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LAND TITLES IN SASKATCHEWAN

VOLUME 2

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Manual of Law and Procedures, Saskatchewan Land Titles Offices

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PART V - TRANSMISSION

Chapter 31. Transmission

A. General

The Land Titles System has as a first principle, in the preparation of instruments, that every registration must be founded on an instrument executed by the registered owner (see Re Rivers (1893), 1 Terr. L.R. 464 (C.A.)). After stating the rule, one must then turn to state the exceptions.

The major exception is where land is transmitted to another. "Transmission" is defined by clause 2(l)(v) of The Land Titles Act to mean "the passing of the title to land in any manner other than by transfer from the registered owner". In essence a transmission is a change of ownership by operation of law or statute.

B. Types of Transmission

There are six main types of transmissions in Saskatchewan:

(1) on death;

(2) following bankruptcy;

(3) by court order;

(4) through tax enforcement proceedings;

(5) by expropriation;

(6) by statutory order.

Only in the first two are applications for transmission still required. There is perhaps a seventh form of transmission when two or more companies amalgamate, but the practice has never required the amalgamated company to take title in its name before dealing with the property. Note that in this latter instance, where a corporation has amalgamated or changed its name and proposes to subdivide land, the registrar automatically issues title into the name of the corporation that signed the plan, unless requested not to do so.

Chapter 32. Transmission on Death

A. Descent of Property

Land in Saskatchewan (and personal property for that matter) does not descend directly from a deceased person to the party entitled to share in the estate, whether there is, or is not, a will, but under section 165 of The Land Titles Act, the land vests in the personal representative. The word 'vest' means that the ownership of the property passes to the personal representative, that is, the executor or administrator, and, of course, the personal representative holds it in trust for the purpose of administering the estate. In Bank of Montreal v. Irvine & Feinstein et al., [1924] 2 W.W.R. 1047 (Sask. C.A.), the word 'vest' was referred to as meaning that the entire interest of a person, legal and equitable, passes by virtue of the statutory provision to another person.

B. Probate Jurisdiction

1. Nature of Probate

The land titles offices only recognize letters probate or letters of administration or other letters giving persons authority to deal with the land of a deceased party, when such letters probate and other letters are issued out of a Saskatchewan court (see Walker on Executors, (5th Edition) page 117, also see Vol. 3, Am. & Eng. Ency. of Law, page 645; also Mortimer's Probate Practice, pages 21 and 22). At page 21 Mortimer says that a grant of probate or letters of administration to represent a deceased person, made by the courts of a foreign country has no direct operation in England. The same is true in Saskatchewan, and as far as probate and administration are concerned any jurisdiction outside Saskatchewan, including another province, is considered a foreign jurisdiction.

Where a deceased person leaves a will appointing an executor, the executor derives his authority from the will, but has to show his authority by obtaining probate of the will from the Surrogate Court.

Where there is no will, or the will does not appoint an executor, or the executor appointed has died or cannot take up his duties, the court appoints an administrator of the estate, who derives his authority from the appointment by the court.

In Re Hiebert Estate, [1934] 3 W.W.R. 193 at 197 (Sask. K.B.), Taylor, J. said, "Administrators are officers of the court. Those interested in estates of deceased persons to be administered under the law of this province must apply to the proper courts of this province for authority to administer the property."

While an administrator is an officer of the court having received his appointment by the court, an executor is in a different position, as an executor receives his appointment by the will, and the probate of the will is merely a confirmation of the testator's appointment. In Northern Crown Bank v. Woodcrafts Limited et al., [1919] 2 W.W.R. 347 at 349 (Alta. S.C.A.D.), Stuart, J.A. said he did not consider that an executor appointed by a testator is in any sense an officer of the court.

In Re Bannerman (1885), 2 Man. L.R. 377 (Q.B.) it was held that the title of executor and his right to deal with the estate as such are always established by the probate. Bryant, D.C.J. in Re Klassen, [1940] 1 W.W.R. 241 at 259 (Sask. Dist. Ct.) held that the executor takes his power from the will and not the court.

On occasion instruments have been submitted to a land titles office using the expression "the estate of _____". Land titles offices should beware of registering any documents such as transfers, mortgages and so forth where such expressions are used because "the estate of _____" is a mere expression and is not a legal entity (see In re Ficulik v. Omelon Estate, [1940] 1 W.W.R. 306 at 315 (Sask. K.B.); Great West Life Assurance Company v. R.M. of Tisdale, [1940] 3 W.W.R. 415 at 416 (Sask. Dist. Ct.), and Lunde v. Lunde (1980), 9 Sask. R. 59 (Q.B.)).

Sometimes, although there may be three executors appointed, the court may grant probate only to two executors or to one executor where two were appointed. One of the executors may, for example, have died before probate, or refused to act, or for some other reason satisfactory to the court, it is necessary to issue letters probate to two executors only. It is for the court to decide to whom letters probate are issued, and so, if a lesser number are named in the letters probate than in the will, the registrar should act on the letters probate as it is not his or her concern as to the number named in the will, (see decision of Milligan, M. T. June 23, 1914 Re Estate of Allison).

2. Types of Grants

Letters probate are issued to an executor nominated by the deceased in the deceased's will. This is the only kind of letters probate.

Letters of administration are issued to a person chosen by the court to administer the estate of the deceased. There are many types of letters of administration. Not all types of letters give the personal representative the authority to dispose of land of the deceased.

The most common are letters of administration, letters of administration with will annexed, and letters of administration de bonis non.

(a) Letters of Administration

These are issued when a person dies intestate i.e. without a will.

(b) Letters of Administration with Will Annexed

This type of administration is issued when an executor is unable or unwilling to act.

(c) Letters of Administration de Bonis Non

"De bonis non" means "of goods not administered". These letters are issued to allow a person to complete the administration of an estate left without a legal representative. This can occur when an executor dies intestate or the executor of the estate is unable or refuses to act or where an administrator dies or is unable to complete the administration.

All of the above are registrable in a land titles office and give the administrator the authority to deal with land.

3. Resealing Grants of Probate or Administration

An executor or administrator appointed by a court outside Saskatchewan has no authority or status to deal with land in Saskatchewan without first having obtained letters probate or administration in Saskatchewan, or having the letters obtained in the outside jurisdiction resealed in Saskatchewan (see Re Application of Bengtson (1954), 14 W.W.R. (N.S.) 620 (Sask. Q.B.)). In Couture v. Dominion Fish Co. Limited (1909), 11 W.L.R. 412 (Man. C.A.), an action was brought by an administrator, appointed as such in the Province of Manitoba but not in the North-West Territories. The action was brought in Manitoba but the death that was the subject matter of the action occurred in the Territories, and so the court held that the administrator, in order properly to bring action, should have been clothed with authority to act as administrator in the North-West Territories. Richards J. at page 410 said, "The next question that arises is, has the administrator appointed by a Surrogate Court in Manitoba power to bring such action? The ordinance in force in the North-West Territories provides that the action shall be brought by and in the name of the executor or administrator of the deceased. The ordinance must mean an executor or administrator possessing legal power or authority in the North-West Territories to administer the estate and effects of the deceased. Now, an administrator appointed by a Manitoba court is, as regards the property, credits, rights, and effects of the deceased situate in the North-West Territories, a foreign administrator simple. The grant of administration in Manitoba has no operation outside that Province".

Although an executor or administrator appointed outside Saskatchewan has no status to act in relation to land in Saskatchewan, section 166 of The Land Titles Act makes provision for the acceptance by land titles offices of the letters probate or administration obtained outside of Saskatchewan, if such has the approval of the proper Saskatchewan court, which approval is signified by an endorsement on the letters probate or administration obtained without Saskatchewan, stating that the letters probate or letters of administration have been 'resealed' in Saskatchewan. The clerk of the Surrogate Court will attach his or her signature and the seal of the court as evidence of the resealing. The result of the resealing is to give the outside letters probate or administration full status in Saskatchewan. The section, however, authorizes the resealing in Saskatchewan of letters probate or administration issued in any other province of Canada or any territory of Canada or in the United Kingdom of Great Britain, Northern Ireland, the Irish Free State, or of any British possession, or any of the states of the United States and Scottish probate. Inasmuch as an executor or administrator may not wish to part with the original letters probate or letters of administration where it was issued by an outside jurisdiction, provision is made in the section for the resealing of an exemplification or duly certified copy thereof. Exemplification is another name for certified copy. The procedure for resealing is outlined in sections 78 to 80 of The Surrogate Court Act.

If letters probate or letters of administration have been issued in jurisdictions other than those mentioned in section 166 and, therefore, cannot be resealed in Saskatchewan, then further letters probate or letters of administration may be taken out in Saskatchewan and these are known as ancillary letters probate or letters of administration, being as the name suggests, ancillary or subordinate to or assisting the letters issued in the country of domicile. The Saskatchewan court, before issuing ancillary letters, has to have evidence that the will has been recognized as valid by the foreign court, that is the court where the testator was domiciled, and the usual evidence of this is the production of an exemplification of the original letters probate issued in the foreign country. However, for the purposes of the land titles office the ancillary letters are sufficient evidence that the applicant is entitled to make application for transmission (see Weir on Probate page 335).

4. When Resealing not Required

Resealing and an application for transmission is not required for a transfer or discharge of a mortgage where the total value of the estate of a deceased person does not exceed $500 (see subsection 170(2)). This section is activated by the presentation of a sworn or certified copy of the original

probate or letters of administration and an affidavit or solemn declaration that the total value of the estate of the intestate or testator in Saskatchewan does not exceed $500.

5. Must File Sworn or Notarial Copy

Under section 166 of The Land Titles Act there must be "produced" to the registrar the original document or "a duly certified copy of such probate, letters of administration, order or certificate" and "file with the registrar a sworn or notarial copy thereof". The certified copy must be certified by the custodial officer of the court. The reference to a sworn copy is a certification by affidavit. The notarial copy is a copy compared to the original by a notary public under official seal. To make sense of the section the "sworn or notarial copy" must be a copy compared to the original, with the letters exhibited, rather than a comparison to the certified copy made by the court official. In addition to what section 166 says the registrar will accept, it has been a long standing practice for the offices to accept a court certified copy, alone, for filing.

6. Duplicate not Produced on Filing

Although section 57 of The Land Titles Act does not state that the duplicate is not produced on filing of letters, the practice does not require the duplicate certificate of title to be produced when letters probate or of administration are filed.

C. The Application for Transmission

1. When Required

It is only necessary to apply for transmission for land, a mortgage or a lease of land (see clause 166(1)). Transmission is not required for a grant or transfer to a personal representative if the proviso to section 173 applies. It is not necessary to apply for transmission for discharges or transfers of leases or mortgages, or caveats or builders' liens or withdrawals of same or any instrument other than a title, a mortgage or a lease. See also subsection 170(1) which refers specifically to transfers or discharges of mortgage.

2. Who may Sign the Application

Subsection 166(1) of The Land Titles Act requires the person claiming transmission to "apply in writing to be registered as owner". Since 1909, it has been the practice to allow the solicitor who has been acting for the estate to apply on behalf of the person claiming transmission. The reason for the decision is that the application is based on proof issued by the court in the form of letters that the personal representative has the right to be so. Furthermore the Rules of the Surrogate Court allow an application for grant of probate or administration to be signed by the solicitor of the applicant.

3. Form

There is no prescribed form of application for transmission. It should, however, set out clearly, the name of the deceased, the names of the personal representatives and an accurate description of the property. An address for the personal representative must be provided unless followed immediately by transfer (see section 252 of the Act). The application need not be witnessed and attested. It must be accompanied by an affidavit of value for the purposes of calculating fees.

4. Land Description

An application for transmission should not be rejected for failure to show a roadway exception. The personal representative accedes to the position of the deceased registered owner. The personal representative can acquire no greater interest than the deceased held.

5. Duplicate must be Produced

Section 160 of the Act requires the duplicate to be delivered up or be proved to have been lost or destroyed.

6. New Title Issued

The registrar makes a memorandum on the title of the application for transmission. The title being transmitted is then cancelled.

Section 169 of the Act directs the registrar to "grant to the executor or administrator as such a new certificate".

The two words "as such" should be noted particularly. They mean that the titles should be issued to the executor or administrator 'as such executor or administrator' and it is important that the word 'as' be included and not just the words 'executor or administrator'. There is the danger that without the word 'as' but merely adding the words 'executor or administrator', the names 'executor' or 'administrator' might be interpreted as decriptive only whereas if the word 'as' is used it must be taken to refer to the capacity of executor or administrator. In Ficke v. Spence and Olson, [1922] 1 W.W.R. 1271 (Sask. K.B.), a certificate of title was registered in the name of "John Olson, personal representative of Andrew Benjamin Handel, deceased". The registrar issued an abstract of title for the land merely in the name of John Olson. The solicitor for the mortgagee prepared his mortgage in the name of John Olson, the mortgages were registered, John Olson obtained the money personally and did not account to the estate. The registrar should, of course, have issued the certificate of

title and the abstract of title both reading "as administrator of the estate of _____". Action having been brought by the mortgagee who lost the priority of his mortgage, judgment was first given against the administrator and then against the registrar to be paid out of the Assurance Fund. If the registrar had correctly issued the title 'as administrator' and had given a correct abstract as administrator, the loss probably would have been averted as the solicitors would have had notice that Olson was only acting in the capacity as administrator. The point to remember is that the word 'as' is important (see also Pearson v. O'Brien (1912), 1 W.W.R. 1026 at 1034 (Man. C.A.)).

Section 83 of The Surrogate Court Act requires every official administrator to be described as such in letters of administration. A certificate of title is prepared in the same way.

The Public Trustee may apply for letters of administration de bonis non to administer an estate where a mentally incompetent person was an executor or administrator prior to the appointment of the Public Trustee as committee for the mentally disordered person (see subclause 31(2)(c)(iii) of The Public Trustee Act).

D. Death of Personal Representative

1. Where One of Two or More Executors or Administrators Dies

Where this occurs, section 73 of The Trustee Act provides that the power vests in the survivor or survivors. Thus, on proof of death the balance may continue.

If the words "no survivorship" are on the certificate of title, section 238 of The Land Titles Act states that the title cannot be dealt with by any less number than are named in the title, except by order of the court (see Re Whitman's Case, [1919] 1 W.W.R. 600 (Sask. M.T.)).

2. Where Sole or Surviving Executor Dies

In Williams on Executors, (9th Edition) Vol. 1, at pages 204-205, the following appears:

> Although the executor cannot assign the executorship, yet the interest vested in him by the will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that if there be a sole executor of A, the executor of such executor is, to all intents and purposes, the executor and representative of the first testator. But if the first executor dies intestate, then his administrator is not such a representative, but an administrator de bonis non of the orginal testator must be appointed by the Court of Probate; for the power of an executor is founded upon the special confidence and actual

appointment of the deceased; and such executor is, therefore, allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator: But the administrator of the executor is merely the officer of the Court of Probate and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator.

Williams' book on Executors is an English book. The Court of Probate is the name of the English Court that has jurisdiction over estates of deceased persons. In Saskatchewan it is the Surrogate Court, but the law set out is applicable in Saskatchewan.

The rule that the executor of a deceased executor becomes the executor of the original testator is subject to the following conditions:

(1) that letters probate must have been granted or resealed in this Province, in relation to all the estates involved; and

(2) that there is nothing in the will indicating a contrary intention to the transmitting of the authority of the executors.

In Williams, (9th Edition) Vol. 1 at page 257 it is stated that if an executor dies before he has taken out probate of the original testator's will his executor does not become executor to the original testator. (An example is In re Hair Estate, [1941] 2 W.W.R. 159 (Sask. Surr. Ct.)). Also see Weir on Probate page 116.

3. Where Sole or Surviving Administrator Dies

If a sole or surviving administrator dies before he has completed his administration, then an application has to be made to the court, by some interested party, for the appointment of a new administrator to complete the administration, in which case, the new administrator is known as an administrator de bonis non, which means that the administrator has been appointed just to complete the administration of that portion of the estate which had not been administered by the original administrator.

4. Summary

(1) If there are two or more executors or administrators, and one dies, the survivor or survivors need not apply for a further transmission, but may deal with the land in the usual way, on production of proof of the death of the co-executor or co-administrator.

(2) If a sole or surviving executor dies having himself appointed an executor in circumstances permitting the existence of a "chain of representation" as outlined on the previous page, the executor of the deceased executor may apply for transmission of title to the land of the original deceased on production of the letters probate (and notarial copy) of the executor's will. The land remains, of course, part of the estate of the original deceased.

The certificate of title will read "John Jones, of _____, executor of the last will and testament of William Smith, deceased, who was, in his lifetime, the executor of the last will and testament of Thomas Brown, deceased".

(3) If a sole or surviving executor dies and no chain of representation exists, or on the death of a sole or surviving administrator, an administrator de bonis non applies for transmission into his name.

E. Disposals by the Personal Representative

1. Compliance with Section 172 of The Land Titles Act

(a) General

A Public Trustee's certificate that no infants are interested in the estate of the deceased owner or a Public Trustee's consent to the proposed dealing are required whenever an instrument is executed by an executor or administrator unless:

(1) the legislation or practice provides an exception; or

(2) the instrument to be registered is accompanied by a court order authorizing the proposed dealing.

This latter exception is created by clause 172(1)(d) of the Act. There is no requirement that the court order reflect consideration of the infants interested. Any order authorizing the dealing is sufficient.

(b) Transfer of Land: When Public Trustee's Certificate Needed

A certificate or consent is required (see subsection 172(1)) except:

(1) under clause 172(1)(c) the instrument is accompanied by an affidavit of the executor or administrator, or one of several executors or administrators, showing that the land was sold by contract of sale in writing entered into by the

deceased owner in his lifetime or by the person from whom the deceased owner in his lifetime acquired his interest therein and remains subject to the contract of sale, and that the instrument is executed pursuant to the contract of sale; or

(2) where the registrar is satisfied by affidavit or otherwise that the deceased person at the time of death had no fixed place of abode in Saskatchewan and had no property in Saskatchewan (see proviso to section 173 i.e. where land is granted or transferred to the executor).

Clause 172(1)(c) also applies if the land is being transferred to a purchaser from the original purchaser, if the executor swears that the transfer is executed pursuant to the agreement for sale. Only one affidavit is necessary.

The words "by the person from whom the deceased owner in his lifetime acquired his interest therein" in clause 172(1)(c) were added by S.S. 1946, c.24 to apply to the situation where "A" sells land to "B" under an agreement of sale. "A" then sells the vendor's interest under the agreement for sale with "B" to "C" and assigns the contract of sale to "C". "C" dies. "C"'s executors can now swear the appropriate affidavit to allow the transfer to "B" without obtaining a Public Trustee's certificate or consent.

(c) Instruments for Which Public Trustee's Certificate Required

Unless an exception can be found elsewhere in this part, all instruments executed by an executor or administrator require a Public Trustee's certificate or consent. The types of instruments specifically mentioned in subsection 172(1) as requiring a Public Trustee's consent or certificate are a transfer and a mortgage but the general phrase i.e. instruments executed by an executor or administrator, is taken to include all other instruments including a plan of survey whether or not public lands are vested.

(d) Instruments for Which Public Trustee's Certificate not Required

Subsection 172(1) specifically excepts an application for transmission, a caveat, and a transfer or discharge of mortgage. This section is construed strictly. If the instrument is not one listed in this part, compliance with section 172 is required.

Under section 174 a Public Trustee's certificate or consent is not required for a public utility easement or transfer if same is required for a railway or a gas, oil or water pipeline and, if:

(1) the land is shown on a plan approved by the Board of Transport Commissioners; or

(2) there is produced an affidavit of purpose by the right of way or purchasing agent.

No certificate of consent is required for SaskTel or SaskPower easements (see section 29 of The Power Corporation Act and section 26 of The Saskatchewan Telecommunications Act.)

F. Land Granted or Transferred to a Personal Representative

No land or mortgage can be transferred to a personal representative unless letters have been filed except where the registrar is satisfied that the deceased did not reside in Saskatchewan and had no property in Saskatchewan (see section 173). The word "transfer" includes a grant (see clause 2(l)(u) of The Land Titles Act).

The proviso to section 173 does not extend to allowing land to be transferred to an executor where the deceased was a buyer under an agreement of sale.

Section 173 means that there must be transmission of a mortgage before an executor or administrator can transfer the mortgage. No transmission is necessary to discharge a mortgage if letters have been filed.

G. Personal Representative cannot Grant Power of Attorney

A personal representative must act personally. It is obvious that when all the executors are regarded in law as one person, one of the executors could not validly give a power of attorney. As executors are trustees, as stated elsewhere, and appointed by reason of the testator's confidence in them, they have no right to delegate their duties except as provided by The Trustee Act. There is a maxim in law that a person who himself or herself acts under delegated authority cannot re-delegate that authority to some other person. As an administrator is an officer of the court, an administrator would have no authority to delegate duties except as provided by The Trustee Act. If he or she is unable, for any reason, to act and carry out duties then an application should be made to the court for further directions and instructions (see section 79 of The Trustee Act).

The court has power to grant administration to a person as attorney of the person entitled, but if this occurs, the registrar will be governed by the court order.

H. All Personal Representatives must Execute Instrument

Under section 17 of The Devolution of Real Property Act, where there are two or more personal representatives, a mortgage, transfer, lease or other disposition of real property shall not be made without the concurrence therein of all such representatives or an order of the court. Personal representatives are executors or administrators and as such are joint tenants. An instrument by such executors or administrators must be signed by all.

Chapter 33. Bankruptcy

A. History

The authority to legislate in relation to bankruptcy was given, by section 91 of the Constitution Act, 1867, to the federal government. However, until 1920 there was no federal Bankruptcy Act.

Provinces therefore legislated regarding assignments, and, notwithstanding the Constitution Act, 1867, these Assignments Acts were held to be constitutional since they dealt only with assignments which were purely voluntary.

On July 1, 1920, the federal government proclaimed in force the Bankruptcy Act (Canada), S.C. 1919, c.36. The Saskatchewan Assignments Act, S.S. 1909, c.142 was repealed by S.S. 1920, c.4 effective November 20, 1925 but any vesting prior to the repeal remained effective.

Many assignments under the Saskatchewan Act remained in the general record until The Land Titles Amendment Act, S.S. 1980-81, c.25 directed the registrar to remove all such assignments (see section 178 of the present Land Titles Act).

B. Structure of the Bankruptcy System

Under section 5 of the Bankruptcy Act R.S.C. 1985, c.B-3 a Superintendent of Bankruptcy is appointed to supervise the administration of the Act. Each of the provinces of Canada constitutes one bankruptcy district. Each district may be divided into two or more bankruptcy divisions. Saskatchewan currently has two divisions (see subsection 12(1)). One or more official receivers are appointed for each bankruptcy division and are deemed to be officers of the court. They have and perform the duties and responsibilities specified by the Bankruptcy Act and its General Rules (see subsection 12(2)). Under section 13 the federal Minister of Consumer and Corporate Affairs is responsible for licensing trustees upon the recommendations of the Superintendent of Bankruptcy. The trustees are persons charged with the day to day workings under the Bankruptcy Act through the administration of the estates of bankrupts. Under clause 183(1)(f) orders in bankruptcy proceedings are granted by justices of the Court of Queen's Bench of Saskatchewan or duly appointed registrars in bankruptcy (section 184) who may exercise the powers granted to them pursuant to section 192 of the Act.

A bankruptcy occurs when a person's creditors petition the court for a receiving order declaring the person bankrupt and appointing a trustee (see section 43). An insolvent person, or the personal representative of a deceased insolvent person, may voluntarily make an assignment in bankruptcy whereby he or she assigns all property to a trustee for the general benefit of creditors (see section 49). In order for a petition to be made, the person must have committed an act of bankruptcy as defined in the Act, such as becoming insolvent or ceasing to meet his or her liabilities generally as they become due (see section 42).

Once a receiving order has been made or an assignment in bankruptcy has been filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his or her property. The property vests in the trustee named in the order of assignment and passes to the trustee without any conveyance, assignment or transfer, subject to filing the necessary documents in the appropriate land titles office. If the trustee changes, the property passes from trustee to trustee without any conveyance, assignment or transfer (see subsection 71(2)).

C. Court Orders outside Saskatchewan

Since bankruptcy is a subject of federal legislation, jurisdiction in bankruptcy is nation-wide. Subsection 188(1) of the Bankruptcy Act reads:

> 188(1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

Orde, J. in Re Fairweathers Ltd.; Ex parte Montreal (1921), 2 C.B.R. 133 at 134 (Ont. S.C.) states:

> ...once the Courts of one province are seized with the matter, no court in any other province will be permitted to intervene in the proceedings or to interfere with the administration of the insolvent estate, except under the order of the court so seized ...

