LAW REFORM COMMISSION OF SASKATCHEWAN
REPORT ON DISPOSAL OF ENGLISH STATUTE LAW IN SASKATCHEWAN

MAY, 2006

I. Introduction

Saskatchewan has been a province for a century, and Canada has been independent and self-governing for nearly a century and a half. When the Canadian constitution was patriated in 1982, the last vestige of colonial ties between Canada and England was cut. It is then a surprise to most citizens that English legislation adopted before our own legislatures were established remains part of our law, enjoying the same status as if it had been enacted by our own law makers.

The *Northwest Territories Act,* 1886 established July 15, 1870 as the "reception date" for English law in the Territories which subsequently became the province of Saskatchewan.[1] English statutes adopted before that date remain part of the law of the province, unless modified by the Saskatchewan legislature. The reception date was reconfirmed in the *Saskatchewan Act,* 1905, when the province was organized.[2]

The doctrine of reception was convenient, perhaps essential, in 1886. Local legislators would have found it almost impossible to create a functioning legal system without it. But with the passage of time, the utility of the received law has declined. It is time to cut this umbilical cord with the source of our legal traditions.

Much of the received law has been repealed in Saskatchewan, either directly or by implication, over the course of a century of legislative activity. A few of the received statutes remain

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[1] Section 11 of *The Northwest Territories Act,* 1886 (R.S.C. 1886, c. 50) provided that:

> Subject -to the provisions of this Act, the laws of England relating to civil and criminal matters, as they existed on the 15th day of July, in the year of our Lord One Thousand, Eight Hundred and Seventy, shall be in force in the Territories, insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by an Act of the Parliament of the United Kingdom applicable to the Territories or the Parliament of Canada or by an ordinance of the Lieutenant Governor in Council, or of the Legislative Assembly.

[2] S.C. 1905, c. 42, s. 16.

important; if only because they have not been replaced by Saskatchewan legislation. These include some statutes that are routinely applied by lawyers and courts in the province. But the doctrine of reception is an archaism, often a source of inconvenience and even confusion. It is often difficult to determine precisely what part of English statute law adopted before 1870 remains in force in the province, or to determine how it should be applied to contemporary legal matters.

In 1990, the Saskatchewan Law Reform Commission issued a study of the reception doctrine, *The Status of English Statute Law in Saskatchewan.*[3] It recommended that those English statutes that remain a useful part of Saskatchewan law should be re-enacted as part of our law; and other English statutes should be declared to be no longer in force. This conclusion reflects the conclusions of legal commentators elsewhere in Canada. Mr. Justice Bouck of the British Columbia Supreme Court put the case for reform in an article in the *Canadian Bar Review* in these terms:

> One might ask why should the laws of this province be afflicted by English legislation enacted centuries ago?... Is a community . . . with its own legislature, its own court system and a modern economy bound to accept the inconvenience of these types of statutes popping up from time to time and disrupting the orderly development of the law.[4]

Saskatchewan's centennial year is an appropriate time to again consider the status of received English statutes in our province.

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[3] Law Reform Commission of Saskatchewan, *The Status of English Statute Law in Saskatchewan,* Feb., 1990.

[4] John C. Bouck, "Introducing English Statute Law into the Provinces: Time for a Change?" (1979), 57 C.B.R. 74.

2. Recommendations

Once the English Statutes that remain a relevant and useful part of the law of Saskatchewan have been identified, disposal of them is not difficult. The Commission's research has found that the list of statutes that should be retained is very short. In its 1990 report, the Commission identified 43 statutes that remained practically important. Saskatchewan legislation since then has rendered some of those obsolete. In addition, the Commission has reconsidered some other statutes on the 1990 list, and concluded that they can now safely be eliminated. In the Commission's opinion, Only 29 statutes, or provisions of statutes, in this category need to be retained as part of Saskatchewan law.

These statutes include some, such as the *Statute of Frauds,* the *Fraudulent Conveyances Act,* and the *Partition Act* that are frequently applied by the courts in Saskatchewan. While it would perhaps be desirable to re-enact these as Saskatchewan statutes, it can be anticipated that as Saskatchewan law changes, they will be replaced by modern statutes. For example, the *Fraudulent Conveyances Act* is currently under review by the Uniform Law Conference of Canada. Similarly, some miscellaneous English statutory provisions could be re-enacted in existing Saskatchewan statutes, but this would mst conveniently be done when these statutes are being revised.

The essential step in disposal of English statutes does not require re-enactment or reconsideration of the received law. The incongruity of retaining the doctrine of reception in our legal system and most of the potential practical mischief the doctrine causes would be eliminated by enacting a statutory list of the handful of English statutes that remain relevant, or necessary, and declaring that all other English statutes are no longer in force in Saskatchewan. The list would clarify the law, and also serve as a guide to final disposal of the statutes on the list. It might also be possible for the Queen's Printer to publish the statutes remaining in force on its web site to make access to them easier.

