INSTITUTE OF LAW RESEARCH AND REFORM

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SMALL PROJECTS

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REPORT

In February 1974 we wrote to all members of the Law Society of Alberta inviting them to call our attention to small defects in the law. In the ensuing months we received over thirty letters, some of them containing two or more suggestions. In several instances, more than one solicitor raised the same point. The letters we received can be put into four categories:

(I) those on which we now make recommendations;
(II) those that are still under consideration;
(III) those that we have included in one of our major projects;
(IV) those on which we plan no action.

We specially invite attention to three items in category II. They are

(1) (a) Affidavits of Execution;
(b) Illegible signature of notaries, etc.
(3) Builders' Lien Act
(6) Seizures Act

The parts of this report dealing with these three matters are really miniature working papers. We seek the opinion of the profession on the questions raised and ask that any comment be in our hands by 30 July, 1975.

Before reporting on the four categories in detail, we point out here that we acknowledged every letter and looked into every suggestion. In our opinion the venture was worthwhile. This report can be taken as an invitation to the profession and the public to continue to call our attention to small defects in the law.

I

RECOMMENDATIONS

(1) Bulk Sales Act, R.S.A. 1970, c. 37

The suggestion here was that creditors whose consent or waiver is required to the bulk sale should be confined to unsecured trade creditors. Under our Act 'creditors' means all creditors, whether trade creditors or not and whether secured or unsecured.

We agree with the suggestion. Our Act is based on the original Uniform Act which the Conference of Commissioners on Uniformity of Legislation adopted in 1920. That Conference re-examined the Act a number of years ago and adopted a Revised Uniform Act in 1961. Under that Act the vendor's statement of creditors is restricted to trade creditors, secured and unsecured (Uniform section 5(2)), whereas under Alberta's Act the statement must include all creditors (Alberta's section 5(2)). Then when one comes to the provision for consent to the sale, the Uniform Act provides for consent of 60% of unsecured trade creditors (Uniform section 10) whereas our Act provides for waiver or consent by 60% of all creditors (Alberta's section 6).

The provisions in the Revised Uniform Act were made deliberately and by way of a change in policy from the original Uniform Act. The Conference thought that the consent of all creditors should not be needed, but only that of unsecured trade creditors. Our present provision makes compliance difficult and serves no justifiable policy.

We recommend (a) that section 5 be amended so that the vendor's statement shall contain a list of the trade creditors; (b) that section 6 and the form of waiver (Schedule B) be amended so that the waiver provision applies to unsecured trade creditors instead of to all creditors. There is no need to change the definition of "creditor".

One might ask why we do not here recommend enactment of the Revised Uniform Act in its entirety. It does have some improvements in addition to those we recommend here. On the other hand some of the provisions are open to question (see Proceedings of Conference of Commissioners on Uniformity of Legislation 1961, pp. 77-79 and 1963, pp. 139-140). We could not recommend its enactment without careful study.

(2) Alberta Evidence Act, R.S.A. 1970, c. 127

Section 19(1) of the Evidence Act permits a person to affirm when he objects from conscientious scruples, religious belief or because the oath does not bind his conscience. This provision comes from England's Oaths Act of 1888. The question raised is whether Alberta's provision is wide enough to permit a person to affirm, for example, where he is a Sikh and his Holy Book is not available. Taken literally, section 19(1) does not cover these facts. The British Parliament apparently thought this to be the case so passed the Oaths Act 1961, which in relevant part provides:

> 1.(1) The Oaths Act, 1888 (which in certain cases permits persons objecting to being sworn to make a solemn affirmation instead), shall apply in relation to a person to whom it is not reasonably practicable to administer an Oath in the manner appropriate to his religious

> belief as it applies in relation to a person objecting to being sworn on any such ground as is mentioned in section one of that Act.
>
> (2) A person who may be permitted under this section to make his solemn affirmation may also be required to do so, and for the purposes of this section "reasonably practicable" means reasonably practicable without inconvenience or delay.

We recommend an amendment to section 19(1) on these lines.

(3) Dower Act, R.S.A. 1970, c. 114

Section 2(c)(i) provides that dower attaches only to the property on which a married owner resides. Yet the dower affidavits (Forms B and G) require the owner to swear that neither himself nor his spouse has resided on the lands. In other words the affidavits are wider than the substantive provision.

When the affidavit was first required by an amendment to the Act in 1919, the affidavit simply said that the land "is not and does not include any part of my home property". There appears to have been no change in the Act or in the form of affidavit until the 1942 Revised Statutes of Alberta, when a clause was added to the affidavit "that neither myself nor my wife have resided on the within mentioned land since 30 April 1917".

In the revised Dower Act of 1948, the original clauses were omitted so that the affidavit simply read "that neither myself nor my spouse have resided on the within mentioned land at any time since our marriage". This is the wording

of Form B today. Form G is an adaptation of Form B and applies where an executor takes the affidavit. There is a clear discrepancy between section 2 and the affidavits.

We recommend that the affidavits be amended to conform to section 2. This does not mean that the present affidavits printed on stationers' forms cannot be used, because they are wider than the requirement of section 2.

(4) Liquor Control Act, R.S.A. 1970, c. 211

Section 110(2)(a) as enacted in 1971 (c. 61, s. 6) refers to sections 222 and 224 of the Criminal Code. These have been renumbered and have become sections 234 and 236. We have consulted members of the Attorney General's department. They agree that section 110 should be amended to refer to the renumbered section of the Code.

(5) Workers' Compensation Act, 1973, c. 87

A solicitor pointed out that it is not clear whether in an action brought by a workman pursuant to section 14(1)(b), the defendant is entitled to bring in as a third party a person who is protected from action--that is to say, a fellow employee or any employer under the Act (sections 13 and 15). There have been inconsistent decisions on this point. We looked into the subject and made recommendations to the Advisory Committee of the Workers' Compensation Board. This we did with the consent of the Attorney General. Our report is attached as Appendix A.

II

MATTERS STILL UNDER CONSIDERATION

(1) (a) Affidavits of Execution: (b) Illegible Signature of Notaries, Commissioners, etc.

Under this heading we shall describe two separate submissions. The first has to do with affidavits of execution and the second with illegible signatures of the officer who is authorized to administer oaths or to take acknowledgements or execute notarial certificates and the like. We shall discuss them in order.

(a) Affidavits of Execution

In the typical affidavit of execution the witness swears that he knows the person whose signature he has witnessed. The form of affidavit in the Land Titles Act (Form 38) provides:

> I, A.B., of ....., in the .....make oath and say:
>
> 1. I was personally present and did see ..... named in the within (or annexed) instrument, who is personally known to me to be the person named therein, duly sign and execute the same for the purposes named therein.
>
> 2. That the same was executed at the ..... in the ....., and that I am the subscribing witness thereto.
>
> 3. That I, ..., know the said ..... and he is in my belief of the full age of twenty-one years.

