1967

PROCEEDINGS

OF THE

FORTY-NINTH ANNUAL MEETING

OF THE

CONFERENCE OF COMMISSIONERS

ON

UNIFORMITY OF LEGISLATION IN CANADA

HELD AT

ST. JOHN'S, NEWFOUNDLAND

AUGUST 28TH TO SEPTEMBER 1ST, 1967

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

OFFICERS OF THE CONFERENCE, 1967-68

Honorary President	G. D. Kennedy, Q.C., Victoria.
President	M. M. Hoyt, Q.C., Fredericton.
1st Vice-President	
2nd Vice-President	R. S. Meldrum, Q.C., Regina.
Treasurer	W. E. Wood, Edmonton.
Secretary	W. C. Alcombrack, Q.C., Toronto.

LOCAL SECRETARIES

Alberta	John E. Hart, Q.C., Edmonton.
British Columbia	Gerald H. Cross, Q.C., Victoria.
Canada	J. W. Ryan, Ottawa.
Manitoba	R. H. Tallin, Winnipeg.
New Brunswick	M. M. Hoyt, Q.C., Fredericton.
Newfoundland	C. J. Greene, Q.C., St. John's.
Nova Scotia	H. F. Muggah, Q.C., Halifax.
Ontario	W. C. Alcombrack, Q.C., Toronto.
Prince Edward Island	J. Arthur McGuigan, Q.C., Charlottetown.
Quebec	Julien Chouinard, Q.C., Quebec.
Saskatchewan	A. C. Balkaran, Regina.

COMMISSIONERS AND REPRESENTATIVES OF THE PROVINCES AND OF CANADA

Alberta:

GLEN W. ACORN, Assistant Legislative Counsel, Edmonton.
W. F. BOWKER, Q.C., LL.M., Dean, Faculty of Law, University of Alberta, Edmonton.
JOHN E. HART, Q.C., Deputy Attorney-General, Edmonton.
H. J. MACDONALD, Q.C., 55 Hollinsworth Bldg., Calgary.
W. E. WOOD, 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, Q.C., Legislative Counsel, Victoria.
G. D. KENNEDY, Q.C, S.J.D., Deputy Attorney-General, Victoria.

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

Canada:

E. A. DRIEDGER, Q.C., Deputy Minister of Justice, Ottawa.
T. D. MACDONALD, Q.C., Assistant Deputy Minister of Justice, Ottawa.
D. S. THORSON, Q.C., Assistant Deputy Minister of Justice, Ottawa.
J. W. RYAN, Department of Justice, Ottawa.
J. A. SCOLLIN, Department of Justice, Ottawa.

Manitoba:

G. E. PILKEY, Q.C., Assistant Deputy Attorney-General, Winnipeg.
G. S. RUTHERFORD, Q.C., Revising Officer, Winnipeg.
ROBERT G. SMETHURST, Canada Trust Bldg., Winnipeg.
R. H. TALLIN, Legislative Counsel, Winnipeg.

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

New Brunswick:

M. M. HOYT, Q.C., Legislative Counsel, Parliament Bldgs., Fredericton.

D. G. ROUSE, Deputy Minister of Justice, Fredericton.

J. E. WARNER, Director of Public Prosecutions, Fredericton.

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

Newfoundland:

HARRY P CARTER, Q.C., 2F, King's Bridge Court, St. John's.

C. J. GREENE, Q.C., Deputy Minister of Justice, St. John's.

VINCENT MCCARTHY, Q.C., Department of Justice, St. John's.

JAMES A. POWER, Q.C., Asst. Deputy Minister of Justice, St. Johns.

FRANK RYAN, Q.C., 283 Duckworth St., St. John's.

Northwest Territories:

DR. HUGO FISCHER, Dept. of Indian Affairs and Northern Development, Ottawa.

Nova Scotia:

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

HENRY F. MUGGAH, Q.C., Deputy Provincial Secretary, Halifax.

HORACE E. READ, O.B.E., Q.C., S.J.D., D.C.L., LL.D., Dean Emeritus, 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., Legislative Counsel, Toronto.

W. C. BOWMAN, Q.C., Attorney-General's Dept., Toronto.

H. H. BULL, Q.C., Crown Attorney, Metropolitan Toronto.

W. B. COMMON, Q.C., Counsel, Ontario Law Reform Commission, Toronto.

A. R. DICK, Q.C., Deputy Attorney-General, Toronto.

H. ALLAN B. LEAL, Q.C., Chairman, Ontario Law Reform Commission, Toronto.

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

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

Prince Edward Island:

R. S. HINTON, Q.C., Summerside.
F. A. LARGE, Q.C., Charlottetown.
A. W. MATHESON, Q.C., Charlottetown.
J. ARTHUR MCGUIGAN, Q.C., Deputy Attorney-General, Charlottetown.
(*Commissioners appointed under the authority of the Revised Statutes of Prince Edward Island, 1951, c. 168.*)

Quebec:

JULIEN CHOUINARD, Q.C., Deputy Minister of Justice, Quebec.
JACQUES DUCROS, Assistant Deputy Minister of Justice, Montreal.
J. W. DURNFORD, Faculty of Law, McGill University, Montreal.
L. P. LANDRY, Department of Justice, Montreal.
ROBERT NORMAND, Parliament Bldgs., Quebec.
LOUIS-PHILIPPE PIGEON, Q.C., 72 Côte-de-la-Montagne, Quebec.

Saskatchewan:

W. G. DOHERTY, Attorney-General's Dept., Regina.
J. G. MCINTYRE, 2236 Albert St., Regina.
R. S. MELDRUM, Q.C., Deputy Attorney-General, Regina.
R. L. PIERCE, Q.C., 201 Gordon Bldg., Regina.
A. C. BALKARAN, Legislative Counsel, Regina.

Yukon Territory:

C. P. HUGHES, P.O. Box 2703, Whitehorse.

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.
Minister of Justice of Canada: Hon. Pierre Elliot Trudeau.
Attorney-General of Manitoba: Hon. Sterling R. Lyon, Q.C.
Attorney-General of New Brunswick: Hon. Bernard A. Jean, Q.C.
Minister of Justice of Newfoundland: Hon. T. A. Hickman, Q.C.
Attorney-General of Nova Scotia: Hon. R. A. Donahoe, Q.C.
Minister of Justice and Attorney-General of Ontario: Hon. A. A. Wishart, Q.C.
Attorney and Advocate General of Prince Edward Island: Hon. A. B. Campbell, Q.C.
Minister of Justice of Quebec: Hon. Jean Jacques Bertrand.
Attorney-General of Saskatchewan: Hon. D. V. Heald, 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
Horace 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 - 1962
E. A. Driedger, Q.C., Ottawa	1962 - 1963
O. M. M. Kay, Q.C., Winnipeg	1963 - 1964
W. F. Bowker, Q.C., Edmonton	1964 - 1965
H. P. Carter, Q.C., St. John's	1965 - 1966
G. D. Kennedy, Q.C., Victoria	1966 - 1967
M. M. Hoyt, Q.C., Fredericton	1967 -

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. Sept. 2, 4, Montreal
1919. Aug. 26-29, Winnipeg.
1920. Aug. 30, 31, Sept. 1-3, Ottawa.
1921. Sept. 2, 3, 5-8, Ottawa
1922. August 11, 12, 14-16, Vancouver.
1923. Aug. 30, 31, Sept 1, 3-5, Montreal.
1924. July 2-5, Quebec.
1925. Aug. 21, 22, 24, 25, Winnipeg.
1926. Aug 27, 28, 30, 31, Saint John.
1927. Aug. 19, 20, 22, 23, Toronto.
1928. Aug. 23-25, 27, 28, Regina.
1929. Aug. 30, 31, Sept. 2-4, Quebec.
1930. Aug. 11-14, Toronto
1931. Aug. 27-29, 31, Sept. 1, Murray Bay.
1932. Aug. 25-27, 29, Calgary.
1933. Aug. 24-26, 28, 29, Ottawa.

1934. Aug. 30, 31, Sept. 1-4, Montreal
1935. Aug. 22-24, 26, 27, Winnipeg.
1936. Aug 13-15, 17, 18, Halifax
1937. Aug. 12-14, 16, 17, Toronto.
1938. Aug. 11-13, 15, 16, Vancouver.
1939. Aug. 10-12, 14, 15, Quebec.
1941. Sept. 5, 6, 8-10, Toronto.
1942. Aug 18-22, Windsor.
1943. Aug. 19-21, 23, 24, Winnipeg.
1944. Aug. 24-26, 28, 29, Niagara Falls.
1945. Aug. 23-25, 27, 28, Montreal.
1946. Aug. 22-24, 26, 27, Winnipeg.
1947. Aug. 28-30, Sept 1, 2, Ottawa.
1948. August 24-28, Montreal
1949 Aug. 23-27, Calgary
1950. Sept. 12-16, Washington, D.C.
1951. Sept. 4-8, Toronto.
1952. Aug 26-30, Victoria.
1953. Sept. 1-5, Quebec.
1954. Aug. 24-28, Winnipeg
1955. Aug 23-27, Ottawa.
1956. Aug. 28-Sept. 1, Montreal.
1957. Aug. 27-31, Calgary.
1958. Sept. 2-6, Niagara Falls.
1959. Aug. 25-29, Victoria.
1960. Aug. 30-Sept. 3, Quebec.
1961 Aug. 21-25, Regina.
1962 Aug. 20-24, Saint John.
1963. Aug. 26-29, Edmonton.
1964 Aug. 24-28, Montreal
1965. Aug. 23-27, Niagara Falls.
1966. Aug 22-26, Minaki
1967. Aug. 28-Sept. 1, St. John's.

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. At the 1963 meeting representation was further enlarged by the presence and attendance of representatives of the Northwest Territories and the Yukon.

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 in 1949.

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

Line	Title of Act	Conference	Adopted Alta	B.C.	Man	N.B	Nfld.
1 –	Assignments of Book Debts	1928	'29, '58*		'29, '51*, '57*	1952‡	1950‡
2 –							
3 –	Bills of Sale	1928	1929		'29, '57*	——$	1955‡
4 –							
5 –	Bulk Sales	1920	1922	1921	'21, '51*	1927	1955‡
6 –							
7 –	Conditional Sales	1922		1922¶		1927	1955‡
8 –							
9 –	Contributory Negligence	1924	1937*	1925		'25, '62*	1951*
10 –	Cornea Transplant	1959	1960‡	1961	1961	——$	1960
11 –	Corporation Securities Registration	1931					
12 –	Defamation	1944	1947	——$	1946	1952‡	
13 –	Devolution of Real Property	1927	1928			1934†	
14 –	Domicile	1961					
15 –	Evidence	1941			1960†		
16 –							
17 –	Foreign Affidavits	1938	'52, '58*	1953†	1952	1958‡	1954*
18 –	Judicial Notice of Statutes and						
19 –	Proof of State Documents	1930		1932	1933	1931	
20 –	Officers, Affidavits before	1953	1958	——$	1957		1954
21 –	Photographic Records	1944	1947	1945	1945	1946	1949
22 –	*Russell* v. *Russell*	1945	1947	1947	1946		
23 –	Fatal Accidents	1964					
24 ●	Fire Insurance Policy	1924	1926	1925$	1925	1931	1954‡
25 –	Foreign Judgments	1933				1950‡	
26 –	Frustrated Contracts	1948	1949		1949	1949	1956
27 –	Highway Traffic and Vehicles—						
28 –	Rules of the Road	1955	1958†	1957†	1960‡		
29 –	Human Tissue	1965					
30 –	Interpretation	1938	1958*	——$	'39‡, '57*		1951‡
31 –							
32 –	Intestate Succession	1925	1928	1925	1927‡	1926	1951
33 –							
34 –	Landlord and Tenant	1937				1938	
35 –	Legitimation	1920	'28, '60*	'22, '60*	'20, '62*	'20, '62*	——$
36 ●	Life Insurance	1923	1924	1923$¶	1924	1924	1931
37 –	Limitation of Actions	1931	1935		'32, '46‡		
38 –	Married Women's Property	1943			1945	1951$	
39 –	Partnership		1899°	1894°	1897°	1921°	1892°
40 –	Partnerships Registration	1938				——$	
41 –	Pension Trusts and Plans						
42 –	Perpetuities	1954		1957‡	1959	1955	1955
43 –	Appointment of Beneficiaries	1957	1958	1957‡	1959		1958
44 –	Presumption of Death	1960		1958$			
45 –	Proceedings Against the Crown	1950	1959‡		1951	1952†	
46 –	Reciprocal Enforcement of Judgments	1924	'25, '58*	'25, '59*	'50, '61*	1925	
47 –							
48 –	Reciprocal Enforcement of Tax						
49 –	Judgments	1965					
50 –	Reciprocal Enforcement of Maintenance						
51 –	Orders	1946	'47, '58*	'46, '59*	'46, '61*	1951‡	'51‡, '61*†
52 –	Regulations	1943	1957‡	1958‡	1945‡	1962	
53 –	Sale of Goods		1898°	1897°	1896°	1919°	1899°
54 –	Service of Process by Mail	1945	——$	1945	——$		
55 –	Survival of Actions	1963					
56 –	Survivorship	1939	'48, '64*	'39, '58*‡	'42, '62*	1940	1951
57 –	Testators Family Maintenance	1945	1947‡	——$	1946	1959	
58 –	Trustee Investments	1957		1959†	1965‡		
59 –	Variation of Trusts	1961	1964		1964		
60 –	Vital Statistics	1949	1959‡	1962‡	1951‡		
61 –	Warehousemen's Lien	1921	1922	1922	1923	1923	
62 –	Warehouse Receipts	1945	1949	1945‡	1946‡	1947	
63 –	Wills	1929	1960‡	1960‡	1964‡	1959‡	
64 –	Conflict of Laws	1953		1960	1955		1955

* Adopted as revised.
° Substantially the same form as Imperial Act (*See* 1942 Proceedings, p. 18).
$ Provisions similar in effect are in force.
● More recent Act on this subject has been recommended by the Association of Superintendents of Insurance.

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

	Ont.	P.E.I.	Adopted Que	Sask	Can.	N.W.T.	Yukon	Remarks
	1931	1931		1929		1948	1954‡	Am. '31; Rev. '50 & '55; Am. '57
		1947		1929		1948‡	1954‡	Am '31 & '32; Rev. '55; Am '59
		1933				1948¶	1956	Am. '21, '25, '39 & '49; Rev. '50 & 61
		1934				1948‡	1954‡	Am '27, '29, '30, '33, '34 & '42; Rev. '47 & '55; Am '59
		1938*		1944*		1950*‡	1955‡	Rev. '35 & '53
		1960		1962		——¶	1962	Sup '65, Human Tissue Act
	——¶	1949		1932			1963	. . . .
	1932	1948				1949*‡	1954	Rev. '48; Am. '49
				1928		1954	1954	Am. '62
								. . . . .
	1960†					1948*‡	1955‡	Am. '42, '44 & '45; Rev '45; Am '51, '53 & '57
	'52, '54*			1947	1943	1948	1955	Am. '51; Rev. '53
		1939				1948	1955	Rev. '31
							1955	.. . .
	1954							
	1945	1947		1945	1942$	1948	1955	..
	1946	1946		1946		1948	1955	. .
								. .
	1924	1933		1925				Stat. Cond. 17 not adopted
				1934				Rev. '64
	1949	1949				1956	1956	....
								Rev '58; Am. '67
	——$					1966	..	
		1939		1943		1948*‡	1954*	Am. '39; Rev. '41; Am. '48; Rev. '53
		1944‡		1928		1949‡	1954‡	Am. '26, '50, '55; Rev. '58; Am. '63
		1939				1949‡	1954‡	Recomm withdrawn '54
	'21, '62*	1920	——$	'20, '61‡		'49‡, '64*	1954†	Rev '59
	1924	1933		1924				. . . .
		1939‡		1932		1948†	1954*	Am. '32, '43 & '44
						1952†	1954†	. . .
	1920°	1920°		1898°		1948°	1954°	.
				1941†				Am. '46
	1954			1957				Am '55
	1954$	1963		1957$				. . . . .
						1962	1962	
	1963‡			1952‡				
	1929			1924		1955	1956	Am '25; Rev '56; Am. '57; Rev '58; Am '62 & '67
								Rev '66
	'48‡ '59*‡	1951‡	1952$	1946$		1951‡	1955‡	Rev. '56 & '58; Am. '63 & '67
	1944‡				1950$			
	1920°	1919°		1896°				
				——$	..			
	1940	1940		'42, '62*		1962	1962	Am '49, '56 & '57; Rev. '60
				1945$				Am. '57
						1964	1962	. . . .
	1939	1963						. . . .
	1948$	1950‡		1950$		1952	1954‡	Am. '50 & '60
	1924	1938		1922		1948	1954	.
	1946‡							. .
				1931		1952	1954‡	Am '53; Rev '57; Am '66
	1954							Rev. '66

‡ 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 28TH, 1967)

10.00 a.m. - 11.10 a.m.

Opening

The forty-ninth annual meeting of the Conference opened at the Holiday Inn, St. John's, Newfoundland, at 10.00 a.m., with the President, Dr. Gilbert D. Kennedy, Q.C., in the chair.

Mr. Cyril J. Greene, Q.C., Deputy Attorney-General of Newfoundland, welcomed the members of the Conference on behalf of the Attorney-General.

Acting Secretary

The appointment of Mr. R. H. Tallin by the President to act as Secretary in the absence of the Secretary to the Conference was approved.

Introduction of Members

The new members of the Conference were introduced by their respective Local Secretaries, and the other members of the Conference introduced themselves.

Minutes of Last Meeting

The following resolution was adopted:

RESOLVED that the Minutes of the 1966 Annual Meeting as printed in the 1966 Proceedings, which were circulated, be taken as read and adopted.

President's Address

The President, Dr. Gilbert D. Kennedy, addressed the Conference on the past and, more particularly, the future of the Conference as it enters its fiftieth year.

Treasurer's Report

The Treasurer, Mr. W. E. Wood, presented the Treasurer's Report (Appendix B, page 44). There was some discussion on the subject of investment of balances on hand from time to time. The following resolution was adopted:

RESOLVED that the Executive instruct the Treasurer on the investment of any balances available from time to time.

The Report of the Treasurer was, on motion, received.

Messrs. Matheson and McCarthy were named as auditors to report at the closing plenary session.

Secretary's Report

In the absence of the Secretary, Mr. Tallin presented the Secretary's Report (Appendix C, page 46), which on motion was received.

Publication of Proceedings

The following resolution 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 for the supply to the Canadian Bar Association, at its expense, of such number of copies as the Secretary of the Association requests.

Resolutions Committee

On motion the following persons were named to the Resolutions Committee:

Messrs. Muggah (Chairman), Normand and H. J. MacDonald.

Nominating Committee

The following Past Presidents were named to constitute a Nominating Committee:

Messrs. Carter (Chairman), Bowker, J. A. Y. MacDonald, Read and MacTavish.

Next Meeting

Dr. Kennedy indicated that he had been authorized by the British Columbia Commissioners to invite the Conference to come to British Columbia next year. The question of the location of the next meeting was deferred until the closing plenary session.

Adjournment at 11.10 a.m.

The opening plenary session adjourned to meet at the call of the President at a time to be fixed later.

MINUTES OF THE UNIFORM LAW SECTION

The following Commissioners and representatives participated in the sessions of this Section:

Alberta:

Messrs G. W. ACORN, W. F. BOWKER, H. J. MACDONALD and W. E. WOOD

British Columbia:

Messrs. P. R. BRISSENDEN, G. H. CROSS, P. FIFOOT and G. D. KENNEDY.

Canada:

Messrs. W. J. RYAN and D. S. THORSON.

Manitoba:

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

New Brunswick:

Mr. M. M. HOYT.

Newfoundland:

Mr. V. P. MCCARTHY.

Northwest Territories:

Mr. F. G. SMITH.

Nova Scotia:

Messrs H. F. MUGGAH and H. E. READ.

Ontario:

Messrs. H. A. B. LEAL, L. R. MACTAVISH and A. N. STONE.

Prince Edward Island:

Messrs J. M. CAMPBELL and A. W. MATHESON.

Quebec:

Messrs. J. CHOUINARD, J. DURNFORD, R. NORMAND and L.-P. PIGEON.

Saskatchewan:

Mr. A. C. BALKARAN.

FIRST DAY

(MONDAY, AUGUST 28TH, 1967)

First Session

11.30 a.m. - 12.30 p.m.

The first meeting of the Uniform Law Section opened at 11.30 a.m. Mr. M. M. Hoyt presided.

Hours of Sittings

It was agreed that the Uniform Law Section should sit from 9.30 a.m. to 12.30 p.m. and from 2 00 p.m. to 4.30 p.m. each day during the meeting.

International Institute for the Unification of Private Law

Mr. Ryan raised the matter of Canada participating in the Hague Convention and the Rome Conference of the International Institute for the Unification of Private Law. Dr. Read reported (Appendix Z, page 247) on the submissions he had sent to Canada and the several provinces respecting participation of Canada in the Hague Convention and the Rome Conference (1966 Proceedings, page 25). After discussion it was decided that Dr. Read would make a report to the plenary session of the Conference with respect to the matter.

Amendments to Uniform Acts

Pursuant to the resolution passed at the 1965 meeting (1965 Proceedings, page 25), Mr. Tallin presented a report on amendments to Uniform Acts (Appendix D, page 47). The report was, on motion, received. After discussion it was decided that no further action would be taken with respect to any of the amendments.

Second Session

2.00 p.m. - 4.45 p.m.

Consumer Protection Legislation

Mr. Stone presented the report of the Ontario Commissioners on consumer protection legislation (Appendix E, page 52) as requested at last year's Conference (1966 Proceedings, page 25). There was a general discussion as to the desirability of proceeding further with the study of this matter. The following resolution was adopted:

RESOLVED that the Chairman determine whether a sufficient number of provinces were interested in this subject to make it worthwhile proceeding with its consideration and, on the basis of his determination, notify the Ontario Commissioners as to whether they should proceed with consideration of the matter and make a report next year respecting the principles.

Bulk Sales

Mr. Bowker presented two reports for the Alberta Commissioners (Appendix F, page 55, which is the same as Appendix Z in the 1966 Proceedings at page 165 and Appendix G, page 65). Mr. MacTavish read a letter which he had received from Mr. Catzman. After discussion, the following resolution was adopted:

RESOLVED that the draft prepared by the Alberta Commissioners and submitted to the 1966 meeting be not adopted and that the Model Bulk Sales Act adopted at the 1961 Conference (1961 Proceedings, page 21) be continued as the Model Bulk Sales Act.

Common Trust Funds

Mr. Brissenden presented a report of the British Columbia Commissioners (Appendix H, page 66) as requested at the 1966 Conference (1966 Proceedings, page 23). After discussion, the following resolution was adopted:

RESOLVED that the matter be referred back to the British Columbia Commissioners to prepare a draft Act and report at the next meeting of the Conference.

Contributory Negligence (Last Clear Chance)

Mr. Bowker presented a report of the Alberta Commissioners (Appendix I, page 68) as requested at the 1966 meeting of the Conference (1966 Proceedings, page 26). After some discussion, the following resolution was adopted:

RESOLVED that a section be added to the Model Contributory Negligence Act to make it clear that the last clear chance rule no longer applies and that the matter be referred to the British Columbia Commissioners to report next year with the draft.

SECOND DAY

(TUESDAY, AUGUST 29TH, 1967)

Third Session

9.30 a.m. - 12.45 p.m.

Contributory Negligence (Tortfeasors)

Mr. Bowker presented the report of the Alberta Commissioners (Appendix J, page 74) as requested at the 1966 meeting of the Conference (1966 Proceedings, page 20). It was suggested that the Canadian Bar Association be asked for assistance on the formation of policy. Mr. Cross volunteered to raise the matter at the Civil Justice Section of the Canadian Bar Association. It was suggested that the Commissioners of the various provinces urge the Civil Justice Subsections of the Canadian Bar Association in the respective provinces to study the matter. After further discussion, the following resolution was adopted:

RESOLVED that assistance be asked from the Canadian Bar Association, Civil Justice Section, and that the Alberta Commissioners report at the next meeting of the Conference with a draft for discussion of policy

Decimal System of Numbering

The representatives of the various jurisdictions reported on the discussions of the Commissioners held in their jurisdiction on the question of the adoption of the decimal system of numbering. After discussion, the following resolution was adopted:

RESOLVED that Canada take the matter under consideration and report at the next meeting of the Conference with recommendations as to the adoption of a decimal system of numbering.

Judicial Decisions Affecting Uniform Acts

Dr. Read presented his report on judicial decisions affecting Uniform Acts (Appendix K, page 87). The following resolution was adopted:

RESOLVED that the Nova Scotia Commissioners continue to prepare a report on judicial decisions affecting Uniform Acts.

A vote of thanks to Dr. Read for the work that he has done in connection with these reports in the past was moved and unanimously passed.

Fourth Session

2.00 p.m. - 4.35 p.m.

Judicial Decisions Affecting Uniform Acts (concluded)

Several of the cases mentioned in Dr. Read's report on judicial decisions affecting Uniform Acts were discussed. The following resolutions were adopted:

1. RESOLVED that subsection (6) of section 3 of the Model Reciprocal Enforcement of Judgments Act be amended

(a) by striking out the words "it is shown by the judgment debtor to" in the first and second lines thereof;

and

(b) by adding thereto, immediately after the word "made" in the third line thereof, the words "is satisfied";

so that the first three lines of subsection (6) of section 3 will read as follows:

'No order for registration shall be made if the court to which application for registration is made is satisfied that'. . .

2. RESOLVED that the British Columbia Commissioners consider the problem raised in the re *Fiszhaut* case and report at the next meeting of the Conference with a proposed draft amendment to The Wills Act, if they think an amendment desirable

Rules of the Road

Mr. Tallin presented the report of the Manitoba Commissioners on the Rules of the Road (Appendix L, page 113) in accordance with the resolutions adopted at the 1966 meeting of the Conference (1966 Proceedings, pages 19 and 20). After discussion it was agreed that the word "necessary" where it appears in sub-clauses (i) and (ii) of the proposed clause (h) and in the proposed subsection (1) of section 73, as set out in the report, be deleted and the words "designed and" where they appear in sub-clauses (i) and (ii) of the proposed clause (h), as set out in the report, be struck out. After further discussion the following resolution was adopted:

RESOLVED that the matter be referred back to the Manitoba Commissioners with the request that they prepare draft amendments to the Rules of the Road in accordance with the decisions

arrived at at this meeting, that the draft be sent to each of the Local Secretaries for distribution by them to the Commissioners in their respective jurisdictions and that, if the draft is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1967, it be recommended for enactment in that form.

NOTE:—Copies of the draft amendments were distributed in accordance with the above resolution. Disapprovals by two or more jurisdictions were not received by the Secretary by November 30, 1967 The draft amendments as adopted and recommended are set out in Appendix M, page 117.

Adoption

Mr. Bowker presented the report of the Alberta Commissioners respecting adoption (Appendix N, page 119, see also 1966 Proceedings, page 26).

THIRD DAY

(WEDNESDAY, AUGUST 30TH, 1967)

Fifth Session

9.30 a.m. - 12.30 p.m

Adoption (concluded)

There was discussion on a number of the matters raised by the report of the Alberta Commissioners. It was agreed that there should be limitation on the freedom of testators to exclude adopted children from a class of beneficiaries. It was also agreed that there was a preference for legislation to state as substantive law the status of an adopted child rather than to deal with the matter by definition and that the statement of status should have retroactive effect. It was also agreed that any draft should deal with the question of recognition of foreign adoptions. After the discussion, the following resolution was adopted:

RESOLVED that the matter of adoption be referred back to Alberta for a further report at the next meeting of the Conference with a draft giving effect to the decisions on policy made at this meeting.

Interpretation Act

Mr. Tallin presented the report of the Manitoba Commissioners with respect to The Interpretation Act (Appendix O,

page 123), which had been prepared by the Manitoba Commissioners after discussion with some of the Saskatchewan Commissioners. After discussion, the following resolution was adopted:

RESOLVED that the draft Interpretation Act attached to the Manitoba Commissioners' report be referred to all jurisdictions for discussion and that the matter be placed on the agenda for general discussion at the next meeting of the Conference.

Sixth Session

2.30 p.m. - 4.55 p.m.

Intestate Succession

Mr. Leal presented the report of the Ontario Commissioners with respect to The Intestate Succession Act (Appendix P, page 149, see also 1966 Proceedings, page 19). After discussion the following resolution was adopted:

RESOLVED that the matter be referred to the Prince Edward Island Commissioners for the preparation of either

(a) a draft Model Act dealing with both the matters dealt with in The Model Testators Family Maintenance Act and the matters pertaining to the variation of intestate succession rules in particular cases; or

(b) draft amendments to The Model Testators Family Maintenance Act so that that Act would include matters pertaining to the variation of intestate succession rules in particular cases.

Foreign Torts

Dr. Read presented his report on foreign Torts (Appendix Q, page 153). After discussion, the following resolution was adopted:

RESOLVED that the recommendation contained in the last paragraph of his report be adopted.

A vote of thanks to Dr. Read for the work that he has done in connection with foreign torts for the Conference for the past years was moved and unanimously passed.

Limitation of Actions

Mr. Acorn submitted the report of the Alberta Commissioners with respect to limitation of actions (Appendix R, page 172)

(See 1966 Proceedings, page 26). After discussion, the following resolution was adopted:

RESOLVED that the matter of limitation of actions be referred to Alberta for report at the next meeting of the Conference with draft for discussion of policy.

FOURTH DAY

(THURSDAY, AUGUST 31ST, 1967)

Seventh Session

9.30 a.m. - 12.30 p.m.

Occupiers' Liability

Mr. Cross presented the report of the British Columbia Commissioners on occupiers' liability (Appendix S, page 179) (See 1966 Proceedings, page 19) After discussion, the following resolution was adopted:

RESOLVED that the matter of occupiers' liability be referred back to the British Columbia Commissioners for further drafting and report at the next meeting of the Conference.

Perpetuities and Accumulations

Mr. Brissenden presented the report of the British Columbia Commissioners respecting perpetuities and accumulations (Appendix T, page 194) (See 1966 Proceedings, page 21). After discussion, the following resolution was adopted

RESOLVED that the matter of The Perpetuities Act and The Accumulations Act be referred back to the British Columbia Commissioners with a request that they prepare a draft Perpetuities Act and a draft Accumulations Act in accordance with the decisions arrived at at this meeting, that the drafts be sent to each of the Local Secretaries for distribution by them to the Commissioners in their respective jurisdictions and that, if the drafts are not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1967, they be recommended for enactment in that form

NOTE:—Copies of the draft Perpetuities Act were not distributed in time for disapprovals to be filed with the Secretary by November 30,

1967, therefore the subject will be included in the 1968 Agenda for further consideration.

Copies of the draft Accumulations Act were not distributed, therefore the subject will be included in the 1968 Agenda for further consideration.

Personal Property Security

Mr. MacTavish reported orally on behalf of the Ontario Commissioners (See 1966 Proceedings, page 22) with respect to the Ontario legislation which will be coming into force in stages. Copies of the Ontario Personal Property Security Act and other Bills connected therewith were distributed. After discussion, the following resolution was adopted:

RESOLVED that the matter of The Personal Property Security Act be referred to the Manitoba Commissioners for the preparation of a draft Bill, the Commissioners to report at the next meeting of the Conference.

Testamentary Additions to Trusts

Mr. Leal presented the report of the Ontario Commissioners relating to testamentary additions to trusts (Appendix U, page 207) (See 1966 Proceedings, page 25.) After discussion, the following resolution was adopted·

RESOLVED that the matter of testamentary additions to trusts be referred to the Saskatchewan Commissioners for preparation of a draft Bill, the Commissioners to report at the next meeting of the Conference.

Eighth Session

2.00 p m. - 5 35 p.m.

Testator's Family Maintenance

Mr. Leal presented the report of the Ontario Commissioners on The Testator's Family Maintenance Act (Appendix V, page 219) (See 1966 Proceedings, page 22). After discussion, it was agreed that all the words after the word "him" in the second line of clause (f) of the proposed section 3A of the Uniform Testator's Family Maintenance Act, as set out in the report, be struck out. After further discussion, the following resolution was adopted:

RESOLVED that the matter be referred to the Prince Edward Island Commissioners for incorporation in the draft revision of

The Testator's Family Maintenance Act or the draft amendments to The Testator's Family Maintenance Act, which they are to prepare for the next meeting of the Conference.

Trustee Investments

Mr. Durnford presented the report of the Quebec Commissioners respecting trustee investments (Appendix W, page 222) (See 1966 Proceedings, page 23). After discussion, the following resolution was adopted:

RESOLVED that the draft amendments to the Uniform Trustee Act (investments) be referred back to the Quebec Commissioners with a request that they prepare a draft in accordance with the decisions arrived at at this meeting, that the draft be sent to each of the Local Secretaries for distribution by them to the Commissioners in their respective jurisdictions and that, if the draft is not disapproved by two or more jurisdictions by notice to the Secretary of the Conference on or before the 30th day of November, 1967, it be recommended for enactment in that form.

NOTE:—Copies of the draft were distributed in accordance with the above resolution Disapprovals by more than two jurisdictions were received by the Secretary before November 30, 1967. The draft is set out in Appendix X, page 239 The subject will be included in the 1968 Agenda for further consideration.

Uniform Construction Section

Mr. Bowker raised the question of the inclusion of a Uniform Construction Section in each Uniform Act (See 1966 Proceedings, page 26). After discussion, the following resolution was adopted:

RESOLVED that each Uniform Act recommended by the Conference have printed at the end thereof a note requesting any province or jurisdiction enacting it to add an additional note to the effect that the Act is, in whole or in part, based on an Act recommended by the Conference, and, if based in part only on the Uniform Act, a note of where the differences occur

New Business

UNSATISFIED JUDGMENT FUNDS

Mr. Ryan raised the question of the applicability of The Unsatisfied Judgment Fund provisions in the various provincial statutes to non-residents. He circulated a paper with respect thereto (Appendix Y, page 241) After discussion, the following resolution was adopted·

RESOLVED that the matter raised in Mr. Ryan's paper on Unsatisfied Judgment Funds be referred to the Northwest Territories Commissioners for report at the next meeting of the Conference.

DRAFTING WORKSHOP

Mr Ryan raised the question of the advisability of the various legislative draftsmen having a separate meeting, either during or before or after the meetings of the Conference. It was agreed that time should be made available for such a meeting in conjunction with the Conference.

APPRECIATIONS TO DR. READ

Mr. Rutherford expressed, on behalf of the Commissioners, the esteem, gratitude and friendship of the members of the Conference, both past and present, to Dr. Read, who indicated that he may not be back at future meetings.

MINUTES OF CRIMINAL LAW SECTION

The following members attended:

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

H. H. BULL, Q.C., Crown Attorney, Toronto;

RHEAL BRUNET, Q.C., Crown Attorney, Montreal;

D. H. CHRISTIE, Q.C., Assistant Deputy Attorney General of Canada;

W. B. COMMON, Q.C., Commissioner, Ontario;

A. RENDALL DICK, Q.C., Deputy Attorney General of Ontario;

J. E. HART, Q.C., Deputy Attorney General of Alberta;

G. D. KENNEDY, Q.C., Deputy Attorney General of British Columbia;

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

T. D. MACDONALD, Q.C., Deputy Solicitor General of Canada;

D. S. MAXWELL, Q.C., Deputy Attorney General of Canada;

J. A. MCGUIGAN, Q.C., Deputy Attorney General of Prince Edward Island;

J. G. MCINTYRE, Q.C., Commissioner, Saskatchewan;

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

G. E. PILKEY, Q.C., Deputy Attorney General of Manitoba;

J. A. POWER, Q.C., Director of Public Prosecutions, Newfoundland;

D. G. ROUSE, Q.C., Deputy Attorney General of New Brunswick; and

J. E. WARNER, Q.C., Director of Public Prosecutions, New Brunswick.

Chairman—J. A. MCGUIGAN *Secretary*—D. H. CHRISTIE

An agenda comprising nineteen items was placed before the Criminal Law Section and a further four proposals were submitted during the course of the meetings. These matters were dealt with as follows.

1. *Transfer of charges after commital,* Section 421(3)

Mr. Bull, Chairman of the Sub-committee appointed in 1966 to consider and report on the application of subsection (3) of section 421 of the Criminal Code where there has been a committal for trial in the province to which a request for the transfer

of a charge is made and, in so far as is relevant to this matter, the position of the Attorney General under section 490 of the Code, presented the Sub-committee's report. The report which concludes and recommends as follows, was adopted:

"It is the opinion of the Sub-committee that:

1. Section 421(3) of the Criminal Code is not sufficiently explicit to permit the transfer of charges after a committal for trial following a preliminary inquiry in the requested province.

2 The application of section 490 of the Criminal Code, because of the doubt regarding its legality in certain circumstances, its impracticability and its cumbersome nature, is not an appropriate solution to the problem.

3. Section 421(3) should be amended to provide for the transfer of all outstanding charges to which the accused signifies his intention to plead guilty regardless of any proceedings taken in respect of such charges in the province where the offences are alleged to have been committed"

There is an Addendum to the Report dealing with three other matters brought to the attention of the Sub-committee, but as these matters were considered by the Sub-committee to be beyond its terms of reference they were simply placed before the meeting for the purpose of discussion and without any recommendations thereon. The matters referred to are:

(a) The following proposal submitted by Mr. Neil A. McDiarmid, Departmental Solicitor, Department of the Attorney General, Province of British Columbia:

"Where an accused is in custody and where a warrant has been issued in another province pursuant to section 639 for the appearance of the accused to be sentenced for the offence of which he was convicted in the other province and upon which sentence was suspended, and with the consent of the accused, he may be brought before any court or person that would have had jurisdiction to sentence the accused for the offence if sentence had been suspended and a warrant issued in the province where the accused is in custody"

After considerable discussion reflecting a divergence of views it was decided the Commissioners should have six weeks in which to make their individual opinions on the proposal known to the Secretary with the understanding that the latter could assume that those Commissioners who did not communicate with him were in agreement with Mr. Dick's recommendation that the proposal be approved subject to the requirement that, in addition to the consent of the accused, the consent of the Attorney General of the province in which the imposition of sentence was suspended,

be obtained. The time limitation of six weeks related to the expectation that a Bill to amend the Criminal Code would be prepared and introduced in Parliament before the New Year.

(b) The following proposal put forward by Mr S. A. Caldbick, Q.C., Crown Attorney for the District of Cochrane, Ontario:

> "I find it rather awkward to comply with the Provisions of 421(3) of the Criminal Code, which provides in part that an Accused must 'Signify in writing before a Magistrate, his intention to plead Guilty to an offence with which he is charged etc'
>
> It means in this District that if we are to comply strictly with the section, the Magistrate must at some time before the Accused is brought before him to plead Guilty, attend at the Detention Centre in Monteith to have the Accused signify his intention in Writing It seems to me that the Intention could be signed before the Superintendent of the Institution in which the Accused is serving his sentence. It is not binding on the Accused in any way and indeed Subsection 4 provides that it is not admissible in evidence against the Accused in any criminal proceedings.
>
> Perhaps this matter could be considered and if it is thought desirable to do so, an appropriate amendment could be suggested to the Department of Justice"

The Commissioners agreed with the recommendation that subsection (3) of section 421 of the Criminal Code be amended to require that the consent of the accused be given by him before the court which received his plea of guilty and imposes sentence.

(c) A proposal that the restrictive interpretation placed on the word "custody" as meaning "in custody under sentence" should be reviewed.

The Commissioners agreed that the reference to the accused being in custody should be deleted from subsection (3) of section 421 and from section 421A of the Criminal Code. It was also agreed that pending legislative action on the foregoing recommendations the phrase "in custody" would be taken to mean "in custody on a charge" as well as "in custody under sentence".

2. *Pre-trial notice of special defences*

Mr. Bull, Chairman of the Committee appointed in 1966 on pre-trial disclosure of the defences of alibi, insanity, automatism, etc, presented the Committee's Report. The Report which concludes as follows, was adopted:

> "The Sub-Committee looks with favour upon the making of a rule providing for pre-trial notice in the case of defences of alibi, insanity

and automatism. It is considered that the giving of such notice is now the practice of prudent defence counsel in the interest of their clients. To make the practice universal would be to remove the abuses that arise by maintaining inviolable the accused's right to silence. We feel however that it would be premature in view of the many procedural details that require discussion and resolution for us to recommend any specific legislative action at this time. This report is respectfully submitted therefore for the purpose of discussion, further study and such action as is deemed appropriate."

3. *Theft and related offences*

The Report of the Committee appointed in 1966 to consider the law of theft and related offences was not presented. It was agreed that the nature and scope of this subject is such that it cannot be adequately dealt with by a Sub-committee and that Mr. Bull and Mr. Common would explore, with the Criminal Law Institute, University of Toronto, what might usefully be done by that group by way of research and preparing recommended amendments to the present law. It was also agreed that the Secretary would endeavour to obtain copies of the relevant provisions of the Model Penal Code prepared by the American Law Institute and the report on this subject prepared in the United Kingdom for circulation to the Commissioners.

4. *Juvenile delinquency in Canada*

Mr. John A. Y. MacDonald, Chairman of the Committee appointed in 1966, to study those aspects of the Report of the Department of Justice Committee on Juvenile Delinquency (hereinafter referred to as "the Report") relating to procedure which fall within the general administration of justice, presented the Committee's Report.

Recommendations 7 and 8 of the Report were not approved and it was agreed that sections 12 and 13 of the Criminal Code should not be amended or repealed.

Recommendation 9 of the Report that the juvenile age should be uniform throughout Canada was "accepted in principle" but the recommendation that this age be seventeen was left in abeyance pending further consideration.

Recommendation 68 of the Report that the principle of section 421 of the Criminal Code apply in relation to juveniles was approved and it was recommended that this be implemented

without waiting for the general revision of the Juvenile Delinquents Act.

It was necessary to go on to other business at this stage of the proceedings, but later the Commissioners agreed to receive the balance of the Report (after deleting the words "who is unmanageable" on page 7, paragraph 3) with the direction that a copy of same be forwarded to the Minister of Justice and the Solicitor General for their consideration.

5 *Recommendations re Criminal Code,* section 306 (Publication of false advertisements)

After hearing representations by Mr. J. J. Quinlan, Q.C., Deputy Director of Investigation and Research (Combines Investigation Act) the Commissioners agreed that section 306 of the Criminal Code could best be enforced along with other related provisions of the Combines Investigation Act and recommended the provisions of section 306 be made part of that Act.

6 *Proof of age in criminal proceedings*

The Commissioners agreed that Mr. Hart and Mr. Christie should prepare a paper for presentation at the 1968 Meeting relating to proof of age in criminal proceedings together with whatever recommendations they consider, if any, might make the law of evidence more effective in this regard.

7. *Hearing appeal by way of trial de novo*

The Commissioners did not approve a proposal that an appellate court hearing an appeal by way of trial *de novo* from conviction only should be vested, upon dismissing the appeal, with jurisdiction to adjudicate on sentence.

8. *Criminal Code, Part XXI* (Preventive detention)

The Commissioners agreed that the provisions relating to appeals in respect of proceedings under Part XXI of the Criminal Code should be brought together in that Part, but in so doing any right in respect of an appeal an accused may presently have under the Supreme Court Act should not be interfered with and, in addition, that the Criminal Code should specifically provide that provincial courts of appeal have jurisdiction in disposing of

an appeal against a sentence of preventive detention or an appeal against the dismissal of an application for an order of preventive detention to order a new hearing.

9 *Proposed amendment to Criminal Code,* section 721

The Commissioners approved a proposal that section 721 of the Criminal Code be amended to allow an appeal by way of trial *de novo* in Saskatchewan to be taken to the judicial centre nearest to the place of trial.

10 *Witness fees*

The Commissioners did not approve proposals

(a) to amend the Criminal Code to authorize the payment of witness fees to expert witnesses at preliminary inquiries;

(b) to amend Item 25 in the Schedule following section 744 of the Criminal Code to provide for the payment of $4 00 per day to witnesses attending at preliminary inquiries; or

(c) that the aforementioned Schedule be repealed altogether

11. *Order of preventive detention*

The Commissioners did not approve a proposal that proceedings under Part XXI of the Criminal Code for an order of preventive detention should be before a panel of three magistrates or judges, as the case may be

12 *Negligent killing of persons by hunters*

The Commissioners agreed that no action should be taken on a recommendation that the Criminal Code be amended to provide a new offence with respect to negligent killing of persons by hunters

13 *Voluntary inhalation of noxious substances*

The Commissioners agreed with a recommendation that consideration be given to amending the Food and Drugs Act to deal with the problem of voluntary inhalation of noxious substances.

14 *Insanity at time of trial*

There was a good deal of discussion concerning Bill C-176—AN ACT TO AMEND THE CRIMINAL CODE (INSANITY AT TIME OF TRIAL)—which was introduced in Parliament in

1966 as a private Member's measure and the Report thereon of the Standing Committee on Justice and Legal Affairs of the House of Commons dated February 28, 1967. In the opinion of this Committee the issue of the fitness of an accused to stand trial, on account of insanity, "could be and should be in some cases postponed until after the evidence for both the Crown and the accused had been heard". The Commissioners adopted a resolution worded as follows:

> "That without passing on the mechanics of Bill C-176, some procedure should be established whereby, with the approval of the court, an issue can be tried as to whether there is a case for the accused to meet before an issue is tried as to the mental condition of the accused; the first issue to be tried in a jury case by the judge alone"

15. *Security for costs on appeals,* Criminal Code Part XXIV

The Commissioners did not approve a proposal that the provisions for security for costs on appeals under Part XXIV of the Criminal Code be repealed

16. *Appointment and salaries of judges*

The Commissioners did not approve a proposal that the Judges Act, R.S C. 1952, c. 159, should not specify the number of superior, district and county court judges to be appointed in the provinces, but should be confined to prescribing the salaries of these judges.

