1961

PROCEEDINGS

OF THE

FORTY-THIRD ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

REGINA, SASKATCHEWAN

AUGUST 21ST TO AUGUST 25TH, 1961

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.

To avoid confusion or uncertainty that may arise from the existence of more than one report on the same subject, all reports should be dated.

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CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA

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Honorary President..... ..J. A. Y. MacDonald, Q.C., Halifax.

President.....J. F. H. Teed, Q.C., Saint John.

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2nd Vice-President... . O. M. M. Kay, Q.C., Winnipeg.

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Secretary..... .....H. F. Muggah, Q.C., Halifax.

LOCAL SECRETARIES

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

British Columbia.... .....Gerald H. Cross, Victoria.

Canada..... ..H. A. McIntosh, Ottawa.

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

New Brunswick ....M. M. Hoyt, B.C.L., Fredericton.

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

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

Ontario .....W. C. Alcombrack, Q.C., Toronto.

Prince Edward Island.....G. R. Foster, Q.C., Charlottetown.

Quebec..... .... .Chas. Coderre, Q.C., 170 Dorchester Blvd. East, Montreal 18.

Saskatchewan.. .....J. H. Janzen, Q.C., Regina.

COMMISSIONERS AND REPRESENTATIVES OF THE PROVINCES AND OF CANADA

Alberta:

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

C. W. CLEMENT, Q.C., Bank of Commerce Bldg., Edmonton.

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

W. E. WOOD, Acting Legislative Counsel, Edmonton.

(Commissioners appointed under the authority of the Revised Statutes of Alberta, 1955, c. 350.)

British Columbia:

P. R. BRISSENDEN, Q.C., United Kingdom Bldg., 16th Floor, Vancouver 1.

GERALD H. CROSS, Legislative Counsel, Victoria.

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(Commissioners appointed under the authority of the Revised Statutes of British Columbia, 1948, c. 350.)

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E. A. DRIEDGER, Q.C., Deputy Minister of Justice, Ottawa.

T. D. MACDONALD, Q.C., Assistant Deputy Minister of Justice, Ottawa.

J. C. MARTIN, Q.C., Counsel, Department of Justice, Ottawa.

H. A. MCINTOSH, Advisory Counsel, Department of Justice, Ottawa.

D. S. THORSON, Assistant Deputy Minister of Justice, Ottawa.

Manitoba:

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

G. S. RUTHERFORD, Q.C., Legislative Counsel, Winnipeg.

R. H. TALLIN, Attorney-General's Dept., Winnipeg.

F. K. TURNER, 303 Power Bldg., Winnipeg.

(Commissioners appointed under the authority of the Revised Statutes of Manitoba, 1954, c. 275.)

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M. M. HOYT, B.C.L., Legislative Counsel, Parliament Bldgs., 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, Q.C., Assistant Deputy Attorney-General, 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:

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

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

HORACE E. READ, O.B.E., Q.C., S.J.D., D.C.L., Dean, Dalhousie University Law School, Halifax.

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

Ontario:

W. C. ALCOMBRACK, Q.C., Municipal Legislative Counsel, Toronto.

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

W. B. COMMON, Q.C., Deputy Attorney-General, Toronto.

L. R. MACTAVISH, Q.C., Legislative Counsel, Toronto.

(*Commissioners appointed under the authority of the Statutes of Ontario, 1918, c. 20, s. 65.*)

Prince Edward Island:

GERALD R. FOSTER, Q.C., 150 Richmond St., Charlottetown.
W. CHESTER S. MACDONALD, Summerside.
E. SOMERLED TRAINOR, Charlottetown.
(*Commissioners appointed under the authority of the Revised Statutes of Prince Edward Island, 1951, c. 168.*)

Quebec:

EMILE COLAS, 276 St. James St. W., Montreal.
G. R. FOURNIER, Q.C., 65 St. Anne St., Quebec.
THOMAS R. KER, Q.C., 360 St. James St. W., Montreal.
YVES LEDUC, Q.C., 4080 Wellington St., Montreal.
LOUIS-PHILIPPE PIGEON, Q.C., 72 Mountain Hill, Quebec.

Saskatchewan:

W. G. DOHERTY, Attorney-General's Dept., Regina.
J. H. JANZEN, Q.C., Legislative Counsel, Regina.
E. C. LESLIE, Q.C., 2236 Albert St., Regina.
R. S. MELDRUM, Q.C., Deputy Attorney-General, Regina.
B. L. STRAYER, Attorney-General's Dept., Regina.

C. P. Hughes P.O. Box 2029
Whitehorse Y.T.

MEMBERS EX OFFICIO OF THE CONFERENCE

Attorney-General of Alberta: Hon. E. C. Manning.
Attorney-General of British Columbia: Hon. Robert W. Bonner, Q.C.
Attorney-General of Canada: Hon. E. D. Fulton, Q.C.
Attorney-General of Manitoba: Hon. S. R. LYON, Q.C.
Attorney-General of New Brunswick: Hon. Louis J. Robichaud, Q.C.
Attorney-General of Newfoundland: Hon. L. R. Curtis, Q.C.
Attorney-General of Nova Scotia: Hon. R. A. Donahoe, Q.C.
Attorney-General of Ontario: Hon. A. Kelso Roberts, Q.C.
Attorney-General of Prince Edward Island: Hon. Melvin J. McQuaid, Q.C.
Attorney-General of Quebec: Hon. Georges-Emile Lapalme, Q.C.
Attorney-General of Saskatchewan: Hon. Robert A. Walker, Q.C.

PRESIDENTS OF THE CONFERENCE

Sir James Aikins, K.C., Winnipeg	1918–1923
Mariner G. Teed, K.C., Saint John	1923–1924
Isaac Pitblado, K.C., Winnipeg	1925–1930
John D. Falconbridge, K.C., Toronto	1930–1934
Douglas J. Thom, K.C., Regina	1935–1937
I. A. Humphries, K.C., Toronto	1937–1938
R. Murray Fisher, K.C., Winnipeg	1938–1941
F. H. Barlow, K.C., Toronto	1941–1943
Peter J. Hughes, K.C., Fredericton	1943–1944
W. P. Fillmore, K.C., Winnipeg	1944–1946
W. P. J. O'Meara, K.C., Ottawa	1946–1948
J. Pitcairn Hogg, K.C., Victoria	1948–1949
Hon. Antoine Rivard, K.C., Quebec	1949–1950
Horce A. Porter, K.C., Saint John	1950–1951
C. R. Magone, Q.C., Toronto	1951–1952
G. S. Rutherford, Q.C., Winnipeg	1952–1953
L. R. MacTavish, Q.C., Toronto	1953–1955
H. J. Wilson, Q.C., Edmonton	1955–1957
Horace E. Read, Q.C., Halifax	1957–1958
E. C. Leslie, Q.C., Regina	1958–1959
G. R. Fournier, Q.C., Quebec	1959–1960
J. A. Y. MacDonald, Q.C., Halifax	1960–1961
J. F. H. Teed, Q.C., Saint John	1961–

HISTORICAL NOTE

More than forty 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.
1955. August 23–27, Ottawa.
1956. August 28–Sept. 1, Montreal.
1957. August 27-31, Calgary.
1958. September 2-6, Niagara Falls.
1959. August 25-29, Victoria.
1960. August 30–September 3, Quebec.
1961. August 21–25, Regina.

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.

Since 1935 the Government of Canada has sent representatives to the meetings of the Conference and although the Province of

Quebec was represented at the organization meeting in 1918, representation from that province was spasmodic until 1942. Since then representatives from the Bar of Quebec have attended each year, with the addition in some years 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 and the Yukon Territory in recent years. As a matter of interest, therefore, these have been noted in the Table appearing on pages 14 and 15.

TABLE (

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

Title of Act	Conference	Adopted Alta.	B.C.	Man.	N.B.	Nfld.	N.S.
ssignments of Book Debts	1923	'29, '58*	....	'29,'51*,'57*	1952‡	1950‡	1931
ills of Sale	1928	1929	....	'29, '57*	——$	1955‡	1930
ulk Sales	1920	1922	1921	'21, '51*	1927	1955‡	——$
onditional Sales	1922	....	1922	....	1927	1955‡	1930
ontributory Negligence	1924	1937*	1925	....	1925	1951*	'26, '5
ornea Transplant	1959	1960‡	1961	1961	——$	1960	1960
orporation Securities Registration	1931	....	....	....	....	....	1933
efamation	1944	1947	——$	1946	1952‡	....	1960$
evolution of Real Property	1927	1923	.. .	....	1934†	....	....
omicile	1961	.	. .	.	.. .		
ridence	1941	....	....	1960†	....	....	....
Foreign Affidavits	1938	'52, '58*	1953	1952	1953‡	1954*	1952
Judicial Notice of Statutes and Proof of State Documents	1930	....	1932	1933	1931	...	....
Officers, Affidavits before	1953	1953	——$	1957	....	1954	....
Photographic Records	1944	1947	1945	1945	1946	1949	1945
Russell v. *Russell*	1945	1947	1947	1946	....	....	1946
e Insurance Policy	1924	1926	1925$	1925	1931	1954‡	1930
reign Judgments	1933	....	....	....	1950‡	....	....
ustrated Contracts	1948	1949	. .	1949	1949	1956	....
ghway Traffic and Vehicles— Rules of the Road	1955	1958†	1957†	1960‡	. ..	....	...
erpretation	1938	1958*	....	'39‡, '57*	....	1951‡	....
estate Succession	1925	1928¶	1925	1927‡	1926	1951	....
ıdlord and Tenant	1937	....	....	....	1938	....	....
itimation	1920	'28,'60*	'22,'60	1920	1920	——$	——$
e Insurance	1923	1924	1923$	1924	1924	1931	1925
ıitation of Actions	1931	1935	....	'32,'46‡	....	....	....
rried Women's Property	1948	....	....	1945	1951$	....	....
tnership	....	1899°	1894°	1897°	1921°	1892°	1911°
tnerships Registration	1938	...	. .	..	——$	....	....
sion Trusts and Plans Perpetuities	1954	....	1957	1959	1955	1955	1959
Appointment of beneficiaries	1957	1958	1957	1959	...	1958	1960
ıumption of Death	1960	....	....	....	...	....	....
eedings Against the Crown	1950	1959‡	....	1951	1952†	....	1951$
iprocal Enforcement of Judgments	1924	'25, '58*	'25, '59*	'50, '61*	1925	...	....
iprocal Enforcement of Maintenance Orders	1946	'47, '58*	'46, '58*‡	'46, 61*	1951‡	'51‡, '61*†	1949
ılations	1943	1957‡	1958*	1945‡	....	....	....
of Goods	....	1898°	1897°	1896°	1919°	1899°	1910°
ice of Process by Mail	1945	——$	1945	——$	....	....	....
ivorship	1939	1948	'39, '58*‡	1942	1940	1951	1941
ators Family Maintenance	1945	1947‡	....	1946	1959	....	——$
tee Investments	1957	....	1959	....	..	....	1957†
ation of Trusts	1961	...	. .	.	..		....
Statistics	1949	1959‡	. .	1951‡	. .	....	1952‡
housemen's Lien	1921	1922	1922	1923	1923	....	1951
house Receipts	1945	1949	1945‡	1946‡	1947	....	1951
	1929	1960‡	1960‡	1936	1959‡	....	....
Conflict of Laws	1953	....	....	1955	....	1955	....

opted as revised.
bstantially the same form as Imperial Act (*See* 1942 Proceedings, p. 18).
visions similar in effect are in force.

ODEL STATUTES

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

	ADOPTED							REMARKS
	Ont.	P.E.I	Que.	Sask.	Can.	N.W.T.	Yukon	
ie	1931	1931	....	1929	....	1948	1954‡	Am. '31; Rev. '50 & '55; Am '57
	....	1947	....	1929	....	1948‡	1954‡	Am.'31 & '32; Rev. '55; Am. '5
	....	1933	....	....	....	1948¶	1956	Am '21, '25, '39 & '49; Re '50
	....	1934	....	....	....	1948‡	1954‡	Am. '27, '29, '30, '33, '34 '42; Rev. '47 & '55; Am. '5
	....	1938*	....	1944*	....	1950*‡	1955‡	Rev. '35 & '53
	——$	1960	....	....	....	....	....	....
	1932	1949	....	1932	....	....	....	.....
	....	1948	....	....	....	1949*‡	1954	Rev. '48; Am. '49
	....	....	....	1928	....	1954	1954	.....
	....	....	.. .	....	....		....	....
	1960†	....	....	....	....	1948*‡	1955‡	Am. '42, '44 & '45; Rev. '4 Am. '51, '53 & '57
	'52, '54*	....	....	1947	1943	1948	1955	Am. '51; Rev. '53
	....	1939	....	....	....	1948	1955	Rev. '31
	1954	....	....	....	....	....	1955	.....
	1945	1947	....	1945	1942$	1948	1955	.....
	1946	1946	....	1946	....	1948	1955	.....
	1924	1933	....	1925	....	....	....	Stat. Cond. 17 not adopted
	....	....	....	1934	....	....	....	.....
	1949	1949	....	....	....	1956	1956	....
	....	....	....	....	....	....	....	Rev. '58
	....	1939	.. .	1943	....	1948*‡	1954*	Am. '39; Rev. '41; Am. '4 Rev. '53
	....	1944‡	....	1928	....	1949‡	1954‡	Am. '26, '50, '55; Rev. '58
	. ..	1939	....	....	....	1949‡	1954‡	Recomm. withdrawn '54
	1921	1920	——$	'20, '61‡	....	1949‡	1954†	Rev. '59
	1924	1938	....	1924	....	....	....	.....
	....	1939‡	....	1932	....	1948†	1954*	Am. '32, '43 & '44
	....	....	....	....	....	1952†	1954†	.....
	1920°	1920°	....	1898°	....	1948°	1954°	.....
	....	....	....	1941†	....	....	....	Am. '46
	1954	....	....	....	....	....	.. .	Am. '55
	1954$	....	....	1960	....	....	....	....
	....	....	....	....	....	....	....	....
	1952‡	....	....	....	1952‡	....	....	....
	1929	....	....	1924	....	1955	1956	Am. '25; Rev. '56, Am. '57; Rev. '58
	'48‡, '59*‡	1951‡	1952$	1946$	....	1951†	1955‡	Rev. '56; Rev. '58
	1944‡	....	....	....	1950$	....	....	.....
	1920°	1919°	....	1896°	....	1948°	1954°	.....
	....	....	....	——$	....	....	....	.....
	1940	1940	....	1942	....	....	....	Am. '49, '56 & '57; Rev. '60
	....	....	....	....	....	....	....	Am. '57
	....	..	....	....	....	....	....	. . ..
	1959	....	....	....	....	....	....	.....
	1948$	1950‡	....	1950$	....	1952	1954‡	Am. '50 & '60
	1924	1938	....	1922	....	1948	1954	.....
	1946‡	....	....	....	....	....	....	.....
	....	....	....	1931	....	1952	1954‡	Am. '53; Rev. '57
	1954	....	....	....	....	....	....	.....

x As part of Commissioners for taking Affidavits Act.
† In part.
‡ With slight modification.
¶ Adopted and later repealed.

MINUTES OF THE OPENING PLENARY SESSION

(MONDAY, AUGUST 21ST, 1961)

10 a.m.–11.30 a.m.

Opening

The forty-third annual meeting of the Conference opened at the Court House, in Regina, at 10 a.m., with Mr. John A. Y. MacDonald, Q.C., the President, in the chair.

Following the introduction of members, the chairman in his preliminary remarks welcomed the new members to the Conference, expressed his pleasure in looking forward to working with them as well as with the old members, drew attention to the fact that Miss Wysocki, of the Attorney General's Department in Ontario, was apparently the first lady to have graced a meeting of the Conference, expressed regret at the absence of representatives from Newfoundland and the absence of the Secretary and the Treasurer, and then called on Mr. Gordon Doherty, of Saskatchewan, to act as Secretary pro tem.

Mr. R. S. Meldrum, Q.C., Deputy Attorney General for the Province of Saskatchewan, on behalf of the Attorney General, the Honourable R. A. Walker, Q.C., expressed the Attorney General's regrets at being unable to attend and welcomed the members to Regina. He outlined some of the plans that had been made for entertainment of the members and their wives, including a coffee party in the barristers' lounge in the Court House following the opening plenary session, a coffee party for the wives to be given by Mrs. Barlow on Wednesday and by Mrs. Kennedy and Mrs. Brissenden on Thursday, a coffee party on Friday tendered by the Officer Commanding the Royal Canadian Mounted Police, and the circumstance that tickets were available for the Saskatchewan Roughrider football game later on in the week. Mr. Meldrum also advised the meeting that the local members of the Conference would be quite happy to assist the visiting members in any respect and invited the visiting members not to hesitate to make their needs known.

Minutes of Last Meeting

The following resolution was adopted:

RESOLVED that the Minutes of the 1960 annual meeting as printed in the 1960 Proceedings be taken as read and adopted.

Presidential Address

In a brief review of the work of the past year the President expressed his thanks for the excellent cooperation received from other officers and members of the Conference. He outlined the proposed work of the meeting as set out in the Agenda (Appendix A, page 48) and mentioned additional arrangements that had been made for entertainment of members of the Conference and their wives. He repeated the comments made by his predecessors, Messrs. Leslie and Fournier, to the effect that the Conference may be spreading itself a bit thin by endeavouring to deal with an extensive agenda at each meeting and suggested that there might be merit in considering fewer items each year and possibly dealing with a fewer number of subjects. He called attention to an article by Mr. Jacob S. Ziegel, of Vancouver, in the May 1961 issue of the Canadian Bar Review, entitled "Uniformity of Legislation in Canada—Conditional Sales Experience", and commended the article to the attention of those who might not yet have read it. He referred, also, to the article by Dean Read reviewing the history of the Conference.

In referring to the attendance at the Conference of Messrs. Fournier and Pigeon as representatives of the Government of the Province of Quebec as well as the Council of the Bar of that Province, he expressed pleasure at the continued interest of the Government of that Province in the activities of the Conference and commented that Mr. Fournier's selection as a representative of the Government following his attendance as a representative of the Bar of the Province constituted a tribute to Mr. Fournier for his excellent work in the past.

Treasurer's Report

In the absence of the Treasurer, Mr. Carter, the President read the Treasurer's report (Appendix B, page 50), which on motion was adopted. Messrs. Alcombrack and Tallin were named as auditors to examine this report.

Secretary's Report

The report of the Secretary, Mr. Muggah (Appendix C, page 52), was distributed in his absence and on motion was taken as read.

Constitution Committee

Mr. MacTavish presented the report of this Committee (Appendix D, page 54) and consideration of it was deferred until the

closing plenary session in order to give the Committee an opportunity to meet and consider some points before the Conference as a whole examined the subject.

Government Contributions

The President reported that in view of the circumstance that the Conference funds appeared to be sufficient to defray the cost of publication of a consolidation of all model Acts and to leave a reasonable balance on hand a committee had not been formed to study the need of the Conference for additional revenue and the advisability of requesting the supporting governments to increase their contributions. After some discussion, the chairman appointed, as a committee to consider the matter, Mr. Kennedy, Mr. T. D. MacDonald, and Mr. Teed.

Resolutions Committee

The following were named to constitute a Resolutions Committee: Messrs. Bowker, Chairman, MacTavish, and Foster.

Nominating Committee

The President named a Nominating Committee, consisting of the following Past Presidents:

Messrs. Fournier, Chairman, Leslie, Read, Wilson, MacTavish, and Rutherford.

Publication of Proceedings

The following resolution on this subject was adopted:

RESOLVED that the Secretary prepare a report of the meeting in the usual style, have the report printed and send copies thereof to the members of the Conference and those others whose names appear on the mailing list of the Conference, and that he make arrangements to have the 1961 Proceedings printed as an addendum to the Year Book of the Canadian Bar Association.

Next Meeting

Following discussion about the time and place of the 1962 meeting, during which Mr. Teed extended an invitation to meet in New Brunswick, Mr. J. A. Y. MacDonald an invitation to meet in Nova Scotia, and Mr. Foster an invitation to meet in Prince Edward Island, it was decided to defer until the closing plenary session a decision on the subject.

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, C. W. CLEMENT and W. E. WOOD.

British Columbia:

Messrs. P. R. BRISSENDEN and G. H. CROSS.

Canada:

Messrs. H. A. MCINTOSH and D. S. THORSON.

Manitoba:

Messrs. G. S. RUTHERFORD and R. H. TALLIN.

New Brunswick:

Messrs. D. J. FRIEL, M. M. HOYT and J. F. H. TEED.

Nova Scotia:

Messrs. H. E. CROSBY and HORACE E. READ.

Ontario:

The Honourable Mr. Justice F. H. BARLOW and Messrs. W. C. ALCOMBRACK and L. R. MACTAVISH.

Quebec:

Messrs. EMILE COLAS, G. R. FOURNIER and L. P. PIGEON.

Saskatchewan:

Messrs. W. G. DOHERTY, J. H. JANZEN, E. C. LESLIE and B. L. STRAYER.

FIRST DAY

(MONDAY, AUGUST 21ST, 1961)

First Session

11.30 a.m.–12.30 p.m.

After the coffee break, during which the members were guests of the Regina members in the barristers' lounge, the first meeting of the Uniform Law Section opened at 11.30 a.m. At the request of the President of the Conference, Mr. J. F. H. Teed presided.

Hours of Sittings

It was agreed that this Section of the Conference should sit daily from 9.30 a.m. to 12.30 p.m. and from 2.30 p.m. to 5 p.m.

Amendments to Uniform Acts

Pursuant to the resolution passed at the 1955 meeting (1955 Proceedings, page 18), Mr. Alcombrack presented his report on this subject (Appendix E, page 57). Some discussion took place on amendments to the Reciprocal Enforcement of Maintenance Orders Act, and it was decided to defer detailed consideration until the New Brunswick report on the subject was before the meeting.

Judicial Decisions affecting Uniform Acts

Dean Read submitted his report on this subject (Appendix F, page 61) and consideration of it was commenced.

Second Session

2.30 p.m.–5 p.m.

Judicial Decisions affecting Uniform Acts—(continued)

Consideration of this report was continued and after discussion it was resolved that the report be received and that the Conference express its thanks to Dean Read for his work.

As a result of the discussions, it was decided that Section 3 of the Bills of Sale Act should be referred to the Alberta Commissioners for study and for a report at the next meeting on the desirability of an amendment in view of the cases referred to in Dean Read's report. It was decided, also, that the British Columbia Commissioners should be asked to make a study of the section of the Highway Traffic (Rules of the Road) Act corresponding to Section 171(2) of the British Columbia Motor Vehicle Act and to

report to the next meeting the results of their study and their recommendations for amendment.

Federal-Provincial Committee on Uniformity of Company Law

Mr. Rutherford submitted a report on the activities of this Committee since the 1961 meeting (Appendix G, page 76). On motion the report was received.

Foreign Torts

Dean Read reported orally on this subject and recommended that as the matter is being reviewed by the American Law Institute and will be dealt with in Volume 6, Conflict of Laws, to be published by that Institute, further study by the Conference be postponed until that volume is available. His recommendation was adopted.

Legislative Assembly

Mr. Wood, pointing out that Mr. Ryan was still out of Canada, recommended that further consideration of this item stand until Mr. Ryan's return. The meeting agreed with his recommendation.

Evidence, Uniform Rules of

Due to the absence of representatives from Newfoundland, to whom this subject had been referred, it was agreed that the subject should remain on the agenda for the 1962 meeting.

Bulk Sales

Dean Bowker presented the report of the Alberta Commissioners (Appendix H, page 77). After discussion the following resolution was adopted:

RESOLVED that the draft Act as set out in the report of the Alberta Commissioners be adopted and recommended for enactment.

Innkeepers

As the report of the Nova Scotia Commissioners was not available, this matter was allowed to stand.

Devolution of Real Property

Mr. Janzen submitted the report of the Saskatchewan Commissioners (Appendix I, page 91). After some discussion it was agreed that the subject should be deferred for consideration at the 1962 meeting on the understanding that the representatives of New Brunswick and Manitoba would forward their comments

and suggestions on the subject to the Saskatchewan Commissioners to assist the Saskatchewan Commissioners in making a report at the 1962 meeting.

Wills

Dean Read submitted a report (Appendix J, page 96) and consideration of the report was commenced.

SECOND DAY

(TUESDAY, AUGUST 22ND, 1961)

Third Session

9.30 a.m.–12.30 p.m.

Wills—(continued)

After further study and discussion of the report on this subject it was resolved that the matter be referred back to the Nova Scotia Commissioners for a further report at the 1962 meeting with respect particularly to proposed amendments to Sections 35 and 38.

Fatal Accidents Act

Mr. Rutherford read the report of the Manitoba Commissioners (Appendix K, page 100) and examination of the report was commenced.

Fourth Session

2.30 p.m.–5 p.m.

Fatal Accidents Act—(continued)

The whole of this session was occupied in discussion and consideration of the report on this Act.

THIRD DAY

(WEDNESDAY, AUGUST 23RD, 1961)

Fifth Session

9.30 a.m.–12.30 p.m.

Fatal Accidents Act—(concluded)

Consideration of this report occupied all of this session and resulted in the following resolution:

RESOLVED that the matter of the Fatal Accidents Act be referred back to the Manitoba Commissioners to revise the draft Act in accordance with the decisions reached at this meeting and to report back at the 1962 meeting.

Sixth Session

2.30 p.m. to 5 p.m.

Survival of Actions

The report of the Alberta Commissioners on this subject (Appendix L, page 108) was submitted by Dean Bowker.

Following discussion of the report the following resolution was adopted:

RESOLVED that the matter of the Uniform Act be referred back to the Commissioners of Alberta for further examination; that the Commissioners of each jurisdiction be requested to submit their views on the questions raised in the report of the Alberta Commissioners by December 31, 1961; and that the subject be again considered at the 1962 meeting.

Domicile

The draft Act appearing at page 108 of the 1960 Proceedings was examined and after consideration and discussion the following resolution was adopted:

RESOLVED that the draft Domicile Act as set out on page 108 of the 1960 Proceedings be referred back to the British Columbia Commissioners to incorporate in it the changes agreed upon at this meeting; that copies of the draft Act as so revised be sent to each of the local secretaries for distribution by them to the members of the Conference in their respective jurisdictions; and that if the draft 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, 1961, it be recommended for enactment in that form.

NOTE:—Copies of the revised draft were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30, 1961. The draft Act as adopted and recommended for enactment is set out in Appendix M, page 139).

Variation of Trusts

Mr. Brissenden presented the report of the British Columbia Commissioners (Appendix N, page 140).

The report, having been considered and discussed, the following resolution was adopted:

RESOLVED that the draft Act as set out in the report of the British Columbia Commissioners be referred back to them to incorporate in it the changes agreed upon at this meeting; that copies of the draft Act as so revised be sent to each of the local secretaries for distribution by them to the members of the Conference in their respective jurisdictions; and that if the draft 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, 1961, it be recommended for enactment in that form.

NOTE:—Copies of the revised draft were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30, 1961. The draft Act as adopted and recommended for enactment is set out in Appendix O, page 142.

FOURTH DAY

(THURSDAY, AUGUST 24TH, 1961)

Seventh Session

9.30 a.m.–12.30 p.m.

Change of Name

Mr. Cross submitted the report of the British Columbia Commissioners (Appendix P, page 143).

Considerable discussion ensued particularly as to the procedure to be followed on an application for a change of name and on the question as to in what official authority to authorize a change should be vested. The following resolution was adopted:

RESOLVED that the Commissioners of each province furnish to the British Columbia Commissioners by December 31, 1961, their answers to and comments on the questions of principle set out in the report of the British Columbia Commissioners and that the British Columbia Commissioners at the 1962 meeting make a further report in the light of the comments and recommendations of the other provinces.

Treaties and Conventions

Mr. Colas read a report on the subject of Provincial Implementation of Treaties and Conventions (see 1960 Proceedings, page 32).

The consensus of the Conference was that the subject was not one that could properly be dealt with by the Conference. It was suggested, however, that the report be received and, if possible, arrangements be made for its publication in the Canadian Bar Review.

Foreign Judgments

Pursuant to the resolution adopted at the 1960 meeting (1960 Proceedings, page 28), Dean Read, on behalf of the Nova Scotia Commissioners, submitted a report on this subject (Appendix Q, page 148) and commented thereon. After discussion, the following resolution was adopted:

RESOLVED,

(*a*) that the report be received;

(*b*) that the Nova Scotia Commissioners be requested to continue a study of a revision of the 1933 Act and in doing so to cooperate with the National Conference on Uniformity of Laws of the United States;

(*c*) that to facilitate such cooperation, a recommendation be made to the plenary session that a representative of the Conference be authorized to attend the next meeting of the National Conference at which a proposed Uniform Foreign Judgments Act is considered; and

(*d*) that the Nova Scotia Commissioners submit a further report at the next meeting of this Section.

Residence Laws of Canada

Mr. Doherty, the Secretary *pro tem*, read a copy of a letter, dated August 16, 1960, from the National Council of Women of Canada, addressed to the Secretary of The Canadian Bar Association, that had been forwarded by him to the Secretary of the

Conference on instructions of the Executive Committee of the Bar Association. The letter from the National Council of Women recited a resolution passed at an annual meeting of that Council, stating as follows:

> "THEREFORE BE IT RESOLVED that the Montreal Council of Women refer to the National Council of Women for study, discussion and submission to the proper authorities *and to the Canadian Bar Association with the request that it be considered by the Commission on Uniformity of Legislation,* the following suggestions as a basis for amendment of Residence Laws in Canada:—
>
> 1. that the fundamental right of Canadian to 'freedom to move' be respected and safeguarded;
> 2. that persons who exercise the right of free movement be placed on an equal footing with all other citizens.
> 3. that since the right of free movement is now being restrained by the existing laws governing 'legal residence', amendments be made which would give all Canadian citizens equal rights to assistance if and when necessary; and furthermore would make possible the provision of immediate social assistance to needy persons wherever they might be when the need arises."

After discussion the following resolution was adopted:

RESOLVED that the Secretary of the Conference advise the Secretary-Treasurer of the Canadian Bar Association that the Conference had considered the resolution of the National Council of Women on this subject and was of the opinion that the subject was not one upon which it was appropriate for the Conference to make any recommendation or take any action.