In addition to the short list of English statutes that retain practical significance referred to above, the Commission's 1990 report identified 11 statutes can be broadly characterized as constitutional**.** None are of much practical significance. Some, such as *Magna Carta,* are now perhaps only of historical significance. A few, such as the *Accession Declaration Act, 1910,* may remain technically necessary. The Commission is of the opinion that the statutes on this list should be declared part of the law of the province. There would be little point, however, in re-enacting them as Saskatchewan statutes now or in the future.

3. A note on the problem of disposing of English statutes

The recommendations made in this report are straightforward, but are possible only because of the extensive research conducted by the Commission and the experience of other Commonwealth jurisdictions that have disposed of the doctrine of reception.

The received law has worked its way into our legal system. Simply to declare English statutes no longer in force *en masse* would have unpredictable and unsettling consequences. While only about 100 of the 15,000 English statutes adopted before 1870 have been considered by the Saskatchewan courts, others have been held to be in force elsewhere in Canada or the Commonwealth. Even i a statute has never been considered by the courts, it may remain a candidate for reception. Prior to the publication of the Commission's 1990 report, there was no reasonably comprehensive list of the received law in force in Saskatchewan (or in any other Canadian province). Identification of the law that can be regarded as in force was itself a major research project, breaking new ground in Canada.

Review of received English statute law in Commonwealth countries began at least as early as 1881, when the New Zealand statutes included a list of "selected Imperial Acts in force@. The first legislative effort to conclusively dispose of received law was adopted by the Australian State of Victoria in 1922. The *Imperial Acts Application Act,* based on an examination of more than 7,000 English statutes, included a list of statutes in force, and repealed most of the remaining received law. New legislation in 1980 substantially reduced the number of received statutes remaining in force in that state. New Zealand, New South Wales, the Australian Capital

Territory, Queensland and South Australia have all followed Victoria's lead.[5]

Canada has lagged behind other Commonwealth countries. In 1897, the Revised Statutes of Ontario included re-enactments of some English statutes presumed to be of particular historical significance, and some 79 English Statutes were reprinted in the 1897 Revised Statutes of British Columbia, but Saskatchewan is the only province in which a review of the received law comparable to the work done in Australia and New Zealand has been completed.

Because of the work published by the Commission in 1990, Saskatchewan is in a position to finally dispose of English Statute law. It is important to appreciate that the work done by the Commission in 1990 has a shelf-life. As the law continues to change, the need to reconsider the work published in 1990 increases. It would be unfortunate if that work had to be replicated in full in the future. However, in some respects the passage of time has served to validate the conclusions reached in 1990. The Commission has kept the issue under review for the past 15 years. No unexpected decisions, finding laws in force that the Commission thought had ceased to be relevant, have been reported. In addition, since 1990, changes in both case and statute law have made some statutes on the list of 39 that seemed relevant in 1990 irrelevant in 2005.

4. English statutes of practical significance

Each chapter of the Commission's 1990 report, *The status of English Statute Law in Saskatchewan,* attempted to provide a brief history of legislation affecting a branch of the law, from real property to prerogative writs. The discussion focused on those episodes in English legal history which produced most of the statutes that continued to be significant at reception date and beyond. This effort was complemented by a review of judicial decisions on English statutes in Saskatchewan, and elsewhere in Canada and the Commonwealth.

The most important practical result of this research was a catalog of "those English statutes that remain a useful part of Saskatchewan law [and] should be reaffirmed as part of our law." The list was not a comprehensive collection of statutes that may be, in force. It deliberately omitted

[5] See *The Commonwealth Law Bulletin,* 1982 at 226 for a brief history of Imperial statutes research and disposal legislation in New Zealand and Australia.

statutes that are no longer of utility, even if a technical argument for reception might be made. The report noted that:

> Inevitably, there will be a margin of error in any attempt to dispose of received statute law. But even a brief review of the "summaries of the statutes considered" appended to the chapters in Part II will suggest that a manageable list of living statutes can be identified that will remove any real likelihood 'of serious problems in the future.

This report will not replicate the Commission's earlier research, contained in the 1990 report. It will focus instead on the 43 English statutes, or provisions of statutes, that the 1990 report identified as statutes that retained utility as part of our law.

Two categories of English statutes that should be retained were identified:
1. Statutes that have been found to be in force in Saskatchewan, or in other jurisdictions in which the reception issue is similar, and which are still of practical application. Statutes such as the *Statute of Frauds* and The *Partition Act* are examples.

2. Statutes that have not been directly referred to in any reported decision, but which are in force by necessary implication. For example, a provision of the *Administration of Estates Act*, 1798 established the rule that an infant executor cannot obtain letters probate. In 1990, a Saskatchewan surrogate court rule appeared to rest on that statutory foundation. For that reason, it was recommended that the provision should be retained in some form. Also included in this category are statutes which provide part of the basic foundation of our legal system. For example, *The Statute of Quia Emptores*, 1290 established the types of legal interests in real property that can be created by conveyance. It is almost certainly in force, and should remain in force, but there has been no need to refer to it in any reported decision in Saskatchewan.