17 *Reading in at trial of evidence given at preliminary inquiry*

The Commissioners did not approve a proposal to amend subsection (1) of section 619 of the Criminal Code to permit the reading in at the trial of the evidence given at the preliminary inquiry by a witness who absconds or disappears after being subpoenaed to attend the trial

18. *Compensation for victims of crime*

There was a general discussion concerning what is being done in Canada in the matter of compensation for victims of crime. Reference was made to the Saskatchewan Criminal Injuries Compensation Act, 1967; the Ontario Law Enforcement Compensation Act, 1967, and to the fact that consideration is being given to amending the City of Vancouver Charter to provide some compensation of this type. The matter is being studied in some of the other provinces

19. *Frivolous appeals, application of section 591*

The Commissioners were referred to paragraph 15 of the Minutes of the 1965 Meeting of the Criminal Law Section wherein the Commissioners recommended that section 591 of the Criminal Code, relating to frivolous appeals, be extended to cover any appeal or application for leave to appeal and agreed that applications for extension of time for leave to appeal should be added to that recommendation.

20. *Release of arrested person for lack of evidence, etc.*

The Commissioners approved a proposal that an appropriate amendment be made to section 438 of the Criminal Code to make it clear that a person who has been arrested may be released prior to the times specified therein for bringing him before a justice if the peace officer making the arrest is satisfied the person should be released for lack of evidence or with the intention of compelling his appearance by way of summons.

21. *Probation in Canada*

Time did not permit consideration of the comprehensive proposals for development of probation in Canada prepared by the Canadian Corrections Association and distributed to the Commissioners It was agreed this report would be taken up at the 1968 meeting, but that in the meantime, having regard to the expected Criminal Code Amendment Bill, those Commissioners wishing to make their views known to the Department of Justice prior to the introduction of the Bill in Parliament would communicate with the Secretary.

22. *Election of officers*

Mr. Dick was elected Chairman and Mr. Christie was elected Secretary for the ensuing year.

MINUTES OF THE CLOSING PLENARY SESSION

(FRIDAY, SEPTEMBER 1ST, 1967)

10 30 a.m. - 11.25 a m.

The plenary session resumed with the President, Dr. Gilbert D. Kennedy, Q.C., in the chair.

Report of Auditors

Mr. Matheson reported that he and Mr. McCarthy had examined the statement of the Treasurer and certified that they had found it to be correct.

On motion the Report of the Treasurer was adopted.

Report of Uniform Law Section

Mr. M M. Hoyt, Chairman of the Uniform Law Section, presented the following report:

The Uniform Law Section met with representatives from Canada, each province and the Northwest Territories. Twenty-seven Commissioners participated in the discussions on the various reports and matters. Every item on the printed agenda was covered. Nineteen written reports and several oral reports were received. In addition, several matters of new business were raised and considered.

The following matters have progressed to the stage of the preparation and distribution of final drafts which, if not disapproved by two or more jurisdictions, will be recommended for enactment:

1. Amendments to Rules of the Road relating to the definition of "highway", to the application of certain provisions to parking lots, and to the duties of drivers to yield right-of-way on green light under certain conditions.
2. The Perpetuities Act.
3. The Accumulations Act.
4. Trustee Investment—Adoption of prudent man rule

Report of Criminal Law Section

Mr. J. A. McGuigan, Chairman of the Criminal Law Section, presented the following report of the Criminal Law Section:

Nineteen members attended the meetings of the Criminal Law Section. Nineteen items on the Agenda and Supplementary Agenda and five other items were dealt with. A detailed report of the work of the Section will be set out in the formal minutes of the Section. Mr. A. Rendall Dick, Q.C., was elected as Chairman and Mr. D. H Christie, Q.C., as Secretary for the next year.

Appreciations

Mr. Muggah, on behalf of the Resolutions Committee, moved the following resolution which was unanimously adopted:

RESOLVED that the Conference express its sincere appreciation

(a) to The Law Society of Newfoundland for the reception on Monday evening at the Battery Motel and to the many members of the Society who so kindly provided transportation;

(b) to The Honourable T A. Hickman, Q.C., Minister of Justice and Attorney-General of Newfoundland, for the reception, dinner and delightful entertainment following them on Tuesday evening at the Holiday Inn;

(c) to the Mayor and Members of the Council of the City of St. John's for the reception and dinner on Wednesday evening at the Newfoundland Hotel;

(d) to the wives of the present and former Newfoundland Commissioners for their kindness in making welcome the wives of visiting members of the Conference by arranging Coffee Parties, the visit to Government House, extending hospitality in their homes, providing sightseeing tours and in other ways adding so much to the pleasure of their visit;

(e) to Mr. C. A Pippy for the exciting cruise on his yacht on Thursday afternoon;

(f) to the present and former Newfoundland Commissioners and other members of the Bench and Bar and to their wives for the bounty and warmth of their hospitality and for the excellence of arrangements for the meeting and the entertainment of the members and their wives;

AND FURTHER BE IT RESOLVED that the Secretary be directed to convey the thanks of the Commissioners to those

referred to above and to all others who contributed to the success of the forty-ninth annual meeting.

Report of Nominating Committee

Mr. Bowker, on behalf of the Nominating Committee, submitted the following nominations for officers of the Conference for the year 1967-68:

Honorary President	G. D. Kennedy, Q C, Victoria
President	M. M. Hoyt, Q.C., Fredericton
1st Vice-President	Louis-Phillipe Pigeon, Q.C., Quebec
2nd Vice-President	R S. Meldrum, Q.C., Regina
Treasurer	W E Wood, Edmonton
Secretary	W. C Alcombrack, Toronto

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

Next Meeting

Dr. Kennedy again extended an invitation to the Conference to meet in British Columbia next year. After some discussion about the exact location of the meeting, the following resolution was adopted

THAT the British Columbia Commissioners arrange the site of the next meeting in British Columbia in consultation with the Executive.

International Institute for the Unification of Private Law

Dr Read reported from the Uniform Law Section respecting a discussion which had taken place in that Section with reference to the participation of Canada in the Hague Convention and at the Rome Conference—International Institute for the Unification of Private Law Dr. Read read a letter which he had sent to the Provincial Premiers. There was some discussion and it was decided that no action should be taken by the Conference until some specific communication had been received from the Government of Canada or the Provincial Governments (See Appendix Z)

Close of Meeting

The Chairman, Dr. G D. Kennedy, made some remarks respecting the work of the Conference during the past year and at the annual meeting.

APPENDIX A

AGENDA

OPENING PLENARY SESSION

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

UNIFORM LAW SECTION

1. Adoption — Report of Alberta Commissioners (see 1966 Proceedings, page 26)
2. Amendments to Uniform Acts — Report of Mr. Tallin (see 1965 Proceedings, page 25)
3. Bulk Sales — Report of Alberta Commissioners (see 1966 Proceedings, page 26)
4. Common Trust Funds — Report of British Columbia Commissioners (see 1966 Proceedings, page 23)
5. Consumer Credit — Report of Ontario Commissioners (see 1966 Proceedings, page 25)
6. Contributory Negligence — Report of Alberta Commissioners (see 1966 Proceedings, pages 19, 26)
7. Decimal System of Numbering — (see 1966 Proceedings, page 22)
8. Foreign Torts — Report of Special Committee (see 1966 Proceedings, page 20)
9. Highway Traffic and Vehicles (Rules of the Road) Act — Report of British Columbia Commissioners (see 1966 Proceedings, page 19)
10. Highway Traffic and Vehicles (Rules of the Road—Parking Lots) Act — Report of Manitoba Commissioners (see 1966 Proceedings, page 20)

11. Interpretation Act—Report of Manitoba and Saskatchewan Commissioners (see 1966 Proceedings, page 21)

12. Intestate Succession Act—Report of Ontario Commissioners (see 1966 Proceedings, page 19)

13. Judicial Decisions affecting Uniform Acts — Report of Dr. H. E. Read (see 1951 Proceedings, page 21)

14 Limitation of Actions — Report of Alberta Commissioners (see 1966 Proceedings, page 26)

15. Occupiers' Liability — Report of British Columbia Commissioners (see 1966 Proceedings, page 19)

16. Perpetuities Act—Report of British Columbia Commissioners (see 1966 Proceedings, page 21)

17. Personal Property Security Act—Report of Ontario Commissioners (see 1966 Proceedings, page 25)

18. Testamentary Additions to Trusts—Report of Ontario Commissioners (see 1966 Proceedings, page 25)

19. Testator's Family Maintenance Act—Report of Ontario Commissioners (see 1966 Proceedings, page 22)

20. Trustee Investments — Report of Quebec Commissioners (see 1966 Proceedings, page 23)

21. Uniform Construction Section—(see 1966 Proceedings, page 26)

22. New Business.

CRIMINAL LAW SECTION

1. Report of the Committee appointed at the 1966 Meeting to consider the application of section 421(3) of the Criminal Code where the accused has been committed for trial in the requested province (Item 2 of 1966 Minutes). (Committee: Chairman — Mr. H. H. Bull, Q.C. Members: Mr. J. E. Hart, Q.C., and Mr. W. C. Bowman, Q.C.). This Report will be circulated when received by the Secretary.

2. Report by the Committee appointed at the 1966 Meeting to consider whether provision should be made requiring the accused to give the Crown pre-trial notice of certain special defences such as alibi, automatism and insanity (Item 10 of 1966 Minutes). (Committee: Chairman — Mr. H. H. Bull, Q.C. Members: Mr. J. G. McIntyre,

Q.C., and Mr J. A. Scollin). This Report will be circulated when received by the Secretary.

3. Report of the Committee appointed at the 1966 Meeting to consider the law of theft and related offences (Item 15 of the 1966 Minutes). (Committee: Chairman — Mr. T. D. MacDonald, Q C. Members: Mr. W. B. Common, Q.C., and Mr. J A. Scollin). This Report will be circulated when received by the Secretary.

4. Report of the Committee appointed at the 1966 Meeting to consider procedural aspects of the Report of the Department of Justice Committee on Juvenile Delinquency in Canada (Item 21 of 1966 Minutes). (Committee: Chairman — Mr. J A. Y. MacDonald, Q.C Members: Mr. J. E. Hart, Q.C., Mr. G E. Pilkey, Q.C., and Mr. A. R. Dick, Q.C). This Report will be circulated when received by the Secretary

5. Proof of age of juvenile in proceedings under section 33(1) of the Juvenile Delinquents Act. Proposed amendment to provide that a juvenile is deemed to be of age indicated by the juvenile on production of a birth certificate or other suitable document if evidence to the contrary is not forthcoming. Mr. J. E. Hart, Q.C., will speak to this Item.

6. Consideration of the 1967 Report on Probation by the Canadian Corrections Association A copy of this Report is being circulated

7. Proposed amendment to section 727 of the Criminal Code to enable the Appeal Court hearing an appeal by way of trial *de novo* to adjudicate on sentence when dismissing an appeal by the defendant against conviction only. Mr. R S. Meldrum, Q.C., will speak to this Item.

8. Proposed amendment to section 667(2a) and (2b) of the Criminal Code (preventive detention) to enable the Court of Appeal to order a new hearing of the application Dr. G. D Kennedy, Q.C., will speak to this Item.

9. Proposed amendment to section 721 of the Criminal Code to enable an appeal by way of trial *de novo* in Saskatchewan to be taken to the District Court at the judicial centre nearest to the place of trial. Mr. J G. McIntyre, Q.C., will speak to this Item

10. Proposed amendment to section 619(1) of the Criminal Code to permit the reading in at trial of the evidence given at the preliminary inquiry by a witness who absconds or disappears after being subpoenaed to attend the trial The Acting Secretary will speak to this Item.

11. Proposed amendment to the Criminal Code to authorize the payment of adequate witness fees to expert witnesses at preliminary inquiries. Dr. G. D. Kennedy, Q.C., will speak to this Item.

12. Proposed amendment to sections 524 and 592 of the Criminal Code. Consideration of the Report of the Justice and Legal Affairs Committee of the House of Commons recommending that provision be made to allow the issue of the fitness of the accused to stand trial to be postponed until after evidence has been heard on the merits of the case. A copy of Bill C-176 and of the Report thereon of the Standing Committee is being circulated.

13. Proposed amendment to Item 25 in the Schedule following section 744 in Part XXIV of the Criminal Code to provide for the payment of four dollars per day to witnesses attending at preliminary inquiries. Dr. G. D Kennedy, Q.C., will speak to this Item.

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 16)

TREASURER'S REPORT

FOR THE YEAR 1966-67

Balance on Hand—September 14, 1966		$6,111.56
RECEIPTS		
Province of P.E.I.—		
November 7, 1966 (1966 contribution)	$ 100.00	
June 16, 1967	100.00	
Province of Alberta—		
February 23, 1967	200.00	
Province of Quebec—		
February 23, 1967	200 00	
Province of New Brunswick—		
February 23, 1967	200.00	
Province of British Columbia—		
April 11, 1967	200 00	
Bar of Province of Quebec—		
April 11, 1967	100 00	
Province of Newfoundland—		
April 11, 1967	200.00	
Province of Ontario—		
June 16, 1967	200.00	
Province of Manitoba—		
June 16, 1967	200.00	
Province of Nova Scotia—		
June 16, 1967	200 00	
Province of Saskatchewan—		
June 16, 1967	200.00	
		$2,100 00
Rebate of Sales Tax—Federal—		
June 16, 1967		212.54
Rebate of Sales Tax—Ontario—		
June 16, 1967		107.23
Bank Interest—October 31, 1966		85.68
Bank Interest—April 30, 1967		54.08
TOTAL RECEIPTS		$8,671.09

TOTAL RECEIPTS carried forward	$8,671.09	
DISBURSEMENTS		
CCH Canadian Limited—Printing Letterheads—October 17, 1967		$ 86 83
Secretary—Honorarium—December 8, 1966		150.00
Clerical Assistance Honorariums — December 8, 1966		175 00
CCH Canadian Limited—Printing 1966 Proceedings—December 29, 1966		2,279 06
Bank Exchange—		
April 11, 1967		.15
June 16, 1967		.40
CCH Canadian Limited—Printing 1967 Agenda—August 7, 1967		78.21
Cash in Bank—August 10, 1967		5,901.44
	$8,671 09	$8,671.09

August 10, 1967 W. E. WOOD, TREASURER

We have examined this statement and certify that we have found it to be correct.

Dated at St. John's, Newfoundland, the 30th day of August, 1967.

(signed) A. W. Matheson,
Vincent P. McCarthy.

APPENDIX C

(See page 17)

SECRETARY'S REPORT, 1967

Proceedings

In accordance with the resolution passed at the 1966 meeting of the Conference (1966 Proceedings, page 17), a report of the proceedings of that meeting was prepared, printed and distributed to the members of the Conference and to the persons whose names appear on the Conference mailing list. Arrangements were made with the Secretary of the Canadian Bar Association for supplying to him, at the expense of the Association, a sufficient number of copies to enable distribution of them to be made to the members of the Council of the Association.

With the untimely death of Mr. Victor J. Johnson, who rendered such valuable assistance to the Conference for many years in supervising the printing and distribution of the Proceedings, Mr. John Cannon, who succeeded Mr. Johnson as Legislative Editor in the Office of the Legislative Counsel in Ontario, has rendered the same assistance by making arrangements for and supervising the printing, proof reading and distribution of the Proceedings.

Appreciations

In accordance with the resolution adopted at the closing plenary session of the 1966 meeting of the Conference (1966 Proceedings, pages 35, 36), letters of appreciation were sent to all concerned

Sales Tax

Applications for remission of Sales Tax amounting to $319.77, paid in respect of the printing of the 1966 Proceedings, were made to the Federal Government and the Ontario Government and, in due course, refunds totalling that amount were received.

W. C. ALCOMBRACK, SECRETARY.

APPENDIX D

(See page 19)

AMENDMENTS TO UNIFORM ACTS

1967

REPORT OF R. H. TALLIN

Assignment of Book Debts, Bills of Sale and Chattel Mortgages, Conditional Sales

Provision was made in Ontario for the repeal of these Acts in conjunction with the coming into force of the new Personal Property Security Act The Ontario Acts are not the Uniform Acts

Defamation Act

Manitoba repealed section 15 which deals with limitations of actions. This was done in conjunction with a number of amendments to The Limitations of Actions Act

Fatal Accidents Act

Manitoba enacted the Uniform Fatal Accidents Act with a number of very minor amendments.

Alberta enacted section 4(3) of the Uniform Act authorizing the inclusion of funeral expenses in the damages awarded under the Act.

Human Tissue Act

Alberta enacted the Uniform Human Tissue Act and repealed Corneal Transplant Act.

Newfoundland enacted a Human Tissue Act which was modelled on the Uniform Act

Insurance — Life Insurance Part (Superintendents of Insurance Drafts)

Yukon Territories enacted the Life Insurance Part of the Uniform Insurance Act which is prepared by the Superintendents of Insurance Conference.

Limitations of Actions

Manitoba enacted a number of amendments to its Limitation of Actions Act which is similar in effect to the Uniform Act. The amendments are to come into force on proclamation. Generally they provide for a two year limitation period with the exception of

(a) actions for penalties — one year,

(b) actions for trespass or injury to real property—six years,

(c) actions for the recovery of money except debts charged on land — six years,

(d) actions on fraudulent misrepresentation — six years from discovery of fraud,

(e) actions grounded on accident, mistake or other equitable ground of relief — six years from discovery of cause of action,

(f) actions on judgments or orders for payment of money — ten years,

(g) action under Fatal Accidents Act—twelve months after death,

(h) highway traffic accident claims — one year, and

(i) all other actions for which no specific period is mentioned — six years.

The amendments also contain a provision for an extended period of limitation for counterclaims and third party proceedings and provided that The Limitations of Actions Act superseded any special provisions in other statutes other than those listed in a Schedule to The Limitations of Actions Act.

There is also a new Part added dealing with the power of a court to extend the limitation period in certain actions involving personal injury.

Reciprocal Enforcement of Judgments

Ontario re-enacted subsection (1) of section 2 of their Act which corresponds with subsection (1) of section 3 of the Uniform Act to read as follows:

> (1) Where a judgment has been given in a court in a reciprocating state, the judgment creditor may apply to any court in Ontario having jurisdiction over the subject-matter of the judgment in the place where

the debtor resides, or, notwithstanding the subject-matter, to the Supreme Court at any time within six years after the date of the judgment to have the judgment registered in that court, and on any such application the court may, subject to this Act, order the judgment to be registered.

The Act now permits the reciprocal enforcement in Ontario of judgments in Superior, County or District Courts of reciprocating states. This is extended to include any court.

The Ontario Act now requires registration in the Supreme Court. The amendment permits registration in lower courts corresponding to the court issuing the judgment for the purpose of reducing costs.

Reciprocal Enforcement of Maintenance Orders

Ontario added the following section to its Act:

5a Where an order or judgment made by a court in a reciprocating state includes provision for maintenance in the determination of any other question, the court in Ontario may, in its discretion,

(*a*) deem the provision for maintenance to be served from any other question determined by the order or judgment; and

(*b*) deem the provision for maintenance to be a provisional order for maintenance and deal with the order under section 5.

The amendment permits a foreign maintenance order to be defended on its merits and not as part of the larger question, such as divorce or custody.

Trustee Investments

New Brunswick and Nova Scotia both added provisions permitting the investment of moneys in bonds, debentures and other securities issued by the International Bank for Reconstruction and Development.

Nova Scotia also amended its Act to permit the investment in debentures of Credit Foncier Franco-Canadian. Another Nova Scotia amendment permits trust companies to invest trust funds in first mortgages on improved freehold or leasehold real estate.

Vital Statistics

The Yukon Territory amended its Vital Statistics Ordinance by adding the following subsections to section 30:

Certificate of divorce or annulment

(4a) The Registrar General shall, upon application and the payment of the prescribed fee, issue to a person whose marriage has been dissolved or annulled in the Territory and who intends to re-marry, a certificate of the dissolution or the annulment

(4b) The certificate of dissolution or annulment shall state:

(a) the names of the parties to the marriage;

(b) the date of the marriage;

(c) the place of the marriage;

(d) that it was dissolved or annulled, as the case may be;

(e) the name and official position of the person who made the decree by which the marriage was dissolved or annulled;

(f) the number and date of the decree;

(g) that the decree is final and not subject to appeal;

(h) the date of the certificate; and

(i) the number of the certificate

Wills

British Columbia enacted a new section 30 of its Wills Act which corresponds with section 33 of the Uniform Act. The new section 30 differs somewhat from the new section 33 which was adopted last year The new section 30 reads as follows:

30. (1) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

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

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

the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible if he had died intestate without leaving a widow and without debts immediately after the death of the testator

(2) Except when a contrary intention appears by the will, where a person dies in the lifetime of a testator either before or after the testator makes the will and that person

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

(b) leaves a widow but does not leave issue any of whom is living at the time of the death of the testator,

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

Manitoba repealed section 22 of its Wills Act which was the same as subsections (2) and (3) of section 21 of the Uniform Act.

APPENDIX E

(See page 19)

CONSUMER PROTECTION LEGISLATION

Report of the Ontario Commissioners

At the 1966 meeting of the Conference, the Ontario Commissioners were requested to report at the next meeting of the Conference on the state of consumer protection legislation in Ontario and in the other provinces (1966 Proceedings, page 25).

Most provinces have enacted or re-enacted comprehensive consumer protection legislation in the past two years. The legislation in general has recurring objectives which may be summarized as follows.

1. Registration or licensing of door-to-door sellers, sometimes called direct sellers or itinerant sellers.
2. Statutory elements required in consumer contracts.
3. A period for rescission of consumer contracts with direct sellers.
4. Requirement for the full and accurate disclosure of the cost of borrowing in specific and uniform terms.
5. Provision to ensure that a negotiable instrument given by a consumer to secure payment for the purchase of goods, when assigned, remains subject to the equities in the original transaction.

The appendix indicates the incidence of coverage of these features by provinces.

Some provinces have additional provisions to limit recourse by sellers on credit. For example, Nova Scotia and Ontario prohibit seizure and sale of the security after two-thirds of the amount secured has been paid; Ontario prohibits securing payment by taking a lien on goods other than those passing in the purchase; Manitoba confines the amount recoverable by a seller who takes a security interest in the goods sold to the amount of the proceeds of their sale.

Two meetings to which all provinces were invited have been held at Ottawa since the last meeting of the Conference. One meeting was held in December, 1966 and one in April, 1967, at

the invitation of the Minister of Finance. The purpose of the meetings was to arrive at a uniform approach on key consumer protection measures. Close continuous liaison has been maintained particularly between Alberta, Nova Scotia and Ontario.

It is important for the practical application of such items as rescission, computation and disclosure of cost of borrowing, the form of contracts and discounting of negotiable instruments that uniformity exist between provinces as most businesses having inter-provincial operations are affected. In these matters considerable uniformity now exists. The differences are mainly owing to the difficulty of predicting the practical problems in a new and very complex field. We feel a body of practical experience is essential for a well-developed uniform Act and would resolve most of the differences. Experience is rapidly increasing as recently passed Acts come into operation.

ARTHUR N. STONE,
for the Ontario Commissioners.

APPENDIX

Consumer Protection Provisions	Alta.	B.C.	Man.	N.B.	Nfld.	N.S.	Ont.	P.E.I.	Que.	Sask.	N.W.T.
1. Central Registration or licensing of door-to-door or direct sellers	1937	—	—	1967	1966	1967	1966	1967	—	1958	1950
2. Statutory elements required in consumer contracts	1954	1967	1962	—	—	1966	1966	1967	—	—	—
3. Rescission period for consumer contracts with direct sellers	1966	1967	1965	1967	1966	1967	1966	—	—	1965	—
4. Requirement for full and accurate disclosure of cost of borrowing in specific and uniform terms	1967	1967	1962	1967	—	1966	1966	1967	—	1967	—
5. Provision to ensure that a negotiable instrument given by a consumer in the purchase of goods, when assigned remains subject to the equities in the original transaction	—	1967	—	1967	—	—	1966	—	—	1967	—

APPENDIX F

(See page 20)

THE BULK SALES ACT

REPORT OF THE ALBERTA COMMISSIONERS

The attached draft Act is the result of the fact that no province has adopted the 1961 revised Act

The background is this. The Conference first approved this Act in 1920 and most provinces enacted it In 1950, a Revised Model Act was adopted. Soon afterwards, it was decided that more extensive revision was desirable. The Ontario, Federal, Manitoba, British Columbia and Alberta Commissioners, in turn, brought in recommendations. These resulted in the 1957 draft (1957 Proceedings, page 97). It was under consideration during the following two years. In 1959, Ontario passed a new Act and the Conference agreed that the Alberta Commissioners should examine it They did so, and in 1960, brought in a new draft, based on the Ontario Act The Conference studied it in 1960 and 1961. After several votes that showed an almost even balance of opinion, and with little enthusiasm, the Conference in 1961 approved the 1960 draft

Since that date, no province has enacted it It seems likely that none will.

The fact is that both the 1957 draft and the 1961 Revision contain improvements over the Acts now in force. It would be regrettable if provinces were to decline to revise their Acts because of two or three provisions borrowed from Ontario's Act. For this reason, the Alberta Commissioners in 1963 suggested re-examination (1963 Proceedings, page 28). In 1964 the matter was deferred (1964 Proceedings, page 27).

The differences between the 1957 draft and the 1961 Revision are on the following three points

1 Consent provisions;

2 Distribution provisions;

3. Provisions for filing documents in court.

The differences under 1 and 2 can be shown as follows:

	Consent	*Distribution*
1957 draft	all trade creditors	all trade creditors
1961 revision	unsecured trade creditors	all creditors

It will be seen that in relation to consent, the 1961 revision requires consent of a smaller class than does the 1957 draft. This facilitates the securing of consent and so far as the Alberta Commissioners recall, did not meet with objection. The distribution provisions, however, did. So did the filing provisions.

The attached draft retains the 1961 provisions re consent and the 1957 provisions re distribution and it omits the provisions for filing in court.

Respectfully submitted,

W. F. BOWKER,
J. E. HART,
H. J. MACDONALD,
G. W. ACORN,
W. E. WOOD,

Alberta Commissioners.

THE BULK SALES ACT

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

2. In this Act,

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

(b) "judge" means a judge of the (county or district) court for the (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;

(c) "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;

(d) "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;

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

(f) "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;

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

(h) "stock" means

(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,

(i) "trade creditor" means an unsecured trade creditor and a secured trade creditor;

(j) "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.

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

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

(b) commission merchants, and

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

NOTE: 1961, s 3(1) altered by removing "manufacturers" from the application of the Act.

(2) Nothing in this Act applies to or affects a sale in bulk by

(a) 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,

(b) a creditor realizing upon his security, a receiver, an assignee or trustee for the benefit of creditors, a trustee under the Bankruptcy Act (Canada), a liquidator or official receiver.

(c) a public official acting under judicial process, or

(d) a trader or merchant selling exclusively by wholesale

NOTE: 1961, s 3(2) with clause (d) added from 1957, s. 4(1)(a)

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

(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.

NOTE: 1961, s. 4

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.

NOTE: 1961, s 5(1).

(2) The statement shall show the names and addresses of the 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.

NOTE: 1957, s 5(2) In the 1961 version, the statement was also required to show the nature of the security of secured creditors.

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

NOTE: 1961, s 6 with "creditor" changed to "trade creditor"

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.

NOTE: 1961, s. 7.

8. Any trade 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 trade creditor.

NOTE: 1961, s 8 with "creditor" changed to "trade creditor".

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, or

(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 the 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.

(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.

NOTE: 1961, s. 9.

10. 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, the consent to the sale 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.

NOTE: 1961, s. 10(1) omitting a condition that the seller deliver to the buyer an affidavit 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 addresses 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

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 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 5, 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 trade creditors generally and may be enforced by any succeeding trustee or by any one of the trade 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.

NOTE: 1961, s 11 with "creditors" in subsection (2) changed to "trade creditors".

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

(a) 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

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

NOTE: 1961, s. 12 omitting a provision that 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.

13. (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 trade creditors of the seller and he shall distribute the proceeds of the sale among the trade creditors of the seller, and in making the distribution all trade 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.

NOTE: 1961, s. 14 with distribution restricted to trade creditors (secured and unsecured) instead of to all creditors. 1961, s. 13 which required the filing of documents with the clerk of the court is omitted.

14. (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 trade creditors, the fee paid may not exceed the amount fixed by the tariff.

(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 trade creditors.

(3) Where the proceeds of the sale exceed the amount required to pay in full all indebtedness of the seller to his trade 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).

NOTE: 1961, s 15 with "creditors" changed to "trade creditors".

15. (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

NOTE: 1961, s 16

16. Unless the buyer has complied with this Act, a sale in bulk is voidable as against the trade creditors of the seller and if the buyer has received or taken possession of the stock he is personally liable to account to the trade 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.

NOTE: 1961, s 17 with "creditors" changed to "trade creditors"

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

NOTE: 1961, s 18 with "creditor" changed to "trade creditor"

18. 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

NOTE: 1961, s 19

19. 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 proceeding is taken within six months from the date of the completion of the sale.

NOTE: 1957, c. 12.

FORM 1

(Section 5(1))

STATEMENT OF TRADE CREDITORS

Name of Creditor Address Amount

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

1. That the foregoing statement is a true and correct statement of the names and addresses of all the 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 trade creditors

(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(1)(c))

WAIVER

In the matter of the sale in bulk

Between

Seller

— and —

Buyer

I, of the of in the of a 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 any claim may, unless otherwise agreed, be asserted against the seller only.

Dated at , this day of , 19

Witness: }

APPENDIX G

(See page 20)

THE BULK SALES ACT

SUPPLEMENTARY REPORT OF THE ALBERTA COMMISSIONERS

At the 1966 meeting, discussion of the report on Bulk Sales was deferred until the 1967 meeting (see 1966 Proceedings, page 26). The report is set out at page 165 of the 1966 Proceedings (appendix Z). This report is not being redistributed to the Commissioners as it is expected that they will have last year's Proceedings at the 1967 meeting

One of the changes made in the draft Act attached to that report was the omission of the provisions requiring the filing of documents in court because of objections to the lengthy and detailed forms required to be used. The purpose of the filing was to fix a starting point for the limitation period. The draft uses the date of the completion of the sale, as all the existing Acts, (except the present Ontario and uniform Acts) have always done.

However, a recent Alberta case (*Thomson v. Richardson* (1967) 58 W.W.R. 743) points out the difficulty creditors may have in determining the date of completion. In that case there was an agreement for sale of two drug stores executed on September 25 (under which property was to pass to the purchaser on September 30). Bills of sale were delivered on October 1 and two defective bulk sales declarations on October 2 and 7. The court found that the sale was effective on or before September 30, six months and one day before the plaintiff commenced his action.

It is suggested that this uncertainty could be avoided by re-inserting in the Act the requirement for filing. But, instead of the bulky documents previously proposed perhaps a brief certificate stating the fact of the sale and the names of the parties would suffice. The views of the Conference are requested on this point.

Respectfully submitted,

W. F. BOWKER,
J. E. HART,
H. J. MACDONALD,
G. W. ACORN,
W. E WOOD,
Alberta Commissioners.

APPENDIX H

(See page 20)

COMMON TRUST FUNDS

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

At the last meeting of the Conference, following the excellent report on common trust funds by Mr. MacTavish on behalf of the Ontario Commissioners, the subject was referred to the British Columbia Commissioners to study and report further at this meeting of the Conference with, if they deemed it desirable, a draft act and regulations.

Your British Columbia Commissioners have given the subject further consideration but have not reached the point where in their opinion they can prepare a draft act and regulations. There is no doubt the common trust fund has investment advantages for relatively small trusts. This has been proved by the experience in the United States, particularly New England. However, although legislation was enacted in both Ontario and British Columbia many years ago, its use has not been great in Ontario and it has not been used in British Columbia because regulations have never been promulgated. It would appear that the chief obstacle lies not directly in the legislation itself but rather in the regulations which govern the operation of such a fund. The experience in Ontario has led to a recommendation by the Trust Companies Association to the legislature for a considerable revision of the regulations

Although it is desirable, in the opinion of your British Columbia Commissioners, that a draft act should go somewhat further than either the legislation in Ontario and British Columbia, they have not yet the information they require to prepare such an Act. Certainly they do not have the knowledge and experience necessary to criticize intelligently or approve the Ontario regulations with the revisions suggested. It is their opinion that these regulations be given, as well as the legislation itself, further study both by members of the bar and by trust company officials. The matter is of such importance that your Commissioners have asked that both legislation and regulations be considered by the British Columbia section of the Trust Companies Association and by the Wills and Trusts sub-section in British Columbia of the Canadian Bar Association. Both have

agreed. It is hoped that this work will be extended to all the sub-sections of both groups in Canada so that they will be able to give your Commissioners the benefit of their conclusions.

It seems to your British Columbia Commissioners that there would be merit, if it is possible constitutionally and otherwise, if each corporate trustee had one common trust fund in which it could invest without the establishment of separate funds in each province. This could be done if provision were made in the Act of each province providing for a single annual passing in the province of the incorporation of the trustee and the acceptance in each provincial jurisdiction of a certificate of the Judge or Registrar who presided at the passing in the province of incorporation of the trustee.

All of which is respectfully submitted,

P. R. BRISSENDEN,
For the British Columbia Commissioners.

APPENDIX I

(See page 20)

CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE

REPORT OF THE ALBERTA COMMISSIONERS

In 1966 the Alberta Commissioners suggested re-examination of the Uniform Contributory Negligence Act in connection with the doctrine of last clear chance (or last opportunity or ultimate negligence). The subject was referred to the Alberta Commissioners. (1966 Proceedings, page 26).

This doctrine was developed at common law mainly to help a plaintiff to escape the consequences of the rule that his contributory negligence defeated his action completely. If the defendant had the last clear chance he was liable in spite of the plaintiff's contributory negligence and *B.C. Electric Railway v. Loach* makes the defendant liable even where he did not have last chance, but would have had it but for his prior incapacitating negligence. In saying that the defendant's negligence was the sole cause of the plaintiff's damage, the courts built up a false theory of causation.

Of course, if the defendant did not have the last chance the plaintiff failed completely. This was at least as harsh as the rule which made the defendant wholly liable where he had last chance. In the early 1920's there was a strong sentiment that the courts should have power to apportion fault and thus to allow a plaintiff to recover a percentage of his damages somewhere between 0% and 100%. Hence in 1924, the Conference enacted the Uniform Act, based on Canada's *Maritime Conventions Act* It did not specifically refer to last clear chance and *MacLaughlin v Long* [1927] S C R. 303 held that the doctrine survived the Act. Between 1932 and 1935 the Conference considered proposals to abolish the doctrine. In 1935 the Conference decided against abolition. In a revised Uniform Act of that year, the Conference included in italics a section which it did not adopt but which it recommended for consideration by the provinces. This section forbids a judge to submit to the jury any question on last chance unless, in his opinion, there is evidence upon which the jury could reasonably find that the act or omission of one party was clearly subsequent to and severable from the act or omission of the

former so as not to be substantially contemporaneous with it. Four provinces — Alberta, Saskatchewan, Newfoundland and Prince Edward Island and the two Territories—have included this section in their Acts and all but Prince Edward Island have a similar provision for non-jury trials. The inclusion or omission of these provisions appears to have had little effect on the decisions.

At times it has seemed that in some provinces, at least, the rule had died. However, in several leading cases, all dealing with a collision between a moving vehicle and a stationary one, last chance was applied against the moving vehicle: *Sigurdson v. B C. Electric Railway* [1953] A.C. 291 (plaintiff stalled on street car tracks); *Bechtold v. Osbaldiston* [1953] S.C.R. 177 (plaintiff pulled over to left and stopped—hit head on); *McKee v. Malenfant* [1954] S.C.R 651 (night collision between vehicles on highway).

A significant recent case is *Great Eastern Oil Company v. Best* [1962] S.C.R. 118. Best had a service station and the premises were dangerous in that his storage tanks were hard to fill and it was easy to spill gas. Nearby was a stove The oil company's trucker was negligent and allowed gas to be spilled. It ignited from the heat from the stove and Best's building burned down. He recovered in full. The Supreme Court thought that no fault attached to the plaintiff at all because the defendant's servant knew of the danger, and even if the plaintiff was guilty of contributory negligence, the defendant had last clear chance. A similar case from Quebec is *Larocque v. Cote* [1962] S C.R. 632

In contrast is *Beamish v. Argue* (1966) 57 D.L.R. (2d) 691 (Ont C A.), where the facts were like those in *Best.* Laskin, J A rejects last chance The person maintaining a dangerous static condition can be responsible along with the person whose negligence is active Best's case "does not prescribe any principle to govern this case; and I hold this view apart from the difference in the relevant legislation of Ontario and of Newfoundland". The only difference we can see is that Newfoundland has the optional clause discussed earlier.

We do not wish to imply that the Supreme Court always insists on applying last chance, e.g, as between the moving and stationary vehicle. An example is *Bruce v. MacIntyre* [1955] S.C.R. 251 where blame was apportioned. Another interesting example is *Hobbs v Shields* [1962] S.C.R. 716 decided shortly after *Best* Hobbs manufactured electrical machinery which

Shields, an expert electrician, was installing. He negligently omitted to ground the machine and was electrocuted. The machine was defective through the defendant's negligence. Had last chance been applied, the widow would have recovered nothing. Instead of that, she recovered 50%.

For a review of the Court's treatment of last chance under the statute see· MACINTYRE, Last Clear Chance After Thirty Years Under The Apportionment Statutes (1955) 33 Can. Bar. Rev. 257; BOWKER, Ten More Years Under the Contributory Negligence Statutes (1965) 2 U.B.C. Law Review 198.

England passed its Statute in 1945. It does not specifically refer to the doctrine, but it is fair to say that the Courts have treated the Act as abolishing it: *Davies v. Swan Motors* (1949) 1 All E.R. 620; *Grant v. Sun Shipping Co.* [1948] A.C. 549; *Stapley v. Gypsum Mines Ltd.* [1953] A.C. 553; WILLIAMS, Joint Torts and Contributory Negligence Cap. 10; FLEMING, Torts, 3rd Ed. 235—243.

There are two main objections to abolition of the doctrine:

(i) It might result in holding a person to be partly at fault when in fact his negligence has "come to rest". Section 2, particularly subsection (2), is designed to prevent this. One cannot avoid borderline cases and differences of opinion, but abolition of the doctrine will put an end to the tendency to look for a single cause and to find it in the conduct of the person who was last negligent in point of time.

(ii) Some persons, including Professor Goodhart, think that the doctrine should be preserved in the class of case where one party sees the dangerous predicament of another and then fails to avoid the danger. The *Sigurdson* case pointed out that a party should not be in a weaker position because he has looked than he would be in had he not looked at all. The trouble with *Sigurdson* is that it was prepared to apply last chance in either of these situations whereas apportionment should be applied in both.

While many courts decline to apply last chance, in a given case, it clearly survives. There are some notwithstanding recent examples in provincial courts.

Milligan v. McDougal (1962) 32 D.L.R. (2d) 57 (P.E.I.) The defendant in a heavily loaded truck came around a curve at 40 m.p.h. while lighting his cigarette. He refrained from braking lest the load shift, and his truck drifted to the left. The plaintiff came toward him at 30 m.p.h. and they hit head on. The plaintiff was held not only negligent but solely to blame.

Weeks v. Cousins and Nesbitt (1964) 44 D.L.R. (2d) 316 (P.E.I.) Cousins was driving too fast on a rainy night going through a hamlet when Nesbitt tried to negotiate a U-turn between intersections. Cousins turned sharply to the left and collided with machinery owned by the plaintiff who was free of blame. Now in a case like this the plaintiff has generally been able to recover against both negligent parties regardless of which of the two had the last chance as between themselves. Yet the court said that Cousins had the last chance, or under *Loach* should have had it and therefore he is the only one liable to the plaintiff. We agree with Dean Wright's critical editorial note.

Fairweather v. Renton (1963) 39 D.L.R. (2d) 249 (N.B.) The plaintiff, a pedestrian, crossed a busy street in daytime between intersections. The defendant's car struck him. The plaintiff recovered 100%.

Peoples Co-operative and Miller v. Anderson (1964) 46 W.W.R. 95 (Man.) Miller left his company's car in his driveway but the rear end protruded onto the highway. On a foggy night defendant's car drifted to the left and struck the plaintiff's parked car. Now if either party had the last chance, it would seem to be the defendant. However, the plaintiff was held solely to blame and the action failed.

It is bad enough to apply last chance as between a negligent defendant and a negligent plaintiff. It is worse however to apply it as between defendants where the plaintiff is free from blame, with the result that one negligent defendant goes off scot free. He should not be freed of liability merely because his conduct is passive or creates a dangerous condition or because the other defendant could have avoided the consequences. Recent examples in addition to *Weeks v. Nesbitt* in which there should have been apportionment as between defendants are

(i) *Hand v. Best* (1962) 34 D.L.R. (2d) 282. This was a sequel to the first *Best* case but here the plaintiff is an

innocent neighbour. It was held that he can recover only against the oil company and not against Best.

(ii) *Lamberty v. Saskatchewan Power Corporation* (1967) 59 D L.R. (2d) 246. The plaintiff is the innocent victim of a gas explosion. D1 hired D2 to excavate on D1's land. D3 is an employee of D2 and operates the excavating machinery. All were negligent in failing to take precautions not to interfere with a gas line. D3's machine struck the gas line and bent it badly. D4 is the Power Corporation whose servants tried to check for leaks and to prevent an explosion. The court put the blame solely on the Power Corporation for failure to prevent the explosion.

We do not here propose a draft section, but shall set out examples that have been proposed or enacted.

1 Damage shall not be deemed not to be caused by the act of any person by reason only of the fact that another person had an opportunity of avoiding the consequences of such act and negligently or carelessly failed to do so. (*Williams, Joint Torts, 516.*)

2. Where a party is found negligent he shall be liable to bear, contribute to or pay a share of the damages notwithstanding that a finding of ultimate negligence is made against some other party. *(Proceedings, Uniformity, 1933, 31.)*

3. The finding that one or more of the parties in an action might, by the exercise of care have avoided the consequences of negligence of another party, or of other parties, shall, after the passing of this Act be material only in fixing the respective contributions of the persons found negligent. *(Proceedings, Uniformity 1933, 32.)*

4. In all actions hereafter accruing for negligence resulting in personal injury or wrongful death or injury to property, including those in which the defendant has had the last clear chance to avoid the injury, the contributory negligence of the person injured, or of the deceased, or of the owner of the property, or of the person having control over the property, shall not bar a recovery but the damages awarded shall be diminished in proportion to the amount of negligence attributable to the injured person or to the deceased or to the owner of the property or to the person having control over the property. *(Prosser, Selected Topics on the Law of Torts, p. 68.)*

5. Damage shall for the purpose of paragraph (a) [which provides for apportionment] be regarded as having been caused by a person's fault, notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so. *(South Africa's Apportionment of Damages Act 1956, sec. 1(b).)*

6. "The fact that any person

(a) had an opportunity of avoiding the consequences of the act of any other person but negligently or carelessly failed to do so, or

(b) might have avoided those consequences by the exercise of care, or

(c) might have avoided those consequences but for previous negligence or want of care on his part,

shall not, by itself be a ground for holding that the damage was not caused by the act of such other person." *(Eire, Civil Liability Act, 1961, sec 56)*

7 "Whenever in any claim for damages founded on an allegation of negligence the Court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment, but the Court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff." *(Western Australia Law Reform (Contributory Negligence and Tortfeasor's Contribution) Act, 1947, sec. 4(1))*

NOTE: This Act abolishes last chance only where the plaintiff had it

Respectfully submitted,

W. F. BOWKER,
J. E. HART,
H. J. MACDONALD,
G. W. ACORN,
W. E. WOOD,
Alberta Commissioners.

APPENDIX J

(See page 21)

CONTRIBUTORY NEGLIGENCE AND TORTFEASORS

Report of the Alberta Commissioners

In 1966 the Ontario Commissioners reported on two cases that showed the complexity of the law in connection with settlements made by one of concurrent tortfeasors (1966 Proceedings 53) As a result, the Alberta Commissioners were requested to make recommendations on the desirability of having a Uniform Tortfeasors Act, and to examine the relationship between such an Act and the Uniform Contributory Negligence Act (1966 Proceedings 20). The doctrine of last clear chance was referred separately to Alberta (1966 Proceedings 26) and we have circulated our report on that subject. We think there should be a Uniform Tortfeasors Act combined with the Uniform Contributory Negligence Act and that the new Act should contain various amendments to the present statutes. Glanville Williams' *Joint Torts and Contributory Negligence* is a thorough analysis and critique of existing law and includes a Suggested Codifying and Amending Measure (Chap. 22). This has been of great help but at this stage we cannot simply adopt all his recommendations. The present report will examine the Canadian statutes and cases and will call attention to major problems, with tentative recommendations on some of them

Every common law province has a Contributory Negligence Act All are close to the Uniform Act though Ontario's Negligence Act chooses different wording in providing for apportionment and so does Manitoba's Tortfeasors and Contributory Negligence Act If it is decided to recast the main apportionment provisions (sec 2(1) and 3(1)), the draftsman should examine Ontario's and Manitoba's as well as the English Act; the phrase "where damage is caused" could be replaced by "where damage is contributed to" This might reduce the tendency to apply last clear chance though a better way is to abolish the doctrine as our other report recommends.

The Contributory Negligence Act has as its main purpose the the apportionment of blame between plaintiff and defendant while the Tortfeasors Act deals with problems arising when there

are two or more tortfeasors. They do, however, overlap to a degree. The Uniform Act, section 3, provides for contribution as between two *negligent* persons and it has been universally assumed that this applies even where the plaintiff is free of blame. The Tortfeasors Act provides for contribution as between co-tortfeasors whether the tort is negligence or any other tort

We attach a copy of Alberta's Tort-Feasors Act which is taken directly from England's Law Reform (Married Women and Tortfeasors) Act, 1935. New Brunswick and Nova Scotia also have this Act and Manitoba has included it with the Contributory Negligence Act under the title "Tortfeasors and Contributory Negligence Act".

THE TORTFEASORS ACT

(i) abolishes the rule that a judgment against one joint tortfeasor bars action against another (section 4(1)(a)), and

(ii) abolishes the rule that one concurrent tortfeasor (joint or not) may not recover contribution from the others (section 4(1)(c)).