When presented with a receiving order made by any bankruptcy court in Canada or an assignment certified by the official receiver in any part of Canada, the registrar accepts it under section 175 of The Land Titles Act.

D. Instruments Submitted

Section 74 of the Bankruptcy Act provides for the registration of :

(1) a receiving order;

(2) an assignment; or

(3) a caveat or caution.

The difference between these three instruments is:

(1) a receiving order - an order by the court upon application of a petitioning creditor for an order against the debtor adjudging the debtor to be bankrupt and ordering the appointment of a trustee (see section 43 of the Bankruptcy Act);

(2) assignment - a voluntary assignment by the bankrupt party to the trustee for the benefit of his or her creditors (see section 49 of the Bankruptcy Act);

(3) caution or caveat - this is registered against the affected title by the trustee when a receiving order or assignment has not been registered, and the effect is like a caveat under The Land Titles Act (see subsection 74(3) of the Bankruptcy Act).

A receiving order will be an order of a superior court in bankruptcy appointing a trustee. Subsection 74(1) of the Bankruptcy Act requires presentation to the registrar of the order "or a true copy thereof certified by the registrar or other officer of the court that made it".

The assignment to a trustee will either be the original or a "true copy thereof certified by the official receiver" (see subsection 74(1)). The certificate of the official receiver should accompany the assignment. It will disclose whether the bankruptcy is summary or ordinary administration.

The caveat or caution will be an original instrument executed by the trustee.

Subsection 175(1) of The Land Titles Act authorizes the filing or the registration of an assignment, receiving order or caution. The assignment or receiving order is filed in the general record. The caution is registered on the title. Subsection 175(2) provides that after filing or registering one of these instruments, no dealings by the bankrupt are permitted.

E. Application for Transmission

Subsection 175(1) of The Land Titles Act provides that upon an assignment being made for the general benefit of creditors by a person, or upon the appointment of a trustee in bankruptcy of the property of any such person, and upon the assignment or receiving order being registered in the land titles office, the trustee may apply to be registered owner of the land and the registrar may, pursuant to the provisions of the Bankruptcy Act, transmit the land (or mortgage, as the case may be) to such trustee who shall thereupon become owner thereof. The trustee, on transmission, becomes the registered owner under the Torrens System.

Although subsection 175(1) uses the word "may", it is not permissive. If the trustee in bankruptcy intends to become the registered owner, the trustee must apply for transmission. An application for transmission is the only way in which a person may deal with property of another, unless the legislation provides otherwise. Even if subsection 175(1) was not in The Land Titles Act an application would be required (see Di Castri Registration of Title to Land, paragraph 721).

There is no form for the application. It should refer to the assignment or receiving order, not necessarily by number, and describe the land to be transmitted. The application need not be witnessed and attested. The trustee must provide an address. The fees will be based on an affidavit of value of the land.

The duplicate certificate of title is not required before title is transmitted into the name of the trustee. Clause 57(a) of The Land Titles Act provides that the duplicate certificate of title need not be produced in the case of "assignments for the general benefit of creditors or receiving orders". By practice, this has been extended to the application for transmission by the trustee for the same reason that the assignment and receiving order are registered without the duplicate. The effect of the Bankruptcy Act is to give the trustee control over the land, upon filing the assignment or receiving order. The trustee should not be prevented from dealing with the land merely because the bankrupt refuses to give up a duplicate.

F. Nature of the Title Issued

The effect of subsections 70(1), 74(2) and section 216 of the Bankruptcy Act is that the registrar, upon application for transmission, issues title free of all instruments recorded in the general record or on the title that are: writs of execution, whether in favour of the Crown or not, or maintenance orders.

Subsection 70(1) of the Bankruptcy Act gives the receiving order and assignment precedence over all attachments, garnishments, judgments, and executions, but does not give the receiving order and assignment precedence over the rights of a secured creditor. An execution creditor is not a "secured creditor" for this purpose.

This was the decision of Martin, C.J.S., in Re Sklar and Sklar (Bankrupts) and Sieberling Rubber Company of Canada v. Canadian Credit Men's Trust Assoc. (1958), 26 W.W.R. 529 (Sask. C.A.). In that case the execution creditor was claiming to be a "secured creditor" over the unsecured creditors of the bankrupt. At page 536 he states:

> "Secured creditor" cannot, in my opinion, refer to any of the process named in the first part of the section but must mean "secured creditor" as defined in section 2(r) and execution creditors do not fall within the definition.

In Re Alva A. Riggs (In Bankruptcy) (1938), 19 C.B.R. 222 (Ont. S.C.), Urquhart, J., held that under the Bankruptcy Act, an execution creditor, whose execution had been filed ahead of a mortgage, was entitled to rank equally and without preference with other execution creditors of the bankrupt in the distribution of the estate of the bankrupt by the trustee.

Other cases on point are:

(1) Westcoast Savings Credit Union v. McElroy et al. (1981), 39 C.B.R. 52 (B.C.S.C.), 2 writs prior to mortgage. Held: mortgagee takes priority. Balance of funds goes to trustee in bankruptcy;

(2) Re Sutton (1967), 10 C.B.R. (N.S.) 285 (Alta. S.C.). Held: when trustee sells property, the writs must not attach title of purchaser;

(3) Re Duncan (1967), 9 C.B.R. (N.S.) 187 (Ont. S.C.), writ of execution followed by chattel mortgage. Held: notwithstanding provincial law would give priority, the chattel mortgage wins;

(4) Re Parton (1967), 61 W.W.R. 171 (Alta. S.C.). Held: no exception made for provincial government writs in terms of priority.

Thus, a title issuing to a trustee in bankruptcy by way of a transmission should issue clear of all executions but subject to all other registered encumbrances against the title of the bankrupt.

If the fact situation is like that in Re Alva A. Riggs the bankruptcy court will order the priorities in the distribution of the estate.

The trustee has to pay the legal costs of the execution creditor whose writ was first placed in the hands of the sheriff (see subsection 73(2) of the Bankruptcy Act).

G. The Homesteads Act

A wife's rights respecting The Homesteads Act do not cease on her husband making an assignment for the benefit of his creditors, or on the court making a receiving order against him. Subsection 8(2) of The Homesteads Act provides that on the registration of a receiving order for the estate of the owner, or of an authorized assignment for the general benefit of his creditors, the trustee may file in the land titles office an affidavit stating, to the best of his knowledge and belief, whether or not the bankrupt or assignor has a wife and, if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, giving, to the best of his knowledge and belief, her address or stating that he does not know her address. When the affidavit is received by the registrar, if it appears that the bankrupt or assignor has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and if such wife has not previously filed a caveat under The Homesteads Act, the registrar shall, by registered mail addressed to her at the address, if any, given in the affidavit of the trustee, otherwise at the address of her husband as it appears by the records of the land titles office, notify her of the registration of the receiving order or assignment, with the date of registration, and require her, if she claims that any of her husband's land is his homestead, to file a caveat in Form D of The Homesteads Act against such land within sixty days of the mailing of the notice.

Sometimes it happens that a transfer is submitted with the affidavit. If this occurs the transfer must be rejected until the sixty days has passed.

The steps to be taken under subsections 8(2), (3) and (4) are entirely permissive, and if taken, protect the trustee, but nevertheless, the trustee may still transfer the land as the owner thereof without any compliance with any provisions of The Homesteads Act, but the trustee then remains liable in damages at the suit of the wife for deprivation of her homestead rights. If, on the other hand, the trustee takes the required steps and the wife files a caveat, then if the trustee transfers the land it is done so with risk and the wife's rights as against the transferee of the land are protected by her caveat which follows on the title of the transferee.

The Homesteads Act also provides what the situation will be in the event that the bankrupt or assignor has no wife who resides in Saskatchewan or who has not resided therein at any time since the marriage, and no caveat is filed within sixty days from the date of the filing of the affidavit, or no caveat is filed within sixty days of the date when the registrar's notice was mailed to the wife. If,

in such circumstances, the trustee sells the land which it subsequently appears was land in which the wife possessed homestead rights, the trustee is not liable in damages, providing the trustee acted in good faith.

H. Exemptions

Under section 67 of the Bankruptcy Act the property of a bankrupt divisible among his or her creditors shall, among other things, not include any property, that as against the bankrupt, is exempt from execution or seizure under the laws of the province. If the proper steps are taken, the bankrupt and his or her spouse can protect the homestead from being sold or dealt with by the trustee. It is well to remember that should there by any conflict between the federal and provincial legislation arising out of this legislation, the federal law will prevail (see In re City Garage and Machine Company Limited, [1921] 1 W.W.R. 371 at 373 (Sask. M.T.)).

Section 67 of the Bankruptcy Act preserves to the bankrupt the exemptions to which a bankrupt is entitled under the laws of the province. Section 176 of The Land Titles Act sets out the procedure that the bankrupt may follow to retain the exempt home quarter or lot. The bankrupt may submit to the registrar a claim in writing, signed in the presence of an attesting witness, that certain land is exempt. If the claim is endorsed with the consent of the trustee in bankruptcy, the land may then be dealt with as if no assignment or receiving order has been made.

The court may also declare certain land to be exempt. In either case, the bankrupt may deal with the land.

I. Consent of the Inspectors

1. Generally

Saskatchewan does not ask the trustee to produce the duplicate or to comply with The Homesteads Act. Instead, Saskatchewan requires compliance with the provisions of the Bankruptcy Act to control the transactions of the trustee.

Section 30 of the Bankruptcy Act provides that the trustee in bankruptcy may, with the permission of the inspectors, do all or any of the things enumerated in the section. The first of these is to "sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, . . . by tender, public auction or private contract with power to transfer the whole thereof to any person or company, or to sell the same in parcels". It will be noted that the trustee must obtain the permission of the inspectors to the sale and must have their approval of the sale

price. Subsection 30(2) goes on to say that the permission of the inspectors must not be a general permission but must be permission to do the particular things specified in the section.

The inspectors referred to in section 30 are appointed at a meeting of creditors; their duty is to look after the interests of the creditors. There may be one inspector or several inspectors not exceeding five (see subsection 116(1)). Subsection 116(1) states that if inspectors are not appointed, the trustee must see to their appointment. The powers of the inspectors may be exercised by a majority of them, and subsection 105(3) provides for the case of an equal division of opinion at a meeting of inspectors.

If an instrument is accepted which has not received the permission of the inspectors it would be wrong to register it and the assurance fund may be liable for the consequences of this error. In Johnstone Fabricators Limited v. Canadian Credit Men's Trust Association Limited (1964), 47 W.W.R. 513 (B.C.S.C.), the trustee in bankruptcy, without waiting for a meeting of creditors at which inspectors could be appointed, sold a crane to the plaintiff on a lease-option agreement. Subsequently a meeting of creditors was held and a sole inspector was appointed. He refused his permission to the sale to the plaintiff because he wished to sell the whole of the bankrupt company's assets to another purchaser. The plaintiff was therefore obliged to surrender the crane to the other purchaser and sued the trustee in bankruptcy for damage. Aitkins, J. said at page 519:

> At the time of the execution of the lease-option agreement on December 22, 1961, between the plaintiff and the defendant, no inspector had been appointed. The lease-option agreement between the parties, and I think there is no dispute as to this, was void and of no effect. I refer to Ross v. Necker, [1948] S.C.R. 526; 29 C.B.R. 1, varied 29 C.B.R. 175, and in particular the judgment of the court as delivered by Taschereau, J. at page 8.

Di Castri in Registration of Title to Land, paragraph 724 states that the statutory power of the trustee to deal with the bankrupt's land is qualified pro tanto by section 30 of the Bankruptcy Act. He cites Re Feldman (1932), 41 O.W.N. 62 (C.A.) as authority for the proposition that a direction by the court to the trustee to effect a sale without the consents of the inspectors may be open to question.

See also In re Gautier Lumber Yard (1960-61), 1 C.B.R. (N.S.) 127 (Que. S.C.) and Re S and W Stereo Pacific Ltd. (1976), 22 C.B.R. (N.S.) 84 (B.C.S.C.).

When a transfer of property or other instrument is presented for registration by a trustee in bankruptcy it is essential that it be accompanied by the permission of the inspectors and the approval of the sale price. This is pursuant to clause 30(1)(a), where the inspectors must approve the price or other consideration on the disposal of property. A convenient way would be for the instrument to be endorsed with a memorandum as follows:

> "Permission is given to the within transfer and the consideration set out therein is approved"

followed by the signatures of the inspectors. It is suggested that a registrar may accept a certificate of the trustee that the signatories constitute a majority of the inspectors, since the trustee is responsible for calling a meeting of creditors in order to appoint inspectors (see section 102). If the assignment or receiving order states who the inspectors are, the registrar can determine whether a majority have signed without the certificate of the trustee.

2. Where Court or Registrar Orders Registration Without Consent

Subsection 192(1) of the Bankruptcy Act sets out the powers of the Registrar in Bankruptcy to, among other things, hear and determine any unopposed or ex parte application.

The Registrar in Bankruptcy will hear an ex parte application for an order directing the registration of an instrument without the consent of inspectors where the Registrar in Bankruptcy is satisfied that no inspectors are appointed and for good reason. The material required on the application is a memorandum to the Registrar in Bankruptcy, sufficient affidavit evidence and a draft order directing the land titles registrar to register a named instrument without the consent of the inspectors. The order must describe the land affected.

The Registrar in Bankruptcy may choose to refer any matter ordinarily within the jurisdiction of the Registrar in Bankruptcy to the court (see subsection 192(6)).

3. Summary Administration

An exception to the need to have the consent of the inspectors exists in relation to summary administration of estates. Subsection 49(6) provides that this summary procedure shall apply where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt after deducting the claims of secured creditors will not exceed $500. Clause 155(e) provides that in summary administration there shall be no inspectors but the trustee in the absence of directions from the creditors may do all things that may

ordinarily be done by the trustee with the permission of inspectors.

The registrar will easily know when an assignment is summary administration by the certificate of the official receiver. All proceedings in summary administration must be entitled as such (see clause 155(a)). Since a receiving order involves a petition by the creditors into court and not an assignment, a receiving order is never summary administration.

J. Registration of Instruments Executed by Trustee

Before registering a transfer of a fee simple or leasehold estate or a mortgage or transfer or discharge of mortgage, transmission must be made of the land or interest, and the consent of the inspectors, except as provided above, will be required to the instrument executed by the trustee. The trustee is properly described in the transfer or other instrument as "The Trustee of the estate of _____ a bankrupt" or as "_____ Trustee in Bankruptcy of the estate of _____," or words to like effect.

Before registering a discharge or withdrawal of a caveat or builders' lien, the assignment or receiving order must be registered but no transmission is required. The consent of the inspectors must be obtained.

K. Effect on Tax Enforcement Proceedings

Tax proceedings continue in the same way. Taxes are upon the land itself and not the owner. It does not matter if the ownership or control of the land changes during the proceedings. The title which is transmitted to the trustee in bankruptcy is subject to the tax lien and all other steps in the tax enforcement process which have been taken. Thereafter, the trustee receives all subsequent notices as the registered owner.

L. Similar Name Problem

Since an assignment or receiving order is filed in the general record, the same similar name problem which arises for writs of execution or maintenance orders arises here. Section 88 and 179 of The Land Titles Act provide the same mechanism for relief.

M. Disclaimer

Section 20 of the Bankruptcy Act provides a method for the trustee to disclaim any interest in property. A trustee may use this procedure:

(1) where the bankrupt is actually trustee of property registered in the bankrupt's name;

(2) instead of the discharge mechanism in subsection 175(3) of The Land Titles Act;

(3) to allow the bankrupt to execute an instrument for whatever reason.

The disclaimer or quit claim, after setting out the recitals might read as to the operative part, "Now, therefore, the said trustee _____ Company Limited hereby disclaims all its right, title or interest in and to the (here describe land) and quit claims all its said right, title or interest to the above described land". The consent of the inspectors must be endorsed in the same way as on a transfer by the trustee in bankruptcy (see subsection 20(1)).

N. Discharge

Subsection 175(3) of The Land Titles Act allows a bankrupt to withdraw an assignment, receiving order or caution upon presentation of the court order discharging the assignor or bankrupt. This provision was added by The Land Titles Amendment Act, S.S.. 1983, effective July 1, 1983. A conditional discharge cannot be registered under subsection 175(3).

O. Writs and Maintenance Orders Remain in the General Record

Section 178 of the Bankruptcy Act provides that an order of discharge does not release the bankrupt from any debt or liability for alimony, a fine imposed by the court, a debt for necessaries or a debt for family or child support. Since the registrar will not know whether a particular writ is covered by the discharge in bankruptcy, all writs remain in the general record until withdrawn by the sheriff acting on the instructions of the execution creditor. A maintenance order must continue to be withdrawn in the usual way. In Franklin v. Schultz (1967), 62 D.L.R. (2d) 643 (Ont. C.A.)) the court held that all debts were discharged by the bankruptcy, but it should be noted that this decision was rendered on application to the court, and has no application to the registrar's practice.

Chapter 34. Orders of the Court

A. Registrar's Powers Vis a Vis Court Orders

1. Registrar's Authority

There are two parts to the question whether the registrar has the authority to reject a court order. The first part is whether under The Land Titles Act the registrar has the authority. The registrar's authority to reject an instrument is contained in subsection 26(2):

> 26(2) The instrument shall then be examined and, if found to be complete and in proper form and fit for filing or registration, shall be signed by the registrar and a record of the acceptance of the instrument shall be entered in the instrument register. If the instrument is found not to be complete and in proper form or appears to be unfit for filing or registration the registrar shall reject and return it and enter a record of the rejection in the instrument register.
>
> (underlining added)

As to whether a court order is an instrument one must look to the definition of instrument in The Land Titles Act:

> 2(l)(i) "instrument" means a grant, certificate of title, conveyance, assurance, deed, map, plan, will, probate or examplification thereof, letters of administration or an examplification thereof, mortgage or any other document in writing relating to or affecting the transfer of or other dealing with land or evidencing title thereto and includes a caveat.

Based on this definition, Di Castri in Registration of Title to Land, page 16-690 concludes that a court order is by implication an instrument and the registrar has the legal authority to reject any instrument.

In F.C. Richert Company Limited v. Registrar of Land Titles for South Alberta Land Registration District, [1937] 3 W.W.R. 632 (Alta. S.C.A.D.) the court considered a claim on the assurance fund arising as a result of a mechanics' lien which was registered after the date of a foreclosure order but before the order was registered. The mechanics' lien was not carried forward. The court said this about the registrar's responsibility, at page 636:

> Sec. 96 definitely defines the effect of an order of foreclosure and the duty of the registrar on receiving it for registration. No judge's order need tell him what to do and if it does and gives a wrong direction as the order

> in this case does the registrar cannot excuse himself by following the direction of the order and disregarding the duty imposed by the statute.

And at page 637:

> But whatever may have been the error in the preparing or signing of the order the registrar was not justified in registering it as he did. Not merely because it directed him to do something which the Act itself provided for but because its direction was at variance with the terms of the statute and of the other part of the order itself he should have refused to receive it until it was corrected and he certainly was not justified when registering it in giving effect to the direction in the face of the contrary terms of the statute and the order as well but should on the contrary have disregarded it.

Similarly, the registrar must satisfy himself or herself that all parties affected by the registration of the order were before the court (see Di Castri, page 16-692).

The second part to the question whether the registrar should reject a court order relates to the propriety of questioning a court order. On this point, the authorities are divided. In Assets Company v. Mere Roihi, [1905] A.C. 176 at 203 (P.C.) the court had this to say about the registrar's authority:

> It by no means follows that errors in procedure, even in matters which in one sense affect jurisdiction, need be noticed, or ought to be noticed, by other persons whose duty it is to act on orders brought to them. It is not their duty to attend to such matters; if it were, their action would be paralyzed. What they have to look to is the order; and if that is good on the face of it, it is their duty to act upon it, and it must be treated as a sufficient foundation for what they do. Not only are they protected from liability if the order turns out to be improperly obtained, but, if what they do under it is made conclusive on questions of title, a title which might be otherwise impeachable must be treated as valid.

Similarly, Wetmore, C.J.S. stated in Canadian Pacific Railway Company v. Mang (1908), 1 Sask. L.R. 219; 8 W.L.R. 774 at 777 (S.C.):

> In my view of the case, all this proof of the preliminaries having been properly taken is a matter for the court - not a matter for the registrar. The judge is to determine whether the proper steps have been taken, not the registrar, and when the judge determines that they have been, and confirms the sale, and the order confirming is filed with the registrar, that is all that is necessary he should have.

But on the other hand, there are cases confirming the registrar's decision where he has questioned the propriety of a particular order. For example, In re Barron (1953), 9 W.W.R. (N.S.) 218 (B.C.S.C.) the registrar refused to comply with an order vesting in a quasi-committee the land of a mentally disordered person. The registrar's decision was upheld. Again, in Re Land Titles Act and Plan I. 3279, Estevan (1913), 3 W.W.R. 1032 (Sask. M.T.) the Master of Titles upheld the registrar's decision to refuse to register an order of the court where the plan which was being registered was not signed by all necessary parties.

In Nicholson v. Drew et al., [1912] 2 W.W.R. 295 (Sask. S.C.), a judge of the Saskatchewan District Court confirmed certain tax sale proceedings, whereas only a judge of the Supreme Court could deal with confirmation of tax sale proceedings. The confusion arose by reason of the word "judge" under The Town Act which was stated to mean a judge of the District Court, "unless the context otherwise requires", and the context did otherwise require. The document of confirmation issued by the District Court was registered in the land titles office. Newlands J. held that the registrar made a mistake when he registered the transfer even though it had been confirmed by the District Court judge and also held that the assurance fund was liable. See also Re Alarie and Frechette (1913), 5 W.W.R. 257 (Man. C.A.) where the court affirmed a registrar's decision refusing to register an order made without legislative jurisdiction.

It can be said with certainty that an order must be one that the registrar can administratively handle. For example, if the land description is incomplete or fails to omit exceptions from the back of the certificate of title and thus encompasses more land than the respondent owns, the registrar must reject the order. Similarly if an order is more far-reaching than the court or counsel would have intended eg. "the registrar shall discharge all present or future liens" without any qualification as to lien claimant or time, the registrar should consider rejection.

Where an order affecting land is out of the ordinary, the solicitors as a matter of practice should prepare the order in draft form for approval. Where counsel and the registrar fail to agree on the registrability of an order, the proper course of action is for the Master of Titles to refer the matter to the Chief Justice.

A copy of an order certified under the seal of the court is acceptable for registration in place of the orginal court order (see Queen's Bench Rule 336).

2. Court has Jurisdiction

The Court of Queen's Bench has almost unlimited power to make orders in relation to land (see section 12 of The Queen's Bench Act and section 86 and clause 87(b) of The Land Titles Act). However, from time to time there are submitted court orders from other provinces and the United States. The only kind of court order which can be registered in Saskatchewan from another jurisdiction is an order of a Superior Court exercising judicial power under a federal statute (see Watson, and Borins and Williams Canadian Civil Procedure, page 154 and Andler v. Duke, [1932] S.C.R. 734). An example of an extra provincial court order capable of registration in a Saskatchewan land titles office is a maintenance order issued under the Divorce Act.

3. Order Must be Directed to the Registrar

Section 226 of The Land Titles Act provides:

> 226 Any order of the court or a judge or the Master of Titles may be enforced in the same manner and by the same officials and process as orders are usually enforced under the procedure and practice of the court of Queen's Bench and shall be obeyed by every registrar when directed to him.
>
> (underlining added)

This section has been interpreted as placing a limit on the kind of order the registrar can accept. It must be directed to him by name or contain a direction to the registrar to do something or be intended for the registrar's action by clear implication: Hudson's Bay v. Goodwin (1915), 8 W.W.R. 1339 (Sask. M.T.). Again in Avelsgaard's Case, [1918] 2 W.W.R. 946 (Sask. M.T.), Milligan M.T. held that the registrar was acting according to the authority given to him in rejecting an order not directed to him. In Re Transfer of Part of Block 7, Townsite of Buchanan and Heier, [1949] 2 W.W.R. 174 (Sask. K.B.) the court supported the position that an order must be directed to the registrar.

The registrar will register some orders which do not meet this standard. However, as this is a discretionary matter the better practice is to prepare the draft order with the land titles expectations in mind.

Di Castri at page 5-100 doubts if it is necessary for an order to include a direction to the registrar where he is not a party to the proceedings. He cites Re Certain Lot New Westminster District (1961), 40 W.W.R. 182 (B.C.S.C.). However, in this case the order requested also provided that "such vesting constitutes a transmission within the meaning of The Land Registry Act". Arguably, such an order would not require a further direction to the registrar in Saskatchewan in that the

order could register as a transmission directly. Di Castri, page 5-100 gives credence to this comment with the following remarks:

> Perhaps the salient fact is that an order of court should be drawn so carefully and clearly that a direction to the registrar need not be delineated. He requires this standard of draftsmanship to be observed in the case of other instruments and documents presented for registration. Thus, he is able to distinguish routinely between a variey of instruments and other documents and to decide on the appropriate course of action.

