as moneys are distributed by a trustee under the *Bankruptcy Act* (Canada); and in making the distribution all creditors' claims shall be proved in like manner, and are subject to like contestation, and entitled to like priorities, as in the case of a distribution under that Act.

Idem

(3) The creditors, vendor, and trustee, have in all respects the same rights, liabilities, and powers, as the creditors, bankrupt, and trustee, respectively, have under the *Bankruptcy Act* (Canada), the vendor and the trustee being deemed for such purpose to be a bankrupt and a trustee respectively under that Act, and the priorities of creditors shall be determined as of the date of the completion of the sale.

Notice

(4) Before making the distribution, the trustee shall cause a notice thereof to be published once in the (provincial) Gazette and in at least two issues of a newspaper published in the province and having a circulation in the locality in which the stock in bulk was situated at the time of the sale, and the trustee shall not make the distribution until at least fourteen days after the last of such publications.

Idem

(5) It is not necessary to publish any advertisement or notice of the distribution other than that required by subsection (4).

Fees of trustee

10. (1) Subject to subsection (2), the fees or commission of the trustee shall not exceed three per centum of the proceeds of the sale that come into his hands and, in the absence of an agreement by the seller to the contrary, the fees or commission, together with any disbursements made by the trustee, shall be paid by being deducted from the moneys to be received by the creditors and shall not be charged to the seller.

Proceeds of sale exceeding debts

(2) Where the proceeds of the sale exceed the amount required to pay in full all indebtedness to creditors that must be included in reckoning the amount of the claims in respect of which waivers or consents are required under subsection (1) of section 7, the fees or commission of the trustee and any disbursements made by him shall be paid from the excess proceeds, to the extent of that excess, and any balance remaining thereafter shall be paid as provided in subsection (1).

Effect of non-compliance with Act

11. (1) Unless this Act is complied with, a sale in bulk shall be deemed to be fraudulent and void as against the creditors of the seller, and every payment made on account of the purchase price and every delivery of a note or other security therefor, and every transfer, conveyance, and encumbrance, of property by the buyer, shall be deemed to be fraudulent and void as between the buyer and the creditors of the seller; but if the buyer has received or taken possession of the stock in bulk, or any part thereof, he is personally liable to account to the creditors of the seller for the value thereof including all moneys, security, or property, realized

or taken by him from, out of, or on account of, the sale or other disposition by him of the stock in bulk or any part thereof.

Estoppel

(2) In an action brought or proceeding had or taken by a creditor of the seller within the time limited by section 13 to set aside or have declared void a sale in bulk, or in the event of a seizure of the stock, or a part thereof, in the possession of the buyer under judicial process issued by or on behalf of a creditor of the seller within such period, the buyer is estopped from denying that the stock in his possession at the time of the action, proceeding or seizure is the stock purchased or received by him from the seller; but if the stock then in the possession of the buyer, or a part thereof, was in fact purchased by him subsequent to the sale in bulk from a person other than the seller of the stock in bulk and has not been paid for in full, the creditors of the buyer, to the extent of the amounts owing to them for the goods so supplied, are entitled to share with the creditors of the seller in the amount realized on the sale or other disposition of the stock in the possession of the buyer at the time of the action, proceeding, or seizure, in like manner and within the same time as if they were creditors of the seller.

Burden of proof

12. In an action or proceeding in which a sale in bulk is attacked or comes in question, whether directly or collaterally, the burden of proof that this Act has been complied with is upon the person upholding the sale in bulk.

Limitation of action, etc.

13. No action shall be brought or proceeding had or taken to set aside or have declared void a sale in bulk for failure to comply with this Act, unless the action is brought or proceeding had or taken within six months from the date of the completion of the sale.

Uniform construction

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

FORM 1

(*Section 5*)

STATEMENT AND DECLARATION

Statement showing names and addresses of all creditors of

, of the of

in the of

Name of Creditor	Address	Nature of Indebtedness	Amount	When due

I, , of the

of in the of , make

oath and say:

1. The foregoing (or annexed) is a true and correct statement of the names and addresses of all the creditors of the said
and shows correctly the amount of the indebtedness or liability due, owing, payable, or accruing due, or to become due and payable, by the said
in each of the said creditors.

(*If the affidavit is made by an agent, add:*)

2. I am the authorized agent of the seller and have a personal knowledge of the facts herein sworn to.

(*Or, if the seller is a corporation*)

I, , of the

of in the of ,

make oath and say:

1. The foregoing (or annexed) is a true and correct statement of the names and addresses of all the creditors of (*name of corporation*) and shows correctly the amount of the indebtedness or liability due, owing, payable, or accruing due, or to become due and payable, by the corporation to each of the said creditors.

2. I am the of the corporation, and have a personal knowledge of the facts herein sworn to.

Sworn before me etc.

NOTE: *Some provinces may wish to insert a provincial statute for the Canada Evidence Act.*

FORM 3

(*Section 7*)

WAIVER

We, the undersigned creditors of

, of the of

in the of hereby waive the provisions of *The Bulk Sales Act* in so far as that Act would apply to, affect, or cause to make fraudulent or void, the sale in bulk by the said of his stock of goods, wares, merchandise, and fixtures, or part thereof, or an interest in his business (*as the case may be*) to

, of the of

in the of , and we hereby admit having received notice of the intended sale and agree not to disturb, dispute, or question the validity of, the sale in any way under the provisions of that Act.

Dated this day of , 19 .

WITNESS:

APPENDIX G

(*See page 19*)

RECIPROCAL ENFORCEMENT OF JUDGMENTS
RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

MEMORANDUM OF THE ONTARIO COMMISSIONERS

At the last annual meeting drafts of each of these Acts were considered and adopted subject to the usual safeguards (1953 Proceedings, pp. 18, 23). These Acts as passed at last year's meeting are set out as Appendix F and Appendix N of the 1953 Proceedings.

Notices of disapproval were filed with the Secretary by Manitoba and Ontario and letters containing criticisms were received from New Brunswick and Saskatchewan. Consequently these Acts are not recommended in their present form and are on the Agenda for further consideration at this year's meeting.

Manitoba has prepared and distributed a report dated July 8th, 1954.

Ontario felt that it was desirable to file objections to these Acts on two specific grounds, namely: (1) constitutional matters arising from the case of *Smith* v. *Smith* [1953] 3 D.L.R. 682, as illustrated in a number of articles in Chitty's Law Journal; (2) doubts as to the suitability from a constitutional point of view of the proposed provision on currency that was hurriedly prepared and adopted at the Quebec meeting. In addition, the Ontario Commissioners were concerned as to the outcome of a case then partly argued before McRuer C.J.H.C. which it appeared might deal with a number of relevant constitutional points, including that of currency. Argument in this case was concluded in January of this year and judgment given by the Chief Justice in March. The case is *Re Scott* [1954] O.R. 246. In short, McRuer C.J.H.C., not without considerable doubt, came to the conclusion that the Ontario Reciprocal Enforcement of Maintenance Orders Act (which is the same as the present Uniform Act) is *intra vires.*

An appeal to the Court of Appeal for Ontario in June of this year was successful and reversed the Chief Justice. The reasons for judgment have not yet appeared in the law reports but copies were distributed by the Secretary to the Local Secretaries on July 23rd, 1954. In short, the Court of Appeal came to the con-

clusion "that the Legislature of the Province of Ontario, in so far as it may, by The Reciprocal Enforcement of Maintenance Orders Act, be endeavouring to impose upon persons subject to its jurisdiction the law of some other country or province as such law may be from time to time, or to confer upon a judge of a juvenile court or a magistrate power to determine whether or not a resident of the Province is liable to maintain a non-resident wife or children by reason of a judgment pronounced or an order made by a tribunal outside the Province, is exceeding its jurisdiction".

This case is now under appeal to the Supreme Court of Canada where it is expected to be argued in the Fall.

In view of this situation it is obvious, it is submitted, that further drafts of these two Uniform Acts cannot be prepared until the judgment of the Supreme Court of Canada in the Scott case is known and considered. However, as mentioned in Mr. Treadgold's letter of July 23rd to the Local Secretaries, it is recommended that all matters in question be discussed as fully as possible at this year's meeting in order that the jurisdiction to which the draft Acts are committed will be as fully informed as possible on the problems which must be answered before this work can be completed.

Respectfully submitted,

L. R. MacTavish,
for the Ontario Commissioners.

APPENDIX H

(*See page 20*)

RECIPROCAL ENFORCEMENT OF JUDGMENTS ACT

REPORT OF THE MANITOBA COMMISSIONERS

At the 1953 Conference a revised draft of the above-mentioned Act was referred back to the Federal Representatives and the Ontario Commissioners for incorporation of certain changes; and the Act as so revised was distributed to the various jurisdictions for final approval. Notices of disapproval were filed by Ontario and Manitoba. Disapproval by Manitoba was stated to be partly for the reasons mentioned by Ontario and partly on account of certain criticisms of the existing Act communicated to the Manitoba Commissioners by members of the legal profession in Manitoba.

The criticisms above referred to were embodied in a memorandum and sent to the secretary. Subsequently the Ontario Commissioners requested us to prepare a report on the matters covered by the memorandum; which report could be considered by the Conference along with the report of the Ontario Commissioners, being made as a result of their disapproval of 1953 draft. At the same time the secretary sent to us copies of correspondence he had with Mr. J. F. H. Teed, Q.C., who had also made certain criticisms of the 1953 draft.

Therefore, while the matter has not been officially referred to the Manitoba Commissioners by the Conference, we are, at the request of the Ontario Commissioners, as above mentioned, submitting this report.

We are setting forth herein a brief statement of the criticisms above mentioned. We think that these matters should be considered by the Conference and decisions made as to how they should be dealt with. We have in some cases made a recommendation with respect thereto and drafted certain suggested changes. These drafts are only intended to put our suggestions in concise form, and no doubt can be much improved.

1. We would first mention one of the objections made by Mr. Teed; namely, that a court of a foreign state acting within its jurisdiction, *according to the law of that state*, might make a maintenance order or other such order for payment of money against a person domiciled in the jurisdiction of the registering court.

Since maintenance orders are dealt with in The Reciprocal Enforcement of Maintenance Orders Act, we suggest that, in The Reciprocal Enforcement of Judgments Act, consideration be given to amending the definition of "judgment" in clause (*a*) of section 2 by adding the following:

> "... but does not include an order for the payment of money as alimony or as maintenance for a wife or former wife or a child, or an order made against a putative father of an unborn child for the maintenance or support of the mother thereof".

2. In the Alberta case of Wedlay vs Quist (1953) 10 W.W.R. (NS) 21, the Court of Appeal of that province decided that a defendant had not been "personally served" in an action brought in British Columbia because he was served outside British Columbia, although the process was in actual fact delivered to him personally. We suggest that the intention in The Reciprocal Enforcement of Judgments Act is to ensure that the debtor actually gets notice of the original action and for that reason we suggest adding a subsection (2) to section 2, such as the following:

> (2) All references in this Act to personal service mean actual delivery of the process, notice, or other document, to be served, to the person to be served therewith personally; and service shall not be held not to be personal service merely because the service is effected outside the jurisdiction of the original court.

We would, however, like to point out that Mr. Ker, in 1953, urged that the Act should recognize domiciliary service made in Quebec of process of Quebec courts. This point the Conference should decide. The new subsection above suggested does not, of course, deal with it.

3. It has been suggested to us that subsection (2) of section 3 of the 1953 draft should also provide that *ex parte* registration should not be made until the time for any appeal against the original judgment has expired or, if an appeal has been made, until it has been disposed of.

It was further suggested that the exemplification of the original judgment for which provision is made in subsection (4) of section 3 should be in a form set out in the Act, or to the like effect, and should be called a "certificate"; and, further, that the certificate should set out certain matters required to be shown under subsection (2) of section 3.

