Report #11

COMMON PROMISOR AND PROMISEE: CONVEYANCES WITH A COMMON PARTY

1972

INSTITUTE OF LAW RESEARCH & REFORM

TABLE OF CONTENTS

COMMON PROMISOR AND PROMISEE: CONVEYANCES WITH A COMMON PARTY

On November 20, 1970, a group of legal practitioners engaged in the oil industry, Messrs. R. C. Muir, W. M. Winterton, W. F. Kelly and J. M. Killey, referred to the Attorney General the problem of enforceability of joint covenants where there is a common promisor and promisee.

On 29th December, 1970, the Deputy Attorney General asked whether the Institute were prepared to undertake this study. The Institute agreed to do so, and commissioned two Alberta lawyers, Kenneth B. Potter and J. Darryl Carter, to prepare a research paper. We received much assistance from their study as we have from the work done by the practitioners who first raised the problem.

While the initial reference to us dealt only with joint covenants, we expanded the scope to conveyances from a person to himself, or to himself and others, which present a related problem. Covenants have to do with contracts generally whereas conveyances have to do with the grant of an interest in real or personal property.

The two problems to which we directed our attention are:

(a) the validity of joint covenants in which there is a common promisor and promisee; for example, covenants by A with A and B jointly or by A and B with A, B and C jointly;

(b) the validity of conveyances in which there is a common grantor and grantee; for example conveyances from A to A and B jointly.

The subject matter has been dealt with in the following order:

I. The Common Law

(1) Covenants
(2) Conveyances

II. Statutory Changes from the Common Law

(1) Covenants
(2) Conveyances

III. Deficiencies in the Present Law and Recommendations for Reform

I
THE COMMON LAW

(1) Covenants

It is well established at common law that a person cannot make a contract with himself and if such a contract is made it is void. This principle has been applied, for example, to bar actions on bills of exchange where there was one party who was both liable and entitled to payment (Mainwaring v. Newman (1800), 2 Bos. & P. 120, 126 E.R. 1190, Neale v. Turton (1827), 4 Bing. 149, 130 E.R. 725); to actions by partnerships against one of their partners (DeTastet v. Shaw (1818), 1 B. & Ald. 664, 106 E.R. 244); or against another partnership in which one of their partners was also a member (Bosanquet v. Wray (1815),

6 Taunt 596, 128 E.R. 1167); and actions on leases where the lessor was also one of the lessees (Boyce v. Edbrooke, [1903] 1 Ch. 836).

All of these cases were cited in the oft-quoted case of Ellis v. Kerr, [1910] 1 Ch. 529. In that case A, B and C were trustees of a marriage settlement. B and C covenanted with the trustees to pay the premiums on a policy of insurance on the life of the settlor. They failed to do so, and A brought action to compel them. Warrington J. held that "as a matter of substance and obligation by a man to pay himself or to pay himself and another, is one which in fact is not an obligation in the eye of the law."

The same judge in Napier v. Williams, [1911] 1 Ch. 361 dealt with the problem again. Three trustees under a will, pursuant to a provision in the will, gave a lease of land to a beneficiary who was one of the three trustees. He assigned the lease to a company which contended that it was not bound by the covenants because the trustee-beneficiary was both covenantor and covenantee. Warrington J. held that Ellis v. Kerr applies and that the covenants are void.

The rationale of the rule in Ellis v. Kerr was applied in Rye v. Rye, [1962] A.C. 496 where the House of Lords held that the proposition that A alone can covenant with himself alone is an absurdity.

Glanville Williams says that "a promise by a man to himself is not a contract but at best, a unilateral

declaration." He then says, however, that just because any such attempt at contract is void, it does not follow that a joint contract between A and B on the one hand and B and C on the other should be void; nor that a contract between A and C jointly on the one hand and C on the other should be void. Yet the common law made them void. "It is difficult to understand how this rule was allowed to disfigure the law of a great mercantile nation for as long as it did" (Williams, Joint Obligations, p. 47). It was applied in a Saskatchewan case, Burdick v. Mills, [1923] 1 W.W.R. 283.

The foregoing discussion has to do with joint contracts. The situation is different in the case of joint and several contracts. There are two basic situations:

(a) Covenant by A in favour of A and B, the benefit of the covenant being several. B may sue A on his several covenant.

(b) Covenant by A and B in favour of B, the covenant being joint and several. B may sue A on his several covenant.

Ellis v. Kerr, [1910] 1 Ch. 529 at 538-9
Williams, Joint Obligations, p. 48.

(2) Conveyances

The common law also held invalid a conveyance to oneself of property, whether real or personal. The rule

applied even where the transferor and transferee were the same person in different capacities; for example, a transfer from A as trustee to himself as beneficiary.

The rule extended too, to the following:

(a) conveyance from A to A and B jointly;

(b) conveyance from A and B (joint owners) to B.

In the first case, the conveyance was not effective according to its tenor. However the transaction was not void: "A conveyance from A directly to A and B would have passed the whole estate solely to B" (Williams, Real Property, 24th ed., (1926) p. 239).

In Cameron v. Steves (1858), 9 N.B. 141, B conveyed a church property to C, M and himself. The three brought action in trespass for breaking into the church. The court applied the common law rule which says: "a feoffment with livery of seisin from A to A and B vests the whole estate in B, for A could not make livery to himself; therefore by virtue of the livery to B, he became enfoeffed of the whole." Thus in the present case, C and M became the joint owners. The court added that the same result is reached by a wider principle which is not based on livery of seisin. It is stated in Sheppard's Touchstone p. 82: "If a deed be made to one that is incapable, and to others that are capable, in this case it shall enure only to him that is capable." The reason why in Cameron v. Steves B could not become joint owner with C and M is that

joint ownership requires the four unities of possession, interest, time and title; and in a transaction of this kind there is no unity of time or title. (However, in Re Sherrett and Gray, [1933] O.R. 690, [1933] 3 D.L.R. 723, Armour J. rejected the argument that in a grant from A to A and B jointly, any of the unities is missing.)