SWORN before me at)
..... in the)
..... this ....) .....
day of .....) Signature
A.D. 19 ..)

(Note: we have omitted the alternative affidavit, which is used when the person executing the instrument has signed by making his mark.)

Several solicitors pointed out that many cases arise where the only person available as the witness is the solicitor's secretary. The solicitor himself must act as the Commissioner. The secretary may never have seen the party before. It is quite wrong to ask her to take an affidavit swearing that she does know him.

We note that although the only statutory form of affidavit is the one quoted above, similar affidavits are used where other statutes require an Affidavit of Execution--for example the Bills of Sale Act. The stationers' forms conform to the Affidavit of Execution under the Land Titles Act. We inquired as to the law and practice in the other western provinces. As far as we can ascertain, the only provision designed to meet this problem is in British Columbia's Land Registry Act. Section 57 says that the execution of every instrument required to be registered shall be witnessed by at least one person of at least 16 years of age, who shall sign his name to the instrument as a witness; and the execution shall be proved in either of the following manners (a) by the affidavit of the witness in Form R, or (b) by acknowledgement of the grantor in Form O. Form R is almost identical with our Form 38. Form O provides:

I hereby certify that, on the ..... day of ....., 19.., at ....., in the ..... of ....., ...

(whose identity has been proved by the evidence on oath of ....., who is) personally known to me, appeared before me and acknowledged to me that ..... the person mentioned in the annexed instrument as the maker thereof, and whose name ..... subscribed thereto as part ....., that ..... knows the contents thereof, and that ..... executed the same voluntarily, and is of the full age of twenty-one years.

In testimony whereof I have hereto set my hand and seal of office at ..... this ..... day of ....., in the year of our Lord one thousand nine hundred and .....

NOTE: Where the person making the acknowledgement is personally known to the officer taking the same, strike out the words in parentheses.

Where this form is used the witness need not sign an Affidavit of Execution. Instead the maker acknowledges to a commissioner for oaths that he is the maker. The procedure might be compared to that in Alberta where a spouse acknowledges his consent to a disposition of the homestead in Form C under the Dower Act.

Apart from British Columbia's Form O, we know of no instance in which an acknowledgement replaces the Affidavit of Execution in western Canada. In Ontario, too, the Affidavit of Execution seems to be in general use. Section 25 of the Registry Act, R.S.O. 1970, c. 409, says that an instrument shall not be registered unless accompanied by an affidavit in the prescribed form of a subscribing witness. The form is not set out in the Act. However the precedents we have examined show that the affidavit is almost identical to that under our Land Titles Act.

In connection with Ontario's Land Titles Act, a form of Affidavit of Execution is provided in rules made

under the Act. Rule 51 prescribes the form of affidavit. There are two forms (38 and 39). In each of them the witness swears that he is "well acquainted" with the maker (Magwood, The Land Titles Act, 1954).

In Quebec, the Civil Code provides for registration of a memorial or summary of documents conveying "real rights". Article 2141 says that the memorial must be acknowledged by the party or proved on oath by a witness. We do not know which method is the more prevalent.

In the Atlantic provinces, the registry laws all provide for the alternative of an Affidavit of Execution or an acknowledgement by the maker before a commission or other specified officer.

(1) New Brunswick--Registry Act, R.S.N.B. 1952, c. 195, s. 50.
(2) Newfoundland--Registration of Deeds Act, R.S.N. 1970, c. 328, ss. 11-14.
(3) Nova Scotia--Registry Act, R.S.N. 1967, c. 265, s. 29.
(4) Prince Edward Island--Registry Act, R.S.P.E.I. 1951 (Office Consolidation 1973), c. 143, ss. 19-21.

We are unable to say which form of proof is in more common use in these four provinces. The forms are not statutory save in Prince Edward Island (Forms C and D). In these forms neither the oath of the witness nor the officer's certificate of acknowledgement states that the witness or officer knows the maker.

In the United States acknowledgement by the maker is commonplace. In that country there is a Uniform

Acknowledgements Act. It sets out the form of certificate of acknowledgement where the execution is by an individual and also where it is by a corporation and by an attorney in fact and by a public officer. The form of certificate where the document has been executed by an individual is as follows:

> State of .....
> County of .....
>
> On this the .... day of ..... 19.., before me ....., the undersigned officer, personally appeared ....., known to me (or satisfactorily proven) to be the person whose name ..... subscribed to the within instrument and acknowledged that ..... he ..... executed the same for the purposes therein contained.
>
> In witness whereof I hereunto set my hand and official seal.
>
> .....
>
> .....
> Title of Officer

It appears that the acknowledgement is widely used in the United States to prove execution. As to the advantages and disadvantages of each, the following passage from 3 American Law of Property (1952) at 310 is of interest.

> As an alternative to certificates of acknowledgement, many states allow a conveyance to be authenticated by the affidavit of a subscribing witness. This is the usual method of authentication in several provinces of Canada. Theoretically it is not as good as a formal acknowledgement by the grantor but in practice it is doubtless superior.

The authority for the last sentence is an article by Wigmore, Notaries Who Undermine Our Property System, 22 Ill. L. Rev. 748 (1928). This article says that abuses are frequent in the United States. Notaries take an acknowledgement stating that they know the person signing as maker when they do not, and forgeries are thus facilitated. Wigmore had several suggestions for making acknowledgements effective.

We do not know the frequency of forgeries in Alberta. However there are cases where the witness takes the Affidavit of Execution although he does not in fact know the person whose purported signature he has witnessed. Thus the purpose of the affidavit is defeated, and what is more serious, the witness is making an untrue statement under oath.

What should be done? It would be possible to require the signer to prove his identity to the witness and to have the affidavit state that the witness is satisfied of the identity. It would be possible, too, to have a certificate of acknowledgement like British Columbia's for use as an alternative to the Affidavit of Execution. Again, we could substitute an acknowledgement for the affidavit in all cases. We received two or three suggestions on these lines. Another alternative would be to abandon the requirement of proof of execution in all cases. We are not disposed to take this course, though we note the following item in the last Annual Report of the British Columbia Law Reform Commission. It says:

> Affidavits of Execution--this study was added to our program in 1974. It will entail an inquiry into the extent to which provincial laws such as the Land Registry Act require that certain transactions be evidenced by affidavits, and an examination of the principles underlying such requirements.

We think that further examination of this question is needed, and WE INVITE COMMENT.

(b) Illegible Signatures of Commissioners for Oaths, Notaries, etc.

A solicitor pointed out that signatures of Commissioners for Oaths are often illegible and that the Commissioners should be required to use in addition a stamp or printed name. In England the following note appears in (1947) 91 Sol. Jo. 340:

> Signature of Commissioners--In a case before Vaisey, J., the Judge said that his attention had been drawn by various officials of the High Court to the fact that in many cases the signature of the Commissioners on documents was indecipherable. It was desirable that in every case it should be possible to identify the Commissioner and, unless his signature as written was plainly legible, it should be further elucidated by means of a rubber stamp or otherwise.