They should be enacted in every province because all agree that the rules are archaic and unfair. The Contributory Negligence Act does not purport to abolish the first of these rules. This was recently assumed in British Columbia where there is no Tortfeasors Act:

Reichl v Rutherford (1965) 51 D L R. (2d) 332 Nor does the Contributory Negligence Act provide for contribution in the case of every tort—for example, a claim by a trustee against a co-trustee on ground of fraud· *Macdonald v. Hauer* (1965) 49 D.L.R. (2d) 365 at 373 (Sask.). Nor a claim against D1 in negligence and D2 in nuisance, unless the nuisance results from negligence' *Funnell v. C.P.R* (1964) 45 D.L.R. (2d) 481 (Ont.). A dentist was held entitled to contribution from a physician where both were held liable for unauthorized extraction of a patient's teeth The dentist's act was a trespass but also was negligent The Supreme Court left open the question whether "fault" extends beyond negligence. *Parmley v Parmley* [1945] S.C.R. 635 at 650 (from B.C.) To sum up, the contribution provision (section 3) in The Contributory Negligence Act is inadequate because it does not apply to all torts.

THE TORTFEASORS ACT

The Tortfeasors Act has met criticism. It has been called a "piece of law reform which itself calls somewhat urgently for reform" (Fleming, Torts, 3rd ed. 688) but this is because of its omissions and ambiguities and not because of its basic principles. Major points in respect of which this Act could be improved are these:

(1) The distinction between joint and concurrent torts should be abolished. The phrase "concurrent tortfeasors" should be used, or perhaps "concurrent wrongdoers", to include trustees. This would do away with the technical rule that the release of one joint tortfeasor releases all and with the distinction between release and a covenant not to sue The present Tortfeasors Act does not touch this rule: *Cutler v. McPhail* [1962] 2 All E.R 474 (release of one joint libeller) (see Williams Act, sec. 1). As Fleming says (page 686), "This anachronism has hitherto miraculously eluded the wand of reform except in Tasmania".

(2) The Tortfeasors Act should deal with the effect of a settlement (release or accord and satisfaction) made by a concurrent tortfeasor. The Tortfeasors Act does not deal with this subject. There are cases in which, for example, D1 and D2 collide. D1's car strikes an innocent bystander P and D1 makes a reasonable settlement with P. D1 in suing D2 for D1's own damage has sometimes included the amount he paid to P in settlement If the amount is fair then even without a section saying that D1 can obtain contribution from D2 in accordance with D2's fault there are Alberta cases allowing the claim · so if D2 is one-third to blame he pays to D1 one-third of the settlement as well as one-third of D's own damage. *Checker Taxi v. Zeniuk* [1947] 1 W.W.R. 172 (Alta.) ; *Tarnova v. Larson* 20 W.W.R. 538 (Alta.). One can argue that this is not authorized by the contribution provision of The Tort-Feasors Act (these judgments to the contrary) and certainly not by the contribution section (section 3(2)) of The Contributory Negligence Act.

The result is, however, just and should be authorized by legislation, such as Ontario's section 3, added in 1948:

> "3 A tort feasor may recover contribution or indemnity from any other tort feasor who is, or would if sued have been, liable in respect of the damage to any person suffering damage as a result of a tort by settling with the person suffering such damage, and thereafter commencing or continuing action against such other tort feasor, in

> which event the tort feasor settling the damage shall satisfy the court that the amount of the settlement was reasonable, and in the event that the court finds the amount of the settlement was excessive it may fix the amount at which the claim should have been settled".

Saskatchewan put this section in its Contributory Negligence Act in 1957 and Nova Scotia added it to the Tortfeasors Act in 1961, omitting the words "or indemnity".

Section 3 is a good provision and we recommend it in principle. It is clearly workable and satisfactory where D1 has settled with P for the whole of the latter's claim Then D1 may simply proceed to claim contribution against D2 and will be awarded contribution on the basis of D2's share of the fault. That the section works well in this situation appears from *Nesbitt v Beattie* [1955] 2 D.L.R. 90 and *Marshler v. Masser* (1956) 2 D L.R. (2d) 484 These cases recognize the desirability of encouraging settlement and of ensuring fairness among the three parties D2 is forbidden to show that D1 was not at all to blame and therefore should not have settled and should not receive contribution. Williams would specifically spell this out in the Act (section 6).

It is important to distinguish between a complete settlement from a settlement by D1 of D1's share. In *National Trust v. Reaney,* P took the money out of court in complete settlement or satisfaction so P could not continue his action against D2. In *Dodsworth v Holt* on the other hand P settled with D1 for the latter's share reserving his rights against D2. Williams (p. 151-2) and Fleming (p. 688) say this type of settlement cannot be final. P may clearly sue D2 even if the settlement is confirmed in a judgment because D1 and D2 are not joint tortfeasors but merely co-tortfeasors: *Neigrich v. Warner* [1937] 1 W.W R 190 (Man.).

Now if P does sue D2 and both D1 and D2 are found at fault, P's judgment against D2 is for all his damages less the amount of the settlement. Therefore D2 has a statutory right to contribution against D1.

We doubt that Ontario's section covers this case. Before it was passed, Gillanders J.A in *Sauriol v. Summers* [1939] 2 D.L R. 297 said it would be desirable to have legislation making it clear that when P settles with D1 for D1's share he can recover from D2 only the portion of P's loss for which D2 is found at fault and that D2 cannot get contribution from D1. Williams at p 151-2 makes a similar proposal. He says that P's judgment against D2 should be reduced by the amount of the settlement or

by D1's share of fault whichever is the greater. In other words, P is identified with D1. (Williams' section 7(2)). We think there should be legislation to this effect. Williams and the American Uniform Contribution Among Tortfeasors Act (as revised) are precedents.

It seems clear that P must disclose the amount of the settlement, though in *Rodenbush v Jeffers* (1958) 11 D.L.R. (2d) 410, the Saskatchewan Court of Appeal held he need not Our proposed amendment would require it just as Ontario's section 3 does.

(3) The Tortfeasors Act, if taken literally, applies to all torts, including intentional ones (even if a crime), while the contribution provisions in the Uniform Contributory Negligence Act do not apply to all torts Williams thinks that even under the Tortfeasors Act there may be doubt whether it applies to intentional torts (pages 87-94). He thinks it should. We are inclined to agree, though as Williams points out, some may feel that as a matter of public policy, a person who commits a flagrant tort such as battery should not be able to obtain contribution from a co-tortfeasor.

(4) Much criticism has been directed to section 4(1)(c) (Alberta) which permits a tortfeasor liable in respect of the damage to recover contribution from any other tortfeasor who is or would, if sued, have been liable. The difficulty can be seen from the following example. P sues D1 who is held liable He seeks contribution against D2. D2 raises the defence that he is a public authority and that the time for bringing action against him is long past. May D1 obtain contribution? Some cases hold that contribution is not possible because to make D2 contribute would be to deprive him of the benefit of his special statute of limitations On the other hand there is the argument that the right of contribution does not arise until P has obtained judgment against D1. This was discussed at length in *BOAC v. Wimpey* 1955 A.C. 169. *Wimpey* decides that where P had previously sued D2 and his action had been defeated by The Public Authorities Protection Act, then D1 on being held liable to P may not obtain contribution against D2. However, there is doubt in the situation where P had not sued D2 at all and D1 seeks contribution after the period prescribed in The Public Authorities Protection Act had expired. The better view seems to be that the right of contribution remains open *Harvey v. Odell*

[1958] 2 Q.B 78, *Sergeant v Canadian Coachways* [1949] 1 D.L R. 857 Of course if special short periods are abolished and the right to bring in third parties even after expiration of the limitation period is preserved, the problem will rarely arise. We think the Act should make it clear that D1 having been held liable to P may claim contribution from D2 within a specified short time (Williams' section 21) At the same time we think it generally preferable that all claims be settled in the original action where feasible. In Ontario, it has been settled that in a claim for contribution under the Negligence Act it must be made in the original action: *Cohen v. McCord* [1944] 4 D.L.R. 753. In that case one K had sued C and M At trial K agreed to dismissal of his action against M and C expressly said he was making no claim over against M in that action. Judgment went against C so he brought a new action against M for contribution and lost On the facts, the result is reasonable but the Court of Appeal held that the Negligence Act contemplates that all issues be tried in the original action.

Even after Ontario put in its Act two sections that seem to contemplate subsequent proceedings for contribution, the Court of Appeal held in *Richmond v. Aylmer* 8 D.L.R (2d) 702 that the Act still contemplates that damages be litigated once only. We doubt that other provinces have taken this position in connection with their Contributory Negligence Acts and certainly so far as the Tortfeasors Act is concerned, subsequent proceedings for contribution are clearly contemplated by Alberta's section 4(1)(c).

(5) It will be noted that both The Tort-Feasors Act and The Contributory Negligence Act provide for indemnity as well as contribution Indemnity usually is synonymous with 100% contribution An example of indemnity is the case where P obtains judgment against D1 and also against D2 who is D1's master and hence liable under *respondeat superior*. *Lister v Romford* 1957 A C 555 holds that the master, having paid the judgment is entitled to complete indemnity against the servant Before this the Ontario Court of Appeal in *Finnegan v Riley* (1939) 4 D L.R. 434 dealt with the case where D1 who is D2's servant committed an assault on P. P obtained judgment against both D1 and D2 and D2 brought a subsequent action for indemnity. He was granted complete indemnity. Dean Wright in his editorial note questions whether Ontario's provision for contribution or indemnity in the Negligence Act should apply to this case. In the later Ontario

case of *Pickin v Hesk* (1954) 4 D.L.R. 90 the servant negligently caused a fire. Plaintiff recovered against both master and servant and the master claimed indemnity against the servant. This was refused on the ground that the contribution and indemnity provision in the Ontario Negligence Act only applies where both parties are personally negligent. Here the master was not. The earlier case is not mentioned.

In Manitoba, which has a Tortfeasors Act combined with the Contributory Negligence Act, the court, on similar facts, required the servant to give complete indemnity to the master. This was done under the indemnity provision of the Tortfeasors Act: *Ewascha v Breen* (1956) 63 Man. Reports 302. We are aware that *Lister v. Romford* has been criticized but do not have a firm opinion as to whether the master's right of indemnity should be abolished Williams thinks not.

(6) Williams favours extension of the Tortfeasors Act to include trustees. He defines wrong to include tort, breach of contract or breach of trust. (Section 39). In a Nova Scotia case, *Matheson v Salah* 33 D.L R. (2d) 147, the action was for damages by a purchaser for breach of an agreement to sell. The defence put the blame on real estate agents, alleging breach of trust. The defendant was held entitled to add them as third parties because the plaintiff might get judgment against the defendant and the defendant's claim for indemnity or contribution would be dealt with under the Tortfeasors Act. The basis of the claim for contribution or indemnity, however, is really the general rules of equity and not the statute. We doubt that the Act is wide enough to permit a trustee defendant to ask indemnity or contribution against a co-trustee and Williams thinks an amendment is necessary to permit this.

The same question arises in connection with modern legislation creating new causes of action, for example, the Ontario and Alberta legislation making trust company directors jointly and severally liable to the company for any deficiency occurring on the disposal of an unauthorized investment that the company is ordered to dispose of.

(7) The Tortfeasors Act in dealing with the basis of contribution (Alberta's section 4(2)) provides that the amount of the contribution recoverable shall be such amount as the court may find to be just and equitable. Under the Uniform Contributory Negligence Act the liability for contribution is based on the

degree in which the defendants are found to have been at fault. We know of no Canadian case discussing the principles of contribution under the Tortfeasors Act but in England, which had the Tortfeasors Act for 11 years before the Contributory Negligence Act, the principle seems to have been the same. As a matter of drafting we are not sure whether the two provisions should be made to conform.

Special provisions might have to be made in cases of trespass or assault where punitive damages are awarded.

(8) When P claims against two or more tortfeasors and both are found at fault, there is considerable difference in the practice of the various provinces as to the manner in which a defendant should assert his right to contribution against a co-defendant. Sometimes it seems sufficient to raise the claim in the pleadings and other times by third-party notice. As to the form of judgment where two or more defendants are found at fault, it is clear that there is a single judgment against both defendants in the whole amount and then there must be a provision for contribution. If the judgment in favour of P is for $900 and D1 is one-third at fault and D2 two-thirds at fault, P's judgment against each is for $900. Williams says that D1 should be given a contingent judgment against D2 for $600 contribution and D2 should be given a contingent judgment against D1 for $300 contribution. In *Walton v. Nearing* 22 D.L.R. (2d) 145, the Nova Scotia Court of Appeal quoted the passage from Williams and gave judgment accordingly We do not know the practice in the other provinces.

Where P is innocent the law always has been that he obtains judgment for all his damages against both D1 and D2. Under Uniform section 3 this is clearly still the case. Williams (p. 396-409) thinks however that this is the case only where P is innocent; he thinks that if P is guilty of contributory negligence, section 3 does not apply at all and the governing section is 2(1). The result is that if each party is one-third to blame and damages are $1,500, P obtains a judgment against D1 for $500 and against D2 for $500 We doubt that this is what Canadian courts do, apart from *Lecomte v. Bell* [1932] 3 D.L.R. 220 (Ont.).

One can, of course, argue that even where P is blameless his judgment should be a separate one against each defendant for his share Williams does not, however, suggest this, except where

P is identified with one defendant (as the wife and gratuitous passenger are).

In connection with counterclaims the practice in most provinces is to set off the two judgments In P.E.I., however, each is separate in automobile cases. Dean Wright favours this because it helps the parties at the expense of their insurers.

If it is decided to enact a Uniform Tortfeasors Act and to combine it with the Contributory Negligence Act there are various other points mentioned by Williams that should be considered, e.g , special provisions relating to defamation and to the bankrupt defendant.

The Contributory Negligence Act

We turn now to the Contributory Negligence Act. Points for consideration here are the following:

(1) Abolition of last clear chance This is a subject of our other report and we will not deal with it here

(2) The Uniform Act in section 4 deals with the case where the plaintiff is a gratuitous passenger and section 5 deals with the situation where one of two negligent persons is the plaintiff's spouse. In these two cases the plaintiff may obtain against the other negligent party a judgment confined to that person's percentage of fault This of course is an exception to the general rule. The reason is that to permit contribution would be to permit, in an indirect way, a wife to sue her husband and a gratuitous passenger to recover for ordinary negligence. These provisions have been criticized by Dean Wright and Dr. MacIntyre and Williams. They think the wife should not suffer financially for the benefit of her husband's insurance company. In England the immunity of spouses in tort was ended in 1962 and perhaps it should be abolished here If it were, then section 4 goes The same applies to section 5 if the gratuitous passenger provisions are repealed.

(3) In the two cases discussed, the plaintiff is really identified with someone else's negligence. There are various other situations in which Canadian Courts have had to consider the question of identification.

(a) in an action under the Fatal Accidents Act where the deceased was partly at fault. The law is now settled that the dependants may recover only the same percentage as the deceased victim could have recovered.

(b) where a child or wife has been injured through D's negligence and the father or husband has become liable for medical or hospital expenses, then the question arises as to whether the father or husband may recover from D in full or whether he may recover merely the percentage that his child or wife could have recovered. The trend in Canada is toward the latter.

(c) A similar problem arises where a husband's claim is for loss of consortium. In *Young v. Otto*, an Alberta court held that the husband's claim depends on the wife's so that he can only recover the same percentage as she would have recovered. In *Mallett v Dunn,* an English court held to the contrary.

(d) Likewise, where the master claims for loss of the servant's services.

Williams (section 25) deals with a number of cases of identification and would not identify the plaintiff in several cases where Canadian law does. If the present judge-made rules as to identification seem fair, they should be enacted. If not, they should be abolished.

(4) The Uniform Act in section 8 says that where damages are occasioned by the fault of more than one party, the court has power to direct that the plaintiff shall bear some portion of the costs if the circumstances render this just. Williams calls this a "platitudinous proposition" (page 494) Manitoba, Nova Scotia and Ontario have the uniform provision Alberta has none All other provinces and the Territories have a different provision, namely that liability for costs shall be in proportion to liability to make good the damage. The difference between these two provisions is considerable. If the plaintiff's damages are fixed at $10,000 and he is 50% to blame, he receives a judgment for $5,000. In the provinces with the uniform section and in Alberta, the cases generally hold that P should recover all of his costs though there is power under section 8 to require him to bear some of them. This may be sound if P is only 10% at fault but what if he is 75% at fault?

In Manitoba, the Court of Appeal in *Carlson v. Chochinov* (1948) 4 D.L.R. 562 refers to the two types of provision and holds that under the Uniform Act, liability for costs is governed by liability for the damage and unless there are some special

circumstances, the plaintiff should recover full costs. This judgment reviews various Ontario cases to the same effect.

In British Columbia, where the plaintiff was 20% at fault and the defendant 80% at fault the plaintiff recovered 80% of his cost in accordance with the British Columbia statute· *Musgrave v. Schutz* (1942) 3 D.L.R. 703. In Saskatchewan *Fallis v. Lewis* (1948) 2 D.L R. 620 was a case in which the plaintiff was 20% to blame and the defendant 80%. The plaintiff claimed all her costs while the defendant contended that the plaintiff should recover only 80% and that the defendant should have a set-off of 20% of his costs Bigelow J. said:

> "I am surprised that there should be so much difference of opinion on this point This may to some extent be due to the fact that the Contributory Negligence Acts are not uniform in the different provinces. One would think with all the time spent by the Committee on Uniformity of Legislation of the Canadian Bar Society that this is an act that could be uniform in the different provinces but it is not so. For instance, it is held that under the British Columbia Act there is a compulsory apportionment of costs
>
> "In Manitoba and Ontario, the Contributory Negligence Act has a clause which provides that a plaintiff shall bear some portion of the costs if the circumstances render that just Notwithstanding that provision, the decisions in Ontario and Manitoba seem to give the plaintiff all his costs
>
> "There is a similar decision in Alberta where there is no provision for the division of costs.
>
> "But I am impressed with the reasoning of Dysart J. in *Dowhy v Lamontagne* where he says: 'Where, therefore, the defendant successfully reduces the plaintiff's unwarranted claim of degrees of negligence, as well as of damages, why should he not have costs commensurate with his success as well as the plaintiff. Both have been partially successful'."

It will be noted that there was no counterclaim in this case. Where there is, then even under the uniform section the plaintiff by way of counterclaim would be entitled to his costs

Respectfully submitted,

W. F. BOWKER,
J. E. HART,
H. J. MACDONALD,
G. W. ACORN,
W. E. WOOD,
Alberta Commissioners.

THE TORT-FEASORS ACT

CHAPTER 336

An Act relating to Proceedings Against and Contribution Between Tort-Feasors

Short title

1. This Act may be cited as *"The Tort-Feasors Act"*

[R S.A. 1942, c. 148, s. 1]

Interpretation "parent" and "child"

2. (1) In this Act, the expressions "parent" and "child" have the same meanings as they have for the purposes of *The Fatal Accidents Act.*

"the judgment first given"

(2) In this Act, the reference to "the judgment first given"

(*a*) shall, in a case where a judgment is reversed on appeal, be construed as a reference to the judgment first given that is not so reversed, and

(*b*) shall, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

[R.S.A. 1942, c 148, s 2; 1944, c. 3, s 1.]

Application of Act

3. Nothing in this Act

(*a*) affects any proceedings against any person for a penalty or forfeiture under any Act of the Province in respect of any wrongful act, or

(*b*) renders enforceable any agreement for indemnity that would not have been enforceable if this Act had not been passed. [R S.A. 1942, c. 148, s. 3]

Where damage suffered as result of tort

4. (1) Where damage is suffered by any person as a result of a tort, whether a crime or not,

(*a*) a judgment recovered against any tort-feasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tort-feasor in respect of the same damage,

(*b*) if more than one action is brought in respect of that damage

(i) by or on behalf of the person by whom it was suffered, or

(ii) for the benefit of the estate, or of the wife, husband, parent or child of that person,

against tort-feasors liable in respect of the damage, whether as joint tort-feasors or otherwise, the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given, and in any of those actions, other than that in which judgment is first given, the plaintiff is not entitled to costs unless the court is of the opinion that there was reasonable ground for bringing the action, and

(*c*) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is or would, if sued, have been liable in respect of the same damage, whether as a joint tort-feasor or otherwise, but no person is entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability regarding which the contribution is sought.

(2) In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such amount as the court may find to be just and equitable having regard to the extent of that person's responsibility for the damage

(3) The court has power

(*a*) to exempt any person from liability to make contribution, or

(*b*) to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

[R.S.A. 1942, c. 148, s 4]

APPENDIX K

(See pages 21, 22)

JUDICIAL DECISIONS AFFECTING UNIFORM ACTS

1966

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 1966 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 1966 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

CONTRIBUTORY NEGLIGENCE

British Columbia Sections 5 and 7

Sections 5 and 7 of the British Columbia *Contributory Negligence Act,* R.S.B.C. 1960, c. 74, which are identical respectively with sections 3 and 5 of the Uniform Act, were interpreted in *Enridge et al v. Copp* (1966) 57 D L.R. (2d) 239, 55 W.W.R. 457. In this case, the plaintiffs, husband and wife, moved for judgment on the verdict of the jury (a) awarding damages to the wife for personal injuries suffered when she was run down by a car driven by the defendant, and (b) awarding damages to the husband for loss of *consortium* and *servitium* The jury found that the defendant's negligence contributed 60% and the plaintiff wife's negligence contributed 40% to the running down. The question in issue was whether the damages awarded to the husband were to be diminished by the extent in terms of percentage to which his wife and co-plaintiff had contributed to her own injuries, that is whether he could recover only 60% of the amount of the damages awarded to him

The defendant argued, *first,* that sections 7 and 5 both precluded the husband from recovering more than 60% of the

damages, and, *second,* that since the husband's action brought *per quod* was at common law dependent upon and derivative from his wife's cause of action, his damages should be diminished by her percentage of negligence Mr. Justice Aikins in the Supreme Court rejected the first argument on the ground that the husband was not in the instant case included within the meaning of section 7 or of section 5, and accepted the second argument.

The judge's interpretation of section 7 was as follows:

I now go on to examine s 7 to see whether it may properly be applied to the facts in the instant case Section 7 reads:

7. In any action founded upon fault or negligence and brought for loss or damage resulting from bodily injury to or the death of any married person, where one of the persons found to be at fault or negligent is the spouse of such married person, no damages, contribution, or indemnity shall be recoverable for the portion of loss or damage caused by the fault or negligence of such spouse, and the portion of the loss or damage so caused by the fault or negligence of such spouse shall be determined although such spouse is not a party to the action

The position in the present case is this: (1) the defendant and plaintiff wife were negligent; (2) as a consequence of their negligence the plaintiff wife suffered bodily injury; (3) because of injury to the plaintiff wife the plaintiff husband has suffered loss of her companionship and services and has had to pay expenses; (4) the plaintiff husband was in no way responsible for the injuries suffered by his wife.

The action brought by the husband is one founded upon negligence and is brought for loss or damage resulting from bodily injury to a married person (his wife). The husband's action is therefore one of those described in the opening part of s 7 concluding with the first use in that section of the words "married person". This, however, immediately follows the words "married person": "where one of the persons found to be at fault or negligent is the spouse of such married person". The words "such married person" can only refer to the married person who has suffered bodily injury and in respect to whose injury damages are claimed. The part of the section just quoted beginning with the word "where" restricts the application of the section to those cases in which: (a) a married person suffers bodily injury, or death, and, (b) the person who is the spouse of the married person who has been found, together with another person, to have been at fault or negligent Section 7, then, says no more than this: If A suffers bodily injury because of negligence on the part of B and C, and C is A's spouse, no damages, contribution or indemnity can be recovered for the portion of the loss or damage caused by C If in the present case the husband were claiming damages for bodily injuries suffered by him because of the negligence of his wife and the defendant s. 7 would apply. He is not making such a claim. The section does not apply to an action for loss of services and companionship of a wife who has been injured in part because of her own negligence and in part because of the negligence of a third party.

Turning to the question of the effect of the husband's action being *per quod*, the judge first considered the Ontario cases which supported the position of the defendant. He then examined, among others, the decisions of the Supreme Court of Canada in *Price v. B.C. Motor Transport Co.* [1932] 2 D.L.R. 161, [1932] S.C.R. 310, and *Littley v. Brooks and C.N.R* [1932] 2 D.L.R. 386, [1932] S.C.R. 462 and remarked:

> In my respectful opinion neither *Littley* nor *Price* settle the question of whether the action *per quod* is a derivative action or is a wholly independent cause of action untouched by contributory negligence on the part of the person in respect to whose injury the action is brought

The judge next considered whether the effect of section 5 of the *Contributory Negligence Act* was impliedly to repeal the prohibition against actions in tort between married persons contained in section 13 of the *Married Women's Property Act* so as to make the wife in the action for loss of *consortium* and *servitium* (a) liable to the husband and (b) liable to contribute to the damages payable by the defendant. He reasoned as follows:

> In . . *Ferguson et al v Macdonald* [1950] 1 D.L.R. 77, [1949] W.W.R. 1130, the plaintiff husband was driving with his co-plaintiff wife as passenger and was in collision with the defendant. Negligence was apportioned as between the plaintiff husband and the defendant. Wood, J., held that the plaintiff wife was entitled to the whole of her damages and that the defendant was not entitled to contribution or indemnity from the plaintiff husband to the extent of the latter's degree of responsibility for the collision. Wood, J., followed *Macklin v Young,* [1933] 4 D.L.R. 209, [1933] S.C.R. 603, in holding that because there could be no liability in tort as between husband and wife by virtue of s. 13 of the *Married Women's Property Act,* then R.S.B.C. 1948, c. 202, now R.S.B.C. 1960, c. 233, there could be no liability on the part of the husband to pay or contribute by way of indemnification to the damages suffered by his wife. The question did not arise as to whether a husband's action *per quod* was a derivative action. The third case in this Province is *Dube et ux v Saville,* [1952] 2 D.L.R. 382, 4 W.W.R. (N.S.) 361. In *Dube et ux v. Saville* the facts were similar to those in *Ferguson et al. v. Macdonald,* in which the plaintiff wife was injured while being driven as a passenger by her husband co-plaintiff. Responsibility was apportioned between the defendant and the plaintiff husband. Manson, J., declined to follow *Ferguson et al. v. Macdonald* and held on the basis of a difference in wording between s. 5 of the *Contributory Negligence Act,* R.S.B.C. 1948, c. 68, now R.S.B.C. 1960, c. 74, s. 5, and the equivalent section of the Ontario *Negligence Act* that *Macklin v Young, supra,* based on the particular wording of the section of the Ontario Act, was not applicable and that s. 5 of the British Columbia Act by implication, and in the particular circumstances stated in that section, repealed s. 13 of the

Married Women's Property Act in so far as that section prohibited actions in tort between husband and wife. On this basis the learned Judge required the plaintiff husband to contribute to the damages payable by the defendant to the plaintiff wife to the extent of the percentage of responsibility found against the plaintiff husband

Section 5 of the *Contributory Negligence Act* of this Province reads as follows:

> 5. Where damages or loss has been caused by the fault of two or more persons, the Court shall determine the degree in which each person was at fault, and except as provided in sections 6 and 7 where two or more persons are found *at fault* they are jointly and severally liable to the person suffering the damage or loss, but as between themselves, in the absence of any contract express or implied, they are liable to make contribution to and indemnify each other in the degree in which they are respectively found to have been at fault.

I have added emphasis to the words "at fault" where they are used for the second time in the above quotation from the British Columbia Act The essential difference between the British Columbia section and the equivalent section of the *Ontario Negligence Act* (s. 3, 1930, c 27) considered by the Supreme Court of Canada in *Macklin v Young, supra*, is that instead of using the words "at fault" where added emphasis has been given to those words in the above quotation, the Ontario Act uses the word "liable" Manson, J , held that because of the use of the words "at fault" the British Columbia Act created a liability in tort on the part of the husband which had theretofore been non-existent and went on to hold, as this was inconsistent with s 13 of the *Married Women's Property Act*, that s 13 should be considered as repealed as to actions in tort by a married person where the injuries suffered by the married person were the result of the joint fault or negligence of the married person's spouse and a third person In *Ferguson et al v Macdonald supra*, Wood, J , took the view that more explicit words than used in s 5 of the *Contributory Negligence Act* were required to effect a repeal by implication of the prohibition against actions in tort between married persons set out in s. 13 of the *Married Women's Property Act* With respect I agree with the view taken by Wood, J In my opinion s 5 should be read subject to the prohibition contained in s 13 of the *Married Women's Property Act* Important legislation is not to be considered as repealed by implication if it is possible to read the later legislation in such a way as not to effect repeal of the earlier legislation: see *Maxwell on Interpretation of Statutes* 10th ed , p 170 I also remark that to hold that the wife was either jointly and severally liable with the defendant to the husband or was liable to indemnify the defendant would lead to the novel result of making a wife liable to her husband for special damages, and damages for loss of *consortium* and *servitium* because of her own negligence in failing to use reasonable care for her own safety and thereby causing or contributing to her own injury. For these reasons, in my view, there can be no liability under section 5 on

the part of the wife to the husband or on the part of the wife to contribute to the damages payable by the defendant.

I am left therefore with a choice between the two contending theories relative to the action *per quod*, the one theory founded on the action being a derivative or dependent action, . . and the other theory that the action is a wholly independent action which is not to be defeated by contributory negligence on the part of the person in respect to whose injuries the action is brought. . .

I now refer to a further case in the Supreme Court of Canada in which that Court had occasion to consider the nature of the action *per quod* In *A-G. Can v Jackson*, [1946] 2 D.L.R. 481, [1946] S.C.R. 489, the Crown sued to recover loss sustained because of injury to a member of the armed forces. The serviceman stood, constructively, in the relationship of servant to the Crown by virtue of a provision of the *Exchequer Court Act* The serviceman was injured while riding as a passenger in the defendant's car and he could not have maintained an action against the driver because of s. 52(1) of the *Motor Vehicle Act* of New Brunswick (c 20, Statutes of 1934) which provided that the driver of a motor vehicle, other than one operated in the business of carrying passengers for hire, should not be liable for any loss or damage for bodily injury or death of any person being carried as a passenger therein. The Supreme Court of Canada held that whether the Crown could recover damages depended on whether the serviceman himself had a right of action arising from the act of the third person, the defendant. On p. 484 D.L.R. Rand, J., said:

> The notion of an Act at once innocent and culpable would here be an innovation whatever the theory behind the liability; and I should say that if there is no wrong to the servant the act is innocuous toward the master.
>
> This qualification of the rule has been applied in Ontario where the claim was asserted by a parent for injury to his child, a right based on the same theory of deprivation of service: *McKittrick v. Byers* [1926] 1 D.L.R 342, 58 O.L R 158 The United States authorities are uniform in the same view: Beach on Contributory Negligence, 3rd ed, p 189. In these cases the cause of action of the master was held to be dependent upon a right in the servant and to be defeated by the contributory negligence of the latter.

At p 489 D L R Kellock, J, after commenting upon the artificial and anomalous quality of the action *per quod* for seduction, went on to say:

> In the case of a parent and child however, the parent's right to sue for damages for injury to the child was always affected at common law by contributory negligence on the part of the child: *Blais v. Yachuk*, [1946], 1 D L R 5 at pp. 19-20, S C.R. 1 at p. 18; *Hall v. Hollander* (1825), 4 B. & C. 660, 107 E R. 1206; *Williams v Holland* (1833), 6 Car. & P 23, 172 E R. 1129; *McKittrick v. Byers*, [1926] 1 D L R. 342, 58 O.L R. 158. I can find no authority showing that in the case of a true master and servant relation, the result was not the same Unless therefore,

there be a wrong of which the servant can complain, with the single exception of seduction, referred to above, the master has no cause of action and in the case at bar there is no such wrong.

It may be that because the precise point with which I am concerned was not before the Supreme Court in the *Jackson* case that what was there said *qua* the issue in the instant case is to be regarded as *dicta,* nevertheless that Court was examining the foundation of the action *per quod,* what was said is of the highest authority, and, in my view, the principle adopted supports the theory that in Canada, as in the United States, the action *per quod* is to be regarded as a derivative or dependent action For these reasons I have concluded that I should follow what seems to me to be the mainstream of Canadian authority and hold that the damages awarded the plaintiff husband are to be diminished by the extent in terms of percentage in which the plaintiff wife was held to have been negligent I hold, therefore, that the plaintiff husband may recover only 60% of the special and general damages awarded to him.

RECIPROCAL ENFORCEMENT OF JUDGMENTS

Manitoba Section 3(6)

In Chapter 30 of the Acts of 1961 the Manitoba Legislature enacted the *Reciprocal Enforcement of Foreign Judgments Act* in the revised form in which it was approved by the Uniformity Commissioners in 1958. In 1966 a question of interpretation unanticipated by the draftsman of subsection (6) of section 3 arose in *Saskatchewan Government Insurance Office v. Anderson* (1966) 57 W.W R 63. The subsection reads·

> No order for registration shall be made if it is shown by the judgment debtor to the court to which application for registration is made that,
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict-of-laws rules of the court to which application is made; or
>
> (ii) without authority, under the law in force in the state where the judgment was made, to adjudicate concerning the cause of action or subject matter that resulted in the judgment or concerning the person of the judgment debtor; or
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court; or

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

(d) the judgment was obtained by fraud; or

(e) an appeal is pending or the time within which an appeal may be taken has not expired; or

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

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

In the instant case an application was made in the County Court in Manitoba to register a default judgment obtained by the plaintiff in Saskatchewan. The application was unopposed. Counsel for the applicant informed Judge Molloy that the judgment debtor did not at any relevant time reside or carry on business in Saskatchewan and that he did not appear or submit to the jurisdiction after service of the writ upon him by registered mail. The question of interpretation appears in the reasons for judgment of Judge Molloy who said:

> Clearly, had the respondent appeared before me he would have had no difficulty in persuading me to dismiss this application by virtue of clause (b) of the above-quoted subsection. That is not disputed by (counsel for the applicant) but he submits that the governing words of the subsection are "if it is shown by the judgment debtor" and he argues that "unless the judgment debtor appears and contests the application, no effect should be given to the various defences available."

Judge Molloy overcame the difficulty by resort to the so-called "Golden Rule" of statutory construction in the following manner:

> It must be admitted that the language of subsec. (6) is clear, without ambiguity or any other apparent difficulty. The legislature has said quite plainly, that it is for the judgment debtor to show to the court that the judgment to be registered falls within one or more of the seven clauses.
>
> Nevertheless, a literal reading may lead, in some instances, to absurdity or injustice, as (counsel for the applicant) concedes with reference to clause (d) If it became known to the court, by perusing the material, questioning the applicant or otherwise, that the original judgment was obtained by fraud, it is inconceivable that the registering court would be helpless and obliged to grant the application

merely because the judgment debtor did not appear. Similar absurdities or injustices come readily to mind under each of the clauses of subsec. (6). If, for example, the certificate issued by the original court showed that an appeal is pending, must the registering court order registration of the judgment simply because the defendant did not appear and show to the court that which was apparent upon the face of the certificate? Similarly, is the registering court obliged to grant an order, in the absence of the respondent, even though it is evident that the judgment was far beyond the jurisdiction of the original court; or that proceedings were carried on without notice of any kind to the judgment debtor, or that time for appeal has not expired; or that the judgment is in respect of a gambling debt or otherwise contrary to public policy; or that the debt is barred by the Statute of Limitations?

When a literal application of the statute, however plain its language may be, leads to such absurdities and injustices as those referred to above, I cannot escape the conclusion that the legislature never intended what it seems to have said. However reluctant one must be to construe the apparently clear words of the legislature, I conclude that I must do so in this instance, holding that sub-sec. (6) is to be read as if its first clause did not contain the words "by the judgment debtor."

In the Manitoba Court of Appeal (1967) 61 D.L.R. (2d) 355, Mr. Justice Freedman, speaking for the Court, upheld the decision of Judge Molloy but reached his conclusion by a less orthodox and more forthright process of interpretation. Mr. Justice Freedman, after saying that it was desirable to do so, quoted clause (6) of section 3 in its entirety, and then took the following approach:

In my view the words "by the judgment debtor" are intended only to define where the onus lies as between the judgment creditor and the judgment debtor. In the absence of those words an argument might be made (albeit a very weak one) that it was for the judgment creditor to negative the various possible defences arising under s. 3 (6) (a) to (g) of the Act The insertion of the words "by the judgment debtor" makes it clear that it is the debtor's obligation to show, if he can, that any of the defences set forth in cls (a) to (g) apply Those words, however, in no way define or curtail the power of the Court. If the Court is satisfied that one of the clauses applies, it is not bound to make an order which would be in defiance of the statute, simply because the applicability of the particular clause was shown not by the judgment debtor but in some other way

Suppose, for example, a certificate which was tendered for registration showed on its face that an appeal was pending; or it indicated that the time within which an appeal might be taken had not expired. Suppose, too, that the judgment debtor did not appear. Can it fairly be said that because this defence under s. 3 (6) (e) of the Act was shown to the Court not by the judgment debtor but from the record

itself, the Court was powerless to give effect to it and instead had to close its eyes to what it knew in fact to be the case? The question answers itself No Court is obliged to pretend such an ignorance of realities. If the Court becomes legitimately seized of facts which show that the judgment offered for registration is not properly registrable, its plain duty is to refuse registration' It is not bound to direct registration merely because the judgment debtor was not the source from which the relevant facts came to its notice.

RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS

Saskatchewan

When applying the *Maintenance Orders (Facilities Enforcement) Act,* two Saskatchewan District Court judges have disagreed concerning the nature and extent of the jurisdiction exercised by a court when granting a so-called provisional order for maintenance. Involved is the difference in legal effect between a provisional order and a so-called confirming order.

In *Hawryluk v Hawryluk* (1966) 54 W.W.R. 661, a deserted wife sought confirmation in Saskatchewan of a provisional order for maintenance made by the Family and Children's Court for the District of Coquitlam, British Columbia, under the *Deserted Wives' and Children's Maintenance Act,* R.S.B.C., 1960, c. 409, and the *Reciprocal Enforcement of Maintenance Orders Act,* R.S.B.C. 1960, c 332 She was deserted by her husband while both were residing in Saskatchewan and he was still residing there when she secured her order in British Columbia. In the Saskatchewan District Court, Judge Batten refused to confirm the provisional order on the ground that the British Columbia Court had no jurisdiction to grant it because (a) there was no evidence that the wife was residing in the Province when she laid her complaint and (b) the husband was not residing in that Province when he deserted her. He said:

> The [*Maintenance Orders (Facilities Enforcement) Act* R.R.S., 1953, c 85] provides a reciprocal procedure whereby the husband may defend the original complaint under the law of that jurisdiction without leaving his place of residence and thus the wife is provided with a procedure for obtaining a provisional order without effecting service or compelling submission of the husband to the jurisdiction of the "originating" court. The court having jurisdiction at his place of residence merely provides the legal machinery for the

enforcement of the claim of a foreign subject under foreign laws against a person and assets within the confirming court's jurisdiction.

It is, therefore, necessary to go to the legislation under which the provisional order was granted to ascertain whether in this case that court had jurisdiction to grant the order. See *In re Wheat* [1932] 2 K.B. 716, 101 LJKB 720. The complaint in this case was laid by the wife under the provisions of the *Deserted Wives' and Children's Act* of British Columbia. The only indication as to jurisdiction defined by that Act itself is in the interpretive section which defines "Magistrate" as follows:

> "2. * * * where the husband resides without the Province, shall mean any Stipendiary Magistrate * * * having jurisdiction in the locality in which the wife resides or in the locality in which the cause of complaint wholly or in part arose,* * *.". . .

In the case before me, the transcript of proceedings does not establish the wife's residence "in Coquitlam" as being in British Columbia in a place over which the magistrate granting the provisional order has jurisdiction. The evidence is all to the effect that all the acts on the basis of which the complaint could be laid and order granted occurred within the province of Saskatchewan, where the husband not only lives but appears to have lived continuously since before the marriage There is no evidence whatsoever to indicate that the husband was under any legal or even moral obligation to support the complainant "in Coquitlam" or that he even knew where she was after the break-up of the marriage in Saskatchewan.

I cannot construe the *Deserted Wives' and Children's Act* of British Columbia as conferring the jurisdiction on the court granting the originating order claimed on behalf of the complainant wife. I therefore find that the magistrate in this case was without jurisdiction and that the provisional order granted herein is a nullity.

In *Douglas v Douglas* (1967) 58 W.W.R. 42 Judge Batten again refused to confirm a provisional order made under the *Wives' and Children's Maintenance Act* and the *Reciprocal Enforcement of Maintenance Orders Act* of British Columbia. In this case the wife was residing in British Columbia when she laid her complaint there but, as was found by the British Columbia Magistrate, the husband was residing in Saskatchewan when the desertion, if any, occurred and was still residing there.

Counsel at the Saskatchewan hearing argued that the reasoning in *Hawryluk v. Hawryluk* did not accord with the reasoning of the Supreme Court of Canada in *Attorney-General for Ontario v. Scott* [1956] S.C.R. 137. Judge Batten rejected this argument on the ground that in the *Scott* case the Supreme Court had not touched expressly upon the question of jurisdiction involved in

the *Hawryluk* case and in the instant case, but that language used by Mr. Justice Locke in the Supreme Court supported the reasoning in the *Hawryluk* case. Judge Batten said:

> In the *Scott case,* Locke, J, specifically states at p. 153:
>
> "Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute. It is true that there will be questions of law to be determined when the application is heard as to the proper interpretation of s-s. 1 of s. 3 of the English statute. Such questions, I assume, will include that as to whether the court by which the order was made in London was of the nature referred to in that subsection, *whether the order made was such as might have been made if a summons had been duly served on the person against whom the application was directed,* as to the grounds of defence available at the time in England and as to the proper construction of portions of s. 5 of the Ontario Act." [The italics are mine]

The issue as underlined in the above paragraph in the judgment of Locke, J., is precisely the question before the court in this case. The issue is not as to the constitutional validity of *The Maintenance Orders (Facilities for Enforcement) Act* (identical with the Ontario *Reciprocal Enforcement of Maintenance Orders Act)* of Saskatchewan. The *Scott* case, cited above, had made a binding decision holding that legislation *intra vires* Before, however, a Saskatchewan court can confirm a provisional order under the provisions of *The Maintenance Orders (Facilities for Enforcement) Act* of Saskatchewan, the court must determine the question, in the words of Locke, J, cited above, "whether the order made was such as might have been made if a summons had been duly served on the person against whom the application was directed." The provisional order must be made under the provisions of that jurisdiction's *Reciprocal Enforcement of Maintenance Orders Act,* but it is also made under other legislative provisions or statute which sets out the jurisdiction of the court and the conditions under which a maintenance order can be made by that court; in this case, the provisional order before this court is entitled "In the Matter of the Wives' and Children's Act" and "In the Matter of the Reciprocal Enforcement of Maintenance Order Act of the Province of British Columbia."

The British Columbia *Wives' and Children's Maintenance Act,* R.S.B.C. 1960, ch. 409, makes provision for the laying and hearing of a complaint before a magistrate and defines "magistrate," "where the husband resides without the Province" (now amended 1966, ch. 56) to mean the magistrate having jurisdiction "in the locality in which the wife * * * resides, or in the locality in which the cause of complaint wholly or in part arose."

It appears clear that the intention of the legislature in enacting both the legislation under which maintenance orders can be made, and the reciprocal legislation under which the maintenance orders can be enforced against the husband resident in a "reciprocating state,"

> was to follow the husband and compel his submission through the courts of that "reciprocating state" to the laws of the matrimonial home where the desertion took place It is inconceivable that the legislature should have intended to allow a wife to pick at will a jurisdiction which she might find favourable for the bringing of a maintenance claim, although it was not the place where desertion was alleged to have taken place, or where the husband had resided, and where the laws governing his obligation to support her, or defining desertion, might be entirely different from those of the jurisdiction in which they had lived and terminated their cohabitation. Under such circumstances, the wife would actually be picking the laws which she preferred to govern the husband's rights, since the confirming court can only confirm or amend or deny the provisional order only in so far as the husband has or has not a defence under the laws of the jurisdiction granting the provisional order

In *Andrie v Andrie* (1967) 60 W.W.R. 53, Judge Pope, another District Court Judge of Saskatchewan, disagreed with Judge Batten's decision in *Douglas v Douglas* and the interpretation of the *Scott* case upon which it was based In *Andrie v Andrie,* Judge Pope granted a provisional order under the relevant Saskatchewan Acts where (a) a wife laid her complaint while residing in Saskatchewan and (b) the husband deserted her while both were resident in Alberta. After quoting from Justices Locke and Abbott in the *Scott* case, Judge Pope said:

> As the learned justices of the Supreme Court of Canada set forth, the application for a provisional order is simply the initiation of proceedings under *The Maintenance Orders (Facilities for Enforcement) Act* to be used in a proceeding that is concluded in the jurisdiction where the defendant resides. It facilitates the resident of any province or state to initiate proceedings to be taken in a reciprocating state The reciprocating state has the right and power to determine what laws shall apply to their citizens Without such an Act, as Abbott, J, states at p 147 (S C R), "deserted wives and children who reside in the province * * * might well result in the burden [of maintaining them] being thrown upon the local community"
>
> It was to place the responsibility of maintenance of deserted wives and children upon the husband that the Act was passed Without such an Act deserted wives and children residing within our province would have no way of obtaining maintenance except through welfare. The Act is for the protection of residents of our own province whether they were deserted in this province or not Residents of all reciprocating states are protected by the legislation which has been approved by all the jurisdictions involved I feel, therefore, that the plaintiff is, under the legislation, entitled to a provisional order which will, of course, be of no force or effect until dealt with by the court where the husband resides

[NOTE.