Furthermore, we entertain doubts as to the sufficiency of the expression "reasonable notice" as used in subsection (2) of section 3. We therefore suggest that subsection (2) might be replaced by several subsections in somewhat the following wording:

(2) An order for registration under this Act may be made *ex parte* in any case in which the judgment debtor,

(*a*) was personally served with process in the original action; or

(*b*) though not personally served, appeared or defended, or attorned or otherwise submitted to the jurisdiction of the original court,

and in which the time within which an appeal may be made against the judgment has expired and no appeal is pending or an appeal has been made and has been dismissed.

(2A) In a case in which subsection (2) applies, the application shall be accompanied by a certificate issued from the original court and under its seal and signed by a judge thereof or the clerk thereof.

(2B) The certificate shall be in the form set out in the schedule or to the like effect and shall set forth the particulars as to the matters therein mentioned.

(2C) In a case to which subsection (2) does not apply such notice of the application for the order as is required by the rules or as the judge deems sufficient shall be given to the judgment debtor.

4. It was suggested to us that a court might construe clause (*a*) of subsection (1) of section 7 to mean that if service could not be made within one month, an application for an extension of the time for service must be made *within that month.* We suggest that this is not desirable and that the clause be amended by adding, after the word "may" in the second line thereof, the words "at any time".

5. Another point raised with us was that if the registering court did not promptly make rules under the Act, the general rules of the registering court, and particularly its rules as to costs, should apply. With that in view we suggest amending section 8 by adding thereto the words: "and, until rules are made under this section, the rules of the registering court, including rules as to costs, mutatis mutandis, apply".

6. Another criticism made to us was with regard to section 11. It is suggested that it should be made clear that action can be taken on the original judgment even after proceedings have been taken to register the judgment under this Act. For that purpose we suggest that section 11 might be redrafted as follows:

11. Nothing in this Act deprives a judgment creditor of the right to bring action on his judgment, or on the original cause of action,

(*a*) after proceedings have been taken under this Act; or

(*b*) instead of proceeding under this Act,

and the taking of proceedings under this Act, whether or not the judgment is registered, does not deprive a judgment creditor of the right to bring action on the judgment or on the original cause of action.

7. It was pointed out to us that at present, when application is made to register a judgment under the Act, a garnishment order cannot be obtained till registration is complete. In cases where notice of the application has to be given to the debtor, this might nullify any advantage to be gained from a garnishment order.

It is submitted that provision should be made for the issue of garnishment orders upon the making of an application for registration, whether *ex parte* or not. This could be made a section following section 7 in the words following or to the like effect:

> 7A.-(1) At the time of, or after, making an application under section 3, the applicant may further apply, *ex parte*, to the registering court for an order that all debts, obligations, and liabilities owing, payable, or accruing due to the judgment debtor from such person as may be named in the application be attached.
>
> (2) A judge of the registering court, upon considering the application for registration of the judgment and the certificate of the original court accompanying it, and upon production of such further evidence as he may require, may, if he deems it proper, make the order mentioned in subsection (1); and the order when made shall be deemed to be a garnishment order before judgment, and the rules of the registering court with respect to such garnishment orders shall apply thereto.

8. It was suggested to us that the Act might provide for the procedure required under section 7 when the judgment debtor desires to have the registration set aside. In our opinion this is a matter for rules of court, but we suggest that the Conference consider it.

9. In clause (*a*) of subsection (3) of section 3 it is stated that an order shall not be made if the original court acted without jurisdiction. We were asked whether this meant "without jurisdiction" under the law of the country, state, or province of the original court, or "without jurisdiction" under the law of the country, state, or province of the registering court. Without doubt the law in this respect may be different in the two countries, states, or provinces.

Mr. Teed raised this point also in his correspondence.

We make no suggestion as to how this matter should be dealt with, but feel that it is important and should be decided.

10. We must refer again to subsection (3) of section 3. This begins with the words "No order for registration shall be made if it is *shown to the court*", etc. We think many lawyers would be inclined to the view that these words put the onus on the judgment debtor, or the person opposing the application for registration, to show that the case comes within one of the following clauses (*a*) to

(*g*). We are told, however, that in practice many courts require the applicant for registration to prove the negative, i.e. that the case does not come within any of clauses (*a*) to (*g*). We are inclined to believe that the Act should put the onus on the judgment debtor, or the person opposing the application for registration. This might be done by adding after the word "shown", in the first line, the words "by the judgment debtor". Alternatively the section might specifically state where the onus lies.

11. Finally, we suggest the inclusion of a section to provide for the form of court certificate from the original court as hereinbefore suggested, and a schedule setting out that form. The schedule might be in something like the following form:

CANADA
Province of

To Wit:

To all whom these Presents shall come.....GREETING:
It is hereby certified that, among the records enrolled in the court of.....at , before the Honourable.....a Justice of the said Court in the Procedure Book there is record of an action, numbered as No.

BETWEEN:

.....
Plaintiff(s)

and

.....
.....
Defendant(s)

1. The writ of summons (statement of claim, or as the case may be) was issued on the day of 19 , and proof was furnished to this court that it was served on the defendant by delivery of a copy thereof to him and leaving it with him and exhibiting the original thereof to him at the time of the service.

2. No defence was entered, and Judgment was allowed by (proof, default, or order).....
.....

3. A defence was entered and Judgment was allowed (at the trial, or as the case may be).....

4. Judgment was entered on the.....day of.....19 .

5. Time for appeal has expired and no appeal is pending (or an appeal against the judgment was made and was dismissed by the Court of Appeal and the time for any further appeal has expired and no further appeal is pending.)

6. Further details, if any.

7. Particulars:

Claim	$
Costs to judgment	$
Subsequent costs	$
Interest	$
	$
Paid on	$
And the balance remaining due on said Judgment for debt, interest and costs in the sum of	$

All and singular which premises by the tenor of these presents we have commanded to be certified.

IN TESTIMONY WHEREOF we have caused the Seal of our said Court at .....to be hereunto affixed.

WITNESS, The Honourable.....a Justice of our said Court at.....this .....day of.....A.D. 19 .

SEAL

.....
Clerk of the Court of

All of which is respectfully submitted. Dated at Winnipeg this 8th day of July, 1954.

I. J. R. Deacon,

R. M. Fisher,

G. S. Rutherford,
Manitoba Commissioners.

APPENDIX I

(*See page 20*)

ORGANIZATION AND PROCEDURE OF UNIFORM LAW SECTION

REPORT OF SPECIAL COMMITTEE, COMPOSED OF MR. RUTHERFORD AS CHAIRMAN AND MESSRS. DESBRISAY, DRIEDGER, LESLIE, MUGGAH, RYAN AND TREADGOLD, AS AMENDED AND ADOPTED BY THE CONFERENCE.

Pursuant to a resolution of the Conference passed at the 1953 meeting, the President appointed your committee to consider and make recommendations to the next annual meeting as to the future organization and functioning of the Conference.

Inasmuch as it was not possible for the committee to meet, it became necessary that its work should be done by correspondence. On the invitation of the chairman, members of the committee (and also the President) submitted their views. These have been summarized and submitted to the members, and as a result of further correspondence, the committee has come to certain conclusions which may be set forth as follows:

I. The annual Agenda is too long, and steps should be taken to shorten it. If the recommendations hereinafter made as to the manner of adopting new projects are approved, this should ultimately lead to the Agenda consisting only of matters to which due consideration can be given during the meeting. It is recommended that the subject-matters now on the Agenda be reviewed after the consideration of this report, with a view to deciding whether any of them should be dropped. In a general way it is suggested that not more than two or three complete Acts can be dealt with successfully at a meeting unless they are very short.

II. It is thought that on occasions new matters have been added to the Agenda with respect to which it was ultimately found that there was little interest or demand for uniform legislation; and this perhaps after much work had been done. Before new projects are taken on, some evidence should be obtained that it is likely that the uniform Act produced will be adopted in several jurisdictions. A method of obtaining this evidence is suggested in a later part of this report.

The criteria that might be observed before entering on the preparation of draft legislation are:

(*a*) Is there an obvious reason for, or is it apparent that it would be desirable or convenient in the public interest to have, a uniform Act on the subject?

(*b*) Has there been from any quarter a demand for uniformity in the provincial legislation?

(*c*) Is there, as above mentioned, some evidence that a uniform Act would likely be adopted in several provinces, at least?

III. More time should be taken at all stages of consideration of proposed uniform legislation. This is perhaps a corollary to the shortening of the Agenda, the purpose of which is to permit more thorough discussion.

IV. One thing the committee does emphasize, and it is thought that our conclusion in this respect will have general support —At the meeting of the Conference there should, in almost all cases, be no attempt at actual drafting, and no discussion of the details of phrasing. Principles, and principles only, should be discussed; although in settling principles it may be necessary to go into some detail as to application, exceptions, special cases, etc., because the draftsmen to whom the preparation of subsequent drafts is allotted must have complete instructions in so far as possible. This rule might have to be relaxed a little at times when the draft under consideration is very brief, for instance, a single section of an Act.

V. As to drafting, as hereinafter mentioned it should be done in at least two stages and by small groups of not more than three. These, at least in the case of the draftsmen who prepare the final draft, should be chosen from among those members who have had the most experience in the actual preparation of legislation.

VI. Every effort should be made at various stages to obtain the assistance of other groups who may be able to give it, such as the various sections, and the provincial subsections thereof, of the Canadian Bar Association. This is mentioned in more detail at a later stage in this report. However, it is suggested that, if the procedure now recommended is adopted, the Chairman should at this time write officially to the President of the Canadian Bar Association:

(a) setting out the intention of the Conference, or committees thereof, to ask, from time to time, for the assistance of various sections and provincial subsections of the Canadian Bar Association; and

(b) expressing the hope that the matter will be laid before the Council of the Association, its endorsement obtained, and the chairmen of sections so informed.

It is suggested that the deans of the various law schools might be interested in assisting the Conference, by having senior students prepare, from time to time, briefs of case law on various subjects with which the Conference may be dealing. It is recommended, therefore, that the Chairman write now to the several deans and enquire whether they would be willing to help in this way, from time to time, on receiving a request from members of the Conference who are engaged in the preparation of a uniform Act.

While it is recommended that an effort should be made, as above indicated, to obtain assistance where required, on the other hand members of the Conference to whom a task is delegated should not allow this to delay its completion. If the assistance sought is not forthcoming, or is delayed, it may be found advisable to proceed without it.

VII. If an existing Act adopted in previous years has been enacted in several provinces and appears to be working satisfactorily, the Conference should generally be slow to take it up again unless there appears to be some good reason, based on principle, for so doing, or unless the redrafting is required only in respect of a section or a few sections that have proved defective. In particular, Acts formerly approved should not be reconsidered merely for the purpose of making formal changes to bring the phrasing more in accord with present usage. This recommendation, however, is not intended to apply in cases such as that of the four commercial paper Acts (Bulk Sales, etc.) which the Conference took up again partly for the addition of new provisions in some of them, but largely to bring them into general conformity both structurally and verbally.

VIII. As hereinafter noted, in the recommendation dealing with procedure, drafts for consideration at an annual meeting of the Conference should be mailed to the commissioners

for each jurisdiction and to the Secretary not later than the first day of June in every case. Exceptions to this rule should be rare.

Drafts or other material for publication in the Proceedings must be in the hands of the Secretary by the first day of November in each year, unless the Secretary, in any case, advises that he can accept the material at a later date.

IX. Not adopted.

X. Not adopted.

XI. Not adopted.

PROCEDURE

XII. Our recommendations under this heading have been left to the last. They constitute the most important part of this report. It must be emphasized, however, that the fundamental purpose of these rules is to expedite and improve the work of the Conference. It is not intended that they should be rigidly applied in cases where strict adherence to the rules is inadvisable or unnecessary. These rules are primarily intended for cases where the Conference is engaged in drafting a complete Act. Sometimes sections or short portions of Acts may be referred to the Conference (such, for instance, as the matter of the taking of affidavits by officers of the Armed Forces), which can be disposed of in a very short time, perhaps entirely at the meeting at which they are first brought up. The Conference will, of course, decide, in each case, whether the rules apply to the matter or whether it can be disposed of summarily or in a shorter time than that mentioned in the rules. It is recommended, however, that, even in such cases, the first discussion should be confined almost entirely to principles and that the actual drafting should be done by a committee and reviewed in the full meeting. If the matter to be drafted is brief, it will probably be possible for the committee to complete a draft and make its report before the end of the meeting.