We agree. The only question is as to how to obtain compliance. It would be possible to impose a penalty if a stamped signature or printed signature were not used to supplement the ordinary signature. It would also be possible to provide for suspending a Commissioner for Oaths who did not comply. We are not at all sure that these sanctions would be wise, especially when one bears in mind that several classes of persons are commissioners ex officio. We plan to go into this further with the Attorney General. In the meantime WE INVITE COMMENT.

(2) Arbitration Act, R.S.A. 1970, c. 21

A solicitor raised the problem as to the role of an arbitrator under the Arbitration Act. Does he represent the party that appointed him or is he completely independent? (Arbitrations under the Labour Act are a different matter and were not included in the solicitor's question.) We consulted a number of solicitors and engineers who have had experience with arbitrations and have completed our examination of the law.

In the meantime another solicitor pointed out that there is doubt as to whether the court can appoint an arbitrator where one of the parties refuses to do so.

Our research on these matters is almost complete and we expect soon to issue a Report or Working Paper.

(3) Builders' Lien Act, R.S.A. 1970, c. 35

In connection with this Act we have considered four submissions. We shall now discuss them in order.

(a) Sections 32 and 35: Driden v. Sieber, [1974] 1 W.W.R. 165, rev'd. on appeal [1974] 3 W.W.R. 368

Section 32 requires a person who has registered a lien to bring action within 180 days and to file lis pendens. Section 35 empowers the court to order cancellation of registration of the lien where the person against whom the claim is made has paid into court the amount of claim. The complete section reads:

(1) The court may, upon application by originating notice,

(a) order that the registration of a lien be cancelled upon the giving of security for or the payment into court of the amount of the claim and such costs as the court may fix, or

(b) order that the registration of a lien be cancelled on any proper ground.

(2) Money paid into court replaces the land discharged and is subject to the claim of all persons for liens to the same extent as if the money had been realized by a sale of the land in an action to enforce the lien.

One question is whether lis pendens need be filed when money has been paid into court. Another has to do with the procedure that a person must follow when he pays in pursuant to section 35.

In Driden v. Sieber, Driden was a principal contractor who made a subcontract with Sieber. The latter registered a lien. To clear the title Driden paid into court the amount of Sieber's claim. Sieber did not bring action within 180 days and at no time did he file lis pendens. Driden applied for payment out to himself of the moneys in court. Shannon J. made the order because Sieber had not brought action within the required time. By way of dictum Shannon J. referred to a situation which was not before him, namely that of an action commenced in time but in which no lis pendens was filed. He pointed to the absurdity of requiring a plaintiff to file lis pendens where the defendant has paid money into court and recommended an amendment to section 32 "to eliminate the need to register a certificate of lis pendens when money has been paid into court".

Sieber appealed. The Appellate Division held that when money is paid into court section 32 does not apply. In other words there is no need to file lis pendens. However, the lien does not expire after 180 days. The court went on to point out that section 35 is silent as to the procedure when money is paid into court, and held that the proper course is for the person paying in to "ask the court to settle the issue to be decided and direct who should be the plaintiff and who should be the defendant."

It is now clear from the judgment of the Appellate Division that lis pendens need not be filed when money is paid into court. However we think that it would help to make this clear in the Act.

The consequence of the ruling that section 32 does not apply is that the lienholder is relieved from the duty of taking proceedings within 180 days. We raise the following question: Should the Act he changed so as to require the lienholder to bring action within 180 days notwithstanding payment into court? On the one hand it can be argued that he should not be so obliged; that the 180-day period is for the purpose of speeding up the process of getting liens off the title, and that once payment has been made into court and the lien has been removed from the title, then the urgency is gone and the claimant should not have to sue within 180 days.

On the other hand the general policy of the Act is to require disputes to be settled promptly, and one can argue that the claimant should be held to the obligation to bring action in 180 days, notwithstanding payment into court. If he is not so obliged then there could be two sets of actions, those relating to the moneys in court and

those relating to the land. Probably the trial of the latter would have to wait the outcome of the trial of the former.

Tentatively we think that a claimant to moneys in court should be required to bring action within 180 days. WE INVITE COMMENT.

Another point that arose in Driden is this. Sieber the lienholder argued that Driden's payment into court under section 35 was an action in which a lien may be realized under section 32. The Appellate Division seems to have rejected this argument. We tentatively agree that payment in should not be treated as a lien action and that the Act be amended to make this clear. WE INVITE COMMENT.

The main question is one that the Appellate Division had to deal with because the Act is silent--that is to say the procedure on payment in. There are two questions.

(1) Who should be served? For example it could be provided that all persons with registered liens be served, or even others with interests registered on the title.

(2) Should the Act specify any other steps to be taken by the person paying in? The judgment in Driden points out that

> . . . it would have been better if the Legislature had spelled out the procedure to be followed when moneys were paid into court under section 35, but since it has not done so the procedure to be followed must be decided by reference to analogous provisions of the Act.

Taking the analogy from other provisions in the Act, the Appellate Division said "There should be a direction by

the court as to the procedure when the application to pay the money into court is made." This means the direction of an issue as to who will be plaintiff and defendant and possibly a pre-trial application like that which is provided in section 39 in connection with enforcement of a lien.

We doubt that the person paying in should have the burden of applying for directions, and would like comment on this question: What procedures, if any, should section 35 spell out in connection with payment in?

We mention now a point that did not arise in Driden, but that is analogous to the problem we have just discussed. It has to do with payment into court of the lien fund under section 18. This may be by originating notice of motion. The question is: Should the procedures on payment in under section 18 be the same as those on payment in under section 35?

(b) Glenway v. Knobloch, [1972] 6 W.W.R. 513

This case deals with the concept of "substantial performance" which first appeared in the 1970 Act. Section 2(1)(a) defines "completion of the contract" as "substantial performance, not necessarily total performance, of the contract"; and section 2(2) states in more detail the meaning of substantial performance. The substantive provision, section 30, says that a lien must be filed within 35 days. However the following summary of the four subsections shows that it is hard to say when the concept of "substantial performance" applies.

(1) A lien in favour of a contractor or subcontractor in cases not otherwise

provided for may be registered at any time up to the completion of the contract and within thirty-five days after completion.

(2) A claim of lien for materials may be registered during the furnishing of the materials and within thirty-five days after the last of the materials is furnished.

(3) A lien for the performance of services may be registered during the performance of the services and within thirty-five days after performance of the services is completed.

(4) A lien for wages may be registered at any time during the performance of the work for which the wages are claimed and within thirty-five days after completion of the work.