The purpose of the re-consideration of the statutes in these categories is to determine whether it is still necessary to retain them as part of our law. The need to do so is illustrated by the case of the Administration of Estates Act, 1798, used as an example above. Since 1990, the Saskatchewan statute law governing administration of estates has been revised. The new

legislation contains a provision similar in content to the received law, making the provision of the 1798 statute no longer necessary. In addition, review of some of the 43 statutes suggests that the Commission was overly cautious in recommending retention in 1990.

These 43 statutes, or provisions of statutes, are discussed below under the following headings:

1. Statutes that no longer need to retained because they have been superceded by Saskatchewan statutes or judicial decisions.
2. Statutes that, on reconsideration, do not need to be retained.

3. Miscellaneous provisions that should be retained.

5. Received statutes that remain of significant practical importance.

This classification is perhaps not necessary for purposes of the recommendations in this report, but will facilitate re-enactment or reform of statutes remaining in force in the future.

(a) Statutes that no longer need to retained because they have been superceded by Saskatchewan statutes or judicial decisions

(i) Administration of estates

The Saskatchewan *Surrogate Courts Act*, 1907 was modeled on the English *Court of Probate Act*, 1857. Since the 1857 Act consolidated most aspects of probate practice that were deemed to require statutory sanction, little English statute law relating to probate and grants of administration remained in force in Saskatchewan. However, the *Court of Probate Act* was not a codification. It expressly preserved the practice in the ecclesiastical courts, amended rather than replaced some earlier legislation, and did not repeal several miscellaneous provisions relating to probate and administration. The survival of a few pre-1857 English statutory rules as part of the law of Saskatchewan was confirmed in *Re Maurat Estate* in 1927.[6] Several of these rules

[6] [1927] 3 W.W.R. 18 (Sask. Surr. Ct.).

remained essential in 1990, but when the Surrogate Courts Act was replaced by the Administration of Estates Act, 1998, all of the English provisions relating to administration identified by the Commission were encompassed in the new legislation.

Intestate Estates Administration Act, 1357
Probate Fees Act, 1529, ss. 3-4

These statutes were statutory foundation for rules as to priority to apply for administration of an estate formerly contained only in Saskatchewan *Rules of Court*. They have now been re-enacted in *The Administration of Estates Act, 1998, s.11*, which comprehensively codifies the priority rules..

Statute of 43 Eliz. 1, c. 8 (1601)

This statute dealt with the effect of an erroneous grant of probate. Such grants are now governed by *The Administration of Estates Act, 1998, ss. 29-30.*

Administration of Estates Act, 1798, ss. 6-7

This provision allowed the court to appoint a temporary administrator if the executor named in a will was under the age of majority. It appears to have practice in Saskatchewan to refuse probate to an infant executor, and appoint an administrator in his or her place. The surrogate court rules facilitated this practice by requiring an executor to affirm that he or she was of the age of majority. The only statutory foundation for both this rule and the practice of the Saskatchewan courts appears to have been the 1798 legislation. *The Administration of Estates Act, 1998* corrected this unsatisfactory state of affairs by enacting the substance of the 1798 legislation.:

15 (2) Where a minor is named as the sole executor by a will:

(a) a judge may grant letters of administration with the will annexed to any other person that the judge considers appropriate; and

(b) when the minor attains the age of majority, the minor is entitled to apply for letters probate.

Administration of Estates Act, 1798, ss. 1-5
Court of Probate Act, 1857, s. 74
Court of Probate Act, 1858, s. 18

The *Administration of Estates Act,* 1798 codified and extended the rules relating to administration *durante absentia,* permitting the court to appoint a temporary administrator *durante absentia* where an executor had obtained probate, but one year after the death of the deceased had not administered the estate, and was residing out of the jurisdiction. Section 74 of the *Court of Probate Act,* 1857 extended the power to appoint an administrator *durante absentia* to cases in which an administrator originally appointed had left the jurisdiction. Section 18 of the *Court of Probate Act,* l858 removed a stipulation that the administrator' *durante absentia* could be appointed to replace an executor or administrator only when there was an intention to take proceedings in equity.

Curiously, even though most of the *Court of Probate Act, 1857* was reproduced in the Saskatchewan *Surrogate Courts Act,* s. 74 of the English Act was omitted. It may be that the drafters of the Saskatchewan legislation believed that the inherent jurisdiction of the court to appoint an administrator in case of need was sufficient. Nevertheless, the Commission concluded in 1990 that the English provisions relating to administration *durante absentia* should be retained as a sure basis for the practice of the Saskatchewan courts. In any event, *The Administration of Estates Act, 1998* has now codified the rules governing temporary administration when an executor or administrator is out of province:

15(1) If the next of kin usually residing in Saskatchewan and regularly entitled to administer an estate is absent from Saskatchewan, a judge, on the application of any person interested, may:

(a) grant temporary letters of administration of the property of the deceased person that are:

(i) for a limited period; or

(ii) to be revoked on the return of the next of kin; and

(b) appoint the applicant or any other person that the judge considers appropriate to be the administrator.