Subject to what has been said, your committee's recommendations as to procedure are as hereinafter set forth.

Rules of procedure:

1. A recommendation that a matter be taken up by the Conference must be in the hands of the Secretary not less than

one month before the next annual meeting. Otherwise it will not be considered until the next following meeting, unless the Conference by resolution decides to consider it at once.

2. (1) It should be a *general* rule that the drafting of a uniform Act, or a major Part of an Act, will not be taken up unless the Conference is satisfied that there is a reasonable possibility that at least four jurisdictions (of which the Dominion may be one in matters in which it has an interest, e.g., The Vital Statistics Act) would like to have a uniform Act on the subject, and that they would (except, of course, in the case of the Dominion) be likely to adopt it, subject, of course, to approval of the provisions thereof when it is completed.

(2) This probability or likelihood may be ascertained in either of two ways:

(a) On recommending a matter to the Conference, the recommending authority may state he has received assurance from other jurisdictions that indicate that four, at least, are interested in having a uniform Act, and are all (or three of them are, if the Dominion is one of those interested) likely to adopt it. It will be noted that this rule is not meant to apply to the drafting or revision of only one section or a few sections of an Act. Where the rule applies, however, no departure therefrom should be made except by unanimous consent of those present at the meeting. Undoubtedly from time to time matters will come up where this consent will be sought and should be given, particularly where those present at a meeting are satisfied from their own knowledge that a uniform Act is desirable and would be well received by provincial governments.

(b) By enquiry, as mentioned in number 3 of these rules.

First stage

3. When a matter comes before the Conference for consideration for the first time, the matter to be decided shall be solely the question as to whether the Conference will proceed further with it. The discussion should be confined entirely to the need and desirability of a uniform Act. If the recommending authority has stated that he has re-

ceived the assurances mentioned in clause (a) of subsection (2) of number 2 of these rules, no further investigation should be required, and the Conference may (and likely will in such cases) by resolution decide to proceed with the matter. In that event it will be, by resolution, referred to the commissioners from one jurisdiction for further action, as hereinafter noted. If, however, no such statement is made by the recommending authority, the Conference may decide that the likelihood of the adoption of the uniform Act should be further investigated before the matter is proceeded with, but that if favourable replies as to the likelihood of adoption are received from four jurisdictions (or from three, and the Dominion expresses a desire for such a uniform provincial Act), the matter should be referred to the commissioner from one jurisdiction, as aforesaid. In such event the Chairman will, as soon as possible, write to the Attorney-General of Canada and the Attorney-General of each province, stating that the matter has been referred to the Conference and asking whether he considers that it would be advantageous to have a uniform Act on the subject, and whether, if such a uniform Act were prepared, it is likely that a bill to enact such an Act would be introduced by his government in the provincial Legislature and recommended for enactment, subject, of course, to approval of the provisions thereof by the government when the Act is completed. The Chairman should request an early reply (not later than November 30th), and he should, not later than December 1st, advise the commissioners to whom the matter was referred whether or not the required number of favourable replies has been received. If the required number is not received within the time limit, the commissioners will not proceed with the matter and the President will advise the Secretary who will so report to the next Conference.

Second stage

4. If favourable replies as to interest and probable enactment are received from the required number of jurisdictions, the commissioners to whom the matter is referred will make a careful study of the existing laws on the subject either in Canada or elsewhere, as they may deem advisable. They will not prepare any draft bill, but will report to the next Conference on the existing laws and their desir-

able features and alleged deficiencies. They will in their report recommend in a general way the type of legislation that they believe is desirable making special mention of the features to be included and those to be excluded.

At this stage, if thought desirable, the commissioners preparing the report may consult, and obtain the assistance of, the sections or local subsections of the Canadian Bar Association or any other bodies that they think may be of assistance.

The report of the commissioners should be mailed by them to each Local Secretary and to the Secretary of the Conference not later than the first day of June preceding the meeting at which it is to be considered. At least three copies should go to each jurisdiction and three to the Secretary.

The Conference should discuss the report and then decide finally whether a draft will be prepared; and, if it is decided to do so, the commissioners of one jurisdiction who will prepare the draft for the next annual meeting should be selected; but the Conference should then go on to discuss in detail the matters set out in the report and decide on the various principles to be adopted. The commissioners to whom, as aforesaid, the matter has been referred to prepare the next draft will take notes of the decisions made.

Third stage

5. By the first day of June next the commissioners preparing the draft will mail copies of it to each Local Secretary and to the Secretary of the Conference. This draft will again be discussed by the Conference as to principles only, each member noting privately for future use any drafting changes he thinks would improve it. However, before consideration of the draft is begun, the Conference should delegate to not more than three, and usually two, experienced draftsmen the task of preparing the next draft (the semi-final stage). These draftsmen need not (and probably will not) be from the same province. They should independently take notes of the discussion on the first draft and the decisions of the Conference on the principles involved. The draftsmen to whom the task is so delegated will have to decide before the close of the meeting which of them is to prepare the preliminary stage of the next draft.

Fourth stage

6. The draftsman who is to prepare the preliminary stage of the next draft, on completion thereof, will submit it to the other one or two draftsmen to whom the matter was committed by the Conference. If time permits and leave of absence and payment of expenses can be arranged with the governments concerned, it would in many cases (certainly in the case of very long Acts) probably be advantageous for the draftsmen to meet and go over the preliminary draft. Failing this, copies will be sent by mail; and by correspondence the draftsmen will settle on the draft to be presented to the Conference. Copies of this draft must be mailed to each Local Secretary and to the Secretary of the Conference by the first day of June next.

   The draftsmen should have full liberty to consult other members of the Conference or any other persons whose advice they consider might be valuable.

   This draft will be discussed, as to principles, at the Conference; and, in view of previous discussions, it should be possible to approve tentatively, without lengthy discussion, in most cases. Members having suggestions as to minor changes in matters of form will not raise them at the meeting, but will convey them privately to the draftsmen at the close of the meeting or by letter within one month thereafter.

   The draftsmen will make such final changes as may be required, and send the draft to the Secretary for publication in the Proceedings as a tentatively approved draft.

Fifth stage

7. The draft so tentatively approved will not be considered as adopted. When the Proceedings containing the draft are published, the Secretary will send a copy thereof to the Secretary of the Canadian Bar Association and to the Chairman of any section of that association which might, in the judgment of the Secretary, be interested, and also to the Editor of the Canadian Bar Review, with a letter stating that the draft is tentatively approved, but will not be finally adopted until the next ensuing meeting, and inviting comments and criticisms. Copies should also be sent to any local subsection of the Canadian Bar Association, and to any other person or body, who may evince interest

and request it. During this period the draft might be brought to the attention of each Attorney-General by the commissioners from that province.

At the next meeting the draft will be placed on the Agenda for final adoption. Unless there has been some severe criticism thereof, there should be little discussion and final approval can then be given. If there are still any minor changes of form, these again should be communicated to the draftsmen at, or after, the meeting, and may be incorporated by them in the draft if deemed advisable, and the draft as adopted with such minor amendments, if any, will be published in the Proceedings.

On the final adoption of a draft the Secretary should advise the Attorney-General of each province (and where deemed advisable the Minister of Justice) of the fact, referring him to the Proceedings in which the final draft appears.

APPENDIX J

(*See page 21*)

LEGITIMATION

REPORT OF THE MANITOBA COMMISSIONERS

At the 1951 meeting of the Conference the following resolution was adopted:

"RESOLVED that the Uniform Legitimation Act be referred to the Manitoba Commissioners for revision, incorporating therein the principles of the recommendations in the Ontario Commissioners' report, and for consideration as to the advisability of legislation making children of void marriages legitimate, and for report at the next meeting."

As instructed, we, the Manitoba Commissioners, have considered the matters remitted to us, and have prepared a revised Uniform Legitimation Act which is set out in Schedule A to this report. Before preparing the draft we gave careful consideration to the report of the Ontario Commissioners presented to the 1951 meeting, including the question of the advisability of legitimating children of void marriages.

It was our conclusion that, having already taken several steps into the field of legitimating children who were bastards under the common law, the legislatures of the several provinces might properly go further. In particular, we are of the opinion that it would not be logical or right to stop at legitimating children of voidable marriages and still leave the children of void marriages to be bastards. We realize the distinction in law between these two kinds of marriages; but we think that it is the children who must be considered, and that we cannot justify legitimating the children of one kind of marriage and not the other. In this view we believe we are in accord with present day thinking on such social problems. Furthermore, there is the anomalous situation that would exist as pointed out by the Ontario Commissioners in the last paragraph of their report.

We have retained for discussion as subsection (2) of section 2 a provision that is in the Ontario Act. We do not, however, recommend it. We think it creates an unfair distinction between the children and is out of line with the tenor of the Act as a whole.

We have followed the recommendation of the Ontario Commissioners and included a section to deal with the matters now

covered, in whole or in part, in the Ontario, British Columbia, and Manitoba legislation, respecting legitimation of children of marriages entered into,

(*a*) after the making of an order of presumption of death;

(*b*) after receipt of a notification of death from the Department of National Defence;

(*c*) in the *bona fide* belief that the spouse has died.

With regard to (*a*) above, this presupposes that a province enacting it has enacted, or will enact, legislation in its Marriage Act to provide for the issue of a marriage licence on the making of a court order of presumption of death.

With regard to (*c*) above, we had some doubts as to whether fraudulent advantage could be taken of this. We considered it wise, as a further insurance of good faith, to provide that the death of former spouse must be registered. We have appended to the section a note respecting the matter of its retroactive effect. As will be seen, we think no further retroactive effect should be given than already exists. That is to say, if the provisions, or any of them, are being enacted for the first time, we suggest there should be no retroactive effect.

We also felt that if, as a result of the spouse who was supposed to be dead turning out to be alive, an action to nullify the presumed marriage with the second spouse was begun, the court should be required to make a finding and declaration as to the legitimacy of any children of the second marriage, so that there could remain no doubt on this point.

Subsection (3) of section 4 of the draft is taken from the British Columbia and Manitoba legislation. We have included it for discussion. We are not clear as to whether there is any need for it, and are not to be taken as recommending its retention.

We had some discussion as to whether sections 4 and 5 could be consolidated. We finally decided they should remain separate. Section 4 deals with cases where there may never be an application for a decree of nullity. Section 5 deals only with cases where a marriage has been decreed void by a court.

We were of the opinion also that section 5 should not apply where parents had gone through a form of marriage as a subterfuge almost certainly knowing that it was worthless. In such a case the offspring of the marriage would be in no better position than the offspring of unmarried people who do not marry each other. Accordingly, we have included in section 5 a requirement

that the form of marriage must have been solemnized before a person entitled to solemnize marriages and must have been duly registered. Subsection (2) of the section, as drafted, lays it down as law that the children to whom it applies *are* legitimate. Actually, no court order is required to *make* them legitimate, although probably it will be necessary or advisable to have a court order to *establish* that legitimacy for the future.

We have also provided that the parents or the child may *at any time* apply for an order. This application may be in an action pending or by a separate motion to the court by originating notice.

We have in this section again provided that where the court of the enacting province is making a decree of nullity, it is required also to make a declaration as to the legitimacy of the children, if any.

We also considered the remarks of the Ontario Commissioners as to the case of Re W. (1925) 56 O.L.R. 611 and its effect on the rights of the Crown. While not disagreeing in any way with the conclusions of the Ontario Commissioners on this point, we feel that since it is a simple matter to remove all doubt on the point, it is advisable to do so. Hence we propose section 6 of the draft.

We now come to another matter that is not mentioned in the report of the Ontario Commissioners or in the resolution, but with which we felt that we should deal.