It will be seen that subsection (1) is the only provision that uses the phrase "completion of the contract". The substantial performance concept applies to that subsection, but then two questions arise. To what contracts does subsection (1) apply? Does the concept apply to any of the other subsections? (For an anticipation of these questions see Comment: Builders' Lien Act by W. H. Hurlburt (1971),IX, Alta. Law Rev. 407 at 420-21.)

In Glenway the facts were these. Glenway had a subcontract to supply doors and windows for some $5,300.

They were put in during the summer. Then in December there were two small items: one for $14.00 for weatherstrip and final adjustment of doors and the other of $20.36 for two windowpanes that had broken. Glenway then registered a lien within thirty-five days. The Chambers judge held that the registration was too late. Glenway appealed and its appeal was allowed. Mr. Justice Kane held that the "substantial performance" provision did not apply. The contract was not within subsection (1). It was either for materials or services or both and the lien was registrable within thirty-five days of the furnishing of the last materials and performance of the last services.

Mr. Justice Clement held that as a subcontractor Glenway was within subsection (1) even though its subcontract was for the supply of materials. Thus the concept of "substantial performance" applies. However Mr. Justice Clement held that this provision merely creates a rebuttable presumption and that on the facts Glenway had rebutted it. Thus the lien was registered in time. Chief Justice Smith concurred with both judgments.

Glenway reduces the scope of the substantial performance provision and leaves its application uncertain. This is unsatisfactory both from the standpoint of the claimant and the person against whom he claims.

Our tentative opinion is that the "substantial performance" concept is sound and that the Act should be amended so as to revitalize it. Several provisions are involved. The definition of "completion of contract" in section 2(1)(a) described above, should apply specifically to subcontracts. At present time there is doubt that it does.

In connection with section 2(2), which sets out the circumstances in which a contract "shall be deemed to be substantially performed", it will be recalled that Clement J. held "these words create merely a rebuttable presumption". The presumption should be conclusive.

As for section 30, it was the existence of subsections (1)-(3) that created the problem in Glenway. To give to the concept of substantial performance the effect it should have our tentative opinion is that subsection (1) should be made a general provision covering all contracts and subcontracts and that subsections (2) and (3) be repealed. There seems to be no reason why "substantial performance" should not apply to contracts to furnish materials or to perform services. If this were done then subsections (1)-(3) could be combined in one subsection to which the "substantial performance" provision would apply. This leaves the matter of a labourer's lien for wages. Should the "substantial performance" rule apply in this case? If that rule is basically sound, then exceptions to it should be avoided. We realize of course that the concept of "substantial performance" may seem inappropriate to a claim for wages. WE INVITE COMMENT as to the desirability of establishing the "substantial performance" concept for all contracts and subcontracts, and whether it should be adapted to claims for wages.

This leads us to mention a problem that did not enter into Glenway, but is related to it.

We refer to the holdback provisions. Section 15(2) says that the owner in making payments under his contract shall "retain for the time limited by section 30 an amount equal to fifteen per cent of the value of the work actually

done." If the "substantial performance" rule were made applicable to the owner's contract, then the owner would not be obliged to retain the holdback until final completion of the last subcontract or the final day of labour, but might pay it out after thirty-five days from substantial completion of the principal contract.

This scheme might to some extent prejudice the claim against the holdback of subcontractors and wage earners, especially where their subcontracts or wages come at a time near the completion of the principal contract. As the law stands now and especially since Glenway, the owner must retain the holdback until the very last nail is driven. This slows the flow of moneys in the construction chain whereas we think the flow should be accelerated. The release of the holdback on the basis of substantial completion would achieve this end. On balance our tentative view is in favour of this policy even though the result may be that the subcontractors or wage earners whose liens arise near the completion of the main contract might lose the benefit of the holdback.

Another provision connected with holdbacks is section 16 which permits the owner to pay out fifteen per cent of the amount of subcontracts. This provision, too, is designed to speed up the flow of funds by allowing the early payment of the portion of the holdback relating to a specific subcontract. Our tentative opinion is that in order to be effective it should allow the payment to be made after the substantial completion of the subcontract. The result would be that the supervisor would have to certify completion when there has been substantial performance.

Another point connected with section 16 is this. The effect of a payment under section 16 is not clear. We think

that that section should operate to extinguish the lien not only of the contractor or subcontractor to whom the payment is made, but also the liens of those claiming under him.

WE INVTE COMMENT on all the points raised in this discussion of the problems arising from Glenway.

(c) Section 38(3)

In connection with proceedings to enforce the lien, section 36 prescribes the parties and section 37 provides for service of the statement of claim. Then section 38 in addition to providing the time for filing of statement of defense, says in subsection (3):

> At any time following service of statement of claim upon him, a party may file with the clerk of the court and serve upon any lienholder a notice to prove lien in the prescribed form.

The submission to us stated that cases have arisen in which a lien claimant has issued a statement of claim, but for tactical reasons has refrained from serving it. This is unfair to the other parties. The suggestion is that section 38(3) be amended so that it will apply at any time following the issue of the statement of claim. Our tentative opinion is that the suggestion is sound.

(d) Section 40(2) and (3)

The case that raised this question was basically as follows. The owner of the building became bankrupt before the building was completed. A number of liens had been filed. The trustee in bankruptcy required funds to protect the building from weather and vandalism. Accordingly he

applied to the mortgagee to advance funds to protect the security. The mortgagee wanted assurance that any advance would have priority over the liens. Section 40(2) and (3) provide for this situation, but only where a statement of claim has been issued. In the case brought to our attention, no action had been started. The trustee in bankruptcy was compelled to apply under the Judicature Act for an order appointing himself as receiver to receive the funds from the mortgagee. It was then necessary to persuade the lienholders to give priority to the mortgage. The suggestion is that section 40(2) and (3) be amended so that any interested party can invoke their provisions even though an action has not been started. Parenthetically we note that in Manitoba, where the statute has no section like our section 40, the Court of Appeal upheld an order appointing a receiver of the balance of mortgage moneys with priority over registered liens. The Court of Queen's Bench had inherent jurisdiction to make such an order (College Housing Co-op. v. Baxter, [1975] 1 W.W.R. 311).

WE WOULD LIKE COMMENT on all the above points.

(4) Proceedings aginst the Crown Act, R.S.A. 1970, c. 285

Section 14 says that in proceedings against the Crown the trial shall be without a jury. The question is whether this section should be removed, so that the general law as to trial by jury will apply. All of the Crown Proceedings Acts that we have examined including that of Great Britain and the Uniform Act and the new British Columbia Act have a provision the same as ours. We have not yet decided whether there is any adequate policy whereby the Crown should be in a different position from any other defendant, and are looking into it further.

(5) Real Estate Agents' Licensing Act, R.S.A. 1970, c. 311

Real estate agents must put up a bond (section 10). It is for the benefit of persons who suffer from the fraud of a real estate agent (section 14). Section 15 provides for the disposition of the proceeds of a forfeited bond. Normally these proceeds are paid into court. However the section is not clear as to how and when a creditor can obtain payment out. We have taken this up with the Department of Consumer Affairs and expect to decide before long whether to make a recommendation.