Section 15(1) makes the English provisions redundant.

Court of Probate Act, 1858, s. 16

This provision was held n force in Saskatchewan in *Re Maurat Estate* in 1927.. This section provided that:

> Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.

In *Re Maurat Estate*, Judge Gravel noted that no similar provision could be found in the Saskatchewan statutes. It would appear that *The Surrogate Courts Act* followed the *Court of Probate Act* of 1857, but not 1858. Failure to apply or probate is now governed by *The Administration of Estates Act, 1998.* Although the new legislation is not identical to the 1858 provision, it appears to be comprehensive enough to preclude continued operation of the English statute. It provides:

> 14(1) Where a person named as an executor by a will fails to apply for letters
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> probate within 60 days after the death of the testator:
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> (a) any person interested in the estate may, by notice of motion, require the executor to appear and produce the will; and
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> (b) a judge may require the executor:

(i) within any time specified by the judge, to apply for letters probate or to renounce probate; or

(ii) to show cause why letters of administration with will annexed

should not be granted to the person interested in the estate or to any other person who is entitled to a grant of administration and is willing to accept the grant.

(2) Where a person named as an executor by a will fails to apply for letters probate or to renounce probate within the time specified by a judge pursuant to subsection (1):

(a) the person's rights with respect to the executorship and any trusteeship pursuant to the will cease; and

(b) any subsequent application by the person must be made and dealt with as if the person had not been named as an executor or trustee.

(ii) Evidence

Most of the rules of evidence are part of the common law, rather than statute law. Statutory rules supplementing the common law in England were largely consolidated in the Saskatchewan *Evidence Act*, 1909. Only a few statutory rules of evidence adopted in England prior to 1870 failed to find their way into the provincial statute.

Evidence Further Amendment Act, 1869, s. 3

This provision established the rule that witnesses are not compellable to give evidence tending to show adultery. It was not incorporated into the Saskatchewan Evidence Act, but a rule of court adopted in 1921 reproduced it in substance. Although the rule was likely adopted under the presumed authority of a 1915 amendment to the *Evidence Act* permitting promulgation of "rules of court concerning the admissibility of evidence," *Lightheart v. Lightheart* suggested that the English statute was required to provide substantive foundation for the rule.[7] Since the rule-

[7] *Lightheart v. Lightheart* [1926] 21 Sask. L.R. 294.

making power was very narrowly construed in other cases, and the 1869 legislation had to do with competency of witnesses rather an admissibility of evidence, this conclusion was likely correct.

Although the policy of the rule was regarded as an anachronism in 1990, the rules of court still contained a provision that allowed witnesses to refuse to answer questions tending to show adultery in some cases. Thus the Commission recommended that the 1869 provision should remain in force until its policy was reconsidered.

The rules of court have now been amended to remove the protection for witnesses contained in the 1869 legislation. Rule 606 now provides:

> (3) No party to a family law proceeding shall refuse to answer a question tending to show that he or she has committed adultery where the adultery has been pleaded and is relevant to the proceeding.

The 1869 provision is no longer necessary. On the contrary, if the 1869 provision is still in force, it places the policy of the new rule of court in question. Thus it is imperative that the 1869 rule be declared to be no longer in force.

(iii) Legal Profession

Most of the English legislation regulating the professions can be characterized as law of local application, and has in any event been superceded by provincial legislation. However, one provision of English legislation governing barristers and solicitors was held to bein force in Saskatchewan, and another held to be in force elsewhere in Canada.

Solicitors Act, 1860 , s. 28

A provision of this Act relating to solicitors liens was said to be in force in Saskatchewan in an

obiter comment in *Bloomaert v. Dunlop* in 1930. [8] However, subsequent Saskatchewan practice appears to have followed the common law without reference to the statute.[9] The statute extended the common law governing solicitors' liens . It made liens enforceable by way of charging order, protected bona fide purchasers for value of charged property, and extended the lien to real as well as personal property.

The Legal Profession Act, 1990, s. 66, largely codifies the law of solicitors' liens. It provides a mechanism for enforcement:

> (2) On an application pursuant to subsection (1) or for the enforcement of an order made pursuant to subsection (1), a judge may make any order that the judge considers appropriate for payment of the lien or charge out of the property recovered or preserved.

Thus the provisions of the 1860 Act relating to enforcement have clearly been replaced. Section 66 does not extend to real property. However, it has never been the practice in Saskatchewan to grant solicitors' liens against real property. Note in addition that section 66(4) preserves common law "exceptions" in regard to the scop of solicitors' liens, but makes no reference to the 1860 statute. Thus it would appear to be safe to regard to section 66 as a complete code regulating solicitors' liens except to the extent it explicitly preserves the common law.

Solicitors Act, 1870 , s. 11

In 1990, there was still some doubt about status of contingency fees in Saskatchewan . The Solicitors Act, 1870 prohibited lawyers from charging contingency fees. Section 11 provided:

> Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicit6r of the interest, or any part of the interest, of its client in any suit, action or other contingent proceeding to be brought or maintained, or to

[8]*Bloomaert v. Dunlop,* [1930] 1 WWR 270 (Sask. CA)

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[9]See e..g. Rees, Newsham and Weir v. Stanek, [1981] 5 WWR 614.