This arises from the British Columbia case of *G. et ux vs. C. et ux* (1951) 2 W.W.R. (NS) 271. In this case an illegitimate child had been placed for adoption with the full consent of the mother, eleven days after its birth. Some months later she and the father began enquiring as to whether they could get the child back if they married. Six months after the birth the parents married. They brought action to recover the child. Although the only consent required for the adoption had been obtained before the child was placed, yet it was held that, on the marriage taking place, the father's consent became necessary ab initio. This consent was refused and an adoption order was refused, the child being delivered to the natural parents.

It has been suggested that this situation be dealt with in such a manner that the legitimation of the child by a subsequent marriage should not upset adoption proceedings already taken or give a father, by virtue of rights newly acquired on his marriage, an opportunity to nullify things previously, and lawfully, done. We are in accord with this suggestion, but are doubtful whether

it properly belongs in The Legitimation Act or in an Act relating to adoption of children. We have prepared a draft clause and included it in Schedule B. If the Conference decides that it is desirable and belongs to the subject of legitimation, it can be added to the draft in Schedule A as another section. If it is decided that it does not belong in The Legitimation Act but is, nevertheless, desirable, it might be recommended to the several provinces for insertion in their respective Acts relating to adoption of children, or referred for further consideration to the commissioners of some province. If such a provision is adopted by any province and included in its Act relating to adoptions, The Legitimation Act should include a section as follows: "This Act is subject to section— of (The Adoption) Act".

The preceding paragraphs of this report appeared in exactly the same words in our report dated 29th May, 1952, which, due to lack of time, was not considered at the 1952 meeting.

Since that time we have made two changes in the draft bill attached. The first of these changes is the substitution, in subsection (2) of section 2, of the words "a woman other than its mother", for the words "another woman" and of the words "a man other than its father" for the words "another man". It seemed to us that the substituted expressions are more accurate.

The second change is the addition of a new subsection (4) to section 4. This change arose as a result of certain correspondence with Mr. H. Allen Leal of Osgoode Hall Law School. This related to the use, in subsection (1) of section 4, of the words "unless the form of marriage is otherwise invalid". These words, with a slight change, were adopted from section 5 of the Ontario Legitimation Act. Mr. Leal contends that they leave a gap in the legislation in respect of cases where the purported second marriage is to a brother or sister, etc., of the spouse believed to be dead. As Mr. Leal's objection may be well founded, we have attempted to meet it by the new subsection (4).

All of which is respectfully submitted.

Dated at Winnipeg this 1st day of June, 1953.

R. M. FISHER,

I. J. R. DEACON,

G. S. RUTHERFORD,

Manitoba Commissioners.

SCHEDULE A

AN ACT RESPECTING LEGITIMATION OF CHILDREN

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

1. This Act may be cited as "The Legitimation Act".

2. (1) Where, before or after the coming into force of this Act a child has been or is born of parents not married to each other, and, after the birth of the child the parents have intermarried or intermarry, the child, for all purposes, shall be deemed to be and to have been, legitimate from the time of birth.

(2) Notwithstanding subsection (1), a child born while its father was married to a woman other than its mother or while its mother was married to a man other than its father shall not inherit in competition with the lawful children of either parent.

NOTE:—Subsection (2) of section 2 above is taken from The Legitimation Act of Ontario. It is included here for the purpose of bringing it to the attention of the Conference, but the Manitoba Commissioners do not recommend its adoption.

3. Nothing in section 2 affects any right, title, or interest, in or to any property if the right, title, or interest, vested in any person,

(*a*) prior to , in the case of any such intermarriage that took place before that date; or

(*b*) prior to the intermarriage, in the case of any such intermarriage that took place or takes place after that date.

NOTE:—Date to be filled in in clause (*a*) above is the date on which section 2 or some provision having a similar effect was first enacted in the province. In Manitoba this will be 27th February, 1920.

4. (1) Where,

(*a*) under section 00 of (The Marriage Act), a judge has made an order of presumption of death and the spouse of the person to whom the order relates thereafter, and in good faith, enters into a form of marriage; or

(*b*) the spouse of a member of the Canadian Forces in respect of whom the Department of National Defence has given official notification that he is dead or is presumed to be dead, enters into a form of marriage; or

(*c*) any spouse,

(i) believes, in good faith, that his or her wife or husband is dead, and

(ii) enters into a form of marriage with another under such circumstances that the crime of bigamy has not been committed,

and the death of the wife or husband is registered or recorded according to the law of the place where it is presumed to have occurred,

if the person,

(*d*) to whom the order of presumption of death relates; or

(*e*) in respect of whom the official notification of death was given; or

(*f*) who is believed to be dead, and whose death is registered or recorded,

as the case may be, was alive when the form of marriage was entered into, unless the form of marriage is otherwise invalid, every child of the persons entering into the form of marriage and who is the issue of these persons, conceived before knowledge of the fact that the person mentioned in clause (*d*), (*e*) or (*f*), as the case may be, is living,

(*g*) shall for all purposes of the law of the province be deemed to be, and to have been, a legitimate child of the persons entering into the form of marriage from the time of birth; and

(*h*) shall have the same rights, benefits, and obligations, under any law or statute in force in the province as it would have had if the person mentioned in clause (*d*), (*e*) or (*f*), as the case may be, had in fact died before the form of marriage was entered into.

NOTE:—Each province will have to consider whether the whole or any part of the above subsection should be given a retroactive effect. It may be that it will be desired to make different parts retroactive to different dates. For instance, in Manitoba the part relating to orders of presumption of death was enacted in 1946 and was made retroactive to the 17th of March, 1943. If clauses (*b*) and (*c*) are adopted, there could be some argument for saying that they should be retroactive to as far as is necessary to validate the children of all marriages contracted under any of the circumstances mentioned in those two clauses. On the other hand, it may be that the rights given thereby should only accrue as from the present time. Provisions will have to be made also as to whether the rights of any third parties acquired before those new measures became law should be affected. The Manitoba Commissioners recommend that the provisions have no retroactive effect except in so far as they, or any of them, may already be law in any province.

(2) Where proceedings are taken seeking a decree of the Court of (Queen's Bench) that a form of marriage entered into in the circumstances mentioned in clause (*a*), (*b*) or (*c*), of subsection (1), is void, if the judge makes the decree, he shall find whether any child of the persons who entered into the form of marriage is legitimate, and shall so declare.

(3) Clauses (*g*) and (*h*) of subsection (1) are to be read as separate and independent enactments, and if either of these clauses is held, for any reason, to be *ultra vires* of the Legislature the other clause shall stand and be valid and operative to the same extent as if the clause found to be *ultra vires* had not been enacted.

(4) For the purposes of this Act, a form of marriage is not otherwise invalid within the meaning of subsection (1) solely because,

(*a*) the woman entering into it is a sister of the wife, or a daughter of a sister or brother of the wife, of the man entering into it; or

(*b*) the man entering into it is the brother of the husband, or the son of a brother or sister of the husband, of the woman entering into it.

NOTE:—Subsection (3) was included in the British Columbia legislation in 1945, and in the Manitoba legislation in 1946. It is included here for discussion as to whether it is required.

5. (1) This section applies to cases to which section 4 does not apply.

(2) Where the parents of a child have, before the conception thereof, entered into a form of marriage before a person entitled to solemnize marriages under the law in force in the place where the form of marriage is entered into, and the marriage is registered or recorded as may be required by the law in force in that place and later is decreed void by a court having jurisdiction to make the decree, if a judge of the Court of (Queen's Bench) is satisfied beyond a reasonable doubt that, at the time of conception of the child, either or both of the parents believed that their marriage was valid, and so declares, the child is legitimate for all purposes of the law of the province.

(3) Where a marriage is decreed void by a judge of the Court of (Queen's Bench), the judge shall find whether or not any child of the persons who entered into the form of marriage is legitimate, and shall so declare.

(4) Either of the parents or the child mentioned in subsection (2), or any issue of the child, may at any time,

(*a*) by originating notice; or

(*b*) in any action to which he is a party and in which the validity of the marriage of the parents or the legitimacy of the child is in issue,

apply to a judge of the Court of (Queen's Bench) for an order declaring that the child is, and has been from birth, legitimate for all purposes of the law of the province; and, if the judge is satisfied beyond a reasonable doubt that such is the case, he may make the order.

(5) An order made under this section, when all times for appeal have expired, shall be conclusive as to the matters therein stated.

(6) Nothing in this section affects any right, title, or interest, in or to property if the right, title, or interest, is vested in any person before the coming into force of this section.

6. Her Majesty is bound by this Act.

7. This Act is subject to (The Adoption Act).

NOTE:—Section 7 is meant to be included only if a provision such as that set out in Schedule B is included in the Act of the province relating to the adoption of children.

SCHEDULE B

Where, under The Child Welfare Act, an illegitimate child has been placed for adoption with, and is in the custody of, adopting parents before the marriage of its natural parents, and whether or not an order or decree of adoption has been made,

(*a*) the father of the child shall not, by reason only of the marriage, be entitled to claim any right of custody or guardianship of the child; and

(*b*) no consent shall be required from the father before the making of a final order of adoption, or to render valid an order of adoption made before the marriage.

APPENDIX K

(*See page 21*)

RULE AGAINST PERPETUITIES AS IT MAY AFFECT PENSION TRUST FUNDS

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

At the 1952 meeting the following resolution was adopted:

"RESOLVED that the subject of the application of the rule against perpetuities to pension trust funds be referred to the British Columbia Commissioners for study, and for consideration of the *Superannuation and other Trust Funds (Validation) Act, 1927*, and to report thereon, with a draft Act if they consider it advisable, to the next meeting."

In conformity with the above direction we have given consideration to representations made by interested parties to the Secretary of the Conference to the above-mentioned Act and various Acts which have been passed in many of the United States dealing with the problem which has been brought before this Conference. We think it desirable to give a short review of the circumstances which have led to the view that some statutory enactment is required to assure that trust funds created for the purpose above-mentioned shall not be affected by the rule against perpetuities and, we think, also any rule of law or statutory enactment limiting periods of accumulation of income, etc.

For many years past superannuation or pension plans of one kind or another have been established by the creation of trusts. In recent years there has been a marked acceleration in the creation of such schemes, particularly by employers for the benefit of employees. These schemes generally provide for the setting up of trust funds to which contribution may be made either by employers or employees or by both, which contributions may be either of real or personal property.

Although many of the trust agreements contain provisions protecting against the above rules or statutes it is believed that many do not have such provisions or satisfactory provisions and that it is desirable that legislation be enacted to validate all such trusts as may presently be in existence. This has been done in the United Kingdom and in many of the United States of America. The Act of the United Kingdom is entitled "The Superannuation and other Trust Funds (Validation) Act, 1927" (17 and 18, George

V. Chapter 41). This Act provides for the registration of funds by a Registrar and provides that the law relating to perpetuities shall not apply and shall be deemed never to have applied to the trusts of any fund registered under the Act. We question the desirability of providing for a registration of such schemes but rather feel that if it is thought desirable to enact legislation that it be of a general nature and wide enough to embrace any bona fide scheme. We have accordingly drafted an Act of that nature.

ERIC PEPLER,

A. C. DESBRISAY,

GILBERT P. HOGG,

British Columbia Commissioners.

AN ACT TO AMEND AND MAKE UNIFORM THE LAW RELATING TO PERPETUITIES AND ACCUMULATIONS AS RESPECTS CERTAIN BENEFIT AND TRUST FUNDS ESTABLISHED FOR THE PURPOSE OF PROVIDING PENSIONS OR OTHER BENEFITS

HER 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 Act".

2. The rule of law relating to perpetuities and any rule of law relating to accumulations and any provision of any statute relating thereto shall not apply and shall be deemed never to have or to have been applied to a trust of real or personal property or real and personal property combined created by an employer as a part of a stock bonus plan, pension plan, disability or death benefit plan, or profit-sharing plan, for the exclusive benefit of some or all of his employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees the earnings of the principal, or both earnings and principal of the fund so held in trust.