Reciprocal Enforcement of Maintenance Orders

Mr. Hoyt submitted the report of the New Brunswick Commissioners (Appendix R, page 157) and consideration of it was commenced.

Eighth Session

2.30 p.m.–5 p.m.

Reciprocal Enforcement of Maintenance Orders—(continued)

Following further consideration of this matter the following resolution was adopted:

RESOLVED that the matter of Reciprocal Enforcement of Maintenance Orders be referred back to the New Brunswick

Commissioners with a request that they revise the amendments to the Uniform Reciprocal Enforcement of Maintenance Orders Act considered at this year's meeting in the light of discussions at the meeting and that they submit at the 1962 meeting a revision of the model Act, incorporating these amendments and any others that had been recommended by the Conference since the last revision of the model Act.

FIFTH DAY

(FRIDAY, AUGUST 25TH, 1961)

Ninth Session

9 a.m.–10.30 a.m.

Conference Practice and Procedure

Mr. Bowker raised a question as to the length to which the Conference should go in promoting the enactment of legislation recommended by the Conference. His question led to a lengthy discussion on the activities and practices of the Conference during which the following matters were examined with practically all persons participating:

(*a*) *Staff*—The manner in which the work of the Conference was performed was compared with that of the United States Conference on Uniform State Laws and it was suggested that the Conference should consider the advisability of engaging a full-time staff to do research and drafting of legislation and, possibly, to assist in promoting the adoption of recommended Acts by provincial legislatures. Another suggestion was that an effort be made by groups, to which projects were assigned, to work more closely with law schools in conducting studies and preparing draft legislation. It was recommended as well that members of the Conference endeavour to work as closely as possible with Law Reform Committees in the various provinces.

(*b*) *Finances*—Considerable discussion revolved around the financing of additional staff and the advisability of approaching the Dominion and provincial governments for increases in their contributions to the Conference and of seeking assistance from private business and industry. One proposal was that the Conference obtain the views of the various governments about

their willingness to contribute to the salary of a full-time employee or to contribute to expenses involved in the engagement of persons for special projects.

(*c*) *Promotion of Legislation*—Various suggestions were made respecting methods by which more wide-spread adoption of Model Acts might be achieved. It was suggested that individual representatives should make an effort to ensure that Acts recommended by the Conference were brought to the attention of, and discussed with, members of the government in their jurisdictions. Some felt that progress might be made if the Secretary of the Conference, as a matter of course, brought to the attention of each Attorney General all Acts that were adopted and recommended by the Conference. Regret was expressed that the Canadian Bar Association had discontinued the practice of publishing the Proceedings of the Conference in all issues of the annual proceedings of the Bar Association. One representative proposed that sub-committees of the Conference be set up in each province to carry on promotional work as well as research and drafting between annual meetings.

(*d*) *Distribution of Reports*—Attention was called to delays that had occurred in a distribution of reports on matters that had been referred to special groups of Commissioners. It was considered that the attention of members of the Conference should be called to the recommended standard practice requiring early distribution of reports and a suggestion was made that such reports should be distributed not later than February of each year to enable members of the Conference to obtain the views of judges, practising lawyers, law teachers, and others.

No definite decisions were reached on any of these points or others incidental to them that were touched upon during the discussion. It was agreed, however, that the subjects be referred to the plenary meeting and that the Section recommend, at that meeting, that requests to governments for additional funds should be made only for the purposes of particular projects or objects.

Expropriation

In reply to an inquiry from the President about the present standing of the Expropriation Act, Mr. MacTavish stated that the subject was now at the Select Committee of the Legislature stage in Ontario and that it had presented very difficult problems. The report of the Select Committee had not yet been made. No action by the Conference at this time was recommended.

Bill of Rights

Considerable discussion developed as the result of Mr. Colas' suggestion that the Conference consider the subject of a provincial Bill of Rights. Reference was made to the Conference's practice respecting the conditions that should ordinarily exist before a study was undertaken, to the advisability or otherwise of seeking the views of provincial governments on such an Act, and to the relative propriety and effectiveness of individual Bills of Rights as an alternative to a constitutional amendment. No definite decision resulted from the discussion.

Closing Meeting

Various members of the Section expressed their thanks and appreciation to Mr. Teed for the fairness and dispatch with which he, as chairman, conducted the meetings of the Section, and a formal vote of thanks was extended to him.

MINUTES OF THE CRIMINAL LAW SECTION

The following members attended:

W. C. BOWMAN, Q.C., Director of Public Prosecutions, Province of Ontario,

MISS C. WYSOCKI, Solicitor, Department of the Attorney General, Province of Ontario, and

G. A. MARTIN, Q.C., of Toronto, representing Ontario;

YVES LEDUC, Q.C., Assistant Deputy Attorney General (Montreal), representing Quebec;

G. R. FOSTER, Q.C., of Charlottetown, representing Prince Edward Island;

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

H. W. HICKMAN, Q.C., Senior Counsel, Department of the Attorney General, representing New Brunswick;

O. M. M. KAY, C.B.E., Q.C., Deputy Attorney General, representing Manitoba;

R. S. MELDRUM, Q.C., Deputy Attorney General, representing Saskatchewan;

H. J. WILSON, Q.C., Deputy Attorney General, representing Alberta;

GILBERT D. KENNEDY, S.J.D., Deputy Attorney General, representing British Columbia;

T. D. MACDONALD, Q.C., Assistant Deputy Minister of Justice,

J. C. MARTIN, Q.C., of the Department of Justice, and

R. R. PRICE, of that Department, representing the Department of Justice of Canada.

Chairman—G. R. FOSTER, Q.C.

Secretary—T. D. MACDONALD, Q.C.

The Criminal Law Section considered an agenda comprising thirty-three working papers, that had been prepared in the Criminal Law Section of the Department of Justice, and a considerable number of other topics that were added to the agenda informally. Consideration of the agenda was completed, the dispositions of the various matters being as follows:

1. *Juvenile Delinquency* (Working Paper No. 33)

The Commissioners endorsed the principle of the Juvenile Delinquents Act and expressed the view that it is working out reasonably well in practice. They made or reaffirmed the following recommendations on specific points:

(*a*) That the age referred to in section 2(1)(a) should be sixteen years and uniform throughout Canada.

(*b*) That as soon as possible the Act should be brought into force in all parts of Canada in which it is not yet in force.

(*c*) That section 421(3) of the Criminal Code should be made to apply to juvenile delinquencies.

(*d*) That the appeal provisions in the Juvenile Delinquents Act should be improved, and assimilated, to the extent practicable, to appeals under the Criminal Code relating to indictable offences or summary conviction offences according to whether the delinquency arose out of what would have been an indictable offence or a summary conviction offence.

(*e*) That the offence of contributing to juvenile delinquency, under section 33 of the Juvenile Delinquents Act, should be transferred into the Criminal Code.

(*f*) That the maximum fine referred to in section 20(1)(c) of the Juvenile Delinquents Act should be increased to $50.00.

(*g*) That the Juvenile Delinquents Act should be amended to permit contraventions of certain provincial statutes such as a Motor Vehicle Act to be charged, in the alternative, as a delinquency under the Juvenile Delinquents Act or a contravention of the provincial statute in the ordinary way.

(*h*) That consideration should be given to creating, under the Juvenile Delinquents Act, a charge or status of being an incorrigible.

(*i*) That provision should be made in the Juvenile Delinquents Act for appropriate court procedure.

(*j*) That provisions should be made for the transfer of a

juvenile delinquent from an industrial school to a jail where such transfer is required for purposes of security or in the best interests of the juvenile.

(*k*) That if section 20 of the Juvenile Delinquents Act is found to be inadequate to permit all the services of a counselling and advisory character that are desirable, it should be amended accordingly.

(*l*) That section 22(1) of the Juvenile Delinquents Act should be reviewed with a view to placing greater responsibility upon a parent or guardian.

2. *The Lord's Day Act* (Working Paper No. 15)

The Commissioners considered The Lord's Day Act in the light particularly of the case of *Gordon* v. *Regina*, 1961 S.C.R., 592 relating to coin operated laundromats. Without approving the policy of the law laid down in this case the Commissioners nevertheless referred to the powers of the provincial legislatures to except activities from the operation of the Act, and recommended that the Act be not changed at the present time.

3. *Substitute Verdicts* (Working Papers Nos. 22 and 32)

The Commissioners recommended that the provision, formerly contained in section 1016(2) of the old Code, whereby the court of appeal was empowered, upon quashing a conviction, to substitute a different verdict which the trial court might have rendered, be restored and that a similar power be conferred upon the Supreme Court of Canada.

4. *Orders Prohibiting Driving* (Working Paper No. 31)

The Commissioners recommended that no action be taken to place in the hands of provincial authorities, instead of the Parole Board, the power to relieve against orders imposed under section 225 of the Criminal Code prohibiting a person convicted of certain offences involving motor vehicles from driving a motor vehicle.

5. *Stay of Proceedings* (Working Paper No. 18)

The Commissioners, in the light of further discussion, and for the time being, recommended against implementation of a recommendation previously made to the effect that the Criminal Code be amended to authorize a prosecutor, with the consent of the court, to withdraw an information in proceedings under Part XVI or Part XXIV of the Criminal Code.

6. *Probation and Suspended Sentence* (Working Papers Nos. 5, 8 and Supplements thereto and Working Paper No. 32)

The Commissioners considered various proposals relating to probation and suspended sentence and made the following recommendations:

(*a*) An accused should not be charged as a subsequent offender on the basis of a conviction occurring more than five years previously.

(*b*) That section 638 of the Criminal Code be amended so as to remove the restriction whereby a court may not ordinarily suspend the passing of sentence on a person who has been previously convicted.

(*c*) That sections 638(4) and 639(4) be amended to permit the court to place on probation again a person who has been brought before it for a breach of the conditions on which the passing of his sentence has been suspended.

(*d*) That the definition of peace officer in section 2(30) of the Criminal Code be amended to include probation officers appointed under the Juvenile Delinquents Act and provincial statutes.

(*e*) A recommendation in favour of the principle that, where a penalty upon conviction for an offence is imposed upon a person already bound by a recognizance, such penalty will not affect the conditions of the recognizance except in so far as is made necessary by implementation of the penalty unless such person is charged and sentenced expressly for the breach of his recognizance.

(*f*) In affirmation of a previous recommendation, that the time limitation contained in section 638(2) during which a recognizance may be kept in force should be removed.

(*g*) A recommendation that section 637 of the Criminal Code be amended to provide that a person who violates a recognizance entered into under that section shall be guilty of a summary conviction offence or an indictable offence depending upon whether the original offence was summary conviction or indictable; and to provide procedure for forfeiting the recognizance; such remedies to lie in the alternative only.

The Commissioners recommended against various other proposals contained in these working papers.

7. *Diplomatic Immunity* (Working Paper No. 7)

The Commissioners approved the principle of Federal legisla-

tion which would permit the bringing to trial, in Canada, of government officials who committed offences outside of Canada while abroad on government business.

8. *Judge's Report on Appeal* (Working Paper No. 20)

The Commissioners recommended that the provision contained in section 588 of the Criminal Code, requiring the trial judge or magistrate to furnish a report to the Court of Appeal in the case of an appeal from conviction in respect of an indictable offence, be retained and that the section be amended to specify that a convicted person who appeals is entitled to have access to such report in the same manner as he has access to other parts of the record.

9. *Waiver of Preliminary Inquiry* (Working Paper No. 21)

The Commissioners recommended that the Criminal Code be amended to provide expressly that an accused person has the right, but only with the consent of the Crown, to waive a preliminary inquiry and proceed directly to trial.

10. *Trial by Superior Court Judge Without Jury* (Working Paper No. 30)

The Commissioners saw no objection to the extension, to the Yukon and Northwest Territories, of section 417 of the Criminal Code which permits an accused charged with an indictable offence in the Province of Alberta to elect trial by a judge of the Superior Court of Criminal Jurisdiction without a jury but recommended against the extension of this section to the other provinces.

11. *Issuing Authority for Subpoenas* (Working Paper No. 27)

The Commissioners recommended that the Criminal Code be amended to provide that persons duly appointed to act as clerks to magistrates and justices presiding under Part XV—Preliminary Inquiry, Part XVI—Summary Trial and Part XXIV—Summary Conviction Trial, have authority to issue subpoenas for the attendance of witnesses before such justices and magistrates where the appointment of such clerks, by the province, contemplated the exercise of such authority.

12. *Worthless Cheques Tendered Employees* (Working Paper No. 28)

The Commissioners recommended against an amendment to the Criminal Code to make it a criminal offence for an employer to give an employee a worthless cheque for work already performed.

13. *Habitual Criminals* (Working Paper No. 4)

The Commissioners recommended against a number of proposals in connection with Habitual Criminals relating to proof of previous convictions, proof of identity and the test of being an Habitual Criminal.

14. *Public Mischief* (Working Paper No. 1)

The Commissioners recommended against a proposal to amend section 120 of the Criminal Code to include false self-accusations and false acts such as pretended suicides.

15. *Meaning of "Publishes"* (Working Paper No. 2)

The Commissioners recommended that section 306(1) of the Criminal Code, relating to the publication of false advertisements, be amended to make clear that it covers the publishing of a statement by other means than newspaper by including the words "circulates or distributes or causes to be circulated or distributed".

16. *Definition of "Company"* (Working Paper No. 3)

The Commissioners recommended that the definition of the expression "company" in section 343(2) of the Criminal Code should be clarified by substituting the word "includes" for the word "means"; by adding the words "partnership, association, society"; by the addition of words to cover "a person representing himself as a partnership, association, society, syndicate, body corporate or company"; and that section 343(1)(a) be also amended to include a reference to "members of" as well as "shareholders or partners in" a company.

17. *Bribery and Corrupt Practices* (Working Paper No. 6)

The Commissioners considered a number of amendments that were proposed to be made to sections 99 to 104 inclusive of the Criminal Code relating to bribery of persons holding public office and recommended that consideration be given to a revision of these sections to ensure that all relevant situations are adequately covered and appropriate penalties provided.

18. *Right to Address Jury Last* (Working Paper No. 9)

The Commissioners recommended that section 558 of the Criminal Code be amended to provide that, where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, unless the trial judge in his discretion permits the Attorney General or Crown Counsel to reply.

19. *Firearms* (Working Paper No. 19)

The Commissioners had before them a scheme of revision of the sections of the Criminal Code relating to offensive weapons including firearms which had been prepared, for purposes of discussion, by a working group. The Commissioners restricted themselves to recommending that the present legislation be tightened in the following respects:

(*a*) Extend section 84 to include pistol, revolver or any other offensive weapon for which the person does not have a permit.

(*b*) Amend section 84 to make the offence thereby created punishable on indictment as well as summary conviction.

(*c*) Extend section 98 to include starting pistols, air pistols and tranquilizer guns and substitute the expression "restricted weapon" for the expression "firearm".

(*d*) Increase the age limit mentioned in section 88(1) and (2) to sixteen years.

(*e*) Amend the firearms provisions to make clear that conditions relating to area and use may be attached to a permit to carry a pistol or revolver.

(*f*) Amend the firearms provisions to make clear that different categories of local registrars, some with authority to issue permits and some with authority to accept registrations only, may be appointed.

(*g*) Amend section 94(5) to provide that a permit may be good for a period not exceeding one year from the date of its issue.

(*h*) Amend the firearms provisions to provide that contravention of a condition of a permit is punishable on summary conviction as well as by possible revocation of the permit.

(*i*) Amend section 97(3) to narrow the classes of persons, particularly those referred to in (c), who are exempt from the requirements of certain of the firearms sections.

20. *Bail* (Working Paper No. 10)

The Commissioners recommended that section 463 of the Criminal Code be amended to permit bail to be granted by, in addition to the functionaries mentioned therein, a magistrate other than a magistrate as defined in section 466 or a justice of the peace, who has actually dealt with the matter.

21. *Bail* (No Special Working Paper)

The Commissioners further recommended, in respect of bail, that section 463 be amended to authorize a judge of the county or district court to review the refusal of bail by a magistrate or justice, in cases not now within the exclusive jurisdiction as to bail of a Superior Court of Criminal Jurisdiction and to permit the refusal by a county or district court judge to grant bail in such circumstances to be reviewed by a Superior Court of Criminal Jurisdiction.

22. *Waiver of Jurisdiction* (Working Paper No. 11)

The Commissioners recommended that section 697 or 698 of the Criminal Code be amended to provide that, after plea but before the hearing has commenced, a magistrate who is not the magistrate who took the plea, but is designated expressly or by implication to preside over the summary conviction court in question, may take the hearing and other subsequent proceedings.

23. *Custody and Treatment of Insane Persons* (Working Papers Nos. 13 and 32)

The Commissioners recommended that the Federal authorities give study and consideration to a proposal whereby the case of a person committed as insane, mentally ill, mentally deficient or feeble minded under a Lieutenant-Governor's warrant, pursuant to sections 523 to 527 of the Criminal Code, would be reviewed at the instance of such person or another person acting on his behalf or the Crown, the application for review to be supported by psychiatric evidence and to be made to the Chief Justice of the Superior Court of Criminal Jurisdiction for the province or such other Judge of that Court as the Chief Justice might designate.

The Commissioners also recommended that section 451 of the Criminal Code be amended to provide that a justice, on a preliminary inquiry, may make a second or subsequent remand of an accused for mental observation under paragraph (c) without the accused being present before the justice.

The Commissioners recommended against a proposal to amend section 451 further to empower a justice, on a preliminary inquiry, to direct that an accused, whom the justice is satisfied to be mentally ill, be remanded in custody until the pleasure of the Lieutenant-Governor of the province is known, the Commissioners being of the opinion that this position is sufficiently covered.

24. *Non-Juridical Days* (Working Paper No. 12)

The Commissioners recommended against amending the Criminal Code or the Canada Evidence Act for the purpose of defining precisely therein what are the non-juridical days.

25. *Murder* (Working Paper No. 14)

The Commissioners recommended against an amendment to section 202(a) of the Criminal Code relating to the case where one person intentionally does an act to another person which, in the course of a short time will likely result in the other person's death, but then by accident does another act which causes the other person's death immediately.

26. *Contempt of Court* (Working Papers Nos. 16 and 32)

The Commissioners recommended against a proposal to amend the Criminal Code to provide for an appeal against a conviction for a contempt committed in the face of the court.

The Commissioners further recommended against the enactment of a new section of the Criminal Code making it an offence, without lawful excuse, to create a disturbance or hinder the maintenance of order in a court of justice.

The Commissioners further recommended that the procedure governing the punishment of contempts in criminal cases, not committed in the face of the court, be simplified and set out in the Criminal Code and be by way of notice to show cause why a person should not be found in contempt.

27. *Disposal of Exhibits* (Working Paper No. 17)

The Commissioners recommended that the Criminal Code be amended to confer upon the courts authority to authorize the forfeiture, destruction, return or other appropriate disposition of exhibits in all cases not now provided for.

28. *Election of Trial Without Jury* (Working Paper No. 23)

The Commissioners recommended that the provisions of Part XV of the Criminal Code relating to elections for trial without jury be reviewed

(a) To permit an accused person who is charged before a justice, not being a magistrate under Part XVI, to elect trial before such a magistrate in respect of an offence over which such magistrate exercises consent jurisdiction;

(b) To provide that the election referred to in section 450(2) of the Criminal Code be put to an accused at the beginning of the proceedings therein referred to;

(c) To provide that, where the accused has an option as to the method of trial it be explained to him at the beginning of the proceedings what such option is, for example, that he may elect to be tried before a magistrate or may elect a preliminary inquiry to be followed by trial before a judge or judge and jury.

29. *Certiorari* (Working Paper No. 24)

The Commissioners considered a proposal that section 682 of the Criminal Code be amended to exclude, from the cases in respect of which a conviction or order may not be removed by *certiorari*, the case of a conviction resulting from proceedings which are invalid *ab initio* by reason, for example, of the information disclosing no offence known to the law. The Commissioners recommended that the question whether this case is in fact within section 682 should be left to be decided by the jurisprudence and that section 682 be not amended at the present time.

30. *Search Warrants* (Working Paper No. 25)

The Commissioners considered a number of proposals for amendment of the Criminal Code in regard to search warrants:

(1) That section 429(1) be amended to provide expressly that it is not necessary to set out in the Information, leading to a search warrant, the source of the information on the basis of which the search warrant is sought;
(2) That section 429(1) be further amended to provide for a search warrant to be issued in respect of a child believed to have been abducted;
(3) That section 429 be amended to make clear that a search warrant may be issued thereunder in respect of an offence not against the Criminal Code;
(4) That section 432 be amended to provide that the maximum period of three months, during which articles seized under or in connection with a search warrant may be detained without instituting proceedings, may be extended by order of the court; and
(5) That section 429 should be amended to require that the things for which the search is to be made should be precisely defined in the search warrant.

The Commissioners recommended against the first mentioned proposal as being unnecessary; they recommended that the second proposed recommendation should not be made without further evidence as to its necessity, for fear that it would be abused;

they recommended the third amendment in principle, subject to further consideration as to its practical necessity; they recommended in favour of the fourth proposal; and in respect of the fifth proposal they recommended no action.

31. *Arrest on Request From Other Jurisdiction* (Working Paper No. 26)

The Commissioners recommended that section 438 be amended to cover expressly the case of a person arrested in one jurisdiction at the request of police in another jurisdiction by providing that a person so arrested shall be taken immediately before a magistrate who would be empowered to remand such person for successive periods of three days until the arrival of a warrant from the other jurisdiction and to provide that no bail should be available for such person.

32. *Bail* (Working Paper No. 29)

The Commissioners considered a number of proposed amendments to the bail sections as follows:

(1) That sections 451 and 463 of the Criminal Code be amended to permit an accused to be released on his own oral recognizance;

(2) That section 451(b)(i) be amended to permit an adjournment of a preliminary inquiry for a period longer than eight days if the sureties do not object, in lieu of the present provision that the sureties must positively consent;

(3) That section 676 be amended to provide expressly that a person may not be released, when under arrest on one charge, on a recognizance given in respect of another charge and upon which there has been default; and

(4) That section 677 be amended to provide expressly that, where the court refuses an application to forfeit a recognizance, such refusal vacates the recognizance and discharges the sureties and the issue thereby becomes *res judicata*.

The Commissioners decided to make no recommendation in respect of the first proposal, recommended the second proposal in principle, recommended against action in respect of the third proposal and made no recommendation in respect of the fourth proposal.

33. (Working Paper No. 32)

Minimum Sentences

The Commissioners recommended that, so far as possible, minimum sentence provisions be omitted from all Federal Statutes.

Fines in Lieu of Imprisonment

The Commissioners considered a proposal that the Criminal Code be amended to permit the court to impose a fine in lieu of any other authorized punishment in all cases of convictions for indictable offences except capital cases and recommended that the principle of permitting a fine to be imposed in lieu of imprisonment should be extended wherever appropriate.

Admission of Facts in Course of Trial

The Commissioners recommended against amending section 708(5) of the Criminal Code to permit admissions of fact to be made on behalf of a defendant by his counsel in summary conviction cases.

The Commissioners recommended that section 619 be amended to permit evidence taken at a previous trial to be read as evidence in a subsequent trial, before the same court or judge, with the consent of the prosecutor and the accused.

Appeals Against Orders of Confiscation

The Commissioners recommended against a proposal to amend the Criminal Code to provide for an appeal to the provincial court of appeal from an order of confiscation under section 171.

Contradictory Evidence

The Commissioners recommended that section 5 of the Canada Evidence Act, which provides that a witness is not excused from answering a question on the ground that the answer may tend to criminate him but may be given the "protection of the court" against his answer being used against him in any criminal proceedings except for perjury, be amended to except also from such protection criminal proceedings under section 116 of the Criminal Code relating to the giving of contradictory evidence.

34. *Prisons and Reformatories Act*

The Commissioners considered four proposed amendments to the Prisons and Reformatories Act as follows:

(1) To enable a provincial authority to grant to prisoners confined in provincial institutions for breaches of the Criminal Code short remissions of sentence on compassionate grounds.

(2) To enable a provincial authority to remit pecuniary penalties received by the provincial or a municipal authority under the Criminal Code.
(3) To enable a provincial authority to direct the transfer of prisoners from any provincial institution to any other such institution in the same province.
(4) To provide machinery for the transfer of prisoners from a provincial institution in one province to a provincial institution in another province.

The Commissioners, upon being polled, showed the representatives of seven provinces in favour of the first proposal and one opposed; the representatives of three provinces in favour of the second proposal, the representatives of three provinces against it and the representatives of two provinces neutral; the representatives of seven provinces in favour of the third proposal; and the representatives of six provinces in favour of the fourth proposal. The Commissioners made no recommendations.

35. *Extradition Act—Fugitive Offenders Act*

The Commissioners, at the suggestion of the Secretary, discussed the working out of the Fugitive Offenders Act and the Extradition Act, but no recommendations were made.

36. *Programming Committee*

A Committee comprising the Chairman, Secretary and a third member to be selected by the Chairman was appointed to consider the program for next year and the composition of the Criminal Law Section.

37. *Magistrates and District Court Judges*

The Commissioners referred briefly to the position of District Court Judges under the Criminal Code but no recommendations were made on this subject.

38. *Election of Officers*

Mr. H. W. Hickman, Q.C., was elected Chairman and Mr. T. D. MacDonald, Q.C., was elected Secretary for the ensuing year.

MINUTES OF THE CLOSING PLENARY SESSION

(FRIDAY, AUGUST 25TH, 1961)

11 a.m.–11.45 a.m.

The plenary session resumed with the President, Mr. MacDonald, in the chair.

Report of Criminal Law Section

Mr. Hickman, in the absence of Mr. Foster, Chairman of the Criminal Law Section, reported orally on the work of the Section and filed a written report (Appendix S, page 168). For the ensuing year, the Chairman of the Section would be Mr. Hickman and the Secretary, Mr. T. D. MacDonald, the representative of the Department of Justice.

Report of Auditors

Mr. Alcombrack reported that he and Mr. Tallin had examined the statement of the Treasurer and found it to be correct and had so certified.

Report of the Committee on the Constitution

The report of this Committee (Appendix D, page 54) was again considered and upon motion of Mr. MacTavish, seconded by Mr. Wilson, it was resolved that the report be adopted.

Report of the Committee on Finances

The Committee on Finances, composed of Mr. Kennedy, Mr. Teed, and Mr. T. D. MacDonald, who had been appointed at the opening plenary session, submitted their report (Appendix T, page 169). On motion the report was adopted.

Banking and Signing Officers

The following resolution respecting the signing of documents relating to banking was passed:

RESOLVED that the Treasurer from time to time be authorized to attend to the banking of the Conference, to sign cheques and other banking documents, and that, in the event of a vacancy in the office of Treasurer or of the incapacity of the Treasurer, the Secretary be authorized to perform these functions, and, in the event of a vacancy in the office of Secretary or of his incapacity, the Executive be empowered to appoint another person to act.

Printing and Consolidation of Uniform Acts

The decision of the 1960 meeting of the Conference (1960 Proceedings, page 46) that a consolidation of uniform Acts be printed was re-affirmed and it was decided that the consolidation should include Acts recommended by the Conference in 1960 and 1961.

Next Meeting

After consideration of the invitations from the Commissioners of Nova Scotia, Prince Edward Island and New Brunswick to hold the 1962 meeting in their provinces, it was decided that the meeting should be held in Saint John, New Brunswick, from Monday to Friday, inclusive, of the week preceding the 1962 meeting of the Canadian Bar Association.

Foreign Judgments

On recommendation of the Uniform Law Section, the following resolution was adopted:

RESOLVED that a representative of the Conference be authorized to attend the next meeting of the National Conference of Commissioners on Uniform State Laws of the United States at which a proposed Uniform Foreign Judgments Act is considered, and that his report be incorporated in a report to be submitted by the Nova Scotia Commissioners to the Uniform Law Section at its next meeting.

Conference Practice and Procedure

Mr. Teed brought to the attention of the meeting the discussions of the Uniform Law Section concerning the engagement of persons to assist in preparation of legislation and mentioned, particularly, Mr. Ziegel's article in the Canadian Bar Review. He reported that the general feeling of the Section was that, on the next occasion when the Conference was in need of funds in order to engage outside assistance, the Governments of Canada and of the provinces should be asked to make an additional contribution for the purpose. Some discussion followed and it was agreed that the matter should stand over for consideration at the next plenary session of the Conference.

Press Release

As a result of a suggestion that it would be desirable that greater publicity should be given to the work of the Conference, Mr. Meldrum was requested to convene a committee to prepare an appropriate press release at the conclusion of the meeting.

Appreciations

Dean Bowker, Chairman of the Resolutions Committee, moved the following resolution which was duly seconded and unanimously adopted:

RESOLVED that the Conference express its sincere appreciation:

(*a*) to the Regina Bar Association for the reception at the Hotel Saskatchewan on Monday evening;

(*b*) to the Attorney General and the Government of Saskatchewan for the dinner at the Hotel Saskatchewan on Monday evening and for the provision of excellent facilities in the Court House for meetings of the Conference;

(*c*) to Mr. and Mrs. E. C. Leslie for their entertainment of wives of members of the Conference at Acadia Lodge at Regina Beach on Tuesday afternoon and for their hospitality to members and wives at dinner;

(*d*) to the Nova Scotia Commissioners for their luncheon at the Drake Hotel on Wednesday noon;

(*e*) to the Law Society of Saskatchewan for the reception and dinner at the Bell City Motel on Wednesday;

(*f*) to the Lieutenant Governor of Saskatchewan the Honourable Frank L. Bastedo and Mrs. Bastedo for the luncheon on Friday;

(*g*) to the Assistant Commissioner, Royal Canadian Mounted Police, for the tour of the barracks and tea on Friday afternoon;

(*h*) to Mr. and Mrs. D. M. Tyerman for the reception at their home on Friday afternoon;

(*i*) to the wives of the Saskatchewan Commissioners for their lavish kindness and hospitality to the wives of members of the Conference including the coffee party given by Mrs. B. L. Strayer and Mrs. W. G. Doherty on Tuesday morning, the luncheon given by Mrs. R. S. Meldrum and Mrs. J. H. Janzen on Wednesday, and the extensive program of sight-seeing around the city;

(*j*) to Mrs. J. L. McDougall for the tea for the wives of members of the Conference at her home on Wednesday afternoon;

(*k*) to Mrs. Karl Petersmeyer for the entertainment of the wives of members of the Conference at her home on Wednesday afternoon;

(*l*) to Mrs. Neil and to Mrs. Solomon for their hospitality to

members of the Conference and their wives on Tuesday afternoon and evening at Regina Beach;

(*m*) to Mrs. F. H. Barlow for the coffee party for the wives of members of the Conference at the Hotel Saskatchewan on Wednesday morning;

(*n*) to Mrs. G. D. Kennedy and Mrs. P. R. Brissenden for the coffee party for the wives of members of the Conference at the Hotel Saskatchewan on Thursday morning;

(*o*) to the Saskatchewan Commissioners for their excellent arrangements for the meeting and for their hospitality throughout;

AND BE IT FURTHER RESOLVED that the Secretary of the Conference be directed to send a copy of this resolution to the interested parties.