In *The Attorney-General for Ontario v Scott et al* [1956] S.C.R. 137, (1956) 1 D.L.R. (2d) 433, Mrs. Scott, then a resident of England, secured a provisional maintenance order before a London Magistrate under section 3 of the *English Maintenance Orders Facilities for Enforcement Act, 1920,* on the ground that her husband had wilfully neglected to provide reasonable maintenance for her and her children. Evidence given by her showed (a) that she and her husband while living together in Canada, had entered a separation agreement and since then she had been living in England and (b) that at the time when she applied for the order her husband was a soldier stationed at Malton, Ontario. The provisional order was filed in Ontario under section 5 of *The Reciprocal Enforcement of Maintenance Orders Act,* R.S.O. 1950, c. 334 (section 6 of the present *Uniform Act*). After the husband was served with a summons ordering him to show cause why the provisional order should not be confirmed, he attacked the constitutionality of section 5 of the Act. He argued that section 5 went beyond provincial legislative power under section 96 of the *B N A. Act,* because it was an attempt by the legislature to clothe a provincial court with power to base the determination of the legal rights of a resident of the province upon orders pronounced in another territorial jurisdiction. The Supreme Court of Canada unanimously upheld the constitutional validity of the Act. In their reasons for judgment two of the judges explained the legal nature and effect of the so-called "provisional" and "confirming" orders Mr. Justice Locke said:

> The use of the word "confirmed", both in the English and Ontario statutes, seems to be unfortunate. To speak of confirming an order which of itself had no binding effect seems to me to be a misuse of language and it is, indeed, in my opinion, the use of this expression which has invited the attack upon the legislation. In effect, the evidence in the present matter given before the magistrate in London, the transcript of which was forwarded by him with the provisional order, is made evidence in the proceedings in Ontario The provisional order for maintenance made for the wife and children is an indication of what the magistrate in England considers appropriate in their circumstances. In the proceedings in Ontario, the husband may, by virtue of s 5 (2), raise any defence that he might have raised in the proceedings in England and the magistrate to whom the application is made may "confirm" the order, with such modifications as might be considered just, meaning that he may make such order as he may think proper upon the evidence. The language employed in

> s. 5 (3) again suggests that some legal effect is given to the order made in England, but this clearly cannot be so The order made must derive its legal force and effect entirely from the applicable Ontario statute (1 D.L.R (2d) p 442.)
>
> . . "The (provisional) order, with the certified copy of the depositions of the witnesses heard by the magistrate in England, afford evidence upon which the (Ontario) magistrate may make an order against the husband, and does nothing more. Any award made must depend entirely for its validity upon the order made by the magistrate under the Ontario statute." (1 D.L R (2d) p. 444)

Concerning the confirmation by the Ontario Court of a "provisional maintenance order" made in another province or another country, Mr. Justice Rand explained:

> . . . The Ontario Court is not completing an operative foreign order whether in relation to a province or to another country; it is making an original order of its own, the preliminary grounds and condition of which is a step taken elsewhere; that step has no substantive efficacy until by acceptance it is adopted and incorporated in the action of the Ontario court. From the beginning it is intended to be a constituent of the proceedings against the debtor in Ontario from the law of which it will draw the only substantive effectiveness it can ever possess. (1 D.L.R. (2d) pp 438-439.)

Justices Locke and Rand thus clearly explain that under sections 5 and 6 of the *Uniform Reciprocal Enforcement of Maintenance Orders Act* the liability upon the husband to pay maintenance is created solely by the law of the province where the confirming order is made against him The only judicial jurisdiction exercised over him is that of the province where he resides at the time the confirming order is made. Since a provisional order as such in no way imposes liability upon the husband, it appears to follow that the issuing province or country does not need to have jurisdiction in personam in order to make a valid provisional order against a non-resident husband. Should it be necessary that the court granting the provisional order have local jurisdiction when the order has no operative effect against the husband but is only evidentiary?]

TESTATOR'S FAMILY MAINTENANCE

Five of the cases reported during 1966 in which widows invoked the *Testator's Family Maintenance Acts* demonstrate the manner in which courts apply some of the statutory and judicial standards by which they exercise their protective discretion,

without being, in the words of Mr. Justice Rand, "will making or will destroying bodies". In three of the cases the widowed applicants had deserted the husbands from whose estates they sought to be awarded benefit.

British Columbia, section 3.

In *Re Murray* (1967) 60 D.L.R. (2d) 76 the petitioner applied under subsection (1) of section 3 of the *Testator's Family Maintenance Act,* R.S.B C. 1960, c. 378, for an order that provision be made for her out of the estate of her late husband in whatever manner the court might think adequate, just and equitable in all the circumstances. This provision reads:

> 3. (1) Notwithstanding the provisions of any law or Statute to the contrary, if any person (hereinafter called the "testator") dies leaving a will and without making therein, in the opinion of the Judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband, or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator of the wife, husband, or children.

(Nothing in the instant case turned on the difference in wording between section 3 of the Uniform Act, which omits the words "just and equitable", and the corresponding subsection (1) of section 3 of the British Columbia Act. The difference in wording applies only to measurement of the amount of the estate to be allowed to a dependant. See 1962 Proceedings at page 58 and 1963 Proceedings at pages 59 and 30.)

Mr. Justice Aikins in the Supreme Court, after a detailed examination of the evidence said:

> It seems to me important to stress that an onus rests on the petitioner to establish that the testator's failure to make provision for her amounts to a breach of the moral duty which he, as husband, owed to her as his wife, to make provision for her proper maintenance and support. The task which I must now undertake is a twofold one. First, I must consider the evidence to see what facts and circumstances have been established, and, secondly, I must consider all the relevant facts and circumstances so established to see whether the petitioner has demonstrated a breach on the part of the testator, borrowing a quotation used by Sheppard, J.A., [in *Re Wills* (1957) 10 D.L.R (2d) 761 at p. 762], of the "moral duty which a just but not loving husband . . owes towards his wife"

In summary then the evidence establishes no more than that the petitioner left her husband in August of 1937 after having lived with him for some 14 months following their marriage without, on the evidence before me, being justified in so doing. Again the evidence shows that within four months of the separation the testator offered to take his wife back and that she refused to consider going back to him. There is no evidence of the terms of the offer of reconciliation to support a finding that the wife was justified in refusing the offer of reconciliation. I cannot speculate in the absence of evidence that the offer of reconciliation was put to the wife with unreasonable conditions and I must therefore, I think, proceed on the footing that a reasonable offer of reconciliation was made and rejected.

I observe again here that since the day following the hearing in Magistrate's Court, (when an application by the wife for maintenance was dismissed) within four months of the separation in August, 1937, the petitioner and the testator went their separate ways There were no communications between them. The petitioner made no demands upon her husband nor did he make any demands upon her

Having stated my conclusions on the facts I now go on to the second inquiry. On the facts as I have stated them, can it be said that the testator owed a moral duty to his wife to make testamentary provision for her proper support and maintenance? The petitioner left her husband She has failed to establish that she was justified in doing so because I am not convinced of the trustworthiness of her evidence of the conduct of her husband which she said led her to leave him. She rejected an offer of reconciliation and refused to go back to her husband. It has not been shown that the offer of reconciliation was either insincere or put on unreasonable terms. The petitioner and the testator lived wholly apart from the time of the separation forward. The separation lasted for nearly 28 years In my view the petitioner has failed to establish that her husband in failing to make any provision for her support and maintenance by his will failed to fulfil a moral duty to provide for her.

The testator being free of any moral duty to provide for his wife was at liberty to dispose of his estate as he saw fit.

The petition must be dismissed . . (60 D L.R (2d) pp 84, 85, 86.)

Saskatchewan section 9(2), (7) and (8)

The following provisions of *The Dependants' Relief Act,* R.S.S. 1960, c. 128, were applied in *Re Cassidy* (1966) 54 D.L.R. (2d) 329:

9.—(2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

(7) The court shall also have regard to the testator's reasons, so far as ascertainable, for making the dispositions made by his will, or

for not making any provision or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient, including a statement in writing signed by the testator and dated, provided that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement

(8) The court may refuse to make an order in favour of any person whose character or conduct is or has been such as in the opinion of the court to disentitle him or her to the benefit of an order under this Act [am 1954, c 22, s. 1]

(Sub-section (7) is essentially similar to section 10 of the Uniform Act. Subsection (8) is the same as sub-section (3) of section 3 of the Uniform Act. Sub-section (2) is not in the Uniform Act.)

The applicant, Sarah Cassidy, widow of the testator, refused to cohabit with or to see him for the twenty-six years prior to his death. During the seven years immediately preceding his death she admittedly lived in adultery

In his will, made in 1953, the testator said

The reason that I am not leaving my wife, Sarah Cassidy, anything is that about fifteen years ago, without any reason whatsoever, and after being married to me for eight years, she left my bed and board and went to live in adultery with another man whose name is Sigurd Steinburg, and who resides with him at the present time at Canwood, Saskatchewan, and who has, I am informed, lived continuously up to the present time in adultery since leaving me

After reviewing the evidence, Mr. Justice Tucker, in the Court of Queen's Bench, said

Counsel for the executors argued that s 9(2) of the *Dependants' Relief Act* made it necessary for me to take into account s. 20 of the *Intestate Succession Act*, R S S 1953, c. 119, which is as follows:

20. (1) If a wife has left her husband and is living in adultery at the time of his death, she shall take no part of her husband's estate

(2) If a husband has left his wife and is living in adultery at the time of her death, he shall take no part of his wife's estate

In my opinion, s. 9 (2) is only applicable if I were to decide that I should make an order herein. If I so decided, I would have to apply this subsection to determine the minimum quantum of such allowance which would be governed by this subsection. It cannot be looked to for guidance on the first question to be decided herein, namely, whether any order at all should be made

The first question therefore for decision appears to be whether, having regard to (a) the conduct of the applicant towards the testator and the circumstances under which they lived apart for over 26 years; (b) the testator's reasons for not leaving anything to her in his will; and (c) her character and conduct, she is disentitled to the benefit of an order under the Act.

The meaning to be ascribed to "character and conduct" was dealt with in *Re Chernoff Estate* (1960), 32 W.W R. 473. (In *Re Chernoff Estate* Mr. Justice Brownridge found that: (a) the husband died in 1960; (b) from about 1952 on he had been living in a small cottage, known as the "bath house", 20 feet by 14 feet, on the farm of a son about two miles from his own farm home; (c) his wife remained in the farm home, and the real issue was that he wanted his wife to live with him in the bath house and she refused to do so on the ground that it was so unsuitable that she could not reasonably be expected to live there.)

There, Brownridge, J. (as he then was), at p. 476 said:

> In my opinion the "character or conduct" referred to in sec. 9 (7) *is not restricted* to those cases in which the petitioner has been guilty of *both* desertion and adultery and is living in adultery at the time of her husband's death If, on an application under *The Dependants' Relief Act,* it were proved that the wife had left her husband and was living in adultery at the time of his death, I have no doubt that such conduct would disentitle her to relief.

And later:

> There may well be circumstances in which desertion by the wife would disentitle her to relief under *The Dependants' Relief Act,* but, in my opinion, the facts of the present case are not strong enough to support such a conclusion

And later:

> It is apparent that the issue which brought the parties to court was not one going to the root of the marital relationship, but a difference of opinion as to the suitability of the bath house as a fit place in which to live. The desertion by the wife was more technical than actual.

In the instant case there was adultery on the part of the applicant before and up to the death of the testator; there was no actual act of desertion of the applicant by the testator but, on the other hand, there was in effect constructive desertion of the testator by the applicant when he was ill in the spring of 1937 and sought her help and agreement to take him into her home with her mother and she refused to help him and expressed the view she did to his sister This was the action and attitude on the part of the applicant which, in the words of Brownridge, J , "went to the root of the marital relationship". In my opinion, therefore, the applicant was chiefly to blame for the separation of the parties from the spring of 1937 until the time of the testator's death . . . (54 D.L R. (2d) at pp. 335-336.)

The principle applicable in cases under such acts as the *Dependants' Relief Act* was referred to in *Saskatoon v Shaw,* [1945] 1 D.L.R. 353, [1945] S.C.R. 42, by Rand, J , at p. 360, where he said:

> It should be remarked that relief legislation of the nature of that in question, which in recent years has appeared in various parts of the world, is not intended to convert Courts into will making or will destroying bodies. The principle that the distribution of property at death should lie not only in the right but also in the discretion and judgment of the owner, is trenched upon only within well defined limits What these statutes do is to enable the Court to subtract from the estate appropriated to others, sufficient to secure to certain dependants certain benefits; subject to those overriding interests, the original dispositions remain.

> On the evidence before me the testator did not desert the applicant and intended to return to her when he left her in 1936 in search of work I consider the applicant's attitude towards him when he was ill and sought to enlist her help in 1937 was cold and callous and was the cause of his feeling she no longer loved him and that there was no point in his attempting to resume cohabitation with her. This was a situation which the applicant accepted for 26 years. Instead of seeking support from the testator during that period, she remained with her mother where she had plainly indicated her husband was not welcome.

> The applicant went to live with Steinburg in 1942 and has been living with him ever since—admittedly in adultery for seven years before the death of her husband Since the death of her husband and up to the present she has continued to cohabit with Steinburg and has shown no interest in the testator until the making of this application after his death.

> Under s. 9 (7) I must "have regard to the testator's reasons . . . for not making any provision" for the applicant, which reasons I have held to be, to some extent at least, well founded Considering this in the light of the established attitude as laid down by Rand, J , in *Saskatoon v Shaw, supra,* that this Act was not intended to convert the Court into a "will destroying" body, and having in mind the conduct of the applicant after she became aware of her husband's serious illness in the spring of 1937, I have come to the conclusion that the applicant is not entitled to an order under this Act. The application is therefore dismissed . . (54 D L R (2d) pp. 338-339.)

Another application made by a widow under the Saskatchewan Act was refused in *Re Shirley Estate* (1966) 55 W.W.R. 56, where Mr. Justice Johnson exercised his discretion under subsection (8) of section 9. The applicant and the testator agreed to separate and entered into a separation agreement in 1955. The testator died in 1963, leaving two-thirds of his estate to his father and one-third to his mentally retarded sister. Mr. Justice Johnson said:

It appears that after separation the wife moved to California, U.S.A, and there obtained employment From the material filed it is clear that in 1959 the wife made overtures to the husband relative to the possibility of obtaining a divorce Apparently the husband was not interested in divorcing his wife. However, in February, 1963, the wife commenced a divorce action against her husband in the courts of the state of California, alleging that her husband had caused her mental cruelty. The writ of summons and complaint were forwarded to the husband from the wife's attorney in California with an accompanying letter in which the wife's attorney made it clear that she was only seeking a divorce and was making no claim on her husband of any kind, not even for costs According to the evidence, the husband did not do anything about this and did not bother to return the "Defendant's Appearance and Waiver" as he was requested to do by the wife's attorney. The husband did not co-operate in the divorce proceedings in any way and there is no evidence of any misconduct on the part of the husband which would justify the wife in taking the proceedings she instituted. The material does not disclose how far the divorce action progressed in the courts of California but it is clear that the divorce proceedings did not proceed to the granting of a decree for dissolution of marriage and, therefore, the applicant was the deceased's wife at the date of his death . . (55 W W R. p 57)

It is clear from the evidence that from 1959 onwards the wife wanted to sever the marital ties The husband did not encourage her, so in order to obtain her objective, in 1963, she started the divorce action against her husband in the courts of California. Probably she would have been successful in obtaining the decree but for the intervention of the husband's death which made further prosecution of the action unnecessary It seems to me that it would be completely incongruous for the wife to obtain the benefit of an order under this Act by reason of the existence of a marriage tie which she had done everything possible to sever. A greater inconsistency I cannot imagine

I am of the opinion that the conduct of the wife in instituting the divorce proceedings in California on the ground of mental cruelty was conduct within the meaning of sec 9 (8), which disentitles her to the benefit of an order under the Act, and I so find

The application is refused (55 W.W.R. 59)

The ameliorating action permissible within the principle enunciated by Mr. Justice Rand in *Shaw v City of Regina* was taken when sub-sections (2) and (7) of section 9 of the Saskatchewan Act were applied by Mr. Justice MacPherson in the Queen's Bench in *Re Bateman* (1966) 55 D.L.R 763 The testator left $15,000 out of his $34,000 estate to his widow and the balance in various amounts to his five younger brothers His widow was an alcoholic and he directed his executor to pay $11,000 of her legacy at the rate of $100 per month The judge,

in granting an application by the widow, held, first, that the testator owed no moral obligation to benefit his brothers, and second. that the widow's legacy was inadequate. He said

> In *Re Rusk* (1957), 6 D L.R. (2d) 700, 21 W.W.R 68 (Sask C A.), it was argued that adult non-dependant children had contributed materially to the building of the estate and as to two of them the testator considered that he had a moral duty to make some provision for them. Culliton, J.A., as he then was, at pp. 704-5, said:
>
> > The material discloses no more than that the children of the deceased were devoted children, fully aware of their filial obligations. The only inference than can be drawn is that the deceased was anxious to recognize in his will the devotion and kindness of his children. As laudable as such an intention may be, it is, in my opinion, neither a justification for the failure of the testator to make reasonable provisions for the maintenance of the applicant nor a reason within s-s (7) precluding the Court from now so doing
>
> These words apply remarkably well to the present situation. The deceased was very close to and very fond of all his brothers but he was under no moral or other obligation to them His intention to provide something for them in his estate was, in my view, insufficient reason for inadequate provision for the widow and not strong enough to come within s-s (7).
>
> The widow has a life expectancy of about 25 years There is nothing before me to indicate that her problem with alcohol is likely to reduce that expectancy If she did not have that problem I would be inclined to give her the entire estate because in my view she will need it. As I stated above, however, I feel that her problem is such that she should not have it in bulk.
>
> There is no evidence before me to indicate what it will cost her to live She has no training or skill As long as she is dominated by her alcohol problem she will probably be unemployable Certainly that will be the case if she demonstrates to employers the degree of impatience she showed to counsel when she was giving evidence
>
> During the latter part of their married life the testator drew from the auto parts business $300 a month as salary. In addition he had coming in whatever the company was paying out on the loans of shareholders
>
> It seems to me that an allowance to the widow of $100 per month is below not only what she was used to but what I consider to be a present subsistence level for an individual in Saskatchewan today. Obviously, therefore, the testator did not provide such maintenance for the widow as is reasonable, just and equitable in the circumstances. In my view, a reasonable monthly allowance to her, considering the $4,000 in bonds which she has already received, should be $250 per month . (55 W.W R p. 767-768)

In *Re Berry Estate* (1966) 58 W.W.R. 187, the applicant widow was 78 years of age. Her deceased husband, who left about $42,000., provided for her in his will as follows:

> (b) I direct my trustees to hold, manage, invest and keep invested the rest of residue of my estate and during the lifetime of my wife, Annie (Nancy) Berry, to pay or apply the net income derived therefrom and any amount or amounts out of capital to and for the benefit of my said wife with absolute discretion to my trustees to decide from time to time how much, if any, of such income or amount out of capital or both is to be paid to or applied for the benefit of my said wife. Any income not so used in any year shall be added to the capital of the said residue and dealt with as part thereof

Pursuant to subsection (2) of section 9 of the 1960 Act, Mr. Justice MacDonald granted an order including payment to the applicant of (a) $3,000 in cash forthwith and (b) $300 each month for life. He said:

> The question to be answered herein is whether par. (b), *supra,* of the deceased's will can be taken to provide reasonable provision for the applicant's maintenance. Without doubt whatsoever, in my opinion, it does not. Even where the assets of the estate are large, and the income is given to the wife with no discretion in the executors, I would have some doubt, but where, as in this case, the executors are given full discretion as to the amount of income or capital which will be allotted to the widow, I hold that reasonable provision has not been made. In this case one of the executors is the residuary beneficiary, and it is to his advantage to use as little of the income and capital as possible for the maintenance of the widow. These circumstances place the widow in an intolerable situation. While it is true that the widow could, under some circumstances, make an application herein after six months from the date of probate, nevertheless, in my opinion, she is entitled to know what her income will be, so that she can spend her declining years with some peace of mind and without any debate as to her rights.
>
> I concur fully with the statement of my brother, Davis, J. in *Re Dependants' Relief Act, Re Courtney Estate, Courtney v Lister* (1958) 24 W.W.R 676, at 683:
>
> > I can nowhere find that a testator, by any device contained in his will, can supplant or exclude the manifest duty which the legislature, by the terms of the Act of this province, has reposed in the courts. Nor can I read into the Act a condition that a dependant must first resort to other available remedies before seeking the remedies which the Act provides. Were it so, a dependant, might well inherit nothing more than the necessity of engaging in repeated, prolonged and costly litigation. The very purpose of our Act is to, at once and finally, secure to a dependant, within the structure of the Act, and in so far as the assets of the estate permit,

reasonable provision for the future, where the deceased has failed to do so. A dependant may apply but once. *Re McCaffery* [1931] or 512.

I also concur with the statement of Wilson, J, in *Re Testator's Family Maintenance Act, Re Hoskins Estate* (1961) 35 W.W.R 430 (B C.) at 431-2:

> This testator may, in his wisdom, have decided that he wanted to protect his wife by keeping the main corpus of the estate in the hands of trustees. So far I would not presume to interfere with what he has done; he had no duty to create an estate for her to dissipate or leave to other persons But he did have a duty to make the fullest sort of provision for her in keeping with his fortune * * *
>
> She can, of course, go to the executor, but I do not see why a deserving sensible widow should be put in the humiliating position of having to resort to the discretion of an executor in order to get things to which the size of her husband's estate should clearly entitle her. . (58 W.W R. pp. 189-190.)

(See reference to *Re Hoskin's Estate* in 1962 Proceedings at page 59.)

WILLS

British Columbia Section 5

In 1960 the Legislature of British Columbia enacted, with slight modification not relevant here, the 1957 version of the Uniform Wills Act. Section 5 governs signatures required to make a valid formal will. Clause (a) of section 5 of the *Wills Act,* R.S.B.C. 1960, c. 408 now reads:

> "5. . a will is not valid unless (a) at its end it is signed by the testator or signed in his name by some other person in his presence and by his direction."

Prior to 1960 the corresponding provision in the *Wills Act,* R.S.B.C. 1948, c. 365 read:

> "6. No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned, that is to say:—It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction . ."

The problem in *Re Fiszhaut* (1966) 56 D.L.R. (2d) 381, 55 W.W.R. 303, was whether section 6 of the 1948 Act was impliedly amended by clause (a) of section 5 of the 1960 Act. The question in the case was whether the will of Stanislaw Fiszhaut made in 1965, was validly executed. At the end of the will was the following:

Signed by Clement Robert Dekler, of 995 Bute Street, Vancouver, B C., 53 years old, on behalf of the said Testator, physically unfit to sign His Last Will, the same having been previously read over to him and he seeming thoroughly to understand the same, in his presence and by his direction and in presence of us both, present at the same time, who at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.
"Clement Robert Dekler"

Mr. Justice Macdonald, in the Supreme Court, dealt with the problem of interpretation and its dependent question in the following manner

> The testator did not sign himself, nor did anyone sign the testator's name Clement Robert Dekler signed his own name at the end and this has raised the question which I must decide
>
> Our *Wills Act,* R S B.C 1960, c 408, applies to wills made after March 31, 1960, and hence applies to this will * * * Has the Legislature, in s 5, used language, which makes it mandatory when some person other than the testator signs, for the signature to be the testator's name? I am informed by counsel that the *Wills Act* to which I have referred was enacted on the basis of recommendations of the Commissioners on Uniformity of Legislation in Canada, for a uniform wills statute Sections the same as our s 5, have been adopted in some other provinces, but I am not aware of any decisions on the point arising in this case
>
> The law as to the signatures required in executing a will before March 31, 1960, is of some significance. . . Apart from a difference of no importance, section 6 of the pre-1960 *Wills Act* of British Columbia is the same as s IX, of the English *Wills Act,* 1837, c. 26 *In Re Clark* (1839), 2 Curt 329, 163 E R 428, is a decision of Sir Herbert Jenner, in the Prerogative Court, on this section Shortly before death, Mr Clark requested the Rev. Mr Furlong to draw his will When it was drafted, the deceased found himself unable from bodily weakness to sign, and he requested Mr. Furlong to sign for him With the statute in hand and intending to follow its provisions the vicar signed the will in question thus:
>
> > "Signed on behalf of the testator, in his presence, and by his direction, by me,
> >
> > 'C. F. Furlong,
> > Vicar of Warfield, Berks'"
>
> The above signature was made for and acknowledged by the testator, in the presence of us, whose names are hereto subscribed —"Mary Butler X her mark, Ann Clark"
>
> In granting probate, Sir Herbert Jenner said this [p 429]:
>
> The statute allows a will to be signed for the testator by another person, and it does not say that the signature must be in the testator's name; here, this gentleman, at the testator's request, signed the will for him, not in the testator's name; but using his

> own name I incline to think that this is a sufficient compliance with the Act; the executrix is a good witness, but will lose her legacy.

The decision was followed by Middleton, J A, in *Re Deeley & Green* [1930] 1 D L R. 603, 64 O L R 535, and has been recognized as authoritative in editions of *Tristram & Coote's Probate Practice* It would, I am confident, be applied in this Province in the case of wills made before March 31, 1960

I turn now to the construction of s 5. The requirement is that if the testator does not sign the will himself it is to be "signed in his name by some other person" Clearly, there would be compliance if the other person signed the testator's name But is the language so express as to exclude the signature of that other person when such signature was unquestionably made as the act of execution of the will by the testator? In my opinion, it is not If it had been intended that only a signature by the writing of the testator's name would be sufficient, precise language to this effect could have been employed In an effort to find an American decision that would be helpful, I noted in 94 Corp Jur Sec, art 173, p 977, a passage stating that:

> Under some statutes it has been held that the signature of the will by the agent in his own name and not that of the testator is insufficient; the will must be signed in the name of the testator.

Then, there is reference back to 68 Corp Jur., p 658, and note 33 thereon This note, referring to some decisions in the Phillipines, states that all were decided under a statute requiring that a will must be signed: "by the testator, *or by the testator's name written by some other person*, in his presence and by his express direction" (My italicizing) This was a statute which made clear provision requiring the other person to sign the testator's name Other language to the same effect can be easily chosen.

I have said that the state of law which applied to wills made before March 31, 1960, is significant The significance is of a negative kind There is nothing in the law, as it stands, to support the suggestion that the Legislature considered it defective in allowing the other person signing a will to sign his own name rather than the testator's, and so enacted s 5, to remedy the defect

For these reasons, I find that the will in question has been executed in a manner complying with the *Wills Act*

British Columbia Section 16

Section 16 of the *British Columbia Wills Act*, R.S.B.C. 1960, is the same as section 17 of the Uniform Act as revised in 1957, which provides that a will is revoked by the marriage of the testator. In *Re Fitzroy Estate* (1966) 57 W.W.R. 77, Mr. Justice Wooton, in the Supreme Court, held that when a person seeks to set aside a will pursuant to this section of the Act, the onus is on

him to establish the marriage by a preponderance of evidence. The will in question was executed by Henry Somerset Fitzroy in 1937. Mr. Justice Wooton said:

> Marriage may be established by direct evidence thereof, but also by evidence of reputation. In that regard the reputation must be exactly that There must be proof of the acceptance by the relatives and by society of the state of marriage between the persons, and if there be satisfactory evidence upon that issue, then the court may conclude that there was indeed a marriage

He found that in the instant case there was no documentary evidence of marriage and that the only evidence of reputation came, not from relatives or independent members of the society in which the testator and his alleged wife lived, but from the couple themselves who, in the official forms filled by them when they applied for social assistance and for old-age pensions, indicated that they were married in England in 1923 or 1924. There was also evidence that in a will made by the alleged wife in 1936 she described herself as "Florence O. Graham" and in an unpublished document purporting to be a holograph will dated in 1960, she said "My name is Florence D. Fitzroy." The judge concluded

> In this confusing state of the evidence I am of the opinion that strict rules should apply and that there should be an abundance of evidence available on the issue of proof by reputation, and I find there is none except the reputation created by the deceased and his alleged spouse, which evidence established the marriage long before the will in question was made, and such reputation was limited to the knowledge of Mr Davidson and his department (Welfare Department of City of Victoria.) . .
>
> I am of the opinion that I do not have to conclude positively that there was no marriage, but I must conclude, as I do, that there has been no satisfactory proof made before me of a marriage after the date of the said will I cannot find upon the evidence that it has been established by a preponderance of probabilities that these two persons were married at a date subsequent to the execution of the last will and testament of the said Fitzroy. . . .
>
> My own conclusion from the evidence here is that there has been no marriage established as having taken place between the parties subsequent to the date of the said will.

APPENDIX L

(See page 22)

RULES OF THE ROAD

Report of Manitoba Commissioners

At the 1966 meeting of the Conference, the Manitoba Commissioners were requested

(a) to review their recommendations respecting the definition of "highway";

(b) to review their recommendations respecting the applicability of certain Rules of the Road to parking lots; and

(c) to study the amendments made by B.C. to the Rules of the Road respecting traffic signals and to report at the next meeting on the desirability of amending the uniform provisions.

(a) *Definition of "highway"*

Last year the Manitoba Commissioners recommended a new definition of "highway". There was some discussion on the definition and several suggestions for improving it were received. We now recommend the following definition be adopted:

(h) "highway" means any place or way, including any structure forming part thereof, which the public is ordinarily entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor, and includes all the space between the boundary lines of any right-of-way or land taken, acquired or used therefor, but does not include

(i) a privately owned area designed and intended and primarily used for the parking of vehicles and the necessary passage ways thereon, or

(ii) a publicly owned area designed and intended to be used exclusively for the parking of vehicles and the necessary passage ways thereon.

(b) *Applicability of certain of the Rules of the Road to Parking Lots*

Last year there was considerable discussion about the proposal to add a new section to the Rules of the Road relating to

the application of certain Rules of the Road to occurrences not on highways. We were instructed to consult with some traffic engineers respecting the advisability of having certain of the Rules of the Road apply to parking lots. The traffic engineers who were consulted suggested that the sections which are mentioned in the proposal set out below might apply in many situations occurring in parking lots, although they admitted there would probably be considerable differences of opinion as to whether all of them should apply or not

We have deleted the reference to offences that apply in places other than highways and parking lots In this respect our recommendation is that if any section should apply in places other than parking lots and highways, then the section itself should be redrafted to make this clear

We recommend the following section be added to the Rules of the Road:

Offences on Parking lots

73. (1) Any person who, in or on any place that is not a highway and that the public is ordinarily entitled or permitted to use for the parking of vehicles, including the necessary passage ways thereon, does any thing that, if done on a highway, would be a violation of any of the following provisions, or of any part thereof, that is to say:

(a) section 4; (Traffic Officers' directions to be obeyed)

(b) section 5; (Instructions of traffic-control devices to be obeyed)

(c) section 12; (Giving information at accidents)

(d) subsections (1) and (2) of section 17; (Careless driving)

(e) section 32; (Starting safely)

(f) sections 55 and 56; (Stop signs and yield signs)

(g) sections 63, 64 and 65; (Backing safely, motorcycle operation, obstruction of view)

(h) section 72; (Open doors)

shall be deemed to have violated that provision, or the part thereof, and is guilty of an offence and liable, on summary conviction to the penalty herein provided for a violation of that provision or the part thereof.

(2) Subsection (1) does not apply with respect to a vehicle, or the driver thereof, in any place where vehicles are stored by the owners thereof, subject to payment of a charge therefor, with the intention and understanding, on the part of both the owner of such vehicle and the owner or operator of the place that the vehicle will not be removed for a period of two weeks or longer unless removed for the purposes of the sale thereof. Where subsection (1) not applicable

(c) *Yielding right-of-way on Green Light*

Last year in the report respecting amendment to Uniform Acts mention was made of an amendment made by British Columbia to its section which is nearly equivalent to section 7 (1) of the Model Rules of the Road. This matter was referred to the Manitoba Commissioners for study. At the present time the Model provision, so far as it is applicable to this problem, reads as follows.

(1) When a green light alone or "GO" signal is shown at an intersection by a traffic-control signal

(a) the driver of a vehicle approaching the intersection and facing the light or signal,

(i)

(ii) Shall yield the right-of-way, if turning left or right, to other traffic lawfully

(A) within the intersection, or

(B) within an adjacent crosswalk,

at the time the light or signal is shown;

If the B.C. amendment were incorporated into the Model section it would read as follows.

(1) When a green light alone or "GO" signal is shown at an intersection by a traffic-control signal,

(a) the driver of a vehicle approaching the intersection and facing the light or signal,

(i)

(ii) shall yield the right-of-way to other traffic lawfully

(A) within the intersection, or

(B) within an adjacent crosswalk,

at the time the light or signal became exhibited;

We feel that the Model section as it stands should be retained as it is intended, we think, to cover the situation where a person approaching an intersection facing a green light wishes to turn left or right and there is already traffic in the intersection which prevents him from making the left or right turn without interfering with that other traffic. This might happen at any time when the green light is being shown and not just at the instant when it is first shown. However, we feel that clearer instructions should be given in the rules relating to the situation where traffic is stranded in an intersection at a time when the green light is first displayed. We therefore recommend that the present provisions of the Model Act be retained, but a provision similar to the present B.C provision be added This could be added as subclause (iii) to clause (a) of subsection (1) of section 7 of the Model Act. It would read as follows:

(iii) shall yield the right-of-way to other traffic lawfully
(A) within the intersection, or
(B) within an adjacent crosswalk;

at the time the light or signal first became exhibited.

APPENDIX M

(See page 23)

AMENDMENTS TO MODEL RULES OF THE ROAD ACT

1. Clause (h) of section 1 of the Model Rules of the Road Act is struck out and the following clause is substituted therefor:

(h) "highway" means any place or way, including any structure forming a part thereof, which the public is ordinarily entitled or permitted to use for the passage of vehicles, with or without fee or charge therefor, and includes all the space between the boundary lines of any right-of-way or land taken, acquired or used therefor, but does not include "highway,"

(i) a privately owned area intended and primarily used for the parking of vehicles and the passage ways thereon, or

(ii) a publicly owned area intended to be used exclusively for the parking of vehicles and the passage ways theron;.

2. Clause (a) of subsection (1) of section 7 of the Model Rules of the Road Act is struck out and the following clause is substituted therefor:

(a) the driver of a vehicle approaching the intersection and facing the light or signal,

(i) may

(A) proceed across the intersection, or

(B) turn left or right, subject to a traffic-control device prohibiting a left or right turn or both,

(ii) shall yield the right-of-way to other traffic lawfully

(A) within the intersection, or

(B) within an adjacent cross-walk,

at the time the light or signal first became exhibited, and

(iii) shall yield the right-of-way, if turning left or right, to other traffic lawfully

(A) within the intersection, or

(B) within an adjacent cross-walk,

during the time the light or signal is shown; and.

3. The Model Rules of the Road Act is further amended by adding thereto, immediately after section 72 thereof, the following section:

Offences on parking lots

73. (1) Any person who, in or on any place that is not a highway and that the public is ordinarily entitled or permitted to use for the parking of vehicles, including the passage ways thereon, does any thing that, if done on a highway, would be a violation of any of the following provisions, or of any part thereof, that is to say:

(a) section 4, (Traffic Officers' directions to be obeyed)

(b) section 5; (Instructions of traffic-control devices to be obeyed)

(c) section 12; (Giving information at accidents)

(d) subsections (1) and (2) of section 17; (Careless driving)

(e) section 32; (Starting safely)

(f) sections 55 and 56; (Stop signs and yield signs)

(g) sections 63, 64 and 65; (Backing safely, motorcycle operation, obstruction of view)

(h) section 72; (Open doors)

shall be deemed to have violated that provision, or the part thereof, and is guilty of an offence and liable, on summary conviction, to the penalty herein provided for a violation of that provision or the part thereof.

Where subsection (1) not applicable

(2) Subsection (1) does not apply with respect to a vehicle, or the driver thereof, in any place where vehicles are stored by the owners thereof, subject to payment of a charge therefor, with the intention and understanding, on the part of both the owner of such vehicle and the owner or operator of the place that the vehicle will not be removed for a period of two weeks or longer unless removed for the purposes of the sale thereof.

(Note: The words in brackets following the clauses in subsection (1) are added only for information for those jurisdictions enacting the section)

APPENDIX N

(See page 23)

ADOPTION

Report of the Alberta Commissioners

In 1966 the Conference agreed to put this subject on its Agenda. It was referred to the Alberta Commissioners for study and report (1966 Proceedings, page 26).

The subject can conveniently be divided into three topics (1) procedure in adoption (2) effects of adoption (3) rules governing recognition of foreign adoptions. Conceivably it will be easier to agree on uniform provisions respecting effects of adoption than on the other two. However, we should not assume at this stage that uniformity is not feasible on any of these three components of the law of adoption. The following articles by Dr. G. D. Kennedy have much helpful material: *The Legal Effects of Adoption* (1955) 33 Can. Bar Rev. 750; *Adoption in the Conflict of Laws* (1956) 34 Can. Bar Rev. 507. In addition, there are letters by Patricia Webb and Dr Kennedy in 34 Can. Bar Rev. 356 and 360.

Effects of Adoption

Dealing with the effects of adoption, Dr. Kennedy showed that in general the statutes existing at the time he wrote did not fully and completely take the child out of his natural family and make it a full-fledged member of the family of those adopting him. He further showed that the legislation should be changed so as to remove the child for all purposes from the one family to the other Since his articles appeared, at least four provinces —British Columbia, Alberta, Ontario and Nova Scotia—have revised their adoption laws and have adopted the principle he recommends. We think that the basic provision of these statutes should be enacted into a Uniform Statute. A related subject with which Dr. Kennedy deals at length is that of other statutes which refer to "child", such as The Fatal Accidents Act, The Family Relief Act, The Insurance Act and The Wills Act and The Intestate Succession Act Dr. Kennedy's' view is that if the adoption statute is thoroughgoing in making the child a member of the family of the adopting parents, then it is better not to refer to adopted children specifically in the other statutes This is something we have not yet fully considered

Perhaps the most important question relating to the effects of adoption has to do with a reference to "child", "children" or "issue" in a will, conveyance or other document. The proposed legislation should deal with this subject but there are at least three types of provision (1) a provision that includes an adopted child in the word "child" in wills or documents made after the adoption; (2) a provision that is general in its terms and does not refer to the time of the will or document; (3) a provision such as Ontario's and Alberta's which applies to documents made at any time including those made before the adoption or even before the Act was passed.

Nova Scotia's Adoption Act (passed earlier this year) contains a provision of the second type.

> "10. (4) In any enactment, conveyance, trust, settlement, devise, bequest, or other instrument, the expression "child" or the expression "issue" or the equivalent of either, includes an adopted child unless the contrary plainly appears by the terms of the instrument."

British Columbia's section on the effect of adoption (Adoption Act, s. 10) contains this subsection:

> "(6) This section does not apply to the will of a testator dying before or to any other instrument made before the seventeenth day of April, 1920.",

(the commencement date of that province's original Adoption Act.

The Child Welfare Acts of Ontario (1965, s. 14) and Alberta (1966, c. 13) now have almost identical provisions on this subject: the following is the Alberta provision showing in parentheses the words omitted in the Ontario version·

> "Any reference to "child", "children" or "issue" in any will (, *conveyance*) or other document, whether heretofore or hereafter made, shall (*unless the contrary is expressed*) be deemed to include an adopted child."

The leading cases are *Re Clement* (1962) S.C.R. 235 and *Re Gage* (1962) S.C.R. 241. The basic holding in these two cases, both of which came from Ontario, is that the provision making an adopted child the child of the adopting parents for all purposes, is not operative to enable the adopted child or his issue to take under the will of a person who made the will before the

Act came into force. The new provisions (quoted above) passed since then in Ontario and Alberta are worded so as to literally apply to such a case.

The Alberta Commissioners would like the views of the Conference as to whether, as a matter of policy, a uniform provision should be enacted throughout Canada as to the position of adopted children under old wills and instruments. We invite the consideration of the Conference of the provisions quoted above, our present leaning being toward a provision like that of Ontario's and Alberta's.

Recognition of Foreign Adoptions

Turning now to problems of conflict of laws, Dr. Kennedy considers the question as to the children to whom the Act applies. His view is that it applies to any child respecting whom proceedings are taken in the enacting province, regardless of the child's domicile of origin.

The main question is as to recognition of foreign adoptions It would be possible to ignore this subject. On the other hand, the New Zealand legislation mentioned in Patricia Webb's letter, cited earlier, purports to deal with this subject. As to Canadian legislation, the Alberta provision reads:

> "63 An adoption effected according to the law of any other jurisdiction has the same effect in the Province as an adoption under this Act."

Nova Scotia's new Adoption Act, on the other hand, is not as sweeping.

> "17. When a person has been adopted in another province, state or country, according to the law of that place, and while domiciled or resident there, or having been born there, or while his adoptive parents were domiciled or resident there, he and his adoptive parents have for all purposes in Nova Scotia the same status, rights and duties as if the adoption has been in accordance with this Act"

The most important recent case is *Re Valentine's Settlement* (1965) 2 All E.R. 226, a decision of the English Court of Appeal. Valentine was domiciled in Southern Rhodesia. He adopted two children who apparently lived in the Union of South Africa and the adoption was made in South Africa under its law. No steps were ever taken in Southern Rhodesia Valentine then

made a settlement leaving property to his children. The Court of Appeal held by a majority that an English Court could not recognize this adoption order. The reason is that the adopting parents were not domiciled in South Africa at the time when the adoption orders were made. Salmond L.J. in dissent, would have recognized the validity of the adoption orders.

In our opinion, an attempt should be made to prescribe in the Act the circumstances in which an adoption in another jurisdiction will be recognized. The Alberta Commissioners invite the consideration of the Conference of the Alberta and Nova Scotia provisions and would appreciate the views of the Conference as to whether, as a matter of policy, a provision along these lines should be enacted throughout Canada.

Respectfully submitted,

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Alberta Commissioners.

APPENDIX O

(See page 23)

THE INTERPRETATION ACT

Last year the Conference referred The Interpretation Act to the Manitoba and Saskatchewan Commissioners with instructions to report with a new Draft Uniform Act. Several of the Saskatchewan Commissioners visited Winnipeg, making it possible to have some joint discussions on the new draft. However, the Saskatchewan Commissioners have not had an opportunity to study the final draft. It should not be presumed that they recommend the final draft.

Attached is a new draft of a Uniform Interpretation Act. It is based largely on the Federal Bill which has been before Parliament for several years (Bill S-15 - 1965, Bill S-9 - 1966, and Bill S-6 - 1967). The discussions of last year have been considered in preparing the draft on the basis of the Federal Bill. Except for sections 1, 2 and 3, the sections of the draft have the same numbers as in the Federal Bill S-6. Notes have been inserted in a number of cases to indicate the source of the section and, in some instances, to indicate matters which require further consideration.

There are a number of matters which require special further consideration:

1. Should subsection (4) of section 1 or some similar provision be included?

2. Subsection (1) of section 2 contains many expressions which were not defined in the previous Model Act. It is a collection of expressions from the Federal Act and various provincial Acts which we thought might be useful to have defined in The Interpretation Act. Many of the definitions of the included expressions are not completed as they will depend upon provincial needs.

3. Subsection (1) of section 8 restricts the application of the *persona designata* rule. This provision requires further discussion, particularly with regard to whether it should apply in situations where a judge is an *ex officio* member of a board or commission which has quasi judicial powers or where a judge is appointed to conduct an inquiry under the Public Inquiries Act or some similar Act.

4. The definition of "proclamation" and section 17(1) and (2) cover similar ground. It should be decided which, if either, of the provisions is desirable to have in the Uniform Act

5. Section 16 deals with enactments binding the Crown. We feel that consideration should be given to the inclusion of some statement regarding whether agencies of the Crown, particularly Crown corporations, are bound by enactments generally.

6. Section 37 of the draft does not cover cases where there is a partial repeal and substitution. This was covered in the Model Act (section 24(1)). A decision should be made as to whether the words "in whole or in part" should be added after the word "repeal" in the second line

7. Section 7 of the present Model Act is not included in the draft. We agree with the Federal decision to remove the provision from The Interpretation Act. It will then be necessary to have some provision inserted in The Evidence Act or some other Act similar to the amendment made by section 40 of Bill S-6.

8. Last year the Manitoba Commissioners recommended that section 27 of Bill S-9 should be dealt with by appropriate provisions in an Act respecting the procedure for provincial offences. We still recommend this.

As the numbering of the draft is based on the Federal Bill and as a number of sections of the Federal Bill are not included in the draft, renumbering will be required. We feel that, perhaps, some rearrangement of the Act might be desirable too, but this has not been done at the present time as we felt it would be simpler to follow the numbering of the Federal Act for the purposes of comparison and discussion.

The Interpretation Act

Application

1. (1) Unless a contrary intention appears in the enactment, every provision of this Act extends and applies to every enactment enacted heretofore or hereafter.

Application of this Act

(2) The provisions of this Act apply to the interpretation of this Act.

Rules of construction not excluded

(3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.

(4) Unless a contrary intention appears in the instrument or document, this Act does not apply to an instrument or document that is not an enactment. Not to apply to instruments and documents

(Note: Subsections (1), (2) and (3) are from section 3 of the Federal Act and subsections (1), (3) and (4) of section 3 of Model Act.)