(6) Seizures Act, R.S.A. 1970, c. 338

We received four letters in connection with this Act. One of them referred to an article that describes abuses by persons repossessing property. As best we can tell, this article described the position in provinces where the creditor may appoint his own bailiff and not to Alberta where seizures are made through the sheriff.

We now describe the problems raised in the other three letters.

(a) The first has to do with Notice of Seizure. Section 25 says that seizure is effected by Notice of Seizure. The bailiff may serve it on the debtor, or attach it to the goods or post it on the premises on which the goods are seized.

The proper giving of notice is especially important because the form of Notice of Objection accompanies it.

The submission to us was in the form of a copy of a letter from the solicitor to the Attorney General in 1965. The complaint is twofold:

(1) that the goods are sometimes in the possession of a third party, e.g., one with a possessory lien, and that the goods are seized and removed without any notice to him so that he is deprived of his lien;

(2) that sometimes, especially in the case of motor vehicles, the Notice of Seizure is attached to the vehicle and that the vehicle is thereupon removed.

We find it hard to picture the situation in which the person with the possessory lien does not know the goods have been seized. As to the second situation, again we do not know how often the bailiff follows the practice of affixing the notice to the goods and then removing them without the debtor's knowledge.

The solicitor's suggestion to solve the first problem is to require the bailiff, where he posts the notice on the premises under section 25(1)(c) to post the notice so it will "come to the attention of the debtor and others immediately concerned with the goods." The solicitor's suggested solution to the second problem is to amend section 25(1)(b) to make it clear that the notice should be attached to the goods only when they are not being removed.

We are looking further into this matter and in the meantime would WELCOME COMMENT.

(b) The second submission has to do with late filing of a Notice of Objection. Section 28 requires the debtor to file Notice of Objection within 14 days. Section 29 says that when the debtor files Notice of Objection the creditor may apply for an Order for Sale. Section 30 deals with the situation where the debtor has not filed Notice of Objection within 14 days. Three alternate courses are set out, all of which provide for sale by one method or another. There is no need for an Order for Sale, and indeed the Appellate Division has held in Reid v. Lindys (1958), 24 W.W.R. 620 that the court has no jurisdiction to grant an Order for Sale where no Notice of Objection has been filed. The problem that a solicitor brought to our attention is this. After the 14 days have expired the creditor may instruct the sheriff to sell the goods under section 30(1)(a). Then after the sale has been advertised the debtor may send in his Notice of Objection. The letter pointed out that the practice is for the sheriff to stop the sale so that the creditor must apply for an Order for Sale, at considerable additional cost. This practice of the sheriff is in fact obligatory on him, at least since the decision of the Appellate Division in Re Industrial Acceptance Corporation (1960), 32 W.W.R. 547. In construing together sections 26-29 and 34 the court held that a Notice of Objection is effective even though it is filed after 14 days.

It could be argued that the debtor who has failed to file Notice of Objection within 14 days should be required to take the initiative by applying for a Restraining Order under section 34. However this would represent an important change in established policy and at the moment we are not prepared to deprive the debtor of the right to file Notice of Objection after 14 days. On the other hand the present law may be unfair to the creditor. WE INVITE COMMENT.

(c) The third submission has to do with a special situation--that of the lessor of chattels. Assuming the lessee defaults in payment of rent then the lessor might consider whether to take possession of the goods himself, or to replevy them, or to proceed under the Seizures Act. Generally the law of Alberta discourages selfhelp by creditors, so the choice is really between replevin and distress under the Seizures Act. The submission to us states that some sheriffs decline to proceed under the Seizures Act. Presumably that procedure is less expensive and more expeditious than replevin.

It is relevant to ask whether the Seizures Act now applies to this type of repossession. Section 18 says that every distress is to be made by the sheriff. Section 2(c) says that "distress" means everything done in the exercise of a power of distress. Section 2(g) says that "power of distress" is the right that a person has to enforce payment against goods or the taking of goods out of the possession of another otherwise than by writ of execution.

Assuming that the sheriff has authority to make the seizure under the above provisions then obviously it is inappropriate to apply the provisions for sale.

If there is no Notice of Objection then section 28 says that the goods seized may be disposed of "according to law". Section 30 has detailed provisions as to the method of sale where there has been no Notice of Objection. There appears to be no specific provision authorizing the return to the lessor of leased chattels.

Where Notice of Objection has been filed section 29 provides for application to the court for an order for removal and sale or for removal or sale. It is arguable that the power to order removal includes the power to order restoration of the chattel to the lessor. If this is not so then it is pointless for the lessor to proceed by way of seizure, even though the Act defines his right to possess as a power of distress.

We are advised that sometimes the lease provides for a refund on completion of the lease where the total payments exceed the true depreciation. In addition there may be a dispute as whether the rent is in arrears. In view of these facts the lessee should have an opportunity to object to the lessor's proceedings to repossess. As we see the problem it can be put in the form of three questions:

(1) Should the lessor be able to effect seizure under the Seizures Act?

(2) If so should the Seizures Act be amended specifically to enable the sheriff to restore possession to the lessor?

(3) What safeguards, if any, should be afforded to the lessee if he does not file Notice of Objection? (Presumably if he files Notice of Objection he will be entitled to be heard on the lessor's application for an order restoring possession to him.)

(7) Statute of Frauds 29 Car. 2, c. 3

The suggestion was to examine this statute with a view to repeal. The important section 4 of the original English statute is still in force in Alberta, and section 17 is in the Sale of Goods Act. We had a research paper prepared last summer and on studying it decided to take this subject on as a major project. More work will be required before we are in a position to produce a Report or Working Paper.

(8) Survival of Actions (especially the claim for loss of expectation of life)

The question here is whether to abolish the claim for loss of expectation of life in an action by an estate where the victim has died. In our opinion this matter could not be dealt with as a small project. We decided to take on as a major project the examination of the Uniform Survival of Actions Act, which abolishes the claim for loss of expectation. We have recently issued a Working Paper with a view to obtaining the views of members of the legal profession as well as of others.

III

MATTERS THAT HAVE BEEN INCLUDED IN EXISTING MAJOR PROJECTS

A substantial number of submissions have to do with matters that are already on our agenda. We shall here list them and point out the project in which they will be examined.

(1) Common Law Spouses

One letter proposed an examination of Alberta law to see to what extent, if any, Alberta should recognize this

status. The Workers' Compensation Act and the Crimes Compensation Act already do so. In British Columbia the Family Relations Act also recognizes it. We have had a research paper prepared on the subject. We plan to deal with this as part of our Family Law Project. It is too early to say whether we shall recommend general recognition of the status or even recognition in connection with specific matters, e.g., the Family Relief Act and the Fatal Accidents Act, and support.