In the United States there has been much litigation and difference of opinion on the effect of a conveyance by an owner to himself and another (44 A.L.R. (2nd) 595). Powell says that the attempt to create a joint tenancy fails because of lack of two of the four unities, but that instead of B taking title to the whole, which is the prevailing English view, the result is that A and B become tenants in common (4A Powell on Real Property 669-70 (1971)).

In the second case, that of a conveyance from A and B to B, Williams simply says that "Questions have also arisen as to the validity of a conveyance to one of their own number" (Real Property, 24 ed., p. 241, (z): Cheshire, Real Property, (1944) 5 ed., 699 is to the same effect). This does not, however, seem to have been a serious problem. A could release his interest to B. The Real Property Act 1925, section 36(2) preserves this right.

The common law rules just described are probably still in force in Alberta. Because this province has always had a Land Titles Act to the exclusion of the old system it is customary to speak of a transfer of land rather than a conveyance. We understand that in both of

Alberta's Land Titles Offices transfers from A to A and B or from A and B to A are registered as a matter of course. It may be however that they are still vulnerable under the common law rules, so later in this report we make recommendations with respect to them.

We turn now from joint tenancies to tenancies in common. Let us consider:

(a) conveyance from A to A and B as tenants in common;

(b) conveyance from A and B as tenants in common to B.

These seem never to have created a problem. In the first case the transaction was effective at common law, for the deed operates to give B an undivided one-half (Cameron v. Steves, at 143). As to the second case, Cheshire (5 ed., p. 560) says that one of the methods by which a tenancy in common is terminated is the acquisition by one tenant of the shares vested in his co-tenants. In any event, so far as Alberta is concerned, each of the two transactions is commonplace, and the appropriate interest is registered in the Land Titles Office.

II

STATUTORY CHANGES FROM THE COMMON LAW

[The legislation discussed in this Part, where not set out in the text, appears in Appendix A.]

The remedial legislation which has come to our attention distinguishes between covenants on the one hand and conveyances on the other, and we shall, in this discussion, maintain that distinction. We recognize that the word "covenant" is, strictly speaking, narrower than "promise" for it is a promise or undertaking in a deed. This distinction is however unimportant in the present discussion.

(1) Covenants

Covenants and agreements, as distinguished from conveyances, are dealt with in section 82 of the English Law of Property Act, 1925, 15 and 16 Geo. 5, c. 20, which provides:

> 82.(1) Any covenant, whether express or implied or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
>
> (2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the court made before such commencement.

It is important to note that this section is retroactive. Glanville Williams, in his book on Joint Obligations, discusses this provision at pp. 47, 58 and

171. His view is that where A and B make a direct promise to B and C, the section provides that B drops out of the obligation on both sides. This seems to be a questionable reading of the section, and was rejected by the Australian case of Stewart v. Hawkins (1960), S.R. (N.S.W.) 104 which considered an almost identical section of the Conveyancing Act 1919-1954 of New South Wales. That case did, however, accept Glanville Williams' view that the section applies where a person jointly with another enters into an agreement with himself and still another party jointly (A and B making an agreement with B and C), although it only refers to one person entering into an agreement with himself and another. Owen and Ferguson JJ., after referring to Williams on Joint Obligations at p. 47 said at pp. 107-108:

> We cite this passage merely because the learned author expresses the view that the section applies to the case where a person jointly with another or others contracts with himself with another or others. With that view as to the application of the section, we are in agreement, but we are unable to accept his view as to its operation.

and Sugerman J. said at p. 109:

> Nor, with respect to the learned author, would the terms of the section appear to support Professor Glanville Williams' suggestion as to the corresponding English enactment (section 82 of The Law of Property Act 1925) that it provides, in effect, that B shall drop out and the contract shall operate as one between A and C.

Partnership contracts are, perhaps, the best example of the problem. A partnership is not an entity (although it may sue or be sued in the firm name under Rule 80 of the Alberta Rules of Court). At common law the joint obligation of all partners with one of the partners (alone or with others) would be invalid. Lindley on Partnership (12th ed., p. 306) suggests that an action lay in such an agreement in equity, but this is doubtful (see Williams, Joint Obligations, p. 47).

In any case, England's section 82 makes valid an agreement between a partnership and one of its members; and according to the interpretation put on the section by Glanville Williams and Stewart v. Hawkins, it applies to an agreement between partnerships with a common member.

Its precise wording should be noted. It applies to a covenant or agreement "entered into by a person with himself and one or more other persons". It does not in terms apply to the converse case of a covenant or agreement entered into by two or more persons with one of themselves. Another point has to do with a covenant by A and B to B and C. Does the section apply at all? Stewart v. Hawkins held it does. However there is a further question. Can B and C sue A, or does the section on the other hand merely permit C to sue A and B? Sugerman J. in Stewart v. Hawkins considered this point though it was not raised. His Lordship thought the section does not permit B and C to bring action against A. His reasoning is as follows. If A and B enter into a covenant with B then the section says that B can enforce it against A. By the same token,

if A and B enter into a covenant with B and C, the section by implication says that C can enforce it against A and B. It does not say that B and C can enforce it as against A.

The American states have applied the common law rules though sometimes an agreement with a common party is enforced in equity. "For those states which feel that the common law rule is too strong to be overthrown by judicial fiat, there is legislative relief" (Williston, Contracts, 3 ed. (1957), Vol. I, 32-34). This refers to the Model Interparty Agreement Act (Uniform Laws Annotated Vol. 9B 303) which has been passed in four states. It provides:

> (1) A conveyance, release or sale may be made to or by two or more persons acting jointly and one or more, but less than all, of these persons acting either by himself or themselves or with other persons; and a contract may be made between such parties.
>
> (2) No contract shall be discharged because after its formation the obligation and the right thereunder become vested in the same person, acting in different capacities as to the right and the obligation.
>
> (3) Nothing herein shall validate a transaction within its provisions which is actually or constructively fraudulent.

It will be noted that this Act covers both contracts and conveyances.