4. Order Prohibiting any Transfer or Dealing

In Re Smith, [1983] 1 W.W.R. 382 (Sask. Q.B.) the court held that an order of the court directing the registrar not to register any transfer or dealing with land is not an instrument within the meaning of section 74 and, accordingly, took effect upon presentation to the registrar. The facts of the case were that the registrar received for registration a transfer of land. Later the same day a court order prohibiting any transfer was received for registration and assigned an instrument number. The court said at page 384:

> In the present case notice of my order was given to the registrar before a new title issued pursuant to the transfer. Accordingly, in my judgment it is of no moment that the transfer is entitled to priority in the sense of having been registered before my number and given an earlier serial number. There can be no further "dealing with the land" upon registration of the order. Clearly, that would involve the issue of a new title covering the land. It matters not that here a transfer was received and registered in the meantime . . . Shortly stated, any "dealing" with the land in the land titles office is effectively stayed (until further order) from the time the registrar is notified that the order has been made.

The effect of this case is that if a court order prohibiting the registrar from registering any instrument is received and brought to the attention of the registrar before an instrument or title is signed off, the registrar must not proceed without contacting the Master of Titles. It is probable that the instrument will be rejected as a result of the court order.

This type of court order may not be an instrument in the sense of being part of the priority structure in section 74 of The Land Titles Act, but it should be assigned an instrument number and entered into the instrument register for record keeping purposes.

5. Should an Order be Registered When the Appeal Period Has Not Expired

Unfortunately, there exists no case law which clearly determines the answer to this question. Section 15 of the Rules of the Court of Appeal provides that an appeal from a judgment, except in certain circumstances, operates as a stay. However, if an order is registered in the land titles office before the expiry of the appeal period or without notice of the appeal being brought to the attention of the registrar it is effective to change title, subject to a further order of the court reversing the process.

The courts have, of course, provided general principles to be followed by the registrar. The wide discretion given the registrar to accept or reject instruments must be exercised wisely (see Holigrocki v. Holigrocki (1967), 58 W.W.R. 368 (Man. Q.B.)) and according to the rules of reason and justice and the law. Moreover, as Di Castri has noted, at pages 5-92 and 5-93:

> . . . the registrar is not to be considered a mere machine for effecting registration . . . A registrar has a judicial duty to examine documentary and other evidence . .
>
> The registrar has a high and responsible duty to discharge and an obligation to see that the purpose of the Act is neither destroyed nor prejudicially affected . . .

At page 16-689 in his discussion of transmissions based on vesting orders, Di Castri is of the opinion (without the authority of case law) that:

> The question of whether or not the order may have been appealed, or will be appealed, is a proper inquiry by the registrar.

By contrast, the argument can be made that the registrar does not have the duty or discretion to refuse registration of an order on the basis that the appeal period has not expired. In Re International Harvester Co. of America and Ebbing (1909), 11 W.L.R. 29 (Sask. S.C.) it was expressed that "the question whether or not the registrar should accept a document for registration must be determined by the provisions of The Land Titles Act alone". This must be tempered by the cases referred to earlier confirming the registrar's authority to look beyond the general law.

The policy at the present time is to rely on the lawyer submitting the order to ensure no appeal has been or will be filed. Orders are registered according to the date received without regard to the appeal period. This should be contrasted with the Alberta system which has now legislated in this area (see section 180.1 of The Land Titles Act R.S.A. 1980, c.L-5).

B. Order Speaks From Day Made

An order has effect as of the day the order is taken out. This has two consequences. In the computation of time, eg. caveat continued for 60 days, the registrar will count the days from the date the order was signed, not from the date of registration.

The second consequence is that an order is considered in the context of the state of the title or the general record as of the day the order was signed. An order is not interpreted as dealing with instruments of which the court has no knowledge at the date of the order.

With this rule problems arise most often with respect to vesting orders and final orders of foreclosure dated prior to writs of execution being filed in the land titles office. Vesting orders and final orders usually direct the registrar to issue a certificate of title free and clear of all encumbrances. In both cases, subsection 180(5) of The Land Titles Act requires the registrar to check the general record, i.e. the registrar must check the general record whenever a certificate of title is "granted" which means in the context of The Land Titles Act "issued". If a writ of execution is filed subsequent to the date of issue of the final order, this fact must be drawn to the attention of the solicitor. It may necessitate another court application.

In re F.C. Richert Company Limited, [1935] 1 W.W.R. 345 (Alta. S.C.A.D.) between the time a judge's vesting order was made and its registration, a mechanics' lien was registered on the title. On registration of the judge's order, the registrar did not carry forward the mechanics' lien on the new title. At page 349 the learned judge states:

> When the new certificate of title issued in Gordon's name the mechanics' lien should have been shown thereon as an encumbrance. Apparently what happened was that the registrar's office treated the vesting order as speaking from the time of its presentation for registration instead of from the time when it was made. The vesting order did not purport to deal with anything registered after it was made.

See also Boulter-Waugh and Company, Limited v. Union Bank of Canada, [1919] 1 W.W.R. 1046 (S.C.C.) and Wasyl Holdings v. Allari, [1981] 31 A.R. 275 (Q.B.).

This is to be contrasted with the position taken with respect to an assignment in bankruptcy dated prior to writs of execution being filed in the land titles office. Writs of execution whenever registered never affect the interest of the trustee in bankruptcy or a transferee from the trustee in bankruptcy. The law assumes that the trustee will resolve all issues of priority. Persons who are

not satisfied with the trustee's decisions must resolve such issues when the trustee makes his final court application.

C. Orders in Mortgage Proceedings

1. Order of Foreclosure

If proceedings have been taken in respect of a mortgage and a final order for foreclosure is received by the land titles office, such final order is the registrar's authority for registering the document. The Rules of Court set out the form in which a final order of foreclosure of a mortgage should be issued. The part of such order of greatest interest to the registrar is the direction that the registrar cancel the existing certificate of title to the land and issue a new certificate of title in the name of the plaintiff, freed and discharged from all encumbrances except such as may be provided in the order. A copy of the final order form is contained in the Saskatchewan Rules of Court as Form 56.

2. Meaning of "Free and Clear of all Encumbrances"

The standard format for a foreclosure order, order confirming sale or vesting order is to direct the registrar to issue title "free and clear of all encumbrances". In most cases, the interpretation of this phrase is a relatively simple matter. However, when this order is read in the context of a certificate of title which is encumbered by an easement, a building restriction caveat, a true easement caveat, a mortgage of easement, an assignment of easement, or a party wall agreement, interpretation is more difficult. "Encumbrance" is defined in The Land Titles Act to mean:

> 2(l)(d) "encumbrance" means a charge on land created or effected for any purpose, inclusive of mortgages, mechanics' liens and executions against lands.

Based on this interpretation, none of the above are encumbrances within the meaning of the Act. Section 146 of The Land Titles Act, for example, speaks in terms of encumbrances, easements and caveats. This shows the legislative intent to not include easements and caveats under the rubric of "encumbrances".

In order to meet the solicitor's expectations, and to ensure protection of third party interests, the policy is to continue all of the above mentioned instruments unless the order specifically directs the registrar to issue the certificate of title free and clear of such instruments.

A possible argument against the above direction could come from a mortgagee with respect to a common law easement registered subsequent to the mortgage. The mortgagee could have his or her interest seriously affected by a subsequent common law easement. However, the registrar will not know in any given case whether the mortgagee has consented to the easement. The registrar must take each order on its face and look to the lawyer to ensure specific direction in the order with respect to potentially contentious instruments.

The position of the Land Titles System on this point must be contrasted with the position taken when a conditional letter accompanies an instrument asking for registration to be effected "clear of encumbrances". In this latter case, the registrar interprets encumbrances to mean endorsements. The reason for this is that with respect to conditional letters, the system feels it must protect the assurance fund against the possibility of misinterpreting the lawyer's instructions to our and the lawyer's loss.

3. Foreclosure of a Mortgage on a Condominium Unit

When a condominium plan is registered, the encumbrances which are endorsed on the certificate of title to the parcel at the time of registration of the plan are registered on the condominium plan. The certificates of title which are issued for the units remain subject to the interests on the condominium plan, but the interests are not endorsed on the certificates of title to the units. Following registration of the condominium plan a number of other instruments can be registered on the plan, eg. builders' liens, leases, caveats based on leases, easements, caveats based on easements, by-laws and the amendment of the by-laws. A lawyer proceeding to foreclose a mortgage on a certificate of title to the unit or on the plan must request either an uncertified or certified photocopy of the encumbrance sheet or part of the plan, as the case may be. When the order is prepared, the lawyer must decide which instruments on the plan are to be affected by the order. An order simply directing the registrar to cancel the certificate of title for a unit and to issue a new certificate of title free and clear of all encumbrances will not necessarily result in an amendment being made to the encumbrance sheet or the condominium plan. The registrar may interpret the order as referring to the title only. The order must direct the registrar to, in essence, partially discharge instruments as these affect a particular unit. If there is any doubt, the registrar may return the order for clarification and possible amendment.

4. Declaration under The Saskatchewan Farm Security Act

The Saskatchewan Farm Security Act, S.S. 1988, c.S-17.1 was proclaimed in force in part on June 24, 1988, and the balance was proclaimed in force September 1, 1988. The Saskatchewan Gazette, August 26, 1988 indicates which sections were proclaimed on each date. The Act repeals The Farm Land Security Act, The Saskatchewan Farm Ownership Act, and The Farm Security Act, but it consolidates many of the provisions of these three Acts into one.

Subsection 44(2) of The Saskatchewan Farm Security Act requires every final order of foreclosure of a mortgage to contain a declaration by the court that the land described in the order is or is not a homestead. "Mortgage" is defined in clause 2(1)(o) to mean a mortgage of farm land. "Farm land" is defined in clause 2(1)(f) to mean real property situated outside a city, town, village, hamlet or resort village exclusive of minerals. "Mortgage" is further defined both in clause 2(1)(o) and clause 43(b), but for the purposes of the registrar, the significant part of these definitions is that the rule in subsection 44(2) is restricted to rural land. Also, the rule applies to mortgages granted by the Farm Credit Corporation before June 24, 1988. "Homestead" is defined by clause 2(1)(h) to mean farm residence not exceeding 160 acres or one quarter section, whichever is greater.

If an order of foreclosure contains a declaration that certain land is a homestead and no other land is mentioned, it cannot be registered. If other lands are included, then the order can be registered as to the lands which are not a homestead and title issued only for such lands as are not a homestead (see subsection 44(5)). The endorsement on the registration stamp would state that it is registered only as to certain specified lands.

Subsections 44(4) and 44(8) provide that the court may make a further order declaring that land previously declared a homestead is not a homestead and upon presentation of the order and declaration the registrar may issue a certificate of title according to the tenor of the order. Fees will be charged on the value of the land.

Subsection 44(12) provides that the Farm Land Security Board may exclude any mortgage or class of mortgages from the Act. There is no authority for this type of order to be registered. Inquiries must be directed to the Board.

5. Judicial Sales - Orders Confirming Sale

Effective September 1, 1984 forms 57 and 58 enacted by the Court of Queen's Bench were repealed and replaced with two new forms (notice appeared in the June 19, 1984 Gazette). Of special significance is new form number 58, the order confirming sale,

which now specifically directs the registrar to cancel an existing certificate of title upon registration of the order. Prior to September 1, 1984, the direction to the registrar was contained in form number 57 (order nisi for sale) and required presentation of a "transfer duly confirmed" in order for a title to be cancelled and issued in the name of the purchaser. The questions for the registrar, with respect to the order nisi for sale, were who can execute the transfer and whether sections 185 to 188 of The Land Titles Act applied to the transfer. New forms 57 and 58 eliminate these problems. The registrar may now rely on the order confirming sale to give direction. The registrar does not need to refer to the order nisi for sale or an accompanying transfer. The order confirming sale is now the operative document. It is expected that only the order confirming sale will be presented to the registrar without any of the accompanying documentation. Orders which continue to follow the old form will be returned.

Sections 185 to 188 of the Act clearly no longer apply to this type of order. The new forms, coupled with the repeal of the third and fourth forms marked "GG" in The Land Titles Act by The Land Titles Amendment Act S.S. 1988, c.28, section 28, effective June 21, 1988, confirm Canadian Pacific Railway Company v. Mang (1908), 1 Sask. L.R. 219; 8 W.L.R. 774 (S.C.) which held that the words "sale under process of law" is a sale conducted under a writ of execution.

6. No need to ensure Compliance with Farm Debt Review Act

The Farm Debt Review Act, S.C. 1986, c.33 requires a secured creditor, which would include a mortgagee, to give a farmer written notice of intention to realize on any security and advise the farmer of his or her right to make an application under section 20 to the Farm Debt Review Board. The registrar need not ensure that the mortgagee has complied with this Act. MacLean, J. in Trobert v. The R.M. of Lomond No. 37, (Sask. Q.B.) Judicial Centre of Weyburn, February 24, 1987, Q.B. No. 22/87 concluded that a municipality must serve a notice on the owner under this Act before proceeding to acquire title for non-payment of taxes but went on to find there is no duty on the registrar to ensure compliance with the Farm Debt Review Act. The Court of Appeal subsequently overturned this decision insofar as the Act applies to municipalities (see 62 Sask. R. 311).

D. Vesting Orders

A frequent question asked is when will the Court of Queen's Bench grant a vesting order. The authority of the court to grant vesting orders is found in several statutes: The Queen's Bench Act, section 17, The Trustee Act, section 23, The Mentally Disordered Persons Act, section 28 and The Land Titles Act, clause 87(a). Generally speaking, a vesting order will not be granted in respect of title to land unless:

(1) the facts are not in dispute;

(2) no other reasonably convenient remedy is available; or

(3) the circumstances are exceptional and compliance with a recognized procedure would result in an injustice.

The cases showing the court's reluctance to grant a vesting order are Re Weber (1951), 2 W.W.R. (N.S.) 401 (Sask. Q.B.) and Re Ralph (1954), 12 W.W.R. (N.S.) 245 (Sask. C.A.) affirming 12 W.W.R. (N.S.) 40 (Sask Q.B.). Both of these cases dealt with an application to vest property of a deceased person who was a non-resident of Saskatchewan. The court has exercised its jurisdiction in Re McDougall (1953), 8 W.W.R. (N.S.) 645 (Sask. C.A.) where the taxing authority in question was no longer in existence and therefore could not make a claim to minerals that had previously been erroneously excluded from the applicant's certificate of title. Again in Re Ray (1952), 6 W.W.R. (N.S.) 282 (Sask. Q.B.) the court granted a vesting order on an ex parte motion by executors of a deceased purchaser for a vesting order where they had completed payments under the contract but could not receive a transfer because the corporate vendor had long since been dissolved. A similar case is Re Aasen (1982), 14 Sask. R. 15 (Sask. Q.B.).

It should be noted a vesting order attracts ad valorem fees (see clause 9(b) of The Land Titles Fees Regulations).

E. Orders Correcting Titles and Instruments

Section 86 of The Land Titles Act provides a general power for the court to correct titles and instruments:

> 86 In any proceeding respecting land or any transaction or contract relating thereto or any instrument, caveat, memorandum or entry affecting the same the judge may direct the registrar to cancel, correct, substitute or issue any duplicate certificate or make any memorandum or entry thereon or on the certificate of title and otherwise to do every act necessary to give effect to the decree or order.

This power is used extensively. Examples of the courts use of its power under section 86 are rectification of a transferee's title, the correction of value, the discharge of an instrument and the reinstatement of a mortgage discharged in error. A use of the court's power under this section which might not normally be considered is to grant a power of attorney. The registrar has no authority to correct instruments and the authority of the registrar is limited with respect to the power to correct a certificate of title.

F. Declaration as to Ownership

1. Mines and Minerals

Where a vesting order is requested as a result of an error in mines and minerals, it is submitted that a declaration of ownership must also be requested to ensure that the registrar will be able to issue a mineral certificate at some future date. The registration of a vesting order with no mention of the controversy giving rise to the application will make it uncertain in future years as to whether the court considered the alternative claim to the mines and minerals.

2. Where the Registered Owner is not a Legal Entity

Professor Mapp in his book Torrens' Elusive Title describes the problem in this way, at page 74:

> Assume that B is not a legal entity recognized under the general law of the jurisdiction, such as a fictious person, an unincorporated club, or a company not yet incorporated. A transfer from A to B would be void if B were not capable of receiving the interest under the general law, and this would leave the interest in A . . . However, under a Torrens system A's registered ownership would presumably have been cancelled. Who would own the interest? A solution must be supplied for this problem if a Torrens system is to function efficiently.

As yet there has been no legislative solution to this problem, but the solution which has been used in the past is for the court to declare who is the appropriate owner of the property. Examples of the kind of case where this problem arises are when the transferee is a partnership or a religious society with no trustees named but in both cases there is a reference to a corporate status or limited liability which caused the registrar to accept the instrument for registration in the first instance.

Chapter 35. Municipal Taxation

A. General

In 1988 The Tax Enforcement Amendment Act, 1988, S.S. 1988, c.57 was assented to on June 28, 1988 and proclaimed in force January 1, 1989. This Act changes the procedure to acquire the title to land for the non-payment of municipal taxes to allow a municipality to determine who to serve and the method of service and to take responsibility for the accuracy of the services made.

The principle of municipal tax enforcement is that when taxes are in arrears, a memorandum of tax lien may be endorsed on the certificate of title to the land. After the effluxion of a certain period of time and after the service of several notices, the municipality may have title to the land issued in its own name.

The detailed procedure for tax enforcement is explained in "A Manual of Tax Title Application Procedure", prepared by the Departments of Urban Affairs and Rural Development. A copy of this is to be found in each land titles office and, it is available from the above departments. Between July and November in each year, the treasurer of each municipality prepares a list of properties in respect of which taxes are in arrear. After approval by the municipality, this list is advertised in a local newspaper, and is posted in the municipality office and other conspicuous places. Not less than sixty days after the advertisement, this list of properties is sent to the land titles office in the form of a tax lien list (see Form A in the Schedule to The Tax Enforcement Act).

Advertising for municipal taxation purposes is no longer made in the Saskatchewan Gazette.

This chapter applies to municipal taxation under The Urban Municipalities Act, 1984, The Rural Municipality Act and The Northern Municipalities Act.

B. Philosophy of the Registrar's Involvement

With the 1988 changes in The Tax Enforcement Act the registrar's role in the title acquisition process must also change. The registrar no longer directs the process but merely ensures that the various instruments are registered in accordance with the forms to The Tax Enforcement Act and in compliance with those rules which mention the registrar by name or, by necessary implication, or which may affect the validity of a title or the registrar's records.

Sections 28 and 29 of The Tax Enforcement Act provide:

> 28 The registrar is not required to:
>
> (a) determine or inquire into the sufficiency of the services required by this Act; or
>
> (b) ascertain or inquire into:
>
> (i) the regularity of any aspect of the tax enforcement proceedings or of any proceedings having relation to the assessment of the land; or
>
> (ii) any aspect of the acquisition of title pursuant to this Act.
>
> 29 The registrar is not liable for any losses or damage sustained on account of any error made by a municipality in the acquisition of title pursuant to this Act.

These provisions significantly reduce the registrar's responsibility with respect to the acquisition of title for failure to pay municipal taxes.

C. The Tax Lien: Form A

1. Form and Execution of the Tax Lien

After the expiration of 60 days from the date of the advertisement in the local newspaper, the treasurer forwards to the registrar two copies of the tax lien in Form A to the Act (see subsection 10(1)). The registrar has no means of determining whether the 60 days have expired and has no responsibility in this area. Subsection 10(1) provides that the lien must be submitted not later than January 31 next following the expiration of the 60 days, but subsection 10(3) provides that "the registrar shall not accept for registration a tax lien except between September 1 of any year and on or before February 15 of the subsequent year". It is this latter section which is the direction to the registrar.

Form A is to be signed by the treasurer under the seal of the municipality (see Form A). Clause 2(j) defines treasurer to include the administrator and "a person to whom the powers and duties of the treasurer under this Act have been assigned by the municipality". The broad definition of treasurer and the presence of the seal mean that the registrar need not inquire into the position or authority of the person signing.

No fee is collected at the time of the registration of the tax lien. The fee is collected as part of either the withdrawal fee or the fees for the application of title.

2. Only one Tax Lien

Subsections 10(3) and (3.1) only allow a municipality to submit one tax lien which must be submitted between September 1 of any year and on or before February 15 of the subsequent year. This means, if there are errors with respect to particular land descriptions, and, if there is time for the lien to be resubmitted, the registrar should reject the tax lien to enable corrections to be made and the tax lien resubmitted.

3. Correcting the Tax Lien

Sometimes, there is insufficient time for a formal rejection. To prevent formal rejection of the tax lien, the registrar is governed by the following principles:

(1) where a quarter section is listed with no exceptions, but the certificate of title shows exceptions for roadways, churches, cemeteries or other tax exempt purposes, the list should be accepted and all certificates of title, other than portions prima facie exempt from taxation, should be endorsed with the lien;

(2) any land registered in the name of the Crown in right of Canada, or of Saskatchewan, or of any other province should be similarly deleted;

(3) unpatented lands should be deleted by the registrar as belonging to the Crown;

(4) land of which the Canada Mortgage and Housing Corporation is the registered owner should be deleted;

(5) if the description is in error and cannot be applied to the title and there is no time for the list to be corrected, the particular item should be deleted.

In each of the above cases, the reason for the registrar's action should be stated in the remarks column of the tax lien.

The registrar's authority to delete land from the tax lien is specifically provided by subsection 10(3.2).

In cases where the treasurer is located in the same city as the land titles office, the same result can be obtained by having the treasurer come into the office and make the necessary deletions or corrections and initial the same. The purpose, of course, is to get the list registered with the one effort when all the titles have been drawn.

4. Special Lands included in Tax Lien

The following lands should remain in the tax lien:

(1) lands registered in the name of the Soldier Settlement Board or the Director, the Veterans' Land Act are taxable (see subsection 5(7) of the Veterans' Land Act, R.S.C. 1970, c.V-4 which expressly states that land held by the Director is subject to taxation);

(2) land owned or mortgaged by the Farm Credit Corporation;

(3) parcels of land specifically described may be prima facie exempt but in fact taxable, i.e. churches no longer used for worship, and any of the properties exempt from taxation by the various municipal Acts while used for the particular purpose, and if specifically described, it shows the municipality's decision to tax the property.

A lien filed in error can always be removed by a withdrawal of the tax lien (see section 13). The registrar does not ask for evidence by affidavit or otherwise as to whether the land is taxable. It is sufficient to specifically describe the land in the lien.

The reason why the tax lien is allowed to charge Farm Credit Corporation land is because subsection 17(2) of the Farm Credit Act, R.S.S. 1985, c.F-2 provides:

> 17(2) The interest acquired by the Corporation, as mortgagee or upon the realization of any security for a loan under this Act, in any land assessed for taxes by a municipality or other taxing authority, shall, for the purpose of recourse to the land itself for realization of the taxes and for such purpose only, be deemed to be held by the Corporation otherwise than as an agent of Her Majesty in right of Canada.

This provision is limited to cases where the interest of the Corporation is that of mortgagee "or upon realization of any security for a loan" under that Act. The registrar will not normally know whether land registered in the name of the Corporation was acquired on realization of a security or in some other way. The registrar should therefore endorse the lien on the certificate of title, and leave the Corporation to assert its exemption, if subsection 18(2) does not apply.

Where the land is not registered in the name of the Corporation but merely subject to a mortgage in the Corporation's favour, it is clearly taxable.

The date of registration of the tax lien and the name of the municipality are recorded in the Tax Lien Record Book to ensure that only one tax lien is filed per year. This is the only permanent record of the list of tax liens filed by the municipalities and, it is necessary to maintain this book.

The duplicate lien is returned to the municipality and if deletions have been made by the registrar, it should be accompanied by a form letter which the treasurer is asked to sign, confirming the deletions. The registrar does not maintain a mechanism to ensure that the form is returned. It is sent to the municipality giving an opportunity to respond but the municipality need not respond if it chooses not to.

No notice of registration of the tax lien is sent to a registered owner (see subsection 10(6)).

D. Withdrawal of the Tax Lien: Form B

1. General

If the treasurer makes a mistake and withdraws the lien against the wrong land then nothing can be done to rectify the error. There is no statutory provision to assist the treasurer when this occurs, and the procedure of advertising and filing a lien with the next tax lien list would have to be followed. The municipality does not lose any taxes owing.

A withdrawal of tax lien should refer to one lien only.