2. (1) In an enactment Definitions

(1) "Act" or "statute" means an Act of the Legislature, and, where used as meaning an Act or statute of a Legislature of another province, includes an ordinance of the Yukon Territory and the Northwest Territories; "Act" or "statute"

(2) "affidavit" in the case of persons allowed by law to affirm or declare instead of swearing, includes an affirmation or statutory declaration; "affidavit"

(3) "architect" means a person who under the (Architects) Act is authorized to practise as an architect within the province; "architect"

(4) "assembly" means the Legislative Assembly of ; "assembly"

(5) "authorized trustee investment" means an investment in which a trustee is authorized to invest any trust money in his hands under section of the (Trustee) Act; "authorized trustee investment"

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

(7) "barrister" means a person who is authorized under the (Law Society) Act to practise as a barrister-at-law within the province; "barrister"

(8) "book" includes a looseleaf book or binder; "book"

(9) "British subject" or "subject of Her Majesty" includes any person who under the law of any country in the British Commonwealth is a citizen of that country; "British subject", or "subject of Her Majesty"

(10) "broadcasting" means the dissemination of any form of radio electric communication, including radio-telegraph, radio-telephone, and wireless transmission of writing, signs, signals, pictures and sounds of all kinds, by means of Hertzian waves, intended to be received by the public either directly or through the medium of relay stations; "broadcasting"

(11) "child" includes an adopted child; "child"

"city" (12) "city" means a corporation incorporated as a city by or under an Act;

"commencement" (13) "commencement" when used with reference to an enactment, means the time when the enactment comes into force;

"Commonwealth" or "British Commonwealth" (14) "Commonwealth" or "British Commonwealth" means the association of countries named in the Schedule, and includes the dependencies, colonies, protectorates, protected states, condominiums, and trust territories of any one or more of them and "country in the Commonwealth" or "country in the British Commonwealth" or "country of the Commonwealth" or "country of the British Commonwealth" includes any dependency, colony, protectorate, protected state, condominium, and trust territory, of any one or more of the countries named in the Schedule;

"Consolidated Revenue Fund", or "Consolidated Fund" (15) "Consolidated Revenue Fund" or "Consolidated Fund" (An appropriate definition should be inserted where necessary.);

"county" (16) "county" (An appropriate definition should be inserted where necessary.);

"County Court" (17) "County Court" (An appropriate definition should be inserted where necessary.);

"Court of Appeal" (18) "Court of Appeal" means the Court of Appeal for ;

"dentist" (19) "dentist" means a person authorized under the (Dental Association) Act to practise as a dentist within the province;

"district" (20) "district" (An appropriate definition should be inserted where necessary.);

"District Court" (21) "District Court" (An appropriate definition should be inserted where necessary.);

"Division Court" (22) "Division Court" (An appropriate definition should be inserted where necessary.);

"electoral division" (23) "electoral division" (An appropriate definition should be inserted where necessary.);

"enact" (24) "enact" includes issue, make or establish;

"enactment" (25) "enactment" means an Act or a regulation or any portion of an Act or a regulation;

(26) "Executive Council" means the Executive Council of ; "Executive Council"

(27) "Gazette" means the (Royal or official) Gazette published by the Queen's Printer (of the province); "Gazette"

(28) "government" or "Government of " means Her Majesty the Queen, acting for the Province of ; "government", or "Government of "

(29) "Government of Canada" means Her Majesty the Queen acting for Canada; "Government of Canada"

(30) "Governor", "Governor of Canada", or "Governor General" means the Governor General for the time being of Canada, or other chief executive officer or administrator for the time being, by whatever title he is designated, carrying on the Government of Canada on behalf and in the name of the Sovereign; "Governor", "Governor of Canada", or "Governor General"

(31) "Governor-in-Council" or "Governor-General-in-Council" means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada; "Governor-in-Council" or "Governor-General-in-Council"

(32) "Great Seal" means the Great Seal of the Province of ; "Great Seal"

(33) "hereafter" shall be construed as having reference to a time after the commencement of the enactment, or part or provision thereof, containing the expression; "hereafter"

(34) "herein" used in any section or part of an enactment shall be construed as relating to the whole enactment, and not to that section or part only; "herein"

(35) "heretofore" shall be construed as having reference to a time before the commencement of the enactment, or the part or provision thereof, containing the expression; "heretofore"

(36) "Her Majesty", "His Majesty", "the Queen", "the King", or "the Crown" means the Sovereign of the United Kingdom, Canada and her other realms and territories, and head of the Commonwealth; "Her Majesty", "His Majesty", "the Queen", "the King", or "the Crown"

(37) "High Court" (An appropriate definition should be inserted where necessary.); "High Court"

(38) "holiday", subject to subsection (2), includes Sundays, New Year's Day, Epiphany, Good Friday, the Ascension, All Saints Day, Conception Day, Easter Monday, Ash Wednes- "holiday"

day, Christmas Day, the twenty-sixth day of December, the birthday or the day fixed by proclamation for the celebration of the birth of the reigning sovereign, Victoria Day, Dominion Day, Labour Day, Remembrance Day, and any day appointed by any law in force in the province or by proclamation of the Governor General or of the Lieutenant-Governor as a general holiday or as a public holiday;

"imprisonment" (39) "imprisonment" means compulsory detention in a gaol, reformatory, or correctional institution;

(Consideration should also be given to the inclusion of the definition of "gaol" or "correctional institution" or any other term used in the statutes of the province.)

"judicial district" or "judicial division" (40) "judicial district" or "judicial division" (An appropriate definition should be inserted where necessary.);

"justice" (41) "justice" means a justice of the peace and includes a magistrate;

"Legislature" (42) "Legislature" means the Lieutenant-Governor acting by and with the advice and consent of the Legislative Assembly of the province, and where used as meaning a Legislature of another province includes the Commissioner in Council of the Yukon Territory and the Commissioner in Council of the Northwest Territories,

"Lieutenant-Governor" (43) "Lieutenant-Governor" means the Lieutenant-Governor of the province for the time being, or other chief executive or administrator for the time being, by whatever title he is designated, carrying on the government of the province on behalf and in the name of the Sovereign;

"Lieutenant-Governor-in Council" (44) "Lieutenant-Governor-in-Council" means the Lieutenant-Governor acting by and with the advice of the Executive Council;

"local government district" (45) "local government district" (An appropriate definition should be inserted where necessary.);

"magistrate" (46) "magistrate" means a magistrate appointed under the (Magistrates) Act;

"mail" (47) "mail" refers to the deposit of the matter to which the context applies in Her Majesty's post office at any place within the province, postage prepaid, for transmission by post;

"may" (48) "may" shall be construed as permissive;

(49) "medical practitioner" means a person authorized under the (Medical) Act to practise medicine within the province; "medical practitioner"

(50) "mental defective", "mental deficiency", "mental ill person", "mental illness", "mentally incompetent", "mentally disordered person", etc. (Appropriate definitions should be inserted where necessary.); "mental defective", etc.

(51) "month" means a calendar month; "month"

(52) "municipality" (An appropriate definition should be inserted where necessary.); "municipality"

(53) "newspaper" in a provision requiring publication in a newspaper, means a printed publication in sheet form, intended for general circulation, published regularly at intervals of not longer than a week, consisting in large part of news of current events of general interest, and sold to the public; "newspaper"

(54) "next" or "now" shall be construed as having reference to the time of commencement of the enactment containing the expression; "next", or "now"

(55) "oath" in the case of persons for the time being allowed or required by law to affirm or declare instead of swearing, includes a solemn affirmation or declaration, and the word "swear" in the like case includes "affirm" and "declare"; "oath"

(56) "official time" (An appropriate definition should be inserted where necessary.); "official time"

(57) "peace officer" or "police officer" or "constable" includes "peace officer", "police officer", "constable"

(a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's officer, and any other public officer employed for the preservation and maintenance of the public peace or for the service or execution of a process,

(b) a warden, deputy warden, instructor, keeper, gaoler, guard or any other officer employed in the service of the government or of the Government of Canada in a penitentiary, gaol, detention home, or correctional institution,

(c) a person appointed under any Act for the enforcement of that Act;

"person" (58) "person" includes a corporation (and the heirs, executors, administrators or other legal representatives of a person);

(Note: Should the words in brackets be deleted?)

"personal representative" (59) "personal representative" means an executor of a will or an administrator of an estate, whether with will annexed or not;

"pharmacist" (60) "pharmacist" means a person authorized under the (Pharmaceutical) Act to carry on the profession of a licensed pharmacist within the province;

"proclamation" (61) "proclamation" means a proclamation of the Lieutenant-Governor under the Great Seal issued pursuant to an order of the Lieutenant-Governor-in-Council;

"professional engineer" (62) "professional engineer", or words implying recognition of any person as a professional engineer or a member of the engineering profession, means a person authorized under the (Engineering Profession) Act to carry on the practice of professional engineering within the province;

"province" (63) "province" means the Province of , and, where used as meaning another province, includes the Yukon Territory and the Northwest Territories;

"public officer" (64) "public officer" includes any person in the public service of the government

(a) who is authorized to do or enforce the doing of any act or thing or to exercise any power; or

(b) upon whom any duty is imposed by or under an enactment; or

(c) who performs a duty in the performance of which the public has an interest and whose remuneration is paid from and out of the Consolidated Fund,

"Queen's Bench" (65) "Queen's Bench" (An appropriate definition should be inserted where necessary),

"radio" (66) "radio" means any transmission, emission or reception of signs, signals, writing, images and sound or intelligence of any nature by means of Hertzian waves;

"regular forces" (67) "regular forces" means the Canadian Forces that are referred to in the *National Defence Act* (Canada) as the regular forces,

(68) "regulation" includes any order, regulation, order-in-council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, instrument, proclamation, by-law, resolution or other instrument enacted "regulation"

(a) in the execution of a power conferred by or under the authority of an Act; or

(b) by or under the authority of the Lieutenant-Governor-in Council;

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between two or more persons;

(Note: See definition of "regulation" in The Regulations Act for the type of regulation to be filed under that Act.)

(69) "repeal" includes revoke or cancel; "repeal"

(70) "reserve forces" means the Canadian Forces that are referred to in the *National Defence Act* (Canada) as the reserve forces, "reserve forces"

(71) "Revised Statutes" means the latest Revised and Consolidated Statutes of the province; "Revised Statutes"

(72) "rules of court" (An appropriate definition should be inserted where necessary.); "rules of court"

(73) "rural municipality" (An appropriate definition should be inserted where necessary.); "rural municipality",

(74) "school district" (An appropriate definition should be inserted where necessary.); "school district"

(75) "security" means sufficient security; "security"

(76) "shall" shall be construed as imperative; "shall"

(77) "standard time" (An appropriate definition should be inserted where necessary.); "standard time"

(78) "statutory declaration" means a solemn declaration made by virtue of the *Canada Evidence Act*; "statutory declaration"

(79) "Superior Court" (An appropriate definition should be inserted where necessary.); "Superior Court"

(80) "Supreme Court" (An appropriate definition should be inserted where necessary.); "Supreme Court"

"surety" (81) "surety" means sufficient surety, and, where this word is used, one person is sufficient therefor, unless otherwise expressly required;

"surveyor" (82) "surveyor" means a person authorized to practise and registered as a land surveyor under the (Land Surveyors) Act;

"telecommunication" (83) "telecommunication" means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or electromagnetic system;

"town" (84) "town" means a corporation incorporated as a town by or under an Act;

"two justices" (85) "two justices" means two or more justices of the peace, assembled or acting together;

"United Kingdom" (86) "United Kingdom" means the United Kingdom of Great Britain and Northern Ireland;

"United States" (87) "United States" means the United States of America;

"unorganized territory" (88) "unorganized territory" (An appropriate definition should be inserted where necessary);

"veterinary" (89) "veterinary" means a person who is authorized under the (Veterinary) Act to practise as a veterinary surgeon within the province;

"village" (90) "village" means a corporation incorporated as a village under an Act;

"will" (91) "will" includes a codicil;

"writing", or "written" (92) "writing", "written", or any term of like import includes words printed, typewritten, painted, engraved, lithographed, photographed, or represented or reproduced by any mode of representing or reproducing words in visible form;

"year" (93) "year" means any period of twelve consecutive months, except that a reference to a "calendar year" means a period of twelve consecutive months commencing on the first day of January and a reference by number to a Dominical year means the period of twelve consecutive months commencing on the first day of January of that Dominical year.

Holidays falling on Sunday (2) Whenever a holiday, other than Remembrance Day or Sunday, falls on a Sunday the expression "holiday" includes the following day, and when Christmas Day falls upon a Sunday the twenty-seventh day of December is a holiday.

(Note: Subsection (1) is a collection of definitions from sections 2(1) and 28 of the Federal Act, sections 2(1) and 21(1) of the Model Act and from various provincial Interpretation Acts. Subsection (2) is from the Manitoba Act.)

Expired enactment deemed repealed

3. For the purposes of this Act, an enactment that has expired or lapsed or otherwise ceased to have effect shall be deemed to have been repealed.

(Note: This is from section 2(2) of both the Federal Act and the Model Act.)

Enacting clause

4. (1) The enacting clause of an Act may be in the following form: "Her Majesty, by and with the advice and consent of the Legislative Assembly of , enacts as follows:".

Order of clauses

(2) The enacting clause of an Act shall follow the preamble, if any, and the various provisions within the purview of the body of the Act shall follow in a concise and enunciative form.

(Note: This is from section 4 of the Federal Act. It is not presently in the Model Act. In those provinces where there is a Statutes Act, this section will unlikely be necessary in The Interpretation Act)

Endorsement of date of royal assent

5. (1) The Clerk of the Assembly shall endorse on every Act, immediately after the title thereof

(a) the day, month, and year when the Act was by the Lieutenant-Governor assented to; or

(b) the day, month, and year when the Act was reserved by the Lieutenant-Governor for the assent of the Governor-General.

Endorsement of date of signification of assent by Governor-General

(2) Where an Act is reserved for the assent of the Governor-General, the Clerk of the Assembly shall also endorse thereon the day, month, and year when the Lieutenant-Governor signified

(a) by speech or message to the assembly; or

(b) by proclamation;

that the Act was laid before the Governor-General-in-Council and that the Governor-General was pleased to assent to the Act.

Endorsement part of Act

(3) The endorsements made under subsections (1) and (2) shall be taken to be part of the Act.

Date of commencement

(4) Where no other date of commencement is provided in an Act,

(a) the date of the assent of the Lieutenant-Governor; or

(b) the date of the signification by the Lieutenant-Governor that the Governor-General was pleased to assent to the Act;

as the case may be, shall be the date of the commencement of the Act.

Commencement of coming into force provision

(5) Where an Act contains a provision that the Act or any portion thereof is to come into force on a day later than the date of assent to the Act or the date of signification that the Act has been assented to, that provision shall be deemed to have come into force in accordance with subsection (4).

Commencement when no date fixed

(6) Where an Act provides that certain provisions thereof are to come or shall be deemed to have come into force on a day other than the date of assent to the Act, or the date of signification that the Act has been assented to, the remaining provisions of the Act shall be deemed to have come into force in accordance with subsection (4).

(Note: Subsections (1), (3), (4), (5) and (6) are from section 5 of the Federal Act and subsection (2) is new Where a province has a Statutes Act, these provisions would normally not be necessary in The Interpretation Act.)

Date of operation

6. (1) Where an enactment is expressed to come into force or operation on a particular day, or on a day fixed by proclamation or otherwise, it shall be construed as coming into force or operation immediately on the expiration of the previous day.

Date of lapse

(2) Where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect immediately on the commencement of the following day.

When no date fixed

(3) Every enactment that is not expressed to come into force on a particular day shall be construed as coming into force on the expiration of the day immediately before the day of the enactment was enacted.

(Note: This is from section 6 of the Federal Act and subsection (1) of section 4 of the Model Act However, subsection (2) differs from the Federal Act as to the date of expiry or lapse of an enactment.)

Preliminary proceedings

7. (1) Where an enactment is not to come into force or operation immediately on its being passed or made and it confers power

(a) to make appointments;

(b) to hold elections;

(c) to make regulations;

(d) to issue, grant or make licences, permits, instruments and documents;

(e) to give notices;

(f) to prescribe forms; or

(g) to do any other things;

that power may, for the purpose of making the enactment effective upon its commencement, be exercised at any time after the passing or making thereof; but a regulation made thereunder, or a licence, permit, instrument or document issued, granted, or made thereunder, before the commencement of the enactment has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective upon its commencement.

Proclamation of portions of Acts

(2) Where an enactment is to come into force on a day fixed by proclamation, the proclamation may apply to, and fix a day for the coming into force of, any part, section, or portion of the enactment; and proclamations may be issued at different times as to any part, section, or portion of the enactment.

(Note: Subsection (1) is taken largely from subsection (2) of section 4 of the Model Act, which appears, in part, as section 7 of the Federal Act Subsection (2) is from the Manitoba Act)

Restriction on *persona designata* rule

8. (1) Where by an enactment judicial or quasi judicial powers are given to a judge or officer of a court, the judge or officer shall be deemed to exercise such power in his official capacity and as representing the court to which he is attached; and he may for the purpose of performing the duties imposed upon him by the enactment, subject to the provisions thereof, exercise the powers he possesses as a judge or officer of the court.

(Note: Should some provision be added excluding from the application of this subsection judges appointed as commissioners under the Public Inquiries Act, etc.?)

Appeal from judge

(2) Without restricting the generality of subsection (1), where under any Act an appeal is given from any person, board, commission, or other body to a court or judge, an appeal lies from the decision of the court or judge as in the case of any other action, matter, or proceeding, in that court or in the court in which the judge is a member

References to court

(3) Where an enactment provides that a proceeding, matter, or thing, shall be done by or before a judge, the term "judge" in

all such cases means a judge of the court mentioned or referred to in the enactment.

(Note: Subsection (1) is from the Model Act. Subsections (2) and (3) are from the Manitoba Act.)

Provisions in private Acts

9. No provision in a private Act affects the rights of any person, except only as therein mentioned or referred to.

(Note: This is from the Federal Act and the Model Act.)

Law always speaking

10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment and every part thereof according to its true spirit, intent and meaning.

(Note: This is from section 10 of the Federal Act and section 6(1) of the Model Act.)

Enactments deemed remedial

11. Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

(Note: This is from both the Federal Act and the Model Act.)

Preamble part of Act

12. The preamble of an enactment shall be read as part thereof intended to assist in explaining its purport and object.

(Note: This is from the Federal Act and section 9 of the Model Act.)

Supplementary matters forming no part of Act

13. References to former enactments after the end of a section or other division of an enactment, marginal notes, headings and tables of contents, form no part of an enactment, but shall be deemed to have been inserted for convenience of reference only.

(Note: This is from the Federal Act and section 10 of the Model Act.)

Application of interpretation provisions

14. (1) Definitions or rules of interpretation contained in an enactment apply to the construction of the provisions of the enactment that contain those definitions or rules of interpretation, as well as to the other provisions of the enactment.

(Note: This is from the Federal Act and subsection (5) of section 6 of the Model Act.)

Interpretation section is subject to exceptions

(2) Where an enactment contains an interpretation section or provision, it shall be read and construed as being applicable only if the contrary intention does not appear.

(Note: This is from subsection (2) of section 3 of the Model Act which is slightly different from the Federal Act.)

Words in regulations have same meaning as in enactment

15. Where an enactment confers power to enact regulations, expressions used in the regulations have the same respective meanings as in the enactment conferring the power.

(Note: This is from the Federal Act which differs slightly from section 12 of the Model Act.)

Her Majesty not bound or affected unless stated

16. Unless the enactment otherwise provides, an enactment is not binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner.

(Note: This is from the Federal Act with slight change in wording. It is also similar to section 13 of the Model Act.)

Proclamation means proclamation of Lieutenant-Governor

17. (1) Where an enactment authorizes the issue of a proclamation, the proclamation shall be understood to be a proclamation of the Lieutenant-Governor issued pursuant to an order of the Lieutenant-Governor-in-Council.

Proclamation of Lieutenant-Governor to be issued on advice

(2) Where the Lieutenant-Governor is authorized by an enactment to issue a proclamation, the proclamation shall be understood to be a proclamation issued pursuant to an order of the Lieutenant-Governor-in-Council; but it is not necessary to mention in the proclamation that it is issued pursuant to such an order.

Judicial notice of proclamation

(3) Where an enactment is expressed to come into force on a day fixed by proclamation, judicial notice shall be taken of the issue of the proclamation and the day fixed thereby without being specially pleaded.

(Note: This is from the Federal Act which is, in part, similar to section 15 of the Model Act.)

Sections 18 and 19 of the Federal Act are deleted.

Powers vested in corporations

20. (1) Words in an enactment establishing a corporation

(a) vest in the corporation power

(i) to sue and be sued by its corporate name,

(ii) to contract and be contracted with by its corporate name,

(iii) to have a common seal and to alter or change it at pleasure,

(iv) to have perpetual succession, and

(v) to acquire and hold personal property or movables for the purposes for which the corporation is constituted and to alienate the same at pleasure;

(b) in the case of a corporation having a name consisting of an English and a French form or a combined English and French form, vest in the corporation power to use either the English or the French form of its name or both forms and to show on its seal both the English and French forms of its name or have two seals, one showing the English and the other showing the French form of its name;

(c) vest in a majority of the members of the corporation the power to bind the others by their acts; and

(d) exempt from personal liability for its debts, obligations or acts such individual members of the corporation as do not contravene the provisions of the enactment incorporating them.

Corporate name

(2) Where an enactment establishes a corporation and in each of the English and French versions of the enactment the name of the corporation is in the form only of the language of that version, the name of the corporation shall consist of the form of its name in each of the versions of the enactment.

(Note: This is from the Federal Act which is similar, in part, to section 14 of the Model Act Subsection (2) will be required only where the statutes are published in two languages.)

Majorities

21. (1) Where an act or thing is required or authorized to be done by more than two persons, a majority of them may do it.

Quorum of board, court, etc.

(2) Where an enactment establishes a board, court, commission or other body consisting of three or more members (in this section called the "association"),

(a) at a meeting of the association, a number of members of the association equal to

(i) at least one-half of the number of members provided for by the enactment, if that number is a fixed number, and

(ii) if the number of members provided for by the enactment is not a fixed number but is within a range having a maximum or minimum, at least one-half

of the number of members in office if that number is within the range,

constitutes a quorum;

(b) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association; and

(c) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

(Note: This is from the Federal Act which includes, in part, clause (d) of section 18 of the Model Act.)

Public officers hold office during pleasure

22. (1) Every public officer appointed before or after the commencement of this Act, by or under the authority of an enactment or otherwise, shall be deemed to have been appointed to hold office during pleasure only, unless it is otherwise expressed in the enactment or in his commission or appointment.

Effective day of appointments

(2) Where an appointment is made by instrument under the great seal, the instrument may purport to have been issued on or after the day its issue was authorized, and the day on which it so purports to have been issued shall be deemed to be the day on which the appointment takes effect.

Appointment or engagement otherwise than by instrument under great seal

(3) Where in an enactment there is authority to appoint a person to a position or to engage the services of a person, otherwise than by instrument under the great seal, the instrument of appointment or engagement may be expressed to be effective on or after the day on which such person commenced the performance of the duties of the position or commenced the performance of the services, and the day on which it is so expressed to be effective, unless that day is more than sixty days before the day on which the instrument is issued, shall be deemed to be the day on which the appointment or engagement takes effect.

Commencement and termination of appointments

(4) Where a person is appointed to an office effective on a specified day, the appointment shall be deemed to have been effective immediately upon the expiration of the previous day; and where an appointment of a person is terminated effective on a specified day, the termination shall be deemed to have been effective immediately upon the expiration of that day.

(Note: This is from the Federal Act with a slight change in subsection (4). Subsection (1) is also similar to section 16 of the Model Act.)

Implied powers respecting public officers

23. (1) Words authorizing the appointment of a public officer include the power of

(a) terminating his appointment or removing or suspending him;

(b) reappointing or reinstating him;

(c) appointing another in his stead or to act in his stead;

(d) appointing a person as his deputy; and

(e) fixing his remuneration and varying or terminating it;

in the discretion of the authority in whom the power of the appointment is vested.

Powers of acting ministers, successors, etc

(2) Words directing or empowering a minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a minister acting for him, or, if the office is vacant, a minister designated to act in the office by or under the authority of an order-in-council, and also his deputy and his successors in the office and their deputies.

Successors to and deputy of public officer

(3) Words directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, include his deputy and his successors in the office and their deputies.

Powers of holder of public office

(4) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office.

Restrictions on deputy ministers

(5) Nothing in this section shall be construed to authorize a deputy to exercise any authority conferred upon a minister of the Crown to make a regulation as defined in The Regulations Act.

(Note: This is from the Federal Act with minor changes. It is similar to section 17 of the Model Act.)

Section 24 of the Federal Act is not included. It was thought this would be better placed in The Evidence Act.

Time limits and holidays

25. (1) Where the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday.

Extension of time where office, etc., closed

(2) Where under an enactment the time limited for registration or filing of any instrument, or for the doing of any thing, expires or falls on a day on which, the office or place in which the

instrument or thing is required to be registered, filed or done, is closed, the instrument or thing may be registered, filed or done on the first following day on which the office or place is open.

Clear days

(3) Where there is a reference to a number of clear days or "at least" a number of days between two events, in calculating the number of days there shall be excluded the days on which the events happen.

Not clear days

(4) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating the number of days there shall be excluded the day on which the first event happens.

Beginning and end of prescribed periods

(5) Where a time is expressed to begin or end at, on or with a specified day, or to continue to or until a specified day, the time includes that day.

After specified day

(6) Where a time is expressed to begin after or to be from a specified day, the time does not include that day.

Within a time

(7) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

Calculation of a period of months after or before a specified day

(8) Where there is a reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include, the month in which the specified day falls, and the period shall be reckoned as being limited by and including

(a) the day immediately after or before the specified day, according as the period follows or precedes the specified day; and

(b) the day in the last month so counted having the same calendar number as the specified day, but if such last month has no day with the same calendar number, then the last day of that month.

Time of the day

(9) Where there is a reference to time expressed as a specified time of the day, the time shall be taken to mean

Time when specified age attained

(10) A person shall be deemed not to have attained a specified number of years of age until the commencement of the anniversary, of the same number of the day of his birth.

Extension of time during which things must be done

(11) Where a thing is required to be done on or during each of a number of specified days being not more than seven days, the thing does not have to be done on or during any day that is

a holiday or any day on which the office or place in which the thing is required to be done is closed; but the thing shall be done on or during one additional day next following the end of the number of days so specified for each holiday or day on which the office or place in which the thing is required to be done was closed during the specified days.

(Note: This is largely from the Federal Act but subsections (2) and (11) are new)

Reference to magistrate, etc.

26. (1) Where anything is required or authorized to be done by or before a judge, magistrate, justice of the peace, public officer, or any functionary, it shall be done by or before one whose jurisdiction or powers extend to the place where such thing is to be done.

Ancillary powers

(2) Where power is given to a person, public officer or functionary, to do or enforce the doing of any act or thing, all such power shall be deemed to be so given as is necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

Powers to be exercised as required

(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

Power to repeal

(4) Where a power is conferred to make regulations, the power shall be construed as including a power exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.

Forms

(5) Where a form is prescribed, deviations therefrom, not affecting the substance or calculated to mislead, do not invalidate the form used.

Gender

(6) Words importing male persons include female persons and corporations.

Number

(7) Words in the singular include the plural, and words in the plural include the singular.

Parts of speech and grammatical forms

(8) Where a word is defined, other parts of speech and grammatical forms of the same word have corresponding meanings.

Power conditionally

(9) Where the doing of an act that is expressly authorized or required is dependent upon the doing of any other act by the Lieutenant-Governor-in-Council or by a public officer, the

Lieutenant-Governor-in-Council, or public officer, as the case may be, has the power to do that other act.

(Note: With the exception of subsection (9), this is the same as the Federal Act Subsection (9) is the same as clause (c) of section 18 of the Model Act.)

Section 27 of the Federal Act is deleted. If it is required by a province, it should be inserted with certain changes in an Act dealing with prosecutions for provincial statute offences.

Section 28 of the Federal Act is deleted as most of the definitions are now included in section 2.

Sections 29 and 30 of the Federal Act are deleted.

Common names

31. The name commonly applied to any country, place, body, corporation, society, officer, functionary, person, party or thing, means the country, place, body, corporation, society, officer, functionary, person, party or thing to which the name is commonly applied, although the name is not the formal or extended designation thereof.

(Note: This is from the Federal Act and is the same as subsection (2) of section 21 of the Model Act.)

Section 32 of the Federal Act is deleted.

Citation of enactment

33. (1) In an enactment or document

(a) an Act may be cited by reference to its chapter number in the Revised Statutes, by reference to its chapter number in the volume of Acts for the year or regnal year in which it was enacted, or by reference to its long title or short title, with or without reference to its chapter number; and

(b) a regulation may be cited by reference to its long title or short title, by reference to the Act under which it was made or by reference to the number or designation under which it was registered under the (Regulations) Act.

Citation includes amendmen

(2) A citation of or reference to an enactment shall be deemed to be a citation of or reference to the enactment as amended.

(Note: This is from the Federal Act which is, except for the provisions relating to references to regulations, the same as section 19 of the Model Act.

Consideration might be given to changing subsection (2) by adding the words "from time to time whether before or after the commencement of the enactment in which the citation or reference occurs".)

Reference to two or more parts, etc

34. (1) A reference in an enactment by number or letter to two or more parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, sub-clauses, schedules, appendices or forms shall be read as including the number or letter first mentioned and the number or letter last mentioned.

Reference in enactments to parts, etc

(2) A reference in an enactment to a part, division, section, schedule, appendix or form shall be read as a reference to a part, division, section, schedule, appendix or form of the enactment in which the reference occurs.

Reference in enactments to subsections, etc.

(3) A reference in an enactment to a subsection, paragraph, subparagraph, clause or sub-clause shall be read as a reference to a subsection, paragraph, subparagraph, clause or sub-clause of the section, subsection, paragraph, subparagraph or clause, as the case may be, in which the reference occurs.

Reference to regulations

(4) A reference in an enactment to regulations shall be read as a reference to regulations made under the enactment in which the reference occurs.

Reference to another enactment

(5) A reference in an enactment by number or letter to any section, subsection, paragraph, subparagraph, clause, sub-clause or other division or line of another enactment shall be read as a reference to the section, subsection, paragraph, subparagraph, clause, sub-clause or other division or line of such other enactment as printed by authority of law.

(Note: This is from the Federal Act which is essentially the same as section 20 of the Model Act.)

Power to repeal or amend reserved

35. (1) Every Act shall be construed as reserving to the (Legislature) the power of repealing or amending it and revoking, restricting or modifying a power, privilege or advantage thereby vested in or granted to a person.

Amendment or repeal at same session

(2) An Act may be amended or repealed by an Act passed in the same session of the (Legislature).

Amendment part of enactment

(3) An amending enactment, as far as consistent with the tenor thereof, shall be construed as part of the enactment that it amends.

(Note: This is the same as section 22 of the Model Act and it is only slightly different from section 35 of the Federal Act.)

Effect of repeal

36. Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment not in force or existing at the time when the repeal takes effect;

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder;

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed;

(d) affect any offence committed against for a violation of the provisions of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and an investigation, legal proceeding or remedy as described in clause (e), may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

(Note: This is from section 23(1) of the Model Act which is essentially the same as section 36 of the Federal Act)

Repeal and substitution

37. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,

(a) every person acting under the former enactment shall continue to act as if appointed under the new enactment until another is appointed in his stead;

(b) every bond and security given for the purposes of, or by a person appointed under, the former enactment remains in force, and all offices, books, papers, forms and things made or used under the former enactment shall continue to be used as before the repeal so far as they are consistent with the new enactment;

(c) every proceeding taken under the former enactment shall be taken up and continued under and in conformity with the new enactment so far as it may be done consistently with the new enactment;

(d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing, under the former enactment or in a proceeding in relation to matters that have happened before the repeal;

(e) when any penalty, forfeiture or punishment is reduced or mitigated by the new enactment, the penalty, forfeiture or punishment if imposed or adjudged after the repeal shall be reduced or mitigated accordingly;

(f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

(g) all regulations made under the former enactment remain in force and shall be deemed to have been made under the new enactment in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead; and

(h) any reference in an unrepealed enactment to the former enactment shall, as regards a subsequent transaction, matter or thing, be read and construed as a reference to the provisions of the new enactment relating to the same subject matter as the former enactment, but where there are no provisions in the new enactment relating to the same subject matter, the former enactment shall be read as unrepealed in so far as is necessary to maintain or give effect to the unrepealed enactment.

(Note: This is from section 37 of the Federal Act which is similar with the exception of clause (f) to sections 23(2) and 24(1) of the Model Act.)

Repeal does not imply enactment was in force

38. (1) The repeal of an enactment in whole or in part shall not be deemed to be or to involve a declaration that such enactment was or was considered by the Legislature or other body or person by whom the enactment was enacted to have been previously in force.

(2) The amendment of an enactment shall not be deemed to be or to involve a declaration that the law under such enactment was or was considered by the Legislature or other body or person by whom the enactment was enacted to have been different from the law as it is under the enactment as amended

Amendment does not imply change in law

(3) The repeal of an enactment in whole or in part or the amendment of an enactment shall not be deemed to be or to involve any declaration as to the previous state of the law.

Repeal does not declare previous law

(4) A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language.

Judicial construction not adopted

(Note: This is the same as the Federal Act and section 25 of the Model Act)

39. (1) Where there is a demise of the Crown,

Effect of demise of Sovereign

(a) the demise does not affect the holding of any office under the Crown in right of ; and

(b) it is not necessary by reason of such demise that the holder of any such office again be appointed thereto or that, having taken an oath of office or allegiance before such demise, he again take such oath.

(2) No writ, action or other process or proceeding, civil or criminal, in or issuing out of any court established by an Act of the Legislature is, by reason of a demise of the Crown, determined, abated, discontinued or affected; but every such writ, action, process or proceeding remains in full force and may be enforced, carried on or otherwise proceeded with or completed as though there had been no such demise.

Continuation of proceedings

(Note: This is from the Federal Act. It has not previously been in the Model Act.)

SCHEDULE

Australia	Cyprus
Barbados	Gambia
Botswana	Ghana
Canada	Guyana
Ceylon	India

Jamaica
Kenya
Lesotho
Malawi
Malaysia
Malta
New Zealand
Nigeria
Pakistan
Sierra Leone
Singapore
Tanzania
Trinidad and Tobago
Uganda
United Kingdom
Western Samoa
Zambia

(Note: This Schedule varies slightly from the Schedule in the Federal Act.)

APPENDIX P

(See page 24)

THE INTESTATE SUCCESSION ACT

At the 1966 annual meeting of the Conference, R. H. Tallin, Esq., of the Manitoba Commissioners, reported on amendments to Uniform Acts. The report referred *inter alia* to an ordinance of the Yukon Territory amending its Intestate Succession Ordinance. The Ontario Commissioners were requested to consider the amendment and to report at the next meeting of the Conference on the desirability of amending the Uniform Act. (1966 Proceedings, p 19).

The Yukon Territory adopted the Uniform Act, with slight modification, in 1954. Section 3 of The Intestate Succession Ordinance, R.O.Y.T. 1958, c. 59, read as follows:

> "3. (1) Where a person dies intestate leaving a widow and one child, one-half of his estate shall go to the widow.
>
> (2) Where a person dies intestate leaving a widow and children, one-third of his estate shall go to the widow.
>
> (3) Where a child of an intestate has died leaving issue and such issue is alive at the date of the intestate's death, the widow shall take the same share of the estate of the intestate as if the child had been living at that date."

The Uniform Act and the Yukon Ordinance do not provide for the payment of a preferential share to the widow where the intestate dies leaving issue. Section 1 of O.Y.T. 1965 (2nd), c. 7 provides that section 3 is to be read subject to the provisions of section 18. Section 2 of O.Y.T. 1965 (2nd), c. 7 added a new Part II to the Ordinance reading as follows:

> "PART II
>
> SPECIAL RELIEF
>
> 18. Where a person domiciled in the Territory dies intestate leaving a spouse and a child or children under the age of twenty-one years, an application may be made to the Court by the spouse for an order directing that all the estate shall go to the spouse or such other order as the Court may see fit, the provisions of section 3 notwithstanding.
>
> 19. Any application hereunder may be made by notice of motion styled in the matter of the estate of the deceased.

20. Notice of any application shall be served upon the Public Administrator of the Yukon Territory and such other persons as the Court may direct and notice of the application shall be advertised in the Yukon Gazette at least 14 clear days before the notice is returnable

21. Subject to this Ordinance the practice and procedure of the Court upon applications in chambers shall, so far as the same are found to be applicable, apply to proceedings under this Ordinance

22. An application shall be supported by an affidavit of the applicant setting forth fully all the facts in support of the application.

23. In addition to the evidence adduced by the applicant, the Court may direct such other evidence to be given as it deems necessary."

It will be noted that the new section 18 applies only where a person dies domiciled in the Territory. Consequently, the section would have no application where a person dies intestate domiciled outside the Territory even though he dies owning an interest in immovables within the Territory, the succession to which would otherwise be governed by the law of the Territory. Clearly, where a person dies intestate while domiciled outside the Territory owning an interest in movables within the Territory, the succession law of the Territory would not apply and, *a fortiori,* s. 18 would not apply.

The second point to be noted is that the new section 18 is only to apply where a person dies intestate leaving a spouse and a child or children under the age of twenty-one years. In the latter circumstances, an application may be made to the Court by the spouse "for an order directing that all of the estate shall go to the spouse or such other order as the Court may see fit, the proceedings of section 3 notwithstanding." It is clear that it is only the spouse that is permitted to make an application, although the Court is empowered to make an order directing that all of the estate should go to the spouse, that the share to which she is entitled under the provisions of section 3 should be reduced, that the shares of the children should be decreased, increased or otherwise altered, or, indeed, that a distribution might be made in favour of persons not entitled by the provisions of section 3. The intent, however, seems clear that the new section is to empower the Court in proper circumstances to direct the distribution of an increased share to the spouse over that provided for in section 3. It is submitted that this is a salutary provision.

It is admitted that in normal circumstances where a person dies intestate leaving a widow and infant children, the widow is expected to provide the care and maintenance of her infant

children. To accomplish this purpose, it seems fitting that where necessary she should have recourse to the total assets of the estate of the intestate and not be circumscribed in her duties by some rigid formula of intestate distribution which would place capital assets outside her direct control. It will be recalled that in New Zealand, in the Australian States, in England, and in three Provinces of Canada (Alberta, Saskatchewan and Newfoundland), the remedial provisions of the dependants' relief or family maintenance legislation have been extended to the case of a total intestacy and in proper circumstances allow the Court to alter the statutory scheme of intestate distribution.

There is a sound case to be made that the surviving spouse of an intestate should receive the whole estate where there are only infant children surviving. She has the moral and legal obligation of maintaining the family unit, frequently without the opportunity of supplementing the family income with outside employment due to the existence of small children. It is true that the assets of the children may be applied for their education and maintenance, but this involves fiddle and fumble and the intervention of others representing the interests of the children, which interests include the preservation of their capital assets. In jurisdictions such as our common law provinces which accept neither community of property nor the division of matrimonial assets between the spouses on death, it is a doubtful privilege, where two or more children are involved, for the widow to apply her one-third share of the assets accumulated by joint endeavour with the husband towards the care and maintenance of the children. It is also a common experience that what is not required for the widow and her family passes on her death testate to the children in any event. If it be objected that where the estate is very large the surviving spouse should not receive it all to the exclusion of the children, leaving them dependent on the whim of the survivor, let it be noted that the law of intestate succession should not be designed for the rich They can afford advice and generally make wills. Intestate distribution should be designed for the average family in which the wealth of the parent does not significantly exceed (if, indeed, it meets) the actual needs of the children.

In England, the Administration of Estates Act, 1925, as amended by the Intestates' Estates Act, 1952, provides that where the intestate leaves a surviving spouse and issue, the surviving spouse takes

(1) all the personal chattels absolutely. Personal chattels are defined by section 55 of the Administration of Estates Act to include furniture, household effects and vehicles, but not chattels used in business or money or securities.

(2) five thousand pounds (£5,000) free of death duties with interest thereon at the rate of 4% from the date of death.

(3) a life interest in half of the residue of the estate. If the surviving spouse so elects, the personal representatives must redeem the life interest by paying the widow or widower its capital value. The other half of the residue and the reversion on the life interest is held upon statutory trusts for the issue. In addition, the Administration of Estates Act, 1925 empowers a personal representative to appropriate any part of the estate towards the satisfaction of any share. Thus, for example, an investment may be allocated to the widow in part satisfaction of her right to £5,000. This power of appropriation was extended for the surviving spouse by the Intestates' Estates Act, 1952 to include the matrimonial home

Although the Ontario statute governing intestate succession would scarcely rank as model legislation in this field, yet it does provide happily for a preferential share of $20,000 to the widow even where there are issue surviving, save in that situation where she is competing with step-children. (See S.O. 1966, c. 45, s 1(1)).

It will be appreciated that a provision such as that contained in section 18 of the Yukon Ordinance has adverse tax effects so far as the estate is concerned in those provinces which still levy succession duties. This arises from the fact that in a jurisdiction such as Ontario, if the widow were to receive the whole of the estate she would be taxed at a much higher rate than if the estate were split between her and the children. This adverse effect could be corrected by increasing the widow's exemption by the amount which is now allowed for infant children and adding it to her own.

It is recommended that the Conference give serious consideration to the amendment of the Uniform Act to incorporate the substance of the Yukon Ordinance, particularly in view of the fact that so few of the provinces have any provision for altering intestate distribution in those circumstances where its provisions cause hardship.

H. ALLAN LEAL,
of the Ontario Commissioners.

APPENDIX Q

(See page 24)

FOREIGN TORTS

The 1966 Report of the Special Committee on Foreign Torts included a tentative first draft of a *Foreign Torts Act* and a short commentary upon it. (See 1966 Proceedings pp. 58-62.) Since the 1966 meeting of the Conference there has been some significant judicial treatment of the problem of torts in the conflict of laws and comment upon the draft Act by specialists in the subject.

In June, 1967, at a round-table held at the annual meeting of the Canadian Association of Comparative Law in Ottawa, the undersigned presented for discussion a paper entitled, "What Should Be the Law in Canada Governing the Conflict of Laws in Torts?" The paper recounted the way in which the question came before the Conference of Commissioners on Uniformity of Legislation, the nature and scope of the problems raised, and the results of the extensive research that had been done since 1956 by the Special Committee concerning the complex theoretical and practical aspects of these problems. (See Proceedings for 1956, p. 62, 1957 p. 122, 1959 p. 79, 1963 p. 112, 1966 p. 58.) The foundation and purpose of the tentative first draft of a *Foreign Torts Act* were explained. A copy of this paper, including the draft Act, was sent in advance of the Ottawa meeting to everyone who was listed as teaching Conflict of Laws in the 1966 Directory of the Association of Canadian Law Teachers, with a covering letter inviting written constructive criticism.

Since Professor Moffatt Hancock was unable to be at Ottawa, he prepared a paper in which he very ably supported the draft Act, and sent a copy to the same Canadian law teachers. His paper, is entitled "Canadian-American Torts in the Conflict of Laws: The Revival of Policy-Determined Construction Analysis". It will likely be published in the Canadian Bar Review next year.

Although the tentative first draft of a *Foreign Torts Act* is set out in the 1966 Proceedings at page 62, it is included here for ease of reference:

Foreign Torts Act

1. When deciding the rights and liabilities of the parties to an action in tort the court shall apply the local law of the state which

has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a substantial connection with the occurrence and the parties the court shall consider the following important contacts:

(a) the place where the injury occurred;

(b) the place where the conduct occurred;

(c) the domicile and place of business of the parties; and

(d) the place where the relationship, if any, between the parties is centered.

3. When deciding which state, among the states having any contacts within section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.

In the paper, mentioned above, prepared and distributed by Professor Hancock in June, 1967, he commented concerning this tentative draft in part as follows·

"What is the source of this statute? Though it resembles in some respects the tentative drafts of the Restatement, Conflict of Laws (Second) for this topic, its general conception is of British origin. As long ago as 1949 Professor J. H. C. Morris suggested that English courts could reach more satisfactory results by using a flexible choice rule in the field of torts similar to the well-established rule for determining the proper law of a contract. In 1951 he developed this idea more fully in his well-known article, "The Proper Law of a Tort" In this article he suggested that American courts would find such a flexible choice rule more helpful and less constricting than the place of wrong formula. This forward-looking and persuasive article doubtless influenced, in part, the tentative formulation of the Restatement, Conflict of Laws (Second) and the reasoning of the New York Court of Appeals in the *Babcock* case (*Babcock v Jackson* (1963) 12 N.Y. (2d) 279). Apart from its general conception, however, the committee's statute differs markedly from both the Restatement (Second) and Professor Morris' pioneering proposal It is uniquely the product of the thinking of Dean Read and his colleagues.

"If this statute were adopted in any particular province what would be its effect? Primarily it would focus the attention of judges and advocates upon the real basic problem of choice cases, the determination of the scope of the divergent domestic rules involved by considering their purpose and effect. According to section 3, in deciding which state's law is to be applied, "the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied." The use of this technique has been frequently demonstrated throughout this article. It has occasionally been explicitly adopted by judges in the past and has probably always influenced their

thinking But the clumsy and simplistic *Phillips v Eyre* formula has always tended to obscure the real policy issues of the torts cases. This statute would restore those issues to their proper central position and completely eliminate the much criticized and overworked *Phillips v. Eyre* formula with its incidental absurdities.

"On the other hand it should be observed that the statute would not have the effect of overruling any of the cases discussed in this article. [*Howells v. Wilson* (1936) 69 Que. K.B 32, *Lieff v. Palmer* (1937) 63 Que. K B 278, *McLean v Pettigrew*, [1945] S.C.R 62, [1945] 2 D L.R. 65]. Indeed it would be more consistent with those cases than the *Phillips v Eyre* formula for the formula as applied in *McLean v Pettigrew* cannot be reconciled with *Lieff v. Palmer*. Moreover, the statute would not have the effect of overruling any other decisions of the Supreme Court or the Privy Council. This observation leads to a further question which has already been touched upon at several points: is it not possible for Canadian judges and advocates to avoid the extreme absurdities of the *Phillips v. Eyre* formula and to adopt the approach recommended by Dean Read and his committee without the aid of actual legislation? This suggestion can best be explained by a hypothetical example.

Suppose that in a case identical with *McLean v Pettigrew* (parties domiciled in Quebec, injury to guest in Ontario) the parties moved to Ontario after the accident so that that province became the most convenient place to try the action. The action was brought in Ontario and the trial judge delivered the following opinion (after stating the facts):

> At the time when this accident occurred both parties were domiciled in the province of Quebec which would have been their normal forum I am satisfied that under the law of Quebec the defendant was guilty of actionable negligence causing the plaintiff's injuries. Prior to the year 1935 the law of Ontario applied in cases such as this was virtually identical with that of Quebec and the plaintiff would have had a cause of action under the law of either province In that year, however, the Ontario legislature enacted the "guest statute" (25 Geo. V. Ont, c. 26, s 11, (1935), which, in effect, prohibited all recovery by the plaintiff in a suit such as this. It is common knowledge that this statute was enacted with a dual purpose. It was intended to protect uninsured defendants against claims by persons who were receiving the gift of a free ride and to protect insurers against the possibility that host drivers and guests might work in collusion against them The statute has recently been amended to permit recovery upon a showing of gross negligence but its purposes remain the same. (By 14-15 Eliz. II, Ont, c 64, s 20(2), 1966). The ostensible beneficiaries of the statute have always been Ontario residents and their insurers I cannot believe that our legislature intended to extend this protection to a Quebec host driver and his insurer as against another Quebec resident merely because their accident occurred in Ontario It seems to me that this case should be decided as if the statute had never been passed.