(2) Conveyances

At common law, if A wished to convey property to himself or, as was more likely, to himself and another person or persons jointly (to A and B), he would have to go through two steps. A would first have to transfer the property to a third party and the third party would in turn have to transfer the land back to A or to A and B. Conveyances of real property, however, were greatly facilitated by the passage of the Statute of Uses, (1535) 27 Hen. 8, c. 10, whereby a conveyance of land from A to B to the use of A automatically became a conveyance from A to himself. The statute could also be used to make a conveyance from A to A and B. Thus a grant from A to B and his heirs to the use of A and B and their heirs operated to vest immediately in A and B a joint estate in fee simple (Williams, Real Property, 24 ed., 240).

Direct conveyances of personal property including chattels real from A to A and B were not possible until the passage of the Law of Property (Amendment) Act, (1859) 22 & 23 Vict. Ch. 35. Section 21 of this Act provided:

> Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or persons or corporation, by the like means as he might assign the same to another.

This section allowed transfers of leaseholds but was said not to relate to leases of freehold: Napier v. Williams, [1911] 1 Ch. 361 at 367. It did not allow conveyances from A to A alone. Having been passed before July 15th,

1870, it is probably presently the law of Alberta (see J. E. Coté, The Introduction of English Law into Alberta, (1964) 3 Alta. L. Rev. 262). It has been expressly adopted by British Columbia in its Laws Declaratory Act R.S.B.C. 1960, c. 213, s. 2, ss. 19.

In 1881, transfers of freehold by A to A and B were permitted by the passage of the Conveyancing Act, 44 & 45 Vict., c. 41. Section 50(1) provided:

> Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband alone or jointly with another person.

Being passed after 1870, this section does not apply in Alberta.

In the Law of Property Act, (1925) 15 & 16 Geo. 5, c. 20, s. 72 replaced and expanded the above two provisions. Subsections (1) and (2) replaced the 1859 and 1881 Acts respectively. They provided:

> (1) In conveyances made after the twelfth day of August, eighteen hundred and fifty-nine, personal property, including chattels real, may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person.
>
> (2) In conveyances made after the thirty-first day of December, eighteen hundred and eighty-one, freehold land, or a thing in action, may be conveyed by a

> person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

Subsections (3) and (4) were new. They provided:

> (3) After the commencement of this Act, a person may convey land to or vest land in himself.
>
> (4) Two or more persons (whether or not being trustees or personal representatives) may convey, and shall be deemed always to have been capable of conveying, any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party; provided that if the persons in whose favour the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance shall be liable to be set aside.

It is important to note the relationship between subsections (2), (3) and (4):

> Subsection (2) permits a conveyance from A to A and B, re-enacting the 1881 legislation.
>
> Subsection (3) permits a conveyance from A to A (or from A and B to A and B).
>
> Subsection (4) permits a conveyance from A and B to one of themselves.

Subsection (4) is retroactive. From its wording one might think that it permits a conveyance from A and B to A and B but both Viscount Simonds and Lord Denning specifically rejected this interpretation in Rye v. Rye, [1962] A.C. 496.

In that case two brothers carried on a partnership as solicitors. They also held certain freehold premises as tenants in common and orally agreed to lease these premises to the partnership. In order to determine whether such a lease was validated by section 72 the House of Lords had to consider the meaning of conveyance. Section 205(l) provided:

> (l) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them:
>
> . . . . . .
>
> (ii) 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument.

Their Lordships held that because of the words "by any instrument" a conveyance could not be made orally and therefore an oral lease was not validated by section 72. Lord Denning and Viscount Simonds (Lord Reid concurring) held that in any event section 72(3) did not empower a person to grant a lease to himself because of the impossibility of a person enforcing a covenant against himself. Lord Denning said at page 514:

> My Lords, I have come to the clear opinion that even under the 1925 Act a person cannot grant a tenancy to himself: For the simple reason that every tenancy is based upon an agreement between two persons and contains covenants expressed or implied by the one person with the other. Now, if a man cannot agree with himself and cannot covenant with himself, I do not see how he can grant a tenancy to himself. Is the tenancy to be good and the covenants bad? I do not think so. The one transaction cannot be split up in that way. The tenancy must stand or fall with the agreement on which it is founded and with the covenants contained in it: and as they fall, so does the tenancy. And what about notice to quit? If A grants a tenancy to himself A, can he mutter a notice to quit to himself and expect the law to take any notice of it? Or, if A and B grant a yearly tenancy to themselves A and B, can there be a notice to quit unless both agree? Of course not. So that, instead of a yearly tenancy, it becomes a life-long tenancy determinable only by the agreement of both. Which is absurd. The truth is that they cannot grant a tenancy to themselves.

Lord Denning said that the section only allowed conveyances without covenants such as conveyances from a sole executor to himself as devisee or from a man who is a beneficial owner to himself as trustee for charitable purposes. It will be noted that Lord Denning treated a lease from A and B to A and B the same as a lease from A to A and Viscount Simonds said at page 505 that it was not suggested that under section 72(3) A and B could do what A could not do himself. Lord Radcliffe, however, while agreeing

that a person's inability to enforce contractual obligations against himself prevented him from making himself his own tenant, went on to say:

> I do not feel sure that the same result would necessarily be reached in the case of two persons seeking to demise to themselves by deed, for section 72(3) would, I think, be able to pass a legal interest by demise and it might be possible to express the required contractual obligations in the form of joint and several covenants, so that each single person covenanted separately with himself and the other. It seems that section 82(1) of the Act would then convert such a covenant into an effective obligation. I should not like to put this possibility out of court in the disposal of the present case, for there is a practical advantage in allowing persons who own land as tenants in common to make a valid demise of it to themselves in another capacity.

Section 82 of this Act, which deals with covenants, has been considered above.

Ontario first enacted provisions similar to section 72 of the Law of Property Act, 1925, in 1933. These provisions are now sections 41, 42 and 43 of the Conveyancing Act, 1970, R.S.O., c. 85.

> 41. Any property may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, or by a wife to her husband, alone or jointly with another person.

> 42. A person may convey property to or vest property in himself in like manner as he could have conveyed the property to or vested the property in another person.
>
> 43. Two or more persons, whether or not they are trustees or personal representatives, may convey and shall be deemed always to have been capable of conveying property vested in them to any one or more of themselves in like manner as they could have conveyed the property to a third party, but, if the persons in whose favour the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance is liable to be set aside.