APPENDIX L

(*See page 22*)

RULE AGAINST PERPETUITIES, APPLICATION TO PENSION TRUST FUNDS

(The following is the form of the section adopted by the Conference and recommended for enactment in appropriate provincial Acts:)

00. The rules of law and statutory enactment relating to perpetuities and to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries.

Rules as to perpetuities, etc., not applicable to employee benefit trusts

APPENDIX M

(*See page 22*)

THE SURVIVORSHIP ACT

REPORT OF THE ALBERTA COMMISSIONERS

At the 1953 meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, the following resolution was passed:

"RESOLVED that the amendment to The Survivorship Act made by British Columbia in 1953 and referred to in Mr. Treadgold's report on Amendments to Uniform Acts be referred to the Alberta Commissioners for study and report to the next annual meeting, with draft amendments if considered advisable."

Accordingly the Alberta Commissioners reviewed the 1953 British Columbia amendment and submit herewith our recommendations thereon.

The Uniform Survivorship Act was amended by the Conference in 1949 and, as far as it is relevant to our purpose, reads as follows:

> "2. (1) Where two or more persons die at the same time or in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to subsections (2) and (3), for all purposes affecting the title to property, be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.
>
> (2) (Provides exceptions as to certain sections of The Insurance Act and The Wills Act.)
>
> (3) Where a testator and a person who, if he had survived the testator, would have been a beneficiary of property under the will, die at the same time or in circumstances rendering it uncertain which of them survived the other, and the will contains provisions for the disposition of the property in case that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other, then for the purpose of that disposition the will shall take effect as if that person had not survived the testator or died at the same time as the testator or in circumstances rendering it uncertain which survived the other, as the case may be."

Section 3 is the uniform interpretation section.

The equivalent British Columbia Act is The Commorientes Act, being chapter 56 of the Revised Statutes of British Columbia, 1948. That Act, so far as it is relevant, reads at present as hereunder:

> "2. (1) Where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to subsections (2), (3) and (4), for all purposes affecting the title to property, be presumed to have occurred in the order of seniority, and accordingly the younger shall be deemed to have survived the older.
>
> (2) (Provides that this section shall be read and construed subject to The Insurance Act provisions.)
>
> (3) Where a testator and a beneficiary under a will die in circumstances rendering it uncertain which of them survived the other and the will contains provisions for the further disposition of the property bequeathed or devised in case the beneficiary predeceases the testator, then, for the purpose of such bequest or devise, the beneficiary shall be presumed to have predeceased the testator.
>
> (4) Where a testator and a sole, or sole surviving executor under the testator's will die in circumstances rendering it uncertain which of them survived the other, and the will contains further provisions with respect to personal representatives in case the executor predeceases, then, for the purpose of probate, the executor shall be presumed to have predeceased the testator."

Subsections (1) to (3) of the British Columbia Act are from the Uniform Act as approved at the 1939 meeting of the Conference (see Appendix D at page 63 of the 1939 Proceedings). That province did not enact the amendments approved at the 1949 meeting of the Conference (see Appendix E at page 43 of the 1949 Proceedings).

Subsection (4) of section 2 of the British Columbia Act was added by chapter 10 of the British Columbia Statutes, 1953 (First Session). This subsection provides against a special case that arises as a result of the operation of the general and particular rule of survivorship established by The Survivorship Act. The general rule is laid down in section 2 (1), the particular rule in section 2 (3).

The reasons for the amendment are best summed up in the words of the recommendation of the British Columbia section of

the Canadian Bar Association to the British Columbia Legislature. The recommendation read:

> "The Commorientes Act, R.S.B.C. 1948, c. 56, respecting the order of survivorship in cases where it is uncertain which of two or more persons survived the other or others provides a statutory rule where such uncertainty exists. This rule, whereby the younger is deemed to survive the older, is subject to two exceptions—one with respect to insurance, the other with respect to testators who provide substitutional gifts in case a named beneficiary does survive the testator. This latter exception (s. 2 (3)) operates where the testator and named beneficiary are the persons whose order of death is uncertain and provides that the beneficiary shall be deemed to have predeceased the testator. Twice this spring, at least, the problem has arisen where a testator has not only provided for a substitutional beneficiary but also for a substitutional executor. The exception as presently worded does not cover a provision for substitutional executors so that the main rule would operate to make the younger survive. This has resulted, in cases where husband and wife meet death in a motor accident, in the wife, the younger, being deemed to survive for executorship purposes so as to prevent the substitutional executors from taking probate, yet being deemed to predecease her husband for purposes of taking property beneficially. In the result, instead of the substitutional executors, an administrator with the will annexed is required. It is thought that the law should be the same for both situations, and this Committee therefore recommends a further exception as follows:
>
> > '2. (4) Where a testator and a sole or sole surviving executor under the testators' will die in circumstances rendering it uncertain which of them survived the other, and the will contains further provisions with respect to personal representatives in case the executor predeceased the testator, then, for the purposes of probate, the executor shall be presumed to have predeceased the testator'."

We first had to determine whether the British Columbia provision was sufficiently important to warrant consideration by the Conference. If so, the next step would be to determine whether the Uniform Survivorship Act was the proper vehicle for the provision.

At first we were of the view that because of the few occasions in which the British Columbia provision would have any applica-

tion it was not of sufficient importance to be included in statutes relating to the order of survivorship. Obviously, that provision would be invoked less often than the general or particular provisions of the present Survivorship Acts.

However, we are now convinced that this view is not correct. The Survivorship Act itself deals with rare cases, and we therefore think that infrequency of the case provided for by the British Columbia provision is not a sound basis upon which to found an argument against that provision. In practice the cautious solicitor by a thirty-day survivorship clause or some similar device provides against such an event as the British Columbia provision anticipates.

We are now of the view that where one section of the Canadian Bar Association proposes a provision, as in this case, the Alberta Commissioners would require cogent reasons against including the provision in the uniform Act before so recommending to the Conference. No such cogent reasons were found on the study, and therefore, we recommend that the British Columbia provision be accepted as sufficiently important for the Conference to include it in its model statutes, with such modification as is necessary in view of the amendments made to The Survivorship Act by the Conference in 1949.

In considering where the British Columbia provision should be placed, the Alberta Commissioners are of the opinion that it should be included in the uniform Survivorship Act rather than in any other Act. The situation that the amendment deals with arises from the application of section 2 (1) of The Survivorship Act in the case of a named executor dying at the same time as the testator or in circumstances rendering it uncertain whether or not he died before or after the testator. The amendment would be more effective if included in The Survivorship Act, otherwise subsection (2) would have to be altered to refer to another Act containing such a provision, and the survivorship provisions would be dispersed through too many Acts.

Therefore, the Alberta Commissioners submit the following recommendations for the consideration of the Conference:

1. That The Uniform Survivorship Act be amended to conform to the amendment of 1953 to the British Columbia Commorientes Act;
2. That the amendments be made:
   (*a*) by striking out the figures and word "(2) and (3)" in subsection (1) of section 2 of The Uniform Survivorship Act

and by substituting the figures and word "(2), (3) and (4)" therefore,

(*b*) by adding the following new subsection immediately after subsection (3) of section 2 of the said Act:

"(4) Where a testator and a sole or sole surviving executor under the testator's will die at the same time or in circumstances rendering it uncertain which of them survived the other, and the will contains provisions with respect to personal representatives in case the executor had not survived the testator, then, for the purposes of probate, the testator shall be presumed to have survived the executor."

Respectfully submitted,

H. J. WILSON,

W. F. BOWKER,

J. W. RYAN,

Alberta Commissioners.

APPENDIX N

(*See page 23*)

AMENDMENTS TO UNIFORM ACTS

REPORT OF D. M. TREADGOLD, Q.C.

Interpretation

Saskatchewan added a new clause to section 16(1) of its Act (section 17(1) of the Uniform Act) to provide that words authorizing the appointment of a public officer or functionary include the power

> (*ca*) of appointing, either before the appointment of a public officer or functionary or while there is a vacancy in the office, another to act in the stead of the public officer or functionary both before the appointment or during the vacancy and after the appointment has been made or the vacancy filled.

Reciprocal Enforcement of Maintenance Orders

New Brunswick amended its Act to permit designation of courts by the Attorney-General in lieu of the statutory requirement that matters other than superior court matters should go to county courts. This amendment is in line with the current revision of the Act by the Conference.

New Brunswick also amended the section dealing with costs which it added to its Act in 1953 (see 1953 Proceedings, page 59) by striking out the words italicized in subsection 1 as set out below:

> (1) Where an order is confirmed with or without modification, the person against whom the order is confirmed is liable to pay the costs of the proceedings *to the officer of the court charged with the enforcement of the order.*

Vital Statistics

Section 22(1) of the Uniform Act authorizes the Director, upon receipt of satisfactory evidence, to make a note on a registration to the effect that the registration was fraudulently or improperly made and to order the delivery for cancellation of all certificates issued from the registration. No certificates may thereafter be issued in respect of the registration. Nova Scotia

amended this section so as to authorize cancellation of the registration in such cases, to require that the cancelled registration remain on file, and to permit the making of a proper new registration of the event recorded.

Section 23 of the Uniform Act authorizes the correction of errors in registrations by the making of notations on the registration. Ontario added a new section to authorize the cancellation of a birth registration and the substitution of a new registration in cases where the registration is so in conflict with the principles as to birth registration that it would be virtually impossible to correct the original registration by making notations of the correct information.

Wills

New Brunswick amended section 4 of its Act (section 5 of the Uniform Act) by adding the following subsection:

> (4) A person who has made a will while he is a member of the naval, military, air or marine forces, may at any time revoke such will, notwithstanding that he is under 21 years of age.

D. M. TREADGOLD.

APPENDIX O

(*See page 23*)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS 1953

REPORT OF DR. H. E. READ, O.B.E., Q.C.

This report is submitted in response to the resolution of the 1951 meeting requesting that an annual report be continued to be made covering judicial decisions affecting Uniform Acts reported during the calendar year preceding each meeting of this Conference. Some of the cases reported in 1953 applying Uniform Acts have not been included since they involved essentially questions of fact and no significant question of interpretation. It is hoped that Commissioners will draw attention to omission of relevant decisions reported in their respective Provinces during 1953 and will draw attention to errors in stating the effect of decisions in this report. The cases are reviewed here for information of the Commissioners. Especially significant are the decisions affecting the uniform Acts concerning contributory negligence, reciprocal enforcement of judgments and reciprocal enforcement of maintenance orders. Attention is also drawn to what may be a deficiency in the Uniform Warehouse Receipts Act. For previous similar reports see 1951 Proceedings (p. 56), 1952 Proceedings (p. 44), and 1953 Proceedings (p. 61).

HORACE E. READ.

BULK SALES

British Columbia Sections 5, 2(f) and (g), 3(d)

In *Herman* v. *Sit Hing Fung* [1953] 1 D.L.R. 507, 7 W.W.R. (N.S.) 543, Wilson J., in the Supreme Court of British Columbia, held that failure by the purchaser to obtain the written declaration required by Section 5 of the Bulk Sales Act, R.S.B.C. 1948, Ch. 35, rendered the sale voidable as againt the vendor's creditors, where the vendor was the lessee of a rooming house in which he had used the bedding, linen, and furniture which he had sold in bulk to the purchaser. The judge interpreted "proprietors of . . . rooming houses", as used in clause (*d*) of Section 3, to include a lessee since the phrase must refer "to the conduct of the business

of a rooming house, the proprietorship of the equipment of the rooming house". He said that "the ownership of the real estate is of no interest to the creditors to be protected by the Act, since their only remedy has reference to chattels." He further held that although the vendor-lessee was evicted three days before the day on which the sale was consummated, he must be treated as the proprietor in relation to this particular purchaser since "he inspected the furniture *in situ* in the rooms of the rooming house while (the vendor) was still in business and therafter negotiated with (him) for its purchase until the day when the sale was consummated."