2. Lien Improperly Filed: Section 13

Section 13 provides for the registration of a withdrawal of tax lien in Form B when a lien has been improperly filed. The registrar's procedure is to endorse on the certificate of title a memorandum that the lien has been withdrawn.

Form B requires the seal of the municipality and the signature of the treasurer, as mentioned above with respect to the execution of the tax lien. To withdraw a lien improperly filed requires a resolution of council but the resolution is not submitted with the withdrawal and does not concern the registrar.

The withdrawal fee includes the fee for the previous registration of the tax lien (see page 351 of this manual).

3. Land Redeemed: Section 19

Sections 19 and 20 provide a mechanism to redeem the land. When the land is redeemed subsection 19(1) provides for the registration of a withdrawal of tax lien in Form B. A withdrawal certificate sometimes covers land in different certificates of title, or in the names of different owners, but

the registrar cannot object since the lands may be assessed to the one owner.

4. Redemption as to Minerals

If the tax lien is registered against land including minerals, then the minerals can be redeemed by the owner separately from the rest of the land if the minerals are taxable under The Mineral Taxation Act and, whether or not the minerals have become severed in title since the registration of the tax lien. If the mineral tax has been paid by the municipality, the owner of the minerals can demand, on payment of the taxes so paid by the municipality, a withdrawal of the lien as to the minerals (see subsection 19(3) of The Tax Enforcement Act). If the municipality has not paid the mineral tax, then the lien can be withdrawn by a certificate from the Deputy Minister of Energy and Mines (see subsection 19(4)). Once a lien is filed against land with minerals included and the minerals are released from the lien, then the minerals cannot again be made subject to a municipal lien for taxes.

The Mineral Taxation Act does not apply to lands within a city, town or village or where the land has been subdivided into lots or blocks, or as a townsite, and a plan of survey has been registered (see subsection 26.1(9) of The Tax Enforcement Act), and in such cases minerals are acquired with the land at the time of title acquisition, if included in the same certificate of title. There is no right of separate redemption of the minerals if The Mineral Taxation Act does not apply.

As to when a municipality is entitled to become the registered owner of mines and minerals see page 362 of this manual.

E. Proceedings for Title: One Year to Expire

Subsection 22(1) of The Tax Enforcement Act provides that at any time after the expiration of one year from the date the tax lien was registered, the municipality may, by resolution, authorize proceedings to request title. A request for title is deemed to be an application to bring land under the Act or an application for transmission (see subsection 22(2)). There is no limitation to the time within which a request for title may be made (see subsection 22(3)).

F. Obtaining Information from the Registrar

1. For the Purposes of the Six Months' Notice

After the municipality authorizes proceedings for title to a parcel, the treasurer must requisition from the registrar a certified copy of the certificate of title and a "general record certificate with respect to all instruments that could be filed against the name of the registered owner, according to the discretion of the registrar" (see subsection 23(1) of The Tax

Enforcement Act) in order to give the owner notice of six months in length.

In order for the municipality to obtain a sufficiently detailed general record certificate, the municipality must state in its request that the information is for the purposes of title acquisition (see subsection 23(1)).

If the search request indicates that the general record certificate is for the purposes of title acquisition, the registrar is asked to exercise some discretion in the preparation of the certificate. The certificate will include everything from the "A" docket, i.e. writs of execution, maintenance orders, bankruptcy assignments or receiving orders, amalgamations, name changes and relief liens but only letters probate or letters of administration from the "B" and "C" dockets which pertain to the registered owner. To show that this certificate is different from others which the registrar issues, a line should be drawn through the sentence saying in essence, that the "B" and "C" dockets have not been searched, and the line should be initialled. Writs of execution or maintenance orders for which an affidavit of identity have been received should not be shown.

If the search request does not indicate the general record certificate is for the purposes of title acquisition, the municipality will receive an ordinary certificate which does not include a search of the "B" and "C" dockets, and may include a writ of execution or maintenance order for which an affidavit of identity has been received.

A copy of the general record certificate should be stapled to the title folder.

In preparing the general record certificate no attempt should be made to determine who should receive the notice. The municipality must make that determination. The registrar may issue one general record certificate covering the names of all registered owners of the land covered by the search request or the registrar may treat each property as being separate, and prepare the general record certificate as to the names of the registered owners of each particular parcel.

2. For the 30 Days' Notice

Subsection 24(1) of The Tax Enforcement Act provides that after the expiration of six months from the date of service of the last person served with the six months' notice, the treasurer is required to requisition from the registrar the same information as above: a certified copy of the certificate of title and a special general record certificate. The registrar may be able to add to the certificate that has been retained or there may be no additional entries. In either case, the registrar would sign, seal and date the general record certificate. The fees

would be charged for the general record certificate in the same manner as if a new certificate were to be issued. If the registrar is unable to use the general record certificate for whatever reason, it still can be a useful guide.

G. Request for Title where Assessed Value Greater than $500: Section 26.1

1. Provincial Mediation Board Consent Must be Filed First

Unless the request for title swears the assessed value of the land to be not more than $500, there must have been registered, or submitted with the request, a copy of the consent issued by the Provincial Mediation Board (see subsection 26.1(5)).

Subsection 7(1) of The Provincial Mediation Board Act provides that the 30 days' notice cannot be sent under section 24 of The Tax Enforcement Act except with the prior written consent of the Board given after the expiration of the period following the six months' notice. Section 11 of The Provincial Mediation Board Act provides that, immediately after the consent of the Board is given, the Board shall cause a copy of the consent to be forwarded to the registrar.

Since service of notices conducted by the municipality are no longer checked by the registrar or registered in the land titles office, the consent of the Board may be received for registration at any time prior to, or accompanied by, the request for title. The consent may be submitted by the municipality, but, if this occurs, the statement of fees is sent to the Provincial Mediation Board, to acknowledge receipt. The consent of the Board is endorsed on the certificate of title (see section 11 of The Provincial Mediation Board Act).

Note that section 24 of The Tax Enforcement Act does not apply to proceedings where the assessed value of land does not exceed $500 (see subsection 26(5)), and that no consent of the Board is required to be registered (see subsection 26(4)).

2. Provincial Mediation Board may Prohibit Request

Section 10 of The Provincial Mediation Board Act empowers the Board to order the prohibition of proceedings leading to the request for title. Section 11 allows the Board to register such an order and instructs the registrar to endorse it on the certificate of title affected.

Subsection 26.1(6) of The Tax Enforcement Act directs the registrar not to accept a request for title after the order prohibiting a request for title has been registered unless a consent of the Board dated subsequent to the prohibition order is registered.

3. Effect of Notice of Mental Infirmity

A notice of appointment of the Public Trustee or a private committee of the estate of a mentally disordered person has no effect on any proceedings under The Tax Enforcement Act (see subsection 35(4) of The Public Trustee Act and subsection 12(4) of The Mentally Disordered Persons Act). Both of these sections allow the registrar to accept for registration "a document registered pursuant to The Tax Enforcement Act" without the consent of the Public Trustee or committee, as the case may be.

4. Request for Title: Form A.7

The form for the request for title where the assessed value is more than $500 is Form A.7 to the Act with paragraphs 3, 4 and 5 deleted and the deletion initialled. The form should be executed under the seal of the municipality with one signature by an official of the municipality.

The land description on Form A.7 should follow the certificate of title except, in certain instances with respect to mines and minerals, which are discussed below. The request for title is accepted although title to the land is in the name of the municipality (see subsection 26.1(2)). This can occur where the municipality has leased the property.

Subsections 26.1(3) and (4) should be read together. The request shall include only land contained in one certificate of title except where:

(1) the land is held under different certificates belonging to the same registered owner; or

(2) the ownership of a parcel is composed of undivided interests covered by different certificates.

Subsection 26.1(4) states that a request for title may include any number of parcels according to the same land titles plan of survey. Note that subsection 26.1(3) is stated to be subject to subsection 26.1(4). Subsection 26.1(4) is the functional equivalent of subsection 58(5) of The Land Titles Act which ensures that one title does not issue for lands in more than one subdivision.

There is always an exception to the rule limiting requests to one plan for which the registrar should use discretion. There are cases where an improved property straddles the boundaries of two plans but is assessed to the one owner and the titles are in the same owner or owners. This request for title should be accepted, and separate titles should issue.

There is no onus on the registrar to summarily combine applications. There may be good reasons why separate

requests have been made. This is true where there is the same registered owner but different assessed owners. Separate assessed owners have separate rights of redemption.

5. Registrar to Issue Title

Assuming the above matters are dealt with, subsection 26.1(7) directs the registrar to issue title to the municipality and states that the title so issued "shall in every respect be of the same force and validity and have the same effect as any other certificate of title issued under The Land Titles Act".

6. Certain Endorsements Carried Forward

(a) General: Section 26.1(8)

When the registrar issues title to the municipality, subsection 26.1(8) extinguishes all rights except the interests of the Crown entitled to priority and interests described in section 27 of The Tax Enforcement Act.

This means that the titles researcher must check the general record for writs of execution held by the provincial or federal Crown as well as reviewing all interests held by the provincial or federal Crown that are endorsed on the certificate of title.

(b) Interests of the Crown

The Constitution Act, 1867 provides for the constitution of Canada and the division of legislative authority between the federal government and the provinces. Section 125 of this Act states that no lands or property belonging to Canada or any province are liable to taxation.

It has been held that section 125 only prohibits federal taxation of provincial property and provincial taxation of federal property. It does not prohibit a government from taxing its own property (see Re Taxation of University of Manitoba Lands, [1940] 1 D.L.R. 579 (Man. C.A.)). It follows that by virtue of this section, any land registered in the name of Canada or in the name of any province other than Saskatchewan but situated within Saskatchewan, is exempt from taxation imposed by the province unless the legislation provides to the contrary.

A provincial statute expressly binding the Crown does not necessarily bind the Crown in right of Canada; see R v. Star Kosher Sausage Manufacturing Company Limited et al., [1940] 3 W.W.R 127 (Man. K.B.) and the authorities cited therein. Also see W.C.B. v. A.G. Canada (1984), 57 B.C.L.R. 21 (S.C.) and Sternschein v. Reginam (1965), 51 W.W.R. 437 (Man. Q.B.).

The federal government may waive the immunity conferred by section 125 of the Constitution Act with respect to lands or agencies under its control. This has been done in the case of veterans' lands, (see subsection 5(7) of the Veterans' Land Act) and for Farm Credit Corporation mortgages (see subsection 17(2) of the Farm Credit Act). Lands of the Director and the Farm Credit Corporation are taxable.

There are some lands not in the name of the Crown but on which the Crown either directly, or through some statutory agency of the Crown, holds a mortgage. It was held in R. v. Quirt (1891), 19 S.C.R. 510, it does not make any difference whether the land was registered in the name of the Crown or whether the Crown held a beneficial interest therein as mortgagee, and that the land was not subject to tax proceedings under a provincial municipal Act. The Crown in that case held a mortgage on land in Ontario which land had been sold for taxes and the Supreme Court of Canada set the tax sale aside.

Section 275 of The Urban Municipality Act, 1984, section 310 of The Rural Municipalities Act and section 226 of The Northern Municipalities Act provide that the interest of the Crown in any property, including property held by any person in trust for the Crown, is exempt from taxation. This applies also to property held by a Crown corporation which is stated to be an agent of the Crown.

As regards the rights of the Crown under a writ of execution, such as a writ of execution issued by the Federal Court of Canada, it was at one time thought that such a writ gave priority to the lien on the land created by the writ of execution over municipal taxation, but adopting the reasoning in Bartlett v. Ousterhout, [1931] O.R. 358 (S.C.), the Deputy Attorney General expressed an opinion dated April 23, 1936, that if such writ of execution was filed prior to the tax lien, then the writ of execution must follow on the tax title, but if the writ of execution was filed subsequent to the tax lien on which the tax proceedings were based, then the tax title would issue clear of such lien but, of course, the execution creditor would be served with the usual notices. The reasoning in Bartlett v. Ousterhout, which was a case of a foreclosure of a mortgage in Ontario where the mortgage was prior to the income tax writ of execution, that the federal government when it took advantage of the provincial Execution Act, its writ of execution had no greater effect than any other writ of execution, but could only bind the land subject to any liens, charges, or equities against it at the time the writ was filed and that such writ was liable to foreclosure in the same manner as any other

subsequent encumbrance. Similarly, a writ of execution by the Crown in the right of the province would stand or fall on the same criterion. This case has been applied in Workman's Compensation Board v. Hilco Lumber Ltd. (1962), 40 W.W.R. (N.S.) 209 (B.C.C.A.).

To sum up, the following rules govern what interests held by the Crown are continued:

(1) all mortgages, leases, liens or other interests of the federal or provincial Crown, including those held by a Crown corporation, are carried forward except:

(i) an interest held by the Farm Credit Corporation; and

(ii) an interest held by the Director, Veterans' Land Act;

(2) all writs of execution in favour of the federal or provincial Crown are carried forward except a writ of execution filed prior to the tax lien.

(c) Section 27

Section 27 of The Tax Enforcement Act requires the registrar to carry forward the following endorsements:

(1) an easement or party wall agreement and any caveat registered in respect of an easement or party wall agreement;

(2) rights acquired under The Public Utilities Easements Act (including a mortgage of easement);

(3) a caveat registered in respect of a right of way or other easement issued or acquired pursuant to The Irrigation Districts Act, The Water Rights Act or The Water Corporation Act;

(4) a caveat registered by or on behalf of the Minister of Highways or Minister of Highways and Transportation or the Minister of Urban Affairs or the Minister of Rural Development or the Minister of Finance;

(5) a caveat registered by or on behalf of a municipal corporation in connection with a spur track rental agreement, easement or right of way.

It is also a long standing practice to carry forward building restriction caveats.

7. Mines and Minerals

Sometimes a tax lien will be registered against a certificate of title which includes mines and minerals or which is silent. Subsection 26.1(9) of The Tax Enforcement Act provides:

> 26.1(9) The municipality is not entitled to become the registered owner of mines and minerals pursuant to this section except where title to the mines and minerals has not been severed from the title to the surface of the land and where:
>
> (a) the land is within any city, town or village;
>
> (b) the land has been subdivided into lots or blocks, or as a townsite, and a plan of survey has been registered in the land titles office; or
>
> (c) the request for title is with respect to a tax lien registered before May 1, 1964 and the municipality certifies that the lien included taxes owing prior to January 1, 1945.

This means that where the land is within any city, town or village or has been subdivided into lots or blocks, and the title includes mines and minerals or, is silent, the land description on Form A.7 simply follows the title. The municipality receives whatever interest the registered owner had in the minerals.

Where land is other than as above, the land description must show the mines and minerals excepted or the request must be with respect to a tax lien registered before May 1, 1964 and be accompanied by a certificate that the lien included taxes owing prior to January 1, 1945.

The fact that a municipality has registered a tax lien under The Tax Enforcement Act does not preclude the Mineral Tax Administrator from making an application for foreclosure of the minerals under The Mineral Taxation Act.

H. Request for Title where Assessed Value Not More Than $500: Section 26

Where the land has an assessed value of not more than $500, a general record certificate is not required and service is only required to be made on the assessed owner (see subsection 26(1) of The Tax Enforcement Act). The reason why the legislation requires the municipality to obtain a certified copy of title is to ensure

that the municipality is fully aware of the state of the title, even though service is only made on the assessed owner and not the registered owner.

After expiry of the six months' notice, the municipality may submit a request in Form A.7 to the registrar. Form A.7 contains an affidavit of value which requires the assessed value of the land, according to the revised assessment roll of the municipality, in effect as of the date of the resolution authorizing proceedings to request title, to be inserted when the assessed value of the land is not more than $500. The registrar will not know when this value should be shown, but Form A.7 must either have the assessed value shown or the portion of the form where such value would be inserted must be deleted and initialled. For the purposes of section 26 requests for title, the municipality may decide to print the form without the additional clauses.

Furthermore, if the assessed value is not shown and no consent of the Provincial Mediation Board has been filed, the registrar will reject the request for title. Since the Board's consent is not required when the value of the land is not more than $500, the registrar's rejection may prompt an amendment to the request for title to reflect the additional clauses.

The prior procedure required a municipality, proceeding under section 26, to wait an additional six months before applying for title. No such special rule applies under the new procedure. All municipalities must wait the specified periods after registering the tax lien and after serving the appropriate notices, but this is no longer a matter of concern for the registrar.

In all respects other than with respect to the 30 days' notice, the affidavit of assessed value and the Provincial Mediation Board consent, the rules and procedures outlined on pages 357 to 362 apply also to the request for title where the assessed value is not more than $500.

I. No Postponement of Tax Lien

A postponement of a tax lien is not acceptable for registration. The priority of the tax lien is not based on registration under The Land Titles Act. Priority for tax liens is derived from The Tax Enforcement Act and it is a priority over all instruments except the ones set out in that Act. If the registrar accepted a postponement of a tax lien, it would have no effect and could lead to some major losses on behalf of someone who relied on the fact of the postponement.

J. Transition for The Tax Enforcement Amendment Act, 1988

The Tax Enforcement Amendment Act, 1988 contains no grace periods with respect to its effect. This means that it will apply to all tax lien proceedings, eg. liens or requests for title, submitted for registration after January 1, 1988.

K. The Agricultural Development and Adjustment Act: Assignment of the Tax Lien

Section 16 of this Act gives power to a municipality to assign a tax lien to the Minister of Agriculture, or to transfer to the Minister land acquired by tax proceedings.

When a lien is assigned to the Minister under this section, the Minister proceeds to serve the necessary notices, but the consent of the Provincial Mediation Board is not required, and the Minister may apply for title at any time within three years from the registration of the tax lien.

L. Taxing Authorities under The Northern Municipalities Act

1. General

The Northern Municipalities Act was proclaimed in force October 1, 1983 and replaced The Northern Administration Act. Under this latter Act the Minister conducted tax enforcement proceedings on behalf of all northern communities with the exception of the towns.

By virtue of the definition of municipality in The Tax Enforcement Act and the definition of northern municipality in The Northern Municipalities Act it is clear that there are now three taxing authorities under the latter Act:

(1) the town;

(2) the northern village;

(3) the Minister of Urban Affairs on behalf of the District.

It should be noted that a northern settlement and a northern hamlet are part of the District, but that only a northern hamlet can hold land (see subsection 119(5)), and neither can execute instruments for the purposes of The Tax Enforcement Act. Subsection 5(2) of The Northern Municipalities Act states that a northern settlement is not a municipal corporation.

Another body created by The Northern Municipalities Act is the Northern Revenue Sharing Trust Account. It is not a body corporate, cannot hold land and is not a taxing authority.

2. Taxation for a Northern Town

There are two towns: Creighton and La Ronge. There have been no changes with respect to the taxing powers of towns in the north. Subsection 8(5) of The Northern Municipalities Act provides that The Urban Municipalities Act applies to towns and

clearly the definition of "municipality" in The Tax Enforcement Act includes towns with no distinction between northern or other towns.

3. Taxation for a Northern Village

The Saskatchewan Gazette dated October 28, 1983, January 6, 1984 and April 19, 1984 indicate the establishment of ten northern villages. Prior to October 1, 1983 the northern villages were designated as local community authorities (also known as northern community areas) and the Minister conducted all tax enforcement proceedings for these entities. With the proclamation of The Northern Municipalities Act the northern village became responsibile for its own taxation. Subsection 191(1) provides that Part X dealing with assessment and taxation applies to a northern village. Section 297 of The Northern Municipalities Act was intended, especially in clauses (e) and (g) to ensure that actions, such as tax enforcement proceedings, would be continued without interruption by the newly created northern villages.

4. Taxation for the District

"District" is defined as follows:

> 2(i) "district" means the Northern Saskatchewan Administration District not including any area within the boundaries of a town or northern village.

With respect to the district, the Minister of Urban Affairs retains the authority to tax by virtue of subsection 191(2) which reads as follows:

> 191(2) A reference in this Part to a council, mayor or any municipal official is, in the case of the application of this Part to the district, a reference to the minister.

The Part referred to is Part X dealing with assessment and taxation.

The district encompasses northern settlements and northern hamlets which were previously known as local advisory committees or local advisory associations. Northern hamlets are bodies corporate (see subsection 6(2)) and can acquire land (see subsection 119(5)), but the taxation function for a northern hamlet is performed by the Minister. Although the transitional provisions (clauses 15(d) and (e) and subsection 295(3) and 296(2)) are not as clear as they might be, in light of the fact that the Act in subsection 191(2) is clear in its intent that the Minister is the taxing authority for the district, there can be no doubt that the Minister can do the tax work for northern hamlets and northern settlements.

Chapter 36. The Mineral Taxation Act, 1983

A. Applicable Act

The first Mineral Taxation Act in Saskatchewan was passed in 1945 and introduced the principle that municipal taxation was, with some exceptions discussed on page 362 of this manual, to be limited to the surface, leaving taxation of mineral interests in land to the then Department of Mineral Resources and now the Department of Energy and Mines.

The Mineral Taxation Act, 1983, S.S. 1983-84, c.M-17.1 was passed effective January 1, 1984. This Act provides for the payment of a mineral rights tax for the 1984 year and thereafter. If the mineral rights tax was not paid in 1984 or in any year thereafter then the new Act governs. For taxes not paid for 1983 and any previous year, The Mineral Taxation Act, R.S.S. 1978, M-17 governs. Although the forms are styled differently, the land titles procedure is the same.

B. Warning of Impending Forfeiture

Subsection 18(1) of the 1983 Act provides that if any mineral rights tax remains unpaid on May 31 in the year following the year in which the tax is due, the Mineral Rights Tax Administrator demands from the registrar a certified copy of the certificate of title to the minerals affected and a general record certificate pertaining to the registered owner. The registrar is required to:

(1) provide the information demanded;

(2) endorse on the certificate of title a memorandum in the prescribed form giving warning of impending forfeiture of that mineral right (see subsection 18(2)).

If there is more than one demand (i.e. because an oil company owns many parcels of land), only one general record certificate need be prepared for the registered owner.

Subsection 18(2) requires the memorandum to be in prescribed form. Since no form has been prescribed, the registrar endorses a memorandum similar to that used under the 1978 Act.

C. If Arrears Paid: Notice Cancelled

Subsection 18(7) provides if the arrears are paid in full and before the date specified in the notice, the Mineral Rights Tax Administrator shall forward to the registrar a request for cancellation of the memorandum of impending forfeiture. On receipt of the request, the registrar shall immediately cancel the memorandum.

D. Forfeiture

Subsection 18(8) provides that if the arrears remain unpaid following service of the notice, the Minister may forward to the registrar a copy of the notice together with an affidavit proving service. On receipt of the notice and affidavit, "the registrar shall issue to the Crown a certificate of title, free and clear of all endorsements, to the mineral right described in the notice" (see subsection 18(9)).

Although proof of service is provided with the notice, the registrar is not required to check the proof of service. Subsection 18(11) provides that the notice is not invalidated even though it was not received by the person who was intended to be served. Also, subsection 18(12) provides that the certificate of title is final and binding and not open to question in any court.

With respect to the certificate of title issued to the Crown, the registrar can include lands in more than one township and more than one hundred lots or lots in more than one subdivision (see subsection 18(10)). As this would be a major inconvenience for the land titles office, the Mineral Tax Administrator never asks for this to be done.

Although subsection 18(9) directs the registrar to issue the certificate of title free and clear of all encumbrances, this does not apply to any interest held by the Federal Crown or its agencies, with one exception.

Subsection 17(2) of the Farm Credit Act, R.S.C. 1985, c.F-2 provides:

> 17(2) The interest acquired by the Corporation, as mortgagee or upon the realization of any security for a loan under this Act, in any land assessed for taxes by a municipality or other taxing authority, shall, for the purpose of recourse to the land itself for realization of the taxes and for such purpose only, be deemed to be held by the Corporation otherwise than as an agent of Her Majesty in right of Canada.

Thus, a Farm Credit Corporation mortgage may be removed from a certificate of title issued to the Crown under The Mineral Taxation Act.

Subsection 191(2) of The Land Titles Act corresponds with subsection 18(9). Subsection 191(2) directs the registrar to issue the title to the Crown "free and clear of all endorsements, including endorsements in favour of Her Majesty the Queen in right of Saskatchewan".

Chapter 37. Statutory Vesting

A. General

Statutory vesting in the true sense involves a transmission i.e. it is a passing of title from one registered owner to another, other than by the transfer. Usually, today the legislation is drafted so as to avoid an application for transmission. However, each statute must be examined to determine whether or not an application for transmission is required.

Often special procedures will be required to determine the extent of the land conveyed by the statute.

Section 227 of The Land Titles Act provides, if no procedure is provided by a statute vesting property from one person to another, the registrar shall proceed as if he or she was presented with a transfer of the land involved.