Section 41 is based upon section 72(1) and (2) of the English Act. Section 42 is based upon section 72(3) but is not restricted to conveyances of land and section 43 is based upon section 72(4).

Re Sherrett and Gray, [1933] O.R. 690, [1933] 3 D.L.R. 723 held that the Ontario Conveyancing and Law of Property Act enabled a person to convey land to himself and his wife jointly, although he could not do so before the Act because at law a man could not convey to himself and also because at law a husband and wife were treated as one.

Ontario's definition of "conveyance" is not in the same wording as England's 205(1)(ii) quoted above, but it appears to be equally comprehensive. It says:

> 1.(1) In this Act,
>
> (a) "conveyance" includes an assignment, appointment, lease, settlement, and other assurance, made by deed, on a sale, mortgage, demise, or settlement

> of any property or on any other dealing with or for any property, and "convey" has a meaning corresponding with that of conveyance;

The leading Ontario case is Re Sutherland and Volos (1967), 62 D.L.R. (2d) 11. S agreed to sell land to V. For some reason the agreement could not be registered under the Registry Act. In order to get on the register, V executed an assignment of the purchaser's interest to himself as trustee for a company to be incorporated. Was the assignment registrable? Laskin J.A. writing the judgment of the Court of Appeal, held that it was. Ontario's counterpart of section 72(3) applies. The comments on Rye v. Rye are of interest:

> Rye v. Rye, [1962] A.C. 496, which involved the English provision comparable to s. 42, was pressed upon this Court as showing its limited character, and hence, correspondingly, the limited character of s. 42. It is unnecessary to say whether we agree with that case, because in holding that a person cannot make a lease to himself under the English s. 72(3) the House of Lords was indicating that a person could not be his own tenant, especially when regard is had to the enforcement of covenants. This is different, however, from the present case, involving an outright transfer of whatever interest was previously held without purporting to create any tenurial relationship. Rye v. Rye does not say that a conveyance in such terms from one person to himself cannot be made: see Megarry and Wade, Law of Real Property, 3rd ed., p. 179.

Why was section 72(3) put in the English Act, and what was its scope intended to be? One must start with the Statute of Uses. Assume a grant by A to B to the use of A. The statute said that A becomes, or remains, the

legal owner. In other words, he has conveyed to himself. This does not mean that it became customary for A to make a simple grant of this kind for on its face it is a futile, or at least unnecessary act. However, there were cases where it was convenient, particularly in family settlements, e.g., grant by A to B to the use of A for life and on his death to the use of B (in fee simple). Then there is the example given by Lord Radcliffe in Rye v. Rye of a freehold owner desiring to make a strict settlement of land. He granted it to a feoffee to the use of himself in fee simple until an intended marriage and thereafter to himself for life with remainders over.

Laskin J.A. in Re Sutherland gives a similar explanation of the purpose of section 72(3). He points out that the Statute of Uses permitted the type of transaction just described to be made in one instrument. That Statute was repealed in 1925 and section 72 permitted a simple grant from A to A in place of a grant under the Statute of Uses:

> No doubt the situations chiefly in mind when the foregoing series of statutes was enacted were those for which the Statute of Uses had previously provided a convenient escape from common law doctrine. For example, the holder of a fee simple might wish to settle the property on himself and his wife jointly, or on himself and another person jointly; or he might wish to strengthen the trusteeship of property by revesting it in himself and another or others as joint trustees. Again, before the legislation under consideration was enacted, a tenant in tail wishing to disentail in his own favour had to do so through the Statute of Uses; and similarly, if he wished to settle property on himself as life tenant and on others in succession.

The effect of section 72(3) is, however, greatly widened if one were to apply literally the definition of "conveyance" in the English Act. It will be remembered however, that the definition does not apply where the context otherwise requires, and the House of Lords declined to apply the definition in Rye v. Rye. In other words, the scope of subsection (3) is not nearly as wide as a literal reading would indicate. Viscount Simonds said:

> If, then, it is asked what meaning can be given to the subsection, I think that the answer is that it is intended partly to supersede the old conveyancing device of a conveyance to uses or of a grant and regrant and partly to provide an essential step in the new machinery set up by the series of Acts passed in 1925. To the latter the word "vest" itself supplies a clue. It appears to refer to the statutory provisions for vesting the legal estate in a tenant for life or statutory owner, which are to be found for example in Sch. 2, para. 1, to the Settled Land Act, 1925.

Lord Radcliffe said:

> The section is plainly intended to bring about some change in the law: but I think it equally plain that the change intended is merely a technical one bearing on the necessary form of deeds or other instruments in writing and has nothing to say one way or the other about the substantial validity of a transaction which is absurd in itself, such as a single individual purporting to make himself his own tenant. Part 2 of the Act of 1925 is divided into three sections: "Contracts" (see s. 40 to s. 50), "Conveyances and other instruments" (see s. 51 to s. 75) and "Covenants" (see s. 76 to s. 84). Section 72 therefore falls within the second part as distinguished from the other two that

> regulate obligations in the nature of contracts, covenants or bonds and I do not read it as being concerned with anything more than rules as to the forms and effects of conveyances and other instruments. It could not by itself touch the contractual element that in most situations constitutes the essence of a demise.

In Re Sutherland and Volos, Laskin J.A. agreed with the statements in Rye v. Rye as to "the situations chiefly in mind" in enacting section 72(3). However he did not think that that subsection, or its Ontario counterpart, is confined to those situations.

Both New Zealand and New South Wales had a provision like section 72(3) before England did. A comment in 36 A.L.J. 45 expresses the opinion that Rye v. Rye does not settle the law of New South Wales. In that state the enactment of the provision was not linked to repeal of the Statute of Uses, and the comment says that there are rare cases where it is desirable to permit persons to lease to themselves. An example is the case of partners. The comments in 82 L.Q.R. 176 and [1962] Mod. L. Rev. 466 express a similar view while one in [1962] Camb. L.J. 34 says the demise of a lease to oneself is an artificial one.