> Defendant's counsel has contended that to apply Quebec law in this case would be inconsistent with the *Phillips v. Eyre* formula which has been reiterated many times by courts of the highest authority. Strictly speaking, that formula purports to deal only with the case of a tort committed *outside* the forum. But the first branch of the formula clearly implies that the court of the forum will invariably apply its own law to torts committed there. And on this assumption the formula appears to forbid the enforcement of any cause of action not recognized by the forum's domestic law. The language of the formula is very broad indeed and as applied to the present case it can only be regarded as the sheerest dictum. The two leading cases in which it has been applied to bar a plaintiff from recovery are all clearly distinguishable from this one. (*O'Connor v. Wray*) [1930] S.C.R. 231; *The Halley* [1868] L R. 2 P.C. 193. In each case the defendant was a domiciliary of the forum whom the law in question was designed to protect. I prefer to rest my judgment upon what I believe to be the proper construction of this statute as applied to the facts of this case.
>
> The case of *McLean v. Pettigrew* clearly indicates that if this action had been litigated in Quebec the courts there would, in effect, hold that our guest statute ought not to be applied to this case. Though I would not consider myself bound by their opinion in such a matter I may say that their view confirms my own conclusion regarding the proper construction of our statute.
>
> Would this judgment be reversed on appeal by higher Canadian courts? Would it receive the strong commendation of Canadian commentators? The answers to these questions must ultimately come from Canadian judges and commentators. In the meantime let us hope that Dean Read's report receives the recognition and support that it so richly deserves."

Professor Jean-G. Castel participated in the round-table at Ottawa, explaining the position being taken by the revisors of the Civil Code of Quebec and expressing his views concerning the Special Committee's tentative draft Act. It appears that the torts rule in the revised Quebec Civil Code may read. "*Article 16. Faits juridiques*:—La responsabilité civile extracontractuelle est régie par la loi du lieu de survenance du préjudice, sauf l'illicéité du fait générateur du préjudice, qui est régie par la loi du lieu où tel fait s'est produit." [Extra-contractual civil liability is governed by the law of the place where the damage occurred, except for the wrongful character of the act causing the damage which is governed by the law of the place where that act is done.] He said that this text is only a preliminary draft, represents a compromise, and that in the end another rule may possibly be adopted by the Private International Law Committee of the Office of Revision of the Civil Code. This preliminary

draft is a version of the place of wrong rule that has been rejected by the American Law Institute's Restatement Second.

Discussing the *Babcock* case, Professor Castel observed that the New York court was careful to point out that there is no reason why all issues arising out of a tort claim should be resolved by reference to the law of the same jurisdiction. Accordingly the law of the place where the act that caused the injury was done should determine the standard of conduct of the actor, for example, in the case of the driver of an automobile, whether he should drive on the right or left hand side of the road. He drew attention to the vague and loose terminology used by the court in stating its new rule and commented that while it is meant to do justice in the individual case it is neither simple nor certain in its application. He explained that its application does not consist of merely compiling lists of the contacts with each of the states involved and selecting the law of the state with which there happens to be the longest list of contacts. Actually the new rule requires the counting of weighted contacts since some contacts are more significant than others in the context of the particular transaction out of which the issue arose. Thus, in some cases the place of conduct weighs more than the domicile of the plaintiff, while in another case the fortuitous nature of the place of conduct might reduce its weight as a contact. The court will group contacts in order to determine the centre of gravity or the most significant contact. "A choice must be made in each case between fortuitous contacts and significant ones."

With reference to choosing the proper law from among the states with which there are significant contacts by the process of weighing the respective policies and interests of those states and those of the forum, Professor Castel asked "Where several states have different or conflicting policies and also legitimate interests in the application of these policies, how will the forum weigh the competing interests or evaluate their relative merits and choose between them accordingly, particularly when this choice might involve applying the foreign law and rejecting the forum's law?" He added:

> Furthermore, in order to properly balance interests or policies, the court must be sure it adequately formulates the interests or policies weighed. The interests or policies to be compared must be expressed in equivalent terms if the selection is to mean something. This is not

> easy and might render the weighing process almost impossible. In most cases it will be very difficult to establish guidelines to be used to formulate a foreign interest or policy.

He went on to say that so far Canadian courts have never really concerned themselves with the policies embodied in the laws they apply or whether any state or province has an interest in having its law applied. He drew attention, however, to *Abbott-Smith v. Governors of University of Toronto* (1964), 45 D.L.R. (2d) 672, in which Mr. Justice Currie in the Supreme Court of Nova Scotia, declared in a dissenting opinion that "If one day there is to be effective clarification of Order XI (1), [service *ex juris*] or if the opportunity is taken to apply a new doctrine, then I should prefer that the doctrine be that of the proper law of the tort as propounded by Professor J. H C. Morris in Proper Law of a Tort (1951), 64 Harv. L Rev 886".

After explaining the various considerations that might influence the adoption of a particular rule of choice of law in this field of conflict of laws, Professor Castel expressed the opinion that it would be better if the content of the rule depended upon the nature of the tort and that there is no need to establish an *a priori* principle to cover all tort cases.

It will be recalled that in 1965 the Commissioners were supplied with copies of the reports of two American landmark cases. One was a decision of the New York Court of Appeals, *Babcock v. Jackson* (1963) 12 N.Y. (2d) 471, (referred to above by Professor Hancock as the *Babcock* case, and by Professor Castel as *Babcock v Jackson,* and the other was *Griffith v. United Air Lines, Inc.* (1964) 203 A. (2d) 706, decided by the Pennsylvania Supreme Court. It was in the light of the *Babcock* and *Griffith* cases that in 1966 the Special Committee ventured to prepare the tentative first draft of a *Foreign Torts Act,* keeping in mind Professor Cheshire's admonition that certainty would be jeopardized and confusion worse confounded by crude resource to a proper law doctrine. (Cheshire, *Private International Law,* 7 ed. (1965) 254.) Although, as Professor Hancock has said, the Special Committee's tentative first draft differs from the Restatement Second, the judicial techniques employed in the *Babcock* and *Griffith* cases as refined in later cases would be relevant when applying the rule stated in section 3. With this and the remarks of Professor Castel and the other commentators in mind, let us look again at these and some later cases.

In the *Babcock* case Judge Fuld, for the majority of the court, applied to torts the doctrine hitherto applied by the same court in conflict of laws cases involving contracts. He said:

> Justice, fairness and "the best practical result" may be achieved by giving, controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation. The merit of such a rule is that . . . it gives to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context, thus allowing the forum to apply the policy of the jurisdiction "most intimately concerned with the outcome of (the) particular litigation".

The facts in *Babcock v Jackson* were as follows

The plaintiff, a gratuitous passenger in the defendant's motor car, was injured in an accident that occurred in Ontario. At the time, the parties, who were New York residents, were on a weekend trip to Canada. The trip had commenced in New York State where the car was licensed, insured and usually garaged. At that time an Ontario statute absolved drivers from liability towards their gratuitous passengers. New York law contained no similar provision. In allowing the action in New York for negligence the judge said

> Comparison of the relative "contacts" and "interests" of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal. The present action involves injuries sustained by a New York guest as the result of the negligence of a New York host in the operation of an automobile, garaged, licensed and undoubtedly insured in New York, in the course of a week-end journey which began and was to end there. In sharp contrast, Ontario's sole relationship with the occurrence is the purely adventitious circumstance that the accident occurred there New York's policy of requiring a tortfeasor to compensate his guest for injuries caused by his negligence cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases (see, e g, 1930 Sen. Int No. 339; Pr No 349; 1935 Sen Int. No 168; Pr No. 170; 1960 Sen. Int. No 3662, Pr No. 3967)—and our Courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders. *Per contra,* Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law The object of Ontario's guest statute, it has been said, is . . . to prevent the fraudu-

lent assertion of claims by passengers, in collusion with the drivers, against insurance companies . . . .

In *Griffith v. United Air Lines* the Pennsylvania Supreme Court approved the reasoning in the *Babcock* case, and said:

> . . . after careful review and consideration of the leading authorities and cases, we are of the opinion that the strict *lex loci delicti* rule should be abandoned in Pennsylvania in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court.
>
> It must be emphasized that this approach to choice of law will not be chaotic and anti-rational. The alternative to a hard and fast system of doctrinal formulae is not anarchy. The difference is not between a system and no system, but between two systems; between a system which purports to have, but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors. Harper, "Policy Bases of the Conflict of Laws: *Reflections on Rereading Professor Lorenzen's Essays,*" 56 Yale L.J. 1155, 1157-1158 (1947).

In 1966 the New York Court of Appeal, in *Macey v Rozbicki* (18 N.Y. 289), for a second time dealt with a personal injury suit in which the question of law was: should the law of the place of wrong, which would be Ontario's "guest statute" or the law of New York State be applied?

In this case the parties, who were both New York residents, intended to remain in Ontario, where the injury to the plaintiff guest passenger occurred, for a longer time than did the parties in the *Babcock* case. The majority of the court simply followed *Babcock v. Jackson,* but in a concurring opinion Judge Keaton placed increased emphasis upon the policies manifested in the relevant legislation of New York and Ontario. His significant language was:

> In determining which law should govern cases involving the guest statute of a foreign jurisdiction and whether a particular state has an interest in the application of its law it seems to me to be of no more than minor significance where the guest-host relationship arose, where the trip was to begin and end, and how short the visit of the parties was in the place where the accident occurred. Neither of these factors has any relation whatever to the New York policy of affording recovery to injured residents of this State or for that matter to the policies of other jurisdictions in denying a remedy.
>
> The only facts having any significant bearing on the applicable choice of law in guest statute cases are the residence of the parties and the place in which the automobile is insured and registered. As we noted in *Babcock*, only these facts have any relation to the policies

> sought to be vindicated by the *ostensibly* conflicting laws. And here as in *Babcock* neither the policies of New York nor Ontario will be furthered by denying recovery Indeed in applying the New York law and allowing this cause of action both New York's and Ontario's policies are furthered. Ontario, as any jurisdiction in which a person is injured, has a definite interest in affording the injured person a remedy so that those of its residents who rendered aid and assistance will ultimately be recompensed . . . . While in cases involving suits by injured passengers against the owners of the automobiles Ontario has decided to give priority to the protection of another class of its citizens—insurers and the purchasers of insurance—where neither of these beneficiaries are involved, there is no longer any interest in denying recovery.

Later in 1966, after the tentative draft Act had been given to the Commissioners, the Supreme Court of New Hampshire applied a policy oriented principle in a guest statute case, where the plaintiff was the wife of the defendant and was injured in Vermont while a passenger in her husband's motor car driving across that State en route from one point in New Hampshire to another. Their home was in New Hampshire and their car was registered and insured in that State. In *Clark v. Clark* (1966) 222 A. 2d 205, Chief Justice Kenison held that the New Hampshire law should be chosen

Although the need for brevity prevents a complete inclusion of Chief Justice Kenison's discussion, it is so directly pertinent to the thinking of the Special Committee when it prepared the tentative draft Act that excerpts are quoted here at some length:

> Vermont has a guest statute under which a host is liable to his automobile guest only if the injuries are caused by the "gross and wilful negligence" of the operator. 23 V.S A. 1491. This state has no guest statute and a guest may recover if the injuries are caused by the host's lack of ordinary care under the circumstances. . . .
>
> In years gone by the choice of law rule of such cases was thought to be settled and the governing law was invariably that of the place where the injury occurred. . . . The only virtue of the old rule, apart from the fact of its pre-existence, was that it was easy for a court to apply. It was easy to apply because it was a mechanical rule. It bore no relationship to any relevant consideration for choosing one law as against another in a torts-conflicts case. . . .
>
> Some jurisdictions, experiencing the same dissatisfaction with the mechanical place of wrong rule, have substituted a straight characterization approach. This approach would reach different results according to whether a torts case could be technically re-characterized as a contracts case, as a family law case, as one presenting a procedural

question, or under some other key-number section heading which would enable a court to vary its choice of law subjectively. This court prefers not to rely on such a technique because it overlooks policy considerations that should underlie choice of law adjudication. See von Mehren & Trautman, The Law of Multi-state Problems 78-79 (1965).

The relevant considerations in choice of law decisions are fairly well known. . . .

One of the considerations is predictability of results. It basically relates to consensual transactions, in which it is important that parties be able to know in advance what law will govern a transaction so that they can plan it accordingly. Reliance upon a predictable choice of law protects the justifiable expectations of the parties. Also, it assures uniformity of decision regardless of forum, thus discouraging "forum shopping." Except for the evils of forum shopping, the predictability consideration does not have much to do with automobile accident cases. They are not planned.

A second consideration is the maintenance of reasonable orderliness and good relationship among the states in our federal system. . . .

Simplification of the judicial task is another important consideration. . . . But simplification of the judicial task is not the whole end of law, and opposing considerations may outweigh it

A fourth consideration is inherent in the obvious fact that every court is more concerned with the advancement of its own state's governmental interests than with those of other states. Governmental interest, however, is not necessarily synonymous with domestic law. A state often has no particularly strong policy in reference to local rules of law which happen through the vagaries of legislative or judicial law making to differ from a neighbor's view. Strong policy concerns can underlie local rules, and they sometimes do, but often they do not. In most private litigation the only real governmental interest that the forum has is in the fair and efficient administration of justice, which is usually true of automobile accident cases.

Finally, a fifth consideration, too often disguised, is the court's preference for what it regards as the sounder rule of law, as between the two competing ones. Professor Cavers has for years been pointing out that in choice of law cases courts have the opportunity to make, and do make, a choice between rules of law, as distinguished from the choice between jurisdictions that they have traditionally purported to make in conflicts cases. Cavers, The Choice of Law Process 9, 79 (1965); Cavers, Re-Stating the Conflict of Laws: The Chapter on Contracts, XXth Century Comparative and Conflicts Law 349, 350, 358 (1961). We prefer to apply the better rule of law in conflicts cases just as is done in nonconflicts cases, when the choice is open to us. If the law of some other state is outmoded, an unrepealed remnant of a bygone age, "a drag on the coattails of civilization" (Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1216 (1946), we will try to see our way clear to apply our own law instead If it is our own law that is obsolete or senseless (and it could be) we will

try to apply the other state's law. Courts have always done this in conflicts cases, but have usually covered up what they have done by employing manipulative techniques such as characterization and renvoi. Morse, Characterization: Shadow or Substance, 49 Colum. L Rev 1027 (1949).

After this review of the relevant choice-influencing considerations, application of them in the present case becomes not unduly difficult, and a lawyer advising these parties—either the plaintiff or the defendant, or insurance company—after the accident could anticipate with reasonable certainty that the law suit would be brought in a New Hampshire court under New Hampshire law Predictability of legal results in advance of the event is largely irrelevant, since automobile accidents are not planned. The expectations of the present parties, if they had any, as to legal liabilities and insurance coverage for accidents, would be with reference to their own state, and they would think in terms of lawsuits brought in New Hampshire courts under New Hampshire law, if they thought about the matter at all . .

As to New Hampshire's governmental interests, it is our duty to further them. We in this instance believe in our own law. Our negligence rule is common law, made by this court, and our Legislature more than once has refused to change it. We have an interest in applying it to New Hampshire residents, especially when such advance expectations as they may have had, based upon their domicile in New Hampshire, their maintenance of a car under our laws, and going on a short trip that was both to begin and end here, would have led them to anticipate application of our law to them. Unlike "rules of the road," as to which every consideration requires obedience to the rules that prevail at the place where the car is being driven, the factors that bear on this host-guest relationship all center in New Hampshire

The only reasons that have ever been given or that Vermont could possibly have, for enactment of its guest statute are (1) to protect kindly hosts from ungrateful guests ("don't bite the hand that feeds you"), and (2) to protect liability insurance companies from suits brought by guests colluding with their hosts. Ehrenzweig, Conflict of Laws, s. 220 (1962). Vermont's interests under its statute are in suits brought in its own courts affecting hosts, guests and insurance companies subject to its jurisdiction. Our primary interest arising out of our ordinary negligence law correspondingly applies to suits in our courts affecting people and relationships with which we have a legitimate concern. That interest in this case is a real one

Finally, we conclude that our rule is preferable to that of Vermont. The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's, as a result of vigorous pressures by skilful proponents. Legislative persuasion was largely in terms of guest relationships (hitchhikers) and uninsured personal liabilities that are no longer characteristic of our automotive society Cavers, The Choice of Law Process 297 (1965). The problems of automobile accident law then were not what they are today. New Hampshire never succumbed to this persuasion No American state has newly adopted a guest

statute for many years. Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them. Pedrick, Taken for a Ride: The Automobile Guest and Assumption of Risk, 22 La. L Rev. 90 (1961); Comment, the Ohio Guest Statute, 22 Ohio St. L. J. 629 (1961) Though still on the books, they contradict the spirit of the times. Leflar, Choice-Influencing Considerations on Conflicts Law, 41 N.Y.U.L. Rev. 267, 278, 307 (1966). Unless other considerations demand it, we should not go out of our way to enforce such a law of another state as against the better law of our own state. Weintraub, A Method for Solving Conflicts Problems: Torts, 48 Cornell L Q. 215, 220 (1963).

Taken altogether, this analysis of the relevant choice of law considerations leads clearly to the application of New Hampshire's law in the present case.

In the course of the letter to the Canadian teachers of Conflict of Laws inviting written constructive criticism of the Special Committee's tentative draft Act it was said:

"The situation appears to be that there is a choice to be made among four different actions as follows:

(1) Leave the *Phillips v Eyre* rule alone, or
or

(2) Change the second branch of the rule as recommended by the Canadian Bar Association to read 'the act must give rise to a civil liability under the law of the place where the act was done', or

(3) Adopt the place of wrong rule as is apparently being done by the commissioners who are revising the Quebec Civil Code, or

(4) Adopt a 'most substantial connection' rule substantially of the nature of the tentative first draft of a *'Foreign Torts Act'* prepared by the Special Committee in 1966."

Five of the Canadian law teachers who were invited to criticize the tentative draft have responded. One of them, a teacher of long experience, rejects the reference to "the purpose and policy" in section 3 of the tentative draft Act as being "alarming and misleading", and would retain the principle of the *Eyre-Machado* cases ameliorated by consideration of "social environment". He has submitted a draft statute of his own supported by a reasoned argument. His draft reads·

1. (1) No action may be brought in any court of this Province except on a cause of action known to the law of this Province

(2) Where the action is in tort, this section requires the existence of the particular head of tort

(3) Where the defendant is alleged to be vicariously liable, this section requires the existence of the particular head of vicarious liability.

(4) Where the plaintiff has been contributorily negligent this section requires that his action be not thereby barred in the view of the law of this Province.

2. (1) It shall be a defence to any action in tort that, under the law governing the social environment of the harmful activity, the plaintiff is prevented by his own part in the transaction from claiming against the defendant, or the defendant is neither civilly nor criminally at fault as against the plaintiff.

(2) The "social environment" shall mean the local public place where it was the background of the harmful activity or of the events leading up to it; but otherwise shall mean the community which constituted that background, even if restricted to the parties themselves

(3) The "harmful activity" shall mean the infliction of intended harm, or the activity resulting in unintended harm.

(3) Nothing in section 2 shall apply to any issue upon the effect of:

(a) a contract, express, implied or imputed, and whether or not between the parties; or

(b) the transmission or other transfer of any right or duty, or the absence of such transmission or transfer; or

(c) a special dispensation by public authority from the ordinary law, whether granted before or after the event

The author of the above-quoted draft, J. A. C. Smith, supports each provision with notes in detail. Considerations of space permit including here only a paragraph of his general introductory statement, where he says:

It is submitted that a consistent set of rules may now be discerned, as a result of juristic discussion perhaps more than of judicial decision, but that the (Special) committee's draft does not embody them. It is submitted that the accompanying draft would be adequate. Particular attention is invited to the proposal of a triple rule instead of the double rule to which we are accustomed. Much of the injustice, hypothetical or real, which is laid at the door of the familiar double rule, is the result of its application to issues to which it is irrelevant. Guest-statutes, it will be submitted, furnish one example of this. (For the principles embodied in the above-quoted draft Act see J A C. Smith, "Torts and the Conflict of Laws", (1957) 20 Mod. L. Rev. 447).

Section 1: The division into 4 subsections has the advantage of concentrating attention on the real points of controversy, which are subsections 3 and 4.

The other law teachers responding by letter were four scholarly young men who have included in their studies the works of David Cavers, Albert Ehrenzweig and Brainerd Currie. The latter two are authors who have severely criticized the second Restatement as being meaningless and nihilistic and who have distrusted all statutory formulations.

One of these law teachers, D. J. MacDougall, stated:

"I would be very grateful if you can present my views which, in summary, are as follows:

(1) No single choice-of-law rule can adequately deal with all torts. I don't think it should be assumed that trespass to the person, negligence and defamation are so similar that one comprehensive choice-of-law rule can cover all cases

(2) Generally speaking I would like torts cases to be decided on an *ad hoc* basis—with due regard being given to the governmental and individual interests involved.

"No doubt you will recognize my inheritance from Currie, Ehrenzweig and Cavers To the extent that they differ, my own views are closest to those of Currie's—although I would allow the courts to 'weigh interests' I am sceptical about the court's ability to fashion new 'principles of preference' or 'true rules' at this stage.

"If I can make a brief criticism of the 4 possibilities you have outlined in your letter:

1. The existing *Phillips v. Eyre* rules are quite intolerable. They place unnecessary obstacles in the path of the plaintiff.

2. An application of the Canadian Bar Association's recommendation would be fair and reasonable in say, 80 per cent of the cases. But I see no reason why it must be applied in a machine-like fashion in the other 20 per cent of the cases where, in my view, other considerations would be more important

3. I should preface my remarks about the proposal by the commissioners revising the Quebec Civil Code by saying that I have not had an opportunity to study their proposal in detail. However, if my understanding of the proposal is correct, I would reject it on two grounds. (a) This formulation of the rule might tend to conceal the court's reasoning processes; or (and this in my view is a more serious consequence) (b) the courts might regard this rule as requiring them to formulate technical rules for 'localizing' the tort

4 The difficulty with the 'most substantial connection' test is that it is virtually meaningless. The whole problem in any conflicts situation is to determine which law is 'most significant.' This 'rule' merely restates the problem It does not solve it My objection to the rule is that it invites the court to state its conclusion as though that conclusion was its own justification. In other words, the court's reasoning processes would be concealed.

"If I had to choose between these four proposals, I would choose the 'most substantial connection' test — but only because it is virtually meaningless and thus gives maximum opportunity for *ad hoc* determination of particular cases."

A second young man, Marvin G. Baer, rejects all four of the proposed treatments of the subject that have been examined by the Special Committee, and would list those particular tort issues that create conflicts and try to find the most appropriate law to apply when faced with each particular conflict. He wrote in part, with some pungency:

"Given such a list, we should try to find the most appropriate law to apply when faced with each particular conflict. Naturally, each individual issue would not have to be attacked in isolation. Analogies might be drawn and groupings made. However, in Currie's words, 'We are beginning to recover from a long siege of intoxication resulting from overindulgence in generalities; for a while, at least, total abstinence should be enforced.'

"Of course, such a list will expand as some states abolish old rights of actions and some states create new ones. However, at least in the latter case the courts, even now, are faced with having to examine specific issues. They do this now using the language of classification. Would it not be better to recognize that we have a new type of conflict that requires a new rule? This rule may be like an existing one but if so, it should be for good reason. Also, the reasons should be expressed and not hidden behind the pretense that all that is being done is to find the existing rule that properly covers the conflict.

"However, if the Special Committee is intent on drafting a short, three section act to cover all foreign torts, I think your second suggestion is the best solution—i e change the second branch of the rule to read 'the act must give rise to a civil liability under the law of the place where the act was done.' This might be combined with a rule allowing the court to decline jurisdiction if the forum has no other connection with the parties or event. This rule is easy to apply, allows scope for the policy behind local statutes which, after all, are not drafted with just local residents in mind, and does provide a defence based on reliance on the law where the defendant acted.

"The place of wrong rule is meaningless for most cases of enterprise liability .

"Your fourth suggestion is to adopt what Professor Ehrenzweig characterizes as the nihilism of the Restatement Second. The rule suggested in the draft Act is no rule at all. Apart from listing some traditional contacts, it gives no guidance to the court on what is the yardstick for measuring the most substantial connection. Assuming something more than just counting contacts is necessary, to which contacts do we give more weight?

"I have some sympathy for the argument that a new approach is needed, that the courts should be free to devise new rules, and that Canadian judges are not going to do this without a little statutory push. If I had more confidence in the ability and willingness of Canadian courts to take on a creative role, I think the Committee's no-rule, which after all only tells the courts to do what is 'proper', would be the best solution.

"However the experience in New York in the four years since *Babcock v. Jackson* convinces me that the draft Act would only lead to anarchy. There, in the 40-odd cases which have purported to follow Babcock, you see a fairly sophisticated and knowledgeable court picking significant contacts on whim."

The third of the young law teachers who commented upon the four possible recommendations that might be made to the Commissioners by the Special Committee, John Swan, expressed himself with equal vigour in his letter:

"If I may refer to the four suggestions made in your letter in order, my comments are:

1. Retention of *Phillips v Eyre.*—Absolutely unacceptable. The recent case of *Anderson v. Eric Anderson* (1965-66) 114 C.L.R. 20 in the High Court of Australia demonstrates the inappropriateness of this approach. In addition, the scope of *Machado v. Fontes* is not clear, e g. *Koop v. Beeb* (1951) 84 Com. L.R. 629, and *McElroy v McAllister,* (1949) S C. 110, 1949 S L.T. 139.

2. Actionability by the *lex loci actus.*—Equally unacceptable. This may overrule *Machado v. Fontes* but then *McLean v Pettigrew* is quite clearly the 'right' result (even if for the wrong reasons) There can be no justification for a case like *McKinnon v. Iberia Shipping,* (1955) S C 20; 1955 S.L T. 49

3. Place of wrong rule—There seems to be only dubious value in adopting a rule that has been, or is being, abandoned in the jurisdiction where it once ruled The recent rejection of the whole basis of Restatement I by the Tentative Drafts of Restatement II and by such cases as *Babcock v Jacleson,* . . indicates the folly of adopting this proposed solution

4. 'Most substantial connection'.—I think that this offers by far the best hope for Canada. I agree with the criticisms and suggestions put forward by yourself and by Moffatt Hancock

"The exact method for achieving the desirable result will almost certainly require legislation The only thing that bothers me is how far we can trust the courts. As Professor Hancock points out, there certainly seems to be a peculiar mystique attached to choice of law rules. I cannot understand why certainty is said to be so desirable in Conflicts when it is not held in the same veneration in a case purporting to follow *Donoghue v. Stevenson* For what it is worth, I may say that in trying to get my students and colleagues to accept an approach

similar to that which you have advocated (though I have tended to make my analysis more in terms of Cavers' approach) I have encountered considerable difficulty. Perhaps the root of the problem in trying to get any reform accepted by judges or the profession lies in the twin facts that most people think that Conflicts is far too difficult to understand and that a book like Dicey gives a spurious impression of logical form, black letter law and simplicity."

The fourth of the young men, C. Gordon Bale, wrote:

"I think that a Foreign Torts Act is necessary and I fully support your tentative first draft. I very much doubt that the Canadian courts will be able to evolve a more rational rule without assistance."

It is apparent that the nature of the reaction of each of the critics to the tentative draft Act varies according to his scholarly background. The criticisms and suggestions of all are worthy of very careful examination. It is to be hoped that in the instances where they recorded immediate reactions they will assist the Special Committee and the profession in general with constructive suggestions based upon more deliberation. These could well be presented in a debate concerning the merits of the tentative first draft of the Foreign Torts Act conducted in the law journals, the law schools and elsewhere. The lack of confidence expressed by some of them in the creativity and objectivity of Canadian judges may be well supported by some of their past performance. However, Mr. Justice Ritchie in the Supreme Court of Canada did well recently when applying the new "closest and most substantial connection" test to determine the proper law of a contract. His approach and method in *Imperial Life Assurance Company of Canada v. Colmenares* (1967) 62 D.L.R. (2d) 138 are revealing and his reasoning processes do not appear to be concealed.

Meanwhile courts continue to be impelled by stare decisis to follow the *Halley* and the *Eyre* precedents. In *Anderson v. Eric Anderson Radio and T V. Pty., Ltd.* (1966) Com. L.R. 20, in the High Court of Australia, as is shown by Professor John Swan of the University of Toronto Law School, (in his perceptive commentary in (1967) 3 University of British Columbia Law Rev. 185), Mr. Justice Windeyer "referred to the rule in *Phillips v. Eyre* and also to some of the academic criticism that had been directed against it. . . . He saw his duty as being to ignore the clashing 'professorial dicta' and looked instead to authority. . . ." Professor Swan, after reviewing the unsatisfactory state of the law and some of the suggested cures, continues: "If then the suggestion that we choose the *lex loci*

actus can only lead to the 'right' result by chance (although it may well lead to the right result in the majority of cases), and, if similarly the application of the *lex fori* can only occasionally provide a sensible result, we must develop more discriminating tests that will enable us to reach the 'right' result in almost all cases. To develop such tests it will be necessary to abandon the search for any simple solution and recognize the fact that choice of law problems are much more complex than is generally realized.

"As an example of a new approach that seems likely to enable the courts to make better decisions there is the recent case in New York, *Babcock v Jackson.* . ."

Reported in 1967 is *Boys v Chaplin* [1967] 2 All. E.R 665 in which the English Queen's Bench Division applied the *Phillips v Eyre* rule. Like *McLean v. Pettigrew,* "the right" decision happened to be reached for the wrong stated reason.

The draft Act has aroused some interest in England. After receiving Professor Hancock's paper, Professor J. H. C. Morris of Magdalen College, Oxford, to whom the legal profession, including the Special Committee, owes the "most substantial connection" concept, replied:

> "I am extremely grateful to you for sending me a copy of your brilliant paper on Canadian-American torts in the conflict of laws. I am taking the liberty of sending it to our Law Commission . . . in an effort to get them to take up the reform of the rules in *Phillips v. Eyre.* The Canadian model statute provides just the opportunity I have been looking for."

Professor Hancock also sent his paper to Dr. Geoffrey Cheshire, author of the best of the English text books on conflict of laws, now in its seventh edition. In the course of his acknowledgment Dr. Cheshire said:

> "The *Phillips v. Eyre* rule, as it has come to be understood, is the apotheosis of folly, and personally I have gradually been converted to the view that the Dean Read approach to the problem, or at any rate something very like it, is the correct solution."

There is general agreement that the law governing the conflict of laws of torts should be reformed. The Special Committee has made its tentative proposal after careful research and after study and analysis of most of what has been written on the subject. The aim has been to find a solution that will assist the courts to bring their decisions into harmony with the real facts of community living. Since a uniform *Foreign Torts Act*

is meant to provide a new beginning, it is in the form of a general rule with a prescribed flexible method for applying it. No attempt has been made to formulate rules governing specific torts, in the belief that the courts themselves are best able to shape applications of the general rule to them in the light of experience. It is believed that the approach and method of the tentative draft are basically sound. The method prescribed by the draft Act for determining which particular state of those having the designated contacts has the most substantial connection with the occurrence and the parties, that is by considering chiefly the purpose and policy of each of the rules of local law that is proposed to be applied, is intended to focus the judicial mind upon the real problem of choice, that of determining which of the conflicting rules of law is most suitable for application to the tort issue that is being adjudicated. It is believed that this method for measuring substantiality of connection is flexible enough to permit the use of a variety of choice-influencing factors, such as comparative governmental and individual interests, preference for the "better law" as avowed in *Clarke v Clarke,* and even the public policy of the forum, without being so flexible as to be justifiably criticized as being meaningless. As Professor Hancock has demonstrated, the road is open for a Canadian court to adopt this approach and method without legislative assistance. Perchance some court may take this road. Meanwhile it is recommended that the Committee be authorized to continue to work toward improving the Act in detail with the purpose of producing an acceptable uniform model act for adoption by the Conference in the near future.

HORACE E. READ,
Chairman, Special Committee on Foreign Torts

NOTE. The Court of Appeal decision in *Boys v Chaplin* is reported in the Times Law Report of December 6, 1967. Lord Denning, M.R, and Lord Upjohn concurred in affirming the judgment of the trial court. Lord Denning held that *Phillips v. Eyre* was not binding on the Court of Appeal and that "the Court should apply the proper law of the tort, the law of the country with which the parties and the act had the most significant connexion". On the facts of the case this was England. Lord Upjohn based his decision on *Phillips v. Eyre* He said that he rejected any idea that the principle of "proper law of the tort" should be introduced into England, however convenient it might be in a vast country like the United States which had fifty states with no system of law of torts common to all. [In Canada, however, *McLean v Pettigrew* is binding.]

APPENDIX R

LIMITATION OF ACTIONS

(See page 24)

REPORT OF THE ALBERTA COMMISSIONERS

In 1966 the Conference agreed to re-examine the Uniform Limitation of Actions Act and referred the matter to the Alberta Commissioners (1966 Proceedings 26).

The Uniform Act was adopted in 1931. The prairie provinces and Prince Edward Island enacted it soon after. Since the war the Northwest Territories and Yukon have followed suit. The Act is a great improvement on the hodge-podge of statutes borrowed from England, which the common law provinces had. When Dean Falconbridge, in 1943, wrote on "The Disorder of the Statutes of Limitations" (21 Can. Bar Rev. 669) he was speaking of the provinces that had not adopted the Uniform Act. He pointed out that the Uniform Act was a great improvement. However, he suggested amendments based on the new English Act of 1939. The first of these extinguishes the title to a chattel after the period for suing for conversion has expired. The second improves the provisions dealing with actions against trustees. The Conference accepted his suggestions and, in 1944, amended the Uniform Act accordingly. However, the amendments have not been adopted even by all the provinces that have the Uniform Act.

In proposing a re-examination of the Act, the Alberta Commissioners had in mind mainly tort actions. This report deals mainly with that subject but it also considers other subjects that call for re-examination. Our recommendations respecting tort claims are based largely on Alberta's 1966 amendments (1966, c. 49) which had been recommended by the Benchers' Law Reform Committee.

PART I — GENERAL

This Part deals with claims in tort and on contracts not related to land; it is a modernization of the 1623 Act. Our main criticism of the present law on limitations in tort is not directed to the Uniform Act but at the proliferation of special Acts. The Limitation Act should be a code but the fact is that in many common law provinces it rarely applies in tort claims. The defendant can invoke the Highways Act for automobile

cases; or, if a municipality, a special provision in a municipal Act; or, if a hospital, a special provision in the Hospitals Act, and, very often, an even more stringent Act, the Public Authorities Protection Act. These are of two types:

(1) those that provide a short period, and

(2) those that require notice before suit.

These special statutes may be overlooked. Besides they raise problems as to which of two special Acts applies.

We see no reason for a short period in vehicle cases or in actions against municipalities, though there is justification for the requirement of notice in snow and ice cases. England does not have these special provisions and, recently, repealed the Public Authorities Protection Act. The only opponents were some public authorities.

Certain special provisions must remain, e.g., those in the Fatal Accidents Act and in survival legislation. They should, however, be put in the Limitations Act. There is one other special limitation that we think should be preserved and moved into the Limitations Act It has to do with actions against physicians, dentists and chiropractors. These provisions make time run from termination of the defendant's services in the matter complained of. We favour retention of this period because it is fairer to the plaintiff. The reason for moving it into the Limitations Act is to make that Act a code and to make its general provisions apply. In most special Acts, there is no reference to plaintiffs under a disability and the disability provisions in the Limitations Act do not apply.

In connection with plaintiffs under a disability, we recommend the new Alberta provision (section 59(2)) which allows time to run when the person under a disability is an infant in the custody of a parent or guardian or a mentally incapacitated person in the custody of a committee or of the Public Trustee. In making this recommendation we are aware that Danckwerts L.J. in *Kirby v. Leather* 1965 2 All E.R. 441 at 445 said of a similar English provision: "This is such an extraordinary provision that at times it seems to me that the draftsman must have been of unsound mind". The English section makes time run where the plaintiff is in the custody of a parent both when the plaintiff is an infant and is of unsound mind. The 1966 Alberta amendment applies to a person of unsound mind only if he is

"in the custody of a committee or of the Public Trustee". The draftsman was quite *compos mentis*.

We turn now to the subject of counter-claims and third party proceedings. Generally, these proceedings must be brought within the statutory period. We think, however, that they should be permitted afterwards as long as they relate to the subject matter of the action. Such provisions are now found in some of the special limitations for automobile accidents in Highway Acts. Section 60 of Alberta's amendment of 1966 is such a provision.

The next point has to do with amendments to pleadings after the statutory period. In speaking of amendments, we exclude the adding or changing of parties with which we shall deal later. It is settled that an amendment should not be permitted after the time has expired if the amendment sets up a new cause of action. This is often hard to determine. In a claim for damage to an automobile, may an amendment be made to add a claim for personal injuries? English authority said no However, the Supreme Court of Canada, in June 1967, upheld an Alberta judgment which holds that such an amendment may be made [*Franks v Cahoon* 58 W.W.R. 513]. We recommend consideration of a provision such as section 44(11) of Saskatchewan's Queen's Bench Act R.S.S. 1965, c. 73. This provision enables the Court to permit the amendment of any pleading as it deems just, notwithstanding that the right of action would have been barred. However, it does not apply to amendments involving a change of parties other than one caused by death of a party.

This brings us to the subject of change of parties. We recommend consideration of a provision like section 61 in Alberta's 1966 amendments. This permits change of parties in three cases·

(1) in motor vehicle cases where the registered owner was not the actual owner and the plaintiff's error was excusable;

(2) where the plaintiff is under disability, or is the estate of a deceased person and the action has been brought by the wrong party provided no one has been misled;

(3) where the original defendant was dead when action was brought.

Before leaving Alberta's amendments we note that they provide a two-year limitation in all cases except actions against doctors, dentists and chiropractors. The reduction to two years of claims for property damage from 6 years (uniform section 3(1)(e)) may be debatable

We turn now to a problem not dealt with in the Alberta amendments. The plaintiff's action may be in contract or in tort. In every case time begins to run when the cause of action arises, but in contract the cause arises on breach and in tort it arises when damage is done In the case of personal injuries or property damage the better opinion is that these are tort claims under Uniform Section 3(1)(d) and (e) even if there is a contractual relationship between plaintiff and defendant, such as employee and employer, or passenger and carrier or bailor and bailee. The Manitoba Court of Appeal, however, held in *Homenick v Weibe* (1965) 50 D.L.R. (2d) 287 that this is not self-evident and sent the matter back to be decided at trial. In that case the plaintiff was an employee injured on an autoboggan that he operated for the employer

We do not think that under a Limitations Act the plaintiff should have an option to sue in contract or tort. Yet in a recent Saskatchewan case, *Paramuschuk v. Meadow Lake* (1965) 47 D.L.R. (2d) 427, the Court of Appeal held the plaintiff does have such an option. This was a case of damage to crops from failure to construct a drainage ditch as agreed upon. In our opinion, the limitation period should not depend on the way the plaintiff frames his claim We recommend consideration of a provision that would make it clear that claims for personal injuries or property damage are in tort. If the period for bringing action for damage to property were not six years, then one can think of cases of hardship, e.g., where there is a bailment to a warehouseman and the goods are damaged long before the plaintiff knows. Where a claim arises for professional negligence, e.g., against a solicitor or architect, one would think it is in tort, however, all the recent cases say it is in contract: *Schwebel v. Telekas* (1967) 61 D.L.R. 470 (Ont. C.A.)

Another point to which we call attention is that of the plaintiff who does not know he has a cause of action in personal injuries The classic case is that of the miner with silicosis. The House of Lords held in *Cartledge v Jopling* 1963 1 All E.R. 41 that time runs from the injury even though the plaintiff does

not know of it. While this case was in the courts, Parliament amended the Limitations Act to permit the Court to enlarge the time where the plaintiff can show that he was unaware of a "material fact" until after the time had elapsed. Alberta omitted this provision from its 1966 amendments for two reasons:

(1) the English provision is very complicated, and

(2) very few cases arise in Alberta because the plaintiff is usually under workmen's compensation.

It will be noted too that the English provision has been used for a purpose that, in our opinion, was never intended. In *Clarke v. Forbes Stuart* 1964 2 All E.R. 282 the plaintiff sued Forbes Stuart (Billingsgate) instead of Forbes Stuart (Thames Street). The Court of Appeal granted leave to sue the correct defendant. We question this and make no recommendation for such a provision. It would be possible to include a short and simple provision analogous to section 4 of the Uniform Act which deals with the case of concealment by fraud. If it were confined to cases where the plaintiff does not know he has a cause of action at all, such as the silicosis cases, it might remove hardship. We are not sure that a provision could be framed without opening the door, e.g., to the person who decided not to sue because he thought the damages trivial and then long after the statutory period, finds out that the damages are more serious.

PART II — CHARGES ON LAND, ETC.

PART III — LAND

PART IV — MORTGAGES OF REAL AND PERSONAL PROPERTY

PART V — AGREEMENTS FOR THE SALE OF LAND

The important point to remember is that in proceedings to recover land or money charged on land, the right is extinguished when the remedy is barred. On the other hand, when a claim on an ordinary debt is statute barred it is only the remedy that is extinguished. The right remains and a part payment, promise or acknowledgment, even after the statutory period, starts time running again.

Under the Uniform Act, the owner's title to land is extinguished if he refrains for ten years from bringing proceedings for possession against a person who has taken possession. A problem arises in those provinces that have a Land Titles Act because these Acts declare the title to be "indefeasible". In *Belize v Quilter* 1897 A.C. 367 the Privy Council held that the Limitations Act prevails. This has been accepted in Alberta and The Land Titles Act provides specifically that a title may issue to a person whom the Court has declared to have been in possession for over ten years. Most Land Titles Acts, however, specifically provide that no one can acquire title by possession. Where such a provision exists the courts have uniformly held that the Land Titles Act prevails: *Smith v National Trust Co.* (1912) 45 S.C.R. 618 [from Manitoba] *Montreal Trust Co. v Murphy* (1967) 59 D.L.R. (2d) 634 [Saskatchewan C.A.] *Gatz v Kiziw* (1953) 16 D.L.R. (2d) 215 [S.C.C. from Ontario]

This is a policy matter on which a decision should be made.

In connection with a mortgagee's action, Uniform section 33 has a provision for acknowledgment of the nature described in section 30 which is an acknowledgment of title. This is inept in a Torrens province because the mortgagee has merely a charge and not title. In Alberta *Manufacturers Life Insurance v Hodges* (1947) 1 D.L.R. 195 holds that in acknowledgment of title can only mean acknowledgment of the charge. Obviously the wording of section 33(b) should be changed in those provinces where mortgages are only a charge.

PART VI — CONDITIONAL SALE OF GOODS

We have no comment on Part VI.

PART VII — TRUSTS AND TRUSTEES

Part VII is the result of Dean Falconbridge's recommendations and is an improvement on the original Uniform Act. One problem, however, occurs to us. A creditor sues the executor of an estate who pleads the statute. The will of the deceased is one which directs the executor to pay debts. The plaintiff argues that the will creates an express trust of property so that section 42(3) applies and his claim is not barred. In *Alexander v. Stipe* (1949) 2 D.L.R. 824 (Alta. C.A.) the Court accepted this argument. This is questionable, but we are not sure that there should be an amendment.

PART VIII — GENERAL

Two comments:

(1) A note at the end of the Act points out that it does not deal with prescription in case of easements. In most provinces an easement can be so acquired though in Alberta there is a specific provision dating from territorial days which forbids the acquiring of easements by prescription. The Conference might wish to consider this point.

(2) The position of the Crown. The Uniform Act does not mention the Crown so therefore it is not bound. The common law rule is that time does not run against the Crown The 1939 English Act (section 30) specifically applies to the Crown though the Crown is given 30 years to bring proceedings for possession of land. We do not think that highways should be affected by the Statute of Limitations, whether owned by the province or municipality. In general, however, we think that the Statute of Limitations should apply to the Crown.

Respectfully submitted,
W. F. BOWKER,
J. E. HART,
H. J. MACDONALD,
G. W. ACORN,
W. E. WOOD,
Alberta Commissioners

APPENDIX S

OCCUPIERS' LIABILITY

(See page 25)

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

In 1965 the British Columbia Commissioners presented a preliminary report with respect to this subject-matter wherein there were set up a number of questions with regard to the substance of any suggested legislation. The report presented at that time related specifically to the Occupiers' Liability Act, 1957 of England. After discussion of this report the topic was referred back to the British Columbia Commissioners in order to follow up with a first draft of proposed legislation.

The answers to the questions posed in 1965 indicated that the Commissioners would be in favour of legislation containing the substance of the English Act with some exceptions. In order that the Commissioners may have a look at the English Act as it would stand with the changes necessary to provide for those exceptions, we append hereto as Appendix "A" the English legislation of 1957 with changes made to provide for the views of the Conference.

It is the recommendation of the British Columbia Commissioners that the Conference refer this matter, after consideration at this meeting, once again to one or more jurisdictions in order that the drafting of the English legislation may receive close inspection. With the greatest of respect, it would appear that some drafting improvement could be made especially in the way of simplification and abbreviation.

The following are the questions that were posed to the members of the Conference in 1965 and the answers given thereto. In each case we have noted the changes, if any, required to give effect to the decisions of the Conference as represented by these answers:—

1. SHOULD THE DISTINCTION BETWEEN INVITEES AND LICENSEES BE ABOLISHED AND ALL SUCH VISITORS BE OWED THE SAME DUTY OF CARE?

Answer:—Yes (Requires no change in the substance of the English Act.)

2. SHOULD LEGISLATION BE PROPOSED TO PREVENT THE OPERATION, IN CANADA, OF THE ENGLISH RULE THAT WARNING TO AN INVITEE COMBINED WITH A FULL APPRECIATION OF THE DANGER BY

THE INVITEE PUTS AN END TO THE OCCUPIER'S DUTY TOWARDS HIM?

Answer:—Yes. (Requires no change in the substance of the English Act.)

3. SHOULD LEGISLATION BE PROPOSED TO REVERSE THE RULE THAT AN OCCUPIER MAY NOT DISCHARGE HIS DUTY BY EMPLOYING AN INDEPENDENT CONTRACTOR?

Answer:—No (This answer does require a change in the substance of the English Act and accordingly the wording of clause (b) of subsection (4) of section 2 of the English Act has been altered. This appears in Appendix "A" as clause (b) of subsection (4) of section 3. We have deleted subsection (2) of section 3 of the English Act as well—consideration should be given to whether this is a proper omission.)