B. Change of Ownership

1. The Royal Trust Corporation of Canada and The Montreal Trust Company of Canada

   The Royal Trust Corporation of Canada Act, S.S. 1978, c.69 and The Montreal Trust Company of Canada Act, S.S. 1980-81, c.105 have slightly different provisions but for land titles purposes are basically the same. In both cases part of the business of the old company (Montreal Trust Company or The Royal Trust Company) is assumed by the new company (Montreal Trust Company of Canada and Royal Trust Corporation of Canada). Thus, the old company is preserved either expressly or because the Act does not, for some reason, apply.

   The Royal Trust Corporation of Canada Act vests all trust property in Royal Trust Corporation of Canada (see subsection 2(1)). Section 3 of The Royal Trust Corporation of Canada Act states that the Act shall be treated as a legal and valid grant, conveyance or transfer of title from The Royal Trust Company to Royal Trust Corporation of Canada of any trust property subject to section 6.

   Subsection 2(1) of The Montreal Trust Company of Canada Act substitutes the name of Montreal Trust Company of Canada for Montreal Trust Company in every document in which Montreal Trust Company is named, essentially as trustee. Subsection 2(2) substitutes Montreal Trust Company of Canada for Montreal Trust Company in any trust document. Section 3 is the section which transfers all trust property to Montreal Trust Company of Canada, again, subject to section 6.

Since only part of the land of the old company is assumed by the new company, the legislature felt it was necessary to insert a section 7 in each Act providing that a particular type of declaration would be accepted as conclusive proof of the facts stated in the declaration. This declaration is needed to enable us to determine which instruments can be executed by the old and the new companies.

It is not readily apparent from section 7 in both Acts that property registered in the name of Royal Trust Corporation of Canada or Montreal Trust Company of Canada is not, in all cases, property "granted to, held by or vested" in that company, using the words from section 7 of each Act. However, those words must be read as meaning "property granted to, held by or vested" in the corporation by virtue of the Act, and when the new corporation becomes the owner of an interest, it would be defeating the intent of the legislation to insist on a declaration under section 7.

Thus, property may be held in either the old or new corporate names, but any subsequent dealing with the property is subject to the following rules:

(1) an instrument executed by the old company dealing with its own interest must contain a declaration either that the property is exempt under the Act (clause 7(b) or that the Act does not apply (clause 7(c));

(2) an instrument executed by the new company dealing with an interest registered in the name of the old company must contain a declaration that title to the property has been changed by section 3 or that the interest has vested in the new company by virtue of the Act (clause 8(a) declaration);

(3) an instrument executed by the new company dealing with an interest registered in the name of the new company does not require a declaration.

2. Land Bank

The Land Bank Repeal and Temporary Provisions Act, S.S. 1982-83, c.L-2.1 was effective April 1, 1983. Subsections 6(1) and 7(1) effect a statutory transfer of property registered in the name of The Saskatchewan Land Bank Commission to Her Majesty the Queen (Saskatchewan). Subsection 7(2) ensures that the land need not be transmitted to enable the Crown to deal with it simply by "citing the Act". The reference to this Act may be either in the instrument or the accompanying documentation.

3. Saskatchewan Housing Corporation

By subsection 4(5) of The Saskatchewan Housing Corporation Act the administration and control of all real property acquired by Her Majesty in right of Saskatchewan under The Housing and Urban

Renewal Act, 1966, were transferred to Saskatchewan Housing Corporation, but there was some doubt as to whether the wording in this section was sufficient to eliminate the need for a transmission of the land before Saskatchewan Housing Corporation could deal with the property.

With the reorganization of the Department of Northern Saskatchewan, it was decided that all real property to which The Northern Housing Regulations apply, should be transferred by statute to Saskatchewan Housing Corporation and at the same time it should be made clear that no transmission is required for Saskatchewan Housing Corporation to deal with land acquired under The Housing and Urban Renewal Act, 1966 or for land acquired by the corporation to which The Northern Housing Regulations apply.

Section 8 of The Department of Northern Saskatchewan Re-alignment Consequential Amendment Act, 1982, S.C. 1982-83, c.29, by adding subsection (6) to section 4 of The Saskatchewan Housing Corporation Act, R.S.S. 1978, c.S-24, transfers all real property to which The Northern Housing Regulations apply to the corporation. The new subsection 4(8) makes it clear that no transmission is required. This provision is extended to the land acquired by the corporation under The Housing and Urban Renewal Act, 1966.

One feature which distinguishes this statutory transfer from other transfers is that it is not possible to know whether the land in the name of Her Majesty is caught by the provisions of this Act. Usually with statutory transfers all land of one named company is transferred to another agency, but in this case, it is clear that not all land belonging to the Crown is transferred. Because of this distinguishing feature, Saskatchewan Housing Corporation is required to execute an affidavit to accompany each dealing with the land indicating that the land in question comes within the provisions of section 4 of The Saskatchewan Housing Corporation Act as amended by this Act. See subsection 4(9) which requires that "an affidavit of an official of the corporation stating that this section applies to the property described in the instrument" must accompany the instrument dealing with Crown property.

Section 8 of The Department of Northern Saskatchewan Re-alignment Consequential Amendment Act came into force November 1, 1982.

4. Saskatchewan Government Insurance

Effective January 1, 1984 certain real property registered in the name of the Saskatchewan Government Insurance was transferred to "Saskatchewan Government Insurance as administrator of the Saskatchewan Auto Fund" by

The Automobile Accident Insurance Amendment Act, 1983, S.S. 1983-84, c.1, subsections 99(4), (6), (7) and (8).

Subsection 99(1) provides that the Lieutenant Governor in Council shall make regulations describing the assets as at January 1, 1984 of S.G.I. which are to form assets of the Saskatchewan Government Insurance as administrator of the Saskatchewan Auto Fund.

The regulations so passed are The Saskatchewan Auto Fund Designation of Assets and Liabilities Regulations, Sask. Reg. A-35 Reg. 1 appearing in the October 5, 1984 gazette.

Clause 99(7)(b) provides that "it is sufficient to cite this Act and a regulation made pursuant to this section as effecting the grant, conveyance or transfer of title from Saskatchewan Government Insurance and the vesting of title in the insurer as administrator of the Fund".

Section 93 of the above mentioned Act also allows S.G.I. to acquire lands in the new name.

5. Agricultural Credit Corporation

Effective January 1, 1984, all land registered in the name of FarmStart is transferred to the Agricultural Credit Corporation of Saskatchewan by The Agricultural Credit Corporation of Saskatchewan Act, S.S. 1983-84, c.A-8.1, section 3. No transmission is required. On and after January 1, 1984 the Agricultural Credit Corporation of Saskatchewan may deal with Farm Start property simply by citing The Agricultural Credit Corporation of Saskatchewan Act. Since all of the land of one well known company was being transferred to one other company, it was decided that no instrument should be rejected for the failure to cite the Act.

6. Saskatchewan Water Corporation

Section 76 of The Water Corporation Act transfers the following to the corporation:

(a) the land of the Saskatchewan Water Supply Board;

(b) the land of any Department, Board, Commission, Corporation or Agency of the Government of Saskatchewan that may be designated by the Lieutenant Governor of Council.

The Order-in-Council is required to be registered and all affected certificates of title marked.

The corporation may deal with the land by citing the Act.

7. Canada Post Corporation

Effective July 15, 1982 the Canada Post Corporation assumed administration and control of certain property formerly owned by Her Majesty the Queen (Canada). The nature of the property was not described in the Canada Post Corporation Act, S.C. 1980-81-82-83, c.54. Instead, the Governor General in Council was given the authority to determine the property, the administration and control of which, had been transferred to the Crown corporation (see section 63). A certified true copy of federal Order-in-Council P.C. 1982-291 which lists the land designated by the Governor General in Council is filed in each office. When land currently in the name of Her Majesty the Queen (Canada) is to be dealt with by the Canada Post Corporation, the instrument to be registered will be executed by the Canada Post Corporation and accompanied by an affidavit of a solicitor with the Department of Justice identifying the land with the land in the Order-in-Council.

Although this provision is not as clear as the provisions which exist for statutory vesting without transmission passed by the provincial legislature, it would appear that only administration and control i.e. change of identity has occurred. Accordingly, no transmission is required.

C. Statutory Name Change

Sometimes it is difficult to determine whether a statutory transmission, without the need for an application for transmission, has occurred or whether a name change has been effected. However, the procedure for the registrar in each type of case is the same. The title may be amended or renewed, on request, or the new owner may deal with the property in the new name by merely citing the Act, or, in certain cases providing further evidence of ownership.

An example of a statutory name change is An Act to incorporate The Saskatchewan Conference Corporation of the Seventh-day Adventist Church, S.S. 1965, c.104.

D. Fees

Where a statutory transmission, without the need for an application, or a name change occurs, the statute usually directs that no fees will be paid.

However, if the new owner wishes the title renewed or amended regular fees for issuing a new title are required to be paid.

Chapter 38. Expropriation

A. The Expropriation Act, R.S.C. 1985, c.E-21

Section 4 of this Act provides that any interest in land required for a public work or purpose may be expropriated by Her Majesty the Queen (Canada). Land is defined by section 2 to include minerals.

The order of procedure is:

(1) a "Notice of Intention to Expropriate" plus a plan of the land affected (see subsection 5(2)) is submitted to the land titles office;

(2) 120 days later a "Notice of Confirmation of Expropriation" (see subsection 14(2) and section 15) is submitted.

"The Notice of Intention to Expropriate" is required by subsection 5(1) to contain the following information:

(1) a description of the land;

(2) the nature of the interest intended to be expropriated and whether such interest is intended to be subject to any existing interest in the land;

(3) an indication of the public work or other public purpose for which the interest is required; and

(4) a statement that it is intended that the interest be expropriated by the Her Majesty the Queen (Canada).

The registrar merely endorses the notice on the titles affected.

The "Notice of Confirmation" must be submitted within 120 days from "the day the notice was given", or else the expropriation is deemed to have been abandoned (see subsection 11(2)). If this notice is received for registration after 120 days has expired, it should be rejected and the notice of expropriation marked cancelled.

The "Notice of Confirmation" may confirm the expropriation as to less land than was outlined in the "Notice of Expropriation" in which case a second plan will be submitted for registration with the notice (see subsections 11(3) and 14(2)). The registrar will endorse the title to the land that is not required with the notice of cancellation.

Section 15 provides that upon registration of the notice "the interest confirmed to be expropriated becomes and is absolutely vested in the Crown". There is no direction to the registrar to cancel the certificate of title affected or to issue new titles in the name of Her Majesty the Queen (Canada).

The word 'vests' means that the ownership of the land is transferred to Her Majesty. (For an interpretation of the word 'vest' see Bank of Montreal v. Irvine & Feinstein et al., [1924] 2 W.W.R. 1047 at 1050 (Sask. C.A.)). Her Majesty the Queen in the Right of Canada thus becomes the real owner of the property expropriated, although no certificate of title has yet been issued to Her Majesty. If Her Majesty wishes a title under the Torrens System, the regular fees are payable to the land titles office in respect of issuing of the certificate of title (see Attorney General of Canada v. The Registrar of Titles of Vancouver Land Registration District, [1934] 3 W.W.R. 165 (B.C.C.A.)). If a title under the Torrens System is required by Her Majesty, the registrar is authorized to issue it by virtue of the provisions of section 227 of The Land Titles Act.

As a general rule, the federal government does not apply for title. The legal nature of these lands i.e. vested but no title issued, may be such that these lands may no longer form part of the Land Titles System, and may be granted again.

The following are federal statutes with expropriation powers:

Aeronautics Act
Broadcasting Act
Canadian National Railway Act
Dominion Water Power Act
Experimental Farm Stations Act
Expropriation Act
Government Railway Act
National Capital Act
National Parks Act
Northern Canada Power Commission Act
Radio Act
Teleglob Canada Act
Telesat Canada Act
Railway Act

The Expropriation Act applies to each of these statutes.

B. The Expropriation Procedure Act

This Act applies to all expropriations under provincial legislation except to expropriations by municipalities and school boards and to expropriations under The Saskatchewan Railway Act, The Crown Minerals Act and The Surface Rights Acquisition and Compensation Act (see subsection 3(3)).

1. Declaration of Expropriation: Section 10

The points to note about the declaration are:

(1) specific signing officers are set out in subsection 10(1);

(2) the land description may be by metes and bounds, if acceptable to the registrar, or a plan of survey (see subsection 10(2));

(3) the effect of the filing of the notice is to vest the land in the expropriating authority free of all charges and encumbrances (see subsection 11(1)), but no public utilities or pipelines easement is to be vested unless the declaration expressly states that such easement is thereby expropriated (see subsection 11(5)).

The last provision means that the registrar cancels the certificate of title and issues a new title in the name of the expropriating authority subject only to public utility and pipeline easements, and, of course, interests taken under federal authority.

Subsection 10(2) provides that "where the land expropriated cannot be sufficiently described without reference to a plan of survey, the expropriating authority shall file in the proper land titles office a plan of survey". A declaration of expropriation may refer for its land description to an existing plan of survey, but section 97 of The Land Titles Act provides that the only type of plan which should be used for expropriation is a 103 or 104 plan. Plans filed under sections 106 and 107 are not monumented on both sides. Accordingly, a declaration of expropriation may refer to a lot, block or parcel on a 103 or 104 plan.

The expropriating authority does not acquire mines and minerals unless the declaration expressly states that the expropriating authority is acquiring the mines and minerals, (see sections 16 to 19).

Where land is taken for a limited time or where a limited estate is taken, section 12 provides that the declaration must so state and that the vesting occurs accordingly. This means, for example, if the expropriating authority desires to expropriate an easement only, the memorandum on the certificate of title would so indicate.

Section 14 allows the expropriating authority to file an amended declaration either replacing or amending the original declaration. Subsections 14(2) and (3) deem the amended or new declaration to take effect from the day the original declaration was filed, but this does not affect land titles procedure. A registration number would be assigned in the usual way. A memorandum of endorsement is made on the certificate of title. The original declaration is not withdrawn.

2. Notice of Expropriation of Easement

Where the expropriating authority is the Crown or an agent of the Crown and desires to acquire an easement, section 21 of The Expropriation Procedure Act provides that subsection 11(1) of The Expropriation Procedure Act applies to allow the filing of a notice of expropriation of an easement. Subsection 11(2) requires the notice to include:

(1) a description of the parcel on which the possession or dedication occurred which must be acceptable to the registrar (see section 97 of The Land Titles Act);

(2) a general description of the nature and extent of the interest expropriated;

(3) an address to which enquiries may be directed.

Upon filing of the notice subsection 11(3) directs the registrar to "make a note of the filing thereof on the title to the land".

3. Notice of Possession or Dedication

Subsection 11(2) provides for the filing of a notice of possession or dedication. It must contain a land description acceptable to the registrar. No title is raised but the registrar makes "a note of filing" on the title affected (see subsection 11(3)). The expropriating authority is required to file the required declaration within one year of possession or declaration.

This procedure is used where the expropriating authority is by statute empowered, without title first being vested, to enter upon land (see subsection 11(2)).

4. Provincial Statutes with Expropriation Powers

The Agricultural Societies Act
The Cemeteries Act
The Crown Minerals Act
The Education Act
The Expropriation Act
The Expropriation Procedure Act
The Expropriation (Rehabilitiation Projects) Act
The Highways Act
The Irrigation Districts Act
The Municipal Expropriation Act
The Pipe Lines Act
The Planning and Development Act, 1983
The Power Corporation Act
The Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act
The Public Health Act

The Public Works Act
The Saskatchewan Railway Act
The Saskatchewan Telecommunications Act
The South Saskatchewan River Irrigation Act
The Surface Rights Acquisition and Compensation Act
The Union Hospital Act
The University of Regina Act
The University of Saskatchewan Act
The Wascana Centre Act
The Water Corporation Act
The Water Power Act
The Water Users Act

5. Fees

Where the expropriating authority is other than the Crown or agent of the Crown, fees are required to be paid including a fee based on the value of the land for the transmission.

C. Municipal Expropriation

Municipal expropriation is governed by The Municipal Expropriation Act.

1. Notice of Expropriation

The effect of subsection 14(3) and subsection 17(2) is that if the land required "consists of a whole lot, block or parcel shown on a plan of subdivision" already registered or the land is a quarter or full section, the municipality need only file:

(1) a notice under seal; and

(2) a certified copy of a resolution of the council approved by the minister.

The effect of filing the notice of expropriation and the certified copy of the resolution, in relation to an already registered plan, is the same as if the plan were being registerd at the time the registrar received the notice (see subsection 19(2)). Accordingly, subsection 18(1), which is the subsection dealing with the effect of registering a plan, applies. The effect is that land covered by the notice of expropriation "vests" in the municipality (see clause 18(1)(a)). Then clause 19(1)(b) directs the registrar to issue a certificate of title to the municipality for the land expropriated. If streets and lanes are required, the Minister of Highways may petition the Master of Titles to amend the plan.

A plan of subdivision under The Land Titles Act, technically speaking, is really only a 104 plan. It is the only true subdivision plan. However, since a 103 plan is used to grant

certificates of title, the practice is to allow a 103 plan to be used for the description on a notice of municipal expropriation. Also, section 16 of The Municipal Expropriation Act speaks of a 103 plan as a subdivision plan which indicates the intention of the legislature to include a 103 plan in the definition of a plan of subdivision. To allow a 103 plan to be used for a land description for a notice of municipal expropriation is consistent with section 97 of The Land Titles Act.

"Parcel" has been defined to mean "piece" or "tract" and to be given its plain meaning (see Re Williams and R. M. of St. Andrews (1968), 65 D.L.R. (2d) 203 (Man. Q.B.) and Lawson v. Lawson, [1959] 29 W.W.R. (N.S.) 43 (Alta. S.C.)). Thus, a bounded area on a plan of survey would be considered a parcel.

2. Plan of Expropriation

Where subsection 14(3) does not apply, a plan of survey must be prepared in conformity with The Land Titles Act except for the signature requirements (see subsection 16(1)). The plan is required to be signed by the mayor, overseer or reeve and clerk or secretary treasurer and sealed with the seal of the municipality (see subsection 16(2)).

Upon receipt of the plan, the registrar is directed to vest the land other than roads, streets, lanes or other public highways in the name of the municipality (see subsection 18(1)). The registrar issues title to the municipality based on this provision. The streets and lanes vest in the Crown. Titles are issued for roads and public highways.

3. Easements

"Land" is defined by clause 2(c) to include an easement, but no procedure is outlined for the taking of an easement. Whether a notice of expropriation is registered under subsection 17(2) or a plan of expropriation is registered under subsection 18(1), the expropriated land vests in the municipality and, the registrar is directed to issue a fee simple certificate of title for the interest acquired.

4. Municipal Boundaries

A municipality may expropriate land outside its boundaries (see Harwood v. Town of Canora, [1934] 2 W.W.R. 348 (Sask. C.A.); Morgan v. City of Prince Albert (1955), 15 W.W.R. (N.S.) 328 (Sask. C.A.); Klinger v. Friesen (1966), 57 W.W.R. 240, aff'd (1967), 58 W.W.R. 574 (Sask. C.A.)). However, a municipality may not expropriate from another expropriating authority (see Fort Garry R. M. v. Fort Garry School Division (1958), 16 D.L.R. (2d) 442 (Man. C.A.)).

PART VI - THE CONDOMINIUM PROPERTY ACT

Chapter 39. The Condominium Property Act

A. History and Purpose

In 1968, The Condominium Property Act was passed to allow, for the first time, separate ownership in residential high-rise complexes and shared rights over the areas and facilities used in common. Prior to 1968, it was possible to acquire absolute ownership in an individual suite or apartment, but extensive easement agreements had to be obtained in order to facilitate the ownership. The Condominium Property Act creates the necessary easements by statute.

In 1968, the Act was intended to cover the high-rise type of condominium development whereby a developer would build or acquire a high-rise, register it as a condominium, acquire legal title to each individual unit and then sell each unit. Sections 3 to 8 provide for this type of development.

The original Act was not intended to accommodate the kind of condominium development common today i.e. the row housing type, where groups of units are built, registered and sold in several distinct or succeeding phases. For this type of project, now called phased condominium development, the developer must sell all existing units built in one phase in order to finance the next stage of development of the project. The Act was amended in 1977 (S.S. 1976-77, c.13) and, due to problems with the amendments dealing with phased condominium development, again in 1978 (R.S.S. 1978, c.8 Supp.) to give the Minister of Consumer and Commercial Affairs, and now the Minister of Justice, certain specific duties, powers and responsibilities with respect to phased condominium development projects. Sections 9 to 10.6 allow and regulate phased condominium development projects.

Eventually there evolved in the marketplace certain schemes designed to circumvent the Act. Primarily these schemes involved the formation of a high-rise property owners' corporation, the sale of an existing apartment complex to that corporation, and the sale of shares in that corporation to the tenants or others who were prepared to buy them for investment purposes. Along with the shares came a seventy-five year lease of one of the units. These leases were called "proprietary leases". In 1981, the Act was amended to curb abuses generated by this type of scheme and to bring such schemes within the protection afforded by the Act (see section 8.1).

The present Act then consists of four logical divisions dealing with four separate topics. Sections 3 to 8 deal with single phase condominium development. Section 8.1 deals with high-rise property owners' corporation schemes and "proprietary leases". Sections 9 to 10.6 deal with multiphased condominium development projects. Sections 11 to 48 deal with the rights and duties of the developer, the condominium corporation and the individual units owners both generally and as between each other.

B. Overview of the Condominium Process

A developer who wishes to develop a condominium buys or constructs a building or buildings and then has prepared a condominium plan covering the land, the common facilities and the type, layout and number of units in existence or to be built under the plan. The developer must obtain municipal approval of the plan. Once approval is obtained and the units are ready for sale, the condominium plan is submitted to the Chief Surveyor for approval. The Chief Surveyor obtains the comments of the registrar with respect to the proposed plan and, if the plan complies with section 7 of the Act, the Chief Surveyor will approve the plan and send it directly to the land titles office. Upon registration of the plan, the registrar cancels the developer's original certificate of title and issues, in the developer's name, a separate certificate of title for each unit and the unit holder's share in the common property. The common property is that area of the parcel of land described in the condominium plan that is not included in a unit eg. common hallways, common recreational facilities and all of the remaining land in the parcel whether developed or not.

Upon registration of the plan, the condominium and a condominium corporation, which consists collectively of the new owners, come into legal existence (see subsection 16(1)). This corporation has only limited powers and cannot own land or receive title to any unit.

As soon as the first unit is sold, the developer's right to build any further units on vacant portions of the property ends. The units are then sold one by one and when the last is sold, the developer's final remaining interest in the property is gone. This describes single phase condominium development.

However, a developer may wish to engage in a stage by stage construction and development of the entire condominium parcel. He or she may wish to begin with the construction of one group of units with certain common facilities, sell these to finance the building of a second group of units on the same parcel adding additional facilities and then, in turn, sell these to finance construction of the next or final phase. This is called phased condominium development.

Under Saskatchewan's first Condominium Property Act the developer could not do this because as mentioned above, the sale of the first unit in the first stage of development ends the developer's right to build on the vacant portion of the parcel. Since 1977 the Act provides a means whereby the developer can reserve the right to continue to build new units and add new facilities. The developer may file a caveat in the land titles office, along with a sketch plan and a special declaration undertaking to provide the additional units and additional common facilities as shown in the sketch plan.

If the developer files a caveat, the developer has two years from the date of filing to construct the units or facilities shown in the sketch plan. The developer must within the same two years register a replacement condominium plan incorporating the changes accompanied by proof that the work undertaken in the declaration has been completed.

Where a developer finds he or she is unable or unwilling to complete the undertaking set out in the declaration within the two year period, there are provisions which allow an extension to be obtained. A replacement plan must be approved in the same way as the initial plan i.e. municipal approval and the Chief Surveyor's approval are required.

If the plan is not registered within the time allowed or extensions of the time, which are available to the developer upon application under the Act, the developer's losses can be substantial. Where the developer has induced first unit purchasers to buy units on the undertaking to provide further common facilities, the purchasers are protected by the bond which the developer must obtain and file with the Minister of Justice. If the replacement plan cannot be or is not registered within the time allowed, the developer's caveat lapses. All improvements done in the interim by the developer are lost to the developer and become part of the common property of the existing unit owners.

The Minister of Justice must approve the declaration and consent to the registration of the caveat before it is registered. Before being granted a consent, the developer is required to post a bond. If the replacement plan is not filed in time, the bond is forfeited and the caveat lapses.

The Act provides provisions dealing with how the common property can be dealt with and the termination and dissolution of a condominium corporation.

All of the above concepts are dealt with in more detail in this chapter.