A number of jurisdictions have passed legislation to change the common law in relation to conveyances where there is a common party. Sometimes the enactment permits A to convey to A and B and also permits A and B to convey to A. So far as we have found, the only provinces, apart from Ontario, which permit A to convey to A alone, are New Brunswick and Prince Edward Island.

These provisions deal with "conveyances" generally. They are not part of a Land Titles Act which provides for registration of specific documents, one being a transfer on which a new certificate of title is issued. A number of Land Titles Acts do provide for registration of transfers from A to A and B and from A and B to A and from a personal representative to himself personally, where he is the beneficiary. Manitoba's Real Property Act and British Columbia's Real Property Act are examples. Alberta's Land Titles Act, which had its origin in the Territories Real Property Act 1880, has never included these provisions. In British Columbia an amendment of 1968 provided: "A person may transfer land to himself in like manner as he could have transferred land to another person." On inquiring into the reason for this amendment we received a helpful explanation from Mr. D. V. DiCastri, Director of Legal Services, Department of the Attorney General for British Columbia. The situations which had arisen were these: A and B as joint tenants might wish to transfer to themselves as tenants in common; A and B as tenants in common might wish to transfer to themselves as joint tenants; A as a joint tenant with B might wish to convert the tenancy into one in common; and A holding title in his own right might wish to hold as trustee for B. It was to ensure the validity of these transfers that the 1968 amendment was passed.

In Alberta there is no general provision comparable to England's section 72; and as we have seen, there is nothing in our Land Titles Act on the subject of transfers with a common party. However it has been held in Australia that the operation of the Torrens system enables a person

to convey to himself at least if he is conveying as an executor (Hosken v. Danaher, [1911] V.L.R. 214). Indeed transfers of this kind are commonplace in Alberta. In addition, transfers from A to A and B and from A and B to A are registered without question. Joint tenancies in the matrimonial home are frequently created by a transfer from the husband to his wife and himself.

There are several Alberta statutes which deal with specific situations:

(1) The Mines and Minerals Act permits an assignment from A to A and B of leases and other interests granted by the Crown to A.

(2) The Public Lands Act has a like provision in connection with dispositions by the Crown under that Act.

(3) The Trustee Act permits trustees to convey to themselves and a new trustee.

(4) The Transfer and Descent of Land Act permits one spouse to transfer lands to the other. The common law inability of spouses to convey to each other stemmed from the fiction of unity of husband and wife. The Conveyancing Act, 1881 (now section 72(2) Law of Property Act) enacted the provision which we have adopted. The same result is reached through the Married Women's Act, which has its origin in the Married Women's Property Act, 1882.

In the United States there is the Model Interparty Agreement Act, set out above. In addition there is the Uniform Property Act, section 18 of which validates conveyances where there is a common grantor and grantee. The first subsection permits a conveyance to the conveyancor and others; the second permits two or more persons to convey to themselves, at least for the purpose of creating a new form of tenancy among themselves (section 18 appears in Appendix A). We note that New York has enacted the substance of section 18 in its Real Property Law, section 240b.

III

DEFICIENCIES IN THE PRESENT LAW AND RECOMMENDATIONS FOR REFORM

(1) Covenants

We think that the law of Alberta is unsatisfactory. A should be able to make a contract with A and B; and A and B with B and C. Often it is commercially desirable for a partnership to contract with one of its members or with another partnership that has a common member.

We think however that it would be inappropriate to permit A alone to enter into a contract with A alone; or to permit A and B to enter into a contract with A and B.

Specific legislation is required to ensure that contracts with a common party are valid.

Specifically, A should be able to make a covenant, promise or agreement with A and B; A and B with B and C; and A and B with A. England's 82 provides for the first of these. It does not specifically cover the second though Glanville Williams and Stewart v. Hawkins both say it should be construed to include it. Nor does it specifically cover the third.

Section 82 speaks of a "covenant" or "agreement" but we think it better to use the term "contract".

We considered whether it would be better to spell out the consequences of the section in the sense of specifying who could enforce the contract against whom. The conclusion was that this is not necessary, so the following recommendation does not include any such provision.

RECOMMENDATION #1

SECTION 1

(1) A CONTRACT IS VALID AND ENFORCEABLE IN ACCORDANCE WITH ITS TERMS NOTWITHSTANDING THAT

(i) A PARTY TO THE CONTRACT ENTERS INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF AND ANOTHER,

(ii) A PARTY TO THE CONTRACT AND ANOTHER ENTER INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF AND STILL ANOTHER,

(iii) A PARTY TO THE CONTRACT AND ANOTHER ENTER INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF.

The intent of the three sub-paragraphs is to validate respectively a promise by A to A and B, by A and B to A and C, and by A and B to A. We are satisfied that the terms "party" and "another" include the plural as well as the singular by virtue of section 18(1)(h) of the Interpretation Act.

There is a special situation which has been called to our attention. For example a number of companies may enter into an agreement to produce gas from their wells as a unit, and one of the companies is named the operator. The operator may have a well of its own outside the unit and may wish to use the unit's gas lines for that well. Accordingly the operator enters into an agreement with itself. In one capacity it represents the unit and in the other itself alone. In form this is a contract between A and A but in substance is between A, B and C on the one hand and A on the other. Thus it is within the spirit of our Recommendation #1 and to remove doubt should be explicitly covered. The specific reference to a deed is included because of the common law rule that in the case of a deed only those who are described as parties may sue or be sued upon it (Margolius v. Diesbourg, [1937] S.C.R. 183).

RECOMMENDATION #2

SECTION 1

(2) THIS SECTION APPLIES TO A CONTRACT WHETHER IN THE FORM OF A DEED OR NOT, IN WHICH A PERSON OSTENSIBLY CONTRACTS WITH HIMSELF ALONE BUT WHERE IN AT LEAST ONE CAPACITY HE IS IN FACT ACTING AS AGENT FOR ANOTHER.

The next point has to do with the right of contribution or indemnity. While no party can be both plaintiff and defendant we think there will be cases where the defendant has the right to claim contribution against the plaintiff or others. He should be able to claim that contribution under the general law and practice. The following recommendation deals with this point.