Report of Nominating Committee

Mr. Fournier, Chairman of the Nominating Committee named at the opening plenary session, submitted the following nominations for the officers of the Conference for the year 1961-62:

Honorary President.... .J. A. Y. MACDONALD, Q.C., Halifax
President.....J. F. H. TEED, Q.C., Saint John
1st Vice-President.....E. A. DRIEDGER, Q.C., Ottawa
2nd Vice-President.. ..O. M. M. KAY, Q.C., Winnipeg
Treasurer.....M. M. HOYT, Fredericton
Secretary..... .....H. F. MUGGAH, Q.C., Halifax

The report of the Committee was adopted and those nominated were declared elected.

Close of Meeting

The President, Mr. MacDonald, on behalf of the visiting members of the Conference, expressed their thanks to the Saskatchewan Commissioners for the excellent arrangements that they had made for the meeting and for hospitality throughout.

Mr. Justice Barlow spoke for the members of the Conference in appreciation of the efforts and services of the President, Mr. MacDonald, in exercising the office of President during the past year.

On motion of Mr. MacTavish, seconded by Mr. Teed, there was recorded a vote of thanks to Mr. Doherty for acting as Secretary pro tem in the absence of Mr. Muggah.

Before withdrawing from the chair, the President, Mr. MacDonald, expressed his gratitude to Mr. Teed for acting as

Chairman of the Uniform Law Section and to the other officers and members of the Conference for their diligence and co-operation during his term of office.

The new President, Mr. Teed, took the chair and addressed the meeting briefly, thanking the members for the honour they had conferred upon him by electing him to the office and undertaking to use his best efforts to maintain the high standards that had been set by his predecessors.

At 11.45 a.m. the meeting adjourned.

APPENDIX A

(*See page 17*)

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. Report of Committee on Constitution (1960 Proceedings, pp. 20, 33).
7. Government Contributions—Report of Special Committee (see 1960 Proceedings, page 46).
8. Appointment of Nominating Committee.
9. Publication of Proceedings.
10. Next Meeting.

PART II

UNIFORM LAW SECTION

1. Amendments to Uniform Acts—Report of Mr. Alcombrack (see 1955 Proceedings, page 18).
2. Bulk Sales—Report of Alberta Commissioners (see 1960 Proceedings, Page 31).
3. Change of Name—Report of British Columbia Commissioners (see 1960 Proceedings, page 32).
4. Devolution of Estates Act—Report of Saskatchewan Commissioners (see 1960 Proceedings, page 32).
5. Domicile—Report of British Columbia Commissioners (see 1960 Proceedings, page 29).
6. Evidence, Uniform Rules of—Report of Newfoundland Commissioners (see 1960 Proceedings, page 25).
7. Fatal Accidents Act—Report of Manitoba Commissioners (see 1960 Proceedings, page 29).
8. Federal-Provincial Committee on Uniformity of Company Law—Progress Report (see 1960 Proceedings, page 23).

9. Foreign Judgments—Report of Nova Scotia Commissioners (see 1960 Proceedings, page 28).
10. Foreign Torts—Report of Special Committee (see 1960 Proceedings, page 28).
11. Highway Traffic and Vehicles (Responsibility for Accidents) —Report of Nova Scotia Commissioners (see 1960 Proceedings, page 31).
12. Innkeepers—Report of Nova Scotia Commissioners (see 1960 Proceedings, page 26).
13. Judicial Decisions affecting Uniform Acts—Report of Dr. Read (see 1951 Proceedings, page 21).
14. Legislative Assembly—Report of Alberta Commissioners (see 1960 Proceedings, page 24).
15. Reciprocal Enforcement of Maintenance Orders—Report of New Brunswick Commissioners (see 1960 Proceedings, page 31).
16. Residence Laws in Canada—Resolution of Montreal Council of the National Council of Women—added at request of Executive Committee of Canadian Bar Association.
17. Survival of Actions—Report of Alberta Commissioners (see 1960 Proceedings, page 32)
18. Treaties and Conventions—Provincial Implementation—Report of Mr. Colas (see 1960 Proceedings, page 32).
19. Variation of Trusts—Report of British Columbia Commissioners (see 1960 Proceedings, page 30).
20. Wills—Report of Nova Scotia Commissioners (see 1960 Proceedings, page 32).
21. New Business.

PART III

CRIMINAL LAW SECTION

The Criminal Law Section will discuss proposals that, since the last meeting, have been received in the Department of Justice for amendment of the Criminal Code. Working papers have been distributed.

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 17*)

TREASURER'S REPORT

FOR YEAR 1960-1961

Balance on hand—September 2nd, 1960.. $6,478.55

RECEIPTS

Province of Alberta.....	$ 200.00	
Province of Newfoundland....	200.00	
Province of Prince Edward Island.....	100.00	
Province of Saskatchewan	200.00	
Province of Manitoba.....	200.00	
Province of New Brunswick ..	200.00	
Province of Quebec.....	200.00	
Government of Canada.....	200.00	
Province of Nova Scotia.....	200.00	
Province of Ontario.....	200.00	
Province of British Columbia .	200.00	
Bar of the Province of Quebec	100.00	
		2,200.00
Bank Interest—October 31, 1960		54.39
Bank Interest—April 30, 1961 ..		87.42
Rebate of Sales Tax.....		

DISBURSEMENTS

Gratuities (Quebec).....		$ 50.00
Wm. MacNab & Son Ltd.—re Printing 1960 Agenda.....		25.15
Wm. MacNab & Son Ltd.— Printing letterheads.....		11.43
Clerical Assistance, Honorariums		125.00
National Printers Ltd. re:		
Printing Proceedings 42nd Annual Meeting.....$1,430.00		
Typing and checking envelopes 15.50		

Sales Tax..... ...	159.01	
Mailing and express charges ..	21.43	
	$1,625.94	1,625.94
CASH IN BANK.... . ..		6,982.84
	$8,820.36	$8,820.36

HARRY P. CARTER, Treasurer

August 2, 1961.

Audited and found correct,

(signed) W. C. ALCOMBRACK

R. H. TALLIN

APPENDIX C

(*See page 17*)

SECRETARY'S REPORT

1961

Proceedings

In accordance with the resolution passed at the 1960 meeting of the Conference (1960 Proceedings, page 20), the Proceedings of that meeting were prepared, printed and distributed among the members of the Conference and others whose names appear on the Conference mailing list. Arrangements were made with the Secretary of the Canadian Bar Association for the supplying to him, at the expense of the Association, of a sufficient number of copies to permit the inclusion of the Proceedings in the copies of the Year Book of the Canadian Bar Association that are distributed among the Council.

An application has been made for the refund of sales tax, totalling $159.01, paid on the printing of the 1960 Proceedings, and it is expected that in due course the refund will be received.

From time to time requests have been received for back numbers of the Proceedings to complete sets in libraries. Excepting for the Proceedings for recent years, the Conference stock of back numbers is practically depleted and many of the requests cannot be met. It would assist greatly in disseminating knowledge of the work of the Conference if the stock of back numbers of Proceedings could be built up again to the point where requests of this sort could be complied with. For this purpose, I would suggest that members of the Conference have a check made in their libraries and forward to the Secretary any spare copies of back numbers of Proceedings that they find there.

Consolidation of Uniform Acts

Shortly after the 1960 meeting, I obtained an estimate of the cost of printing the consolidation of Uniform Acts prepared by Mr. Driedger and by Mr. Cross. The estimate indicated that the cost of printing and binding in buckram 250 copies would be in the vicinity of $2750 and for 500 copies in the vicinity of $3450. For the same books with paper covers similar to those used for the annual Proceedings, the cost would be $2525 for 250 books or $3000 for 500. It occurred to me that it would be desirable to obtain quotations from more than one source before actually

placing the order, but at the time of preparing this report I have not obtained the additional quotations.

Water Protection Legislation

During the course of the year I had correspondence with the Joint Committee of the Engineering Institute of Canada and the Canadian Institute of Sewage and Sanitation on the use, conservation and pollution control of water resources. This Committee has been working for some time on this subject and inquired about the possibility of cooperation by the Conference in the preparation of legislation. I undertook to bring the matter to the attention of the Conference for the purpose of ascertaining whether or not the Conference would be prepared to assist in the preparation of legislation to give effect to policies and principles that the Committee ultimately decided should be recommended to the provincial legislatures for adoption. Copies of correspondence are in the files and may be referred to if the Conference decides to consider the matter further.

Place of Meeting, 1962

In January of this year I received from the Secretary-Treasurer of the Barristers' Society of New Brunswick an invitation from the Council of that Society to the Conference to hold its 1962 meeting at Fredericton. I advised the Secretary-Treasurer that I would bring the invitation to the attention of the meeting and let him know as soon as possible of the Conference's decision.

HENRY F. MUGGAH,
Secretary.

APPENDIX D

(*See pages 17 and 43*)

REPORT OF THE COMMITTEE ON THE CONSTITUTION

At last year's annual meeting of the Conference in Quebec City, the President, in the course of his presidential address, stated (1960 Proceedings, page 19):

> "May I be permitted to suggest that a committee be appointed to study the constitution and suggest the appropriate amendments if any are to be made. At least, we could find out if the 1944 draft was ever adopted."

Mr. Fournier's suggestion was immediately acted upon and a committee composed of Messrs. MacTavish, Wilson, Leslie, Rutherford and Colas was appointed to study the matter (1960 Proceedings, pages 20, 21).

The records of the Conference disclose that at its organization meeting in Montreal in 1918 the recording secretary, Mr. John D. Falconbridge, read a draft temporary constitution which was considered clause by clause and amended in several respects, after which it was adopted as a temporary constitution (1918 Proceedings, pages 7, 8).

At the second annual meeting held in Winnipeg in 1919, Mr. Falconbridge presented an oral report of the Committee on the constitution, which apparently had been set up by executive action, and which recommended that the preparation of a permanent constitution and bylaws be deferred. This report was adopted (1919 Proceedings, page 12).

Leaving the matter of the constitution in this temporary and nebulous position apparently worked out quite satisfactorily for it was not until 1944, some 25 years later, that the subject was again considered officially.

In that year the Canadian Bar Association asked the Conference to consider the establishment of a Criminal Law Section and in order to develop this proposal the Conference adopted the following resolution (1944 Proceedings, page 22):

> "Resolved that the matter of the revision of the constitution to provide for the establishment of the Criminal Law Section be referred to a committee to be appointed by the chairman to report at the next meeting and that for the time being the

members duly appointed by the respective jurisdictions to consider criminal law matters be authorized to meet and consider such matters as they deem expedient and to report to this meeting of the Conference."

Subsequently a committee composed of Messrs. Wilson, Forsyth, Hogg, MacTavish and O'Meara was appointed to implement the resolution.

Later in that 1944 meeting, Mr. O'Meara, on behalf of the committee, stated that the resolution appointing the committee was not sufficiently clear to enable the committee to function satisfactorily, and, to help clear the situation, the following resolution was then passed (1944 Proceedings, pages 30, 31):

"Resolved that the Conference approves the formation of a Criminal Law Section of the Conference.

Resolved that the Constitution Committee consider the revision of the constitution and prepare a draft constitution for submission to the Conference at its next meeting."

In the 1944 Proceedings is set out without comment as an appendix a draft constitution that it would appear had been prepared beforehand and inserted for purposes of convenient study.

At the 1945 meeting the agenda called for the report of the Committee on the Constitution that had been set up the previous year. However, the item was not called and the committee expired, and, although the subject was discussed informally in that and in subsequent years, no further action was taken on the subject of the constitution until last year.

Your present committee has reviewed the history outlined above and after careful consideration of the advantages and disadvantages of a formal constitution unanimously recommends that the Conference continue to function as it has in the past without any formal constitution. We are of the opinion that all matters of a constitutional nature can be dealt with appropriately from time to time as they arise. This system has functioned satisfactorily for some 43 years and we see no reason why it won't operate as satisfactorily in the future as it has in the past.

One further matter requires to be mentioned. On page 33 of the 1960 Proceedings it is noted that Mr. Fournier referred to correspondence that he had received that contained suggestions for enlarging the membership of the Conference to include representatives of faculties of law schools in addition to commissioners

appointed by governments. This suggestion was referred to this committee. This committee is of the opinion that if at any time the Conference should decide as a matter of policy to extend its membership along the lines referred to by Mr. Fournier, or in any other way, it is likely that more appropriate action could be taken without a formal constitution than with one.

Respectfully submitted,

L. R. MACTAVISH,
for the Committee.

APPENDIX E

(*See page 20*)

AMENDMENTS TO UNIFORM ACTS
1961

REPORT OF W. C. ALCOMBRACK

Cornea Transplant

British Columbia and Manitoba enacted the Uniform Act.

Interpretation

Manitoba amended its Act, which is basically the Uniform Act as revised by the Conference in 1953, by adding the following provision to section 20 of the Manitoba Act (section 18 of the Uniform Act):

> (3) Where, under any Act of the Legislature, the time limited for the registration or filing of any instrument, or for the doing of any thing, expires or falls on a day on which, pursuant to any statute or law in force in the province, the office or place in which the instrument or thing is required or authorized to be filed or done, is closed, the time so limited extends to, and the instrument or thing may be filed or done, on the first following day on which the office is open.

The subsection added is to provide for the situation where the time limited for filing documents expires on a Saturday and the office in which the document is required to be filed is closed pursuant to law. This provision is necessary as Saturdays are not declared holidays and, therefore, the time for filing would not be extended under the general provision in clause *k* of section 18 of the Uniform Act:

> (*k*) where the time limited for the doing of anything expires or falls upon a holiday, the time so limited extends to and the thing may be done on the first following day that is not a holiday.

Legitimacy

Saskatchewan enacted the Uniform Act with slight modifications in wording.

Reciprocal Enforcement of Judgments

Manitoba enacted the Uniform Act (as revised in 1958) with the addition of the following provision to section 3:

(8) Where, on an application for registration of a judgment it appears to the court that the judgment is in respect of different matters and that some, but not all, of the provisions of the judgment are such that, if they had been contained in a separate judgment, that judgment could properly be registered under this Act, the judgment in respect of which the application is made may be registered in respect of those provisions but not in respect of any other provisions contained therein; and the court may determine which of the provisions of the judgment are registerable and which are not.

This provision was added to take care of the situation that arose by reason of the judgment of Chief Justice Williams in the case of *Paslowski* v. *Paslowski* (1957) 22 W.W.R. 584. It was held that "judgment" was confined to a final judgment for the payment of money only and excluded judgments which gave other additional relief.

Reciprocal Enforcement of Maintenance Orders

Manitoba enacted the Uniform Act (as revised in 1958) with the addition of the following provisions:

Subsections 2, 3 and 4 were added to section 2 and a subsection 4 was added to section 3 to take care of the difficulties that arose in the *Paslowski* case referred to above and in the case of *Fleming* v. *Fleming* (1959) 28 W.W.R. 241.

Section 2

(2) A maintenance order, or that part of a judgment that relates solely to a maintenance order, does not fail to be a maintenance order within the meaning of clause (*d*) of subsection (1) solely by reason of the fact that the amount payable thereunder may be varied from time to time by the court in the reciprocating state by which the order was made or the judgment given.

(3) Where, in proceedings to enforce against any person a maintenance order registered under this Act or at any other time, it is shown to the court in Manitoba in which the order is registered, or to which a certified copy thereof is sent for registration, that the order has been varied

by the court that made it, either as to the amount thereof or the times, terms, or method of payment thereof, if the court in Manitoba is satisfied by the preponderance of evidence that the order has been so varied it shall record that fact and the nature and extent of the variation, and the maintenance order so registered shall be deemed to be varied accordingly and may be enforced only in accordance with the variation.

(4) Subsection (3) does not apply to a provisional order that may be varied by the confirming court as provided in subsection (5) of section 6.

Section 3

(4) Where, on receipt by the court of a certified copy of a maintenance order for registration, it appears to the court that

(*a*) the order is in respect of different matters or forms part of a judgment that deals with matters other than the maintenance order; and

(*b*) that part of the order or judgment that relates solely to the maintenance order, if it had been contained in a separate order, could properly be registered under this Act;

the order or judgment, a certified copy of which has been received by the court, may be registered in respect of that part thereof that relates solely to the maintenance order but not in respect of any part thereof or any other provisions contained therein; and the court may determine which of the provisions of the order or judgment are registerable as a maintenance order and which are not.

The following clauses were added to section 10 authorizing the Lieutenant Governor in Council to make regulations:

(*b*) for facilitating communications between courts in Manitoba and courts in England or elsewhere in the British Commonwealth or in the Republic of Ireland for the purpose of confirmation of provisional orders pursuant to this Act;

(*c*) providing such forms as may be necessary for the purposes of this Act;

(*d*) without being limited in any way by the foregoing, generally for the purpose of giving effect to the provisions of this Act.

A section was added similar to one enacted by Ontario in 1959 to facilitate arrangements with American States as follows:

14. Where a maintenance order sought to be registered in a court in Manitoba, or a provisional order sought to be confirmed by a court in Manitoba under this Act, or any accompanying document, uses terminology different from the terminology used in Manitoba, the difference does not vitiate any proceedings under this Act.

Newfoundland amended its Act to adopt certain of the provisions of the revised Act of 1958 and enacted the same provision as section 14 of the Manitoba Act above.

W. C. ALCOMBRACK.

APPENDIX F

(*See page 20*)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS 1960

REPORT OF DR. W. 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 1960 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 1960 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.

HORACE E. READ

BILLS OF SALE

Alberta Section 3.

The governing statute in *Althen Drilling Company Limited* v. *Machinery Depot Limited* (1960) 31 W.W.R. 75 was The Bills of Sales Act, R.S.A. 1942, c. 217, Section 3:

> 3. Every sale or mortgage which is not accompanied by an immediate delivery and an actual and continued change of possession of the chattels sold or mortgaged shall be absolutely void as against creditors and as against subsequent purchasers or mortgagees claiming from or under the grantor in good faith, for valuable consideration and without notice, whose conveyances or mortgages have been duly registered or are valid without registration, unless the sale or mortgage is evidenced by a bill of sale duly registered; and the sale or mortgage, and the bill of sale, if any, evidencing the sale or mortgage, shall, as against creditors and such subsequent purchasers or mortgagees, take effect only from the time of the registration of the bill of sale.

Venus Oils Limited made a bill of sale to the plaintiff of some oil casing in December, 1952. In January, 1953 the plaintiff took possession of the casing, stored it in a fenced lot belonging to a

third person and engaged a watchman to look after it. Early in 1955, about two years after the plaintiff took possession, the defendant purchased a part of the casing, which forms the subject matter of the action, from Venus Oils Limited and removed it to the defendant's lot. The bill of sale was never registered by the plaintiff. On appeal to the Appellate Division of the Supreme Court of Alberta, a judgment awarding damages for conversion of the casing was affirmed.

Mr. Justice Macdonald, for the Appellate Division, referred to the statement of the Supreme Court of Canada in *G.T.P. Ry.* v. *Dearborn* [1919] 1 W.W.R. 1005, 58 S.C.R. 315, that the object of the registration requirement in *The Bills of Sale Act* is to secure publicity for the protection of third parties dealing in good faith with a person in actual possession of goods and chattels. He then continued:

> Sec. 14 of *The Bills of Sale Act, supra,* states as follows:
>
> > "14. A sale or mortgage or a bill of sale which under this Act is void, or has ceased to be valid, as against creditors, or purchasers or mortgages, shall not, by reason of the fact that the grantee has subsequently taken possession of the chattels sold or mortgaged, be rendered valid as against persons who became creditors, purchasers or mortgagees before the grantee took possession."
>
> If subsequent possession by a grantee could never render valid a sale, mortgage, or bill of sale, as against creditors, purchasers or mortgagees, there would be no necessity for sec. 14, supra, and, in particular, the inclusion of the last fourteen words of the said section.
>
> In *Heaton* v. *Flood* (1897) 29 OR 87 (referred to by Anglin, J. in *G.T.P. Ry.* v. *Dearborn, supra,* at p. 326, Meredith, C.J. in dealing with the effect of a chattel mortgagee taking possession, states at p. 92:
>
> > "It has unquestionably in many cases been laid down, or stated or assumed, that the taking of possession under a mortgage, which has not been registered in conformity with the provisions of the Act, by the mortgagee before the intervention of the creditor would operate to validate the mortgage as against the creditor; but in none of these cases has it been necessary to determine or has it been decided what the nature of the possession must be in order that it shall have that effect, . . ."
>
> It seems to me that, considering the objects of the statute, it is open for a court to declare that, depending upon the circumstances that exist in any individual case, a change of possession that is actually open, continuous and "reasonably sufficient to afford public notice thereof" may cure, as against subsequent creditors, purchasers or mortgagees, the defect of failing to register a chattel mortgage or bill of sale which is not accompanied by an immediate delivery and an actual and continuous change of possession of the chattels sold or mortgaged.

In the case at bar, there is no suggestion in the evidence that possession of the casing was ever in Venus Oils Ltd. subsequent to January, 1953. This is not a situation whereby an innocent purchaser is lulled into a false sense of security by reason of the fact that the vendor of goods has actual or ostensible possession of goods. Indeed, when the appellant purchased the goods it was a purchase of goods sight unseen and without knowledge of the exact location of the goods.

Whatever defect there may have been in the failure of the respondent to register its bill of sale or take immediate delivery and be in actual and continuous possession of the chattels from the granting of the bill of sale, such defect, in my view, has been cured by the respondent taking actual possession and being in continuous possession of the goods from January, 1953, a period of over two years before the appellant purchased the goods. The change of possession was open and was reasonably sufficient to afford public notice thereof.

In *London Joint Stock Bank* v. *Simmons* [1892] AC 201, at 215, 61 L.J. Ch. 723, Lord Herschell states:

> "The general rule of the law is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless that person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shewn, a good title is acquired by personal estoppel against the true owner. I think that under the circumstances that existed in this case, the appellant purchased the goods at its peril. It made little attempt, if any, to ascertain the ownership of the goods. It did not rely on any ostensible possession of the goods in the vendor—indeed it did not even ascertain the exact location of the goods. To allow the appellant (defendant) good title to the goods would, in my opinion, result in an injustice."

Alberta Section 3(2)

In *Consolidated Finance Company Limited* v. *Alfke and Waldron's Used Car Lot* (1960) 31 W.W.R. 497, the plaintiffs held chattel mortgages on five used motor cars and the mortgagor, a used car dealer, sold them to the defendant, another used car dealer, who purchased them in good faith for valuable consideration and without notice.

The plaintiff did not register the mortgages on two of the cars, (a 1953 Meteor and a 1953 Ford Sedan), until after the defendant purchased them. In an action for a declaration of title and on order for removal and sale of the five vehicles it was held that the sale was not a sale in the ordinary or usual course of the mortgagor's business, and, therefore, the defendant purchaser took subject to the chattel mortgages that had been reg-

istered prior to the sale, but not to the two that were registered after the sale.

Mr. Justice Riley applied subsection (2) of Section 3 of The Bills of Sale Act, R.S.A. 1955, c. 23, which reads:

> "The sale or mortgage and the bill of sale, if any, evidencing the sale or mortgage take effect, as against creditors and such subsequent purchasers or mortgages, only from the registration of the bill of sale."

After remarking that this provision seemed "perfectly clear and unambiguous" to him, he continued:

> There appears to be no reported case in which the said subsection has been judicially considered, but the section plainly indicates that the registration has no retroactive effect, and does not merely establish a point of time that the chattel mortgagee can exercise rights against a subsequent purchaser for value and without notice.

He then distinguished *Klimove* v. *General Motors Acceptance Corporation and Dubuc* (1955) 14 W.W.R. 463, [1955] 2 D.L.R. 215 in which the Appellate Division of the Supreme Court of Alberta held that under *The Conditional Sales Act* a conditional vendor who registers the conditional sale agreement within the 21-day period prescribed by the Act has priority of title over a bona fide subsequent purchaser for value, despite the fact that the agreement was registered after the purchase was made. (See Comment on the *Klimove* case in 1956 Proceedings p. 48.) He said:

> In the case at bar it is of no moment that a search made in the proper registration office was not made with respect to the 1953 Meteor and the 1953 Ford sedan referred to in par. 6 of the statement of facts, because had the defendants searched they would not have found the plaintiff's encumbrance. It is to be emphasized that the prior encumbrance was a chattel mortgage and not a conditional sales agreement, and *The Conditional Sales Act* (which governed Klimove's case) did not contain a section such as sec. 3(2) of the *Bills of Sale Act.*

Manitoba Section 2(h)

In *Brown & Murray Ltd.* v. *North Star Oil Ltd. et al* (1960) 33 W.W.R. 49, the plaintiff entered a contract in the form of a "lien note" to sell goods to one *Setter.* The document contained the following provision, "and I/we hereby agree that if the said goods are not settled for in accordance with the said terms or if default shall be made in any payment, you and your agents are at liberty to remove the said goods; and you, after such removal may sell such goods." Another sentence reserved title in the vendor until all moneys payable had been fully paid. Setter later absconded and all of the goods in his possession were seized under a writ of attachment. He had not paid the plaintiff for some of the goods

that were ordered and delivered after the date on which the contract was made, and the latter claimed these goods as his property from the execution creditors.

It was held that the document was a "floating lien" which as to goods sold after the date of the contract was a chattel mortgage as defined in the Bills of Sale Act, 1957 Man. c. 5, section 2(h) of which reads: " 'Mortgage' includes—an agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to a charge or security on any chattels is conferred".

In the course of stating his reasons for judgment, in favor of the execution creditors, Lindal, C.C.J. said: at 33 W.W.R. 57:

> When Setter sent in a new order and the goods were delivered to him, the outside public such as his creditors would have reason to believe that the property in the goods delivered was in Setter and not in the company. Without any document, to which the public had access, coming into existence at the time Setter acquired possession, an attempt is made to fasten upon the transaction an unknown proviso in a document signed at some time in the past. That is the very type of "secret bills of sale of personal chattels" contemplated by the British Parliament when it enacted the quoted definition in the Bills of Sale Act of 1878. And that was the evil sought to be removed by the legislature of Manitoba when it passed the uniform Act of 1929, and adopted the almost word-for-word definition in the English Act.
>
> In my view the portion of the contract, relating to future-acquired goods, comes within The Bills of Sale Act of Manitoba and is void against the execution creditors of Jack Setter & Sons.

CONDITIONAL SALES

British Columbia

In *Vernon Finance Ltd.* v. *Brandt* (1959) 22 D.L.R. (2d) 231, the plaintiff was assignee of the vendor under a conditional sale agreement covering a motor car. Both the agreement and assignment were registered as required by *The Conditional Sales Act*, R.S.B.C. 1948, c. 64, and the purchaser was notified of the assignment. The purchaser loaned the car to his brother, who took the car to the defendant's garage for necessary repairs, which were made. The conditional sale agreement prohibited the purchaser from letting the car for hire, but did not otherwise restrict its use by third persons with the consent of the purchaser. The repair bill was not paid and the defendant retained the car, claiming a lien. The purchaser later defaulted on his payments under the

conditional sale agreement and the plaintiff demanded possession from the defendant, who rejected the demand. The plaintiff brought an action of replevin and the defendant asked for a declaration of entitlement to a lien. In rendering judgment for the defendant, Mr. Justice Whittaker, in the Supreme Court, held that the purchaser had implied authority to subject the car to the repairer's lien and this authority had been exercised by his brother as his agent, (citing *Security Loan* v. *Hewlett* (1951), 59 Man. L.R. 159.) Concerning the effect of registration under the Act relative to the lien, the Court said:

> In this Province a mechanic who does work on a chattel for its improvement is entitled to a particular lien. This right of lien is not given by statute but is derived from the common law. Sections 42-50 of the *Mechanics' Lien Act*, 1956 (B.C.), c. 27, simply set out the procedure to be followed in enforcing the lien and the circumstances under which the lien may be preserved upon surrender of possession. The *Conditional Sales Act* does not cut down this right to a lien and registration thereunder does not serve as constructive notice to a garageman of the fact of registration nor of the terms of a conditional sale agreement. Registration does not confer upon a conditional vendor any rights he did not have before the Act was passed. The effect of the statute is to require a conditional vendor who has delivered possession to a purchaser to comply with the provisions of the statute as to registration before becoming entitled, as against certain specified persons, to enforce his common law rights. The Act is for the protection of those dealing in good faith with persons having possession of the goods.
> (Citing, inter alia, *Traders Finance Corp.* v. *Dawson Implements Ltd.* (1958), 15 D.L.R. (2d) 515 at p. 519, a judgment by Mr. Justice Whittaker commented upon in 1959 Proceedings, p. 58.)