4. SHOULD THERE BE A STATUTORY RULE ALLOWING AN OCCUPIER TO CONTRACT OUT OF HIS OBLIGATIONS?

Answer:—Retain English wording (No change required).

5. SHOULD THERE BE A STATUTORY RULE THAT AN OCCUPIER MAY EXCLUDE HIS LIABILITY BY NOTICE?

Answer:—No. (The English Act does not deal directly with this question but an alteration has been made by the deletion of the words "or otherwise" at the end of subsection (1) of section 2 of the English Act which appears in Appendix "A" as subsection (1) of section 3.)

6 SHOULD ANY PROPOSED LEGISLATIVE CODE REGARDING OCCUPIERS' LIABILITY INCLUDE STATUTORY RULES PERTAINING TO THE LIABILITY TO PERSONS USING CHATTELS OF ANOTHER?

Answer:—Yes. (The answer requires no change in the substance of the English Act.)

7 SHOULD A STATUTORY "COMMON DUTY OF CARE" TO TRESPASSERS BE PROPOSED?

Answer:—No (Requires no change)

8. SHOULD THE GENERAL DUTY OF CARE, IF APPLIED BY STATUTE TO INVITEES AND LICENSEES, ALSO APPLY TO CONTRACTUAL VISITORS?

Answer:—Yes (No change required inasmuch as the English Act applies the general duty of care to contractual visitors "in so far as the duty depends on a term to be implied in the contract".)

9. SHOULD THERE BE PROPOSED A SPECIAL RULE REGARDING LIABILITY OF THE OCCUPIER TO A CHILD TRESPASSER?

Answer:—Yes (No change required)

10. IF A SPECIAL RULE IS TO BE APPLICABLE TO THE LIABILITY OF AN OCCUPIER TO A CHILD TRESPASSER, WOULD THE "RESTATEMENT RULE", AS SET FORTH IN THE RESTATEMENT OF THE LAW OF TORTS, BE SUITABLE?

Answer:—In answer to this question the Conference decided that further consideration should be given thereto. Accordingly no provision has been inserted in Appendix "A" to bring into effect the restatement rule mentioned.

11. SHOULD THE LANDLORD OF UNFURNISHED PREMISES BEAR A LIABILITY TO THE GUEST OF HIS TENANT?

Answer:—Yes. (No change required in the substance of the English Act)

12. WHAT RULE, IF ANY, SHOULD REPLACE THAT IN *CAVALIER v. POPE*?

Answer:—The rule as contained in the new Occupiers' Liability Act, 1957, of England should be used

The numbering of the altered legislation as set forth in Appendix "A" has been changed to make provision for our placing of the title of the Act in section 1.

A copy of the Occupiers' Liability Act, 1957, as it was passed in England, is attached as Appendix "B" for comparative purposes.

We have mentioned above our view that the drafting of the English legislation might be revised in order that our proposals might be in accord with the style of drafting familiar to the Conference. While we have not attempted to make a redraft, in order to demonstrate our thinking the following is a very rough preliminary redraft of the English legislation down to the end of section 2 thereof. This should not be considered as an alternative at this time but is offered as a "structure" around which a redraft might be completed if thought advisable:—

1. This Act may be cited as the *Occupiers' Liability Act*

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

"common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that a visitor will be reasonably safe in using premises for the purpose for which he is invited or permitted by the occupier to be there;

"occupier" means an occupier at common law;

"visitor" means an invitee or licensee at common law but does not include a trespasser.

3. (1) An occupier of premises owes the common duty of care to all visitors to the premises except as extended, restricted, modified, or

excluded by agreement with the visitor, and the circumstances to be taken into account in applying the definition of "common duty of care" include

(a) the circumstance that an occupier must be prepared for children to be less careful than adults, and

(b) the circumstance that an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so,

and all other relevant circumstances

(2) In applying subsection (1),

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe,

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance, or repair by an independent contractor employed by the occupier, the occupier is not thereby absolved from the common duty of care, and

(c) the common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor.

4. To the extent that the common law rules applicable to occupiers and visitors apply, section 3 applies to

(a) a person occupying or having control over any fixed or movable structure, including any vessel, vehicle, or aircraft, and

(b) a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not visitors to the premises or structure.

There would follow sections 3, 4, and 5 of the English Act with whatever redrafting might be necessary. It should be noted that subsection (2) of section 3 of the English Act has been omitted in Appendix "A" by reason of the answer given by the Conference to question number 3; consideration should be given to whether or not it should be omitted in any redraft.

All of which is respectfully submitted.

GILBERT D. KENNEDY,
P. R. BRISSENDEN,
GERALD H. CROSS.

Appendix "A"

OCCUPIERS' LIABILITY ACT

Title

1. This Act may be cited as the Occupiers' Liability Act.

Preliminary

2. (1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

(a) the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft; and

(b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

Extent of occupier's ordinary duty

3. (1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not thereby absolved from the common duty of care.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Effect of contract on occupier's liability to third party

4. (1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract,

whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) In this section "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(3) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(4) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but, in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement (whether express or implied) after that commencement.

Landlord's liability in virtue of obligation to repair

5. (1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

(2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put

by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord

(5) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(6) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(7) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Implied term in contracts

6. (1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care

(2) The foregoing subsection shall apply to fixed and movable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

Appendix "B"

CHAPTER 31

Occupiers' Liability Act, 1957

ARRANGEMENT OF SECTIONS

An Act to amend the law of England and Wales as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there, to make provision as to the operation in relation to the Crown of laws made by the Parliament of Northern Ireland for similar purposes or otherwise amending the law of tort, and for purposes connected therewith

[6th June, 1957]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Liability in tort

Preliminary

1.—(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the pre-

mises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

(*a*) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and

(*b*) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors

(4) A person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of this Act, a visitor of the occupier of those premises.

12, 13 & 14, Geo 6, c. 97

Extent of occupier's ordinary duty

2.—(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

(*a*) an occupier must be prepared for children to be less careful than adults; and

(*b*) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

(*a*) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(*b*) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Effect of contract on occupier's liability to third party

3.—(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and persons acting under his direction and control.

(3) In this section "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but, in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement (whether express or implied) after that commencement.

Landlord's liability in virtue of obligation to repair

4.—(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

(2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the

premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by this acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way or of rights conferred by virtue of an access agreement or order under the National Parks and Access to Countryside Act, 1949.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Liability in contract

Implied term in contracts

5.—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

(2) The foregoing subsection shall apply to fixed and moveable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

General

Application to Crown. 10 & 11 Geo. 6, c 44

6. This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act, 1947, and that Act and in particular section two of it shall apply in relation to duties under sections two to four of this Act as statutory duties.

Powers of Parliament of Northern Ireland 10 & 11 Geo 5, c 67

7. The limitation imposed by paragraph (1) of section four of the Government of Ireland Act, 1920, precluding the Parliament of Northern Ireland from making laws in respect of the Crown or property of the Crown (including foreshore vested in the Crown) shall not extend to prevent that Parliament from amending the law of tort, or enacting provisions similar to section five of this Act, so as to bind the Crown in common with private persons; but as regards the Crown's liability in tort, no such amendments shall bind the Crown further than the Crown is made liable in tort under the law of Northern Ireland by Orders in Council under section fifty-three of the Crown Proceedings Act, 1947.

Short title, etc.

8.—(1) This Act may be cited as the Occupiers' Liability Act, 1957.

(2) This Act shall not extend to Scotland, nor to Northern Ireland except in so far as it extends the powers of the Parliament of Northern Ireland.

(3) This Act shall come into force on the first day of January, nineteen hundred and fifty-eight.

APPENDIX T

(See page 25)

PERPETUITIES

REPORT OF THE BRITISH COLUMBIA COMMISSIONERS

Following the excellent report last year of the Ontario Commissioners this subject was referred to the British Columbia Commissioners for study with a view to developing a uniform act using the Ontario Act as a guide. In 1966 Ontario enacted not only a Perpetuities Act but also made sweeping amendments to its Accumulations Act. This, as well as other related legislation, resulted from an exhaustive study of the subject and report by the Ontario Law Reform Commission.

Two reports, namely No. 1 and No. 1A, were in fact made by the Commission. Both have been studied and have been of inestimable help to your Commissioners.

This report will be divided into two parts. The first will deal with perpetuities, the second with accumulations

1. *Perpetuities*

Much time and thought were given in an attempt to improve the Ontario Act. The subject is complex and difficult and your Commissioners felt they should not lightly interfere with legislation drafted, revised and enacted with such care and scholarship. The Ontario Act is in the opinion of your Commissioners a tremendous stride forward and while there may be some differences of opinion among the profession regarding such matters as the definition in certain cases of "relevant" lives and the desirability of providing draftsmen with a period in gross as an alternative, their conclusion is that the Ontario Act should be adopted as a Uniform Act. A copy is annexed

2. *Accumulations*

The Accumulations Amendment Act, 1966 became effective in Ontario on 6 September 1966. In effect it added two additional periods for valid accumulations. First, twenty-one years from the date of making an *inter vivos* disposition. Secondly, the duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the date of making an *inter vivos* disposition. The first is applicable only to *inter vivos* trusts and apart from providing the advantage of a period in

gross, might conceivably avoid bringing the settled fund into the estate of a settlor for estate tax and succession duty purposes. The second additional period is the same as the third period except that the period commences at the date of the creation of the trust instead of the date of the death of the settlor.

Annexed is a copy of the Accumulations Act of British Columbia which was passed at the last session of the British Columbia Legislature and which became law on the 23rd March 1967. This Act was drafted by a committee made up of a number of practitioners in this field including one of your Commissioners. It was based upon the Ontario Act. If compared with the Ontario Act two differences will be observed. First, it is not an amending act and consequently the language was changed. Secondly, subsections (1b) and (2) were deleted and a fresh section, namely 5 of the British Columbia Act, was substituted. This change was made to remove any possibility of conflict between the two Ontario subsections and to deal specifically with accumulations validly empowered by dispositions taking effect before the Act. It was believed to be an improvement upon the Ontario Act and your Commissioners have approved the change. In the result your Commissioners recommend that the British Columbia Act be adopted as a draft uniform act subject only to the addition in those jurisdictions which have not already passed similar legislation to the addition of section 3 of the Ontario Accumulations Act relating to pension funds.

All of which is respectfully submitted.

P. R. BRISSENDEN,
for the British Columbia Commissioners

An Act to modify the Rule against Perpetuities

Assented to July 8th, 1966
Session Prorogued July 8th, 1966

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

1. In this Act, Interpretation

(*a*) "court" means the Supreme Court;

(*b*) "in being" means living or *en ventre sa mere;*

(*c*) "limitation" includes any provision whereby property or any interest in property, or any right, power or authority over property, is disposed of, created or conferred.

Rule against perpetuities to continue; saving

2. The rule of law known as the rule against perpetuities shall continue to have full effect except as provided in this Act.

Possibility of vesting beyond period

3. No limitation creating a contingent interest in real or personal property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.

Presumption of validity and "Wait and See"

4.—(1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish,

(*a*) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of sections 8 and 9, shall be treated as void or declared to be void; or

(*b*) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

General power of appointment

(2) A limitation conferring a general power of appointment, which but for this section would be void on the ground that it might become exercisable beyond the perpetuity period, shall be presumptively valid until such time, if any, as it becomes established by actual events that the power cannot be exercised within the perpetuity period.

Special power of appointment, etc

(3) A limitation conferring any power, option or other right, other than a general power of appointment, which apart from this section would have been void on the ground that it might be exercised beyond the perpetuity period, shall be presumptively valid, and shall be declared or treated as void for remoteness only if, and so far as, the right is not fully exercised within the perpetuity period.

Applications to determine validity

5.—(1) An executor or a trustee of any property or any person interested under, or on the validity or invalidity of, an interest in such property may at any time apply to the court for a declaration as to the validity or invalidity with respect

to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and the events that have occurred at the time of the application and having regard to sections 8 and 9.

Interim income

(2) Pending the treatment or declaration of a presumptively valid interest within the meaning of subsection 1 of section 4 as valid or invalid, the income arising from such interest and not otherwise disposed of shall be treated as income arising from a valid contingent interest, and any uncertainty whether the limitation will ultimately prove to be void for remoteness shall be disregarded.

Measurement of perpetuity period

6.—(1) Except as provided in section 9, subsection 3 of section 13 and subsection 2 of section 15, the perpetuity period shall be measured in the same way as if this Act had not been passed, but, in measuring that period by including a life in being when the interest was created, no life shall be included other than that of any person whose life, at the time the interest was created, limits or is a relevant factor that limits in some way the period within which the conditions for vesting of the interest may occur.

Idem

(2) A life that is a relevant factor in limiting the time for vesting of any part of a gift to a class shall be a relevant life in relation to the entire class.

Idem

(3) Where there is no life satisfying the conditions of subsection 1, the perpetuity period shall be twenty-one years

Presumptions and evidence as to future parenthood

7.—(1) Where, in any proceeding respecting the rule against perpetuities, a question arises that turns on the ability of a person to have a child at some future time, then,

(*a*) it shall be presumed,

(i) that a male is able to have a child at the age of fourteen years or over, but not under that age, and

(ii) that a female is able to have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but,

(*b*) in the case of a living person, evidence may be given to show that he or she will or will not be able to have a child at the time in question.

dem

(2) Subject to subsection 3, where any question is decided in relation to a limitation of interest by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question that may arise concerning the rule against perpetuities in relation to the same limitation or interest notwithstanding that the evidence on which the finding of ability or inability to have a child at a particular time is proved by subsequent events to have been erroneous.

dem

(3) Where a question is decided by treating a person as unable to have a child at a particular time and such person subsequently has a child or children at that time, the court may make such order as it sees fit to protect the right that such child or children would have had in the property concerned as if such question had not been decided and as if such child or children would, apart from such decision, have been entitled to a right in the property not in itself invalid by the application of the rule against perpetuities as modified by this Act.

dem

(4) The possibility that a person may at any time have a child by adoption, legitimation or by means other than by procreating or giving birth to a child shall not be considered in deciding any question that turns on the ability of a person to have a child at some particular time, but, if a person does subsequently have a child or children by such means, then subsection 3 applies to such child or children.

Reduction of age

8.—(1) Where a limitation creates an interest in real or personal property by reference to the attainment by any person or persons of a specified age exceeding twenty-one years, and actual events existing at the time the interest was created or at any subsequent time establish,

(*a*) that the interest, apart from this section, would be void as incapable of vesting within the perpetuity period; but

(*b*) that it would not be void if the specified age had been twenty-one years,

the limitation shall be read as if, instead of referring to the age specified, it had referred to the age nearest the age specified that would, if specified instead, have prevented the interest from being so void.

(2) Where the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents subsection 1 from operating to save a limitation creating an interest in favour of a class of persons from being void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly. Exclusion of class members to avoid remoteness

(3) Where a limitation creates an interest in favour of a class to which subsection 2 does not apply and actual events at the time of the creation of the interest or at any subsequent time establish that, apart from this subsection, the inclusion of any persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the limitation to the class to be void for remoteness, such persons shall be excluded from the class for all purposes of the limitation, and the limitation takes effect accordingly. Idem

(4) For the purposes of this section, a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and a person shall be treated as a potential member if in his case some only of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied. Interpretation

9. Where any disposition is made in favour of any spouse of a person in being at the commencement of the perpetuity period, or where a limitation creates an interest in real or personal property by reference to the time of the death of the survivor of a person in being at the commencement of the perpetuity period and any spouse of that person, for the purpose of validating any such disposition or limitation, that but for this section would be void as offending the rule against perpetuities as modified by this Act, the spouse of such person shall be deemed to be a life in being at the commencement of the perpetuity period even though such spouse was not born until after that time. Spouses

10.—(1) A limitation that, if it stood alone, would be valid under the rule against perpetuities is not invalidated by reason only that it is preceded by one or more limitations that are invalid under the rule against perpetuities, whether or not such Saving

limitation expressly or by implication takes effect after, or is subject to, or is ulterior to and dependent upon, any such invalid limitation.

Acceleration of expectant interests

(2) Where a limitation is invalid under the rule against perpetuities, any subsequent interest that, if it stood alone, would be valid shall not be prevented from being accelerated by reason only of the invalidity of the prior interest.

Powers of appointment

11.—(1) For the purpose of the rule against perpetuities, a power of appointment shall be treated as a special power unless,

(*a*) in the instrument creating the power it is expressed to be exercisable by one person only; and

(*b*) it could, at all times during its currency when that person is of full age and capacity, be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.

Idem

(2) A power that satisfies the conditions of clauses *a* and *b* of subsection 1 shall, for the purpose of the rule against perpetuities, be treated as a general power.

Idem

(3) For the purposes of determining whether an appointment made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have been so treated if exercisable by deed.

Administrative powers of trustees

12.—(1) The rule against perpetuities does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.

Application of subs 1

(2) Subsection 1 applies for the purpose of enabling a power to be exercised at any time after this Act comes into force, notwithstanding that the power is conferred by an instrument that took effect before that time.

Options to acquire reversionary interests

13.—(1) The rule against perpetuities does not apply to an option to acquire for valuable consideration an interest reversionary on the term of a lease.

(*a*) if the option is exercisable only by the lessee or his successors in title; and

(*b*) if it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

Application of subs. 1

(2) Subsection 1 applies to an agreement for a lease as it applies to a lease, and "lessee" shall be construed accordingly.

Other options

(3) In the case of all other options to acquire for valuable consideration any interest in land, the perpetuity period under the rule against perpetuities is twenty-one years, and any such option that according to its terms is exercisable at a date more than twenty-one years from the date of its creation is void on the expiry of twenty-one years from the date of its creation as between the person by whom it was made and the person to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.

Options to renew leases

(4) The rule against perpetuities does not apply nor do the provisions of subsection 3 of this section apply to options to renew a lease.

Easements, *profit a prendre*, etc.

14. In the case of an easement, *profit à prendre* or other similar interest to which the rule against perpetuities may be applicable, the perpetuity period shall be forty years from the time of the creation of such easement, *profit à prendre* or other similar interest, and the validity or invalidity of such easement, *profit à prendre* or other similar interest, so far as remoteness is concerned, shall be determined by actual events within such forty-year period, and the easement, *profit à prendre* or other similar interest is void only for remoteness if, and to the extent that, it fails to acquire the characteristics of a present exercisable right in the servient land within the forty-year period.

Determinable interests

15.—(1) In the case of,

(*a*) a possibility of reverter on the determination of a determinable fee simple; or

(*b*) a possibility of a resulting trust on the determination of any determinable interest in real or personal property,

the rule against perpetuities as modified by this Act applies in relation to the provision causing the interest to be determinable as it would apply if that provision were expressed in the form of a condition subsequent giving rise on its breach to a right of re-entry or an equivalent right in the case of personal property, and, where the event that determines the determinable interest does not occur within the perpetuity period, the provision shall be treated as void for remoteness and the determinable interest becomes an absolute interest.

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(2) In the case of a possibility of reverter on the determination of a determinable fee simple, or in the case of a possibility of a resulting trust on the determination of any determinable interest in any real or personal property, or in the case of a right of re-entry following on a condition subsequent, or in the case of an equivalent right in personal property, the perpetuity period shall be measured as if the event determining the prior interest were a condition to the vesting of the subsequent interest, and failing any life in being at the time the interests were created that limits or is a relevant factor that limits in some way the period within which that event may take place, the perpetuity period shall be twenty-one years from the time when the interests were created.

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(3) Even though some life or lives in being may be relevant in determining the perpetuity period under subsection 2, the perpetuity period for the purposes of this section shall not exceed a period of forty years from the time when the interests were created and shall be the lesser of a period of forty years and a period composed of the relevant life or lives in being and twenty-one years.

pecific non-
haritable
usts

16.—(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as and to the extent that it is exercised either by the original trustee or his successor, within a period of twenty-one years, notwithstanding that the limitation creating

the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

Idem

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other recurring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or his or their successors, who would have been entitled to the property comprised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.

Rule in *Whitby vs. Mitchell* abolished

17. The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without affecting any other rule relating to perpetuities

Rules as to perpetuities not applicable to employee-benefit trusts

18. The rules of law and statutory enactments relating to perpetuities do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits, to employees or to their widows, dependants or other beneficiaries.

Application of Act

19. Except as provided in subsection 2 of section 12 and in section 18, this Act applies only to instruments that take effect after this Act comes into force, and such instruments include an instrument made in the exercise of a general or special power of appointment after this Act comes into force even though the instrument creating the power took effect before this Act comes into force.

Short title

20. This Act may be cited as *The Perpetuities Act, 1966*

Accumulations Act, 1967

Title

1. This Act may be cited as the *Accumulations Act, 1967*. 1967, c. 2, s. 1.

Restriction

2. No disposition of any real or personal property shall direct the income thereof to be wholly or partially accumulated for any longer than one of the following terms:—

(*a*) The life of the grantor or settlor.

(*b*) Twenty-one years from the date of making an inter vivos disposition.

(*c*) The duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the date of making an inter vivos disposition:

(*d*) Twenty-one years from the death of the grantor, settlor, or testator:

(*e*) The duration of the minority or respective minorities of any person or persons living or en ventre sa mere at the death of the grantor, settlor, or testator:

(*f*) The duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated. 1967, c. 2, s. 2.

Consequence of contravention

3. Where an accumulation is directed contrary to this Act, such direction is null and void, and the rents, issues, profits, and produce of the property so directed to be accumulated shall, so long as they are directed to be accumulated contrary to this Act, go to and be received by such person as would have been entitled thereto if such accumulation had not been so directed. 1967, c. 2, s. 3.

Application

4. Sections 2 and 3 apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and whether or not the power to accumulate extends to income produced by the investment of income previously accumulated. 1967, c. 2, s. 4.

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5. This Act applies to every disposition of real or personal property whether heretofore or hereafter made, except that nothing in this Act shall render invalid any act validly done, or

any accumulation validly empowered by a disposition taking effect, before the coming into force of this Act. 1967, c. 2, s. 5.

6. Nothing in this Act extends to any provision for payment of debts of a grantor, settlor, devisor, or other person, or to any provision for raising portions for a child or children of a grantor, settlor, or devisor, or for a child of a person taking an interest under any such conveyance, settlement, or devise, or to any direction touching the produce of timber or wood upon any lands or tenements, but all such provisions and directions may be made and given as if this Act had not been passed. 1967, c. 2, s. 6. Saving

7. The *Accumulations Restraint Act* is repealed. 1967, c. 2, s. 7 Repeal

An Act to amend The Accumulations Act

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

1.—(1) Subsection 1 of section 1 of *The Accumulations Act* is repealed and the following substituted therefor: R S O 1960, c 4, s 1, subs. 1, re-enacted

(1) No disposition of any real or personal property shall direct the income thereof to be wholly or partially accumulated for any longer than one of the following terms: Maximum accumulation periods

1. The life of the grantor.
2. Twenty-one years from the date of making an *inter vivos* disposition.
3. The duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the date of making an *inter vivos* disposition.
4. Twenty-one years from the death of the grantor, settlor or testator.
5. The duration of the minority or respective minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, settlor or testator.

6. The duration of the minority or respective minorities of any person or persons who, under the instrument directing the accumulations, would, for the time being, if of full age, be entitled to the income directed to be accumulated

Application of subs. 1 restrictions

(1*a*) The restrictions imposed by subsection 1 apply in relation to a power to accumulate income whether or not there is a duty to exercise that power, and such restrictions also apply whether or not the power to accumulate extends to income produced by the investment of income previously accumulated.

Idem

(1*b*) The restrictions imposed by subsection 1 apply to every disposition of real or personal property, whether heretofore or hereafter made.

Previous acts, etc., not affected

(2) Nothing in subsection 1 affects,

(*a*) the validity of any act done; or

(*b*) any right acquired or obligation incurred,

R S O. 1960, c. 4

under *The Accumulations Act* before this Act came into force.

R S O 1960, c. 4 amended

2. *The Accumulations Act* is amended by adding thereto the following section:

Rules as to accumulations not applicable to employee benefit trusts

3. The rules of law and statutory enactments relating to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries.

Short title

3. This Act may be cited as *The Accumulations Amendment Act, 1966*

APPENDIX U

(See page 26)

TESTAMENTARY ADDITIONS TO TRUSTS

The question of testamentary additions to trusts was raised at the 1966 annual meeting of the Conference. After discussion, it was agreed that this subject should be put on the agenda and the Ontario Commissioners were requested to study the subject and to report at the next meeting of the Conference.

It will be admitted at the outset that the problem does not arise frequently in Anglo-Canadian jurisprudence, if one is to judge by the reported cases. This may be attributed to the fact that one sees only the tip of the iceberg, or, again, it may reflect the fact that *inter vivos* trusts are not used as an estate planning device as frequently in this country and in England as they are in the United States. The problem plagued the American courts and estate planners for two decades and loomed so large that between 1953 and 1961 no less than twenty-two states had passed legislation to remedy the deficiencies of the common law. On August 25, 1960, the National Conference on Uniform State Laws approved the Uniform Testamentary Additions to Trusts Act which was approved in the same year by the American Bar Association. A copy of the Uniform Act is appended hereto as Appendix A. In the period between 1961, the first legislative year in which the Uniform Act was available, and 1964 eighteen states, or approximately one-third, have enacted it. Connecticut, which initiated its own legislation in 1953, subsequently repealed it and adopted the Uniform Act.

The factual situation giving rise to the problem is simply stated. A creates an *inter vivos* trust in proper form in favour of B, the beneficiary. A then dies having executed a will in proper form in which he leaves a legacy of $10,000 to T, the trustee of the *inter vivos* trust, such legacy to form part of the *res* of the *inter vivos* trust and to be administered and distributed in accordance with the terms of the trust. Where the *inter vivos* trust is irrevocable and not subject to being amended or altered in any particular, no problem arises at common law either in the United States, the United Kingdom, or the common law jurisdictions in this country.

In *Re Playfair,* [1951] Ch. 4 A, the testator, by his will left £20,000 to T, the trustee of an *inter vivos* trust made by him in 1888, to be "held by them on the trusts of the said settlement." The *inter vivos* trust was irrevocable. During argument, attention was directed to the point whether the legacy was an accretion to the sum settled by the *inter vivos* trust or whether the terms of the trust were incorporated in the will as to this £20,000, i.e. a referential trust. It made a difference because A's son who took under the *inter vivos* trust predeceased the testator but he had a vested interest under the trust. If the £20,000 fell to be distributed under the will, as the law then stood in England, there would have been a lapse. The court held that the legacy was an accretion to the *inter vivos* trust and the son's estate was entitled to the legacy. In the judgment no reference was made to the doctrine of incorporation by reference. This was significant as will be seen in what follows in this report.

Difficulty arises if we assume the same factual situation as in *Re Playfair,* except that the *inter vivos* trust was revocable. The courts here get into a conceptual snarl in applying the doctrine of incorporation by reference: see *In re Edwards' Will Trusts,* [1948] Ch. 440; *In re Schintz' Will Trusts, Lloyds Bank Ltd. v. Moreton,* [1951] Ch. 870. The doctrine of incorporation by reference is a probate doctrine and enables documents to be included as part of a will even though not executed in accordance with the formalities prescribed by the Wills Act. The prerequisites in applying the doctrine are: (1) that the reference in the will must show that the testator intended to incorporate the extrinsic document into the will; (2) the language of the will must be such that it refers to the extrinsic document as one already in existence at the time of the execution of the will; (3) the reference in the will must be sufficiently specific that it identifies the extrinsic document with reasonable certainty; (4) the document offered must be proven satisfactorily to be the one referred to in the will; and (5) there must be satisfactory proof that the document was actually in existence at the time of the execution of the will: see *Allen v. Maddock* (1858), 11 Moore P.C. 427.

It is clear law that a document not existing in unalterable form at the date of the execution of the will cannot be incorporated into the will. The Courts have stated that a testator cannot by his will create for himself a power to dispose of his property by an instrument not executed as a will or codicil.

Johnson v. Ball (1851), 5 DeG. & Sm. 85; *In Bonis Smart*, [1902] p. 238. One wonders what special magic lies in the formalities prescribed for the execution of wills as contrasted with those concerning *inter vivos* trusts. The fact that the settlor is parting with his property during his lifetime is a matter sufficiently serious to ensure that the proprieties are observed.

The fact remains, however, that the Anglo-Canadian courts will not permit a legacy to a revocable *inter vivos* trust even though the trust remains unaltered and unrevoked up to the death of the testator. Some of the American courts, with faltering steps, have upheld the validity of "pour-over" from a will to a revocable *inter vivos* trust even though the trust has been altered in the period between the date of execution of the will and the death of the testator. This has been accomplished by resorting to the doctrine of "facts of independent significance" or what may amount to the same thing, of "the trust being a legal entity."

The doctrine of "facts of independent significance" is not new in our law. There are a number of instances where the court will resort to extrinsic evidence to establish the identity of a beneficiary or the subject matter of a legacy or a devise For example, if A leaves a legacy of $1,000 to the person employed as his chauffeur at the date of his death, the court will admit evidence to establish the identity of the legatee. It may not be the same person employed by the testator in that capacity at the date of the execution of the will. The testator is not engaged in the process of discharging one chauffeur and hiring another for the purpose of altering his testamentary disposition. Similarly, the testator who leaves the balance in a designated bank account to a named beneficiary, may deposit and withdraw from that account during his lifetime, thus altering the bequest, without any design on changing his will, though this is clearly the result of his conduct. These are facts of independent significance.

The American courts have applied this doctrine to uphold the validity of bequests and devises to revocable *inter vivos* trusts even in those cases where the trust has been amended in the period between the date of the execution of the will and the date of the death of the testator. The existence of the trust as a full-blown legal institution and not an empty shell is a fact of independent significance. It has been posited that if the only purpose served by the extrinsic document is to dispose of property under

the will, then it has no significance independent of the will and the attempted disposition is invalid because of the failure of the testator to comply with the formalities prescribed by the Wills Act, so far as the extrinsic document is concerned.

In the factual situation posed, it is demonstrably false in any event for the court to say that the testator is seeking to incorporate the terms of the revocable *inter vivos* trust into his will. He may, of course, in a totally different factual situation intend to do just that, but in that event one ends up with a testamentary trustee(s) administering and distributing a testamentary trust, which is a strikingly different result.

The American courts occasionally have validated a bequest to a revocable *inter vivos* trust on the ground that the trust is a legal entity and therefore capable of receiving a bequest from the will of the testator in the same way as an individual or any other legal entity. The application of this doctrine accomplishes the same result and is conceptually very close to that which validates the legacy on the ground that existence of the trust is a fact of independent significance.

Even the most flexible and venturesome approach adopted by some of the courts in moulding common law principles to evolving situations left some problems unresolved and frustrated the legitimate aspirations of the estate planners. For example, there remained the problem of a legacy to the revocable *inter vivos* trust which was revoked by the testator before his death but subsequent to the making of the will. A similar difficulty arose when the testator left a legacy to a revocable *inter vivos* trust created by another and the settlor revoked the trust prior to the death of the testator. Would the legacy still be effective if the settlor, to whose trust a legacy had been bequeathed, revoked the trust after the death of the testator? These and other unresolved problems are discussed in a helpful monograph by Osgood, "The Law of Pour Overs and the Uniform Testamentary Addition to Trusts Acts" (1964 unpublished).

Osgood's monograph contains an extensive bibliography and the text of a number of the American "pour-over" statutes which predated the Uniform Act. It also contains a phrase by phrase commentary on the provisions of section 1 of the latter Act which is reproduced here to facilitate analysis.

"*Section 1*

'A devise or bequest,

One Commissioner suggested that the Act be broadened to include specifically the exercise of a power of appointment as some states have done. This suggestion was rejected on the ground that the above language include the exercise of a power of appointment by will and that any attempt to include other powers of appointment would create additional problems the Act was not intended to solve.

'the validity of which is determinable by the law of this state,

This phrase was included at the suggestion of Professor Bogert to avoid any question in the conflicts of law area as to whether or not a particular state was attempting to reach out into the laws of other states. The phrase as originally suggested used the word 'determined' which the Committee replaced with 'determinable' so that it was clear that the Act applies not only to accomplished but also to prospective testamentary dispositions as well.

'may be made by a will to the trustee or trustees of a trust established or to be established

The phrase 'or to be established' would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written, and is intended to cover both situations.

'by the testator or by the testator and some other person or persons or by some other person or persons

The original draft of the Act contained the phrase 'by the testator' and/or some some other person or persons', which the Committee expanded to its final form, first of all to eliminate the objectionable use of the couplet 'and/or', and secondly, to remove any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

'(including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts)

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the Act wisely removes any question of the validity of a pour-over to such a trust.

'if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will.

Thus the Act requires that the trust instrument, in the case of a pour-over to an *inter vivos* trust, actually had been executed before or contemporaneously with the will. Parenthetically, it should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved from the necessity of making certain that the trust has been executed before the pour-over will. The pour-over is valid under this provision as long as the signing of both instruments takes place as part of the same transaction.

'or in the valid last will of a person who has predeceased the testator

This provision validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not at all clear whether the second testator must have predeceased the testator whose will pours over at the time of the execution of the latter's will or at the time of his death, the sense of the Act would seem to require the first result. First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly,

since it would appear to be the intent of the Act to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the testator has intervened. Unfortunately, the proceedings of the Commissioners shed no light on this question and it may some day come before a court for its interpretation and adjudication.

'(regardless of the existence, size or character of the corpus of the trust.)

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust had to be before it was significant enough to support the pour-over. The Uniform Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. Professor Hawley has been quite critical of this provision. In his words,

> '. . . a trust without a corpus is nothing at all. . . . [By] definition a trust is a method of holding property, so that a trust with no assets does not exist. It has no legal significance, much less any independent significance.'

He goes on to ask if the Uniform Act and any other statutes which contain similar language, 'create a new kind of institution, a trust without a corpus.' This appears to be exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

'The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator

This is a significant provision. It codifies a position which many courts and even a few legislatures have been unwilling to take. However, this provision does not stand for all that it would appear to, as it is qualified by or at least must be read together with provisions of the Act that follow. All that this provision says is that a pour-over to a revocable, amendable trust is not invalid because the testator amends it during his lifetime or

another does so either before or after the testator's death. It does not determine the effect of the amendment on the pour-over.

'Unless the testator's will provides otherwise,

By the inclusion of this clause, the Act reserves to the testator the power to provide by his will for results other than those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in in his will.

'the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given

In brief, there is an actual pour-over and a single, non-testamentary trust results.

'and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will),

This language is consistent with the intent of the Act to codify an exception to the Statute of Wills by validating pour-overs to trusts amended after the execution of the pour-over will.

'and, if the testator's will so provides, including any amendments to the trust made after the death of the testator

This provision proved to be by far the most troublesome and controversial in the course of the Conference proceedings. Several commissioners argued forcefully that the pour-over should be complete, not partial, that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his intention, that this provision might well create more confusion than now exists in the law, and that it would certainly create administrative problems in cases where the will was silent and the trust was amended after the death of the testator. For instance, asked one of the Commissioners, what

happens to the pour-over property when, after the testator's death, another who has the power to amend the trust exercises it for the purpose of replacing the incumbent trustee with another? In spite of the persuasive arguments advanced by the Commissioners who opposed the inclusion of this provision, their motion which would have had the effect of deleting it was defeated by a vote of 33 to 20. The position of the majority is sound. Despite the difficult administrative problems which might arise if there were an amendment subsequent to the testator's death, the language of the Act as finally adopted affords him better protection against his or his counsel's failure to give proper consideration to the possibility of subsequent amendments. The testator is presumed to be content with the pour-over trust as it stood at the time of his death, whereas amendments made after his death might have been very unsatisfactory and displeasing to him. Yet, the Act does not close the door. It gives him the opportunity to bestow upon another the power to make amendments after his death which may affect the use and disposition of his property. If this is what he wishes, he need only to provide for it in his will.

'A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse'

If nothing more, this provision should operate as a caveat to a testator and his attorney to make proper provisions in the former's will for alternative disposition of the pour-over property unless they are content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over or by the residuary clause if it does not

The Commissioners had considerable difficulty in arriving at the language in section 2 of the Act, but finally adopted the following·

'This Act shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this Act'

Not only did the Commissioners not want the Act to have any retroactive effect, but they also did not want to infer [sic] in this section that it was declaratory of the existing law in a jurisdiction where it was not the law prior to its enactment or that it changed the law in a jurisdiction where it already was the law.

Actually, their difficulty in drafting section 2 stemmed from the fact that in many jurisdictions, no one knew what the law was, so that the Commissioners could not tell what effect any declaration might have. By a vote of 28 to 25, they decided to say nothing more than what appears in the section as finally adopted.

Sections 3, 4, 5, and 6 of the Act, the standard formal sections, were adopted by the Committee without comment or question."

It is recommended that the Conference direct the preparation of a draft modelled on the American Uniform Act for discussion at the next annual meeting. It will be appreciated that this legislation need not form the subject of a separate statute but might be added as a section(s) to the Uniform Wills Act or form part of the Trustee Act or its equivalent in the various provinces.

H. ALLAN LEAL,
of the Ontario Commissioners.

Appendix "A"

Uniform Testamentary Additions to Trusts Act

Section 1. Testamentary Additions to Trusts. — A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

Section 2. Effect on Prior Wills —This Act shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this Act.

Section 3 Uniformity of Interpretation.—This Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 4. Short Title.—This Act may be cited as the Uniform Testamentary Additions to Trusts Act.

Section 5. Repeal.—The following acts and parts of acts are hereby repealed:

(*a*)

(*b*)

(*c*)

Section 6.. Time of Taking Effect.—This Act shall take effect

APPENDIX V

(See page 26)

TESTATORS FAMILY MAINTENANCE ACT

The Uniform Act referred to above, and similar legislation enacted in most common law jurisdictions of the Commonwealth, reflect the social policy that testators must provide for the support of their dependants out of their estates at their death, and if they fail in that duty the court should have jurisdiction to put things right.

The report submitted one year ago demonstrated that, notwithstanding the apparent acceptance of this principle of social policy, under this legislation there is no obstacle to a testator denuding himself of all or the bulk of his assets so that there is at his death no estate out of which an order made under the Act can be satisfied. Thus the statute is circumvented and the public policy which prompted it is rendered sterile. This is true even though the testator has disposed of his estate during his lifetime for the express purpose of defeating his dependants' remedy under the Act.

Following a discussion of the reports submitted at the last annual meeting, it was resolved that the Ontario Commissioners make a further study and report with a draft Act for consideration of the next meeting of the Conference (1966 Proceedings, p. 22 and Appendix P, p. 103).

It seems clear that the principle of recapturing assets and deeming them to be part of the estate of the testator at his death should be limited to those assets in which the testator had an interest or over which he exercised control up to the moment of his death. This would eliminate all transactions involving *bona fide* purchasers and the donees of absolute gifts The exclusion of the latter is dictated by the difficulties involved in recapture which in most cases would render the court order nugatory or administratively inconvenient and complicated.

It is recommended that the Uniform Act be amended by adding thereto the following section:

"3a. (1) Where a testator dies leaving a will, and without making therein adequate provisions for the proper maintenance and support of his dependants, or any of them, the following

transactions effected by him at any time before his death, whether benefitting his dependants or any other person, shall be treated as testamentary provisions and the capital value thereof, as of the date of the death of the testator, shall be included in his net estate for the purposes of this Act:

(a) gifts *mortis causa*;

(b) money deposited, together with interest thereon, in an account in the name of the testator in trust for another or others with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(c) money deposited, together with interest thereon, in an account in the name of the testator and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of such persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(d) any disposition of property made by a testator whereby property is held at the date of his death by the testator and another as joint tenants with right of survivorship or as tenants by the entireties;

(e) any disposition of property made by the testator in trust or otherwise, to the extent that the testator at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof. The provisions of this subsection shall not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the testator;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of *The Insurance Act,* Revised Statutes of Ontario, 1960, c. 190, as re-enacted by Statutes of Ontario, 1961-62, c. 63.

(2) The transactions referred to in paragraphs (b), (c) and (d) of subsection (1) shall be deemed to be testamentary provisions for the purpose of this Act to the extent that the funds on deposit were the property of the testator immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entireties was furnished by the testator. The dependants claiming under this Act shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the testator. Where the other party to a transaction described in paragraphs (c) or (d) is a dependant, such dependant shall have the burden of establishing the amount of his contribution, if any.

(3) The provisions of this section shall not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been personally served on such corporation or person a certified copy of a suspensory order under subsection (2) of section 3 enjoining such payment or transfer. Personal service upon the corporation or person holding any such fund or property of a certified copy of such suspensory order shall be a defense to any action or proceeding brought against such corporation or person with respect to the fund or property during the period such order is in force and effect.

(4) This section does not affect the rights of creditors of the testator in any transaction with respect to which a creditor has rights.

(5) [Application]"

Note:

The specific provisions suggested for implementing the recommendations contained in the Report of August 2, 1966 and those of the Supplementary Report of the same date have been rejected in this draft. The former are too broad inasmuch as they make reference to classes of property which would be administratively difficult to recapture and the latter because they would apply only to dispositions made or proposed to be made to defeat the policy of the Act. The above draft is based upon the amendments to The Decedent Estate Laws (New York) by Laws of New York, 1965, c. 665 dealing with the similar problem of bolstering the surviving spouse's elective right.

H. ALLAN LEAL,
of the Ontario Commissioners

APPENDIX W

(See page 27)

TRUSTEE INVESTMENTS

Introductory Note.

At the 1966 meeting of the Conference, the report of Messrs. Louis-Philippe Pigeon, Q.C., and J. W. Durnford, recommending the adoption of the Prudent Man Rule in trustee investments, was adopted, and instructions were given for a revised Model Act to be prepared (1966 proceedings, page 23).

It appeared to the undersigned that the Prudent Man Rule should incorporate the following elements:

1) an unfettered freedom as to the type of investment;

2) the standard of prudence that would be shown by somebody who is handling *someone else's* property as opposed to his own (since a person might speculate with some of his own funds in a way that he would not with funds he was administering for others);

3) a liability to make good the losses arising from imprudent investing;

4) an obligation to diversify (if the circumstances call for it);

5) an acknowledgment that the investment instructions contained in the will override the statutory provisions as to investments;

6) retroactivity so as to cover trusts already in existence

The attached draft was prepared in the light of the Model Act of the American Bankers Association (which has been adopted by a large number of those States that have accepted the Prudent Man Rule) and of the equivalent statute of Minnesota (see *Appendices A and B*).

For the interest and information of Commissioners, there is also attached (*Appendix C*) a copy of the well-known *Mayo* case which illustrates the results of legal list investments.

LOUIS-PHILIPPE PIGEON, Q.C.
J. W. DURNFORD.

DRAFT

An Act to Amend the Trustee Act

(Two disapprovals were received by the Secretary before November 30th, 1967. *The subject will be included in the* 1968 *Agenda for further consideration.)*

1. Sections (insert reference to sections corresponding with sections 2 and 3 of Model Act) of the "Trustee Act" are repealed and the following substituted therefor.

"2. In acquiring, investing, re-investing, exchanging, retaining, selling and managing property for the benefit of another, the trustee shall exercise the judgment and care which a man of prudence, discretion and intelligence, who, as a trustee of the property of others, would exercise as such trustee; subject to the foregoing standards, a trustee is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of securities, unless it is otherwise directed by an express provision of the law or of the will or other instrument creating the trust or defining the trustee's duties and powers."

"3. No corporation that is a trustee shall invest trust money in its own securities."

2. Section 1 shall apply to trustees acting under trusts arising before or after the coming into force of this Act.

Appendix A

(American Bankers Association Model Act & Annotations)
(Taken from *Trust and Estate Legislation,* published by the Trust Division of the American Bankers Association, 1961)

Prudent-Man Investment

TEXT OF ACT

Be it enacted:—

SECTION 1. In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of another, a fiduciary shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property real, personal or mixed, and every kind of investment, specifically including but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire or retain for their own account.

* * *

and within the limitations of the foregoing standard, a fiduciary may retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

Note: The foregoing addition to Section 1 is included for the consideration of those states which desire particular treatment of the retention of trust property.

SECTION 2. Nothing contained in this Act shall be construed as authorizing any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order or other instrument creating or defining the fiduciary's duties and powers, but the terms "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of section 1 hereof.

SECTION 3. Nothing contained in this Act shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of fiduciary property.

SECTION 4 The provisions of this Act shall govern fiduciaries acting under wills, agreements, court orders and other instruments now existing or hereafter made.

Note: Specific provisions that may be desired in specific states and repealing sections, if desired, are to be inserted or added. A preamble may be desired.

Model

PRUDENT-MAN INVESTMENT ACT

Thirty-nine jurisdictions recognize the prudent-man rule as the proper philosophical concept underlying the making of trust investments. Twenty of these have enacted the recommended statute, with or without minor variations, and six have the rule by judicial decision. Four more allow full investment discretion to fiduciaries but in language somewhat different from that of the model act. One has a rather special statute.

Eight jurisdictions recognize the rule (three of these in the form of the model act) but apply it only in a modified way, generally by limiting the percentage of a trust as to which the trustee may exercise full discretion One state appears to authorize the court to approve investments other than those on the legal list.

Eight states retain the old-fashioned legal list but three of these include stocks, under various formulae, as legal investments. Finally, three states do not appear to have legislated at all on this subject nor to have court decisions for guidance.

Since one variation from the model act, made in several states, is the specific inclusion of certain types of mutual fund shares as prudent investments, these instances are noted by the addition to the citations of the words "mutual funds"

The following states have the model act:

ARKANSAS
1955 Ark. Stats, §§ 58-301 to 58-306 Mutual funds. Does not apply to veteran guardianships

CALIFORNIA
1943. Civil Code, § 2261

COLORADO
1951. C R S. 1953, 57-3-1 to 57-3-6

DELAWARE
1943. 12 Del Code, § 3302.

FLORIDA
1953. FSA, Ch. 518 11.

HAWAII
1945. Rev Laws 1955, § 179.14(a). Applies only to trust companies Amended in 1959 to include mutual funds.

IDAHO
1949. Code 68-502 to 68-505

ILLINOIS
1945 Ill. Rev. Stats. 1957, Ch 148, §§ 32, 32-1a, 32-1b.