The court distinguished *Paisley* v. *Leeson Dickie Gross & Co.* (1920), 28 B.C.R. 363, which held that the British Columbia Bulk Sales Act of 1913, then in force, did not apply to fixtures of a store, on the ground that Section 2(*f*)(ii) of the Act now in force (R.S.B.C. 1948, Ch. 35) (Uniform Bulk Sales Act), provides: " 'stock' means the . . . chattels . . . with which any person carries on a business . . ." The following passage from the judgment is also of interest:

"Chevrier J. in *Archambault & Gauthier* v. *Barett* [1949], 3 D.L.R. 324, O.W.N. 295, considered a clause in the Ontario Bulk Sales Act which is identical with that in our own Act defining stock, and concluded that it did not cover furniture and fixtures. In so doing he relied for authority on *Paisley* v. *Leeson Dickie Gross & Co.* already cited. It is apparent that the difference between the statute before him and the 1913 Bulk Sales Act of this Province was not brought to his attention. Nor was there before him, as there is here, a provision specifically designating the class of persons concerned, rooming-house proprietors, as subject to the statute. *Barthels, Shewan & Co.* v. *Sloane* (1914), 19 D.L.R. 547, 7 S.L.R. 376, cited by the plaintiff, deals with a Saskatchewan statute which is obviously different from ours in that it concerns itself only with 'goods, wares or merchandise ordinarily the subject of trade and commerce.' *Barthels, Shewan & Co.* v. *Peterson* (1914), 16 D.L.R. 465, 24 Man. R. 794, is likewise distinguishable."

CONTRIBUTORY NEGLIGENCE

Nova Scotia Sections 2 and 5

In *MacDonald and MacDonald* v. *McNeill* [1953] 1 D.L.R. 755 and 2 D.L.R. 248, husband and wife sued for damages resulting

from the wife being struck by defendant's automobile. The wife was found to have been two-thirds at fault and defendant one-third. The principal question was whether the husband was entitled, under Section 2 of the Nova Scotia *Contributory Negligence Act* (1926 N.S. Ch. 3), to recover his damages in full for loss of his wife's services, or must they be discounted by two thirds in proportion to his wife's degree of fault. The pertinent language of Section 2 is: "Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault. . . ."

Ilsley C.J. held that "the husband in this case could be said to be at fault only if he were liable for his wife's negligence, which he is not. His damages, therefore, cannot be apportioned." The Chief Justice reasoned that "after the '*Bernina*' case ((1888) 13 App. Cas. 1) and before the Contributory Negligence Acts providing for apportionment, a plaintiff was precluded from recovery for the negligence of the defendant on the ground of contributory negligence only when the contributory negligence was his own or that of a person for whose acts he was responsible at the time of the accident." In Nova Scotia, by an Act amending the Married Women's Property Act (1935 N.S. ch. 33), "a husband's liability as such for his wife's torts was done away with. . . . His wife in this case was not acting as his servant in the course of her employment when she committed the negligent act in question. He was not identified with her in any way. *The Contributory Negligence Act*, therefore, has no application to the case, there having been no contributory negligence by the husband. He should, therefore, recover both his general and special damages in full."

The Chief Justice felt that he was not constrained by Section 5 of the Nova Scotia *Contributory Negligence Act* to follow *McKittrick* v. *Byers* [1926] 1 D.L.R. 342, 58 O.L.R. 158 and later Ontario decisions allowing apportionment, since, first, he considers them to have been erroneously decided, and, second, Ontario has not enacted the Uniform Act. Section 5 reads: "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." He also adheres to his decision despite the contrary decisions of single judges in Provinces which have the Uniform Act, British Columbia and Alberta, both of whom relied upon Ontario authority: (*Bowes* v. *Hawke* [1938] 1 D.L.R. 791, 52 B.C.R. 315; *Young and Young* v. *Otto* [1948] 1 D.L.R. 285 (Alta.)). He

prefers his own reasoning and that of Hilbery J. in *Mallett and Another* v. *Dunn* [1949] 1 All E.R. 973 (K.B.D.), whose conclusion accords with his. There is no doubt of the soundness of the reasoning of Ilsley J. and Hilbery J.

DEVOLUTION OF REAL PROPERTY ACT

Saskatchewan Sections 12(1), 13 and 15(b)

A series of recent cases has held that the usual so-called "mining leases" and "oil leases" are not leases in the correct legal sense of the term, but are sales or agreements to sell a severable portion of the land: *Detomac Mines, Ltd.* v. *Reliance Fluorspar Mining Syndicate Ltd.* 1952 4 D.L.R. 385, O.R. 783; *McColl Frontenac Oil Co. Ltd.* v. *Hamilton* 1953 1 S.C.R. 127; *Re Heier*, 1953 1 D.L.R. 792, 7 W.W.R. (N.S.) 385 (Sask.); *In re Crumley Estate* (1953) 10 W.W.R. (N.S.) 284. From this holding the result in *Re Heier* followed that such a self-styled lease is not a lease within the meaning of that term as used in the Saskatchewan *Devolution of Real Property Act*, Section 15(1) (*b*) (R.S.S. 1940, Ch. 108). Section 15 reads:

> 15. (1) The personal representative may, from time to time, subject to the provisions of any will affecting the property:
>
> (*a*) lease the real property or any part thereof for any term not exceeding one year;
>
> (*b*) lease the real property or any part thereof, with the approval of the court, for a longer term.

Consequently, dismissal of an application for approval of an "oil lease" under Section 15(1) (*b*) was upheld by the Saskatchewan Court of Appeal. The result reached in *In re Crumley Estate* and in *In re Harper's Estate* (1953) 7 W.W.R. (N.S.) 691 was that an "oil lease" is a sale of real property requiring compliance with Sections 12(1) and 13 of the same Act, which read:

> 12. (1) Subject to the provisions hereinafter contained, no sale of real property for the purpose of distribution only shall be valid as respects any person beneficially interested, unless he concurs therein.
>
> 13. No sale, where an infant is interested, shall be valid without the written consent or approval of the Official Guardian or, in the absence of such consent or approval, without an order of the court.

LIMITATION OF ACTIONS

Alberta Act, Section 5 (1) (b)

In *Shorb* v. *Public Trustee* (1953) 8 W.W.R. (N.S.) 657, Egbert J. held that the limitation imposed on bringing of actions being a statutory limitation, and its effect being to destroy vested rights, the Statute of Limitations must be interpreted strictly, and a defendant, to bring himself within its purview, must clearly prove the facts which make it applicable to his case. The *Limitation of Actions Act* of Alberta (R.S.A. 1942 Ch. 133) provides:

> 5.—(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (*h*) Actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action.

The judge pointed out that the one fact to be proved by the defendant in defence of the action before the court for rectification based on mutual mistake of an agreement to sell land is under this statutory provision, that the plaintiff "discovered" the cause of action more than six years before the commencement of the action. Since the defendant failed to prove this fact, the action was not barred by the Act. It is not enough for the defendant to show that by reasonable diligence the plaintiff should have discovered that he had a cause of action for rectification based on mutual mistake.

RECIPROCAL ENFORCEMENT OF JUDGMENTS

Alberta Act, Sections 4 (3) and 5

In *Wedlay* v. *Quist* [1953] 4 D.L.R. 620, 10 W.W.R. (N.S.) 21 application was made *ex parte* in Alberta for an order for registration of a British Columbia in personam judgment for payment of money. In the original action the defendant was served in Alberta with a concurrent writ of summons and order for service ex juris. There was no evidence of service of the writ on him having been made in British Columbia, and it was not established that any of the recognized conflict of laws bases of personal jurisdiction over him existed in that Province when the original action was commenced.

The application was refused by the Alberta trial judge on grounds not relevant here. Appeal from his order was dismissed

by the Appellate Division, where Frank Ford, J.A., delivering the judgment for the Court, said that counsel for the applicant (appellant) argued that:

> "as the judgment debtor was 'personally served', the judgment creditor has the right to have an order made *ex parte;* that the words 'personally served' as they appear in sec. 4(3) do not mean in the Province of the 'original court' but extend to personal service anywhere when allowed by the law of that Province; and that when the order is made *ex parte* the onus is put upon the judgment debtor to have it set aside on any of the grounds mentioned in sec. 5."

Sec. 4 (3) of the Alberta Statute is as follows:

> "The order may be made *ex parte* in all cases in which the judgment debtor was personally served with process in the original action, or in which, though not personally served, he appeared or defended or otherwise submitted to the jurisdiction of the original court. In all other cases, reasonable notice of the application shall be given to the judgment debtor."

The Court pointed out that under Section 8 of the Act a registration made on an *ex parte* order may be set aside on the grounds stated in Section 5, which include the fact that "(*a*) the original court acted without jurisdiction"; and continued:

> "If one considers the provisions of the British Columbia statute concomitant with sec. 4(3) of the Alberta statute, and which is supposed to have reciprocal effect, we should have no difficulty in holding that the words 'personally served' in both mean service within the jurisdiction of the original court. In this connection reference may be made to *Lung* v. *Lee* (1928) 63 O.L.R. 194.
>
> "In all the provinces other than Alberta in which reciprocal legislation has been passed as well as in the original of the Uniform Act as proposed by the Conference of Commissioners on Uniformity of Laws, the provision reads as follows:
>
> > 'Reasonable notice of the application shall be given to the judgment debtor in all cases in which he was not personally served with process in the original action and did not appear or defend or otherwise submit to the jurisdiction of the original court. In all other cases the order may be made *ex parte.*' (See vol. 10 of the *Proceedings of the Canadian Bar Association,* 1925, p. 328.)
>
> "This construction gives full force to the words of Mr. Pitblado, Q.C., in presenting the proposed Uniform Act to the Canadian Bar Association when he said:
>
> > 'As drawn the Act does not change the law as to the defences which could be set up in the Province if, instead of being registered, an action were brought on the foreign judgment': Vol. 9, *Proceedings of the Canadian Bar Association,* 1924, p. 17.
>
> "In my opinion the law as laid down in *Emanual* v. *Symon* [1908] 1 K.B. 302, 77 L.J.K.B. 180, and *Bank of Ottawa* v. *Elsdale* [1920] 1 W.W.R. 913, 15 Alta. L.R. 269, still applies. Reference may also be

made to *Mattar and Saba* v. *Public Trustee* (*Coudsi Estate*) (1952) 5 W.W.R. (N.S.) 29.

> "Even granting that in Alberta an application to register here a British Columbia judgment may be made *ex parte* when the judgment debtor was personally served in Alberta with process in the original action this does not require the judge, to whom the application is made, to hear it and grant the order *ex parte*. Indeed, in my opinion, where, as in the instant case, it seems clear that the process was not served on the defendant in British Columbia and that he did not appear or defend or otherwise submit to the jurisdiction of the British Columbia court, and, indeed, in all cases in which the applicant's material shows that, or leaves a doubt whether, the judgment debtor would have any of the defences which he would have the right to raise if an action were brought on the original judgment the order for registration should not be made *ex parte*. There is clearly, in my view, a discretion left with the judge applied to.
>
> "This seems to be the view that the learned judge appealed from had. See also *Hausman* v. *Franchi* [1949] O.W.N. 695, and cases therein referred to."

The foregoing is interesting as a reaffirmation of the principle that the reciprocal enforcement Acts are designed to facilitate enforcement only of foreign judgments rendered with valid jurisdiction in the conflict of laws sense and are not designed to extend such jurisdiction beyond established common-law limits. Frank Ford, J.A. goes on to comment upon the lack of reciprocity that has characterized the attitude of the English, and hence the Canadian Courts, in refusing to recognize jurisdiction of foreign courts exercised on bases unknown to the judge-made law but on which the English and Canadian courts themselves exercise competence by statutory authority. He quotes from Dicey's Conflict of Laws, 6th ed., p. 362, the prophetic observation that:

> "It is obvious that the High Court must in the long run concede to the courts of foreign countries pretty much the same rights of jurisdiction which it claims for itself."