New Brunswick Section 14(1) and (2)

In *McNutt* v. *Alexander Fraser Ltd.* (1959) 23 D.L.R. 236, the defendant bought a power saw and building materials under two conditional sale agreements, the rights under both being assigned to the Industrial Acceptance Corporation, by the vendors. The rights were subsequently reassigned to the plaintiff, one of the original vendors. The defendant defaulted under the contracts and the plaintiff seized the saw, and sued for the price of the goods sold to the defendant. The defendant contended that the Section 14 of the *Conditional Sales Act* alone determines the rights and obligations of the parties, when the seller has retaken the goods and that when the statutory twenty day period, in which a purchaser who has defaulted may redeem his goods, has expired, the seller is deemed to have rescinded the contract and cannot sue for the contract price. The pertinent provisions of *The Conditional Sales Act*, R.S.N.B. 1952, c. 34 are as follows:

14. (1) Where the seller retakes possession of the goods pursuant to any condition in the contract, he shall retain them for twenty days, and the buyer may redeem them within that period by paying or tendering to the seller the amount then due on the contract price, together with the actual costs and expenses of taking and keeping possession, or by performance or tender of performance of the condition upon which the property in the goods is to vest in the buyer and payment of such costs and expenses; and thereupon the seller shall deliver up to the buyer possession of the goods so redeemed.

(2) Where the goods are not redeemed within the period of twenty days, and the seller does not intend to look to the buyer or guarantor of the buyer for any deficiency on a resale, the seller may sell the goods, either by private sale or at public auction, at any time after the expiration of that period.

Chief Justice McNair, in the Appellate Division, upheld the decision of the lower court that the plaintiff, by resuming possession, had not rescinded the contract and was entitled to recover the balance owing of the purchase price of the goods, on the assumption that the contract provided for resumption of possession on the buyer's default. The Act contains no express rule applicable to the facts and consequently resort would be had to the common law. Chief Justice McNair said in part:

> The defendant's contention that the provisions of s. 14 of the Act are in substitution of the common law is plainly untenable. See *Humphrey Motors Ltd.* v. *Ells*, [1935] 2 D.L.R. 705, S.C.R. 249, where s. 10 of the *Conditional Sales Act* then in force, with which the present s. 14 is in substantial conformity, was involved and the question for determination was whether it gave a right to sue for a deficiency on repossession and sale where no such right was stipulated for in the contract. At pp. 709-10 D.L.R., pp. 254-5 S.C.R. Dysart J. says: "It is argued, however, that the section confers the right by implication. This argument is based upon the assumption that the Act is a Code and is to be construed as embracing all conditional sales. As already pointed out, we do not regard the Act as a complete Code. If the Conditional Sales Act seeks only to remedy certain evils inherent in or incidental to conditional sales, it ought to be interpreted as amending and not as repealing the common law on the subject; if on the other hand, it is a general Act, it 'must not be read as repealing the common law relating to a special and particular matter unless there is something in the general act to indicate an intention to deal with that special and particular matter' per Channell, J., in *Rex* v. *Salisbury*, [1901] 1 K.B. 573, at p. 579. To interpret s. 10 as appellant suggests, would be to import into the section something which is not there and which, if there, would have the effect of repealing the common law. We are therefore unable to accept the conclusions based upon the argument." See also the decision of this Court in *LaBelle* v. *Traders Finance Corp.* [1957], 9 D.L.R. (2d) 275.
>
> If there are no special provisions in the contract to the contrary a conditional sale vendor who has lawfully resumed possession may, apart from any other course that may be open to him in the circum-

stances, elect to treat the contract as not rescinded and sue for the price. The latter course is open to him provided he has retained and preserved the goods in their condition when retaken and is ready and willing to deliver them to the purchaser on payment. The controlling principles are enunciated in *Sawyer* v. *Pringle* (1891) 18 O.A.R. 218 by Haggerty C.J.O. where he says (p. 221): "This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain named conditions by the defendant." (This distinction is recognized in s. 2 of the Sale of Goods Act, R.S.N.B. 1952, c. 199) . . .

HIGHWAY TRAFFIC—RULES OF THE ROAD

British Columbia Section 171(2)

In *White et al* v. *Derban (Peace River Transport) Ltd. et al* (1960) 33 W.W.R. 542, a driver in charge of a truck and trailer unit had parked on the right side of a highway so that the right wheels were flush with the right side of the travelled surface, and the left wheels were three feet to the right hand of the center white line. A motor car collided with the rear of the trailer at a high rate of speed and some of the occupants of the car were killed and some injured. It was claimed, in an action against the owner of the truck and trailer and its driver, that parking so as to all but completely block the travelled right-hand portion of the highway, was negligence by reason of breach of statute. The statutory infraction was alleged to be of subsection (2) of Section 171 of *The Motor Vehicle Act*, 1957 B.C., c. 39, which reads: "Subject to subsection (3), no person shall park a vehicle so as to obstruct the free passage of traffic on the highway." Mr. Justice Ruttan, in the Supreme Court held that the driver was not in breach of this subsection of the Act in parking his truck and trailer where he did. The reasons stated by the judge for this decision were:

> Counsel were agreed that subsec. (1) did not apply but during the course of argument I suggested that no part of this section was applicable since it appeared to refer only to parking and leaving of vehicles outside of a built-up area, here the municipality of Surrey. However counsel in written submissions have agreed that subsec. (2) does apply since it contains no direct reference to areas "outside of a business or residence district."
>
> I am not completely in agreement here since it is possible to hold that the Act was directed to controlling road obstructions outside municipal areas, leaving to the municipalities the task of regulating their own traffic by by-law. A somewhat parallel section appears in the Ontario Highway Traffic Act, RSO, 1937, ch. 288, sec. 40 (now RSO,

1950, ch. 167) where I agree the clear language leaves no doubt as to the area concerned:

> ". . . no person shall park or leave standing any vehicle whether attended or unattended upon the travelled portion of a highway outside of a city, town or village, when it is practicable to park or leave such vehicle off the travelled portion of such highway; provided, that in any event, no person shall park or leave standing any vehicle, whether attended or unattended, upon such a highway unless a clear view of such vehicle may be obtained from a distance of at least two hundred feet in each direction upon such highway."

However, it is not necessary for me to seek to interpret this section further, because in any event I hold that subsec. (2) of sec. 171 cannot be read to mean there is an absolute prohibition to park if the obstruction so created substantially blocks the travelled portion in only one direction along the highway. Since every act of parking on the roadway must constitute an obstruction of some sort, and thus cut down in part the completely free passage of traffic, the phrase "free passage" must be interpreted in a relative rather than an absolute sense. I find a fair interpretation is to read "free" to mean "reasonable" and here I adopt the submission of Mr. Brown as enlarged in his written argument. I agree also that some significance must be attached to the use of the word "highway" as distinct from "roadway" in subsec. (1) of sec. 171. It is agreed by counsel that where a highway contains two or more lanes going in each direction each of these lanes is a roadway. There is no prohibition against parking on a roadway, and even if one roadway is completely blocked that does not block the entire highway, nor as I have already held, does it obstruct free passage on the highway where the obstruction occurs at a place where traffic may freely go around. Here there was a broken white line at the place of impact indicating that cars could freely go around an obstruction by crossing the centre line. Had there been a solid line in the centre it might well be held that the obstruction was complete. On the night in question, a witness saw two drivers at least coming from the south before the accident happened, both of whom were held up behind the truck and trailer momentarily and then swung out to pass by crossing the broken white line.

RECIPROCAL ENFORCEMENT OF JUDGMENTS

British Columbia

The revised uniform *Reciprocal Enforcement of Judgments Act,* which, which was approved at the 1958 Conference, was enacted in British Columbia on March 20, 1959 (1959 B.C. c. 70). Substitution of the word "State" without definition in the revised Act for the word "province" used in the original Act, raised the question whether the revised Act deals with reciprocity between the provinces of Canada.

In the course of his opinion in *Garfin* v. *Bird* (1960) 32 W.W.R. 430, Mr. Justice Norris, in the Supreme Court, said:

> (Counsel for the plaintiff) . . . submits that because of the use of the word "State" in a number of places in the Act and in particular in sec. 3, an important section, it is not intended that the Act shall in respect of its reciprocal provisions be applicable to other provinces of Canada but to jurisdictions wherein the country itself is termed a "State" or where individual "States" are within one country such as the United States of America . . . (As to the order-in-council, sec. 16 of the Interpretation Act, RSBC, 1948, ch. 1, continues the effect, under the 1959 Act, of the order-in-council passed under the earlier Act making the statute applicable to the province of Alberta.) As to the use of the word "State" in the 1959 Act, I am of the opinion that this word is to be used in the broad sense of a jurisdiction outside of British Columbia and includes the term "province". This is made clear by the reference in sec. 11 (1) of the 1959 Act to "a State in or outside Canada".
>
> The *Shorter Oxford Dictionary*, vol. II, p. 2005, defines "state" as "Commonwealth, polity . . . the body politic . . . a body of people occupying a defined territory and organized under a sovereign government. Hence . . . a territory occupied by such a body."
>
> *Murray's Dictionary*, vol IX, part I, p. 852, sec. 29, defines the word as
>
> "the body politic as organized for supreme civil rule and government."
>
> If, in accordance with the provisions of sec. 23 (6) of the *Interpretation Act* I give (as I must) the 1959 Act, "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act" and of the provisions thereof according to "their true intent and meaning" there seems to be no doubt that such Act deals with reciprocity between this province and the other provinces of Canada as well as between this province and jurisdictions outside Canada.

TESTATOR'S FAMILY MAINTENANCE

British Columbia

In *Re Jones Estate* (1959) 30 W.W.R. 498, Mr. Justice Ruttan, in the Supreme Court, laid down some guide lines for determining the proper award to be made to a petitioner. Their essence is in the following extracts from his reasons for judgment:

> While the court may, and often does interfere with the testator's intentions and thus redraw certain terms in his will, this power is exercised sparingly. The guiding principle is thus stated with his usual felicity by Roach, J.A. in *Re Duranceau* [1952] OR 584, at 593, [1952] OWN 498:

> "The Court is authorized to interfere with the will of a testator to the extent only of providing out of the testator's estate adequate provision for the future maintenance of a dependant. It may be that certain cases will arise in which having regard to the nature of the estate of the testator and other circumstances, the Court would be justified in awarding a dependant a lump sum; but in my opinion, where the circumstances permit, it is much more desirable that the estate should be charged with an amount which will provide for payment to the dependant of a periodical allowance for the dependant's future maintenance. Such an order will usually result in the minimum of interference with the otherwise intended division by the testator of the capital of his estate."

The succession duty valuations are related back to the date of death in 1956. During the course of the trial, counsel for the executors introduced evidence to show the financial history of the companies since 1956. It all seemed to lead to the conclusion that the companies do not now have the same ability to pay any substantial sums to the petitioner and in fact are not paying any dividends on their shares and are even delinquent on their debenture and other interest payments. Mr. Bonnell stated he felt it was the duty of the executors to bring forth such evidence following the authority of this dictum from *Re Borthwick; Borthwick* v. *Beauvais*, which reads as follows:

> "The value of the estate for the purpose of administering this Act must be ascertained as at the date of the order which the court makes under the Act. Time will have elapsed in the ordinary case between those two dates and it may well be that the judge may require that the evidence of value shall be brought up to date. He may call on the executors to bring their valuation up to date and to say whether they wish to modify it in any way in the light of what has happened since the death. It may or may not be that he may wish that to be done. The result may be to raise or lower the value of the estate . . ."

But whereas under the English statute the court appears bound to bring the value of the estate up to date, there is no such direction contained in our Act. The earlier decisions of our own courts, including that of the Supreme Court of Canada in *Walker* v. *McDermott* [1931] SCR 94, which reversed [1930] 1 WWR 332, 845, 42 BCR 184, seem to have proceeded on the basis of the value of the estate taken at the date of death. However more recent cases would appear to follow the English practice, in particular the decision of Robertson, J. in *Re Jones Estate* [1934] 3 WWR 726, at 732, 49 BCR 216, followed with some "mental reservations" by my brother Wilson in *Re Urquhart Estate* (1956-57) 20 WWR 177, at 179.

But if Mr. Bonnell's conclusions are to be accepted and the companies have a reduced ability to pay, then we must consider whether or not the shares have been valued on an entirely false basis. If we cannot proceed on the understanding that companies are revenue-producing concerns then the only way of obtaining funds to provide for the widow would be to sell the assets or the shares on the open market or wind up the companies and make a lump-sum apportionment.

It is not necessary to take this extreme position, nor for me to decide which date is the significant one for valuing the estate of the deceased. The net earnings of the companies are still over $150,000 a year, and there is no suggestion this figure was lower than usual, nor that the value of the shares as previously fixed should be depreciated. If the evidence brought forward by the executor is relevant and admissible at this time, it still does not alter the valuations placed upon the shares by the succession duty department, nor generally the gross value of the estate since the date of death. That valuation shall therefore be adopted for the purpose of this hearing.

Family maintenance legislation is not uniform in all the provinces, but the governing principles seem everywhere to be the same. In *Walker* v. *McDermott, supra,* Mr. Justice Duff, as he then was, laid particular stress on the phrase "just and equitable," as it appears in sec. 3 of the British Columbia statute. He said at p. 96:

> "If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account."

"Just and equitable" appears in no other statute but that of Saskatchewan, but *Walker* v. *McDermott* is accepted as a leading authority in every province . . .

But there is some authority in this province for the proposition that the court's discretion is restricted by the same rule which governs the apportionment of estates to widows and children upon intestacies under the *Administration of Estates Act,* RSBC, 1948, ch. 6. In *Barker* v. *Westminster Trust Co.* [1941] 3 WWR 473, 57 BCR 21, under a heading entitled "7. What constitutes an equitable share in the estate," O'Halloran, J.A. has the following to say in his judgment at p. 493:

> "What is the standard or the yardstick by which the court shall determine if a provision is adequate, just and equitable? The words of the statute [in the opinion of the judge before whom the application is made] should not be read too literally for then we would revert to the time when equity was interpreted by the length of the 'Chancellor's foot.' . . . However there is a standard for the guidance of the judge. It is the standard set up by law for the distribution of intestate estates. By sec. 114 (1) of the *Administration Act, supra,* if the wife had died intestate, by operation of law, the husband would have taken her entire estate. It is true the Testator's Family Maintenance Act does not apply to intestate estates, but the policy of the law of this province as to what constitutes 'proper maintenance' is reflected in the statutory provision applicable to intestate estates."

While this was not the judgment of the court, it still merits my most careful consideration. But, with respect, I do not believe his lordship intended that the rule of intestacy must be rigidly followed, for he goes on to say at p. 494:

> "There may be special circumstances which justify the testatrix

> in bequeathing a lesser amount than the policy of the law thus indicated."
>
> One such special circumstance has already been considered in the present case: The desirability of retaining the bulk of the estate in its present form of a trading company. Another is the existence of a substantial separate estate already vested in Mrs. Jones, which she secured from the testator some years before his death.
>
> It is perhaps a trite observation that the fundamental purpose of this statute is to provide maintenance, not to build up capital holdings.

In *Re Fisher Estate, Re Fisher's Application* (1960) 31 W.W.R. 697, the testatrix during the sixth decade of her life was the victim of an unfortunate marriage with the petitioner. After reviewing the pertinent aspects of the marriage experience, Mr. Justice Sullivan, in the Supreme Court said:

> As I see it the petitioner's claim has nothing upon which to stand other than the fact that he did go through a form of marriage ceremony with the much elder testatrix some nine years before her death; and in line with the reasons of such decisions as *Sobodiuk* v. *MacLaren* (1954) 13 WWR (NS) 222, 62 Man. R. 334, I am inclined to hold forthwith at conclusion of trial, that all moral duty owed by wife to husband in this case had been fully discharged in her lifetime, particularly in view of the strain and disturbance of the marital relationship brought about by petitioner's own misconduct involving drunkenness, cupidity and violent assault; and remembering also that the onus lies upon petitioner to satisfy the court that his wife's will does not make "adequate provision for the maintenance and support" of him as her surviving husband, in all of the circumstances of the case.
>
> I still have the feeling that my first impressions were sound and that the proper order in this case would be to dismiss the prayer of the petition with costs. It is with some misgiving, therefore, following lengthy consideration, that I make an award of $1,000 to petitioner out of his wife's estate, to be payable *pro rata* with payments to her son and grandson as moneys become available for distribution by her executor. I understand that for some period of time there will be a differential of only $50 per month between accounts receivable and accounts payable with respect to the uncompleted real-estate transactions of the testatrix, which differential will grow larger as the business of winding-up the estate progresses.
>
> It can do no harm to say that the allowance hereby given to petitioner with reluctance and considerable doubt as to its legal or equitable justification has been prompted by the thought that a higher court, without benefit of hearing and observing petitioner upon the witness stand, might find error in a finding that his misconduct obliterated every shred of moral duty owed to him by his deceased wife—after all she married him for better or for worse—and that protracted litigation could result in dissipation of the estate in costs.

This award seems to be debatable on grounds of both policy and practicability.

WILLS

Alberta Sections 17(b) and 18

In *Re Manuel* (1960) 23 D.L.R. (2d) 190, the issue was whether a clause of an attested will was effectively revoked by the testator, after its execution, having written in his handwriting over the words of the clause: "Revoked Aug. 7, 1957 'N.M. Manuel'."

Mr. Justice Riley, in the Supreme Court of Alberta, held that the clause was effectively revoked under Section 17 of the *Wills Act*, R.S.A. 1955, c. 369, which reads:

> "No will or any part thereof is revoked otherwise than as provided by Section 15 or . . . (b) by some writing declaring an intention to revoke the same and made in a form in which a will is by this Part permitted to be made."

Citing *Harvie* v. *Watch Tower Bible & Tract Society* (1957) 21 W.W.R. 139, in which the Appellate Division held that there can be a valid holograph codicil to a duly attested will, Mr. Justice Riley decided that the testator Manuel effectively cancelled or revoked, within the meaning of Section 17(b), that clause of his will over which he had written in the instant case. (Cf. 1954 Proceedings at p. 45 and 1955 Proceedings at p. 105.)

Mr. Justice Riley held further that Section 18 of the Act was not applicable to the facts of this case. Section 18 reads:

> 18(1). No obliteration, interlineation, cancellation by drawing lines across the will or any part thereof or other alteration made in any will after the making thereof is valid or has any effect except so far as the words or effect of the will before the alteration are not apparent, unless the alteration is made in a form permitted by this Part.
>
> (2). A will with the alteration as part thereof shall be deemed to be duly made if the signature of the testator and the subscription of the witnesses, if required, are made in the margin or in some part of the will opposite or near the alteration, or at the foot or end of or opposite to a memorandum referring to the alteration and written at the end or in some other part of the will.

Referring to this section, he said: "The important word therein is 'alteration'. The section quite clearly deals with a case where there has been some physical change in the bequests in a will, as distinct from revocation." With reference to *Re Cottrell* [1951] 4 D.L.R. 600, he said:

> In an attested will in the usual form the testator, subsequent to execution of the will, stroked out "1000" in a bequest of $1,000 inserted "100" in his own writing and signed without witnesses. Egbert J. held that the attempt to change the will was ineffectual and that the will must still be read as "1000".
>
> He . . . said that (Section 18) allowed obliterations or interlineations but that while holograph interlineations may alter a holograph will,

an attested will cannot be so altered. In the case of an attested will, said Egbert J. the interlineations to be effective must also be attested. His basis for this was the addition of the words in the section "if required". He said the only effect these words can have is to mean that witnesses must subscribe the interlineations if the will is attested but there need not be witnesses to the interlineation if the will is in holograph form.

I have grave doubts that the *Cottrell* case is applicable. Manuel's writing is not a mere codicil, it is not an interlineation, but a writing declaring an intention to revoke, as I think is contemplated by s. 17(b) of the *Wills Act* quoted *supra*. Hence the *Cottrell* case, which dealt with an alteration, which the learned trial Judge held to be a mere interlineation, is not applicable. The said learned trial Judge did not have to consider the possibility of the *Cottrell* interlineation being "some writing declaring an intention to revoke". The *Cottrell* case was not the case of a cancellation or revocation, but was rather the changing of a sum of money in such a way as to amount to a new bequest. The Manuel writing, on the other hand, is clearly "some writing declaring an intention to revoke." We do not have the changing of a word or the changing of a sum of money, but a written statement declaring an intention to revoke, together with a date and the full signature of the testator.

Subsection (2) of Section 19 of the Revised Uniform Wills Act of 1957 appears to be consistent with the statement by Mr. Justice Egbert that "while holograph interlineations may alter a holograph will, an attested will cannot be so altered".

The subsection now reads:

(2) An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 6 (Military forces) or section 7 (Holograph Will) the signature of the testator, are or is made,

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

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

APPENDIX G

(*See page 21*)

REPORT RE UNIFORM COMPANIES ACT

In October, 1960, the general inter-provincial committee on The Companies Act met in Winnipeg and again considered the draft previously prepared together with a large number of suggestions from various sources. The report of this committee, with its recommendations, was then passed on to the Committee of the Conference of Commissioners on Uniformity of Legislation in Canada which met in Winnipeg the following week. The committee completed its job of drafting both the Letters Patent draft and the Memorandum draft. The actual work of finally putting the draft in shape as amended by the two committees was committed to Mr. W. E. Wood, Assistant Legislative Counsel of Alberta. Mr. Wood did a splendid job on this and had the draft completed by the middle of December, 1960. Copies were then sent to Mr. R. J. Cudney, Deputy Provincial Secretary of Ontario, who is the chairman of the main inter-provincial committee. Mr. Cudney was to arrange for the printing and distribution of the draft. These have not yet been received.

I recently telephoned Mr. Cudney's office and (he being out of the city) I was informed by his assistant, Mr. Lavine, that due to a variety of causes the printing had been held up. It had been hoped to have the draft ready for this summer, but it now looks as if the printed draft will not be available till some time in the fall.

Dated at Winnipeg, this 14th day of August, 1961.

G. S. RUTHERFORD,
Chairman, Drafting Committee on Uniform Companies Act Conference of Commissioners on Uniformity of Legislation in Canada.

APPENDIX H

(*See page 21*)

THE BULK SALES ACT
1961 REPORT OF ALBERTA COMMISSIONERS

At the 1960 meeting the Alberta Commissioners presented a report and draft Act (1960 Proceedings, page 120). It was studied section by section. Certain changes were agreed upon and the draft was referred back to the Alberta Commissioners to incorporate the changes and settle a few minor points. The Alberta Commissioners were authorized to circulate the revised draft which would become effective if not disapproved by two jurisdictions before November 30, 1960 (1960 Proceedings, page 31).

After the meeting the Alberta Commissioners made the changes but refrained from circulating the draft for the following reason. Members will recall that the 1960 draft is based on Ontario's 1959 Act rather than on the 1957 draft which in turn was based on the 1954 draft prepared by Manitoba. Of course, the 1960 draft and the 1957 draft have much in common and both are an improvement on the present uniform Act. The main differences are:

(1) the consent provisions,
(2) the 1960 draft permits *all* creditors instead of only trade creditors to participate in a distribution, and
(3) the 1960 draft provides for filing the documents in court.

During the discussion in 1960 there was a clear division of opinion as to which one of the two schemes should be adopted. On a very close vote the Conference accepted Alberta's recommendation to follow the 1960 scheme.

After the meeting the Alberta Commissioners, in light of the absence of unanimity, felt a reluctance to circulate their revised draft and thus make it the Act of the Conference (unless vetoed). They decided instead to consider further the pros and cons of the 1957 and 1960 drafts in the hope that unanimity on one or the other could be achieved.

During the year W. F. Bowker had an interview with Mr. Catzman of Toronto who was a main sponsor of the Ontario Act. He was most helpful and his views were of great assistance.

We shall now set out our views on the three points mentioned above:

1. Consent. It will be recalled that both the 1957 and 1960 drafts simplify the obtaining of consent; under both the consent of 60% of creditors is confined to *trade* creditors. However, the consent provision in the 1957 draft includes *secured* trade creditors whereas the 1960 draft requires the consent of *unsecured* trade creditors only. This makes it easier to obtain consent. To the extent that the two differ we still prefer the 1960 draft because it simplifies the transaction and at the same time gives a voice to those most concerned, viz., unsecured trade creditors.

2. Distribution. The next important point of difference between the two has to do with distribution of the purchase price where a trustee has been appointed to receive and distribute it. The 1957 draft gives the proceeds to trade creditors, secured and unsecured, but excludes non-trade creditors. The 1960 draft on the other hand provides for distribution among all creditors.

It will be noted that the 1957 draft includes the same classes of creditors both for purposes of consent and distribution. The 1960 draft on the other hand has a narrower class for consent and wider classes for distribution. The difference can be illustrated as follows:

	Consent	Distribution
1957 draft	trade creditors, secured and unsecured	trade creditors, secured and unsecured
1960 draft	unsecured trade creditors	*all* creditors, secured and unsecured, trade and non-trade

At first blush the 1957 scheme seems more consistent and logical. However, we are convinced that the 1960 scheme is wiser. When it comes to distribution the case is something like that of a bankruptcy and traditionally all creditors share. A more weighty argument is that a provincial Act that distributes funds to a special class of creditors might have the qualities of a fraudulent preference and might even invite constitutional attack. Thus we still favour the scheme embodied in our 1960 draft.

3. Filing. The third point has to do with the statement that section 13 of the 1960 draft requires to be filed in court. Its purpose is two-fold:

(1) to make available in a public place to anyone interested the particulars of the transaction,

(2) to provide a definite point of time from which the limitation of action provision runs.

We have continued to consider whether this requirement is more onerous than it is worth. In Mr. Catzman's opinion this has not proved to be so in Ontario. On balance we favour retaining it.

We might mention that we have examined the Bulk Sales provisions of the Quebec Civil Code which Mr. Ker mentioned at the 1960 meeting (sections 1569a to 1569e Q.C.C.). The scheme simply requires an affidavit by the seller disclosing his creditors and the amount of the debts and requires the vendor to pay the purchase price rateably to the seller's creditors. While the simplicity of this scheme is attractive it might have pitfalls in a common law province and in any event it is so different from the type of Act we are accustomed to that we are not prepared to recommend it.

All of which is respectfully submitted.

H. J. WILSON, Q.C.

W. F. BOWKER, Q.C.,

W. E. WOOD,

Alberta Commissioners.

Edmonton, Alberta,
July 4, 1961.

THE BULK SALES ACT

AN ACT RESPECTING BULK SALES

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the (
), enacts as follows:

Short title

1. This Act may be cited as "The Bulk Sales Act".

Interpretation

2. In this Act,

"buyer"

(*a*) "buyer" means a person who acquires stock under a sale in bulk;

"court"

(*b*) "court" means the (county or district) court of a (county or district) in which the seller's stock or a substantial part thereof is located or the seller's business or trade or a substantial part thereof is carried on at the time of the sale in bulk;

(1960 draft revised)

"creditor"

(*c*) "creditor" means any creditor, including an unsecured trade creditor and a secured trade creditor;

"judge"

(*d*) "judge" means a judge of the court;

"proceeds of the sale"

(*e*) "proceeds of the sale" includes the purchase price and any security therefor or for any part thereof, and any other 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, less the proper and reasonable costs of the seller's solicitor for completing the sale;

"sale"

(*f*) "sale", whether used alone or in the expression "sale in bulk", includes a transfer, conveyance, barter or exchange, but does not include a pledge, charge or mortgage;

(1960 draft revised)

"sale in bulk"

(*g*) "sale in bulk" means a sale of stock, or part thereof, out of the usual course of business or trade of the seller;

"secured trade creditor"

(*h*) "secured trade creditor" means a person to whom a seller is indebted, whether or not the debt is due,

(i) for stock, money or services furnished for the purpose of enabling the seller to carry on business, or

(ii) for rental of premises in or from which the seller carries on business,

and who holds security or is entitled to a preference in respect of his claim;

(*i*) "seller" means a person who sells stock under a sale in bulk; "seller"

(*j*) "stock" means "stock"

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

(ii) the fixtures, goods and chattels with which a person carries on a trade or business;

(*k*) "unsecured trade creditor" means a person to whom a seller is indebted for stock, money, or services, furnished for the purpose of enabling the seller to carry on a business, whether or not the debt is due, and who holds no security or who is entitled to no preference in respect of his claim. "unsecured trade creditor"

3.—(1) This Act applies only to sales in bulk by, Application of Act

(*a*) persons who, as their ostensible occupation or part thereof, buy and sell goods, wares, or merchandise;

(*b*) commission merchants;

(*c*) manufacturers; and

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

(2) Nothing in this Act applies to or affects a sale in bulk by an executor, an administrator, a committee of the estate of a mentally incompetent or incapable person, the Public Trustee as committee under The Act or a person under an order made under that Act, a creditor realizing upon his secarity, a receiver, an assignee or trustee for the benefit of creditors, a trustee under the Bankruptcy Act (Canada), a liquidator or official receiver, or a public official acting under judicial process.

4.—(1) A seller may apply to a judge for an order exempting a sale in bulk from the application of this Act and the judge, if he is satisfied on *such evidence as he thinks necessary* that the sale 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, except section 8, does not apply to the sale. (1960 draft revised) Judicial exemption

(2) The judge may require notice of the application for the order to be given to the creditors of the seller or such of them as he directs and he may in the order impose such terms and give

such directions with respect to the disposition of the proceeds of the sale or otherwise as he thinks fit.

Statement of creditors

5.—(1) The buyer, before paying or delivering to the seller any part of the proceeds of the sale other than the part mentioned in section 7, shall demand of and receive from the seller, and the seller shall deliver to the buyer, a statement verified by the affidavit of the seller in Form 1.

(2) The statement shall show the names and addresses of the unsecured trade creditors and the secured trade 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 them and, with respect to the claims of the secured trade creditors, the nature of their security and whether their claims are due or, in the event of sale, become due on the date fixed for the completion of the sale.

No preference or priority

6. From and after the delivery of the statement mentioned in section 5, no preference or priority is obtainable by any creditor of the seller in respect of the stock, or the proceeds of the sale thereof, by attachment, garnishment proceedings, contract or otherwise.

Part payment

7. The buyer may, before he receives the statement mentioned in section 5, pay to the seller on account of the purchase price a sum not exceeding ten per cent of the purchase price which shall form part of the proceeds of sale and which the seller shall hold in trust,

(*a*) for the buyer until completion of the sale, or if the sale is not completed and the buyer becomes entitled to repayment of it, until it is repaid to the buyer; or

(*b*) where the sale is completed and a trustee has been appointed, for the trustee until the seller complies with clause (*b*) of section 12.