C. Registration of a Condominium Plan

The Chief Surveyor is the first contact with the Land Titles System with respect to the creation of a condominium. Section 111 of The Land Titles Act requires every plan to have the approval of the Chief Surveyor of land titles offices before being presented for registration to a land titles office. As a matter of administration, as soon as the Chief Surveyor receives a plan for examination, a print copy of the plan is prepared and submitted to the land titles office for comments with respect to proper execution and attestation. Clause 7(1)(h) of the Act requires every plan to be "signed by the developer" but the Act is silent as to whether or not there must be a witness and an affidavit of attestation required under section 63 of The Land Titles Act. It has been decided that section 63 of The Land Titles Act overrides The Condominium Property Act. Attestation is required under section 63 of The Land Titles Act. Under The Condominium Property Act, the Chief Surveyor is checking to ensure that the plan complies with section 7 of the Act and sections 5 and 6 of the Regulations.

A question asked early in the development of the condominium concept was whether it was possible for two or more separate buildings to be the subject matter of a condominium plan.

Although it could be argued that the definition of condominium plan requires the "whole of the building ... to be divided into two or more units" and the definition of unit is not as clear as it might be, if possible, the legislation should be interpreted to enable the creation of a condominium. If one examines the legislative history of The Condominium Property Act in Saskatchewan, the intention of the legislature was to provide more flexibility. In 1968, when the Act was first passed, the definition of building was as follows:

> 2. (b) "building" or "buildings" means the building shown in a condominium plan.

In 1976-77, chapter 23, the concept of replacement plan legislation was first introduced and the definition of building remained unchanged. However, due to certain difficulties with the legislation providing for the replacement plan concept, these provisions were repealed in 1978 by Statutes of Saskatchewan, chapter 7 and the present definition of building was introduced as follows:

> 2. (d) "building" means one or more buildings situated on a parcel.

Thus, subsection 3(1) is interpreted as meaning buildings may be divided into units by the registration of a condominium plan in the manner provided by the Act and the Regulations.

Ultimately in examining a condominium plan for registration the registrar is checking that:

(1) the plan has been approved by the Chief Surveyor;

(2) an additional copy is provided for the purposes of allowing the Chief Surveyor to receive registration details;

(3) the heading on the plan refers to the certificate of title being cancelled;

(4) a certificate by a Saskatchewan land surveyor and a certificate of the clerk of the local authority appear on the first page of the plan (see subsection 8(1) of the Act and subsection 5(2) of the Regulations);

(5) proper execution by the registered owner (developer) of the parcel (see clause 7(1)(h));

(6) each sheet is endorsed in the upper right hand corner "sheet _____ of _____ sheets" and signed by the surveyor and clerk of the local authority who issued the certificates required by subsection 8(1).

The encumbrance sheet, because the registrar can add additional sheets, need not be signed by the surveyor and the clerk of the local authority. Neither certificate nor signature need be under seal.

The Act applies only with respect to land held in fee simple (see subsection 3(3) of the Act). Therefore, if land is held in leasehold it cannot be the subject matter of a condominium plan.

Subsection 3(3) also provides that the Act does not affect any interest in mines and minerals. In essence, the Act excepts mines and minerals from the plan. The mines and minerals are left behind.

Subsection 4(1) of the Act directs the registrar upon registration of a condominium plan to cancel the existing certificate of title and duplicate certificate of title to the parcel described in the plan except as to any mines and minerals, if any, in the certificate of title, and issue a separate certificate of title and duplicate certificate of title for each unit described in the plan to the registered owner named on the plan. This will normally be the developer of the condominium project. No reference to mines and minerals is made on the certificate of title to a unit.

The registrar lists the certificate of title numbers on the schedule of unit factors which forms part of the plan when registering a new condominium, but the certificate of title numbers are not updated when the units are transferred.

Prior to the introduction of phased condominium development in 1977, the land titles office would calculate the value on each certificate of title by dividing the value shown on the certificate of title cancelled by the total number of units. However, with the introduction of phased development, this practice which was questionable at the time became even more questionable. Now, when certificates of title are issued from a condominium plan, no value is shown.

Subsection 4(2) of the Act directs that no more than one unit shall be included in one certificate of title and no other land, except the owner's share in the common property, shall be included in a certificate of title with a unit.

With respect to interests i.e. endorsements on the certificate of title for the parcel, these are endorsed upon the condominium plan and not upon the certificates of title issued for the units (see subsection 4(1) of the Act).

D. Creation of the Condominium Register

Subsection 3(2) of the Act provides that a condominium plan shall be deemed upon registration to be embodied in the register. This is a reference to section 260 of The Land Titles Act which provides that when the words "the register" are used in any other Act, they are deemed to mean the certificate or certificates of title in a land titles office. The effect of this statement is in essence to treat the condominium plan as a certificate of title. This has special significance to the Land Titles System as will be demonstrated.

In addition to the reference to endorsing interests on the condominium plan contained in subsection 4(1), The Condominium Property Act and The Builders' Lien Act make other references to the registration of instruments on the condominium plan. These are as follows:

(1) a mechanics' lien - section 13 of The Mechanics' Lien Act;
(2) a builders' lien - subsection 32(3) of The Builders' Lien Act;
(3) a developer's caveat - section 9 of the Act;
(4) an extension granted to a developer with respect to a developer's caveat - section 10.1 of the Act;
(5) the repeal or amendment of by-laws - section 20 of the Act;
(6) a lease of the common property - subsection 27(7) of the Act;
(7) an easement or a restrictive covenant against the common property - section 29 of the Act;
(8) the notice of termination of condominium status - section 34 of the Act;
(9) a writ of execution against the corporation - section 46 of the Act;
(10) a personal property security notice affecting the common property - section 47 of the Act.

Of course, any instrument dealing with the above instruments would also have to be shown on the condominium plan i.e. a discharge, a postponement, an assignment. There are two major types of instruments which cannot be registered against the condominium plan except when they are already registered against the parcel out of which the plan has taken land, eg. a mortgage and a caveat.

Thus, it can be seen that the condominium plan is treated like a certificate of title with respect to the endorsement of certain types of instruments. This calls for special treatment by the Land Titles System of the condominium plan. Section 3 of the Regulations provides that the registrar shall keep a register of condominium plans and shall record therein particulars of all condominium plans registered in the office pursuant to the Act. Subsections 10(1) and (2) of the Regulations provide that the registrar may add additional sheets to the condominium plan upon which may be made any entry that is to be or may be made upon the plan itself and such extra sheets must be numbered and signed by the registrar. It was decided shortly after the Act came into effect that the registrar would keep a separate copy of the endorsement sheet with the plan and with the register created under section 3 above mentioned. In 1987 it was decided that the registrar should keep, in a master folder next to the title folders for the condominium units, the primary part of the plan referred to in subsection 3(2) of the Act as being "the register".

In addition, since the endorsement sheet is not yet microfilmed there is no means to index it in the event of loss. Unlike instruments which are microfilmed in numerical order according to the instrument numbers assigned thereto, when the endorsement sheet is affected it does not have a new instrument number assigned to it to enable it to be indexed. It is more like a certificate of title. At the present time, the only backup method for ensuring protection in case of fire or water damage is to send a photocopy of the endorsement sheet to the Master of Titles after every endorsement. Under circular dated December 17, 1986, the Master of Titles directed the offices to prepare the endorsement sheet according to a particular format.

In preparing an instrument for registration against a condominium plan the proper land description is to simply refer to the condominium plan number.

E. Multiphase Development

It may be that condominium development is to take place in stages i.e. a first group of units is built at the present time and later additional units and/or additional common facilities are completed on the same parcel of land comprised in the condominium plan. The Act makes provision for this type of phased development in sections 9 to 10.6 by providing that the developer may file a caveat against the plan i.e. the endorsement sheet (see section 9). This caveat reserves to the developer the right to construct additional units and additional common facilities which, when completed, will be part of the original condominium plan. There is no provision for allowing development of additional land to be part of the original plan, therefore, all land to be utilized must be part of the original condominium plan from the beginning.

A caveat may also be filed against a replacement plan in cases where there are more than two phases to the development process. However, the intention to file subsequent development caveats and the number of phases must be shown in the declaration accompanying the caveat filed against the original condominium plan (see subsection 9(2)).

In accepting a developer's caveat against either a condominium plan or replacement plan, the registrar must be satisfied that:

(1) the developer has not yet transferred title to any unit, if the caveat is filed against a condominium plan, or any additional unit, if the caveat is filed against a replacement plan (see clauses 9(1)(a) and (b));

(2) the caveat is accompanied by a declaration of the developer in Form 8 to the Regulations (see clause 9(3)(a) of the Act and section 21 of the Regulations);

(3) the caveat is accompanied by a certificate of acceptance granted by the Minister of Justice (see clause 9(3)(b)).

The Condominium Property Act gives responsibility for the Act to the Minister of Consumer and Commercial Affairs, but pursuant to an Order-in-Council under The Government Organization Act, S.S. 1987, c.9-5.1, this responsibility was transferred effective July 1, 1987 to the Minister of Justice.

Following registration of the caveat, the developer has two years to present for registration a replacement plan that:

(1) complies with sections 7 and 8 of the Act i.e. the requirements with respect to the registration of an original plan (see clause 9(4)(c)); and

(2) complies with the declaration filed with the developer's caveat or any amendment thereto;

(3) is endorsed with or accompanied by a certificate of approval of the corporation by resolution of the board (see clause 9(4)(d)).

The Chief Surveyor's Office reviews the replacement plan to ensure it is consistent with the declaration.

If a developer is unable to complete the undertaking, section 10.4 of the Act provides for an extension of time for completion of construction and registration of a replacement plan. In order to obtain an extension, the developer must obtain the approval of the corporation, by special resolution, and a certificate of acceptance granted by the Minister of Justice. The certificate of acceptance and a notice of amendment or a notice of extension, as the case may be, must be filed with the registrar (see sections 10 and 10.1).

The approval of the corporation may be proven by a certificate under the seal of the corporation signed by at least two members of the board.

Notice to the registrar must be filed before the expiry of time allowed for completion (see clause 10.1(1)(c)). Any extension of time must not exceed three years from the day on which the caveat was registered (see subsection 10.1(1)).

In the case of an amendment of a declaration, the notice must be filed within two years of the registration of the caveat (see section 10). No amendment to the declaration or extension of time takes effect until such notice has been endorsed upon the condominium plan by the registrar.

If the developer does not register the replacement plan within the time allowed, the caveat shall cease to have any effect, subject only to an order of the court either amending the declaration or extending the time for registration of the replacement plan under section 10.4 (see subsection 9(5)). Subsection 10.4(1) requires the application to be made within thirty days of the expiry of time. Thus, when neither a replacement plan is registered nor any application is made under that section, the caveat will lapse, and the registrar may mark it as being lapsed by the effluxion of time at the expiry of the thirty days. No diary system is maintained for this purpose. The caveat is lapsed when the endorsement sheet is examined for some other purpose.

Subsection 9(6) of the Act provides that sections 159 and 161 of The Land Titles Act do not apply to a caveat filed pursuant to section 9. This means that a person cannot request a registrar to send a notice to lapse a developer's caveat pursuant to section 159. The caveat remains in force until removed by the developer or by the expiry of the time, or by the registrar when registering the submitted replacement plan. The caveator is able, under section 158 of The Land Titles Act, to make an application to the court for an order removing the caveat.

If the replacement plan is submitted for registration before the caveat lapses, or pursuant to a court order under subsection 10.4(3), the registrar shall, if the replacement plan complies with the Act and the declaration, follow the procedure set out in clauses 10.3(1)(a) to (f):

(1) discharge the caveat and any notice endorsed under section 10 or 10.1 on the condominium plan;

(2) cancel the condominium plan;

(3) register the replacement plan, subject to any interests endorsed upon the condominium plan i.e. any interest endorsed against the condominium plan (and not discharged or withdrawn) must be endorsed against the replacement plan;

(4) cancel the certificates of title to the units described in the condominium plan and issue to the owners thereof certificates of title for the same units as described in the replacement plan subject to any interest affecting a particular unit that is endorsed on the cancelled certificate of title for that unit;

(5) issue to the developer certificates of title to the additional units free and clear of all interests that were endorsed on the certificates of title issued under the condominium plan (note that the reference number on the titles issued from the replacement plan is the number of the condominium plan or replacement plan that has been cancelled); and

(6) do any other thing that the registrar considers necessary or advisable to carry out the purposes of this section.

Subsection 10.3(2) deals with the situation of a delayed or lost duplicate certificate of title. Where the registrar does not have the duplicate certificate of title, the registrar retains possession of the duplicate of the new certificate of title issued under clause 10.3(1)(d) until such time as he or she receives the duplicate of the cancelled certificate of title or a statutory declaration in a form acceptable to the registrar, by the owner, or someone having knowledge of the facts, of the accidental loss or destruction of the duplicate. This means that the registrar does not require the duplicate certificates of title to be presented at the time of registration of the replacement plan. It is land titles practice to forward a letter to each of the registered owners advising them to forward their duplicates to the registrar.

Upon registration, the replacement plan is deemed to be the condominium plan and the name of the corporation is changed by substituting the number of the replacement plan for the number of the original condominium plan (see subsection 10.3(3)).

F. Dealing with the Condominium Unit

Subsection 4(3) of the Act provides that after a certificate of title to a unit has been issued, the unit comprised therein "may devolve or be transferred, leased, mortgaged, or otherwise dealt with in the same manner and form as any land held under The Land Titles Act and memoranda showing such dealings shall be made by the registrar upon the certificate of title of the unit affected".

The crossover of interests endorsed on the condominium plan and those endorsed on the unit title create certain questions with respect to the method of registering certain types of interests. The most frequently asked question is with respect to the partial discharge of a mortgage registered against the condominium plan. The rule is that any instrument dealing with an instrument registered on a condominium plan must be endorsed upon the condominium plan. Thus, if the developer's mortgage was on the certificate of title which was cancelled upon the registration of the condominium plan, any subsequent discharge of that mortgage even in relation to the newly created units must be endorsed upon the condominium plan. It cannot be registered against the individual units because there is no instrument to be discharged against that unit.

Similarly, if it is intended to postpone a mortgage registered on the plan to an interest registered on a certificate of title to a unit, the postponement is endorsed upon the condominium plan only.

There is no legislative authority to discharge a mortgage registered on the plan in relation to a unit. Similarly, there is no specific section allowing the registrar to postpone an instrument on the encumbrance sheet in favour of an instrument on the title. However, the purpose and intent of the legislation is to enable lenders and buyers to finance and purchase condominium property in the same way as they purchase other property. If a mortgagee cannot postpone a mortgage on the plan to an instrument on the title it would have a detrimental effect upon financing this type of property.

G. Enquiries with Respect to a Condominium Unit i.e. a Certified and Uncertified Copy and Preparing an Abstract

Subsection 6(1) of the Act provides that an owner to a unit holds the unit and a share in the common property subject to interests affecting the unit or the condominium plan. Although subsection 6(2) goes on to provide that the owner of a unit is liable only in respect of any such interest in proportion to the unit factor for his or her unit, the fact remains that those interests registered against a condominium unit are not the only interests which affect the ownership. This again calls for special treatment with respect to the condominium certificate of title. Effective January 1, 1987, the following changes in procedure were made with respect to providing a copy of a certificate of title for a condominium:

(1) if requested to provide a copy of a condominium unit title, the registrar will attach to the copy, a copy of the condominium endorsement sheet unless there has been a specific request not to provide it;

(2) an exception is made to the above rule where a series of unit titles are requested, as long as at least one endorsement sheet is provided;

(3) a certified copy of a unit title is made by stamping the certificate of title stamp on the copy and adding the words "and extract of condominium plan" after "certificate of title";

(4) if a copy of the endorsement sheet is requested alone, no copy of any of the unit titles is provided and a certified copy of the endorsement sheet is made by using the certificate of title stamp and striking out the words "certificate of title" and inserting "extract of condominium plan";

(5) the fee for an uncertified copy of the condominium unit title and endorsement sheet together is $3 in total and for a certified copy of the two together in total is $5.

In addition, whenever a search of a condominium title is conducted at the counter, the endorsement sheet is shown to the customer.

It is not possible to give an abstract of a condominium plan but from time to time it may be necessary for court purposes to have an abstract of one of the unit titles which would include the interests registered against the plan. In preparing an abstract of this nature, the endorsements which appear on the certificate of title are shown first. A line is added stating "THE TITLE TO THE WITHIN DESCRIBED PROPERTY IS ALSO SUBJECT TO THE FOLLOWING INSTRUMENTS WHICH APPEAR ON THE CONDOMINIUM PLAN, AFORESAID" and then the instruments affecting the unit, which are endorsed on the condominium plan, are shown. Of course, if there are no encumbrances or endorsements on the certificate of title to the unit the word "also" is dropped from the above notation.

Clause 22(1)(a) of The Land Titles Act, which was added by S.S. 1988, c.28 and effective June 21, 1988, provides for abstracts of surveyed lands for which no certificate of title has been granted. An abstract of a title for a condominium unit is provided because there is no certificate of title for the condominium plan.

H. Disposing of the Common Property

1. General

(a) When Common Property is Part of Unit

Subsection 5(2) of the Act provides that the common property is held by the owners of all the units as tenants in common in shares proportional to the unit factors for the respective units. Subsection 5(3) provides that except as provided in the Act, a share in the common property shall not be disposed of or become subject to any charge except as "appurtenant to the unit of an owner". This means that any disposition of or charge upon a unit operates to dispose of or charge the share in the common property. The owner of a unit cannot transfer or mortgage or otherwise deal with his or her share of the common property by itself but must transfer, mortgage or otherwise deal with the common property as part of the unit affected.

However, sections 27 to 29 of the Act provide for some specific dispositions of the common property. By unanimous resolution, a corporation may be directed to do one or more of the following:

(1) transfer the common property or any part thereof (see subsection 27(1));

(2) lease the common property or any part thereof (see subsection 27(1));

(3) accept a grant of easement or restrictive covenant benefitting the common property (see section 28);

(4) execute a grant of easement or restrictive covenant burdening the common property (see subsection 29(1)).

(b) Whether Homesteads Act Applies

As to whether The Homesteads Act applies to a disposition of the common property remains a moot point. Section 44 of the Act states that for the purposes of The Homestead Act, one unit, together with the owner's share in the common property, constitutes the homestead. One could argue that a transfer or other disposition by a corporation of the common property is effectively a disposition of part of each and every homestead in the condominium plan and requires compliance with The Homesteads Act. This opinion is bolstered by subsection 27(2) which shifts responsibility to the board to ensure that all persons, who have registered interests in the parcel or who have interests which have been notified to the corporation, have consented in writing to the transfer. The Act does not

give responsibility to the board with respect to "statutory interests". However, it is unlikely that the legislature intended that the corporation should be put to the trouble of obtaining homesteads compliance with respect to dispositions of the common property. It remains a question for the legislature or the courts.

(c) Planning Approval Required

If the transfer or lease affects a part only of the common property, a certificate of the approving authority under The Planning and Development Act will be required (see subsection 8(3) of The Condominium Property Act).

(d) Execution

The corporation executes, under seal, any instrument disposing of the common property or any plan of survey required.

2. Transfer of the Common Property

Subsection 27(4) provides that a registrar shall not register a transfer of the common property or any part thereof unless it has endorsed thereon or is accompanied by a certificate under the seal of the corporation stating:

(1) the requisite unanimous resolution to transfer the common property was properly passed;

(2) the transfer conforms with the terms of the resolution;

(3) all those having interests in the parcels have consented in writing to the release of such interests.

This certificate is conclusive proof of the facts stated therein for the purposes of the registrar (see clause 27(5)(b)), and shall be in Form 4 to the Regulations.

A description of the common property being transferred can only be based on a 103 plan of survey unless a whole lot or parcel from an existing plan of survey is affected. Whether a plan is used or not, a Master of Titles' order will be required to amend the condominium plan. The 103 plan may be filed, but, when the transfer is presented for registration, it must be accompanied by a Master of Titles' order amending the condominium plan to show the new boundaries. The transfer and the Master of Titles' order are each given a registration number. The transfer is assigned the lower registration number and is registered first. Both instruments are endorsed on the endorsement sheet. The old title is not revived. The new title issues from the transfer based on the new plan of survey.

Upon the registration of the transfer the registrar shall amend the condominium plan by deleting therefrom the common property comprised in the transfer (see clause 27(6)(a)), and issue to the transferee a certificate of title for the land transferred (see clause 27(6)(b)). No notification of the transfer is to be made on any other certificate of title in the register (see clause 27(6)(b)). There is no affect on any unit factor as the unit factors are only a reflection of the ratio of ownership among the owners.

A transfer of common property has the effect of transferring only the surface and not the mines and minerals as the mines and minerals are excepted out of the common property by subsection 3(3).

3. Lease of the Common Property

The certificate under the seal of the corporation that is required before a transfer of common property can be registered is also required for a lease of the common property. The certificate must be in the same form as that required for the transfer with the necessary changes (see subsection 27(4) of the Act and Form 4 to the Regulations). A lease of the common property can only be by plan of survey unless a whole lot or parcel from an existing plan of survey is affected.

The registrar registers the lease by noting it on the condominium plan (see subsection 27(7)). The endorsement on the condominium plan must clearly show that the instrument registered is a lease, include such other particulars as the registrar requires, and be signed by the registrar (see section 14 of the Regulations).

A leasehold title may be issued pursuant to section 119 of The Land Titles Act if the lease is for more than ten years.

4. Acceptance of a Grant or Easement or Restrictive Covenant Benefitting the Common Property

The Act contains no special provisions for the registration of such easement or covenant and is merely accepted by the corporation. The land description may be by metes and bounds if the description is acceptable to the registrar. The easement must be accompanied by a unanimous resolution. The registrar registers the easement or covenant by endorsing it on the condominium plan (see section 28).

5. Granting of an Easement or Restrictive Covenant Burdening the Common Property

When the easement or restrictive covenant burdens the common property a certificate in Form 6 of the Regulations under the seal of the corporation is required (see subsection 29(4)). This certificate is in favour of the registrar conclusive proof of the facts stated therein (see clause 29(5)(b)). The easement or covenant is noted on the condominium plan (see subsection 29(6)). The memorandum on the condominium plan must clearly state that the instrument registered is an easement or a restrictive covenant that burdens the common property, provide such other particulars as the registrar requires, and be signed by the registrar (see section 14 of the Regulations).

I. Redivision of a Condominium Unit

Section 11 provides for the redivision of units. Subsection 11(1) refers to an owner redividing "his unit", but subsection 11(5) contemplates an apportionment among the unit or units being divided. Thus, redivision can encompass more than one unit, i.e. the division of three units into two.

A condominium plan of redivision must comply with section 7 of The Condominium Property Act and sections 4 to 8 of the Regulations (see subsection 11(2)). Wherever the legislation refers to "condominium plan", it should be read as "condominium plan of redivision" and "parcel" should be read as "redivided unit" or "units".

The plan showing the division depicts the units being redivided and is detailed on the floor plan. There is no need to remeasure the building, but the surrounding blocks of the original plan are shown to enable one to get a proper relationship of the new plan to the original plan. If the original plan consisted of several buildings, then the building where the redivided unit is located should be identified and if there are several floors, to the building, a vertical section should be shown to identify the level where the redivided unit is located.

The signatures and certificates required for a condominium plan are required for a plan of redivision, but are revised to refer to the redivision. The registered owner of the units is the developer for the purposes of the Act.

Subsection 6(2) of the Regulations provides that the units are to "be numbered consecutively commencing with unit 1 and terminating with a unit numbered to correspond to the total number of units comprised in the parcel". As mentioned above "parcel" refers to, in this context, the redivided units. Therefore, if old unit 25 is being redivided into two new units, the units would be numbered 1 and 2.

Subsection 11(5) requires the apportionment of the unit factors of the units being redivided among the units being created. The schedule will, therefore, be in the normal form except that rather than having the sum of the unit factors equal to 10,000, the sum equals the unit factor of the original unit or, if more than one unit is included in the redivision, equal to the sum of the original unit factors.

Subsection 11(6) requires the registrar to amend the original registered plan in the manner prescribed by the Regulations. Section 9 of the Regulations provides as follows:

> 9. Before registering a condominium plan or redivision of a unit or units the Registrar shall:
>
> (a) endorse upon the original registered condominium plan a notification of the redivision; and
>
> (b) indicate on the diagram in the original registered condominium plan illustrating the unit or units being redivided that the unit or units are redivided.

Often the plan may not show the floor plan of the specific unit but shows only a typical floor plan. In such a situation the indication of the redivision of units can be shown on the sheet showing the schedule for unit factors.

Registration of the plan of redivision will result in the cancellation of the certificate of title for the units being redivided and the issuing of title for the units on the plan of redivision. The description to be used in the new title is:

> ...unit number 2 in Plan of Redivision Number 88CS32961 in Condominium Plan Number 79CS01296.