RECOMMENDATION #3

SECTION 1

(3) ANY RIGHT OF CONTRIBUTION OR INDEMNITY THAT EXISTS UNDER THE GENERAL LAW SHALL APPLY TO CONTRACTS VALIDATED BY THIS ACT.

Another point is this. The above recommendations deal with contracts generally while some of our later recommendations deal with conveyances. The fact is that there is no strict dichotomy between the two. The law of property and contract are intermingled. We think it best to specify that the foregoing recommendations apply to a contract which provides for a conveyance or assignment

of an interest in real or personal property. Accordingly we recommend:

RECOMMENDATION #4

SECTION 1

(4) THIS SECTION APPLIES TO A CONTRACT WHICH PROVIDES FOR THE CONVEYANCE OF AN INTEREST IN LAND OR PERSONAL PROPERTY OR A CHOSE IN ACTION.

The foregoing recommendations should apply to existing contracts as well as to contracts made in future. Our recommendation on this point appears below as Recommendation #6.

(2) Conveyances

Conveyances should be valid and effective according to their tenor whether made by A to A and B or by A and B to A or by A and B to B and C. The following recommendation is designed to effect this. We have not thought it necessary to define "conveyance", though we realize that England and Ontario have defined it.

RECOMMENDATION #5

SECTION 2

AN INTEREST IN LAND OR PERSONAL PROPERTY OR A CHOSE IN ACTION MAY BE CONVEYED

(i) BY A PERSON TO HIMSELF JOINTLY WITH ANOTHER PERSON,

(ii) BY TWO OR MORE PERSONS TO ANY ONE OR MORE OF THEMSELVES, BEING LESS THAN ALL,

(iii) BY TWO OR MORE PERSONS TO ANY ONE OR MORE OF THEMSELVES AND ANOTHER PERSON,

IN LIKE MANNER AS THE INTEREST MIGHT BE CONVEYED TO A THIRD PARTY; PROVIDED THAT IF THE PERSONS IN WHOSE FAVOUR THE CONVEYANCE IS MADE ARE BY REASON OF ANY FIDUCIARY RELATIONSHIP OR OTHERWISE, PRECLUDED FROM VALIDLY CARRYING OUT THE TRANSACTION, THE CONVEYANCE SHALL BE LIABLE TO BE SET ASIDE.

We have given much thought to whether to provide for a conveyance from A alone to himself alone. This is permitted by England's section 72(3) and also in Ontario, New Brunswick and Prince Edward Island, and outside Canada, in New Zealand and New South Wales (see 36 A.L.J. 45). With some difference of opinion the prevailing view is not to recommend such a provision. That view accepts the rationale of Rye v. Rye notwithstanding the suggestion that a person should be able to lease to himself as a desirable business arrangement in connection with taxation. Even where the conveyance contains no covenant, we think a general provision permitting a conveyance from A to A to be undesirable. Indeed in Re Sutherland, where there was no covenant in the assignment from A to A of the purchaser's interest, the assignment was self serving and questionable. (Later in connection with the Land Titles Act we do make specific exceptions.)

The matter of making all the foregoing recommendations applicable to existing contracts and conveyances will now be considered. Since the purpose is to cure a

harshness in the common law we think it proper to make the foregoing recommendations retroactive. In England's Law of Property Act 1925, the section on conveyances is retroactive except for section 72(3) respecting a conveyance from a person to himself, and section 82 relating to covenants likewise applies to covenants and agreements entered into before or after the commencement of the Act.

RECOMMENDATION #6

SECTION 3

THIS ACT APPLIES TO CONTRACTS AND CONVEYANCES WHETHER MADE BEFORE OR AFTER THE COMMENCEMENT OF THIS ACT, BUT WITHOUT PREJUDICE TO ANY ORDER OF A COURT MADE BEFORE SUCH COMMENCEMENT.

The last point in connection with these recommendations is: Where should they go? They are outside the Land Titles Act. It would not be appropriate to put them in the Transfer and Descent of Land Act, or so far as personal property is concerned in the Bills of Sale Act or Sale of Goods Act. In this province the Judicature Act has been the repository for many miscellaneous provisions, but these recommendations should not go there. We favour a special Act and propose that it be called the "Common Parties (Contracts and Conveyances) Act".

Our recommendations in the form of a draft Act are set out in Appendix B.

The Land Titles Act does not specifically provide for the registration of an instrument from A and B jointly

to A, or A to A and B jointly. Whether mortgages or leases are ever submitted in this form we do not know. As to transfers, our Land Titles Act and its predecessor the Real Property Act, 1886 (Canada) never specifically said that an owner "may make a valid transfer from himself jointly within any other person". As we have said earlier, many Torrens Acts do have such a provision; Manitoba's is an example (see Appendix A). In Alberta the Registrars in fact accept transfers from A to A and B as joint tenants and from A and B as joint tenants to A. Even if any question could be raised that the old common law rules apply so that in the first case B becomes sole owner, it will be set at rest by our recommendations on conveyances so no amendment to the Land Titles Act is needed.

There is another type of transfer which was void at common law--from a sole executor to himself as beneficiary. The Land Titles Act has never specifically provided for this case, but in fact transfers are registered as a matter of course.

We think it best formally to validate such transfers and to do so in the language of British Columbia's statute.

RECOMMENDATION #7

THAT THE LAND TITLES ACT BE AMENDED BY ADDING THE FOLLOWING SECTION:

"A TRUSTEE OR EXECUTOR OR ADMINISTRATOR MAY MAKE A VALID TRANSFER TO HIMSELF INDIVIDUALLY."

We considered whether to recommend a section on the lines of British Columbia's 1968 amendment which permits a transfer from a person to himself and decided against it. We could have recommended an alternate provision, for example one specifically permitting tenants in common to transfer to themselves as joint tenants and covering the converse case, and permitting a person to transfer to himself as trustee. However we decided against any recommendation on these lines at the present time.

There remains one special situation in connection with easements. In Alberta the grant of an easement is in statutory form (section 68 and form 12), and is registered against the title to both dominant and servient tenements (section 70). At present there is nothing in Alberta law to change the rule that a man cannot have an easement over his own land. "The dominant and servient owners must be different" (Cheshire, Real Property, 5 ed., p. 231). Moreover an easement validly granted is extinguished when the owner of one of the tenements acquires the other, and most but not all of the cases say that it is not revived on severance.