Particulars

8. Any creditor of a seller is entitled to demand of the buyer particulars in writing of the sale in bulk in which case the buyer shall forthwith deliver such particulars in writing to the creditor. (1960, s. 8, revised to remove reference to seller)

Completion of sale

9.—(1) Where the buyer has received the statement mentioned in section 5, he may pay or deliver the proceeds of the sale to the seller and thereupon acquire the property of the seller in the stock,

(*a*) if the statement discloses that the claims of the unsecured trade creditors of the seller do not exceed a total of $2,500 and that the claims of the secured trade creditors of the seller do not exceed a total of $2,500 and the buyer has no notice that the claims of the unsecured trade creditors of the seller exceed a total of $2,500 or that the claims of the secured trade creditors of the seller exceed a total of $2,500;

(*b*) if the seller delivers a statement verified by his affidavit showing that the claims of all unsecured trade creditors and all secured trade creditors of the seller of which the buyer has notice have been paid in full; or

(*c*) if adequate provision has been made for the immediate payment in full of,

(i) all claims of the unsecured trade creditors of the seller of which the buyer has notice, and

(ii) all claims of secured trade creditors of the seller which are or become due and payable upon completion of the sale of which the buyer has notice,

but, where any such creditor has delivered a waiver in Form 2, no provision need be made for the immediate payment of his claim.

(1960, clause (c) revised in form—see subsection (2))

(2) Where a sale is completed in accordance with clause (c) of subsection (1) the buyer shall ensure that all such claims are paid in full forthwith after the completion of the sale.

(New—from 1960, section 9, clause (c))

Completion of sale

10.—(1) Where the buyer has received the statement mentioned in section 5 and if section 9 does not apply, he may pay or deliver the proceeds of the sale to the trustee appointed under subsection (1) of section 11 and thereupon acquire the property of the seller in the stock, if the seller delivers to the buyer,

(*a*) the consent to the sale in Form 3 of unsecured trade creditors of the seller representing not less than sixty per cent in number and amount of the claims that exceed fifty dollars of all the unsecured trade creditors of the seller of whose claims the buyer has notice; and

(*b*) an affidavit of the seller deposing

(i) that he has delivered to all unsecured trade creditors and secured trade creditors personally or by registered mail addressed to them at their latest known ad-

dresses at least fourteen days before the date fixed for the completion of the sale copies of the contract of the sale in bulk, or if there is no written contract, written particulars of the sale, the statement mentioned in subsection (1) of section 5, and the statement of affairs in Form 4, and

(ii) that the affairs of the seller as disclosed in the statement of affairs have not materially changed since it was made.

(2) Copies of the documents mentioned in clause (b) of subsection (1) shall be attached as exhibits to the affidavit mentioned therein.

Appointment of trustee

11.—(1) Where a sale in bulk is being completed under section 10, a trustee shall be appointed,

(*a*) by the seller with the consent in Form 3 of his unsecured trade creditors representing not less than sixty per cent in number and amount of the claims that exceed fifty dollars of the unsecured trade creditors as shown by the statement mentioned in section 4; or

(*b*) by a judge upon the application of any person interested where the unsecured trade creditors of the seller representing not less than sixty per cent in number and amount of the claims that exceed fifty dollars as shown by the statement mentioned in section 5 have consented to the sale in bulk but have not consented to the appointment of a trustee, or where the trustee appointed under clause (a) is unable or unwilling to act.

(2) Every trustee shall, *unless a judge otherwise orders*, forthwith give security in cash or by bond satisfactory to the judge for the due accounting for all property received by him as trustee and for the due and faithful performance of his duties, and the security shall be deposited with the clerk of the court and shall be given in favour of the creditors generally and may be enforced by any succeeding trustee or by any one of the creditors on behalf of all by direction of a judge and the amount of the security may be increased or decreased by a judge at any time.

(1960 draft revised)

When proceeds of sale paid to trustee

12. Where a sale in bulk is being completed under section 10,

(*a*) the seller shall deliver to the trustee a statement verified by the affidavit of the seller showing the names and addresses of all 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 them;

(*b*) the seller shall pay to the trustee all moneys received by him from the buyer on account of the purchase price under section 7; and

(*c*) the buyer shall pay or deliver the balance of the proceeds of the sale to the trustee.

Filings on completion of sale

13.—(1) Within five days after the completion of a sale in bulk, the buyer shall file in the office of the clerk of the court an affidavit setting out the particulars of the sale, including the subject matter thereof and the name and address of the trustee, if any, and exhibiting copies of the statement mentioned in section 5, the statement, if any, mentioned in clause (b) of section 9, the waivers, if any, mentioned in clause (c) of section 9 and the consent and affidavit, if any, mentioned in section 10.

(2) If the buyer fails to comply with subsection (1), a judge may at any time,

(*a*) upon the application of the trustee or any creditor, order the buyer to comply therewith;

(*b*) upon the application of the buyer, extend the time for compliance with subsection (1); or

(*c*) upon the application of the buyer after the lapse of one year from the date of the completion of the sale in bulk and upon being satisfied,

(i) that the claims of all unsecured trade creditors and secured trade creditors of the seller existing at the time of the completion of the sale, have been paid in full,

(ii) that no action or proceeding is pending to set aside the sale or to have the sale declared void, and

(iii) that the application is made in good faith and not for any improper purpose,

make an order dispensing with compliance with subsection (1).

Distribution of proceeds of sale

14.—(1) Where the proceeds of the sale are paid or delivered to a trustee under section 12, the trustee is a trustee for the general benefit of the creditors of the seller and he shall distribute the proceeds of the sale among the creditors of the seller, and in making the distribution all creditors' claims shall be proved in

like manner and are subject to like contestation before a judge and are entitled to like priorities as in the case of a distribution under the Bankruptcy Act (Canada), as amended or re-enacted from time to time, and shall be determined as of the date of the completion of the sale.

(2) Before making the distribution, the trustee shall cause a notice thereof to be published in at least two issues of a newspaper having general circulation in the locality in which the stock 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.

(1960 draft 14(3) omitted)

Fee of trustee

15.—(1) The Lieutenant Governor in Council may establish a tariff of fees for trustees and when any of the fee payable to a trustee is to be deducted from the moneys to be paid to the creditors, the fee paid may not exceed the amount fixed by the tariff.

(Replaces 1960, s. 15 (1))

(2) Subject to subsection (3) and in the absence of an arrangement between the seller and the trustee to the contrary, the fee, together with any disbursements made by the trustee, shall be deducted by him from the moneys to be paid to the creditors.

(3) Where the proceeds of the sale exceed the amount required to pay in full all indebtedness of the seller to his creditors, the fee of the trustee together with any disbursements made by the trustee shall be deducted by him from the excess proceeds to the extent of that excess, and any portion of the trustee's fee remaining unpaid thereafter shall be deducted as provided in subsection (2).

Who may make affidavits

16.—(1) Subject to subsections (2) and (3), an affidavit required to be made under this Act by a seller may be made by an authorized agent of the seller and, if the seller is a corporation, by an officer, director or manager of the corporation.

(2) Where the seller is a partnership, the affidavit shall be made severally by each of the partners or his authorized agent.

(3) An affidavit by a person other than the seller may be made only by a person who has a personal knowledge of the facts sworn to, and the fact that he has the personal knowledge shall be stated in the affidavit.

(1960 draft, s. 16 rewritten)

Effect of non-compliance with Act

17. Unless the buyer has complied with this Act, a sale in bulk is voidable as against the creditors of the seller and if the

buyer has received or taken possession of the stock 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.

Who may bring action

18. An action or proceeding to set aside or have declared void a sale in bulk may be brought or taken by any creditor of the seller, and, if the seller is adjudged bankrupt, by the trustee of his estate.

Burden of proof

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

Limitation of action

20. No action shall be brought or proceeding 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 the proceeding is taken either before the documents are filed under section 13 or within six months after the date on which the documents were filed under section 13.

FORM 1

(Section 5 (1))

STATEMENT AS TO SELLER'S CREDITORS

Statement showing names and addresses of all unsecured trade creditors and secured trade creditors of . . . . . of the . . . . . of . . . . . , in the . . of. . . . . and the amount of the indebtedness or liability due, owing, payable or accruing due or to become due by him to each of them.

UNSECURED TRADE CREDITORS

Name of Creditor	Address	Amount

SECURED TRADE CREDITORS

Name of Creditor	Address	Amount	Nature of Security	Due or becoming due on the date fixed for the completion of the sale

I,. . . . . ., of the . . . . . of. . . . . ., in the . . . . . of. . . . . ., make oath and say:

1. That the foregoing statement is a true and correct statement

(a) of the names and addresses of all the unsecured trade creditors of the said. . . . . and of the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the said. . . . . to each of the said unsecured trade creditors; and

(b) of the names and addresses of all the secured trade creditors of the said. . . . . and of the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the said. . . . . to each of the said creditors, the nature of their security, and whether they are or in the event of the sale will become due and payable on the date fixed for the completion of the sale.

(and, if sworn by someone other than the seller)

2. That I am. . . . . and have a personal knowledge of the facts herein deposed to.

SWORN before me, etc.

FORM 2

(*Section 9 (c)*)

WAIVER

In the matter of the sale in bulk

Between

Seller

— and —

Buyer

I,. . . . of the . . . . of. . . . . in the . . . . of. . . . . a *secured* (an unsecured) trade creditor of the above named seller, hereby waive the provisions of The Bulk Sales Act, which require that adequate provision be made for the immediate payment in full of my claim forthwith after completion of the sale, and I hereby acknowledge and agree that the buyer may pay or deliver the proceeds of the sale to the seller and thereupon acquire the property of the seller in the stock without making provision for the immediate payment of my claim and that any right to recover payment of my claim may, unless otherwise agreed, be asserted against the seller only.

Dated at. . . . . this. . . . . day of . . . . ., 19 . . .

Witness:

FORM 3

(Sections 10 (1)(a) and 11 (1)(a))

CONSENT

In the matter of the sale in bulk
Between:

Seller

— and —

Buyer

I, ... of the..... of..... .....

in the..... ..... of..... . ....., an unsecured trade creditor of the above named seller, hereby acknowledge and agree:

1. That I have received
   (a) a copy of the statement showing the names and addresses of the unsecured trade creditors and the amount of the indebtedness or liability due, owing, payable or accruing due or to become due and payable by the seller, and showing the names and addresses of his secured trade creditors, the nature of their security and whether their claims are or, in the event of sale, become due on the date fixed for completion of the sale, and the amount of the indebtedness or liability due, or owing, payable or accruing due or to become due and payable by the seller;
   (b) a statement of the affairs of the seller; and
   (c) a copy of the contract of the sale in bulk (or particulars of the sale).
2. That I consent to the sale.
3. That I consent to the appointment of..... as trustee.

DATED at..... this..... day of....., 19.....

Witness:

FORM 4

(Section 10 (1) (b))

STATEMENT OF AFFAIRS

Assets included in the Sale in Bulk	
(a) Amount of the proceeds of the sale.....	$ .. ..
Assets not included in the Sale in Bulk	
(b) Stock-in-trade at cost price not exceeding fair value..	$.....
(c) Trade fixtures, fittings, utensils, etc.	$.. .. ...
(d) Book debts—Good..... .... $...	
Doubtful . .. . $....	
Bad..... ..... $...	
Estimated to produce.....	$.. .....
(e) Bills of exchange, promissory notes, etc.....	$... .....
(f) Cash in bank.	$.. .....
(g) Cash on hand	$... ...
(h) Livestock	$.. . ..
(i) Machinery, equipment and plant....	$. . ....
(j) Real estate..	$..... . .
(k) Estimated value of securities in hands of secured creditors.....	$ ....
(l) Furniture	$... ....
(m) Life insurance policies	$..... .
(n) Stocks and bonds..	$.... ..
(o) Interest in estates	$.....
(p) Other property, viz..	$.....
Total.....	$ .. ....
Liabilities	
(q) Unsecured trade creditors..	$.....
(r) Secured trade creditors.....	$.....
(s) Preferred creditors.....	$.....
(t) All other liabilities, except contingent liabilities set out below.....	$.... ....
Total.....	$.....
Surplus or deficiency.....	$ ..... .
Contingent Liabilities	
(u) Liabilities under endorsements and guarantees.....	$ .. . ...
(v) All other contingent liabilities.....	$ ....
Total...	$... . .

I, ... , of the .. .. of..... .... , in the .. . . of. . . ..,..... ....., make oath and say that the above statement is to the best of my knowledge and belief a full, true and complete statement of the affairs of..... . ... on the.. .... day of . ..., 19....., (which date shall not be more than 30 days before the date of the affidavit) and fully discloses all the property of the said ... ... of every description.

SWORN before me, etc.

APPENDIX I

(See page 21)

DEVOLUTION OF REAL PROPERTY

REPORT OF THE SASKATCHEWAN COMMISSIONERS

At the 1960 meeting of the Conference the Alberta Commissioners, in compliance with a resolution passed at the 1959 meeting, submitted the following report with respect to the Uniform Devolution of Real Property Act:

"The Uniform Act provides:

'15. 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 property or any part thereof, with the approval of the court, for a longer term.'.

"Saskatchewan has the Uniform Act (with variations that are irrelevant). In re Heier 7 W.W.R. 385 (1952-3) the personal representative applied to the Court for approval of an oil lease. The Court of Appeal ruled that it could not give approval under this section because an oil lease is not a lease. Hence the amendment to (a) and (b) which now say that the personal representative may 'lease or otherwise dispose of real property'.

"With the policy of these amendments we agree. A personal representative should have the statutory power to give a mineral lease as well as an ordinary lease.

"As to the wording of the Act we think the Conference should consider whether Saskatchewan's wording should be used or whether on the other hand the Act should define lease to include mineral lease (as Alberta did in The Land Titles Clarification Act, 1956, which the Supreme Court in Hayes v. Mayhood 1959 S.C.R. 572 held applicable to The Devolution of Real Property Act).

"It is true that only three provinces have the Uniform Act and that the problem has been solved in two of them. However, this is not a reason for declining to make a desirable amendment".

The Alberta report was referred to the Saskatchewan commissioners with the request that they study the matter discussed therein with a view to determining whether the Uniform Devolution of Real Property Act ought to be amended.

By reason of the decision in the Heier case referred to in the Alberta report and the decision in Berkheiser v. Berkheiser et al, (1957) S.C.R. 387, in which the Supreme Court of Canada held that an instrument that purported to grant and lease all petroleum and natural gas within, upon or under certain land was a grant of a profit a prendre, the Legislature of Saskatchewan has made such amendments to section 15 of the said Act as were considered necessary to enable a personal representative, with the approval of the court or the concurrence of the interested persons, to lease or otherwise dispose of mines and minerals. The Alberta Commissioners stated that they agreed with the policy of these amendments. We also agree with that policy. In view of the fact that other provinces that have passed or may hereafter pass the Uniform Devolution of Real Property Act in its present form will almost certainly face the same problem with respect to "mineral leases" that Alberta and Saskatchewan have met we are of opinion that it is advisable to make such changes in the uniform Act as are necessary to overcome the difficulty.

As to wording the Alberta Commissioners suggested that the Conference should consider whether Saskatchewan's wording should be used or whether on the other hand the Act should define "lease" to include mineral lease as Alberta did in The Land Titles Clarification Act, 1956. In the latter Act the word "lease" is a noun whereas in The Devolution of Real Property Act it is a verb. While this may not be a sufficient reason for discarding the idea of a definition it does seem to present a difficulty in drafting that can be avoided by using the words in Saskatchewan's 1960 amendment, that is to say, "lease, grant a profit a prendre in respect of or otherwise deal with or dispose of mines and minerals". This, in a few words, fully meets the case for which provision should be made and no definition is necessary.

It should also be pointed out here that the 1960 amendment to section 15 of Saskatchewan's Act authorized the disposition of mines and minerals "whether the same have already been worked or not". This was included to alter the common law rule that if a limited owner such as a personal representative opened mines without authorization under the will, trust instrument, etc., he committed waste. Authority to work mines was implied if they were opened at the time the personal representative took over. If they were unopened, opening them was waste. This problem was solved as early as 1856 in England, the present law there being found in The Settled Land Act, 1925 (15 Geo. V c. 18), section 41. Saskatchewan also had dealt with this problem in

The Lunacy Act, R.S.S. 1953, c. 310, section 15(e), but not in The Devolution of Real Property Act. It is believed that the amendment now protects the personal representatives from liability for waste.

Before setting forth a draft of the amendment we are proposing we wish to call the attention of the Conference to the new clause (b) of subsection (1) of section 15 enacted by Saskatchewan in 1958. The uniform clause (b) permits a personal representative to lease real property, with the approval of the court, for a term longer than one year. The new clause (b) enacted by Saskatchewan permits a personal representative to lease real property, with the approval of the court *or* the concurrence of the interested persons, for a term longer than one year. We believe that the new Saskatchewan clause (b) is reasonable and suggest that the Conference consider including a similar provision in the uniform Act.

If the Conference should decide to amend the said uniform clause (b) so as to give a personal representative the same power as he has under the new Saskatchewan clause (b) we think it would be appropriate to join this with the power proposed to be given with respect to the disposition of minerals, and therefore we recommend that clause (b) of subsection (1) of section 15 of the Uniform Devolution of Real Property Act be deleted and the following substituted therefor:

"(b) with:

(i) the approval of the court; or

(ii) the concurrence of the adult persons beneficially interested and, if any infants or lunatics are so interested, the approval of the Official Guardian (*or other proper officer*) on behalf of the infants and, in the case of a lunatic, the approval of ;

lease the real property or any part thereof for a longer term, or lease, grant a *profit a prendre* in respect of or otherwise deal with or dispose of mines and minerals forming part of the real property whether the same have already been worked or not and either with or without the surface or other real property, or grant any easement, right or privilege of any kind over or in relation thereto".

NOTE:—In provinces where sand and gravel are surface and not minerals the words "or sand and gravel" should be inserted after the word "minerals" in the fourth line following subclause (ii) because a removal of sand and gravel would probably constitute waste.

In the preparation of the above draft of the proposed new clause (b) we have looked at section 14 of the uniform Act and it

seems to us that that section does not say quite what was intended when it was originally adopted. The words "if any infants or lunatics are so interested" in the fourth and fifth lines relate to the concurrence of the adult persons beneficially entitled as well as to the approvals of the two officers. This surely could not have been intended since the concurrence of the adult persons should be a requirement in every case and not only where infants or lunatics are beneficially interested. We therefore recommend that section 14 be revised to read as follows:

"14. The personal representative may, with the concurrence of the adult persons beneficially interested and, if any infants or lunatics are so interested:

(a) the approval of the Official Guardian (*or other proper officer*) on behalf of the infants; and

(b) in the case of a lunatic, the approval of ;

divide the real property of the deceased among, and convey it to, the persons beneficially interested".

Dated at Regina, Saskatchewan, the 15th day of May, 1961.

E. C. LESLIE

W. G. DOHERTY

B. L. STRAYER

J. H. JANZEN

Saskatchewan Commissioners.

COPY OF SECTIONS 14 AND 15 OF THE UNIFORM DEVOLUTION OF REAL PROPERTY ACT AS PUBLISHED IN THE PROCEEDINGS OF THE TENTH ANNUAL MEETING OF THE CONFERENCE OF COMMISSIONERS ON UNIFORMITY OF LEGISLATION IN CANADA, COMMENCING ON PAGE 22.

14. The personal representative may, with the concurrence of the adult persons beneficially interested, with the approval of the Official Guardian (or other proper officer) on behalf of infants and, in the case of a lunatic, with the approval of , if any infants or lunatics are so interested, divide or partition and convey the real property of the deceased person, or any part thereof, to or among the persons beneficially interested.

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;

(c) raise money by way of mortgage of the real property or any part thereof for the payment of debts, or for payment of taxes on the real property to be mortgaged, and, with the approval of the court, for the payment of other taxes, the erection, repair, improvement or completion of buildings, or the improvement of lands, or for any other purpose beneficial to the estate.

(2) Where infants or lunatics are interested, the approvals or order required by sections 12 and 13 in case of a sale shall be required in the case of a mortgage, under clause (c) of subsection (1) of this section, for payment of debts or payment of taxes on the real property to be mortgaged.

APPENDIX J

(See page 22)

CONFLICT OF LAWS GOVERNING WILLS

At the 1959 meeting of the Conference a report was presented on the Conflict of Laws Governing Wills. (Set out in 1959 Proceedings, Appendix R, page 132.) After some discussion the following resolution was adopted: "Resolved that the subject be referred back to Dean Read for further study and for a report with a draft Act, if he considers it advisable at the next meeting of the Conference". At the 1960 meeting, the undersigned reported that discussions were to occur at the Hague Conference on Private International Law in October, 1960 on the preparation of a multilateral convention concerning the formal validity of wills. The objective was to be to ensure that the law on this subject will become as broadly uniform over as wide an area as possible. Consequently, preparation of any suggested amendments to the present Canadian Uniform Act was deferred pending the result of the Hague Conference.

The Hague Conference was held from October 5 to 26, 1960, and comprised delegations from Austria, Belgium, Denmark, Finland, France, Western Germany, Greece, Italy, Japan, Luxemburg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom, and Yugoslavia. The United States was represented by an Observer Delegation. Agreement was reached upon a draft Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions. The provisions relevant to any proposed amendments to the Uniform Act are as follows:

> The States signatory to the present Convention,
>
> Desiring to establish common provisions of the conflicts of laws relating to the form of testamentary dispositions,
>
> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

A testamentary disposition shall be valid as regards form if it complies with the internal law:

(a) of the place where the testator made it, or

(b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

(c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

(d) of the place in which the testator had his habitual residence whether at the time when he made the disposition, or at the time of his death, or

(e) so far as immovables are concerned, of the place of their situation.

For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, shall be that law within such system, with which the testator had the closest connexion.

The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.

Article 2

Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition.

The revocation shall also be valid as regards form if it complies with any one of the laws according to the terms of which, under article 1, the testamentary disposition that has been revoked was valid.

In the 1959 Report, after discussing the report of the United Kingdom Parliamentary Private International Law Committee, the following statement was made: "It is believed that this Conference should consider giving effect to the recommendations of the Parliamentary Committee concerning:

(1) extending the connecting factors concerning an interest in movables to an interest in land;

(2) abolishing domicile of origin as a connecting factor; and

(3) including a rule expressly providing that the same connecting factors apply to revocation by every method authorized by Section 16 of the Uniform Wills Act 1957, as apply to formal validity, when a will is made".

It will be observed that the Draft Convention gives effect to recommendations (1) and (2) in Article 1, and to recommendation (3) in Article 2.

It will also be observed: *first*, that nationality of the testator is included as a connecting factor in clause (b) of Article 1, and that the penultimate paragraph of the Article attempts to provide a solution to the practical difficulty, noted in the 1959 Proceedings

on page 133, of using nationality as a connecting factor as between the constitutent units comprised in either a composite or a federal system; and, *second*, that "habitual residence" is included as a connecting factor in clause (d) of Article 1. Neither of these were among those included in the original proposal by the United Kingdom but they are familiar to the law of continental European countries, and serve to widen the base in support of the policy of effectuating testamentary dispositions.

To illustrate the modifications of Part II (Conflict of Laws) of the Uniform Wills Act, 1953, that would make it uniform with the Hague Convention of 1960, Section 35 of the Uniform Act (See 1953 Proceedings at pages 51-52) is amended to read as follows, with substantive changes italicized:

35. (1) As regards the manner and formalities of making a will of an interest in movables or of *an interest in land* or of both, a will made either within or without the Province is valid and admissible to probate if *either* at the time when the testator made it or *at the time of his death,* it complied with the internal law:

(a) of the place where the will was made; or

(b) of the place where the testator was domiciled; or

(c) *of the place where the testator had his habitual residence;* or

(d) *subject to subsection (2), of the nationality of the testator.*

(2) *For the purpose of this Act, if a national law consists of a non-unitary system, the law to be applied shall be determined by the rules in force in that system, and, failing any such laws, by the law within the system with which the testator had the closest connection.*

An additional section, 39, would follow the lead of the Convention and apply the rules of Section 35 to the formal validity of a revocation by every means: (See 1959 Proceedings, pages 135-136.)

39. *As regards the manner and formalities of altering or revoking a will, an alteration or a revocation is valid if it complies with the rules governing alteration or revocation of any one of the laws according to which under Section 35 the will that the alteration or revocation affects was valid.*

A member of the United States Observer Delegation at the Hague Conference has stated:

> The convention on the conflict of laws relating to the form of testamentary dispositions is the result of an initiative taken at the preceding session of the Conference by the United Kingdom. The topic was suggested in the light of the fact that the British legislation on the subject, Lord Kingsdown's Act of 1861, needed to be revised and that uniform regulation

of the subject matter in the world commended itself. Among the materials taken into account were the Ontario Wills Amendment Act of 1954, framed after the Canadian Uniform Wills Act as revised in 1953, and the conflicts section 7 of the (U.S.) Model Execution of Wills Act of 1940 which has its origin in the Uniform Foreign Executed Wills Act of 1910.

The guiding principle of the new convention is *favor testamenti*, that is, the endeavor to facilitate recognition of last wills established according to a law other than that of the forum.

(Kurt H. Nadelmann, "The Hague Conference on Private International Law", (1960) 9 Am. Jour. Comp. Law 583 at p. 584.)

It is recommended that Part II of the Uniform Wills Act be amended as set out in the above redraft of Section 35, [excepting clauses (c) and (d) of subsection (1), and subsection (2)]; Section 38 and Section 39. It is further recommended that consideration next be given to broadening the Act to coincide with the Hague Convention to the extent of including clauses (c) and (d) of subsection (1) of Section 35, and subsection (2) thereof as set out above.

Respectfully submitted,

HORACE E. READ,
for the Nova Scotia Commissioners.

APPENDIX K

(See page 22)

THE FATAL ACCIDENTS ACT

REPORT OF THE MANITOBA COMMISSIONERS

At the 1960 meeting of the Conference the draft of The Fatal Accidents Act prepared by the New Brunswick Commissioners was referred to the Manitoba Commissioners for study and redrafting in the light of the discussion thereof and the decisions taken at the meeting, and for report this year.

The Manitoba Commissioners have, as instructed, made a further draft embodying, as we understood them, the decisions of the Conference and the views expressed by various Commissioners to which there was little or no dissent.

We have added one or two definitions that seemed useful and would facilitate the shortening of some of the substantive provisions. An attempt has been made in subsection (5) of section 3, to meet the difficulty arising from the decision in Cairney vs. MacQueen (1956) S.C.R. 555. For this purpose we have adapted some language from The Trustee Act of Manitoba. The substance of section 5 of the New Brunswick draft is transferred to subsection (2) of section 6. We have added a new subsection (3) to section 6, which we felt would be useful. The substance of subsections (2) and (3) of section 7 of the present Manitoba statute have, as instructed, been included as subsections (4) and (5) of section 9 for the purpose of discussion.

With regard to the latter part of section 8 of the New Brunswick draft, which we have made subsection (2) thereof, we understand that, in Manitoba at least, where moneys paid into court in satisfaction of a claim are not accepted, notice of the fact that the moneys have been so paid in is not given to the judge. In any province where that is the case subsection (2) of section 8 would appear to be redundant. We have so indicated in a note appended to section 8.

We have included as section 12 a provision the substance of which is section 10 of the present Manitoba statute and section 9 of the Ontario statute; and we have also included, as section 11, a provision that is section 11 of the Saskatchewan Act, although we have added thereto an additional subsection as subsection (3) thereof.

With regard to section 12, we have drafted it to refer to "an action" (in the singular) rather than to "actions" (in the plural) since the Act includes a specific provision that only *one* action may be brought.

With respect, we find ourselves unable to agree with the New Brunswick Commissioners that the Act should purport to affect the Crown in right of any province or, indeed, in right of Canada or any part of the Commonwealth, the executive government of which is vested in Her Majesty. In our view there is a considerable doubt, to say the least, whether a provincial legislature can bind the Crown in any right other than that of its own province. We suggest, therefore, that it is better not to include a provision that might be found to be ultra vires.

Dated at Winnipeg, this 26th day of June, 1961.

G. S. RUTHERFORD,

R. H. TALLIN,

Manitoba Commissioners.

"MODEL ACT"

FATAL ACCIDENTS ACT

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 Fatal Accidents Act".

Definitions:

2. In this Act,

"child"

(*a*) "child" means a son, daughter, grandson, granddaughter, step-son, and step-daughter, and includes (*an adopted child*), an illegitimate child, and a person to whom the deceased stood *in loco parentis;*

NOTE:—In some provinces the provisions of the legislation respecting adoption of children may render it unnecessary to include an adopted child in this definition.

"deceased"

(*b*) "deceased" means a person whose death has been caused as mentioned in subsection (1) of section 3;

"judge"

(*c*) "judge" includes the jury in all cases tried by a jury;

"parent"

(*d*) "parent" means a father, mother, grandfather, grandmother, step-father, and step-mother, and includes (*an adoptive parent*), a person who stood *in loco parentis* to the deceased, and the mother of an illegitimate child;

NOTE:—In some provinces the provisions of the legislation respecting adoption of children may render it unnecessary to include an adoptive parent in this definition.

"tortfeasor"

(*e*) "tortfeasor" means a person by reason, or partly by reason, of whose wrongful act, neglect, or default the death of the deceased is ultimately caused and who, if death had not ensued, would have been liable to him for damages.

Liability for damages caused by death

3.—(1) Where the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the deceased to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued is liable to an action for damages, notwithstanding the death of the deceased, even if the death was caused in circumstances amounting in law to culpable homicide.

When cause of action arises

(2) Subject to subsection (4), the liability to an action for damages under this section arises upon the death of the deceased.