The reason for suggesting that the new certificate of title for a unit in a redivision plan should make reference to both the redivision and the original condominium plan numbers is to allow for greater ease of use. Subsection 11(3) provides:

> 11(3) Notwithstanding section 16, the owners of units in a condominium plan of redivision are not a corporation, but are, upon the date of registration of the plan of redivision, members of the corporation formed on registration of the original plan.

Describing the land as suggested above immediately informs a person making a search what corporation the particular unit is a part of without referring to the redivision plan.

Registration of the plan of redivision results in the cancellation of the titles to the original units. The units on the original plan are numbered consecutively and titles are filed likewise. To

eliminate needless searches for misfiled or lost titles the folders for the cancelled titles for redivided units are retained in their sequential spot and are cross referenced to the new plan of redivision. The titles to the redivision plan are filed in the normal fashion used for condominium plans.

The units on a redivision plan are a part of the corporation formed on registration of the original plan and as such are subject to the encumbrances and endorsements of the original plan. Rather than maintaining an additional encumbrance sheet for the plan of redivision, the encumbrance sheet for the plan of redivision states "refer to encumbrance sheet condominium plan ___(number)___". A search of a title for a unit on a redivision plan will include a search of the original condominium plan encumbrance sheet.

J. Administrator Acting in Place of the Condominium Corporation

Section 30 gives the court the power to appoint an administrator who has, to the exclusion of the board and the corporation, the powers and duties of the corporation or such of those powers and duties as the court orders. If the court order appointing the administrator is silent as to what powers and duties the administrator has, the administrator has all the powers and duties of the corporation (see sections 21 and 22).

Subsection 15(1) of the Regulations provides that a court order appointing the administrator may be endorsed upon a condominium plan and the endorsement shall contain such particulars as the registrar determines and be signed by the registrar.

Since the powers and duties of an administrator exist to the exclusion of the corporation, a check of the plan must be made to determine if such administrator has been appointed before a document executed by a condominium corporation is registered. If a document is submitted by an administrator acting in place of the corporation, the registrar must ensure that the court order appointing the administrator has been registered and also that the administrator has the power to execute the instrument presented for registration.

K. Foreclosure or Vesting Order Dealing with Condominium Ownership

A potential trap for the registrar and the practitioner is the interpretation of a foreclosure or vesting order that does not deal specifically with the endorsements on the condominium plan. For example, a solicitor obtains an order directing the registrar to cancel a unit and issue title to the mortgagee, free and clear of all encumbrances. The registrar must decide whether this is a direction to partially discharge interests against the plan that affect that unit. Following the decision to provide copies of the endorsement sheet with each copy of a title for a unit, it has been decided to construe a foreclosure order of a condominium unit

strictly. Unless the order directs the registrar to remove or partially discharge endorsements against the plan, the registrar deals only with the unit title.

L. Enforcing The Tax Enforcement Act Against a Condominium Unit

Clause 41(c) of the Act provides that all proceedings under The Tax Enforcement Act, including the registration and enforcement of liens and the obtaining of title to units for the nonpayment of arrears of taxes apply in respect of the owner of a unit as if the unit and share in the common property were land and improvements or a parcel within the meaning of The Tax Enforcement Act. Any reference in The Tax Enforcement Act to an owner or joint owner includes the owner of a unit and any reference in that Act to "land", "lot" or "parcel" is deemed to be a reference to the term "unit" as used in The Condominium Property Act.

M. The Builders' Lien Act

Section 32 of The Builders' Lien Act provides for the registration of builders' liens against certificates of title for units or, if the claim is against the common property, against the condominium plan. In essence, where services or materials are provided in respect of a lien of a unit, any such lien shall be registered pursuant to section 50 of The Builders' Lien Act against the certificate of title for that unit. Conversely, where services or materials are provided in respect of the common property, any lien that arises is to be registered pursuant to section 50 against the condominium plan and not against the certificate of title to any unit.

The registrar does not make the decision as to whether or not a lien affects either a unit or the common property. The registrar acts upon the land description provided in the builders' lien i.e. either the land description for the unit title or the condominium plan.

N. The Personal Property Security Act

Notices filed pursuant to section 54 of The Personal Property Security Act may be filed against the condominium plan or a unit title depending on who has requested the goods that have become fixtures. If the owner of a unit requested the goods, and they have been delivered and affixed to the building or parcel, the notice is to be filed against the title to the unit (see section 47 of The Condominium Property Act).

O. Writs of Execution

If the writ of execution is obtained against the name of the owner of a unit, the writ will be endorsed against the certificate of title to that unit if the owner attempts to deal with the unit. If the writ of execution is obtained against the name of the corporation, the writ may be registered against the condominium plan. Section 46 of The Condominium Property Act provides that where a judgment is obtained against a corporation a writ of execution in respect thereof may be registered against the condominium plan.

P. By-laws

Every condominium that comes into existence upon the registration of a condominium plan is regulated by by-laws (see subsection 21(1)). The by-laws are provided in schedules A and B of the Act and apply to the condominium until such time as the corporation passes its own by-laws (see subsection 20(2)).

Subsection 20(3) of the Act provides that the by-laws set forth in schedule A shall not be added to, amended or repealed except by unanimous resolution. Furthermore, subsection 20(4) provides that an addition to or amendment or repeal of any by-law set forth in the schedule has no effect until the corporation lodges a copy of the amendment or repeal with the registrar and until the registrar has made reference thereto on the plan. A notice of change of by-laws is provided for in section 12 of the Regulations and must be in Form 3. Only the seal of the condominium corporation is needed even if the units are all in the name of the developer. Subsection 12(2) of the Regulations provides that the endorsement on the plan of a memorandum of the amendment to the by-laws may contain such directions as the registrar directs and must be signed by the registrar.

There is no provision in the Act for an amendment to the by-laws set forth in schedule B to be lodged at a land titles office or for the registrar to note an amendment to schedule B on the condominium plan, and if an amendment to schedule B is submitted to a land titles office it will be rejected.

Q. Termination of Condominium Status

The condominium status of a building may be terminated in two ways:

(1) by unanimous resolution (see section 32); or

(2) by court order made on the application of the corporation, an owner or registered mortgagee of a unit (see subsections 33(1) and (2)).

Upon the condominium status being terminated by either of the above two methods, the corporation "shall forthwith" lodge with the registrar a notice of termination in Form 5 to the Regulations (see section 34 of the Act and section 16 of the Regulations).

Section 16 of the Regulations states that the registrar shall, upon receipt of notice of termination, endorse upon the plan a notification of the termination of the condominium status of the building and the vesting of the parcel in the owners. The registrar may determine the particulars and sign the endorsement.

Upon such notification of the termination of the condominium status, the owners of the units in the plan are entitled to the parcels as tenants in common in shares proportionate to the unit factors of the respective units (see subsection 34(2)). There is no authority for the registrar to issue a certificate of title to anyone, at this point.

When the condominium status is being terminated, the corporation may be directed by unanimous resolution to transfer the parcel or any part thereof (see subsection 35(1)). A transfer of this type may not be registered until:

(1) the notification of the termination of the condominium status has been endorsed on the plan; and

(2) the transfer has endorsed thereon or is accompanied by a certificate under the seal of the corporation stating that the resolution was properly passed and that all necessary consents have been obtained (see subsection 35(4)).

The certificate mentioned in the second requirement is to be in Form 6 of the Regulations (see section 17 of the Regulations). This certificate is, in favour of the registrar, conclusive proof of the facts stated therein (see clause 35(5)(b)). The transfer may be modified to say that the corporation is transferring the land pursuant to section 35 of The Condominium Property Act rather than that the corporation is the registered owner of the units. The land description for the transfer should be the description of the parcel that existed before registration of the condominium plan.

Subsection 35(4) and Form 6 raise the question whether the registrar must receive executed discharges and withdrawals for the registered interests or whether the registrar merely acts on Form 6 to issue title free and clear of all endorsements. The problem with the latter interpretation is that there will be occasions when the parties may wish an encumbrance, eg. a mortgage on all units, to carry forward. Certain types of public utility easements will be required to continue as well. Accordingly, the preferred approach is for the registrar to receive discharges for all encumbrances on the units which are intended to be discharged and to issue the new titles subject to all endorsements, except those for which there is received a proper discharge or withdrawal.

The registrar shall then cancel the certificates of title relating to the units and register the transfer by issuing to the transferee a certificate of title for the land transferred whether or not the registrar is in possession of the duplicate certificates of title for the units (see subsection 35(6)).

When a parcel is transferred by a corporation pursuant to section 35, the registrar shall enter upon the condominium plan a notification that the condominium plan has been cancelled.

If a transfer is not received, it is believed that no further plan may be registered. A court order may be required to facilitate dealing with the land by some or the majority of the unit holders.

The most common reason for terminating the status of a condominium plan is to, in essence, start the condominium process again to accommodate phased development. This has been done successfully on several occasions. The steps are as follows:

(1) the owners of the individual condominium units pass a unanimous resolution to terminate the condominium status of the building;

(2) in accordance with section 35 of the Act, the owners pass a unanimous resolution directing that the parcel be transferred, presumably to a developer;

(3) all of the necessary documents are submitted to the registrar, eg. discharges of instruments, notice of termination in Form 5, transfer with a certificate in Form 6 that the resolution was properly passed and that all necessary consents have been obtained;

(4) the registrar issues a title to the transferee for the parcel subject to any endorsements that have not been withdrawn (common ownership is being obtained in order to commence the procedure again);

(5) the new plan approved by the Chief Surveyor is registered and the registrar issues titles from this plan to the owner/developer of the parcel who will have signed the plan;

(6) the owner/developer transfers units to prior and new owners according to a previously agreed procedure;

(7) the registrar registers new instruments, if any.

PART VII - HOMESTEADS

Chapter 40. The History, Purpose and Effect of The Homesteads Act

A. History and Purpose

The common law gave to wives and husbands certain rights known as dower and curtesy respectively. Dower consisted of the right of a wife to a life interest, after the death of her husband, in one-third of the lands which he owned at any time during the marriage. Curtesy consisted of the right of a husband to a life estate, after the death of his wife, in all lands which she owned at anytime during the marriage, provided they had children who might have been capable of inheriting the lands. These rights did not prevent either spouse from disposing of land but a purchaser had to ensure that the rights were released if the purchaser did not want to be subject to the rights of the surviving spouse when the married person died.

The common law rules no longer apply in Saskatchewan (see section 18 of The Devolution of Real Property Act) but have been replaced by The Homesteads Act which grants homesteads rights to the wife only.

The first Act providing homesteads rights to wives was The Homesteads Act, S.S. 1915, c.29 which came into force June 24, 1915. The early cases indicated the purpose of the Act. In Nielsen v. Jenewein, [1924] 2 W.W.R. 696 (Sask. C.A.), Lamont, J. at page 699 says that the authorities seemed to him to establish:

(1) that the object of the legislation was to prevent the husband from alienating the homestead without the consent of his wife;

(2) that as against a non-consenting wife every transfer, agreement of sale, lease or other instrument intended to convey any interest in a homestead is invalid and void.

The most emphatic statement to the effect that noncompliance with the Act renders a transaction void and not merely voidable was made in Friess v. Imperial Oil Limited (1954), 12 W.W.R. (N.S.) 151 at 155 (Sask. C.A.).

In Lett v. Gettins, [1918] 3 W.W.R. 614 (Sask. C.A.), Haultain, C.J.S. said at page 615, "The object of the 1915 Act respecting homesteads was to protect "the rights" of a wife "in the homestead" of her husband, and for that purpose to prevent the encumbrancing or alienation of the homestead without her consent". At page 616, Haultain, C.J.S. also said "Looking at the main object of the Act--the protection of the wife's interest..." At page 617, Newlands, J.A. said "This Act was undoubtedly passed for the purpose

of preventing a married man from disposing of or mortgaging his homestead without the consent of his wife". At page 619, Elwood, J.A. said, "The Act in question, in my opinion, had for its object the protection of the wife's interest in the homestead of the husband".

In Audoorn v. Audoorn and Pelsma, [1935] 2 W.W.R. 364 (Sask. C.A.), Haultain, C.J.S. said, "The Homesteads Act does not give the wife any right in her husband's 'homestead' other than the right to prevent him from transferring, selling under agreement, leasing, mortgaging, transferring or conveying any interest in the homestead without her consent, which is to be given in the manner prescribed by the Act".

B. The Registrar's Role

The court has consistently found the purpose of the Act to be as stated above, but the court's attitude to the effect of noncompliance with the formalities of the Act has changed since Friess v. Imperial Oil Limited, mentioned above. John Williams in his article "The Homesteads Act: Reflections on its Purpose and Operation in Saskatchewan" (1983-84), 48 Sask. L. Rev. 57 reviews the cases dealing with the effect of noncompliance.

The leading Saskatchewan case on the effect of noncompliance is Toronto-Dominion Bank v. Gordon et al., [1981] 5 W.W.R. 235 (Sask. C.A.). Bayda, J.A. (as he then was) found that there are two elements to the wife's consent: (1) did the wife have a consenting state of mind; and (2) was the wife's consent expressed in compliance with the Act. This latter point was found to be made of four statutory requirements:

(1) the signature to the instrument (see subsection 3(1));

(2) the written declaration (see section 4);

(3) the examination and acknowledgment of the wife (see subsection 4(1));

(4) the certificate of the proper officer (see subsection 3(1) and section 5).

Bayda, J.A. then divided all previous cases into three broad categories:

(1) where there is no consenting mind or any compliance with the formalities the agreement is null and void;

(2) where there is a consenting mind but no formalities the agreement is valid but unenforceable until the formalities are complied with;

(3) where there is a consenting mind but only some of the formalities are met i.e. the signature and declaration, the agreement is valid and enforceable.

Since Toronto-Dominion Bank v. Gordon the Saskatchewan Court of Queen's Bench has had several occasions to apply the approach taken by Bayda, J.A. and to extend it. In Suppes et al. v. Wellings et al., [1982] 4 W.W.R. 106 (Sask. Q.B.) Batten, J. (as she then was) held to be valid and enforceable an agreement for sale which contained the wife's signature but no other compliance with the Act. The same result on almost identical facts (offer to purchase with wife's signature only) was achieved in McClenaghan v. Haley, [1983] 5 W.W.R. 586 (Sask. C.A.).

Notwithstanding that the court is taking a more liberal approach to the effect of noncompliance with the formalities, the registrar's role has not changed materially. The registrar cannot assume the authority of the court to determine whether the wife had a consenting mind. The registrar can only look to the formalities to determine whether the Act has been complied with.

It is unclear as to whether a wife who has been deprived of asserting her homesteads rights is entitled to claim on the assurance fund. In Tatko v. Liefke, [1947] 2 W.W.R. 1044 (Alta. S.C.A.D.) the widow was deprived of her life estate because her husband had transferred the homestead by swearing a false affidavit that he had no wife. The court allowed the widow to claim on the assurance fund by interpreting section 157 of the Alberta Land Titles Act (the same as Saskatchewan's section 197) as allowing "any person deprived of any land or encumbrance or of an estate or interest therein to claim against the fund". It is open to question whether in Saskatchewan the registrar would be found liable for accepting a properly completed instrument. No life estate is created in Saskatchewan. Note that Senstad v. Makus, [1978] 2 S.C.R. 44 at 56 has no application in that the Alberta Dower Act now specifically allows a nonconsenting wife to claim on the assurance fund.

To sum up, the registrar's duty is to see that a document shows that either:

(1) the requirements of section 3 to 6 of The Homesteads Act are complied with by furnishing a declaration (Form A) and certificate (Form B); or

(2) an affidavit in Form C or Form E accompanies the document; or

(3) evidence is provided to show that The Homesteads Act does not apply to the document eg. transfer to wife, court order, etc.

C. Meaning of Homestead

1. Definition from The Exemptions Act

Whether or not a particular property is or is not a homestead is not a question which the registrar has to decide. But it may be helpful to have a note of some of the law bearing on this point.

In The Homesteads Act the word 'homestead' means a homestead under the provisions of paragraphs 10 and 11 of subsection 2(1) of The Exemptions Act and (except for the purposes of section 12 of The Homesteads Act, i.e. when the owner dies) includes any property which has been such a homestead at any time. Turning to The Exemptions Act paragraph 10 of section 2 exempts the homestead provided the same is not more than 160 acres, and paragraph 11 exempts the house and buildings occupied by the execution debtor, and the lot on which the house and buildings stand to the extent of $32,000.00.

Section 44 of The Condominium Property Act provides that one unit, together with the owner's share in the common property, constitutes a homestead.

There is some confusion in the minds of some people as to what is meant by the word 'homestead'. The word 'homestead' has not the same meaning when the province was being settled as it has in The Exemptions Act or The Homesteads Act. (As to this confusion see Frey v. Herde et al., [1929] 3 W.W.R. 700 at 702 (Sask. K.B.). When the province was first being settled the word 'homestead' related entirely to the entry for land, and indicated that the person entering may obtain the land on the performance of certain conditions without payment of money or giving any similar consideration (see In re Claxton (1885-1893), 1 Terr. L.R. 282 (N.W.T.S.C.) and Re John Abell Engine and Machine Works Co. Ltd. v. Scott (1898-1907), 6 Terr. L.R. 302 (N.W.T.S.C.)). In the early years of this century 'homesteaders' were pouring into the North West Territories, and later the western provinces, to 'take up land' under the Dominion Lands Act, meaning of course, that when they performed their duties and did the necessary work on the land they would get the patent and title for the land. That is not what is meant by the word 'homestead' under The Homesteads Act and The Exemptions Act.

2. Occupancy Required at Some Point

In Re McEachen Estate, [1933] 2 W.W.R. 177 at 180 (Sask. K.B.), Taylor, J. referring to a homestead under The Exemptions Act, which is referred to in the definition under The Homesteads Act, quotes from an earlier case that it "is the homeplace, the place where the home is, the actual residence of the debtor and his family".

In Re Hetherington Interpleader (1910), 14 W.L.R. 529 (Sask. S.C.), Lamont, J. said that it has been laid down in a number of cases that the term 'homestead' within the meaning of the Exemption Ordinance (and this is the meaning in The Homesteads Act), means the homeplace, the house and the adjacent land occupied as a home, the actual residence of the debtor and his family, and quotes the authority for his statements. He went on to say at page 532 that:

> The leading and fundamental idea connected with a homestead is, unquestionably, associated with that of a place of residence for a family, where the independence and security of a home may be enjoyed without danger of loss, harassment or disturbance by reason of the improvidence of the head or any other member of the family, and that to quote Thomson on Homesteads and Exemptions, page 99 "it is a secure asylum, of which the family cannot be deprived by creditors". The purpose of the Exemption Ordinance being to preserve to the debtor and his family a home in which they can dwell without risk of disturbance from creditors, it follows that to secure the protection of the Ordinance there must be actual occupancy of the place as a home. But the term 'actual occupancy' is not to be understood as requiring constant personal presence, so as to make a man's residence his prison, or that a temporary absence enforced by some casualty or for the purposes of business or pleasure would constitute a ceasing to occupy or an abandonment of the homestead.

This definition of homestead has been applied in E.T. Marshall Co. Ltd. v. Fleming (1966), 55 W.W.R. 11 (Alta. Dist. Ct.) and Re Surkan (1981), 36 C.B.R. 211 (Alta. Q.B.).

3. When Land Becomes a Homestead

As to when land becomes a homestead, the law is not settled. Land does not become a homestead until it is occupied, but whether occupation by the husband without the wife is sufficient has not been decided. In Pendleton v. Pendleton, [1927] 2 W.W.R. 720 (Sask. K.B.) the court held that where a couple had not yet moved into a house, the land was not a homestead. It may be that a wife can assert rights against land on which she has never resided (see Deptuch v. Kurmey (1964), 48 W.W.R. 45 (Sask. Q.B.).

4. Can have more than One Homestead

The definition of homestead in The Exemptions Act and the case law interpreting the definition from The Exemptions Act apply to The Homesteads Act, but no other aspect of The Exemptions Act is applicable to The Homesteads Act. Whereas for the purposes of The Exemptions Act a person can have only one homestead (see

Purdy v. Colton (1908), 1 Sask. L.R. 288 (Sask. C.A.)). A woman can assert homestead rights with respect to several pieces of property and may place caveats on more than one piece of property. On this point see the definition of homestead in The Homesteads Act and Birkeland v. Birkeland, [1971] 5 W.W.R. 662 (Sask. Q.B.). Re Stevenson (1971), 16 C.B.R. (N.S.) 173 (Sask. Q.B.) which appears to be incorrectly decided in relation to The Exemptions Act.

5. Petroleum and Natural Gas Lease

Petroleum and natural gas rights are as a matter of law, land, and The Homesteads Act applies in connection with any transfer or other dealings in such rights (see Reddick v. Pearson and Pearson, [1948] 2 W.W.R. 1144 (Alta. S.C.)).

6. Applies to Lessee's Interest

It appears homestead rights can arise in connection with a leasehold interest (see Williams, "The Homesteads Act: Reflections on its Purpose and Operation in Saskatchewan" (1983-84) 48 Sask. Law Rev. 57 at 68 and 69). This means that homesteads compliance is required on a transfer or surrender of lease executed by a male owner to a person not his wife. The wife's rights would not be greater than the husband's and would terminate upon the expiry of the lease.

D. Application of the Act

1. Subsection 3(1)

Subsection 3(1) of The Homesteads Act is the main subsection of the Act. It reads as follows:

> 3(1) Every transfer, agreement for sale, lease or other instrument intended to convey or transfer an interest in a homestead to any person other than the wife of the owner, and every mortgage intended to charge a homestead in favour of any such person with the payment of a sum of money, shall be signed by the owner and his wife, if he has a wife who resides in Saskatchewan or has resided therein at any time since the marriage, and she shall appear before a judge of Her Majesty's Court of Queen's Bench for Saskatchewan, local registrar of the Court of Queen's Bench, registrar of land titles or their respective deputies, or a solicitor or justice of the peace or notary public and, upon being examined separate and apart from her husband, she shall acknowledge that she understands her rights in the homestead and signs the instrument of her own free will and consent and without compulsion on the part of her husband:

Provided, that where an examination is taken outside Saskatchewan it shall be taken and acknowledgment made before a person authorized to take affidavits under section 64 of The Land Titles Act;

Provided further that no person shall be qualified to take the acknowledgment of a wife under this section when such person, his employer, his partner or his clerk has prepared the document in question or is otherwise interested in the transaction involved.

2. Instruments Affected

Section 3 applies to every "transfer, agreement of sale, lease or other instrument intended to convey or transfer an interest in a homestead". Sometimes a question is raised as to whether an easement is covered by the section. An easement does not "transfer or convey" an interest in land, but it does grant or create an interest in land. Furthermore, in section 17 the legislature has provided that The Homesteads Act does not apply to statutory easements. This indicates the intention of the legislature that section 3 should be construed broadly so as to include common law easements i.e. if common law easements were not covered by the Act, statutory easements would not have to be excluded in section 17.

Section 17, which is dealt with in detail in chapter 25 on statutory easements, exempts from the application of the Act statutory easements for a particular purpose. If the easement is for a railway, or a gas, oil or water pipe line or is authorized by The Public Utilities Easements Act and the land is shown on a registered plan approved by the Board of Transport Commissioners for Canada, no further compliance with The Homesteads Act is necessary. Where the land is not shown on a registered plan approved by the Board of Transport Commissioners, there must be an affidavit of the right of way or purchasing agent of the transferee or grantee stating the purpose of the easement to bring the easement within subsection 17(3).

With respect to lands or easements acquired by SaskPower the following section appears in The Power Corporation Act:

29. The Homesteads Act and subsection 172(1) of The Land Titles Act do not apply to the acquisition of lands or easements by the corporation for the purposes of power lines or pipe lines whether under this Part or otherwise.

and similarly for SaskTel in The Saskatchewan Telecommunications Act:

26. The Homesteads Act and subsection 172(1) of The Land Titles Act do not apply to the acquisition of lands or easements by the corporation for the purposes of telecommunication lines whether under this Part or otherwise.

Thus, although an affidavit of the right-of-way or purchasing agent is required for public utilities easements an exception is made for SaskTel and SaskPower. No affidavit is required when the easement is granted to SaskTel or SaskPower.

Section 18 of The Homesteads Act provides that the Act does not apply to the acquisition of lands for a public highway.