It is regrettable that the assistance to be derived from *Travers* v. *Holley* [1953] 2 All E.R. 794, was not available to the Court in the instant case. The Court of Appeal "conceded" in the *Travers* case the eminently sensible principle that "our courts . . . should recognize a jurisdiction they themselves claim." Could this principle not have been applied to recognize as valid the jurisdiction exercised by the British Columbia court under legislation not peculiar to that Province but common to most units of the British Commonwealth, including Alberta (See Commentory on *Travers* v. *Holley* by Gilbert D. Kennedy in (1953) 31 Canadian Bar Review 799.)

British Columbia Sections 2 (1) and 3 (1)

In the Supreme Court of British Columbia in the case of *In re Reciprocal Enforcement of Judgments Act; In re Wilson,* (1953) 7 W.W.R. (N.S.) 524 application was made to register under the *Reciprocal Enforcement of Judgments Act,* R.S.B.C. 1948, Ch. 286, a judgment of the Supreme Court of Ontario for alimony. The judgment was made ancillary to a divorce decree, the decree *nisi* having been pronounced more than six years, and the decree absolute less than six years prior to the instant application. Section 3 (1) of the Act restricts making of an application to "within six years after the date of the judgment". Section 2 (1) defines "judgment" to mean "any judgment or order given or made by a court in any civil proceeding. . . whereby any sum of money is made payable. . . ."

The question, therefore, to be determined was: when was the "date of judgment"; was the "sum of money made payable" pursuant to a final judgment on the date when the Ontario decree *nisi* was made or on the date when the order absolute was made? Wilson J. concluded that the latter date was the "date of judgment", resting his case upon *Hulse* v. *Hulse and Tavernor* (1871) C.R. 2 P. & D. 259, 40 L.J.P. & M. 51 where it was said: "The two decrees (nisi and absolute) are the beginning and ending of the same act, the one inchoate and the other perfecting or complete; a space of time being interposed to admit of enquiry." The finality of the alimony decree depends upon that of the divorce decree to which it is ancillary. "Obviously", declared Wilson J., "if the decree of dissolution were, by reason of intervention by the Queen's Proctor, to fall during the six-month period, the provisions as to maintenance and alimony must fall with it, and obviously the decree absolute makes final and conclusive not only the dissolution of the marriage but the provisions as to alimony and maintenance."

This definitive case is obviously soundly decided. It should prove a useful precedent.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

Uniform Act, 1953 Revision, Sections 3, 5, and 6; Ontario Section 5.

A decision of the Manitoba Court of Appeal, although concerned with an order granted under the *Wives' and Children's Maintenance Act* of that Province, bears directly upon the scope

and effectiveness of the *Uniform Reciprocal Enforcement of Maintenance Orders Act.* In *Smith* v. *Smith,* [1953] 3 D.L.R. 682; (1953) 9 W.W.R. (N.S.) 144, the Court dismissed an appeal from the judgment of Tritschler J., who had set aside the order of a magistrate who had granted a wife maintenance on the grounds of cruelty, desertion, and non-support. Neither husband nor wife were resident in Manitoba but were both resident in British Columbia, and the alleged offences were committed there. Tritschler J., at the trial held that upon correct interpretation, the Magistrate had no competence conferred on him by the Act to issue the order because:

> "Legislation is *prima facie* territorial and unless the *Wives' and Children's Maintenance Act* shows a clear contrary intent, it will not be presumed that it is meant to assert jurisdiction over a husband who is not a resident of the Province where both spouses were residing and cohabiting outside the Province at the time cohabitation ceased."

Adamson J.A. for the Court of Appeal gave as complete reasons for judgment the following:

> "The right of the Province to legislate in respect of civil rights is confined to persons resident in the Province; *McGuire* v. *McGuire & Desordi,* [1953], 2 D.L.R. 394 O.R. 328. Therefore, the provisions of the *Wives' and Children's Maintenance Act* do not apply to persons resident in another Province. The offences of cruelty, desertion, and non-support committed outside Manitoba are not acts 'over which the Legislature of the Province has legislative authority within the meaning of s. 5 of the *Manitoba Summary Convictions Act.*' "

The decision in *Smith* v. *Smith* is undoubtedly correct on constitutional grounds since on the facts no offence against the wife's civil rights was committed by the husband in Manitoba. Furthermore, although no mention of it is made by the Court, the magistrate's order was invalid at common law since no basis of jurisdiction in personam existed over the husband when the action was commenced. (*Re Kenny* [1951] 2 D.L.R. 98)

One consequence of *Smith* v. *Smith* is that if a maintenance order were to be granted by a court of a reciprocating Province in a case identical in facts, it would not be entitled to registration in another Province under its *Reciprocal Enforcement of Maintenance Orders Act* (Section 3 of the 1953 revision). A second consequence is that in this fact situation a Province would have no power to to make a provisional order against a non-resident defendant, and such an order should not be confirmed by the reciprocating state in which the defendant is resident (under Sections 4, 5, and 6 of the 1953 revision). As will be seen, however, the second of these consequences should not result on constitutional grounds if the

wife were resident in the Province when the application for a provisional maintenance order was made.

In the course of his reasons for judgment in *Smith* v. *Smith*, Tritschler J., used the following language which is in part misleading:

> "As to desertion: If the husband deserted the wife, this must have taken place in British Columbia; if the husband's conduct caused cohabitation to terminate, and he committed the act of desertion by compelling the wife to leave, that act also must have been committed in British Columbia. As to the locus of the non-support charge, it ought not to be said that this offence occurs in every place where the wife happens to be residing . . . ."

It has been held in England and in Canada that desertion and non-support are continuing acts and occur at both the place of residence of the wife and of the husband, so long as the husband wrongfully refuses to cohabit with and fails to support his wife: *In re Wheat*, [1932] 2 K.B. 716; *Hill* v. *Hill* [1951] O.W.N. 347, affirmed [1951] O.W.N. 507 (C.A.).

The material facts of *In re Wheat* were as follows: The husband and wife were married in South Africa in 1909. While they were living in St. Helena in 1921, they executed a voluntary agreement for separation and maintenance. They did not live together thereafter, but the wife resided in South Africa and the husband in England. In 1928 the wife journeyed to her husband's house in England, but he refused to live with her. She returned to her South African residence and secured a provisional order for maintenance from a magistrate there against her husband, who was a resident of England. The order of the Metropolitan Magistrate of London, under the *Maintenance Orders (Facilities of Enforcement) Act, 1920*, of England, confirming the provisional order was upheld by the King's Bench Division. With reference of the jurisdiction of the magistrate in South Africa to make the provisional order, Humphreys J. for the Court said:

> "Mr. Cairns, who argued the case in support of the magistrate's decision, submitted that there was evidence that the wife was deserted and left without means of support in East London. We think this is so. There can be no doubt that desertion is a continuing act. Many authorities could be quoted in support of that view, but it is sufficient to refer to the case of *Heard* v. *Heard*, [1896] P. 188, and to the judgment of Jeune P. in that case, a judgment in which Gorell Barnes J. entirely agreed. The headnote of the case is as follows:
>
> > 'For the purpose of proceedings under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, there-

fore, be made within six months of the commencement of the desertion.'

"This is the judgment of the President:

'In this case the husband left the wife more than six months before the summons was taken out against him, and the question is whether in consequence the proceeeding is barred by the limitation of time imposed by the Summary Jurisdiction Acts, in accordance with which applications under the Summary Jurisdiction (Married Women) Act, 1895, must be made; or, in other words, whether desertion is a continuing act within the meaning of s. 4 of the last-mentioned Act. It is quite true that the 'desertion of a wife by her husband—that is to say, his leaving her against her will, with the intention of not returning—may be considered as an act complete in itself. But it is equally true that so long as a husband remains absent, he continues to desert his wife, and desertion may in this way be considered as a continuing act.'

"In the course of that judgment reference was made to a case decided in this Court of *Wilkinson* v. *Wilkinson* (1894) 58 J.P. 415. It would be useful to read a few lines from the judgment of Day J., in that case. The Court consisted of Lord Coleridge C.J. and Day J. In the course of his judgment Day J., observed as follows:

'The mistake is in assuming that desertion is a specific act, whereas it is more proper to describe it as a course of conduct continuing over a considerable period.'

"It is further to be observed that the words of s. 2 of Act No. 7 of 1895 are: 'deserts his wife or leaves her without means of support.' We have not been supplied with a copy of the deposition of the wife made in East London, which was before the learned magistrate who states this case, but we are bound to assume in the absence of any suggestion to the contrary that there was evidence before the magistrate who made the provisional order that the wife, who had been deserted in England, was still being deserted and was left without means of support by her husband in the place where she was residing (in South Africa) at the time when the provisional order was made."

In *Hill* v. *Hill* a decision of Barlow J. in the High Court of Justice of Ontario was affirmed by the Court of Appeal without calling on counsel for the respondent. There was before the Court an application by a husband to prohibit a judge of the Family Court of Toronto from proceeding under a summons issued against the applicant under the *Deserted Wives' and Children's Maintenance Act*, R.S.O. 1950, Ch. 102. Dismissing the application, Barlow J. said:

"The facts are that the parties were married in British Columbia on the 15th June, 1950, and lived together until the 13th November, 1950, when the applicant left his wife, saying that he was going to Toronto to live with his daughter and would not return to British Columbia. The applicant came to Ontario in November last and took up residence at the town of Weston in the County of York. The respondent wife came

to Toronto about the 1st January, 1951, and on the 24th January, 1951, she swore out an information and complaint alleging desertion and the failure to provide her with maintenance, resulting in the issue of a summons to the applicant, which is the reason for this application.

"Prohibition will lie only if the Family Court Judge has not jurisdiction to hear the complaint.

"Counsel for the applicant contends that the Family Court has no jurisdiction on the ground that the desertion of the respondent took place in British Columbia. He relies on the answers made by the respondent to questions put to her upon a cross-examination upon her affidavit, in which answers she states that the desertion took place in British Columbia. Counsel for the applicant admits for the purpose of his argument that the applicant deserted the respondent, but contends that such desertion took place in British Columbia, outside the territorial jurisdiction of the judge of the Family Court of the County of York, and that therefore the latter has no jurisdiction. Counsel for the applicant admits that the place where the desertion took place is the only ground upon which he is attacking the jurisdiction of the Family Court judge.

"Counsel for the respondent and for the Family Court judge contend that even though desertion took place in British Columbia, it is a continuing desertion and that since the applicant has come to Ontario to reside and has not made provision for the maintenance of his wife, who is now in Ontario, it is a continuing desertion. I am much impressed with this argument. It appears to me that since the applicant has now taken up residence in Ontario, he has made himself subject to the laws of the Province of Ontario and that the failure to maintain his wife is desertion under The Deserted Wives' and Children's Maintenance Act: see In re Wheat, [1938] 2 K.B. 716, at 723."

From the premise that desertion and non-support are continuing acts, the result followed:

(a) in the *Wheat* case that the desertion and non-support, although commenced at the place of the husband's residence in England, continued both there and at the place of the wife's residence in South Africa; and

(b) in the *Hill* case that the desertion and non-support, although commenced at the place of residence of husband and wife in British Columbia, where the wife later continued to reside, continued at the place of the husband's later acquired residence in Ontario.

Clearly then the husband wrongfully refuses to cohabit with his wife and refuses to support her, he violates continuously his wife's civil rights to cohabitation and support both (i) within the territory of the Province where he is residing at any time; and (ii) within the territory of the Province where she is residing at any time.

A provincial legislature, under Section 92 (13) of *The British*

North America Act may therefore validly provide a wife with a right of action against her non-resident husband for maintenance while she is residing within the Province.

In view of what has been said, it appears that *Meyers* v. *Meyers* [1953] 2 D.L.R. 255, which purported to apply to an application under the *Reciprocal Enforcement of Maintenance Orders Act* the decision of Tritschler J. in *Smith* v. *Smith*, (1953) 7 W.W.R. (N.S.) 167, was wrongly decided. In the *Meyers* case the wife was first deserted in Ontario while she and her husband resided there. She afterwards became resident in Manitoba, while her husband remained resident in Ontario. While she was resident in Manitoba and while the husband's offence of desertion and non-support continued against her within that Province, she secured a provisional order for maintenance from a County Court Judge there. On authority of *Smith* v. *Smith*, the wife's application for confirmation of the Manitoba provisional order in Ontario, under the *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1950, Ch. 334, was dismissed.