> give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action or proceeding.

The 1870 Act was held to be in force in the Yukon in 1900 in *Robertson v. Bossuyt*[10] The legal professions legislation in force in the Yukon at that time was similar to the Saskatchewan Legal Professions Act. Because the decision in *Robertson v. Bossuyt* was rendered by the British Columbia courts, it was regarded as applicable in that province as well. Thus the Commission concluded in 1990 that the 1870 legislation was likely in force in Saskatchewan.

Since 1990, the status of contingency fees in Saskatchewan has been clarified. The courts have held that contingency fees are permitted, [11] and rule 1501(2)(a) of the Law Society now provides:

> A member who enters into a contingent fee agreement shall ensure that the agreement is fair and the members remuneration provided for in the agreement is reasonable, under the circumstances existing at the time the contract is entered into.

Thus the 1870 Act has been superceded.

(b) Statutes that, on reconsideration, do not need to be retained.

(i) Procedure

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[10]*Robertson v. Bossuyt,* (1900), 8 B.C.R. 301.

[11]*Re Legal Profession Act and Merchant Law Group* (Sask. QB , June 21, 2001).

Procedural rules are generally not regarded as part of the received law. In a few cases, however, procedural rules in English statutes have been held to have been received, usually to correct a perceived oversight in the provincial rules of court.

Administration of Justice Act, 1696, s.8

This statute contained a rule in regard to replevin bonds. In 1967, it was held in *Bennett v. Lofgren* that the statute was a necessary complement to The Rules of the Court of Queen's Bench governing replevin.[12] Rule 408, it stood in 1967, followed the traditional English practice of requiring the plaintiff to post a bond twice the value of the goods replevied. The 1696 statute affirmed that if the plaintiff's claim to the property failed, damages were limited to the value of the property, not the amount of the bond. This made it clear that the double value of the bond was merely to ensure that it was adequate, not to give the defendant what amounted to punitive damages.

In 1990, the Commission recommended retaining the 1696 provision. However, this conclusion overlooked revision of rule 408 in 1987. The rule now sets the amount of the bond at the value of the property to be replevied as stated in the writ. There is no reason to believe that, in absence of the 1696 statute, the usual rule in regard to security, which limits recovery to actual damages, would not apply to replevin. Thus the 1696 provision is no longer required.

Laws Continuance Act, 1739-40, s. 68.

This provision sets a six-month limitation on certiorari. Although it appears on its face to apply only to criminal proceedings, and thus lie outside provincial jurisdiction, an obiter comment in

[12][1967], 61 WWR 622 (Sask. QB).

the 1987 court of appeal decision in *Re Bassett* [13] seemed to imply that it might have application in civil cases. Decisions in other provinces uniformly hold otherwise.[14] No Saskatchewan decision since 1990 has followed Moreover, the provision has not been applied in Saskatchewan since 1987 has referred to *Re Bassett*.. Thus it no longer seems necessary to retain the 1739-40 provision.

(ii) Evidence

As noted above, only a few statutory rules of evidence adopted in England prior to 1870 failed to find their way into the provincial *Evidence Act.* In 2004, the Commission issued a review of The *Evidence Act*, [15] which analyzed the relationship between the legislation and its English sources. This review is the basis for re-consideration of the statutes discussed below.

An Act to Amend the Evidence Act 1851, s.7

This provision allowed the courts to admit in evidence certified copies of foreign "acts of state" and judgements. It was not reproduced in *The Saskatchewan Evidence Act.* It has been held in force in Manitoba , where it was used to admit articles of incorporation of an American company.[16] In 1990, the Commission recommended that the 1851 provision might remain useful.

A close examination of provisions relating to admission of documents in *The Saskatchewan*

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[13]*Re Bassett (1987), 35 DLR (4th) 537 (Sask. C.A.)*

[14]E.g. *Re Ursaki* (1960) 24 DLR(2nd) 761 (BCSC).

[15]Law Reform Commission of Saskatchewan, *The Saskatchewan Evidence Act: A Review*. Jan. 2004.

January, 2004

[16]*Allen v. Standard Trusts Co.*, [1920] 3 WWR 991.

Evidence Act suggests that there is no longer, if there ever was, any need to retain the 1851 provision. In so far as it relates to admission of foreign law and judgements, section 3(2) of The Evidence Act allows the court to take judicial notice of British and Canadian law. Law from other jurisdictions must be proved, usually through evidence of an expert, if it is to be formally placed in evidence. The 1851 provision was almost certainly not intended to supplant this rule: Even if a copy could be admitted, the court would require that its interpretation be proved. Thus the 1851 provision might be of value only in regard to documents of state such as the articles of incorporation admitted in the Manitoba decision. But it appears that even this utility has been supplanted. The business records provisions in The Evidence Act (section 31), adopted in 1969, admits records made in the ordinary course of business, and applies to records kept by "every kind of business, profession, occupation, calling, operation, activity or government activity, whether carried on for profit or otherwise."