(2) Judicature Act, R.S.A. 1970, c. 193, and Divorce Act, R.S.C. 1970, c. D-8 (Restraining Orders)

We received several suggestions in connection with restraining orders and also in connection with the right of a non-owning spouse to remain in the home pending the hearing of a petition for divorce or an action for judicial separation. We are examining these matters in connection with Matrimonial Property.

(3) Limitation of Actions, R.S.A. 1970, c. 209

A solicitor raised the matter of the limitation period for actions against hospitals under part 9 of the Limitations Act. We have on our agenda the re-examination of the whole of this statute, and will consider in that project the limitation period for actions against hospitals.

(4) Land Titles Act, R.S.A. 1970, c. 198

We received six submissions, which we now describe.

(a) The relation between s. 61 of the Land Titles Act and s. 35 of the Judicature Act

Section 61 deals with the situation where a mortgagor subsequently transfers the land. The section provides that there is implied a covenant by the transferee that he will pay the mortgage debt. This provision has always been in the Land Titles Act. The Judicature Act in s. 34 bars actions by the mortgagee on the covenant for payment but then s. 35 makes an exception in the case of a mortgage by a corporation. The solicitor points out that a corporate mortgagor may transfer the land to an individual and that conversely an individual mortgagor may transfer the land to a corporation. The result seems to be that in the first case the individual transferee is not protected against an action on the covenant and that in the second case the corporate mortgagor is. If this is the case then the policy of the Judicature Act is subverted.

(b) The Assurance Fund

The submission is that there are too many obstacles in the way of collecting from the fund.

(c) Sections 106 and 107

These provisions forbid the inclusion in a conditional sale agreement of a mortgage on land. The submission asks for reconsideration of these provisions.

(d) Time of Expiry of Judgment

Several solicitors pointed out that an action on a judgment must be brought within 10 years whereas under

s. 128 of the Land Titles Act a writ lasts for 6 years and may be renewed. The suggestion is that these provisions should be made to dovetail.

(e) Stringent acceleration clauses on transfer of mortgaged land without consent of mortgagee

On occasion mortgages provide that should the mortgagor transfer the land, then the acceleration clause will take effect. The point in the submission is that this seems to be rather severe. It may be that this matter does not come under the Land Titles Act. However we intend to examine it.

(f) Discrepancy in wording between s. 64(2)(a) and the Tax Recovery Act, s. 23(6)(c)

This has to do with the title to land acquired through tax recovery proceedings. The intent of both Acts is that the title be subject to easements and rights of way. There is however some difference in wording. We think it is only verbal, and that there is no difference in substance. However we agree that the two sections should have the same wording.

We are referring all of the above items to the Director of our Land Titles project.

IV

SUBMISSIONS ON WHICH NO ACTION IS PLANNED

(1) Alberta Government Telephones Act, R.S.A. 1970, c. 12

Section 9(2), enacted in 1965, says that officers and employees of the AGT Commission shall hold office at

pleasure of the Commission unless otherwise agreed with the officer or employee. The Public Service Act, R.S.A. 1970, c. 298, does not apply to the AGT, nor has the Crown Agencies Employee Relations Act, R.S.A. 1970, c. 79, been extended to the AGT.

The submission was that AGT employees should be brought under the Public Service Act, presumable through the Crown Agencies Employee Relations Act, or alternately that section 9(2) of the AGT Act be amended to remove the provision for appointments at pleasure. We understand that most AGT employees are members of the Brotherhood of Electrical Workers though some, including those in positions of management, are not.

We are not prepared to take up this submission as a small project. It is a very complex one, and involves issues of policy. We have no basis for recommending that the Public Service Act be made applicable to the AGT. As for the alternate of repealing section 9(2), we do not think that it would be proper to recommend repeal without an examination of the background of section 9(2) and an understanding of the operation of the provision. This understanding we could not acquire without intensive study of it which would move this matter out of the category of a small project.

(2) Change of Name Act, R.S.A. 1970, c. 41

This submission was particularly concerned with the case of a woman who is married or divorced or who is the mother of an illegitimate child, and who wishes to change the surname of the child to the one that she herself uses. The letter overlooked the new Change of Name Act (1973, c. 63), which had been passed several months before the

solicitor's letter to us, and which deals with the problem that the solicitor raised. Where an application to change the surname of a child is made by a person who is married or divorced or the mother of an illegitimate child(ss. 5, 7 and 8) the consent of the father is required. However a later provision permits the court to dispense with that consent, having regard to the best interests of the child (s. 11). It may be that problems will arise under the new Act. For example, there are two provisions that seem inconsistent in policy. A common law spouse may not change his or her name to that of the person with whom he or she is living (s. 10), and yet the mother of an illegitimate child may apply to change the surname of the child to that of the man with whom she is living, provided he consents (s. 8(4)).

Any proposal to amend our Act should await the publication of the Ontario report on the same subject. In that province the Law Reform Commission in 1971 examined the Change of Name Act and recommended that it be amended to equalize the rights of married women with those of married men. The Act was amended accordingly in 1971. Subsequently the Law Reform Commission undertook the study of the right of a married woman to retain her maiden name or on remarriage to retain her first husband's name, or to revert to her maiden name. This study also includes the problem of the children's names. The latter is one of the principal matters that our 1973 Act deals with. It may be that the Ontario report will have some points of interest. In the meantime, our new Act meets the problem that the solicitor raised.

(3) Criminal Code, section 306(b)

This was a suggestion to amend this section by creating the offense of breaking and entering "without

justification". Since our recommendations have always been confined to provincial matters, we referred this suggestion to the Attorney General's Department.

(4) Examination for Discovery

A solicitor pointed out that sometimes a corporation names as its officer for discovery someone who lives in another province, perhaps as far away as Ontario. We referred this complaint to the Standing Committee on the Rules of Court.

(5) Gas Utilities Act, R.S.A. 1970, c. 158

This Act requires the approval of the Public Utilities Board to the issue of bonds and mortgages of property by the owner of a gas utility (s. 24(1)(e) and (g)). The submission was that there should be a provision whereby the Board could grant exemptions from this requirement. It appeared to us that this power already existed in s. 3. Indeed the Public Utilities Board informed us on January 17th last that the Board was prepared upon application to issue an order under s. 3 providing

> It is further declared effective as of the ..... day of ....., A.D. that the provisions of section 24(1)(e), 24(1)(g) and of section 25(1) of the Gas Utilities Act shall not apply to the applicant.

The Board has laid down requirements that the applicant must meet. This information can be obtained from the Board.