The facts in the *Meyers* case are essentially different from those in *Smith* v. *Smith* and are on all fours with those in *In re Wheat.* The Manitoba provisional order was within the constitutional orbit of the *Maintenance and Orders (Facilities of Enforcement) Act* of that Province and should have been confirmed.

The judge in *Meyer* v. *Meyer* also made the following statement, the narrowing effect of which has no justification:

> "The whole purpose of the *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1950, c. 334, or as it is called in Manitoba the *Maintenance Orders (Facilities for Enforcement) Act*, 1940 (Man.), c. 35, was designed to follow up a husband by reaching him in a reciprocal jurisdiction where the wife was residing in the jurisdiction from which the husband had fled.
>
> "In the present case the wife could have obtained a provisional order in Ontario if the husband had deserted her here and fled to Manitoba which could have been forwarded to Manitoba for confirmation. But that is not the case here. The cause of complaint arose entirely in the City of Hamilton and it was the wife who went to Manitoba, not the husband."

The sponsors of this social welfare legislation can hardly have intended to impose upon injured wives and their children the hardship that could often occur from requiring them to return for relief to the Province where the desertion and non-support began. The records of the Conference of Commissioners on Uniformity of Legislation in Canada reveal no purpose to restrict the application of the reciprocal Act in the way asserted in the

Meyers case. There is evidence that one affirmative object of the Act is to reach the husband who has fled. This evidence is recorded in the 1945 Proceedings at page 24:

> "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."

The general purpose of the maintenance legislation is to protect the interests of dependants to the full extent of constitutional power of the Provinces.

In *Holland* v. *Holland* [1950] 1 W.W.R. (N.S.) 286 (See 1951 Proceedings, p. 62) the jurisdiction of a reciprocating Province to make a provisional order was recognized in a case in which the facts were essentially the same as those in *In re Wheat.* At the date of making the provisional order in Manitoba, the wife was residing in Manitoba, and the husband was residing in British Columbia. Four years previously, the wife had journeyed from Manitoba to British Columbia and, at an interview with her husband, he had told her that he was not going to live with her again. Since then, he had failed to support the wife and their child. In resistance to confirmation of the Manitoba provisional maintenance order under the *British Columbia Maintenance Orders (Facilities for Enforcement) Act,* R.S.B.C. 1948, Ch. 198, counsel for the husband contended that the Manitoba court had no jurisdiction, as the husband was not in Manitoba, nor resident, nor domiciled there when the provisional order was made. The court, however, citing *In re Wheat,* held that the Manitoba provisional order was not made without jurisdiction, and confirmed the order.

In view of the cases just discussed, there seems to be no doubt that a Provincial Legislature, under Section 92(13) of the *British North America Act,* may validly provide a wife with a right against her non-resident husband for maintenance while she is residing within the Province. The Legislature has power to determine the legal effect of acts done within the territory of the Province. If, then, the continuing non-support causes injury to the wife at her place of residence, the injurious act occurs in the Province where the wife is residing and is a violation of her civil right to support there, regardless of where the husband may be, and that Province should be recognized as having con-

stitutional power to create a right to maintenance and vest it in the wife. Where, however, the husband is not resident or otherwise within the territory of the Province, there is no constitutional legislative power to confer jurisdiction *in personam* over him upon its courts so as to enable them to make a valid order in the nature of a final judgment against him; hence, the utilization of the device of a provisional order, which, in effect, merely declares the fact of the wife's *prima facie* right to maintenance.

Although this report is normally confined to cases reported in the calendar year preceding the meeting of the Conference, a case first decided in March, 1954, and now reversed on appeal, bears so significantly on the validity and effect of the Uniform Act here being considered that reference to it is now made. *In re Scott* [1954] 2 D.L.R. 467, McRuer C.J.H.C. dismissed a motion for an order to prohibit further proceedings by a magistrate in respect of a provisional order or summons to show cause, issued by him against a husband under Section 5 of the *Ontario Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, Ch. 334 (Section 6 of the Uniform Act as revised in 1953). The wife had secured a provisional order for maintenance in London, England, while residing there, and applied in Ontario for its confirmation.

The Ontario Court of Appeal, in a judgment delivered on June 25th (not yet published in the law reports), reversed the decision of McRuer C.J.H.C. on two grounds: The first ground, which was not taken before McRuer C.J.H.C., is that subsection (2) of Section 5 of the Ontario Act (Section 6 of revised Uniform Act) is *ultra vires* in so far as it limits the defences of the person on whom the summons is served (the husband) to only those defences that he might have raised in the original proceedings had he been a party thereto in the other Province or foreign state; the reason being that the Legislature of a Province cannot abdicate and surrender to the legislative body of a foreign state "the right to declare that the law governing the civil rights of a person resident (in the Province) shall be limited to those which may *from time to time* be in effect in the foreign state." This ground is incontestable. (See (1940) 18 Canadian Bar Review, pp. 434-444.) The second ground of reversal is that subsection (1) of Section 5 of the Ontario Act is *ultra vires* in so far as it purports to clothe a magistrate or juvenile court judge with power to confirm a provisional order because, in the words of Pickup C.J.O., "an attempt by the Legislature of a Province of Canada to clothe an existing

inferior court or some new provisional court or authority with power to determine the legal rights of residents of the Province in respect of judgments or orders pronounced or made in another territorial jurisdiction is repugnant to Sec. 96 of *The British North America Act* in that it indirectly alters the character of an existing tribunal or creates a new tribunal outside of the purview of Sec. 96 in such a manner as to bring such tribunal within the intendment of that Section, while retaining control of the appointment of the magistrate or judge presiding over such tribunal."

The following passage from the reasons for judgment of Pickup C.J.O., speaking for the Court of Appeal, sustains several of the grounds upon which McRuer C.J.H.C. upheld the constitutionality of the Act and is consistent with all of the cases discussed above, excepting *Meyer* v. *Meyer*, which case must be regarded as having been erroneously decided: (I have numbered the points for convenience.)

(1) "In my opinion this statute is not, in its pith and substance, legislation relating to civil rights outside of the Province. A maintenance order made by a tribunal outside of Ontario under Sec. 5 is provisional only and has no legal effect whatever unless and until it is confirmed by a court in Ontario. The confirmation or variation of such an order by a court in Ontario is a matter of civil rights within the Province. The subject matter is the liability of a resident of this Province for the maintenance of his wife and children. Regardless of where the wife and children reside, it is, in my opinion, clearly within the legislative competence of the Province to impose and enforce such a liability, if the liability already exists by law, it is within the competence of the Legislature to legislate as to how such liability shall be determined, subject always to such limitations as may be imposed by reason of the effect of Sec. 96 of the British North America Act, which I shall discuss later."

(2) "As to the contention that Sec. 4 is *ultra vires* because it purports to authorize the making in Ontario of an order against a person who is not resident in Ontario, I do not think there is anything in that Section beyond the powers of the Legislature of the Province. Any order made in Ontario under that Section is provisional and of no effect until confirmed by a court having 'competent jurisdiction over the person against whom the order is made.' An order made in Ontario under Sec. 4 does not determine the legal right of anyone. Civil rights outside of the Province are not affected by it but by the confirmation order (if any) made in the reciprocating State."

(3) "I am unable to see any valid legal reason why the Province of Ontario cannot, in relation to a subject matter within its legislative jurisdiction, make a reciprocal arrangement with another Province or a foreign State in relation to such subject matter. It is not, in my opinion, the exercise of any treaty-making authority vested in the Parliament of Canada. To hold otherwise would, I think, be to stultify the exercise within Ontario

> of the power which the Province undoubtedly has to provide for maintenance of wives and children who are resident within the Province. One means of doing this is by reciprocal arrangement with other States, such as appears in the statute. I would, therefore, not give effect to the contention of the appellant that the statute in question is *ultra vires* of the Legislature of the Province in that it deals with civil rights outside the Province or deals with matters of international comity."

It is understood that an appeal in *In re Scott* has been taken to the Supreme Court of Canada. Pending the outcome, the effect of recent decisions upon the *Uniform Reciprocal Maintenance Orders Act,* as presently enacted by the Provinces, may be stated as follows:

(1) The constitutional power of a Province to make a reciprocal arrangement with another Province or a foreign state in relation to this subject matter and any other subject matter within its legislative jurisdiction is sustained (*In re Scott*).

(2) A Province may, by legislation, validly authorize its courts to make a provisional maintenance order at the suit of a resident dependent against a person who is not resident there but is resident in a reciprocating Province or State. (Section 5 of the revised Act) (*Holland* v. *Holland; In re Scott*).

(3) Regardless of where the dependant resides, it is within the legislative competence of a Province to empower its appropriate courts to:

(*a*) confirm or vary a provisional order for maintenance against a resident of the Province which was granted at the suit of a dependant while resident in a reciprocating Province or state (Subsection (1) of Section 6 of the revised Act) (*Holland* v. *Holland; In re Scott*);

(*b*) make an original final maintenance order against a person who resides in the Province (under the *Wives' and Children's Maintenance Act*). (*Hill* v. *Hill*) (This is the order that may be registered under Section 3 of the revised Act.)

(4) A Province has no constitutional power to empower its courts to issue a maintenance order of any sort when both the dependant and the person against whom a maintenance order is sought are not resident within the Province. (*Smith* v. *Smith*).

(5) It is a violation of Section 96 of *The British North America Act* if the Legislature of a Province, pursuant to subsection (1) of Section 6 of the revised *Uniform Reciprocal Enforcement of Maintenance Orders Act,* authorizes the Lieutenant-

Governor-in-Council to designate as a confirming court a magistrate, juvenile court judge, or any court except a court which by law prior to enactment of the Provincial Act had power to determine the legal effect of a foreign judgment. (*In re Scott*) (This will require a reconsideration of existing orders-in-council.)

(6) Subsection (2) of Section 6 of the revised Act is *ultra vires* to the extent that it limits defences to those that the person on whom the summons was served could have raised under the law in force for the time being in the reciprocating Province or State that issued the provisional order. (*In re Scott*) (Subsection (2) should be amended accordingly.)

The effect of the foregoing cases is not to place undue limitation upon the power of the Provinces of Canada to accomplish the design of the Acts cogently expressed by McRuer C.J.H.C. to be "to facilitate the enforcement of the obligations of husbands and parents where the dependant and the person under obligation are not resident in the same State."

WAREHOUSE RECEIPTS

Ontario Act

Lack of definition of "owner" as used in *The Warehouse Receipts Act*, R.S.O. 1950, Ch. 418, caused difficulty in *Toronto Storage Company Ltd.* v. *Dominion Acceptance Limited*, [1953] O.W.N. 81. The plaintiff, a warehousing company, sued the defendant for storage charges on a quantity of insulating wool that had been left for storage by the mortgagor of the goods after they had been mortgaged to the defendant. The goods were never in the possession of the defendant. Lovering Co. Ct. J. held that the defendant was neither an owner nor a bailor of the goods, and hence the plaintiff could not recover on a contract for storage within the statutory provision (Section 3(5) of the Uniform Act adopted by the Commission in 1945) that ". . . 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 . . ." The Judge remarked:

> "There was much discussion by counsel at the trial as to the meaning of the word 'owner' in The Warehouse Receipts Act, R.S.O. 1950, c. 418. The plaintiff's counsel contended that the chattel mortgagee, who held

the warehouse receipt, must be considered the owner. There appears to be no interpretation in the statute or in any reported Canadian case of the word 'owner' as used in the Act. It is true that the chattel mortgagee holds the legal title, but surely he cannot be considered the real owner. He has at best a conditional title, subject to the right of the mortgagor to observe its provisions. He has no right to deal with the mortgaged goods in any way unless the mortgage is in default. In this case the mortgagor had at all times the dominant control over the goods."

INDEX