Thus, there appears to be little scope left for the application of the 1851 provision.

Common Law Procedure Act, 1854, s. 26

Case law prior to 1854 appears to have required proof of documents attested by a witness by calling the witness, even if the document was not one required to be witnessed at law. The 1854 statute relaxed this rule. Modern evidence law gives the courts a broader general discretion tin regard to admission of documents than in the past. It is very unlikely that the old rule would now be revived even if the statute was not retained.

(iii) Other statutes

Fires Prevention (Metropolis) Act, 1774, c. 86.

This provision has been held to be in force in Saskatchewan[17] and elsewhere in Canada.[18] It reversed older English decisions that presumed that an accidental fire was caused by the occupier of the building. Although the courts hav e found the statute convenient to reject the 18th Century authorities it reversed, it should be noted that both those cases and the statute ante-date development of modern negligence law in the 19th Century, which would now govern in absence of the statute. It seems very unlikely that the pre-1774 authorities would now but applied, even in the absence of the statute.

Land Clauses Consolidation Act, 1845

This Act includes provisions relating to expropriation. Some cases under it have been cited and applied by Canadian courts, particularly in regard to injurious affection. For that reason the Commission suggested it might be useful to re-enact it in Saskatchewan. However, the Act itself has never been applied in a Canadian decision, or held to be in force.

Forfeiture Act, 1870

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In 1990, some doubt was registered that forfeiture of property on conviction for certain offences is within Federal jurisdiction, and whether the *Forfeiture Act, 1870*, is in force in the provinces. The legislation abolished forfeiture, but placed limits on the felon's right to dispose of it . The Canadian Criminal Code abolished forfeiture in 1892, without limiting the property rights of felons. Although the limitations on the rights of felons in the 1870 legislation never seem to have been applied in Canada, it has been held that forfeiture is a matter of property and civil

[17]*Gallo v St. Cyr*, [1983] 2 WWR 395 (Sask. QB).

[18]The earliest case appears to be *Carr v. Fire Assurance Association* (1887), 14 OR 487. See also Wilson v. Port Coquitlam, [1923] SCR 235.

rights, thus *ultra vires* Parliament.[19] The Forfeiture Act is not in force in the eastern provinces, where reception occurred prior to 1870. [20] It has been held to be in force in Manitoba.[21] In Saskatchewan it has been found not to be in force, but on the basis of inapplicable Quebec law.[22]

In 1990, the Commission thought the safest course was to retain the *Forfeiture Act, 1870*, in the event that it might be within provincial jurisdiction. However, in eastern Canada, where the legislation is clearly not in force, no problems have arisen as a result of the lack. For that reason, the Commission has now concluded that the *Act* need not be retained.

(c) Miscellaneous provisions

The statutes discussed here were identified as candidates for retention in the Commission's 1990 report. Because the Commission is still of the opinion that they should be retained, the reasons for that conclusion will not be repeated here. Some suggestions will be made, however, for final disposal by re-enactment or reform in the future.

(i) Landlord and Tenant

The Saskatchewan Landlord and Tenant Act was enacted in 1918-19. It is a consolidation of English statute law. In fact, marginal notes in the original enactment identified to English source of each provision. However, a few English provisions that have been held to be in force, or seem necessary to fill gaps in the Saskatchewan statute remain part of the law of the province.

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[19]*Dumphy v. Kehoe* (1981), 21 Rev. Leg. 119 (Que. SC). *Young v. Carter (1912), 5 DLR 655 (Ont. HC).*

[20]*Dumphy v. Kehoe*; *Young v. Carter (1912), 5 DLR 655 (Ont. HC).*

[21]*Cooke v. Westgate*, [1944] 4 DLR 309 (Man. C.A.).

[22]*Re Noble Estate*, [1927] 1 WWR 938 (sask. Surr. Ct.).

Statute of Marlbridge, 1267, c.23

This provision has been held in force in Saskatchewan, and is treated as in force in Canada by text-book writers. It established the rule that a leaseholder is liable for waste unless the terms of the lease provide otherwise. A similar provision is contained in The Land Titles Act (s. 120), but applies only to leases subject to that Act. The statute could be re-enacted in *The Landlord and Tenant Act*.

Landlord and Tenant Act, 1851, s. 3.

This provision provides that fixtures placed on land used for agricultural purposes by a tenant remain the property of the tenant. It is treated as in force in Canada by text-book writers. The provision could be re-enacted in *The Landlord and Tenant Act.*

Landlord and Tenant Act, 1709, s. 4

This provision allows action for debt against tenant for life for arrears of rent. It is treated as in force in Canada by text-book writers. The provision could be re-enacted in *The Landlord and Tenant Act*.