(6) Health Insurance Premiums Act, R.S.A. 1970, c. 167

Section 14 as re-enacted (1972, c. 46, s. 5) says that when a person who has failed to pay arrears of premiums

is a member of an employer's group or an employee group, that group, when notified by the Commission to do so, shall deduct the premium from the person's salary. The letter to us submitted that this provision is unfair, and indeed, possibly in contravention of the Alberta Bill of Rights. We examined the Act and went into the matter with the Solicitor General. As a result of our inquiries we are satisfied that the procedure is fair, and indeed that the Department goes to great lengths to notify the person liable for premium before any stringent steps are taken. In light of this, we plan to make no recommendation.

(7) Planning Act, R.S.A. 1970, c. 276

We received a letter stating "There is no provision in the Planning Act that reserves be allocated fairly (or at all) between public and separate schools." We understand that a general review of the Act has been underway for sometime and the government has invited comments on the pending bill. For this reason we suggested that the solicitor make a submission to the Director of Planning.

(8) Public Works Act, R.S.A. 1970, c. 303

This submission, which had already been made to the government, has to do with sections 14 and 15. They deal with government contracts. Section 14 says that where a person has supplied labour, materials, etc., to a contractor and the contractor does not pay that person, he may within a specified time file a claim with the Crown. Section 15 sets out the procedure for payment of the claim.

The submission is that the person filing the claim should be required to bring action against the contractor

within a specified number of days, on an analogy to the Builders' Lien Act. We have looked into the matter and have concluded that the present provisions are not unreasonable. (Section 14 was amended in 1974, but on a different point.)

(9) Surrogate Courts Act, R.S.A. 1970, c. 357, and Administration of Estates Act, R.S.A. 1970, c. 1

Alberta has two Surrogate Courts--one for Northern Alberta and one for Southern Alberta. Within the territorial limits of each court are a number of judicial districts.

The question is this. Assuming that a deceased person had resided in Southern Alberta, may his personal representative apply for probate or letter of administration to the Surrogate Court of Northern Alberta, provided the deceased had property in Northern Alberta?

Our Rules of Court have always said that where the deceased has resided in Alberta, the personal representative must apply in the judicial district where the deceased had been resident, and that where the deceased had resided outside Alberta, application must be made in a judicial district where he had property. Rule 4(1) provides:

> Every application for a grant shall be in Form 1 and shall be signed by the applicant and shall be filed by him or by his solicitor
>
> (a) in the judicial district where the deceased had his residence at the time of his death, or
>
> (b) in the judicial district where the deceased had property at the time of his death if the residence of the deceased is outside Alberta.

This Rule is essentially unchanged from Rule 462 in the Judicature Ordinance, 1893, No. 6.

Quite apart from the Rules, Alberta has always had statutory provisions dealing with the same matter. The original District Courts Act (1907, c. 4) established a separate District Court in each judicial district. Section 41(1) gave jurisdiction to a District Court on the same basis that the Rules of Court give it. This section remained essentially unchanged through the revisions of 1922, 1942 and 1955, and until enactment of the Surrogate Courts Act in 1967. It should have been amended in 1933 to correspond with the reconstitution of the District Courts in that year. The separate District Court in each judicial district was abolished. Instead, two District Courts were created--one for Northern Alberta and one for Southern Alberta. The judicial districts themselves were not affected. However, each of the two new District Courts had within its territorial limits a number of judicial districts.

The Surrogate Courts Act, passed in 1967, created two Surrogate Courts with jurisdiction in probate, replacing the District Courts. Section 14 of the new Act (now R.S.A. 1970, c. 357) makes the distinction between court and judicial district that should have been made in 1933. Subsections (1) and (2) give jurisdiction to the Surrogate Court within whose territorial limits the deceased resided, or in the case of a non-resident, had property. Then subsections (3) and (4) specify the judicial district in which application shall be made. These subsections are essentially the same as Surrogate Rule 4(1), quoted above.

The Surrogate Courts Act was amended in 1974 to provide for a single Surrogate Court for the whole province,

and the name of the Act was changed accordingly (1974, c. 76). These amendments have not been proclaimed. We understand they will be proclaimed together with the 1974 amendments to the District Courts Act, which create a single District Court for the province (1974, c. 68). These amendments include a new section 14. It re-enacts, in shorter form, subsections (3) and (4), just described, and omits subsections (1) and (2). They are not appropriate when there is only a Surrogate Court in the province.

To return to the question posed at the beginning, it arose because of the existence of section 3 of the Administration of Estates Act, which was passed in 1969 (now R.S.A. 1970, c. 1). That section says:

> (1) An affidavit made in support of an application to a surrogate court for a grant and deposing that the place of residence or some property of the deceased person or infant is within the territorial limits of the court is conclusive for the purpose of giving that court jurisdiction.
>
> (2) Where the application is pending and it is shown to the court
>
> (a) that the deceased at the time of his death was not resident or did not have property within the territorial limits of the court, or
>
> (b) that the infant does not reside or have property within the territorial limits of the court,
>
> the court may stay the proceedings and make such order as to the costs of the proceedings as it thinks fit.

The case brought to our attention was basically this. Let us suppose that the deceased lived in the judicial

district of Peace River in Northern Alberta but had property in the judicial district of MacLeod in Southern Alberta. The executor can properly swear in his affidavit that the deceased had property in Southern Alberta. The argument then is that section 3 operates to give to the Surrogate Court of Southern Alberta the jurisdiction to issue the letters.

Taken literally and by itself, section 3 can be construed to have that effect. We do not think, however, that it was ever intended to alter the provisions in the Surrogate Courts Act and in the Surrogate Rules, which specify the judicial district in which application is to be made. In any event no possible doubt will remain when the 1974 amendments to the Surrogate Courts Act are proclaimed. Indeed section 3 of the Administration of Estates Act may be inappropriate when there is only one Surrogate Court in the province.

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

NOTE: Dr. Kreisel is not a lawyer but is a member of the Board of the Institute. He has no responsibility for nor did he participate in the preparation of this Report.

June 2, 1975

CHAIRMAN

DIRECTOR

APPENDIX A

January 15, 1975

THE WORKERS' COMPENSATION ACT

Report to Advisory Committee on Workers' Compensation

In February, 1974, this Institute invited members of the legal profession to call our attention to small defects in the law, with a view to looking into them, and if appropriate, to make recommendations to the Legislature.

One solicitor brought to our attention the judgment of Chief Justice McLaurin in Fischer v. Trenchard (1963), 42 W.W.R. 701, and the conflicting order of Chief Justice Milvain in Czechowski v. Ossendoth in 1966.

The problem is this. A worker may not sue his employer (s. 13(2)) or any other worker of the employer (s. 15(a)) or any other employer in an industry to which the Act applies (s. 15(b)). Apart from the above provisions, the worker or the Board in his name, may bring action against any person who has wrongfully caused the worker's injury. Sometimes the defendant claims that another person is at least partly to blame; and under our general law, the defendant can bring in that other person as a third party so as to get contribution from him if the court finds both parties to blame. The difficulty arises when the defendant wants to join as a third party one of those whom the worker could not sue in the first place; that is to say, the worker's own employer, or another worker of that employer, or another employer under the Act. Should he be able to do so? The Act does not spell out the answer and our courts have had difficulty with it.