KANSAS
1949. Kan. Gen. Stats., 1949, 17-5004 to 17-5007 Mutual funds. Does not apply to guardians

MAINE
1945. R S., 1954, Ch. 160, §§ 18-21 Mutual funds.

MISSISSIPPI
1956. Code 1942, § 421 5 Mutual funds.

NEVADA
1947 NRS 164.050

NEW MEXICO
1951. N M Stats 1953 Ann, 33-1-16. Mutual funds

OREGON
1947. ORS 128 020 to 128 050.

SOUTH DAKOTA
1955. Laws of 1955, Ch. 12.

TENNESSEE
1951. TCA 35-319 to 35-325 Mutual funds. This is in addition to a very full legal list.

TEXAS
1945 Civil Stats, Art. 7425b, § 46.

UTAH
1951. U C.A 1953, 33-2-1.

VIRGINIA
1956. Code 1950 (1956 Supp.) §§ 26-45.1 Mutual funds

WASHINGTON
1947 R.C W 30.24.

The following states have adopted the prudent-man rule by judicial decision:

MARYLAND
1922 *Fox v. Harris,* 141 Md. 485, 119 Atl 256.

MASSACHUSETTS
1830. *Harvard College v Amory,* 9 Pick 446.

MISSOURI
1940. *Rand v McKittrick,* 346 Mo. 466, 142 S W 2d 29

NORTH CAROLINA
1928 *Sheets v J. G Flynt Tobacco Co,* 195 N.C. 149, 141 S E. 355. (Note: G S 36-1 to 36-5 authorize fiduciaries to invest in certain types of bonds)

RHODE ISLAND
1886 *Peckham v. Newton,* 15 R I. 321, 4 Atl. 758. See also G L 1956, 18-4-2 which gives broad investment powers but not in the language of the prudent-man rule Mutual funds (Note: G L. 1956. 18-4-2 enacts the prudent-man rule.)

VERMONT
1945. *St. Germain v. Tuttle,* 114 Vt 265, 44 A. 2d. 137

The following states have statutes enacting the prudent-man rule in language differing from that of the model act:

CONNECTICUT
1949. Conn Gen. Stats (1958) § 45-88. Fiduciaries may invest "with the care of a prudent investor"

MICHIGAN
1948 M S A. 26 85. Mutual funds

MINNESOTA
1943. M.S.A. 501.125. Close in language to the model act

OKLAHOMA
1949 60 O.S 161. Language similar to the model act.

One state has quite a different statute which nevertheless gives trustees full discretion at least as to stocks:

KENTUCKY
1944. KRS 386.020 This is fundamentally a legal list but subdivision (h), which relates chiefly to certain types of stocks, authorizes investments in "dividend paying securities which would be regarded by prudent business men as a safe investment" Mutual funds.

The following states recognize the prudent-man rule but apply it only in a modified way:

NEW HAMPSHIRE
1949. RSA 564:18 This is a simplified version of the prudent-man rule with a 50 per cent limitation on the exercise of the fiduciary's discretion beyond a brief legal list. The legal list, however, authorizes for fiduciaries all investments legal for savings banks and these include a wide variety of stocks See RSA Ch 387. Mutual funds

NEW JERSEY
1951. N J.S.A.3A: 15-18 to 15-29 § 15-19 enacts a prudent-man rule applicable to all fiduciary investments but § 15-20 limits stocks to 40 per cent of the principal of a trust estate subject to certain restrictions set forth in the other cited sections Mutual funds

NEW YORK
1950. Personal Property Law § 21. The preamble contains a brief statement of the prudent-man rule applicable to all fiduciary investments but discretionary investments are limited to 35 per cent subject to certain restrictions.

NORTH DAKOTA
1951. Rev. Code 6-0515. This enacts the substance of § 1 of the model act as a supplement to provisions requiring 50 per cent of trusts to be invested in certain classes of bonds

OHIO
1953 R C 2109 371. This is a simplified statement of the prudent-man rule with discretionary investments limited to 35 per cent of trusts Mutual funds.

PENNSYLVANIA
1949 20 P.S, §§ 821.2 to 821.22. § 821 2 exonerates fiduciaries investing with due care and prudence in the types of investments authorized in Pennsylvania § 821.9 authorizes investments in stocks under certain conditions, but not in common stocks in excess of one-third of the value of trusts. Mutual funds.

WEST VIRGINIA
1955 Code, § 4216. The language of the model act is used but discretionary investments are limited to 35 per cent of trusts. Mutual funds.

WISCONSIN
1959. Wis Stats. 1959, 320.01 to 320.06. This enacts all of the model act and then limits investments to 50 per cent in common stocks.

In one state it would appear that fiduciaries may invest outside of the legal list if they obtain the approval of the court:

IOWA
1958. Code, § 682.23 is a legal list in which fiduciaries must invest "unless otherwise authorized or directed by the court." In *In Re Wiley's Guardianship,* 34 N W 2d. 593 (1948) the Supreme Court of Iowa held that the court could authorize variations from the legal list.

Three jurisdictions with legal lists include as legal investments certain stocks selected pursuant to formulae:

DISTRICT OF COLUMBIA
The legal list is set forth in Rule 23, Local Civil Rules of the District Court. Investment in up to 40 per cent in specified stocks is permitted.

INDIANA
1945 Burns' Stats. 31-501 (f) and (k) permit trustees to acquire specified stocks.

SOUTH CAROLINA
1948. Code 1952, § 67-58 is a legal list including authority to acquire up to 30 per cent in stocks.

The following states retain the type of legal list limited to fixed-income investments: Alabama, Georgia, Louisiana, Nebraska, and Wyoming.

The following states have no trust investment legislation:

ALASKA
Comp. Laws 1949, 34-3-5, was repealed.

ARIZONA

MONTANA
Art. V., § 37, of the state constitution forbids the legislature to authorize fiduciaries to buy stocks.

Note: Since this material was prepared, Louisiana has enacted a statute providing that the prudent-man rule shall apply to fiduciaries for minors (Louisiana Code of Civil Procedure, Art. 4269)

501.125 Kinds of property a trustee may acquire

Subdivision 1. Properties and investments. In acquiring, investing, reinvesting, exchanging and managing property, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures and other individual or corporate obligations, and corporate stocks, which an ordinarily prudent person of discretion and intelligence, who is a trustee of the property of others, would acquire as such trustee.

Subd. 2. Shall not be compelled to dispose of property. Unless the trust instrument or a court order specifically directs otherwise, a trustee shall not be required to dispose of any property, real, personal, or mixed, or any kind of investment, in the trust, however acquired, until the trustee shall determine in the exercise of a sound discretion that it is advisable to dispose of the same, but nothing herein contained shall excuse the trustee from the duty to exercise discretion at reasonable intervals and to determine at such times the advisability of retaining or disposing of such property.

Subd. 3. Not to alter terms of will. Nothing contained in this section shall be construed as authorizing any departure from or variation of the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the trustee's duties and powers, but the terms "authorized securities," or "authorized investments," or "legal investments," or words of similar import, as used in any such instrument or in the statutes of this state in so far as they relate to the investment of trust funds by corporate trustees or by individual trustees, shall be taken to mean every kind of property, real, personal or mixed, and every kind of investment, which a trustee is authorized to acquire under the terms of subdivision 1 hereof

Subd. 4. Not to be construed to limit powers of court. Nothing contained in this section shall be construed as restricting the power of a court of proper jurisdiction to permit a trustee to deviate from the terms of any will, agreement, court order or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of trust property

Subd. 5. Who are trustees. The term "trustee," as used in this section, includes individual trustees and corporations having trust powers and the provisions hereof shall govern trustees acting under wills, agreements, court orders and other instruments now existing or hereafter made

History and Source of Law

Derivation:

St Supp 1944, § 8090-4 to 8090-8

Laws 1943, c 635, §§ 1-5.

Cross References

Bond of trustee to run to state, see § 574.11

Corporate stock, representation by trustee, at meetings, see § 300 57.

Estate tax, liability of trustee, see § 291 35

Investments by trustees, see §§ 50 14, 60.38

Larceny by trustee, see §§ 622 01, 622.13

Mortgage foreclosure, trustee bidding in property, see § 582 11

State treasurer as trustee, bond, see § 7 013.

Testamentary trustee, qualification before discharge of representative, see § 525.504

Law Review Commentaries

Judicial control of the discretionary powers of trustees June 1918, 2 Minn. Law Review 535.

Review of legislation enacted in 1943, including Laws 1943, c. 635, regarding power of trustee to acquire property. Dec 1946, 31 Minn. Law Review 86.

Notes of Decisions

1. Construction and application

It is duty of trustees to preserve corpus of trust for remainderman, and to secure usual rate of income on safe investments for life tenant, and to use sound discretion in reference to each of these objects. Congdon v Congdon, 1924, 160 Minn. 343, 200 N.W. 76.

Appendix C

In re TRUSTEESHIP UNDER AGREEMENT WITH Charles H. MAYO, dated August 17, 1917.

Esther Mayo HARTZELL, petitioner, and Charles W. Mayo, et al., beneficiaries, Appellants,

v.

G. Slade SCHUSTER, et al, trustees, Respondents,

Roderick D. Peck, guardian ad litem, and William J Mayo, II, Respondents

In re TRUSTEESHIP UNDER AGREEMENT WITH Charles H MAYO, dated March 28, 1919, as amended for the benefit of Esther Mayo Hartzell, et al

Esther Mayo HARTZELL, petitioner, and John Mayo Hartzell, et al., beneficiaries, Appellants,

v.

G Slade SCHUSTER, et al., trustees, Respondents,

Roderick D Peck, guardian ad litem, Respondent

Nos 37943, 37944

Supreme Court of Minnesota

Nov 10, 1960.

Proceeding on petition of a beneficiary for orders authorizing trustees of two separate trusts to deviate from investment restrictions in the trust instruments. The District Court, Hennepin County, Irving R. Brand, J, denied the petitions, and beneficiary appealed The Supreme Court, Dell, C. J, held that where trusts, provided that the trustees should manage, care for and protect the fund in accordance with their best judgment and discretion, and invest in certain described property, "but not real estate nor corporate stock," but if deviation from authorized investments was not permitted, accomplishment of the dominant inten-

tion of the donor to prevent a loss of the principal of the trust would be substantially impaired because of changed conditions due to inflation since the trusts were created, to avoid such occurrence, in equity, trustees should have the right, and be authorized to deviate from the restrictions by permitting them to invest a reasonable amount of the assets of the trusts in corporate stocks of good sound investment issues

Reversed and remanded for further proceedings in accordance with opinion.

See also 100 N.W 2d 513.

1. Trusts—112

In construing a trust instrument, one of the court's highest duties is to give effect to the donor's dominant intentions as gathered from the instrument as a whole.

2. Trusts—112

Neither a court, a beneficiary, nor the Legislature is competent to violate the dominant intention of the donor of a trust.

3. Trusts—112

When the language of a trust instrument is clear, the intention of the donor must be ascertained therefrom, and in determining such intention the court is not at liberty to disregard plain terms employed in the instrument

4. Trusts—217(3)

In construing trust provisions restricting investment of trust funds, a court must be especially concerned in giving full effect to the donor's intentions.

5. Trusts 217(3)

Where scope of investment permissible under a trust instrument is restricted, the court will permit trustees to deviate therefrom only if the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired.

6. Trusts—217(3)

Only in exceptional circumstances or in cases of emergency, urgency or necessity will deviation from a donor's intention as to scope of investment of trust funds, as evidenced by the trust instrument, be authorized, and even if the donor could not have foreseen the changed circumstances, deviation will not be authorized unless it is reasonably certain that the purposes of the trust would otherwise be defeated or impaired in carrying out the donor's dominant intention.

7. Trusts—217(4)

Where two trusts provided that the trustees should protect the fund in accordance with their best judgment and discretion, and invest in certain described property, "but not real estate nor corporate stock," but if deviation from authorized investments was not permitted, accomplishment of the dominant intention of the donor to prevent a loss of the principal of the trust would be substantially impaired because of changed conditions due to inflation since the trusts were created, to avoid such occurrence, in equity, trustees should have the right and be authorized to deviate from the restrictions by permitting them to invest a reasonable amount of the assets of the trusts in corporate stocks of good sound investment issues

Syllabus by the Court

1 In construing trust instruments the court must give effect to donor's dominant intention as expressed

therein and may not disregard plain terms employed in trust instruments.

2 With respect to provisions in trust instruments restricting type of investments in which trustees may invest trust funds, courts are especially concerned to give full effect to donor's intention.

3 Where scope of investment permissible under trust instrument is restricted, court will permit trustees to deviate therefrom if accomplishment of the purposes of the trust are otherwise defeated or substantially impaired. Only in exceptional circumstances or emergencies will deviation from donor's intention evidenced in trust instrument be authorized However, where the donor during his lifetime could not have foreseen the claimed exceptional circumstances or emergencies relied upon for deviation, deviation may properly be authorized.

4 Evidence here considered and held to compel order authorizing trustees to deviate from the restrictive investment provisions of trusts and to invest portion of trust assets in corporate stocks since such evidence clearly established a continuing, unforeseeable inflation which would further diminish value of trust assets and thereby circumvent or frustrate the dominant intention of the donor to preserve the value of the corpus of the trusts

Best, Flanagan, Lewis, Simonet & Bellows, and Archibald Spencer, Minneapolis, for appellants

Dorsey, Owen, Barber, Marquart & Windhorst, David R. Brink, Robert L Crosby, Roderick D Peck, and Richard Siegel, Minneapolis, for respondents in No 37943.

Dorsey, Owen, Barber, Marquart & Windhorst, David R Brink, Robert L. Crosby, and Roderick D Peck, Minneapolis, for respondents in No 37944.

DELL, Chief Justice

Appeals from orders of the district court denying the petitions of Esther Mayo Hartzell, as beneficiary, for orders authorizing the trustees of two separate trusts created by the late Dr Charles H. Mayo on August 17, 1917, and March 28, 1919, to deviate from identical investment restrictions in the trust instruments or to construe the term "other forms of income bearing property" as used therein as authorizing investment of trust funds in corporate stock The donor died May 26, 1939.

The petitions were opposed by the trustees. Roderick D Peck was appointed guardian ad litem and appeared for all "unknown, unascertained, minor and incompetent beneficiaries" with respect to both trusts Appearances were also made on behalf of the petitioner, William J Mayo II, one of the beneficiaries, and the trustees The present appeals are taken by the petitioner and by a number of other beneficiaries of the trusts

With reference to investments the provisions of both trusts are in substance as follows:

"* * * The TRUSTEES shall hold said property as a trust fund and collect the interest, income and profits therefrom as the same accrue; *manage, care for and protect said fund all in accordance with their best judgment and discretion,* invest and re-invest the same in *real estate mortgages, municipal bonds or any other form of income bearing property (but not real estate nor corporate stock),* * * *" (Italics supplied.)

At the time of the hearing the value of the assets of the first trust was approximately $1,000,000, invested mostly in municipal bonds and in 1,944 shares of common stock of the Kahler Corporation, the latter coming into the trust at the time of its creation from the donor The value of the assets of the second trust at the time of the hearing was approximately $186,000 invested mostly in municipal bonds. The first trust by its terms will continue until 21 years after the death of the petitioner, who was 51 years of age at the time of the hearing; while the second trust by its terms will partially terminate as each surviving child of petitioner attains the age of 30 years and will fully terminate when the last of such children attains such age; but in the event of certain alternatives it will not continue longer than 21 years after the death of all of donor's children

In support of the petition, evidence was submitted that an inflationary period, which could not have been foreseen, had commenced shortly after the donor's death in 1939; that it had reduced the real value of the trust assets by more than 50 percent; that a further inflationary period or a permanent "creeping inflation," which the donor could not have foreseen, must be expected; that on December 30, 1940, when the trustees filed their first accounting, the value of the assets of the first trust was $957,711 60: that in October 1958, at the trustees' most recent accounting, the value of such assets was $968,893 08, which in terms of 1940 dollar values meant that in 1958 the assets of the first trust were worth only $456,139 67: that the same percentage of shrinkage was experienced in the second trust; that the provisions of the trust prohibiting investments in real estate and corporate stocks had caused such shrinkage; and that the market value of common stocks had almost doubled since 1939 while the actual value of bonds, in terms of purchasing power, had been cut almost in half since that time. Appellants state that even in the short period between March 1959 and November 1959 the Consumer Price Index of the Bureau of Labor Statistics has increased from 123.7 to 125.6, representing an increase of almost 2 percent in 8 months

Petitioner urges that the donor's ultimate and dominant intention was to preserve the value of the trust corpus and that this will be circumvented unless the court authorizes the trustees to deviate from the investment provisions of the trusts and invest part of the funds in corporate stocks; that it is common practice of trustees of large trusts which have no restrictive investment provisions (including the First National Bank of Minneapolis, one of the trustees in both trusts here) to invest substantial proportions of trust assets in corporate stocks to protect such trusts against inflation, and she asserts that if no deviation is permitted and the next 20 years parallel the last 20 years the ultimate beneficiaries of these trusts will be presented with assets having less than one-fourth of the value which they had at the time of the donor's death.

In opposition to the petition, the trustees refer to the donor's clear intention, as expressed in the trust instruments, that no part of the trust funds should be invested in real estate or corporate stocks, and urge that, since no emergency or change of circumstances which could

not have been foreseen or experienced by the donor during his lifetime has been shown, no deviation from the donor's clearly expressed intention would be justified. They urge that the rule is well established that where prospective changes of conditions are substantially known to or anticipated by the settlor of a trust the courts will not grant a deviation from its provisions They point out that the donor here had survived some 20 years after the creation of the trusts during a period in which there had been both a great inflation and a severe depression; that after creating such trusts he had observed the inflation of the post-World-War-I period, the stock market fever of the pre-1929 era, the market crash of 1929, and the subsequent depression and lowering of bond interest rates during the late 1930's; that despite these economic changes he had never altered the investment restrictions in these trusts; and that he was always aware of his right to amend the trust instruments and, in fact, had consented to minor departures from the provisions of one of the trusts in 1932 and had once amended another trust to permit acquisition of common stocks, but had never requested any change in the investment provisions of the trusts now under consideration and apparently was satisfied with them exactly as they had been drawn and executed Petitioner offered expert testimony favoring deviation and respondents' expert testimony was to the contrary. The lower court found in favor of respondents and these appeals followed

[1-3] 1 The principles governing construction of trust instruments are well settled. One of the court's highest duties is to give effect to the donor's dominant intention as gathered from the instrument as a whole.[1] Neither the court, a beneficiary, nor the legislature is competent to violate such intention [2] When the language of the instrument is clear, the intention of the donor must be ascertained therefrom [3] In determining such intention the court is not at liberty to disregard plain terms employed in the trust instrument.[4]

[4] 2. With respect to trust provisions restricting investments in which a trustee may invest trust funds, the courts are especially concerned in giving full effect to the donor's intention Thus, in In re Trusteeship Under Will of Jones, 202 Minn 187, 189, 277 N.W 899, 900, it was held that trustees were not authorized to invest trust assets in corporate stock because of the absence of specific directions to do so and because of the trust provision that the trustees "shall invest and reinvest all principal cash in the trust fund in first mortgages on improved real estate, in municipal or corporation bonds or in any other form of income bearing property, except real estate, *but * * * shall have first regard for the safety of principal * * **" (Italics supplied) The court by implication held that the provision allowing investment in corporate bonds excluded authority for investment of trust funds in corporate stocks

Subsequently this trust again came before us in In re Trust Under

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1 In re Trust Created by Will of Crosby, 224 Minn 173, 28 N W 2d 175

2 In re Trust Under Will of Jones, 221 Minn 524, 22 N W 2d. 633

3 In re Trust Created by Will of Tuthill, 247 Minn 122, 76 N W 2d 499

4 In re Trusteeship Created by Fiske, 242 Minn. 452, 65 N W 2d 906

Will of Jones, 221 Minn. 524, 22 N.W.2d 633. It was then urged that under a subsequent statutory enactment which authorized trustees to invest trust funds in corporate stocks, and because of changed economic conditions and the prospect of higher income from corporate stocks, the court should authorize the trustees to invest trust funds in the latter. In denying both contentions this court stated (221 Minn. 528, 22 N W 2d 635):

> "There has been no showing that authority to deviate from the terms of this trust is necessary to effectuate the ultimate intention of the testator or *to preserve the corpus of the trust.* * * * authority to deviate * * * is being sought solely with a view to increasing the income of the life tenants thereunder * * * it would be improper for the court to substitute its judgment on a matter of business for that of the testator * * * *" (Italics supplied)

[5] 3 Petitioner urges that under the evidence presented here, which dealt extensively with the question of inflation and its resultant impairment of the purchasing power of the trust corpus, a question arises which was not considered in In re Trust Under Will of Jones, supra, and that following the suggestion made in that case that (221 Minn 527, 22 N W.2d 634) "the court may, in a proper case, invoke its equity powers to authorize a deviation from the terms of a testamentary trust," deviation should have been authorized The general principles governing deviation to which this court has adhered whenever the question has been presented are set forth in Restatement, Trusts (2 ed) § 167, comment c:

> "Where by the terms of the trust the scope of investment which would otherwise be proper is restricted, the court will permit the trustee to deviate from the restriction, if, but only if, the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired Thus the court will permit the investment if owing to changes since the creation of the trust, such as the fall in interest rates, the danger of inflation, and other circumstances, the accomplishment of the purposes of the trust would otherwise be defeated or substantially impaired. Where by the terms of the trust the trustee is not permitted to invest in shares of stock, the court will not permit such an investment merely because it would be advantageous to the beneficiaries to make it"

[6] In applying the foregoing rule the courts have adopted certain rules for guidance. It is only in exceptional circumstances described as cases of emergency, urgency, or necessity that deviation from the intention of the donor, as evidenced by the trust instrument, has been authorized. In most of the cases where deviation was authorized, the fact that the donor could not have foreseen the changed circumstances played an important part Even under such circumstances deviation will not be authorized unless it is reasonably certain that the purposes of the trust would otherwise be defeated or impaired in carrying out the donor's dominant intention.[5]

[5] Gaines v. Arkansas Nat Bank, 170 Ark 679, 280 S W 993; Stone v Clay, 103 Ky 314, 45 S W 80; Matter of Young's Estate, 178 Misc 378, 34 N Y S 2d 468; Stanton v Wells Fargo Bank & Union Trust Co., 150 Cal App 2d 763, 310 P 2d 1010; Thomson v Union Nat. Bank, Mo., 291, S W 2d 178; Rogers v English, 130 Conn 332, 33 A 2d 540, 147 A L R 812

[7] 4. In our opinion the evidence here, together with economic and financial conditions which may properly be judicially noticed,[6] compels us to hold that unless deviation is ordered the dominant intention of the donor to prevent a loss of the principal of the two trusts will be frustrated. When the trusts were created and for many years prior thereto, the dollar, based upon the gold standard, remained at a substantially fixed value. On March 9, 1933, the United States went off the gold standard and has since that time remained off from it domestically. While some inflation shortly thereafter followed, it was not until after the death of the donor that inflation commenced to make itself really known and felt Since then it has gradually increased until at the time of the trial of this case the purchasing power of the dollar, measured by the Consumer Price Index of the U. S. Bureau of Labor Statistics, had depreciated to one-half of its 1940 value While the experts called by the respective parties disagreed as to when inflation, which they felt was then dormant, would start again and at what percentage it would proceed, there was no disagreement between them that further inflation "in the foreseeable future" could be expected. There was testimony that there would possibly be none for the next year or two and that then it would "increase so that over the period of ten years, on the average, the trend line would be between one and a half and two per cent * * *." But from the date of trial to November 1959 there was an increase of almost 2 percent in the cost of living index.

At the time these trusts were created it was common practice for business men, in protecting their families through the creation of trusts, to authorize investments to be made by their trustees only in high-grade bonds or first mortgages on good real estate. Many of the estates then had statutes preventing trustees from investing in corporate stocks or real estate Since that time many of the states, including Minnesota,[7] have enacted statutes permitting trustees to invest in corporate stocks and real estate In recent years most trust companies have encouraged donors, when naming the companies as trustees, to permit investment in common stocks as well as bonds and mortgages. And these trustees maintain competent and efficient employees, well acquainted with the various aspects of corporations having listed stocks, so as to enable them to make reasonably safe and proper corporate-stock purchases.

Throughout the trial considerable reference was made to the 1929 stock-market crash as a reason why deviation should not be granted There are many reasons, however, why the market action of that period is not a controlling factor today At that time, many of the corporations, including some of the very best, did not maintain sufficient current assets in relation to current liabilities And several of them then carried a large funded indebtedness drawing high interest rates with comparatively early maturities. Many companies also, during that period, declared and paid higher dividends than should have been paid. As a result they did not retain and build up a sufficient surplus for future

[6] See, e g , Village of Aurora v. Commissioner of Taxation, 217 Minn 64, 14 N W 2d 292; 7 Dunnell, Dig (3 ed) § 3451b(8)

[7] L 1943, c. 635

use in the business When the crash came, many of them, because of such practices, had great difficulty for a long period of time in extricating themselves from their unfortunate financial positions. Dividends from many of such companies were stopped or greatly reduced. A few of them failed altogether This caused the market value of stocks for a long period of time to greatly decline. But even so, almost all of the companies having corporate stock classified as "good, sound investment stocks" not only survived but have been paying regular and substantial dividends Many of them are now considered outstanding, safe, investment stocks. Now almost all of these companies maintain a high ratio between their current assets and their current liabilities. They have also built up and retain large surpluses for use in their business Many of them now have no funded debt at all; and those that do, in most instances, have fixed maturity dates well ahead in years with a satisfactory rate of interest

Officers and directors of companies registered and listed on the New York and American Stock Exchanges, as well as beneficial owners of more than 10 percent of any of its securities, must now, under the Securities Exchange Act of 1934, 15 U S C A § 78a et seq., file a statement with the exchange where the stock is registered and listed, and a duplicate original thereof with the Security Exchange Commission, indicating their ownership at the close of the calendar month and such changes in their ownership as have occurred during such calendar month Such statements must be in the hands of the commission and the exchange before the 10th day of the month following that which they cover The information thus made available is published for the benefit of the public. Large investment companies have been organized under the Investment Company Act of 1940, 15 U.S.C.A. § 80a-1 et seq They now buy, sell, and own large amounts of corporate stocks in various companies. This assists in stabilizing the market in difficult financial times.

In 1929 there was no Security Exchange Commission to regulate and control corporate stock purchases or sales Many of the people of that era were not investing in stocks at all but were gambling in them At that time the margin requirement was only 10 per cent and brokers' loans reached an alltime high of approximately $8,500,000,000. Until recently margin requirements were, as fixed within the framework of the Securities Exchange Act, 90 percent. As a result there has been very little speculation and brokers' loans have been relatively small. In 1929 large speculators pooled their resources with a premeditated plan to buy and force certain stocks upward. This upward surge prompted uninformed people to purchase those stocks When the stocks had reached a predetermined value, the pool operators sold out, the stocks declined, and the people took the losses During that period promotors were dealing in public utilities stocks, merging companies together without proper relation one to the other geographically or otherwise When the crash came those stocks suffered greatly Some of the companies never recovered at all

Several of them were required to divest themselves of their complex and wide holdings under the Public Utility Holding Company Act of 1935, 15 U.S.C.A. § 79a et seq. These practices are no longer permissible under that act and the

rules and regulations of the Security Exchange Commission. Since 1932, because of heavy Federal expenditures, the national debt has grown from a high of approximately $25,400,000,000 at the end of World War I to approximately $258,600,000,000 at the end of World War II and to approximately $290,000,000,000 at the present time Inflation has been steadily increasing. None of this was foreseeable by an ordinarily prudent investor at the time these trusts were created, nor at the time of the donor's death in 1939, since these inflationary practices did not become noticeably fixed and established until after his death

It appears without substantial dispute that if deviation is not permitted the accomplishment of the purposes of the trusts will be substantially impaired because of changed conditions due to inflation since the trusts were created; that unless deviation is allowed the assets of the trusts, within the next 20 years, will, in all likelihood, be worth less than one-fourth of the value they had at the time of the donor's death To avoid this we conclude that in equity the trustees should have the right and be authorized to deviate from the restrictive provisions of the trusts by permitting them, when and as they deem it advisable, to invest a reasonable amount of the trust assets in corporate stocks of good, sound investment issues. Through an investment in bonds and mortgages of the type designated by the donor, plus corporate stocks of good, sound investment issues, in our opinion, the trusts will, so far as possible, be fortified against inflation, recession, depression, or decline in prices Corporate trustees of the kind here are regularly managing trusts consisting of corporate stocks, bonds, and mortgages, on a sound financial basis and there is no reason why they cannot do the same thing here

Reversed and remanded for further proceedings in conformity with this opinion

THOMAS GALLAGHER, J., took no part in the consideration or decision of this case.

MELCO
INVESTMENT COMPANY,
Appellant,

v

Lawrence GAPP, Respondent
No 38020

Supreme Court of Minnesota

Nov 4, 1960.

Purchaser's action for specific performance. The District Court, Anoka County, Carl W Gustafson, J, dismissed action and denied plaintiff's motion for new trial, and plaintiff appealed. The Supreme Court, Dell, C. J., held that fact that purchaser under contract which gave vendor right to terminate on default delayed performance four months past appointed date did not establish purchaser's intent to abandon contract

Reversed.

1. Vendor and Purchaser—101

A vendor, in order to terminate a defaulting purchaser's rights without resorting to judicial proceedings, must give 20 days' notice of his intention to do so, regardless of whether such notice is required by the agreement M.S.A. § 559 21

2. Vendor and Purchaser—185

Even in absence of statute, purchaser's failure to perform on appointed date did not, ipso facto, work a termination of contract

which contained provision entitling vendor to terminate contract on default, in absence of any positive act by vendor to manifest his intention to terminate contract, even though time was made of the essence. M S A. § 559.21.

3. Specific Performance—99

Where, although purchaser was in default and contract entitled vendor to terminate, vendor took no positive action toward termination, purchaser was entitled to maintain action for specific performance.

4. Vendor and Purchaser—86

Equitable interest of a purchaser may be lost by abandonment

5. Abandonment—2

"Abandonment" is a voluntary relinquishment of an interest by the owner with the intent of terminating his ownership.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

6. Vendor and Purchaser—86

A purchaser's intent to abandon may be shown by conduct.

7. Vendor and Purchaser—86

A purchaser's mere failure to pay purchase price under real estate contract does not, in itself, constitute an abandonment, in absence of other circumstances such as a lengthy lapse of time, supporting an inference of intent to abandon.

8. Vendor and Purchaser—86

That purchaser, under contract which gave vendor right to terminate on default, delayed performance four months past appointed date did not establish purchaser's intent to abandon contract M S A. § 559.21.

APPENDIX X

(See page 27)

AN ACT TO AMEND THE TRUSTEE ACT

(Revised 1967)

Sections ———————————— of the Trustee Act are repealed and the following substituted therefor·

1. In sections 2 to 6, "securities" includes shares, stock, debentures, bonds, notes, evidences of indebtedness, obligations, certificates, deposit receipts, trust or investment certificates issued by a trust company, investment contracts and any other documents, instruments or writings commonly known as securities

2. (1) In acquiring, investing, re-investing, exchanging, retaining, selling, lending and managing property for the benefit of another, a trustee shall exercise the judgment and care which a man of prudence, discretion and intelligence would exercise as a trustee of the property of others

(2) Subject to subsection (1), a trustee is authorized to acquire and retain every kind of securities, unless it is otherwise directed by an express provision of the law or of the will or other instrument creating the trust or defining the duties and powers of the trustee.

3. Without in any way limiting the principle that no trustee shall allow his duty and interest to conflict,

(a) no trustee that is a corporation shall invest trust money in, or lend trust money on the security of, its own securities or those of a corporation affiliated with it, and

(b) no trustee shall invest trust money in, or lend trust money to, a corporation controlled by him or a corporation that is an affiliate of a corporation controlled by him

4. A trustee may, pending the investment of any trust money, deposit it during such time as is reasonable in the circumstances in any bank or in any trust company, loan corporation or other corporation empowered to accept moneys for deposit and that has been approved for such purpose by the Lieutenant Governor in Council

5. Except in the case of a security that cannot be registered, a trustee who invests in securities shall require the securities to be registered in his name as the trustee for the particular trust for which the securities are held, and the securities may be transferred only on the books of the corporation in his name as trustee for such trust estate.

6. Where a trustee holds securities of a corporation in which he has properly invested money under this Act, he may concur in any compromise, scheme or arrangement

(a) for the reconstruction of the corporation or for the winding-up or sale or distribution of its assets, or

(b) for the sale of all or any part of the property and undertaking of the corporation to another corporation, or

(c) for the amalgamation of the corporation with another corporation, or

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

(e) whereby

(i) all or a majority of the securities of the corporation, or of any class thereof, are to be exchanged for securities of another corporation, and

(ii) the trustee is to accept the securities of the other corporation allotted to him pursuant to the compromise, scheme or arrangement,

in like manner as if he were entitled to the securities beneficially, and may, if the securities are investments made in accordance with subsection (1) of section 2, accept any securities of any denomination or description of the reconstructed or purchasing or new corporation in lieu of or in exchange for all or any of the original securities

7. Sections 2 to 6 apply to trustees acting under trusts arising before and after the commencement of those sections

APPENDIX Y

(See page 27)

UNSATISFIED JUDGMENT FUNDS

Uniformity in Residence Requirements

All the provinces of Canada have now established unsatisfied judgment funds for motor vehicle damage claims, under the following provincial Acts:

Newfoundland	—*The Highway Traffic Act* S.N. 1962, No. 82
Prince Edward Island	—*The Highway Traffic Act* S.P.E.I. 1964, c. 14, Part X
Nova Scotia	—*The Motor Vehicle Act* R.S.N.S. 1954, c 184
New Brunswick	—*The Motor Vehicle Act, 1955* S.N.B. 1954, c. 13
Quebec	—*Highway Victims Indemnity Act* R.S.Q. 1964, c. 232
Ontario	—*Motor Vehicle Accident Claims Act,* 1961-62—S.O. 1961-62, c. 84.
Manitoba	—*The Unsatisfied Judgment Fund Act* R.S.M. 1954, c. 112; 1965, c. 89
Saskatchewan	—*The Automobile Accident Insurance Act* R.S.S. 1965, c. 409
Alberta	—*The Motor Vehicle Accident Claim Act* S.A. 1964, c. 56
British Columbia	—*The Motor Vehicle Act* R.S.B.C. 1960, c. 253

In all but two of the provinces (Manitoba and Quebec) the fund is not liable to a claim by a person who "ordinarily resides" outside the province unless he "resides" in a jurisdiction in which recourse of a substantially similar character is afforded to residents of the province.

In Quebec a person who is domiciled in a jurisdiction where residents of Quebec do not enjoy rights equivalent to those

granted by Quebec legislation cannot make application to the fund.

Manitoba does not appear to restrict claims under its legislation on any basis of residence.

Attention has been drawn to the fact that a class of Canadian citizen appears to have been inadvertently excluded from the benefits of the provincial legislation in all the provinces with the possible exception of Quebec and Manitoba, namely, servicemen in the Canadian forces who are posted to various jurisdictions in the course of their service. A serviceman who is posted to a base in Canada from a jurisdiction outside Canada in which no substantially similar recourse against an unsatisfied judgment fund is provided and who incurs damages while in route through Canada by motor vehicle to his Canadian post at a time before he has actually again taken up a physical residence in any province, has apparently no recourse to an unsatisfied judgment fund, even in the province of his original domicile, under the rules prevailing in all the provinces other than Quebec and Manitoba.

While our concern is directed toward the situation of the servicemen, it seems that the exclusion may similarly apply to Canadians employed by corporations carrying on business outside Canada. In the circumstances, it is more in accord with the primary objective of the Conference to seek to have the matter placed on the agenda of the Conference for consideration in terms of uniformity and to obtain, if possible, a recommendation from the Conference to the provincial governments in the matter. As will be seen from the enumeration of the residence requirements of the various statutes set out in the appendix hereto, there is already considerable uniformity in the provincial legislation in this matter. We have no wish to affect such uniformity as now exists in the reciprocal provisions but wish both to maintain this uniformity and obtain relief for the excluded classes to which we refer. This approach is, we believe, consistent with the primary objective of the Conference of Commissioners on Uniformity of Legislation in Canada, that 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". (1964 Proc. p. 12).

The alternative of having the Government of Canada approach each of the provinces for remedial legislation for Canadian

servicemen, might cause the prevailing uniformity to be disturbed by the obtaining of unequal responses to the federal government's request. In the instant case, uniformity might be better served by taking the matter in the first instance to this Conference where the position of citizens other than servicemen might be considered also.

Your Commissioners for Canada, therefore, respectfully request that the Conference (with uniformity as well as remedy in mind) give consideration to the position of Canadians who appear to be excluded from the benefits of provincial unsatisfied judgment funds by reason of service in the armed forces of Canada or service in the employ of corporations having operations outside Canada, and make such recommendations, if any, as seems to the Conference to be desirable in the circumstances.

On behalf of the Commissioners for Canada

D. S. MAXWELL, Q.C.,
D. S. THORSON, Q.C.,
J. W. RYAN.

Appendix

NEWFOUNDLAND

Highway Traffic Act, 1962—Statutes of Newfoundland 1962—No. 82

s. 99 "No action shall be brought against the Minister under section 98 by or on behalf of any person who ordinarily resides outside Newfoundland unless that person resides in a jurisdiction in which recourse of substantially similar character to that provided by this Part is afforded to residents of Newfoundland."

s. 2(iii) 'resident' includes a person who

(i) lives in the province for a total of ninety days or longer in a year,

(ii) is employed or engaged in any activity for gain in the province for a total of thirty days or longer in a year,

(iii) is attending school or college in the province, or

(iv) is in the province and whose children attend school or college in the province."

PRINCE EDWARD ISLAND

The Highway Traffic Act—1964—c. 14, Part XI—Unsatisfied Judgment Fund, i.e., sections 335 to 357

s 351(6) "Judgment Recovery (P.E I.) Ltd. shall not be required to pay any amount in respect of a judgment in favour of a person who does not ordinarily reside in Prince Edward Island unless that person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this Act is afforded to residents of Prince Edward Island."

NOVA SCOTIA

Motor Vehicle Act R.S.N.S. 1954, c. 184

s. 179(11) "The Provincial Treasurer shall not be required to pay out of the Fund any amount in respect of a judgment in favour of a person who ordinarily resides outside of Nova Scotia unless that person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this section is afforded to residents of Nova Scotia."

1958, c. 47, s. 1(2)

"(bee) 'resident' includes a person who

(i) for more than thirty days in any year is employed or engaged in any activity for gain in the Province;

(ii) is attending school or college in the Province;

(iii) is in the Province and whose children attend school in the Province;

(iv) lives in the Province for more than ninety days in any year."

NEW BRUNSWICK

Motor Vehicles Act, 1955—1955, c. 13

s. 299(1) "There may not be paid out of the Fund

(a) . . .

(b) any amount in respect of a judgment in favour of a person who *ordinarily resides* outside of New Brunswick unless such person resides in a juris-

diction which provides substantially the same benefits to persons who ordinarily reside in New Brunswick."

QUEBEC

Highway Victims Indemnity Act, Revised Statutes of Quebec 1964, c. 232

s. 40 "The following persons cannot make application to the Fund:

(f) any person domiciled in a state, province or territory where residents of the Province of Quebec do not enjoy rights equivalent to those granted by this Division."

"Domicile" is defined as follows under article 79 of the Civil Code:

"79. The domicile of a person, for all civil purposes, is at the place where he has his principal establishment."

ONTARIO

Motor Vehicle Accident Claims Act, 1961-62, Statutes of Ontario, 1961-62, c. 84

s. 23(1) "In this section, 'residence' shall be determined as of the date of the motor vehicle accident as a result of which the damages are claimed.

(2) The Minister shall not pay out of the Fund any amount in favour of a person who ordinarily resides outside of Ontario unless such person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this Act is afforded to residents of Ontario, provided that no payment shall include an amount that would not be payable by the law of the jurisdiction in which such person resides"

MANITOBA

The Unsatisfied Judgment Fund Act, Statutes of Manitoba, 1965, c. 89 replaces sections 153 to 160, R.S.M. 1954, c 112 as at 1 July, 1965. No provisions as to residence.

SASKATCHEWAN

Automobile Accident Insurance Act—R.S.S. 1965, c. 409

s. 57(1) For the purpose of this section the residence of a person shall be determined as of the date of the motor vehicle accident as a result of which the damages are claimed.

(2) The insurer shall not pay any amount under section 48, 51 or 52 to or on behalf of a person who ordinarily resides outside Saskatchewan unless he resides in a jurisdiction in which recourse of a character substantially similar to that provided by those sections is afforded to residents of Saskatchewan, and in no event shall a payment under any of those sections include an amount that would not be payable by the law of the jurisdiction in which such person resides.

ALBERTA

Motor Vehicle Accident Claims Act 1964, c. 56

s. 15(1) "The Minister shall not authorize payment out of the Fund of any amount in favour of a person who ordinarily resides outside Alberta unless the person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this Act is afforded to residents of Alberta.

(2) . . .

(3) For the purposes of this section 'residence' shall be determined as of the date of the motor vehicle accident as a result of which the damages are claimed."

BRITISH COLUMBIA

Motor Vehicle Act R.S.B.C. 1960, c. 253 Unsatisfied Judgment Fund, see 104 *et seq.*

s. 108(4) "In no event may any action be brought against the Attorney General by or on behalf of any person who ordinarily resides outside of British Columbia unless such person resides in a jurisdiction in which recourse of a substantially similar character to that provided by this section is afforded to residents of British Columbia."

APPENDIX Z

(See page 19)

The Hague Conference and UNIDROIT

Pursuant to the resolution passed at the 1966 meeting of the Conference as set out on page 25 of the Proceedings of that year, the undersigned consulted with the Department of External Affairs of Canada in the following October who suggested that it would be most timely if supporting representations were made by the Commissioners to the provinces after the Prime Minister of Canada had placed the matter before the Premiers. By letter dated July 10, 1967, from the Legal Advisor of the Department of External Affairs the undersigned was informed that the Prime Minister under date of June 29, 1967, had written to the Premiers concerning Canada's intention to join The Hague Conference on Private International Law and the International Institute for the Unification of Private International Law (UNIDROIT) at Rome, and "that the Canadian Government envisages that, in the event of Canadian membership in these two organizations, the Conference of Commissioners on Uniformity of Legislation in Canada be used to the greatest extent possible as a channel for facilitating participation by the provinces in the conferences sponsored by The Hague Conference and the International Institute for the Unification of Private Law." On receipt of this letter, the undersigned immediately drafted the following letter and sent it to the Premier of each of the provinces:

> "The Conference of Commissioners on Uniformity of Legislation in Canada has been informed that the Government of Canada proposes to seek membership in the Hague Conference on Private International Law and also in the International Institute for the Unification of Private Law at Rome At their last meeting the Commissioners by resolution requested me to inform you that they believe that it is desirable that Canada be an active participant in the work of both organizations
>
> "The Conference of Commissioners on Uniformity of Legislation in Canada was organized in 1918 and since then has prepared sixty-four model statutes As you know, most of them have been enacted by a large majority of the provincial legislatures There is little doubt that there could be a useful contribution made, both at the Hague and at Rome, toward the unification of private law if the wide experience that has been acquired by the Conference was utilized by the delegates from Canada whoever they might be However, the Commissioners would emphasize that their advocacy of Canadian participation is

primarily for the benefit of persons resident in a province where, as a consequence of the implementation of international agreements by its legislature, the law on particular subjects would be improved by becoming uniform with the laws of other countries

"A recent illustration of a detriment suffered by Canadians as a result of having no voice at the Hague Conference concerned the formal validity of wills. In 1953 the Commissioners completed a Model Act Relating to the Conflict of Laws of the Formal Validity of Wills which was a revision and modernization of the so-called Lord Kingsdown's Act. This new Model Act is now in force in British Columbia, Manitoba, Newfoundland and Ontario In 1961 the United Kingdom and seventeen other countries at the Hague Conference completed a *Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions.* In 1963 the United Kingdom amended its Wills Act to conform to the Hague Convention The 1961 Hague Convention made some improvements over the Canadian Model Act. On the other hand, some of its rules are not suitable for Canadian needs, but might have been made suitable by slight modifications If Canada through membership had been able to be heard at the Hague, the provinces might well have had the opportunity of gaining the advantage of a widespread international as well as inter-provincial uniformity of law concerning testamentary dispositions

"A thorough exposition of the advantages to be gained by Canadian membership in the Hague Conference and its attendant problems and responsibilities is contained in an article by Dr Jean-G. Castel of Osgoode Hall Law School published in March of this year in the Canadian Bar Review. With his permission I am sending a copy to you under separate cover and commend it to your careful consideration. What he says concerning adhesion to the Hague Conference applies with cogency to the International Institute for the Unification of Private Law

Yours sincerely,
Horace E Read, Q C
For the Conference of Commissioners on Uniformity of Legislation in Canada"

It will have been observed that in the letter to the Premiers there was no suggestion that the delegates to the conferences to be held by the two international organizations should be drawn from the ranks of the Commissioners or be nominated by them. As Professor Jean-G. Castel indicates, in his article referred to in the letter in which he ably advocated adhesion to The Hague Conference (see the Canadian Bar Review for March 1966 at page 27), the actual composition of the delegations is a matter that would have to be worked out between the federal and provincial governments. Similarly the manner and extent to which the Conference of Commissioners would be effectively

used as "a channel for facilitating participation by the provinces in The Hague and UNIDROIT conferences" would be a matter for discussion and arrangement to be entered upon if and after membership in one or both of the organizations has been accomplished.

The undersigned gratefully recognizes the assistance given by Dr. Castel's article and by Dr. Hugo Fischer in his suggestions concerning some of the points to be included in the letter to the Premiers. He has expressed his opinion, in which the undersigned concurs, that this Conference should be prepared to assist the governments of Canada and of the provinces in any practicable way and should therefore, when requested to do so, (a) give its advice and assistance and (b) designate persons, not necessarily from its membership, who are best qualified to make a constructive contribution to the solution of particular problems of international uniformity of private law from time to time. Meanwhile no action should be taken by this Conference.

HORACE E. READ.

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