(3) No settlement made, release given, or judgment recovered in an action brought, by the deceased within a period of three months after the commission or occurrence of the wrongful act, neglect, or default causing his death, is a bar to a claim made under this Act or is a discharge of liability arising under this Act; but, unless it is set aside, a settlement made or release given, or a judgment recovered in an action brought, by the deceased after the expiration of such a period is a bar to the making of any claim and is a discharge of liability under this Act. Effect of settlements made by deceased

(4) If, at the time of the death of the deceased, the tortfeasor is himself dead, the liability arising under this Act shall, for the purposes of this Act, be conclusively deemed to have been subsisting against the tortfeasor before his death. Prior death of tortfeasor

(5) Where the tortfeasor dies after the death of the deceased, the liability and cause of action arising under this Act shall, for the purposes of this Act, be conclusively deemed to lie upon and continue against the personal representative as if the personal representative were the tortfeasor in life. Subsequent death of tortfeasor

4.—(1) Every such action shall be for the benefit of the wife, husband, parent, child, brother and sister, or any of them, of the deceased, and except as hereinafter provided, shall be brought by and in the name of his executor or administrator. Persons entitled to benefit

(2) In every such action the judge may award such damages, by way of fair compensation, as are proportioned to the pecuniary loss resulting from the death, to the persons respectively for whose benefit the action is brought. Amount of damages

(3) Where an action has been brought under this Act there may be included in the damages awarded an amount sufficient to cover the reasonable funeral expenses of the deceased. Funeral expenses

5.—(1) Where there is no executor or administrator of the deceased, or there being an executor or administrator, no action is brought as provided in section 4 within six months after the death of the deceased, an action may be brought by and in the name or names of any one or more of the persons for whose benefit the action would have been brought if it had been brought as provided in section 4. Bringing of action where no personal representative

(2) Every action so brought shall be for the benefit of the same persons as if it were brought in the name of the executor or administrator. Idem

(3) Where an action is begun as provided in section 4, but has not been brought to trial within six months after it has been Idem

begun, then the (*statement of claim*) in the action and all subsequent proceedings therein may, on application, be amended by substituting as plaintiff, all or any of the persons for whose benefit the action was or should have been begun.

Considerations in assessing damages

6.—(1) In assessing damages in an action brought under this Act the judge shall not take into account

(*a*) any sum paid or payable on the death of the deceased, whether made before or after the coming into force of this Act;

(*b*) any premium that would have been payable in future under any contract of insurance if the deceased had survived;

(*c*) any benefit or right to benefits, resulting from the death of the deceased, under (*The Workmen's Compensation Act*, or *The Social Allowances Act*, or *The Child Welfare Act*) or under any other Act that is enacted by any legislature, parliament, or other legislative authority and that is of similar import or effect; and

(*d*) any pension, annuity or other periodical allowance accruing payable by reason of the death of the deceased.

NOTE:—For the Acts named (in brackets and in italics) in clause (c) above, each province will substitute the relevant Acts in force in that province.

Consideration of moneys received under settlement made by deceased

(2) Notwithstanding subsection (3) of section 3, where the deceased has in his lifetime released or settled any claim for damages that he had, or might have had, against any tortfeasor, or has recovered judgment for any such damages, in assessing damages in any action brought under this Act, the judge may take into account

(*a*) the amount of any payment made to, and the value of any benefit received by the deceased, as consideration or part of the consideration for the release or settlement of the claim; and

(*b*) any amount recovered or otherwise received upon any such judgment.

Consideration of moneys, etc. received under settlement made by claimant

(3) Where the executor or administrator of the deceased or any person by whom or for whose benefit a claim may be made or an action may be brought under this Act has received moneys or any benefit by way of a settlement or partial settlement of the claim or action, in assessing damages in an action brought under this Act the judge may take into account the amount of the moneys and the value of the benefit so received.

7.—(1) Only one action lies for and in respect of a cause of action arising under this Act. One action only

(2) Notwithstanding any other Act of the Legislature, or any contract, but subject to subsection (3), Procedure in, and limitations on, bringing of action

(*a*) it is not necessary that any notice of claim or intended claim, or notice of action or intended action or any other notice, or any other document, be given or served, as provided in any such other Act, or in any such contract, or at all, before bringing an action under this Act;

(*b*) an action, including an action to which subsection (4) or (5) of section 3 applies, may be brought under this Act within two years after the death of the deceased, and no such action shall be brought thereafter.

(3) No action shall be brought under this Act unless the deceased dies within one year after the commission or occurrence of the wrongful act, neglect, or default causing his death. Where no action permissible

8.—(1) The defendant may pay into court in one sum of money as compensation for his wrongful act, neglect, or default to all persons entitled to damages under this Act, without specifying the shares into which, or the parties among whom, it is to be divided under this Act. Payment into court

(2) Where a sum paid into court under subsection (1) is not accepted and issue is taken by the plaintiff as to its sufficiency, but the judge finds it to be sufficient, the defendant is entitled to a verdict on that issue. Judgment thereon

NOTE:—Under the practice in the courts of some provinces subsection (2) above may be unnecessary or inadvisable. Each province therefore should consider whether it should be retained.

9.—(1) In every action brought under this Act the (*statement of claim*) shall contain, or the plaintiff shall deliver therewith, full particulars of the names, addresses, and occupations of the persons for whose benefit the action is brought, and the manner in which the pecuniary loss to those persons is alleged to have arisen. Particulars required in bringing action

(2) The failure or omission of the plaintiff to comply with subsection (1) is not a ground of defence to the action, or a ground for its dismissal. Effect of failure to give particulars

(3) Where any such failure or omission occurs, the court, on application, may order the plaintiff to give such particulars or so much thereof as he is able to give, and the action shall not be tried until he complies with the order; but the failure or omission is not a ground for the dismissal of the action. Order for particulars

Affidavit of plaintiff

(4) The plaintiff shall file with the (*statement of claim*) an affidavit in which he shall state that to the best of his knowledge, information, and belief, the persons on whose behalf the action is brought as set forth in the (*statement to claim*) are the only persons entitled, or who claim to be entitled, to the benefit of the action.

Order dispensing with affidavit

(5) A judge of the court in which the action is brought may dispense with the filing of an affidavit, as required in subsection (4), if he is satisfied that there is sufficient reason for doing so.

NOTE:—Subsections (4) and (5) are taken from the Manitoba statute and are included for discussion as to the desirability of retaining them.

Division of amount recovered

10.—(1) The amount recovered in an action brought under this Act, after deducting the costs and expenses incurred in respect thereof and not recovered from the defendant, shall be divided amongst the several persons for whose benefit the action was brought and who shall be specified in the judgment, in such shares or amounts as may be determined by the judge at the trial or subsequently as provided in subsection (3).

Award of funeral expenses

(2) For the purpose of any such division any amount awarded as funeral expenses shall be conclusively deemed to be awarded to the person who paid them, or if not paid, to the person who is liable for payment thereof.

Subsequent apportionment

(3) Where the amount recovered has not been otherwise apportioned, a judge in chambers may apportion it among the persons entitled thereto.

Postponement of apportionment among infants

(4) The judge may, in his discretion, postpone the distribution of any moneys to which infants are entitled or apportion them as hereinbefore provided, and

(*a*) where distribution is postponed, may direct payment from the undivided fund; or

(*b*) where the moneys are apportioned, may give directions as to the manner in which they shall be paid or applied and the amounts in which, and the persons to whom or for whose benefit, the moneys shall be paid.

Application to judge respecting settlement

11.—(1) Where an action is maintainable under this Act, and some or all of the persons for whose benefit the action is maintainable are infants, if

(*a*) either before or after beginning action, the executor or administrator of the deceased; or

(*b*) after beginning action, any other persons by whom, under section 5, action may be brought;

agrees on a settlement of the claim or action, either the person mentioned in clause (a) or clause (b) or the person against whom the claim or action is made or brought, may, on ten days' notice to the opposite party and to the (*official guardian*) apply to a judge of (*Her Majesty's Court of Queen's Bench for Manitoba*) sitting in chambers, for an order confirming the settlement.

Action on application

(2) The judge may on the application confirm or disallow the settlement; but, subject to subsection (3), if the settlement is confirmed by him, the defendant or the person against whom the claim is made is discharged from all further claims.

Where some defendants discharged

(3) Where there is more than one defendant or more than one person against whom a claim may be made, only

(*a*) those defendants; or

(*b*) those persons against whom a claim is made;

who are parties to the settlement are discharged from further claim.

Order for distribution

(4) The judge may also on the application order that the money or a portion thereof be paid into court or otherwise apportioned and distributed as he may deem best in the interests of those entitled thereto.

NOTE:—Taken from Saskatchewan Act.

Determination of questions between persons entitled

12. Where an action is brought under this Act, a judge of the court in which the action is pending may make such order as he may deem just for the determination of all questions as to the persons entitled under this Act to the amount, if any, that may be recovered.

NOTE:—Taken from Ontario and Manitoba Acts. Each province should consider whether this section is necessary under the practice of its courts.

Liability of Crown

13. Her Majesty in right of (*Manitoba*) is bound by this Act.

Commencement of Act

14. This Act comes into force on

APPENDIX L

(*See page 23*)

THE SURVIVAL OF ACTIONS ACT

1961 REPORT OF THE ALBERTA COMMISSIONERS

At the 1960 meeting of the Conference, the Alberta Commissioners were requested to make a study of the matter of a uniform Survival of Actions Act and to submit a report at the 1961 meeting with a draft Act if they considered it advisable (1960 Proceedings, p. 32).

At common law the general rule was that a representative could not sue or be sued for a wrong committed against or by the deceased for which unliquidated damages only would be recoverable; the rule is expressed in the maxim actio personalis moritur cum persona. The only cases in which a remedy for a tortious act could be pursued against the estate of a deceased person were where property or proceeds or value of property belonging to another had been appropriated by the deceased and added to his own estate or money. Claims founded on any obligation under a contract or debt that might have been enforced by suing the deceased in his lifetime were enforceable against the representative. This did not apply to contracts founded on personal considerations or to joint obligations.

All of the common law provinces and the United Kingdom have to varying extents modified the common law position by statute. An examination of this legislation shows a considerable variation in the causes of action that are allowed to survive for the benefit of and against estates. There is also a variety of exceptions, restrictions and limitation periods. For the purposes of comparison these provisions are set out in a condensed form in Appendix A to this report. Attached as Appendices B to K are the present statutory provisions of the common law provinces and the United Kingdom. From the sources of information available to us it would appear that the province of Quebec does not have any general survival of actions legislation but includes an appropriate provision with each subject dealt with in the Civil Code.

The existing legislation falls into two main classes. New Brunswick, Nova Scotia and Prince Edward Island provide for the survival of all causes of action with certain exceptions and restrictions. These Acts are based on the United Kingdom Act of

1934. The Acts of the other provinces are not intended to be declaratory of the law relating to contract. These are much older enactments; Ontario's date from 1887. They provide, with some variations, for the survival of actions in tort. In addition, three of these Acts enable the representative to bring an action of account and four permit distress for rent due during the deceased's lifetime. Two of the Acts provide that where there is a joint obligation, the representative of a deceased obligor is liable to the same extent as if the obligation were joint and several. There is also a number of other matters dealt with by one or more of these Acts. Because of the differences in the existing legislation, as indicated by Appendix A, it is thought that these matters should be considered by the Conference before a draft Act is prepared.

There are differences between actions that survive for the benefit of estates and actions that survive against estates. For convenience we propose to discuss these two types of action separately. The following are matters that should be considered by the Conference with respect to actions surviving for the benefit of estates:

1. *Scope and wording of the main provision for survival*

Some of the Acts say that all types of actions survive—others just deal with torts to persons or property. Where the comprehensive approach is used there is no need to include actions of account or any other particular action. There remains the question of extra judicial proceedings such as distress. Although, strictly speaking, distress is not an action we believe the survival legislation is the proper place for it. We have considered why the legislation on this point does not provide for survival of the right of distress when the tenant dies. The English statute of (1540) 32 Hen. VIII did this but the English re-enactment of 1833, like the Canadian statutes based on it, deals only with the death of the landlord. Williams on Landlord and Tenant states that the right survives when the tenant dies but the only authority given is the statute of Henry VIII.

It should be noted that some of the Acts, in addition to keeping certain actions alive, give an action to the estate for funeral expenses.

2. *Exceptions*

The province of Saskatchewan excludes from the scope of its legislation, all torts resulting in death. The other exceptions in

the various Acts have in common the fact that they are torts for which exemplary damages may be given. These are defamation, malicious prosecution, false imprisonment and arrest, seduction, adultery and enticement. The basis for awarding the exemplary damages is to punish the defendant and give a soladium to the plaintiff. The commonest and in many cases the only exception is defamation but we see no reason for singling it out. However, the Conference may prefer to leave defamation as the sole exception and to restrict the others by a provision that no exemplary damages are to be given in any case.

3. *Restrictions*

Most of the provinces (Alberta, Manitoba and Newfoundland being exceptions) prohibit damages for loss of expectation of life and we favour this restriction. We also recommend that the Conference prohibit exemplary damages and damages for physical disfigurement, and pain or suffering.

At least one of the provinces excludes damages for death and compensation for expected earnings subsequent to death. We think this exclusion is not necessary because these items are not included in the first place; they are not surviving rights. Manitoba provides that the damages are to be calculated without reference to the loss or gain to the victim's estate consequent on the death. We think this is sound but it may not be necessary. The English, New Brunswick and Prince Edward Island Acts have a special provision that in breach of promise actions, damages are limited to damages to the estate. A restriction of this kind combined with the prohibition against exemplary damages, leaves very little that can be claimed, as the English cases show (see 2 Mod. L.R. 278).

4. *Limitation of Actions*

At present there are two main types of limitation periods:

(*a*) action to be brought within one year of death;

(*b*) action to be brought within six months after representation taken out and in any event not later that two years after death.

These special provisions override the general provisions of the statute of limitations. They can operate not only to extend the time within which the action could otherwise have been brought but probably also to reduce it in cases where the ordinary limitation period for a cause of action is greater than one or two years. This may be of no great importance with tort actions with fairly

short limitation periods but its effect on actions with longer limitation periods should be seriously considered. The Acts that use the one year period are those that apply to tort only. This period does not apply to contract actions which are governed by the ordinary statute of limitations. The Maritime provinces' Acts which use the six months and two years provision apply to contract actions as well as to tort. It would appear that the United Kingdom does not provide a special limitation for actions (in tort or contract) surviving for the benefit of estates and the running of the statute of limitations is not interrupted by the death. If the Conference favours a statute applying to all causes of action, one solution would be to provide a one year period for tort only and let the ordinary law apply to other types of actions.

Consideration should also be given to special Acts such as Motor Vehicles Act, municipal Acts and public authorities protection Acts which provide special (and usually short) limitation periods. Would a plaintiff be able to rely on the period specified in The Survival of Actions Act or do the above mentioned Acts provide a complete code? We are in favour of setting out the relationship of these conflicting Acts in the survival legislation and we would like the Conference's views as to which should prevail.

With regard to actions against estates, we have the following comments:

1. *General scope*

Each of the existing Acts allows the same actions to survive against estates as it allows to survive for the benefit of estates. While in some instances there are slight differences in language between the two provisions we do not think the differences are significant. We can see no reason why the same type of actions should not be allowed to survive against as well as for estates.

2. *Exceptions*

In the case of each province the exceptions in actions against estates are identical with those for actions by estates. We are not satisfied that this should be so.

For example, there may be good reason for barring an estate from suing a person for defamation or adultery but we are not satisfied that a living victim of a defamation should be barred completely from an action against the wrongdoer's estate. It may be that restrictions could be imposed on such actions but this is not the same as prohibiting them completely.

3. *Restrictions*

At present none of the Acts impose restrictions on the damages that may be recovered from the estates of deceased persons. If the Conference wants to remove some of the exceptions it may want to impose restrictions.

4. *Limitations*

In general the same problems arise with actions against estates as with actions by estates. It should be noted that while the English limitation legislation does not provide a special limitation period for any type of action by estates it does prescribe a period for actions in tort against estates. The Maritime provinces provide the same limitation period for all types of actions by and against estates. As the legislation of the other provinces applies to tort only the limitation period is naturally applicable to tort only. Some of the other provinces may provide a limitation period for other types of actions in their statute of limitations. Alberta provides that actions may be brought against estates

(*a*) within the time otherwise limited for bringing the action; or

(*b*) within two years of the date of death,

whichever period is the longer.

We lean in favour of a flat period such as one year from death; combined with this should be a provision such as is now found in a number of the existing Acts whereby the court is empowered to appoint an administrator ad litem by whom and against whom any action may be brought.

Whatever sort of limitation period is decided upon, there remains the problem of whether an action can be brought under a Survival of Actions Act if at the time of the death the action against the wrongdoer was barred under the statute of limitations. It is our opinion that it could not be brought but we raise the question because of the comment in Airey v. Airey (1958) 2 All E.R. 571 at page 578 that that decision did not attempt to answer this question. We think it would be best to remove doubt and make it clear that the action survives under the Survival of Actions Act only as long as the action was not barred to or against the deceased at the time of death under the otherwise applicable limitation law.

General Comment:

The basic question to be decided is whether a model Survival of Actions Act should apply to all causes of action or just to actions

in tort. If an Act applying to all causes of action is decided upon there is one matter that the Alberta Commissioners believe should be given the utmost consideration.

There are or were actions besides tort actions that die with the person, e.g., contracts based on personal considerations, joint obligations, matrimonial causes and certain statutory remedies. The existing Acts that provide for the survival of all causes of action set out the exceptions and restrictions for tort actions but there are no exceptions or restrictions with respect to non tort actions. If this type of Act is in the nature of a compulsive code do these particular causes of action now survive? If all or any of them are not intended to survive, we are of the opinion that this should be set out in the Act in the same manner as the exceptions and restrictions on tort.

All of which is respectfully submitted.

H. J. WILSON, Q.C.

W. F. BOWKER, Q.C.

W. E. WOOD,

Alberta Commissioners.

Appendix A

Summary of existing survival of actions legislation—(references in brackets are to the sections of the appropriate Act).

1. *Actions maintainable by Estates*

Type of Action	Exceptions	Restrictions	Limitation period
	ALBERTA		
"Any tort or injury to the person or to the real or personal estate of the deceased" (32 (1)) Distraint for rent (35 (1))	Libel and slander (32 (1))	———	One year after death (32 (3))
	BRITISH COLUMBIA		
Action of account (70) "Torts or injuries to person or property of deceased" (71 (2)) Distraint for rent (73) Action for trespass done to the estate, goods, credits or effects of the testator during his lifetime (74)	Libel and slander (71 (1))	No damages in respect of physical disfigurement, pain or suffering death — loss of expectation of life — expectancy of earnings subsequent to death (71 (2))	———
	MANITOBA		
All actions and causes of action in tort whether to person or property (49 (1)) Action of account (50)	Defamation, malicious prosecution, false imprisonment, false arrest (49 (1))	Where the tort caused death, damages not to include exemplary damages and are to be	One year after death (49 (2))

Type of Action	Exceptions	Restrictions	Limitation period
	MANITOBA—*Con.*		
		calculated without reference to loss or gain to estate consequent on death (49 (1))	
	NEW BRUNSWICK		
All causes of action (1)	Defamation, seduction, inducing spouse to leave or remain apart from the other — damages for adultery (1)	No exemplary damages, no damages for loss of expectation of life, in breach of promise limited to damage to the estate (3)	6 months after personal representative takes out representation and in any event 2 years after death (5)
	NEWFOUNDLAND		
Any injury to estate of deceased, committed in his lifetime for which he would have had an action (22 (1))	— —	—	Injury within 6 months of death and action brought within 1 year of death (22 (1))
Distraint for rent (22 (2))			
	NOVA SCOTIA		
All causes of action (1 (1))	Adultery, inducing a spouse to leave or remain apart from his spouse (1 (2))	Actual pecuniary loss to the estate only and no damages for punitive and exemplary matters, loss of expectation of life, pain and suffering (3)	6 months after representation taken out and in any event not later than 2 years after death — not extinguished under Limitation of Actions Act until 6 months after representation taken out (4)

Type of Action	Exceptions	Restrictions	Limitation period
		ONTARIO	
All torts or injuries to person or property of deceased (38 (1)) Action of account (39)	Libel and slander (38 (1))	No damages for: death, or loss of expectation of life (38 (1))	1 year after death (38 (4))
		PRINCE EDWARD ISLAND	
All causes of action (1)	Defamation, seduction, inducing one spouse to leave or remain apart from other, damages for adultery (1)	No exemplary damages, no damages for loss of expectation of life. In breach of promise limited to damage to estate (3)	6 months after representation taken out and in any event 2 years after death (5)
		SASKATCHEWAN	
All torts or injuries to the person not resulting in death, or to the real or personal property of the deceased (52 (1)) Distraint for rent (55)	Libel and slander (52 (1))	Damages proportioned to loss sustained by estate (52 (2))	One year after death (52 (3))
		UNITED KINGDOM	
All causes of action (1 (1))	Defamation and seduction and inducing one spouse to leave or remain apart from the other. Damages for adultery (1 (1))	No exemplary damages. In breach of promise limited to damage to estate (1 (2))	——

2. *Actions maintainable Against Estates*

Type of Action	Exceptions	Limitation period
	ALBERTA	
"Wrong . . . in respect of his person or of his real and personal property". (33 (1))	Libel and slander (33 (1))	One year after death (33 (2))
	BRITISH COLUMBIA	
Tort or injury to person or property (71 (4))	Libel and slander (71 (1))	6 months (71 (4)(b))
	MANITOBA	
All actions and causes of action in tort whether to person or property (49 (1))	Defamation, malicious prosecution, false imprisonment, false arrest (49 (1))	One year after death (49 (2))
	NEW BRUNSWICK	
All causes of action (1)	Defamation, seduction, inducing spouse to leave or remain apart from the other—damages for adultery (1)	Proceedings pending at death or cause of action arose not earlier than 6 months before death and proceedings taken within 6 months of taking out representation (4)
	NEWFOUNDLAND	
Any wrong to another in respect of his property (22 (1))	———	Injury committed within 6 months of death and action brought within 6 months after administration taken out (22 (1))

Type of Action	Exceptions	Limitation period
	NOVA SCOTIA	
All causes of action (1 (1))	Adultery, inducing a spouse to leave or remain apart from his spouse (1 (2))	6 months after representation taken out and in any event not later than 2 years after death—not extinguished under Limitation of Actions Act until 6 months after representation taken out (4)
	ONTARIO	
Wrong to another in respect of his person or property (38 (2))	Libel and slander (38 (2))	1 year after death (38 (4))
	PRINCE EDWARD ISLAND	
All causes of action (1)	Defamation, seduction, inducing one spouse to leave or remain apart from other, damages for for adultery (1)	Proceedings pending at date of death or cause of action arose not earlier than 6 months of death and proceedings brought within 6 months of taking out representation (4)
	SASKATCHEWAN	
Wrong in respect of person or real or personal property (53)	Libel and slander (53)	One year after death (53)
	UNITED KINGDOM	
All causes of action (1 (1))	Defamation and seduction and inducing one spouse to leave or remain apart from the other, damages for adultery (1 (1))	Proceedings pending at date of death or proceedings brought within 6 months of taking out representation (1 (3))

Appendix B

THE TRUSTEE ACT
Revised Statutes of Alberta, 1955

Chapter 346

(*Sections 32, 33, 33a, 34, 35, 36*)

32.—(1) The executors or administrators of any deceased person may maintain an action for any tort or injury to the person or to the real or personal estate of the deceased except in cases of libel and slander, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

(2) The damages when recovered form part of the personal estate of the deceased.

(3) The action shall be brought only within one year after the death of the deceased person.

33.—(1) Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of libel and slander, the person so wronged may maintain an action against the executors or administrators of the deceased person who committed the wrong.

(2) The action shall be brought only within one year after the death of the deceased person.

33*a*.—(1) Where a person wronged is unable to maintain an action under section 33 because neither probate of the will of the deceased person nor letters of administration of the deceased person's estate have been granted in Alberta, a judge of the Supreme Court or a judge of the district court, as the case may require, may, on the application of the person wronged and on such terms and on such notice as he may deem proper, appoint an administrator ad litem of the estate of the deceased person, whereupon

(a) the administrator ad litem is an administrator against whom and by whom an action may be brought under section 33, and

(b) a judgment in favour of or against the administrator ad litem in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased

person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity.

(2) This section applies whether the wrong was committed or the deceased person died before or after the commencement of this section. (1960, c. 11, s. 1)

34.—(1) In estimating the damages in any action under section 32 or 33 any benefit, gain, profit or advantage that in consequence of or resulting from the wrong committed has accrued to the estate of the person who committed the wrong shall be taken into consideration and forms part of or constitutes the whole of, the damages to be recovered.

(2) Subsection (1) applies whether or not any property or the proceeds or value of any property belonging to the person bringing the action or to his estate has or have been appropriated by the person who committed the wrong or added to his estate or moneys.

35.—(1) The executors or administrators of any lessor or landlord may distrain upon the lands demised for any term or at will for the arrears of rent due to such lessor or landlord in his lifetime in like manner as such lessor or landlord might have done if living.

(2) The arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due, and the law relating to distress for rent is applicable to the distress so made.

36.—(1) Where any one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners may by action proceed against the representatives of the deceased contractor, obligor or partner in the same manner as if the contract, obligation or promise had been joint and several, and this notwithstanding there may be another person liable under such contract, obligation or promise still living, and an action pending against such person.

(2) The property and effects of stockholders in chartered banks and the members of other incorporated companies are not liable to a greater extent than they would have been if this section had not been passed.

Appendix C

THE ADMINISTRATION ACT
Revised Statutes of British Columbia, 1960

Chapter 3

(*Sections 70-75*)

70. An executor and administrator has the like powers to prosecute and defend an action in the nature of the common-law action or writ of account as his testator or the deceased intestate would have if living.

71.—(1) This section does not apply in respect of an action of libel or slander, nor does it apply in respect of a tort or injury occurring before the twenty-ninth day of March, 1934.

(2) The executor or administrator of a deceased person may bring and maintain an action for all torts or injuries to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or, if death results from such injuries, to damages for the death, or for the loss of expectation of life (unless the death occurred before the twelfth day of February, 1942), or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action form part of the personal estate of the deceased; but nothing herein contained shall be in derogation of any rights conferred by the Families' Compensation Act.

(3) Where an action is maintained under subsection (2), in addition to the remedies that the deceased would, if living, be entitled to, the executor or administrator may be awarded damages in respect of reasonable expenses of the funeral and the disposal of the remains of the deceased person.

(4) In the case of a tort or injury to person or property, if the person who committed the wrong dies, the person wronged, or, in case of his death, his executor or administrator, may bring and maintain an action against the executor or administrator of the deceased person who committed the wrong, and the damages and costs recovered in the action shall be payable out of the estate of

the deceased in like order of administration as the simple contract debts of the deceased. The following provisions apply in respect of actions within the scope of this subsection:

(*a*) If no probate or letters of administration are issued in the Province in respect of the estate of the deceased person who committed the wrong within three months after his death, a Court of competent jurisdiction or any Judge thereof may, on the application of the person wronged or his executor or administrator, and on such notice to such persons either specially or generally by public advertisement as the Court or Judge may direct, appoint a person to represent the estate of the deceased for all purposes of the intended action and to act as defendant therein; and the action brought against the person so appointed in his representative capacity and all proceedings therein binds the estate of the deceased in all respects as if a duly constituted executor or administrator of the deceased were a party to the action:

(*b*) In the case of actions against persons appointed to represent estates under the provisions of clause (a), no action shall be brought after the expiration of ten months from the death of the deceased person who committed the wrong; and in all other cases no action shall be brought under the provisions of this subsection after the expiration of six months from the death of the deceased person who committed the wrong.

(5) In the case of an action pending between two persons in respect of a tort or injury to the person or property of one of them, if the person wronged dies, his executor or administrator may continue the action against the person who committed the wrong; or, if the person who committed the wrong dies, the person wronged may continue the action against the executor or administrator of the deceased person who committed the wrong or against a person who may be appointed by the Court or a Judge thereof to represent the estate of the person who committed the wrong in the like manner and with the like effect as provided in clause (a) of subsection (4); and, if both the person wronged and the person who committed the wrong die, the executor or administrator of the person wronged may continue the action against the executor or administrator of the person who committed the wrong or against a person who may be appointed by the Court or a Judge thereof to represent the estate of the person who

committed the wrong in the like manner and with the like effect as provided in clause (a) of subsection (4); and every action continued by virtue of this subsection is, as regards the damages recoverable and the damages and costs recovered, governed by the provisions of this section respecting the damages recoverable and the damages and costs recovered in the case of actions brought and maintained by virtue of the other subsections of this section.

(6) Where at the time of the tort or injury in respect of which an action is brought by virtue of subsection (4) or is continued by virtue of subsection (5) the person who committed the wrong was insured against liability for loss or damage in respect thereof by a motor-vehicle liability policy within the meaning of the Insurance Act, and where the person wronged or his executor or administrator recovers a judgment in the action, then, notwithstanding the terms of the policy or the provisions of any law or Statute to the contrary, the liability of the insurer under the policy extends thereto, and the person or the executor or administrator by whom the judgment is recovered has the same rights and remedies as against the insurer and in respect of the insurance-moneys payable under the policy as the person wronged would have if both he and the insured person who committed the wrong were alive and the action had been brought or continued against the insured; but the estate of the insured is liable to pay or reimburse the insurer, upon demand, any amount paid by the insurer by reason of the provisions of this subsection which the insurer would not otherwise be liable to pay.

(7) This section is subject to the provisions of section 12 of the Workmen's Compensation Act, and nothing in this section shall prejudice or affect any right of action under the provisions of section 81 of that Act or the provisions of the Families' Compensation Act.

72. An executor or administrator of any lessor or landlord may distrain upon the lands demised for any term, or at will, for arrears of rent due to such lessor or landlord when living.

73. The arrears may be distrained for after the determination of the term or lease at will, in the same manner as if the term or lease had not been determined, but the distress shall be made within six calendar months after the determination of the term or lease, and during the continuance of the possession of the tenant from whom the arrears are due; and all the provisions in the several Statutes relating to distress for rent are applicable to the distress so made.

74. An executor and every administrator with the will annexed of a testator, as the case may be, is entitled to bring and maintain an action and recover damages and costs for a trespass done to the estate, goods, credits, or effects of the testator during his lifetime, in like manner as the testator could, if living, have brought and maintained the action.