In Alberta there is a special situation in which there can be an easement in gross. The owner of land can grant to the Crown or a municipality or to any pipe line, utility company or railway company the right to carry its pipe, wires, conductors or transmission line upon, over or under the parcel; and the instrument granting the right may be registered (section 71(1)).

One large municipality sometimes has granted to itself an easement for pole anchors, water mains, deep sewers, pedestrian walkways, etc. This is done in connection with the subdividing of land and selling the lots. The convenience is obvious. We see no harm in this and think that it should be provided for.

Another case where it is, to say the least, a convenience to permit an owner to grant an easement to himself is shown by the following example. A owns two adjoining lots, and it is necessary to pass over lot #1 to reach #2. A gives a mortgage on #2. Should the mortgagee foreclose, he has no right of way unless he can invoke the doctrine of Wheeldon v. Burrows (1879), 12 Ch. D. 31 that a right of way is implied. It is doubtful that implied easements are possible in Alberta, and even if they are, that a mortgagee on foreclosure could assert such an easement. It is commercially useful to enable A to grant an easement to A giving a right of way over lot #1 to lot #2. Thus the mortgagee is protected if he has to foreclose. At present A has to sever the ownership, for example by forming a company to hold lot #1 and have the company grant him an easement in favour of lot #2. We think specific provision should be made to permit A to create an easement over lot #1 in favour of lot #2 even though he owns both; likewise with restrictive covenants. In addition there should be an anti-merger provision when the two parcels return to a common ownership.

RECOMMENDATION #8

THAT THE LAND TITLES ACT BE AMENDED BY THE ADDITION OF THE FOLLOWING SECTION:

(1) (a) AN OWNER MAY GRANT AN EASEMENT OR RESTRICTIVE COVENANT FOR THE BENEFIT OF LAND WHICH HE OWNS AND AGAINST LAND WHICH HE OWNS AND THE EASEMENT OR RESTRICTIVE COVENANT MAY BE REGISTERED UNDER THIS ACT.

(b) WHERE THE DOMINANT AND SERVIENT TENEMENTS ARE REGISTERED IN THE NAME OF THE SAME PERSON, THE EASEMENT IS NOT MERGED BY REASON OF THE COMMON OWNERSHIP.

(2) THE CROWN A CORPORATION OR COMPANY MENTIONED IN SECTION 71(1) MAY GRANT TO ITSELF ANY OF THE RIGHTS DESCRIBED IN THAT SECTION.

IV

ACKNOWLEDGEMENTS

The Institute acknowledges with thanks the assistance received from the following:

Messrs. R. C. Muir, W. M. Winterton, W. F. Kelly and J. M. Killey, Barristers and Solicitors of Calgary, who provided helpful suggestions and constructive criticism.

Messrs. Kenneth B. Potter of Calgary and J. Darryl Carter of Yellowknife, Barristers and Solicitors, who prepared a useful research paper for the Institute.

Mr. J. V. DiCastri, Director of Legal Services, Department of the Attorney General, Victoria, British Columbia,

who explained certain provisions in British Columbia's Land Registry Act.

Professor Maurice Sychuk, of the Faculty of Law, University of Alberta, who referred to us a number of relevant statutes and gave various helpful suggestions.

Robert Curtis, a student in the Faculty of Law, University of Alberta, who examined various aspects of the common law and also modern statutes in other jurisdictions.

1 October, 1972

W. F. Bowker
R. P. Fraser
G. H. L. Fridman
Wm. Henkel
W. H. Hurlburt
H. Kreisel
Frederick Laux
W. A. Stevenson

by _____
CHAIRMAN

_____
DIRECTOR

NOTE: Dr. Kreisel is a member of the Institute but is not a lawyer and has no responsibility for the contents of this report.

APPENDIX A

Alberta

(a) The Mines and Minerals Act, R.S.A. 1970, c. 238, s. 178:

(1) A lessee may transfer an agreement to himself and another person or persons, and upon registration of the transfer is entitled to the interest that the transfer purports to convey to him to the same extent as if he were not the transferor.

(2) Two or more persons, being the lessee of an agreement, may transfer the agreement to one or more of them, who upon registration of the transfer are entitled to the interest that the transfer purports to convey to him or them to the same extent as if he or they were not the transferor.

(b) The Public Lands Act, R.S.A. 1970, c. 297, s. 121:

(1) An assignor may assign a disposition to himself and another person or persons and upon registration of the assignment is entitled to the interest that the assignment purports to convey to him to the same extent as if he were not the assignor.

(2) Two or more persons, being the holders of a disposition may assign the disposition to one or more of them, who upon registration of the assignment are entitled to the interest that the assignment purports to convey to him or them to the same extent as if he or they were not the assignors.

(c) The Trustee Act, R.S.A. 1970, c. 373, s. 14(3):

> As often as any new trustee is appointed under this section, all the trust property . . . shall . . . be . . . conveyed . . . so that it is . . . vested in the new trustee . . . with the surviving . . . trustees. . . .

(d) The Transfer and Descent of Land Act, R.S.A. 1970, c. 368, s. 7:

> A man may make a valid transfer of land to his wife, and a woman may make a valid transfer of land to her husband, without, in either case, the intervention of a trustee.

British Columbia

The Land Registry Act, R.S.B.C. 1960, c. 208, s. 22 provides:

> (1) Any registered owner of land may make a valid transfer directly to himself jointly with another or others, and registered owners may make a valid transfer directly to one or more of their number either alone, or jointly with some other person, and a trustee or an executor or an administrator may make a valid transfer to himself individually.

and in 1968 the following subsection was added:

> (1) (a) A person may transfer land to himself in like manner as he could have transferred land to another person.

Manitoba

The Real Property Act, R.S.M. 1970, c. R30, s. 86, provides:

> (1) An owner of land registered under this Act may make a valid transfer to himself jointly with any other person; and registered owners may make a valid transfer to one of their number either solely or jointly with some other person.
>
> (2) An executor or administrator may make a valid transfer to himself individually.