Distress for Rents Act, 1837, s. 15
Apportionment Act, 1834

Together, these provisions established rules for apportionment of rent in certain circumstances when a tenancy is prematurely terminated. They have been re-enacted in some provinces. These provisions could be re-enacted in *The Landlord and Tenant Act.*

(ii) Real property, wills and trusts

Posthumous Children Act, 1698

At common law, a posthumous child was deemed born in the father's lifetime for the purpose of wills and intestacy. The 1698 legislation extended the rule to remainder created by deed. It has been re-enacted in some Canadian jurisdictions. The scope is very limited, but remainders might still be created by deed of trust. Since the statutory rule applies almost exclusively to trusts, it could be reenacted in *The Trustees Act*. It might be useful for purposes of clarity to enact the common law rule in *The Wills Act* and *The Intestate Succession Act*.

Illusory Appointments, 1830
Law of Property Amendment Act, 1859, s.12

These miscellaneous provisions relating to powers of appointment could be included in *The Trustees Act.*

Sale of Reversions Act, 1867

This statute provides that a sale of a prospective interest in land that may be received by will or on intestacy shall not be over-turned merely because it was sold for less than value, reversing the more protective approach of equity. This provision should likely be re-enacted, perhaps in both *The Wills Act* and *The Intestate Succession Act*.

Sale of Land by Auction Act, 1867, ss. 5-7

Provisions in this statute governing reserve bids at auctions have been held in force in Saskatchewan and Alberta. They might be re-enacted in *The Auctioneers Act.*

(iii) Other Statutes

Habeas Corpus Act, 1816, ss. 3-4.

These provisions reverse the common law rule that, in civil matters, facts deposed by the person holding the detainee cannot be impeached on an application for *habeas corpus*. They have been re-enacted in some Canadian jurisdictions, and remain important. The provisions could be re-enacted in *The Queen's Bench Act*.

Mercantile Amendment Act, 1856, ss.3 and 5

These provisions, relating to guarantees of loans, have been held in force. They could be re-enacted as a Saskatchewan statute.

Gaming Act, 1710
Gaming Act, 1835
Gaming Act, 1845

Despite changes in the legislation governing gambling in the last few decades, the policy of these English statutes still appears to be relevant and necessary. The *Gaming Act*, 1710, rendered many times of gambling contracts void and unenforceable. The 1835 legislation provided protection to holders in due course of securities or property resulting from wagering contracts. The 1845 legislation extended the scope of the 1710 Act to "every contract by way of gaming or wagering." These provisions have been held to be in force in Saskatchewan, Alberta and Manitoba, and held to be matters within provincial jurisdiction by the Supreme Court of Canada.

The *Criminal Code* provides that proceeds from illegal lotteries and other games of chance are forfeit. This effectively renders any contract arising out of a game of chance void. The *Code* also provides protection for holders in due course. The *Code* does not, however, extend these rules to

other forms of gambling or betting. Thus, the English *Gaming Acts* appear to remain necessary, though they have clearly been modified by creation of regulated lotteries and other legalized gambling. Their substance could be reenacted in *The Alcohol and Gaming Regulation Act*.

(d) Provisions that should remain part of the law, but are not consulted in practice

The English legislation discussed here provided foundation for basic common law and equitable concepts. Though it is no longer necessary to consult the *Statute of Uses, 1535* for any purpose, the law of trusts was developed from the concepts it introduced. Although some of these statutes have been re-enacted in the Ontario statute books, there is very little reason to re-enact them now r in the future. They should, however, be declared to remain in force.

Quia emptores terrarum, 1290

This statute provides doctrinal support for the modern concept of the fee simple in land. Regarded as in force by authorities on real property law, it has been re-enacted in Ontario.

Statute of Uses, 1535

This statute is the doctrinal foundation for the modern trust. Regarded as in force by authorities on real property law, it has been re-enacted in Ontario.

Charities Act, 1601, preamble

The preamble to the Charities Act lists the ”heads of charity.” It is the foundation for case law defining charitable purposes, but is no longer consulted itself.

(e) Received statutes that remain of significant practical importance

All of these statutes remain important parts of the law of Saskatchewan. While it will be sufficient to dispose of these statutes by declaring that they remain in force, they are all candidates for reform.

Statute of Partition, 1539
Statute of Partition, 1540
Administration of Justice Act, 1705. S.8
Partition Act, 1868

English partition legislation has been held in force n Saskatchewan and continues to provide the law governing partition and sale of co-tenancies. *Partition Acts* have been enacted in most provinces. The Commission's report, *Co-ownership of real property, 2001,* made proposals for a Saskatchewan *Partition Act* to modernize and replace the received law. The *Administration of Justice Act, 1705* established the rule that a co-tenant may demand an accounting. Although this matter was not dealt with in the Commission's report, an accounting provision is essentially incidental to possible partition, and could be provided for in partition legislation.

Fraudulent Conveyances Act, 1570

This legislation remains the principal law governing fraudulent preferences to creditors. It has been held in force in Saskatchewan, and re-enacted in several provinces. Its subject matter is currently under review as part of the Uniform Law Conference of Canada's Commercial Law Strategy.