75. An executor of an executor has all the powers, rights, rights of action, and liabilities of his immediate testator in regard to the estates and effects of the first testator.

Appendix D

THE TRUSTEE ACT
Revised Statutes of Manitoba, 1954

Chapter 273

(Sections 49 to 53)

49.—(1) All actions and causes of action in tort, whether to person or property, other than for defamation, malicious prosecution, false imprisonment, or false arrest, in or against any person dying shall continue in or against his personal representative as if the representative were the deceased in life; but in any action brought or continued under authority of this section by the personal representative of a deceased person for a tort causing the death of the person, the damages recoverable for the benefit of his estate shall not include any exemplary damages and shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(2) No action shall be commenced under authority of this section after the expiration of one year from the death of the deceased.

(3) All causes of action under this section and every judgment or order thereon or relating to the costs thereof shall be and form assets or liabilities as the case may be of the estate of the deceased.

(4) The rights conferred by this Act are in addition to, and not in derogation of, any rights conferred on the dependants of deceased persons by The Fatal Accidents Act.

50. A personal representative shall have an action of account as the testator or intestate might have had if he had lived.

51. Executors of executors shall have the same actions for the debts and property of the first testator as he would have had if in life; and shall be answerable for such of the debts and property of the first testator as they recover, as the first executors would be if they had recovered them.

52. The personal representative of any person who, as executor or as executor in his own wrong or as administrator, wastes or converts to his own use any part of the estate of any deceased

person, shall be liable and chargeable in the same manner as his testator or intestate would have been if he had been living.

53. Every personal representative, as respects the additional powers vested in him by this Act, and any money or assets by him received in consequence of the exercise of those powers, shall be subject to all the liabilities, and compellable to discharge all the duties that, as respects the acts to be done by him under the powers, would have been imposed upon a person appointed by the testator, or would have been imposed by law upon any person appointed by law, or by any court of competent jurisdiction to execute such power.

Appendix E

THE SURVIVAL OF ACTIONS ACT
Revised Statutes of New Brunswick, 1952

Chapter 223

1. Subject to the provisions of this Act, on the death of a person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate; provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or to claims for damages on the ground of adultery.

2. Except as in this Act otherwise provided where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall be calculated in the same manner as if the deceased person were living and the action had been brought by him.

3. Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person

(*a*) shall not include any exemplary damages; or

(*b*) shall not include any damages for loss of expectation of life; or

(*c*) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry.

4. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived against the estate of a deceased person, unless either,

(*a*) proceedings against him in respect of that cause of action were pending at the date of his death; or

(*b*) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

4A. Where a cause of action has survived against the estate of a deceased person, and there is no legal personal representative

of the deceased person against whom such action may be brought or maintained in this Province, a court of competent jurisdiction, or any judge thereof, may, on the application of a person entitled to bring or maintain such action, and on such notice as the court or judge may deem proper, appoint an administrator ad litem of the estate of the deceased person, whereupon,

(*a*) the administrator ad litem shall be deemed to be an administrator against whom such action may be brought or maintained, and

(*b*) any judgment obtained by or against the administrator ad litem shall be of the same force and effect as a judgment in favour of or against the deceased person, or his legal personal representative, as the case may be. (1959, c. 73, s. 1)

5. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived for the benefit of the estate of a deceased person unless proceedings in respect of that cause of action are taken within six months after his personal representative takes out representation, and in any event within two years after the death of the deceased person.

6. Where damage has been suffered by reason of an act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

7. The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the relatives of deceased persons by the Fatal Accidents Act.

Appendix F

THE TRUSTEE ACT
Revised Statutes of Newfoundland, 1952

Chapter 166

(Section 22)

22.—(1) An action may be maintained by the executors or administrators of any person deceased for any injury to the estate of such person, committed in his life time, for which an action might have been maintained by such person, so as such injury shall have been committed within six months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person, and damages, when recovered, shall be part of the estate of such person and an action may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his life time to another in respect to his property; so as such injury shall have been committed within six months before such person's death, and so as such action shall be brought within six months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such persons.

(2) The executors or administrators of any lessor or landlord may distrain upon the lands demised, for any term or at will, for the arrearages of rent due to such lessor or landlord in his life time, in like manner as such lessor or landlord might have done in his life time.

(3) Such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; Provided that such distress be made within the space of six months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears become due. All the powers and provisions of the law relating to distress for rent shall be applicable to distresses made under the provisions of this Act.

Appendix G

THE SURVIVAL OF ACTIONS ACT
Revised Statutes of Nova Scotia, 1954

Chapter 282

1.—(1) Except as provided in subsection (2), where a person dies after this Act comes into force, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate.

(2) A cause of action does not survive death when the action is for:

(*a*) adultery;

(*b*) inducing a spouse to leave or remain apart from his or her spouse.

2. Where damage has been suffered by reason of an act or omission as a result of which a cause of action would have subsisted against a person if that person had not died before or at the same time as the damage was suffered, there is deemed to have been subsisting against him before his death whatever cause of action as a result of that act or omission would have subsisted if he had not died before the damage was suffered.

3. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the estate are recoverable; and in no case are damages recoverable for:

(*a*) punitive and exemplary matters;

(*b*) loss of expectation of life;

(*c*) pain and suffering.

4. No action shall be brought under this Act unless proceedings are begun within six months after the personal representative takes out representation and, in any event, not later than two years after death. Such a cause of action is not extinguished under the provisions of the Limitation of Actions Act, until at least six months after representation is taken out.

5. The rights conferred by this Act are in addition to and not in derogation of any rights conferred by the Fatal Injuries Act.

6. Where there is no executor or administrator or none within the Province of an estate against which or for the benefit of which a cause of action survives under this Act, a judge of the Supreme Court or a judge of a County Court, on an application made after the expiration of twenty days from the date of death, may, on such terms as to costs or security therefor as the judge thinks fit, appoint a person to represent the estate for all purposes of any action, cause or proceedings on behalf of or against the estate. (1957, c. 49, s. 1)

Appendix H

THE TRUSTEE ACT
Revised Statutes of Ontario, 1960

Chapter 408

(*Sections 38 and 39*)

38.—(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; provided that if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by The Fatal Accidents Act.

(2) Except in cases of libel and slander, if a deceased person committed a wrong to another in respect of his person or property, the person wronged may maintain an action against the executor or administrator of the person who committed the wrong.

(3) Where a person wronged is unable to maintain an action under subsection 2 because neither letters probate of the will of the deceased person nor letters of administration of the deceased person's estate have been granted within six months after the death, a judge of the Supreme Court may, on the application of the person wronged and on such notice as he may deem proper, appoint an administrator ad litem of the estate of the deceased person, whereupon,

(*a*) the administrator ad litem shall be deemed to be an administrator against whom an action may be brought under subsection 2; and

(*b*) any judgment in favour of or against the administrator ad litem in any such action has the same effect as a judgment in favour of or against, as the case may be, the deceased person, but it has no effect whatsoever for or against the administrator ad litem in his personal capacity.

(4) An action under this section shall not be brought after the expiration of one year from the death of the deceased.

39. A personal representative has an action of account as the testator or intestate might have had if he had lived.

Appendix I

AN ACT TO ENABLE THE SURVIVAL OF ACTIONS AND TO AMEND THE JUDICATURE ACT

Laws of Prince Edward Island, 1955

Chapter 17

(Assented to March 18, 1955)

BE IT ENACTED by the Lieutenant-Governor and Legislative Assembly of the Province of Prince Edward Island as follows:

1. Subject to the provisions of this Act, on the death of a person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate; Provided that this section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other, or to claims for damages on the ground of adultery.

2. Except as in this Act otherwise provided where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall be calculated in the same manner as if the deceased person were living and the action had been brought by him.

3. Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person

(*a*) shall not include any exemplary damages; or

(*b*) shall not include any damages for loss of expectation of life; or

(*c*) in the case of a breach of promise to marry, shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry.

4. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived against the estate of a deceased person, unless either,

(*a*) proceedings against him in respect of that cause of action were pending at the date of his death; or

(*b*) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

5. No proceedings are maintainable in the courts of the Province in respect of a cause of action which by virtue of this Act has survived for the benefit of the estate of a deceased person unless proceedings in respect of that cause of action are taken within six months after his personal representative takes out representation and in any event within two years after the death of the deceased person.

6. Where damage has been suffered by reason of an act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purpose of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

7.—(1) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any right of action for the benefit of the relatives of deceased persons conferred by the Fatal Accidents Act.

(2) This Act shall not affect any right or cause of action in contract or otherwise subsisting against or vested in the estate of a deceased person which would have survived apart from this Act.

8. Section 38 of The Judicature Act, R.S.P.E.I. 1951, chapter 79 is repealed, saving always all such rights of action as may have accrued thereunder before the passing of this Act.

Appendix J

THE TRUSTEE ACT

Revised Statutes of Saskatchewan, 1953

Chapter 123

(Sections 52 to 57)

52.—(1) The executors or administrators of a deceased person may maintain an action for all torts or injuries to the person not resulting in death, except libel and slander, or to the real and personal estate of the deceased, in the same manner as the deceased might have done if living.

(2) In every such action the judge or jury may give such damages as he or it thinks proportioned to the loss sustained by the estate of the deceased in consequence of wrong committed.

(3) Every such action shall be brought within one year after the death of the deceased.

53. If a deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of libel and slander, the person so wronged may maintain an action against the executors or administrators of the person who committed the wrong, but such action shall be brought within one year after the decease.

54. In estimating the damages in an action under either of sections 52 and 53 the benefit, gain, profit or advantage which in consequence of or resulting from the wrong committed may have accrued to the estate of the person who committed the wrong shall be taken into consideration and shall form part or may constitute the whole of the damages to be recovered, whether or not property or the proceeds or value of property belonging to the person bringing the action or to his estate has or have been appropriated by or added to the estate or moneys of the person who committed the wrong.

55. The executors or administrators of a lessor may distrain upon the lands demised for any term or at will for the arrears of rent due to the lessor in his lifetime in like manner as the lessor might have done if living.

56. Such arrears may be distrained for at any time within six months after the determination of the term or lease and during the continuance of the possession of the tenant from whom the arrears became due, and the law relating to distress for rent shall be applicable to the distress so made.

57. If one or more joint contractors, obligors or partners die, the person interested in the contract, obligation or promise entered into by such joint contractors, obligors or partners may proceed by action against the representatives of the deceased contractor, obligor or partner in the same manner as if the contract, obligation or promise had been joint and several, notwithstanding that there may be another person liable under the contract, obligation or promise still living and an action pending against such person, but the property and effects of stockholders in chartered banks or the members of other incorporated companies shall not be liable to a greater extent than they would have been if this section had not been passed.

Appendix K

CHITTY'S STATUTES

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1933-35

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LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934

24 & 25 Geo. 5, c. 41—An Act to amend the law as to the effect of death in relation to causes of action and as to the awarding of interest in civil proceedings.

Be it Enacted, etc.:

1. (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under section one hundred and eighty-nine of the Supreme Court of Judicature (Consolidation) Act, 1925, for damages on the ground of adultery.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:

(*a*) shall not include any exemplary damages;

(*b*) in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry;

(*c*) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.

(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either

(*a*) proceedings against him in respect of that cause of action were pending at the date of his death; or

(*b*) proceedings are taken in respect thereof not later than

six months after his personal representative took out representation.*

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932, and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

(7) Subsections (1), (2), (5) and (6) of section twenty-six of the Administration of Estates Act, 1925, shall cease to have effect.

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*Amended by Law Reform (Limitation of Actions etc.) Act, 1954, c. 36, s. 4, by striking out the words "the cause of action arose not earlier than six months before his death and".

APPENDIX M

(*See page 24*)

DRAFT MODEL ACT TO REFORM AND CODIFY THE LAW OF DOMICILE

Title

1. This Act may be cited as the Domicile Code.

Common law

2. This Act replaces the rules of the common law for determining the domicile of a person.

Interpretation

3. In this Act, unless the context otherwise requires, "mentally incompetent person" means . . . .

Domicile

4.—(1) Every person has a domicile.

(2) No person has more than one domicile at the same time.

(3) The domicile of a person shall be determined under the law of the province.

(4) The domicile of a person continues until he acquires another domicile.

Place of domicile and presumptions

5.—(1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.

(2) Unless a contrary intention appears,

(*a*) a person shall be presumed to intend to reside indefinitely in the state and subdivision where his principal home is situate; and

(*b*) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.

(3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.

Mentally incompetent persons

6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.

7. This Act comes into force on a day to be fixed by the Lieutenant-Governor by his proclamation.

APPENDIX N

(*See page 24*)

VARIATION OF TRUSTS

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

This report is supplemental to the Commissioners' report dated July 15, 1960, wherein the Commissioners recommended the adoption of the Ontario Variation of Trusts Act with "few or minor amendments". By an amendment in 1959 to its Trustee Act, New Brunswick enacted the provisions contained in the Ontario Act. To date none of the remaining Provinces have enacted similar legislation.

A draft Act is attached to this report, and the Commissioners have the following comments.

1. The draft Act is identical with the Ontario and New Brunswick Acts except that the word "enlarging" is deleted from subsection (1) of section 2 which reads in part as follows: " . . . varying or revoking all or any of the trusts or enlarging the powers of the trustees . . ." The Commissioners are of the view that a model Variation of Trusts Act might well provide, at least by inference, for the abridgment as well as the enlargement of the powers of the trustees in managing or administering the trust property.

2. With respect to clauses (a), (b), (c) and (d) of subsection (1) of section 2, it is the view of the Commissioners that the words "any person ascertained or unascertained, born or unborn" might well cover the classes segregated by these four clauses, but after consideration the Commissioners have adopted the view that the English law reform committee was right in setting up the four classes, and too much risk would be involved in departing from them for the sake of brevity. Also there would be the disadvantage of losing at least some of the benefit of the case law in England, Ontario and New Brunswick.

3. The reason why subsection (2) is made applicable only to clauses (a), (b) and (c) and not to clause (d) is because the possibility of the persons covered by clause (d) taking is in most cases so remote that it should not be necessary for the Court to be certain that the proposed variation was for the benefit of persons in this class.

4. The question of whether or not the word "arrangement", which is used in subsection (1) of section 2 of the English, the

Ontario and the New Brunswick Acts, was sufficient, was considered by the Commissioners and it was decided that it should be used since it has had the advantage of judicial interpretation. In *Re Steed's Will Trusts (1960) 1 All E.R. 487*, Lord Evershed for the Court said the following:

> "I think that the word 'arrangement' is deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts."

5. It is the view of the Commissioners that the Rules of Court of each Province which adopts the model Variation of Trusts Act provide that the settlor, if living, shall be served with any application under the Act.

6. A Uniform Trustee Investment Act was approved in 1957. Section 4 of that Act was enacted by Nova Scotia in 1957 and by British Columbia in 1959. While this section enables the Court summarily to authorize investments in addition to trustee investments or those authorized by the trust instrument, it does not eliminate the need for a uniform Variation of Trusts Act because of the various other circumstances which arise and can be dealt with fully only under such an Act.

7. Generally, the need for and the results flowing from a Variation of Trusts Act may be summarized shortly, if not exhaustively, as follows:

(a) The inflexible limitations of many trusts may be disastrous to both the trust funds and the beneficiaries because of inflation and income and estate taxes.

(b) Taxpayers may legally arrange their affairs with respect to their own property to reduce taxation to a minimum. There is no sound reason why beneficiaries of a trust should not have similar arrangements made on their behalf.

(c) The welfare of a beneficiary of a trust may, if the Court sees fit, displace or take precedence over the intention of a settlor.

Respectfully submitted,

GILBERT D. KENNEDY
P. R. BRISSENDEN
GERALD H. CROSS
British Columbia Commissioners.

APPENDIX O

(*See page 24*)

AN ACT TO EXTEND THE JURISDICTION OF THE SUPREME COURT TO APPROVE THE VARIATION OF TRUSTS IN THE INTERESTS OF BENEFICIARIES AND TO SANCTION DEALINGS WITH TRUST PROPERTY

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 Variation of Trusts Act, 1961.

2.—(1) Where property, real or personal, is held on trusts arising before or after the coming into force of this Act under any will, settlement or other disposition, the Supreme Court may, if it thinks fit, by order approve on behalf of,

(*a*) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or

(*b*) any person, whether ascertained or not, who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons; or

(*c*) any person unborn; or

(*d*) any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined,

any arrangement, by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto, varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

(2) The court shall not approve an arrangement on behalf of any person coming within clause (a), (b) or (c) of subsection (1) unless the carrying out thereof appears to be for the benefit of that person.

3. This Act comes into force on the day it receives Royal Assent.

APPENDIX P

(*See page 24*)

CHANGE OF NAME ACTS

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

It was resolved last year that the British Columbia Commissioners report on the desirability of having a uniform Change of Name Act, and, if that report were positive, that a draft Act be submitted to the Conference.

That a statutory procedure should be available or mandatory for the changing of names in order that official record might be kept of changes, has been accepted in principal in all common law provinces, while Quebec effects each change of name by separate statute. All of the Change of Name Acts are based on the common law principle that a person is at liberty to change his name, and the variations of importance have to do with the extent to which there is opportunity to restrict that liberty by reason of the statutory procedure prescribed. There are important differences also with regard to the changing of the names of children. Any disadvantages to uniformity in this field of legislation are not apparent to us, and there appears to be no merit in having various methods of obtaining changes of name and various statutory rules as to whose names might be changed in force throughout the country. The adoption of a uniform procedure, or even of a number of basic rules, might, however, obviate some difficulties that seem certain to arise respecting the validity in the Province of a change of name, of a child for instance, effected in another province. From the point of view of the person whose interest lies in the prevention of misrepresentation arising from change of name, similar procedures, records and rights and duties in the various jurisdictions would be of help in ascertaining his legal position in all parts of Canada in relation to the name-changes and in acquiring information regarding applications for and certificates authorizing changes of names. Therefore, we recommend the adoption of a draft model Act.

Before the drafting of an Act is started, however, the principles to be incorporated in it should be determined by the Conference. In order to facilitate that determination, we set forth here a list of questions the answers to which should provide a basis for the draft.

CHANGE OF NAME ACTS

(Except where expressly mentioned, the following material does not apply to Quebec or Prince Edward Island).

1. SHOULD THE STATUTORY PROCEDURE BE MANDATORY, SO THAT A CHANGE OF NAME IS PROHIBITED EXCEPT AS DIRECTED BY THE CHANGE OF NAME ACT OR SOME OTHER STATUTE?

NOTE:—Ontario, British Columbia, Saskatchewan and New Brunswick have such a provision.
Newfoundland has provision similar in intent—see section 15(3).
Prince Edward Island has provision similar in intent.
Alberta's provision may be the opposite—see section 10.
Nova Scotia has no such provision.

2. WHAT QUALIFICATIONS SHOULD BE REQUIRED OF AN APPLICANT FOR A CHANGE OF NAME?

NOTE:—(a) Age—The minimum age for an applicant is
18 years in Ontario,
19 years in Alberta,
21 years or 18 years if a married man, widower or widow in Saskatchewan,
21 years in all other provinces.

(b) Marital status—In all provinces except Manitoba any person except a married woman may make application for change of name.
In Manitoba any person except a married woman may make application subject to section 3(6).
In Ontario and New Brunswick a married woman deserted by her husband may make application.
In Nova Scotia a married woman not living with her husband may make application.

3. FOR WHAT CLASS OR CLASSES OF DEPENDANTS SHOULD AN APPLICANT BE PERMITTED AND BE REQUIRED TO MAKE APPLICATION FOR CHANGES OF SURNAMES OR GIVEN NAMES OR BOTH?

NOTE:—In each province except Manitoba, either a change of surname of a married man carries with it a change of the surnames of his wife and unmarried infant children, or an applicant for a change of surname who is a married man must apply for changes of the surnames of his wife and unmarried infant children.
In each province a married man may apply for a change of the given names of his wife and any or all of his unmarried infant children.
In Ontario and New Brunswick a married woman deserted by her husband may apply for a change of name or names of her unmarried infant children of whom she has custody.
In Ontario, Alberta and New Brunswick an applicant who is a

widower or widow must apply for change of surname of his or her unmarried infant children. In Nova Scotia a change of surname of a widower or widow carries with it a change of the surname of his or her unmarried infant children. There is no such provision in Manitoba, Newfoundland or British Columbia. In each province a widow or widower may apply for a change of the given names of any or all of his unmarried infant children.

In Ontario, New Brunswick, Manitoba, Saskatchewan and British Columbia, a person whose marriage has been dissolved may apply for change of name or names of any or all of his or her unmarried infant children in his or her custody.

In Ontario, New Brunswick and Saskatchewan a woman whose marriage has been dissolved and who remarries may apply for a change of surname of her child or children.

In Ontario and New Brunswick an unmarried mother who marries or a widowed mother who remarries may apply for a change of surname of her unmarried infant children.

4. WHAT CONSENTS SHOULD BE REQUIRED AND IN WHAT CIRCUMSTANCES?

NOTE:—The consent provisions in the various provincial statutes are only slightly varied, and generally speaking an applicant of a specific description in any province requires the same consents. The main difference occurs where the application is made for unmarried infant children over the age of fourteen. In Ontario, New Brunswick, Saskatchewan and British Columbia, consents of those children are required, while in Alberta, Manitoba, and Nova Scotia the consent of the wife only is required. Newfoundland's requirements in such a case are more detailed.

Various provisions occur with regard to the power of a judge to dispense with consents.

5. SHOULD THE APPLICATION BE MADE TO A COURT OR TO A GOVERNMENT OFFICIAL?

NOTE:—This appears to be a very important question and involves not only the procedural aspects but the very important matter of providing a forum competent to hear objections and decide contested issues if they arise. Ontario and New Brunswick both require the application to be made to a judge while in all the other provinces application is made to a Government official or a Minister of the Crown. The New Brunswick and Ontario statutes are both much more detailed as to the powers and duties of the judge and court officials than are the statutes of the other provinces with regard to the functions of the Minister or the Government official as the case may be. Section 15 in the Ontario and New Brunswick Acts is that which provides specifically for the hearing of evidence by persons interested and objections. With few exceptions the discretion given to a judge in those two provinces and to the Ministers or officials in the other provinces are the same.

6. SHOULD INFORMATION BE AVAILABLE FROM THE SHERIFF'S OFFICE WITH REGARD TO THE APPLICANT BEFORE AN ORDER MAY BE MADE?

NOTE:—Both Ontario and New Brunswick require a certificate from the Sheriff of the county in which the application is made and of other counties if the judge so directs as to the existence of any unsatisfied executions in his hands against the property of each person over twenty-one years of age whose name might be affected by the application. Also when an order is made the appropriate sheriffs are informed. The other provinces have no such provision.

7. WHAT INFORMATION SHOULD BE REQUIRED FROM THE APPLICANT BEFORE A DECISION IS MADE AS TO WHETHER TO ALLOW THE APPLICATION OR NOT?

NOTE:—The various provisions are not dissimilar and this is mainly a question of listing the facts necessary to a decision in each particular circumstance. The answer to this question will depend largely upon whatever determination the Conference makes with regard to question No. 3 above.

8. SHOULD THERE BE A MANDATORY TIME LAPSE AFTER THE COMPLETION OF ADVERTISING OF NOTICE OF INTENTION TO MAKE THE APPLICATION AND IF SO WHAT SHOULD THAT PERIOD BE?

NOTE:—Each province has requirements with regard to advertising of such a notice but the provisions as to a time lapse before the application is made are by no means uniform. Alberta, Manitoba and Nova Scotia make no provision, Ontario and New Brunswick are identical, and the other three provinces have varying time limitations.

9. SHOULD THERE BE A PROVISION FOR AN APPLICATION FOR ANNULMENT OF AN ORDER AFTER IT HAS BEEN MADE?

NOTE:—New Brunswick and Ontario both have a provision enabling a person who has reason to believe that the order was obtained by fraud or misrepresentation to make an application for the annulment of the order. The other provinces do not have any such provision. There are, however, provisions in each of the other provinces providing for an annulment of the order to be made without application and the procedural provisions following on such an annulment are similar.

10. WHAT PENALTIES SHOULD BE PROVIDED FOR CONTRAVENTION OF THE ACT?

11. WHAT PROVISION SHOULD BE MADE FOR THE MAKING OF REGULATIONS UNDER THE ACT?

There will be other questions which will arise when it comes to the actual drafting of the model statute but they will have to do mainly with the procedure to be followed in detail when making the application and upon the making of an order. The answers to such questions however will depend upon the answers to the above questions and should not create any difficulties as to policy.

Respectfully submitted,

GILBERT D. KENNEDY,

P. R. BRISSENDEN,

GERALD H. CROSS.

APPENDIX Q

(*See page 25*)

FOREIGN JUDGMENTS ACT

(See 1959 Proceedings, p. 30, and 1960 Proceedings, p. 81.)

At the 1960 meeting of this Conference it was "Resolved that the Nova Scotia Commissioners be asked to undertake a study of a revision of the Uniform Foreign Judgments Act of 1933 and in doing so to cooperate with the National Conference on Uniform State Laws of the United States and to examine any draft Act prepared by that body and by the International Law Association and to submit a report at the next meeting."

During the first week of March, 1961, the undersigned conferred at Harvard Law School with Professor Kurt H. Nadelmann who was assigned the task of preparing a first draft of a "Uniform Foreign Money—Judgments Act" for a special committee of the National Conference of Commissioners on Uniform State Laws. An exchange of correspondence with him has been maintained since then. On August 4 at the annual National Conference held in St. Louis, preliminary consideration was given to this draft which was prepared by Professor Nadelmann with the assistance of Professor Willis Reese of Columbia University School of Law. The Nova Scotia Commissioners have been supplied with a copy of this draft in multilithed form. It comprises eight sections. Examination discloses that it is substantially based upon the United Kingdom Foreign Judgments (Reciprocal Enforcement) Act of 1933. The draftsmen state that that Act "forms the basis for satisfactory arrangements by Great Britain with a number of continental countries and is widely known abroad. Generally speaking, the principles embodied in the Act of 1933 are in line with what our own courts have laid down on recognition of money judgments of foreign courts. In a few respects, the Act of 1933 has now become antiquated". Departures from the United Kingdom model consist mainly of incorporation of developments of the law in the United States as formulated in the Restatement Second, Conflict of Laws, Tentative Draft No. 3, 1956.

In the American draft Act there is also some similarity to new departures made in the Model Act Respecting the Recognition of Foreign (Money) Judgments which was unanimously adopted by the International Law Association at the conference held in Hamburg, Germany, on August 8, 1960. (Reproduced in

1960 Proceedings, pp. 92-93.) This Model Act was submitted to the Hague Conference on Private International Law, which had been requested by the Council of Europe to prepare a general convention on recognition and enforcement of foreign judgments. One of the first decisions taken at the 1960 session was to accept the request, and a Special Commission was established to deal with the subject. It has been remarked that:

> The Special Commission has been assigned an important task at a singularly opportune moment. The Benelux countries as well as the six nations forming the European Economic Community have for some time been engaged in work on reciprocal recognition and enforcement of their judgments. The United Kingdom, it is known, is engaged in negotiations with a number of countries for the conclusion of treaties under the authority of the British Foreign Judgments (Reciprocal Enforcement) Act of 1933. In the United States, the National Conference of Commissioners on Uniform State Laws is currently preparing for submission to the states of the Union a Uniform Recognition of Foreign Money-Judgments Act, and the Canadian Commissioners recently decided to revise their Model Act of 1933 in co-operation with the United States Commissioners with the purpose of advancing uniformity of legislation between the two countries. From these mutual efforts improvements may come to a field well known for its unsatisfactory condition.
>
> (Nadelmann, "The Hague Conference on Private International Law", (1960) 9 Am. Jour. Comp. Law, 583, at pp. 586-587.)

Although the Uniform Reciprocal Enforcement of Judgments Act as revised in 1958, provides fairly satisfactory procedural machinery, the substantive law on recognition of foreign judgments is not uniform among the provinces and is in several respects outdated. (See Nadelmann, "Enforcement of Foreign Judgments in Canada", (1960) 38 Can. Bar Rev. 68.) By careful attention to the work being done in the United States and Europe and consultation with the persons who are carrying it on, it should be possible to revise the 1933 Canadian Act so as to embody generally acceptable rules that will be uniformly adopted. There are some rules, among those proposed in the draft Act that was presented to the National Conference, that depart from those contained in the Canadian Uniform Act of 1933. An expression of opinion concerning them might well be made at this meeting.

A. Rule (1) of clause 5 (a) of Section 6 of the National Conference's draft Act reads:

> "(a) For the purposes of this Act the courts of the country of the original court shall be deemed to have had jurisdiction if
>
> (1) the judgment debtor was served personally in the country of the original court and the courts of this state do not find that the

> original court was a seriously inappropriate forum for the trial of the action."

This jurisdiction is based upon sections 78 and 117e of the American Law Institute's Restatement, Second, Conflict of Laws. The substance of neither was included in the 1933 Uniform Act. Section 78 reads: "A state has judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." Section 117e reads: "While the plaintiff ordinarily controls choice of the forum, a court does not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff."

There is some English and Canadian authority that mere temporary physical presence within a foreign law district at the time the action is begun is sufficient to give its courts personal jurisdiction which should be recognized. At common law the presence of an individual in the territory of the court, even for an instant, gives jurisdiction which can be validly exercised if he is properly served with a writ during that instant. The undersigned has commented:

> It must be remarked that cases occasionally may arise in which it would be desirable if temporary presence were available as a jurisdictional fact. For example, in a British Columbia action the defendant, who was a United States citizen resident in the Yukon, was served while in British Columbia buying supplies. In holding that the courts of that province had jurisdiction Chief Justice Davie said: "Temporary residence is sufficient to authorize the service of the writ and the *capias:* . . . particularly when, as is the case here, there are no civil Courts in the Yukon, and this is the nearest spot where the plaintiff can litigate his rights." However, consideration must be given to the reasons which led the Conference of Commissioners on Uniformity of Legislation in Canada to reject a suggestion that they should include temporary presence as a ground of jurisdiction in the draft Uniform Foreign Judgments Act. These reasons were stated by Dean Falconbridge, who said that its inclusion though theoretically sound, from a practical point of view would render it quite impossible to get the Statute adopted in most of the provinces, especially in those we might call "importing" or "debtor" provinces . . . . The possibility of occasional hardship from the plaintiff's point of view would not be sufficient to justify the adoption of general rules which would be regarded as depriving the defendant of his right to defend on the merits at his own place of residence.
>
> (Read, *Recognition and Enforcement of Foreign Judgments* (1938) at p. 151)

It would seem that the objections raised by Dean Falconbridge would likely be met by the "inappropriate forum" limitation. Concerning the factors to be considered by courts when applying this doctrine, the American Law Institute comments that the two most important are,

(1) that since it is for the plaintiff to choose the place of suit, his choice of a forum should not be disturbed except for weighty reasons, and (2) that the action will not be dismissed in any event unless an alternative forum is available to the plaintiff. Because of the second factor, the suit will be entertained, no matter how inappropriate the forum may be, if defendant cannot be subjected to jurisdiction in other states. The same will be true if plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept defendant's stipulation that he will not raise this defense in the second state.