Ontario

We have set out in the text sections 41-43 of the Conveyancing and Law of Property Act, R.S.O. 1970, c. 85. The following two provisions are not of great significance for our purposes, but we include them because they deal with transactions involving the same person on both sides. They are in the Land Titles Act, R.S.O. 1970, c. 234.

(1) Section 96 permits a "transfer to uses", this being a transfer given to such uses as the transferee may appoint. The transferee is called the owner to uses. Subsection (6): "An owner to uses who dies without having exercised his power of appointment by transfer, charge or will shall be deemed to have appointed the land by way of transfer to himself immediately before his death."

(2) Section 129(3) provides for registration of restrictive covenants. Subsection (4): "A covenant shall not be registered under subsection (3) unless . . . (b) the covenantee is a person other than the covenantor; . . ."

New Brunswick

The Property Act, R.S.N.B. 1952, c. 177, ss. 22 and 23, provides:

> (1) Freehold land may be conveyed by a person to himself jointly with another person by the like means by which it might be conveyed by him to another person.
>
> (2) It may, in like manner, be conveyed by a husband to his wife, or by a wife to her husband, alone or jointly with another person.
>
> (3) A person may convey land to or vest land in himself.
>
> 23. A person has power to assign personal property now by law assignable, including chattels real, jointly to himself and another person or other persons by the like means as he might assign the same to another.

Nova Scotia

The Real Property Act, R.S.N.S. 1967, c. 261, s. 9, provides:

> 9. Freehold land may be conveyed by a person to himself jointly with another person, including his spouse, by the like means by which it might be conveyed by him to another person; and may in like manner be conveyed by a husband to his wife and by a wife to her husband, alone or jointly with another person.

Prince Edward Island

The Real Property Act, R.S.P.E.I. 1951, c. 138, s. 14, provides:

> (1) Any property may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person, and may in like manner be conveyed or assigned by a husband to his wife, or by a wife to her husband alone or jointly with another person.
>
> (2) A person may convey property to or vest property in himself in like manner as he could have conveyed such property to or vested such property in another person.
>
> (3) Two or more persons (whether or not trustees or personal representatives), may convey and shall be deemed always to have been capable of conveying any property vested in them to any one or more of themselves in like manner as they could have conveyed such property to a third party; provided that if the persons in whose favor the conveyance is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance shall be liable to be set aside.
>
> (4) This section, where applicable, shall apply to all conveyances executed since the second day of October 1939.

United States

We have set out in the text the Model Interparty Agreement Act. Another relevant Act is the Uniform Property Act. Section 18 provides:

Identity of Grantor and Grantee:--

(1) Any person or persons owning property which he or they have power to convey, may effectively convey such property by a conveyance naming himself or themselves and another person or persons, or any or more of themselves and another person or other persons, as grantees, and the conveyance has the same effect as to whether it creates a joint tenancy, or tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property to the persons named as grantees in the conveyance.

(2) Any two or more persons owning property which they have power to convey, may effectively convey such property by a conveyance naming one, or more than one, or all such persons, as grantees, and the conveyance has the same effect, as to whether it creates a separate ownership, or a joint tenancy, or tenancy by the entireties, or tenancy in common, or tenancy in partnership, as if it were a conveyance from a stranger who owned the property, to the persons named as grantees in the conveyance.

(3) Any "person" mentioned in this Section may be a married person, and any "persons" so mentioned may be persons married to each other.

APPENDIX B

THE COMMON PARTIES (CONTRACTS AND CONVEYANCES) ACT

1.(1) A CONTRACT IS VALID AND ENFORCEABLE IN ACCORDANCE WITH ITS TERMS NOTWITHSTANDING THAT

(i) A PARTY TO THE CONTRACT ENTERS INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF AND ANOTHER,

(ii) A PARTY TO THE CONTRACT AND ANOTHER ENTER INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF AND STILL ANOTHER,

(iii) A PARTY TO THE CONTRACT AND ANOTHER ENTER INTO A COVENANT, PROMISE OR AGREEMENT WITH HIMSELF.

(2) THIS SECTION APPLIES TO A CONTRACT, WHETHER IN THE FORM OF A DEED OR NOT, IN WHICH A PERSON OSTENSIBLY CONTRACTS WITH HIMSELF ALONE BUT WHERE IN AT LEAST ONE CAPACITY HE IS IN FACT ACTING AS AGENT FOR ANOTHER.

(3) ANY RIGHT OF CONTRIBUTION OR INDEMNITY THAT EXISTS UNDER THE GENERAL LAW SHALL APPLY TO CONTRACTS VALIDATED BY THIS ACT.

(4) THIS SECTION APPLIES TO A CONTRACT WHICH PROVIDES FOR THE CONVEYANCE OF AN INTEREST IN LAND OR PERSONAL PROPERTY OR A CHOSE IN ACTION.

2. AN INTEREST IN LAND OR PERSONAL PROPERTY OR A CHOSE IN ACTION MAY BE CONVEYED

(i) BY A PERSON TO HIMSELF JOINTLY WITH ANOTHER PERSON,

(ii) BY TWO OR MORE PERSONS TO ANY ONE OR MORE OF THEMSELVES, BEING LESS THAN ALL,

(iii) BY TWO OR MORE PERSONS TO ANY ONE OR MORE OF THEMSELVES AND ANOTHER PERSON,

IN LIKE MANNER AS THE INTEREST MIGHT BE CONVEYED TO A THIRD PARTY; PROVIDED THAT IF THE PERSONS IN WHOSE FAVOUR THE CONVEYANCE IS MADE ARE BY REASON OF ANY FIDUCIARY RELATIONSHIP OR OTHERWISE, PRECLUDED FROM VALIDLY CARRYING OUT THE TRANSACTION, THE CONVEYANCE SHALL BE LIABLE TO BE SET ASIDE.

3. *THIS ACT APPLIES TO CONTRACTS AND CONVEYANCES WHETHER MADE BEFORE OR AFTER THE COMMENCEMENT OF THIS ACT, BUT WITHOUT PREJUDICE TO ANY ORDER OF A COURT MADE BEFORE SUCH COMMENCEMENT.*