It might help to point out here that those who may be sued are (a) a worker who is not a fellow worker of the

plaintiff, and (b) a person who is outside the Act. Until an amendment of 1969, a fellow worker could be sued.

In Fischer v. Trenchard, cited above, the court held that the defendant could not join the worker's employer as a third party; the purpose of the Act would be defeated if the defendant by third party proceedings were obliquely permitted to secure an additional remedy against the employer.

In Ozechowski v. Ossendoth, Ozechowski and Ossendoth (both employees of Soapone) were working with Francis (employee of Peerless) and Putz (employee of Harrison). They were mixing chemicals. An explosion occurred, killing all but Ozechowski. He brought action against the estates of each of the three other workers. The accident happened in 1964, and at that time a worker could sue a fellow employee, as Ossendoth was.

The Ossendoth estate brought in Peerless and also Harrison as third parties. Harrison applied to strike out the third party notice. Mr. Justice (now Chief Justice) Milvain on 3 March 1966, dismissed the application, but gave no written reasons. We understand that Harrison launched an appeal but dropped it and indeed that the action itself may have been dropped.

It will be noted that in Fischer v. Trenchard the third party was the worker's own employer while in Ozechowski the third parties were not. Maybe Milvain J. thought that this made a difference.

In 1968 came Majeau v. Yurchuk, Nikiforuk and Watson. Majeau, Nikiforuk and Yurchuk worked for Ditchers. Watson

worked for Watson Ltd. which had a subcontract from Ditchers. Majeau was electrocuted. His estate sued the three defendants for negligence. Mr. Justice O'Byrne found Watson (25%) and Nikiforuk (75%) to blame. The defendants had brought in both employers, Ditchers and Watson Ltd., as third parties. Mr. Justice O'Byrne held they were improperly joined.

> The defendants, I hold, cannot properly third party companies in an industry within the scope of the Workmen's Compensation Act as [Ditchers and Watson Ltd.] were on the date in question. Otherwise the purpose of this Act would be defeated and in effect, it would permit the doing of something indirectly which could not be done directly.

The Fischer case is published in the law reports. The other two are not. In the past several years the problem of joining an employer as third party has arisen from time to time. We heard of two cases this past summer. The law is not clear, and we think the Act should be amended to remove uncertainty.

In Ontario the defendant cannot join as a third party the worker's employer. Indeed Chief Justice McLaurin in Fischer v. Trenchard followed the Ontario case of Sinkevitch v. C.P.R., [1954] O.W.N. 21. There is a later case, Averletti v. Meertens, [1968] 2 O.R. 864 to the same effect.

Moreover in Ontario the defendant cannot join as a third party another employer under the Act (Meyrick v. Baker, [1955] O.W.N. 849). In Manitoba he can (Lariviere v. Pfeiffer (1962), 38 W.W.R. 26). As stated above, Mr. Justice O'Byrne took the Ontario position.

Our view is that any one who is protected from actions should likewise be protected from third party proceedings--namely, all employers under the Act and also fellow workers of the plaintiff.

However if the Act is amended to make this clear, then in a case where the defendant is less than 100% to blame, he should only be liable in accordance with his degree of fault, 25% or 50% or 60%, as the case may be. This is the law in Ontario (Workmen's Compensation Act, R.S.O. 1970, c. 505, s. 8(11) and (12)).

The working of the Ontario section is seen in the trial judgment in Forget v. Mack Trucks (1970), 8 D.L.R. (3d) 301. The Board in the name of the worker sued one Armstrong and Mack Trucks. The judge found Armstrong 40% to blame and Mack Trucks 60% to blame. He also found Mack Trucks to be an employer under the Act and therefore protected from suit. The plaintiff had settled with Armstrong and the action against Mack Trucks was dismissed. Had there been no settlement, the judgment against Armstrong would have been for 40% of the damages.

This result seems quite correct. It is true that the Court of Appeal reversed the trial judgment (16 D.L.R. (3d) 385), but this was on the ground that the court had to obtain the ruling of the Board as to whether the action as against Mack Trucks, was one of which the right to bring is taken away by the Act. The Board then ruled that the action had not been taken away (the Board was the true plaintiff). Mack Trucks appealed to the Supreme Court and failed (41 D.L.R. (3d) 421). (It might seem unfair to make the Board the sole judge as to whether the action lies, particularly when the Board has an interest as the true plaintiff. However, the Supreme Court had already held in

Alcyon Shipping Co. v. O'Krane, [1961] S.C.R. 299 that this makes no difference. The decision is for the Board.)

To sum up our views, we think the Act should be amended (1) to forbid third party proceedings against any employer under the Act, (2) to provide that the plaintiff cannot recover from the defendant for the portion of the damages attributable to the employer.

On 22nd November, 1974, the Director of the Institute attended a meeting of the Advisory Committee and put forward the Institute's views. On 3 December the Chairman of the Advisory Committee informed the Director by letter that the Advisory Committee agreed with the Institute's views, and invited the Institute to draft an appropriate amendment. This we have done.

The amendment we propose could conveniently go in the Act after section 15.

15A In an action arising out of injury to or death of a worker, and taken pursuant to section 14(1)(b) of this Act, a defendant may not bring third party or other proceedings against any employer or worker who is protected from action by section 13(2) or section 15 of this Act; and where any such employer or worker by his fault or negligence caused a portion of the plaintiff's damage or loss, then the portion so caused shall be determined although such employer or worker is not a party to the action; and the defendant shall not be liable for the portion of damage or loss caused by the fault or negligence of such employer or worker.

This section is longer than the comparable provision in Ontario's Workmen's Compensation Act (s. 8(11)) and is longer than section 4 or section 5 of the Contributory Negligence Act, each of which deals with an analogous situation. We need not go into the reasons here, for they are of more interest to the draftsman than to your Committee.

There are two points that came to our attention during our study of this subject, and which this report does not touch:

(1) The Act says that action by the workman may "with the consent of the Board, be taken". In Kucher v. Cuthbertson, [1971] 3 W.W.R. 85, Kirby J. held that the action is not a nullity even though the worker failed to obtain consent before starting action. We see no need to amend the Act to change the law as laid down in this case.

(2) The Act does not forbid the worker to bring action against another worker whose employer is in an industry to which the Act applies--it only forbids action against a co-worker of the plaintiff. In Ontario we read section 9(11) as excluding action against workers of any employer under Schedule I of the Act (i.e., employers who pay into the accident fund). We have not gone into the question whether our Act should be amended to exclude actions against workers of other employers.

We wish to record our thanks to Mr. James Ritchie, Solicitor to the Workers' Compensation Board. He furnished

us with the judgments and orders in the unreported cases and generally gave us great help in understanding the problem.