The remaining factors can best be grouped under the two principal interests involved: those of the parties and those of the public. This has been done as follows by Mr. Justice Jackson in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947):

> "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to a fair trial . . .
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."
>
> (Restatement, Second, Section 117e, Comment c.)

B. Rule (7) of clause (a) of Section 6 of the draft Act reads:

> "(a) For the purposes of this Act the courts of the state of the original court shall be deemed to have had personal jurisdiction over the defendant if
>
> (7) the judgment debtor, being a defendant in the original court, operated a motor vehicle or owned or possessed real property in the state of the original court and the proceedings were in respect of a cause of action arising out of such operation or ownership."

Both of the bases of jurisdiction of foreign courts in Rule (7) are unknown to the common law and are derived from Sections 84 and 84a of the Conflicts Restatement Second. Section 84 reads:

> A state has judicial jurisdiction over an individual who has done, or caused to be done, an act which either took place in the state or resulted in consequences in the state for the purposes of any cause of action

arising out of the act within limitations of reasonableness appropriate to the relationship derived from the act.

Like other supportable bases of jurisdiction they are justified by their reasonableness. The American Law Institute, under the heading, *Act done or caused to be done in a state,* comments:

> Whether an exercise of judicial jurisdiction on the basis of an act done or caused to be done in the state would be reasonable depends upon the facts of the case. The principal factors to be considered are the nature and quality of the act, the extent of defendant's contacts with the state and the degree of inconvenience which would result to the defendant by his being forced to stand suit in the state on the particular cause of action.
>
> With respect to the first of these factors, it is reasonable that a state should have judicial jurisdiction over a defendant as to causes of action arising from an act done by him within the state which is of a sort dangerous to life or property, even though the defendant is not otherwise subject to the judicial jurisdiction of the state. By doing such an act, the defendant endangers the interests of persons in the state; it is therefore only just that he should be subject to suit in the state for any injury or damage he may cause as a result. So a state can exercise judicial jurisdiction, if it so desires, over a non-resident defendant as to injuries caused by him while shooting a gun or driving an automobile within its territory. Where the act is not dangerous to life or property, the state must have closer contacts with the defendant than would otherwise be necessary to permit it to exercise judicial jurisdiction over him as to causes of action arising out of the act. It is reasonable that a state should have judicial jurisdiction over any individual as to causes of action arising from an act done for pecuniary profit having substantial consequences within the state even though the act is an isolated act not constituting the doing of business within the state. The fact that a state subjects a particular act to special regulation is also relevant to a determination whether it is reasonable for that state to exercise judicial jurisdiction over the defendant as to causes of action arising out of that act.
>
> The extent of defendant's contacts with the state is material. The more closely a defendant is connected with the state, the less inconvenient it will be for him to stand suit there and the more reasonable in turn for the state to subject him to its judicial jurisdiction . . . .
>
> The degree of inconvenience which the defendant would undergo by being forced to stand suit in a particular state depends in large part upon the extent of his contacts with that state. At times, however, it may be affected by the nature of the cause of action involved. Thus, witnesses in a tort action will normally reside in the state where the complained-of act took place; here the inconvenience to a non-resident defendant of being forced to stand trial in that state is counterbalanced to some extent by the fact that he is thereby spared the cost and trouble of transporting his witnesses to another place. The same consideration is less likely to be present in a contract action where the evidence will frequently be documentary in nature or else be limited to the testimony of the parties themselves.

Restatement Section 84a reads:

> A state has judicial jurisdiction over an individual who owned a thing in the state for the purposes of any cause of action arising out of the thing within limitations of reasonableness appropriate to the relationship derived from the ownership of the thing.

The Comment, (c), is as follows:

> It is reasonable that a state should have judicial jurisdiction over a defendant as to causes of action arising from a thing owned by him within the state which is of a sort dangerous to life or property even though the defendant is not otherwise subject to the judicial jurisdiction of the state. By owning such a thing, the defendant endangers the interests of persons in the state, and therefore can fairly be required to stand suit in the state for injury or damage he may cause as a result. The thing need not be peculiarly dangerous to life, as is a bomb or other explosive; it need only be of a sort from which liability in tort for personal injuries is not unlikely to arise, as is true, for example, of an apartment house. When the thing is not dangerous to life or property, the state must have closer contacts with the defendant than would otherwise be necessary to permit it to exercise judicial jurisdiction over him as to causes of action arising out of the thing. Apart from any dangerous quality, the character of a thing as movable or immovable is significant. Things that are immovable must by their nature remain in the state. For this reason, their ownership may involve a closer and more continuous relationship with the state than in the case of a movable. For other factors that are relevant in determining whether judicial jurisdiction exists, see Section 84, Comment c.

It is urged that adoption of rule (7) of the National Conferences' draft Act should involve abolishing clause (b) of Section 4 of the 1933 Uniform Act. The undersigned has commented concerning that clause:

> In one type of action *in personam* it is not sufficient to have jurisdiction over the person of the defendant to render a valid judgment. In so-called "local" actions, not only must a court have personal jurisdiction, but it must have jurisdiction *in rem* as well. To put it another way, in local actions the courts of the law district of the situs of the immovable with which the action is concerned have exclusive jurisdiction . . . .
>
> As jurisdiction in local actions *in personam* is exclusive to the law district of the situs of the immovable concerned, and as that law district does not have jurisdiction in such actions merely because they are local, it is plain that situations may readily arise in which a denial of justice will result.
>
> In the Uniform Foreign Judgments Act approved by the Conference of Commissioners on Uniformity of Legislation in Canada in 1933, Section 4 is as follows: "For the purposes of this Act, no court of a foreign country has jurisdiction: (a) in an action involving adjudication upon the title to, or the right to the possession of, immovable property situate in this province; or (b) in an action for damages for an injury in respect of immovable property situate in this province."

Section 3 declares the bases on which foreign courts will be recognized as having jurisdiction *in personam.*

It is agreed that there can be no quarrel with Section 4, clause (a), but it is submitted that clause (b) is open to criticism. In this connection it may be pertinent to quote the suggestions made by the writer in response to a request of the Commission for a critique of the proposed Act:

> It is suggested that Section 4, clause (b) be amended by adding "except where such injury arises out of trespass to that property." It is suggested that the following provision be added to section 3 or inserted as a section by itself: "For the purpose of this Act, in an action *in personam* a court of a foreign country has jurisdiction in an action for damages for an injury in respect of immovable property situate in this province, if that injury arises out of trespass to such property." Section 4, as it now stands, is merely a codification of *British South Africa Co.* v. *Mocambique.* It should be remembered that that case is based primarily upon the distinction in England between a so-called "local" and a so-called "transitory" action. The extension of this purely arbitrary decision to exclude actions for damages for trespass when the question of title to foreign land is merely incidental to an ordinary personal action amounts to an unwarranted denial of justice in many cases. The ridiculous result that follows from a blind adherence to such a rule is exemplified in *Brereton* v. *Canadian Pacific Railway Company,* 29 O.R. 57. In an action *in personam* for damages arising out of trespass to foreign land there need be no pretence to declaring the question of title to be *res adjudicata.* The question of title is in such a case essentially merely one of fact to be found as such for the purposes of the personal action. A situation such as the following may arise under section 4(b) of the draft Act:
>
> A, who resides in Ontario, drives his motor car into Nova Scotia and crashes into B's building there. Under section 3, in order to have the judgment recognized in other provinces, B would probably have to sue in Ontario. Suppose A has assets in Manitoba but none available in Ontario or Nova Scotia. Any such judgment by an Ontario court cannot under section 4(b) be recognized in Manitoba. The consequence is that there is a complete denial of justice for B. It is submitted that B will find no assistance in the Reciprocal Enforcement of Judgments Act, supposing that all the provinces concerned have adopted it, because under section 4(a) of that Act the original court must have had jurisdiction, and "jurisdiction" not being otherwise defined in that Act presumably means jurisdiction in the international sense or that possessed under the Uniform Foreign Judgments Act.

The Commission recorded its reaction to these suggestions as follows:

> When the situation is further analysed, however, it will be found that by no process of each province passing an Act relating to the effect of foreign judgments in that province can the situation be materially improved, unless at the same time each province legislates, internally as it were, to provide that its own courts

can entertain an action for trespass to foreign land, thereby reversing the present legal situation as laid down in the *British South Africa Co.* v. *Mocambique* case. Even then, assuming the present law in the States of the American Union is substantially the same as our law, there would not be a reciprocal clearing up of the matter between the States of the Union and the Canadian Provinces.

Any such amendment as we have referred to would properly go in the Judicature Acts of the respective provinces, as it really is not a matter affecting foreign judgments.

In view of the certificate of character given to the present state of the law in the *British South African Co.* v. *Mocambigue* case, in view of the fact that we would have to go outside of foreign judgments and recommend changes in the local law of each province, in view of the fact that even then we could not clear up the situation with respect to the United States, and in view of the fact that cases of hardship under the present law have not seriously arisen, we are of opinion that it would be better to make no change in the Act as drafted on this point.

It is submitted: (a) that there is no objection, constitutional or otherwise, to amending the provincial Judicature Acts by a provision in the Foreign Judgments Acts abrogating the effect of the Mocambique case as to actions *in personam* for damages for injury to immovables;
(b) that Courts should be enabled to recognize the judgments of states such as Minnesota and New York, where actions *in personam* in local actions concerning foreign land are entertained, as well as those of any other law district which may now or in the future take jurisdiction in such cases. Especially should this be so if the Commission's function is to attempt to improve the law, not merely to standardize it.

It is further submitted that the fact that the House of Lords chooses to give a certificate of character to an indefensible rule at common law is no reason whatever for failing to repeal or amend it by legislation, particularly if the legislation is designed not merely to be declaratory but creative, "to adopt the best practice."

On more mature consideration the writer would now recommend that the draft Uniform Foreign Judgments Act should be revised as follows: (i) Section 4, clause (b) should be deleted. (ii) An enabling provision should be added to the Act declaring that "the courts of a Province have jurisdiction in any 'local actions' *in personam* which arise in foreign law districts when those Courts have jurisdiction *in personam;* and that judgments rendered by foreign courts when exercising a similar jurisdiction shall be recognized." This, it will be observed, is wider in effect than the clause suggested to the Commission.
(See Read, *Recognition and Enforcement of Foreign Judgments*, (1938) pp. 186, 191-193.)

It is perhaps superfluous to point out that Rule 7 of clause (a) of Section 6 of the Draft Act is consistent with the local jurisdiction now exercised by the courts of the provinces under Order XI of the rules under the Judicature Act.

While the 1933 Uniform Act expressly purports to be a code so far as jurisdiction of foreign courts is concerned, the National

Conference's draft Act provides that "Nothing here said shall be taken to prevent the courts in this state from recognizing other bases of jurisdiction." A similar provision is in the International Law Association's Model Act. (See 1960 Proceedings at p. 93.) It is to be observed that, in addition to the traditional, new bases of jurisdiction have been recognized by courts in the United States in recent years. One of the criticisms of the 1933 Act has been that enactment in its present form would be to introduce premature rigidity into a field of Canadian law where there is need for development by creative judicial action.

HORACE E. READ,
for the Nova Scotia Commissioners.

APPENDIX R

(*See page 26*)

THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

REPORT OF NEW BRUNSWICK COMMISSIONERS

At the 1958 session of the Conference held at Niagara Falls, the Conference considered the report from the British Columbia Commissioners on a Uniform Reciprocal Enforcement of Judgments Act and a Uniform Reciprocal Enforcement of Maintenance Orders Act. This report is printed in the report of the 1958 proceedings at pages 81-84. Attached to it were the two draft Acts recommended by those Commissioners.

At that time, the Conference had before it Dr. Read's 1958 report on "Judicial Decisions affecting Uniform Acts" in which reference was made to a judgment of Chief Justice Williams in *Paslowski* v. *Paslowski*, 1957, 22 W.W.R. 586, 11 D.L.R. (2nd) 180.

After discussion and making some amendments to the drafts, the Commissioners approved a Reciprocal Enforcement of Judgments Act (1958 Report, pages 90-96) and a Reciprocal Enforcement of Maintenance Orders Act (1958 Report, pages 97-103). These drafts were distributed and as disapproval of two or more jurisdictions was not received within the time limit, they were adopted and recommended for enactment.

At the 1959 session of the Conference, the Commissioners had before them Dr. Read's 1959 Report on "Judicial Decisions affecting Uniform Acts" in which was referred to and discussed a judgment of Mr. Justice Treleaven of Ontario in *Summers* v. *Summers*, 1958, 13 D.L.R. (2nd) 454. He held that an order directing payment of maintenance made by the High Court of Justice in England (as part of divorce proceedings taken by a wife against her husband under the Matrimonial Causes Act of 1950) could be registered in Ontario under its Reciprocal Enforcement of Maintenance Orders Act and dismissed an application to expunge its registration. Such part of Dr. Read's report is printed in the 1959 Proceedings at pages 65-70. The *Summers* v. *Summers* case, already referred to, was discussed at length.

Mr. J. F. H. Teed of New Brunswick then agreed to study the

provisions of the Reciprocal Enforcement of Maintenance Orders Act, (particularly in the light of the Summers case), and to report to the 1960 meeting of the Conference.

At the 1960 meeting of the Conference such report was not ready. However that session of the Conference had before it Dr. Read's 1960 report on "Judicial Decisions affecting Uniform Acts", in which particular reference was made to another decision of Chief Justice Williams of Manitoba in *Fleming* v. *Fleming*, 1959, 19 D.L.R. (2nd) 417. Chief Justice Williams there held that "maintenance order" as the subject matter of the Manitoba Reciprocal Enforcement of Maintenance Orders Act, did not include an order or decree directing payment of alimony, as ancillary to a decree of divorce.

Dr. Read suggested that consideration be given to making the definition of "maintenance orders" explicit with reference to alimony and maintenance orders rendered incidental or ancillary to divorce and judicial separation decrees.

Provinces which have accepted and enacted the substance of the 1958 Reciprocal Enforcement of Maintenance Orders Act have made some changes. Some amendments have also since been enacted by certain Provinces. The 1960 Conference agreed that the New Brunswick Commissioners should carry on with their study of The Reciprocal Enforcement of Maintenance Orders Act and submit their report to the 1961 Conference.

The New Brunswick Commissioners have since received from Mr. L. R. MacTavish some communications with reference to certain difficulties experienced in the administration of the Act, in particular some arising out of its provisions respecting appeals and some arising out of the lack of specific provisions authorizing the use of affidavits as evidence. They have also received Mr. Alcombrack's 1961 report on Amendments to Uniform Acts and have considered those portions which relate to amendments to The Reciprocal Enforcement of Maintenance Orders Acts.

The attention of the New Brunswick Commissioners has been directed to five different points:

(1) The need for redefining the expression "maintenance order" in clause (d) of section 2.

(2) Whether or not the Act should contain provision whereby a person against whom an unconfirmed maintenance order has been registered should have the right to apply to have such registration set aside.

(3) Whether the Act should contain further or amended provisions respecting appeals.

(4) Whether the Act should contain provisions providing for the use of affidavits as evidence.

(5) Whether the Act should contain provisions authorizing the Lieutenant-Governor in Council to make regulations respecting certain administrative procedures.

1. REDEFINING THE EXPRESSION "MAINTENANCE ORDERS" CONTAINED IN CLAUSE (d) OF SECTION 2.

Chief Justice Williams appears to be of the opinion that as presently defined, "maintenance order" does not include a "judgment" or a "decree" and also that the Act containing such definition does not authorize the registration of an order, judgment or decree which also adjudicates upon, or gives directions with respect to, any matter in addition to periodical payments of money.

On principle there appears to be no good reason why a directive to pay alimony or maintenance made by a Court of Divorce (which in some jurisdictions at least, takes the form of a decree and not an order) could not be registered under the Act (other conditions being appropriate) while such a directive in the form of an order could be so registered.

Further on principle there appears to be no good reason why an order or decree in a Divorce Court, or other Court directing periodical payment of maintenance only could be registered, while an order or decree of the same Court could not be registered merely because some other subject matter was also dealt with in the same order or decree.

The Province of Newfoundland appears to have anticipated a similar difficulty arising out of The Reciprocal Enforcement of Judgments Act and made some provision respecting the same in its statute on that subject (as reported at p. 111 in the 1957 Proceedings of the Conference). The Province of Manitoba has recently enacted an amendment to its Reciprocal Enforcement of Judgments Act to like effect. Manitoba has also recently amended its Reciprocal Enforcement of Maintenance Orders Act as stated in Mr. Alcombrack's 1961 report on Amendments to Uniform Acts, a copy of which statement is attached for convenience as Schedule "A" to this report.

Your Commissioners recommend that the expression "maintenance order" be redefined and express provision made for the

registration of part only of such an order where other matters are dealt with in the same order.

2. SHOULD THE ACT CONTAIN PROVISION WHEREBY A PERSON AGAINST WHOM AN UNCONFIRMED MAINTENANCE ORDER HAS BEEN REGISTERED HAVE THE RIGHT TO APPLY TO HAVE SUCH REGISTRATION SET ASIDE?

The Uniform Reciprocal Enforcement of Maintenance Orders Act as recommended by the Conference, for purposes of convenience, is divided into parts.

The first part (sections 1 and 2) consists of a title and definitions.

The second part (section 3) is headed "Enforcement of Maintenance Orders Made in Reciprocating States".

The third part (sections 4 and 5) is headed "Maintenance Orders against Non-residents".

The fourth part (section 6) is headed "Confirmation of Maintenance Orders Made in Reciprocating States".

The fifth part (sections 7-16) is headed "General".

The second, third and fourth parts deal with different situations. In the *third* part (Maintenance Orders against Non-residents) subsection (8) of section 5 gives to the unsuccessful applicant for a provisional maintenance order a right to appeal against the refusal of such order.

In the *fourth* part (Confirmation of Maintenance Orders Made in a Reciprocating State) subsection (6) of section 6 gives to the party bound by an order (made provisionally in a reciprocating state and which has been *confirmed* by an order of a Court) a right to appeal against the confirmation of the order.

In the *second* part however, (relating to the Enforcement of Maintenance Orders Made in a Reciprocating State) the party against whom a non-provisional order has been registered is given no right to appeal, nor is he given any right to apply to have the registration of such order set aside or vacated.

In this respect The Reciprocal Enforcement of Maintenance Orders Act differs materially from The Reciprocal Enforcement of Judgments Act. Under the last mentioned Act no judgment made in a reciprocating state can be registered as of right. Section 3 authorizes the making of an application for an order that a judgment given in a reciprocating state be registered in some

Court in the Province. But a maintenance order which is *not* "provisional only" may be registered under section 3 of The Reciprocal Enforcement of Maintenance Orders Act ex parte and as of right, without any confirmation, and without the party against whom it is made having any right to appeal, or probably much more important, having any right *to apply to have it set aside.*

On principle, such a situation does not appear to be a proper one. It could cause great injustice,—to illustrate, a woman in England brings an action for divorce and claims alimony and maintenance; her husband is served by advertisement, he never sees it and does not appear to the action. The English Court orders the husband to pay alimony and ultimately grants a divorce and directs him to pay maintenance. In a divorce action maintenance may be very substantial. These Divorce Court Orders are *not* "provisional only". Under the authority of *Summers* v. *Summers* the wife is entitled to have these orders registered as of right in Ontario, and perhaps in some other Provinces. Once so registered, she is entitled to enforce the same in such Province as of right and the husband can do nothing.

It is the opinion of the Commissioners that a party against whom a non-provisional maintenance order has been registered ex parte should have the right to apply to have it set aside upon grounds similar to those on which he may apply to have set aside a judgment which had been confirmed and registered ex parte.

3. SHOULD THE ACT BE AMENDED BY INSERTING FURTHER PROVISIONS RESPECTING APPEALS OR AMENDING THE EXISTING PROVISIONS?

The Commissioners have considered the communications received from Mr. L. R. MacTavish respecting appeals. It appears to them probable that certain difficulties respecting appeals experienced in Ontario arose out of other statutory provisions with respect to appeals in force in that Province and do not arise because of the wording of The Reciprocal Enforcement of Maintenance Orders Act.

4. SHOULD THE ACT CONTAIN PROVISIONS AUTHORIZING THE USE OF AFFIDAVITS AS EVIDENCE?

The Commissioners have not had the opportunity to devote that attention to this point which would give them confidence in any specific recommendation. But as a general observation it appears to them that although occasions arise where it is desirable

to adduce evidence in this manner, provisions respecting such use would be more properly included in a general Evidence Act.

5. SHOULD THE ACT CONTAIN PROVISIONS AUTHORIZING THE LIEUTENANT-GOVERNOR IN COUNCIL TO MAKE REGULATIONS RESPECTING CERTAIN ADMINISTRATIVE PROCEDURES?

Previous to the receipt of Mr. Alcombrack's 1961 report of Amendments to Uniform Acts your Commissioners had not been aware that any Province had considered such provisions were necessary or desirable. It is now apparent however, that at least the Province of Manitoba has found a need for some such provisions and has enacted them. Your Commissioners favor the acceptance of the Manitoba provisions with some changes in terminology.

Your Commissioners have prepared and attached to this Report as Schedule "B", a draft of proposed amendments to The Reciprocal Enforcement of Maintenance Orders Act.

J. F. H. TEED,

M. M. HOYT,

D. J. FRIEL,

New Brunswick Commissioners.

Schedule "A"

AMENDMENTS TO UNIFORM ACTS
1961

Reciprocal Enforcement of Maintenance Orders

Manitoba enacted the Uniform Act (as revised in 1958) with the addition of the following provisions:

Subsections (2), (3) and (4) were added to section 2 and a subsection (4) was added to section 3 to take care of the difficulties that arose in the *Paslowski* case referred to above and in the case of *Fleming* v. *Fleming* (1959) 28 W.W.R. 241.

Section 2

(2) A maintenance order, or that part of a judgment that relates solely to a maintenance order, does not fail to be a maintenance order within the meaning of clause (d) of subsection (1) solely by reason of the fact that the amount payable thereunder may be varied from time to time by the court in the reciprocating state by which the order was made or the judgment given.

(3) Where, in proceedings to enforce against any person a maintenance order registered under this Act or at any other time, it is shown to the court in Manitoba in which the order is registered, or to which a certified copy thereof is sent for registration, that the order has been varied by the court that made it, either as to the amount thereof or the times, terms, or method of payment thereof, if the court in Manitoba is satisfied by the preponderance of evidence that the order has been so varied it shall record that fact and the nature and extent of the variation, and the maintenance order so registered shall be deemed to be varied accordingly and may be enforced only in accordance with the variation.

(4) Subsection (3) does not apply to a provisional order that may be varied by the confirming court as provided in subsection (5) of section 6.

Section 3

(4) Where, on receipt by the court of a certified copy of a maintenance order for registration, it appears to the court that

(*a*) the order is in respect of different matters or forms part of a judgment that deals with matters other than the maintenance order; and

(*b*) that part of the order or judgment that relates solely to the maintenance order, if it had been contained in a separate order, could properly be registered under this Act;

the order or judgment, a certified copy of which has been received by the court, may be registered in respect of that part thereof that relates solely to the maintenance order but not in respect of any part thereof or any other provisions contained therein; and the court may determine which of the provisions of the order or judgment are registerable as a maintenance order and which are not.

The following clauses were added to section 10 authorizing the Lieutenant-Governor in Council to make regulations:

(*b*) for facilitating communications between courts in Manitoba and courts in England or elsewhere in the British Commonwealth or in the Republic of Ireland for the purpose of confirmation of provisional orders pursuant to this Act;

(*c*) providing such forms as may be necessary for the purposes of this Act;

(*d*) without being limited in any way by the foregoing, generally for the purpose of giving effect to the provisions of this Act.

A section was added similar to one enacted by Ontario in 1959 to facilitate arrangements with American States as follows:

14. Where a maintenance order sought to be registered in a court in Manitoba, or a provisional order sought to be confirmed by a court in Manitoba under this Act, or any accompanying document, uses terminology different from the terminology used in Manitoba, the difference does not vitiate any proceedings under this Act.

Newfoundland amended its Act to adopt certain of the provisions of the revised Act of 1958 and enacted the same provision as section 14 of the Manitoba Act above.

Schedule "B"

AN ACT TO AMEND THE RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS ACT

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

1. The Reciprocal Enforcement of Maintenance Orders Act is amended by repealing clause (d) of section 2 thereof and substituting therefor the following:

(d) "maintenance order" means an order, judgment or decree ordering or directing the periodical payment of money as alimony or as maintenance for a dependant of the person against whom such order, judgment or decree was made and includes any such order, judgment or decree made in, or made incidental or ancillary to, divorce or judicial separation actions or proceedings; and

2. The said Act is further amended by enacting a new section 2A to be inserted immediately after section 2 thereof as follows:

2A. A maintenance order does not fail to be a maintenance order within the meaning of clause (d) of section 2 solely by reason of the fact that the amounts payable thereunder or the times, terms or method of payment may be varied from time to time by the Court in the reciprocating state by which the order was made.

3. The said Act is further amended by enacting a new section 3A to be inserted immediately after section 3 thereof as follows:

3A. (1) Where a maintenance order made by a Court in a reciprocating state has been registered under section 3 the person against whom the order was made may, within one month after he has had notice of the registration, apply to the registering Court to have such registration set aside.

(2) On an application under subsection (1), the Court may set aside the registration of the maintenance order if it is shown to the Court that,

(a) the person against whom the order was made was not ordinarily resident within the reciprocating state of the original Court and did not voluntarily appear or otherwise submit to the jurisdiction of that Court; or

(b) the person against whom the order was made was not served personally with process issued out of the reciprocating state in which the order was made and did not appear, notwithstanding that he was ordinarily resident within the state of that Court, or had agreed to submit to the jurisdiction of that Court; or

(c) the order was obtained by fraud; or

(d) an appeal is pending or the time within which an appeal might be taken has not expired.

4. The said Act is further amended by enacting a new section 6A to be inserted immediately before section 7 thereof as follows:

6A. (1) If a maintenance order contains provisions or gives directions with respect to matters other than periodical payments of money as alimony or maintenance, such order may be registered or confirmed under this Act in respect of those provisions thereof which order or direct the periodical payment of money as alimony or maintenance, but may not be so registered or confirmed in respect of any other provisions therein contained.

(2) If in proceedings to enforce a maintenance order registered under this Act, or if at any other time, it is established to the satisfaction of the Court in which the order is registered or to which a certified copy thereof has been sent for registration or confirmation that such maintenance order has been varied by the Court that made it, either as to the amount of any periodical payments or the times, terms or method of payment thereof, the Court shall record the fact of such variation and the nature and extent of the variation, and any such maintenance order which has been registered shall be deemed to have been varied accordingly and may be enforced only in accordance with such variation, and any such maintenance order which has been sent for registration or confirmation shall be registered or confirmed only as so varied.

(3) Subsection (2) shall not apply to provisional orders which have been confirmed and which may be varied by the confirming Court under subsection (5) of section 6.

(4) Where under this Act, a maintenance order is sought to be registered or a provisional order is sought to be confirmed and the order or any accompanying document uses terminology different from the terminology used in the Court, such difference shall not prevent the order being registered or con-

firmed, as the case may be, and when so registered or confirmed it shall have the same force and effect as if it contained the terminology accustomed to be used in the Court.

5. The said Act is further amended by enacting a new section 15A to be inserted immediately after section 15 thereof as follows:

15A. The Lieutenant-Governor in Council may make regulations for the following purposes:

(a) to facilitate communications between Courts in this Province and Courts in a reciprocating state respecting the confirmation of provisional orders made pursuant to this Act or made in a reciprocating state;

(b) to provide forms for the purposes of this Act; and

(c) in general, to give effect to the provisions of this Act according to their true intent.

APPENDIX S

(*See page 43*)

CRIMINAL LAW SECTION

REPORT TO PLENARY SESSION

1. Representatives of all the provinces, except Newfoundland, together with representatives of the Federal Government were in attendance at the meetings of the Criminal Law Section.

2. The Commissioners in the Criminal Law Section considered and dealt with some thirty-three working papers concerning amendments to the Criminal Law and have made recommendations which the Secretary of the Section has been instructed to place before the Minister of Justice. They also considered a considerable number of matters, relating to the Criminal Law, not incorporated in working papers and made recommendations or expressed views relating to the same.

3. The particular subjects discussed, and the recommendations and views relating thereto of the Criminal Law Section, will appear in the printed Proceedings of the Conference.

4. The Chairman of the Criminal Law Section for the ensuing year will be H. W. Hickman, Q.C. The Secretary will be T. D. MacDonald, Q.C.

Respectfully submitted,

G. R. FOSTER,
Chairman

T. D. MACDONALD,
Secretary

APPENDIX T

(See page 43)

REPORT OF COMMITTEE ON FINANCES

We have examined financial statements and work of the Conference. It appears that we have a comfortable annual operating surplus on the basis of our present work and that with a total surplus carried forward of six thousand dollars we see no need to suggest any change in provincial or Federal contributions. If, however, our work so changes in the future that serious additional expenses are entailed, a further review will be necessary.

Respectfully submitted,

GILBERT D. KENNEDY

J. F. H. TEED

T. D. MACDONALD

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