Statute of Frauds 1677
Statute of Frauds Amendment Act, 1828

These statutes have been held in force in Saskatchewan, and have been re-enacted in several

provinces.. They impose writing requirements for certain transactions, including sale of real estate. Though often criticized as archaic, they will remain an important part of the law until replaced by a more modern approach. It has been re-enacted in several provinces. The Commission has made proposals for modernization of the law in its *Report on the Statute of Frauds*, 1996 .

Accumulations Act, 1800

The Commission has recommended repeal of the Accumulations Act in its *Proposals Relating to the Rules Against Perpetuities and Accumulations*, 1987 and *Proposals for Reform of the Trustees Act*, 2002.

4. Constitutional Statutes

The statutes discussed here should be treated in a different manner than other received law. Most of the statutes in this category overlap federal and provincial jurisdiction, and many of them have been superseded in large part by provincial legislation. Nevertheless, it is appropriate to retain these landmarks in the evolution of the English constitution as part of Saskatchewan law to the extent that they are relevant to matters within provincial jurisdiction.

Because the statutes in this category are primarily of historical interest, no good purpose would be served by re-enacting them as provincial statutes, or attempting to determine the extent to which they remain relevant in practice. Instead, these statutes should be declared to remain in force to the extent that they relate to matters within provincial jurisdiction, and are applicable to the province.

***Magna Carta,* 1297, c. 29**
***Statutes of 5 Edw. 3,* c. 9; *25 Edw. 3, stat. 5,* c. 4; *28 Edw.3,* c. 3; *42 Edw. 3,* c. 3**
***Statute of Marlbridge,* c. 1**

These medieval statutes are regarded as foundations of the rule of law. The statutes of Edward III confirmed and extended *Magna Carta*, recognizing the principle of due process.

***Petition of Rights,* 1627**
***Bill of Rights,* 1688**

These *Acts* date from the English revolutionary period. In them, Parliament affirmed traditional liberties, and stated the principle that "the King's subjects shall not be taxed but by consent of Parliament.

***Toleration Act,* 1689**
***Roman Catholic Emancipation Act,* 1829**

These *Acts* were milestones i the extension of religious freedom. The first gave full civli rights to "dissenting" Protestants, the second to Catholics.

***Act Abolishing Slavery,* 1833**

This remains the only legislation in force in Canada that explicitly deals with slavery. It is an important historical milestone**.**

***Act of Settlement,* 1700**
***Royal Marriages Act,* 1772**
***Accession Declaration Act,* 1910**

These *Acts* were adopted when the British Parliament still had authority to legislate in constitutional matters for Canada and the Empire. They regulate succession to the English Crown, and should remain uniform in all Commonwealth nations that recognize the Queen as head of state.

6. Proposed Disposal of English Statutes Act

An Act to clarify the law in Saskatchewan relating to the application of English Statutes enacted

prior to July 1,1870

Short title

1. This Act may be cited as *The English Statutes Disposal Act*.

English statutes in force

2. The English statutes listed in Schedule I remain in force in Saskatchewan insofar as they are not modified or replaced by an Act of the Saskatchewan Legislature.

Constitutional and historical English statutes in force

3. The English Statutes listed in Schedule II, which are of historical or constitutional significance, remain in force in Saskatchewan insofar as they are not modified or replaced by an Act of the Saskatchewan Legislature.

Other English statutes not in force

4. All other English statutes received as part of the law of Saskatchewan by virtue of the *Saskatchewan Act* are declared to be of no force and effect.

Coming into force

5. This Act comes into force on the day of assent.

Schedule I

(*Section 2*)

Accumulations Act, 1800
Administration of Justice Act, 1705, s.8
Apportionment Act, 1834
Charities Act, 1601, preamble
Distress for Rents Act, 1837, s. 15
Fraudulent Conveyances Act, 1570
Gaming Act, 1710
Gaming Act, 1835
Gaming Act, 1845
Habeas Corpus Act, 1816, ss. 3-4.
Illusory Appointments, 1830
Landlord and Tenant Act, 1851, s. 3

Landlord and Tenant Act, 1709, s. 4

Law of Property Amendment Act, 1859, s.12

Mercantile Amendment Act, 1856, ss.3 and 5

Partition Act, 1868

Posthumous Children Act, 1698

Quia emptores terrarum, 1290

Sale of Reversions Act, 1867

Sale of Land by Auction Act, 1867

Statute of Frauds 1677

Statute of Frauds Amendment Act, 1828

Statute of Marlbridge, 1267, c.23

Statute of Uses, 1535

Statute of Partition, 1539

Statute of Partition, 1540

Schedule II

(*Section 3*)

Accession Declaration Act, 1910

Act Abolishing Slavery, 1833

Act of Settlement, 1700

Bill of Rights, 1688

Magna Carta, 1297, c. 29

Petition of Rights, 1627

Roman Catholic Emancipation Act, 1829

Royal Marriages Act, 1772

Statutes of 5 Edw. 3, c. 9; *25 Edw. 3, stat. 5,* c. 4; *28 Edw.3,* c. 3; *42 Edw. 3,* c. 3

Statute of Marlbridge, c. 1

Toleration Act, 1689