3. Applies to Joint Owners

The Homesteads Act should be complied with whether there is only one registered owner or whether several parties are the registered owners, and whether the registered owners hold as joint tenants or tenants in common (see Imperial Life Assurance Co. v. Gordon, [1980] 1 W.W.R. 551 (Sask. Q.B.)). Reference can be made to the Manitoba Court of Appeal case, Wimmer v. Wimmer, [1947] 2 W.W.R. 249 (Man. C.A.). This case held that the fact property occupied by a husband and wife as their home is owned by them as joint tenants or tenants in common does not prevent it being a 'homestead' within the meaning of the Manitoba Dower Act. Although there is no dower in Saskatchewan (see section 18 of The Devolution of Real Property Act) yet the statement of law would be applicable to The Homesteads Act of Saskatchewan. In British Columbia the case of Evans v. Evans, [1950] 2 W.W.R. 717 (B.C.S.C.) was decided under the Wife's Protection Act. The headnote of this case, which was heard by Chief Justice Farris of the Supreme Court of British Columbia, states the Wife's Protection Act, R.S.B.C. 1948, c. 364 applies to the case where the title to the property was issued in the names of a wife and her husband as joint tenants. In his judgment the Chief Justice said, "It would seem clear to me that the object of this Act is not to confer any property rights in the wife but to protect her, without her consent, from their home being sold over her head". Chief Justice Farris quotes the case of Wimmer v. Wimmer above referred to and states that the Manitoba Act was, for the purpose of the judgment, nearly identical with the British Columbia's Wife's Protection Act. Other jurisdictions, notably Alberta, have changed those rules so that The Homesteads Act does not apply where land is held jointly.

4. Does not apply to Conveyance to Wife

As noted above, The Homesteads Act only affects conveyances to a "person other than the wife of the owner". However the registrar requires proof by affidavit of the transferor or grantor that the transferee or grantee is his wife.

A common type of transfer occurs when a husband owns the homestead absolutely. He wishes to convey the land to himself and his wife. Instead of the usual affidavit of the husband, the husband should swear an affidavit which states that "I am the transferor and one of the transferees mentioned herein and the other transferee is my wife".

There is no harm in the wife taking the declaration and the examination being made, but the above procedure can also be used.

5. Does not apply to Instruments executed by a Woman

The Act only provides protection to female spouses. This means that when a woman owns land she need not comply with The Homesteads Act.

Sometimes it happens that a woman owns land, but her given name could also be a man's name. To avoid a rejection asking for homesteads compliance, the affidavit of execution should state that the person is a woman.

E. Declaration (Form A) and Certificate (Form B)

1. Form

When land is a homestead a declaration in Form A (see section 4 and above) and a certificate by a proper official in Form B (see section 5) is required.

Both the declaration and the certificate contain a blank where the wife or examining officer inserts who the instrument is in favour of. Neither the prescribed form nor the Act indicate what information is required in the blank. It could be that what was intended is a choice of "transferee" or "mortgagee". It is preferable to set out the names of the transferees but "the transferees" is acceptable. The registrar does not for instance require names to be repeated in a mortgage. The names of the transferees in a homestead declaration certificate are not essential for the validity of the declaration or the certificate, but they are mainly included to identify the transfer for which the certificate was given.

The registrar will accept a transfer or instrument with the blank completed without actually noting to whom the interest has been conveyed. Some lawyers feel that the consent, in order to be an informed consent, must be to a named person. However, this is a matter for the examining officer and not the registrar.

2. Instrument must be signed by Owner and his Wife

When a man's wife has resided in Saskatchewan, she must sign the instrument conveying or transferring an interest in the homestead.

The wife's signature can be one of the following:

(1) a signature as a joint owner of the property;

(2) a signature as a co-covenantor of the property;

(3) if the wife is neither a co-owner nor a co-covenantor, she must still sign the instrument, subject to what is said below with respect to the declaration.

Section 4 of The Homesteads Act reads as follows:

> 4. (1) Every such transfer, agreement, lease, mortgage or other instrument shall contain or have annexed to or endorsed or written thereon a declaration by the wife (Form A) that she has executed the same for the purpose of relinquishing her rights in the homestead.
>
> (2) If the declaration is contained in the instrument, the wife's signature to the instrument shall be a sufficient signature to the declaration, as well as to the instrument.
>
> (3) The declaration may be endorsed or written at the end or on any part of or at any place on the instrument, and the wife's signature to the declaration shall be a sufficient signature to the said instrument as well as to the declaration.
>
> (4) If the declaration is annexed to the instrument, the wife shall sign both the declaration and the instrument.

This section contemplates that the declaration in Form A may be:

(1) contained in the instrument which would be where the declaration precedes the signature of the mortgagor;

(2) endorsed or written on the instrument or at the end of the instrument;

(3) annexed to the mortgage which would be where the declaration is attached to the mortgage on a detachable page or sheet of paper.

Aside from the requirements of registration, the instrument ends with the signature of the owner. The Homesteads Act requires additional formalities if the land is a homestead within the

meaning of the Act. The declaration, to come within the meaning of subsection 4(3), must appear as endorsed on the mortgage or at the end of it, but not on a separate sheet of paper. If the declaration is contained in the mortgage or appears at the end of the instrument beneath the signature of the mortgagor, then the wife's signature on the declaration is her signature to the mortgage as required under section 3 of the said Act.

If, however, the declaration of the wife appears on a separate sheet of paper annexed to the mortgage, then she must also sign the mortgage. This is expressly provided for in subsection 4(4) as above quoted. The reason for this rule is that a detachable declaration is capable of misuse. The wife's signature on the mortgage identifies the mortgage with the declaration on the annexed sheet of paper.

A form that has the declaration after the execution clause but on the same page as the execution clause would not be annexed to the instrument. If the declaration is not on the same page as the execution clause and is loose from the instrument or attached only by a staple then the wife must sign both the declaration and the instrument, in order to prevent misuse.

Reference may be made in this connection, to Reynolds v. Ackerman (1960), 32 W.W.R. 289 (Alta. S.C.), where McBride, J., of the Alberta Supreme Court, was dealing with similar provisions in the Alberta Dower Act. He said at page 294:

> The clear intent of the statute, I hold, is that the consent of a spouse must be placed upon the instrument, that is, on some sheet of the instrument and if this had been placed on the front of p. 1 of this Ex. No. 2 or somewhere on p. 2 or even on the back of p. 2, I would have held it was sufficient consent as placed or written on or at the end of the instrument, but, to my mind, and I so hold, this consent clearly falls within subsection (5) as being a consent annexed to the instrument, and the provision of the statute is equally imperative and equally clear that the spouse shall sign both the consent and the instrument.

To sum up, two signatures of the wife are required when the declaration is on a separate piece of paper either loose or stapled to the rest of the instrument where the piece of paper follows, in order, after the attestation clause.

It should be stressed that if the wife is a co-owner or co-covenantor her signature to the instrument is also a signature to the declaration, but her signature to the declaration is not sufficient to execute the instrument. The registrar does not reject an instrument prepared for the signature of a co-covenantor who is not actually mortgaging land

unless the document appears incomplete. (See chapter 18 on attestation.)

The Public Trustee or committee may sign a declaration on behalf of a mentally disordered person and be examined (see chapter 49 on Mental Infirmity).

A wife who is an infant may sign and be examined without the consent of the Public Trustee (see section 19 of The Homesteads Act).

3. Wife cannot grant Power of Attorney or General Release

The Homesteads Act does not make any provision for a wife to grant a Power of Attorney which would allow her attorney to sign the consent which is required to be taken by the wife of the owner of a homestead when such is required. If a transfer of a homestead is to be registered, it must comply with the requirements of The Homesteads Act and the wife must be examined in person and give the necessary consent as provided by that Act.

On a number of occasions in the past, documents have been submitted and enquiries made from land titles offices with reference to the possible registration of general releases signed by a wife so as to obviate the necessity of the wife signing and making the necessary acknowledgments in connection with various dealings in land. Any such document should be refused registration. See Re The Land Titles Act; Re Act Respecting Homesteads, [1918] 1 W.W.R. 504 (Sask. M.T.) where Milligan, M.T. said, "I would therefore direct the registrar that he should refuse to register the instrument such as it is purporting to be a general release of homestead rights on the part of the wife, excepting where accompanied by a judge's order." There is no provision in The Homesteads Act for registering a general release by a wife.

Sometimes a husband and wife are leaving the province to live in another country. The property cannot be sold before departure. It may not be possible to have an examination before a proper official in their new country. If a court order cannot be obtained, it may be that the parties will wish to convey the property to the wife before departure and for the wife to grant a power of attorney to transfer the land. The Homesteads Act does not require compliance for women.

4. Person qualified to conduct Examination

In the province the following persons may conduct the examination of the wife:

(1) a judge of the Court of Queen's Bench;

(2) a local registrar or deputy local registrar of the Court of Queen's Bench;

(3) a land titles registrar or assistant registrar;

(4) a solicitor;

(5) a justice of the peace;

(6) a notary public.

It is submitted that the above list does not include persons who, by virtue of another office, are ex officio a justice of the peace or a notary public (see R. v. Webb, [1943] 2 W.W.R. 239 (Sask. K.B.) for an analogous case.)

Sometimes a person who conducts the examination is also the witness. This is acceptable. There are only two rules with respect to who can take certificates or witness instruments. The first rule deals with homesteads. Subsection 3(1) of The Homesteads Act provides that no person shall be qualified to take the acknowledgment of a wife when such person, his employer, his partner or his clerk has prepared the document in question or is otherwise interested in the transaction involved. The second rule has to do with witnesses generally. That rule states that no person who is a party to an instrument can be a witness to that instrument. There is no rule that says the witness and the person taking The Homesteads Act certificate cannot be the same person.

The person must certify, in the certificate, that he or she is not interested in the transaction. Furthermore, it is the fact of the wife's acknowledgment and understanding which is the important aspect of the transaction. In Marcelin Savings and Credit Union Limited v. Verbonac et al., Sask. Q.B., Wedge, J. Feb. 19, 1988, Prince Albert Q.B. 1043 and 1045, (unreported), the person who took the examination was the credit union manager. Wedge, J. followed Toronto-Dominion Bank v. Gordon et al., [1981] 5 W.W.R. 235 (Sask. C.A.) and found that since the wife had signed the document and been examined, with the necessary documents completed, she could not raise lack of compliance to prevent a foreclosure order from issuing.

If the examination is taken outside Saskatchewan, it can only be taken before a person authorized to take affidavits under section 64 of The Land Titles Act which does not include a lawyer unless the lawyer is also a notary public acting under official seal.

F. Affidavit of the Husband: Form C

1. Form

The Homesteads Act does not apply to land that is not a homestead, nor to an owner who has not a wife (see Lett v. Gettins, [1918] 3 W.W.R. 614 (Sask. C.A.)). However, section 7 requires that no transfer, mortgage or other document may be registered, even if the land is not a homestead or the owner has not a wife, unless it is accompanied by an affidavit in Form C of the owner stating either that the land described in such instrument is not his homestead and has not been his homestead at any time, or that he has not a wife, or that his wife does not reside in Saskatchewan and has not resided therein at any time since the marriage.

Form C contains alternative clauses. The clauses which are not applicable should be deleted and initialed. As long as the statements in Form C to The Homesteads Act are not contradictory, it is acceptable for the owner (or his agent under Power of Attorney) to leave existing more than one statement. For example, it is possible for an owner to swear that no part of the land has been his homestead and that he has no wife. The "or" separating the two clauses need not be struck out to enable him to swear to these facts.

However, this does not mean that all of the clauses can stand together. It is not possible for an owner to swear that he has no wife or that his wife does not reside in Saskatchewan. Either of these two clauses must be struck from the affidavit.

The case of Deptuch v. Kurmey (1964), 48 W.W.R 45 (Sask. Q.B.) concerned the effect of a false affidavit by a transferor that the land had never been his homestead. It was held that the transfer was null and void since the land was in fact the transferor's homestead and his wife had not signed the declaration or been examined. However, the setting aside of the transfer as null and void is subject to the rights of a purchaser for value who relies on the certificate of title in good faith and without fraud.

The importance of the case from the point of view of the registrar of land titles is that it emphasizes the care that must be taken to ensure that The Homesteads Act is properly complied with. This is not always easy and, as will be seen from the remarks in this section, there are a number of traps which the unwary titles researcher may fall into.

2. Husband can grant Power of Attorney

Subsection 7(2) allows an agent acting under a power of attorney with respect to the execution of the instrument to swear the husband's affidavit.

3. Where Husband Mentally Disordered

The Public Trustee or committee may take the affidavit for a mentally disordered husband (see chapter 49 on Mental Infirmity).

G. Agreements for Sale

1. Wife's compliance on Agreement for Sale Sufficient for Transfer

Section 6 allows the registrar to register a transfer of land with no homesteads compliance by the owner if the transfer is accompanied by:

(1) an agreement for sale with the wife's declaration and examining officer's certificate;

(2) an affidavit identifying the transferee as the purchaser under the agreement for sale.

2. Husband's Affidavit on Agreement for Sale not Sufficient Compliance for Transfer

Notwithstanding the fact that an agreement for sale contains or has annexed thereto an affidavit of the male vendor complying with section 7 of The Homesteads Act eg. has no wife, when the transfer is submitted to the land titles office a new affidavit of the male transferor must be sworn to accompany the transfer. It is not possible to register the transfer without separate compliance with The Homesteads Act.

There is no judicial authority directly on point. The case of Royal Bank of Canada v. Harding (1986), 46 Sask. R. 94 (Q.B.) held that the applicable date for compliance with The Homesteads Act is the date of execution of the instrument and not the date of registration.

In that particular case, the court considered whether there was sufficient compliance with The Homesteads Act with respect to a mortgage which was executed at the time the male mortgagor was single and registered at a later time when the male mortgagor was married. The court held that the mortgage was valid. Another case, Lett v. Gettins, [1918] 3 W.W.R. 614 (Sask. C.A.) further discusses the significance of the swearing of the affidavit which would lead one to conclude that the time at which it is important for the affidavit to be sworn is the time of execution.

However, the decision in Lett v. Gettins makes a statement at page 618 that the only effect of the lack of an affidavit on an instrument is that it cannot be registered. Although the instrument may be perfectly valid for the purposes for which it is made, there may not be sufficient compliance to enable the instrument to be registered. In essence, what we are considering is whether or not subsection 7(1) allows the registrar to accept a transfer under the circumstances outlined.

In all probability, the purchaser under an agreement for sale could compel the transfer of the instrument notwithstanding that the male transferor has married in the interim, but there are two reasons why the land titles office cannot accept a transfer for which the homesteads compliance is contained in the agreement for sale only. First, the legislature has addressed the question of when there has been sufficient compliance on an agreement for sale where the wife has indicated that she has relinquished her rights and been examined under section 6 of The Homesteads Act. There is no legislative authority for the registrar to exercise his discretion to accept the instrument where the homesteads compliance is by the male. Secondly, in order to read the legislation as allowing the registration of the transfer with the agreement for sale it would be necessary to read in a requirement of an affidavit identifying the transferee as the purchaser under the agreement for sale as is provided in section 6. It is unlikely that the registrar has the authority to do this.

H. Transfer to Mortgagee or Back to Seller Needs Extra Certificate

A transfer to a person who holds a mortgage on the homestead or is a quitclaim deed in favour of the seller of the homestead requires an additional certificate (see subsection 5(2)). This certificate can only be taken by a practicing solicitor. There is no prescribed form for the certificate, but it must state that the solicitor "has explained to the wife, separate and apart from her husband, and that she understands the purpose and effect of the instrument".

Both certificates could be combined in one form, if properly drafted to cover every item, and executed by a practicing solicitor in Saskatchewan. However, the registrar would want to be very careful that every matter was covered in the certificate. As a general rule, there should be two certificates.

Subsection 5(2) provides that the first proviso to subsection 3(1) applies. This means that if the wife's examination is taken outside Saskatchewan, the list of persons who can take the examination includes a notary public but not a solicitor.

If a discharge of mortgage comes in with the transfer to the mortgagee, the registrar would not expect the extra form to be completed because after the discharge is registered, there is no

evidence of the fact that the land was being transferred to the mortgagee. This ends the obligations of the registrar. It may not have ended the obligation of the mortgagee or the mortgagee's solicitor.

I. Effect of Divorce

The law is that divorce ends all homestead rights (see Re Caveat 74Y06300, [1983] 1 W.W.R. 670 (Sask. Q.B.)). However, there is no mechanism provided in the legislation for the registrar to give effect to a decree absolute. The question of future homesteads compliance should be dealt with in the court order at the time of divorce.

If homesteads compliance has not been dealt with at the time of divorce, the issue will arise for the registrar in two ways:

(1) where a modification to the affidavit of the husband is attempted;

(2) where it is sought to discharge a homesteads caveat by presentation of the decree absolute.

The registrar has no authority to accept a modification to the husband's affidavit or to withdraw the homesteads caveat.

If the male registered owner remarries and has never resided on the property with his new wife, it should be possible for the male owner to swear that the land has never been his homestead at any time, since the affidavit is prepared in relation to his present circumstances, and assuming that it is the wife's occupancy which makes land a homestead. If the man and his new wife have resided on the property, the new wife can be examined.

In addition, the former wife may complete a relinquishment and homestead certificate referring to herself as the former wife but the registrar would still require homesteads compliance by the male. The point is that since the former wife has no rights on the homestead and if the husband has not resided on the property with his present wife it's not a homestead, therefore, the registrar cannot be found liable for accepting the former wife's declaration and accompanying certificate. It is merely surplus.

If a homesteads' caveat has been registered and not dealt with at the time of divorce, a further court order will be required under section 10 of the Act.

J. Homesteads on Death

Section 12 of The Homesteads Act provides that on the death of the male owner, the homestead vests in the personal representative. Thus, the personal representative stands in the shoes of the male owner and must comply with The Homesteads Act, unless, of course the personal representative is the widow of the male owner. The Act is complied with if one of the following occur:

(1) if it is proven by affidavit that the widow is the sole executrix or administratrix of the estate (it is not sufficient for the widow to state in the transfer clause that she is the widow);

(2) the personal representative must take the equivalent of the husband's affidavit which is Form E;

(3) the transfer is accompanied by an affidavit of the transferor that the transferee is the widow of the deceased;

(4) the widow signs a declaration in Form A and the examining officer signs a certificate in Form B.

Where the widow signs a declaration, it reads "I _____, widow of _____, deceased, do hereby declare etc.".

In such a case, the certificate in Form B should read, "I judge of the Court of Queen's Bench of _____, (or as the case may be) do hereby certify that I have examined _____, widow of _____, deceased, the former owner of the within described lands and now registered in the name of _____ as executors (or administrators as the case may be) separate and apart from the said _____, and she acknowledges to me that she signed the same of her own free will and consent and without any compulsion on the part of the said _____, for the purposes of relinquishing her rights etc.".

In cases where the widow is one of several personal representatives, she should sign the declaration and be examined separate and apart from the other personal representatives and a certificate furnished to that effect, unless the case can be dealt with by affidavit in Form E.

The Homesteads Act deals purely with the rights of the wife or widow to veto transactions in regard to the homestead: Audoorn v. Audoorn and Pelsma, [1935] 2 W.W.R. 362 (Sask. C.A.). The registrar is only concerned to see that such instruments are accompanied by one of the affidavits in the forms set forth in the Act to show that the declaration by the wife or widow in Form A and the certificate in Form B is not required, and failing an affidavit in such statutory form, then in the absence of proof that the transfer is to the wife or widow, then such transfer must be accompanied by the declaration

and certificate. The purpose of section 12 is that where the personal representative, other than the widow, cannot bring the transaction under any of the four alternatives provided for in Form E, then the declaration and certificate with the necessary changes, must be provided. If the widow is the sole executrix of her husband's estate and it is so proven, then that ends the enquiry for the reason that her husband having died there is no one that she could be examined separate and apart from. However, if she is not the executrix or if she is only one of the executors, then her co-executors or co-administrators become, for the purpose of section 12, her statutory husband or husbands and the examination is separate and apart from them, the purpose being to provide her with the safeguard of an independent examination as to her consent as against the statutory husband or husbands as provided for in the section. This statutory husband may even be a trust company. It is not enough to say that being one of the personal representatives of her husband's estate that the examination is not required. All executors and administrators are joint tenants and although treated in law as one owner, yet as a joint tenant, the wife has an interest in the property as owner and she also has her rights of veto under The Homesteads Act: Wimmer v. Wimmer, [1947] 2 W.W.R. 249 (Man. C.A.). The rights of the widow are particularly dealt with by McNiven, J., (as he then was) in Re Wenet Estate, [1949] 2 W.W.R. 85 (Sask. K.B.). At page 92 he refers to Crichton v. Zelenitsky, [1946] 2 W.W.R. 209 (Man. C.A.), wherein Bergman, J., of the Manitoba Court of Appeal sets forth an exhaustive study of dower rights and history of Western Canadian statutes on the rights of the wife and widow and children in the homestead.

Section 13 of The Homesteads Act gives power to a judge of the Court of Queen's Bench to dispense with the signature and acknowledgment of the widow and section 14 thereof gives curative powers to a judge of the same court not only to cure defects in certificates required under section 5 or affidavits required under sections 7 or 12, but also to dispense with them, but of course, these powers must be exercised prior to the registration of the instrument and not afterwards, and such orders would have to accompany the defective instrument tendered for registration.

K. Court Orders

Several sections of The Homesteads Act confer authority on the Court of Queen's Bench with respect to the Act, and which may be filed in a land title office:

(1) where the wife is a mentally disordered person or is living apart from her husband under circumstances disentitling her to alimony the court may dispense with the signature and acknowledgment of the wife (see subsection 3(2));

(2) the court may direct that a homesteads caveat lapse, and when such an order has been filed, no further homesteads caveat can be filed unless the caveat is accompanied by a judge's order (see section 10);

(3) the court may dispense with the signature and acknowledgment of the widow (see section 13);

(4) the court may remedy defects in a certificate or affidavit (see section 14);

(5) where a certificate or affidavit cannot be obtained because of the death of a person or the person cannot be found, the court may dispense with the certificate or affidavit (see section 14).

The court will also assume jurisdiction under The Queen's Bench Act or The Land Titles Act to make declaratory orders or general orders with respect to homesteads rights (see chapter 34 on Court Orders with respect to the registrar's requirements for court orders).

An order dispensing with the declaration and examination certificate of a mentally disordered person is likely to be rare as the Public Trustee and a committee now have powers to complete homesteads documents. For further detail on this point see chapter 49 on Mental Infirmity.

L. Homesteads Caveats

See chapter 22 on Caveats.

M. Bankruptcy

See chapter 33 on Bankruptcy.

PART VIII - THE HERITAGE PROPERTY ACT

Chapter 41. The Heritage Property Act

A. Municipal Heritage Property: Part III, ss. 8 to 37

1. Designation of Property

Any council may, by by-law, designate any property, that is not already designated as heritage property, as Municipal Heritage Property (see section 11). A certified copy of the by-law is to be registered in the appropriate land titles office (see subsection 12(2)). Section 55 in Part IV dealing with the designation as Provincial Heritage Property specifically allows for the designation of Crown property, but there is no authority in Part III for a municipality to designate Crown property as Municipal Heritage Property. Thus, even though the Act binds the Crown (see section 80), a municipality cannot designate Crown property.

Sometimes a by-law submitted under subsection 12(2) will be a "Notice of Intention to Designate as Municipal Heritage Property". The Act is not as clear as it could be on this point, but it appears open to the council to register a by-law giving notice of the intention to designate (see subsections 11(2) and 13(2)).

The by-law may also be a "Designation of Municipal Heritage Property". This is how the by-law will read after a review hearing and council's consideration of the review hearing report under section 16, but, even before any hearing, council can, by by-law, simply designate property as Municipal Heritage Property (see section 13). There need be no by-law registered indicating the intention to so designate.

A municipality may decide to register the by-law giving notice of intention to designate and the by-law actually designating the property as Municipal Heritage Property. Both endorsements remain on the title until withdrawn. If the designation as Municipal Heritage Property is withdrawn, the registrar should also remove any by-law giving notice of intention to so designate.

2. Notice of Withdrawal of Designation

Upon receipt of a notice of objection to the designation of the property, the municipal council is required to either refer the matter to a review board for a hearing and report or register a notice of the withdrawal in the appropriate land titles office (see clause 13(2)(b)).

If the council refers the matter for a review hearing, the council must, after consideration of the report, either pass a by-law designating the property as Municipal Heritage Property or register a notice of withdrawal in the appropriate land titles office (see clause 16(b)).

3. Repeal or Amendment of a By-law

Section 17 provides for the repeal or amendment of a by-law, but there is only authority to register the repeal of the by-law.

Section 24 provides for the registration of a notice of the repeal of the by-law in the appropriate land titles office. Amendments of by-laws cannot be registered. Where notice of an amendment to a by-law must be given by registration, the only procedure is to repeal the by-law and register a new by-law.

4. Notice of Change of Ownership

When land that has been designated as Municipal Heritage Property is transferred or transmitted, the land titles office is required to "give notice of the change to the municipal official of the municipality in which the property is situate" (see section 25).

There is no prescribed form for this notice. A notice that describes the property, the registration number and date of the designation and the former and new owners of the land is sufficient. The notice of change of ownership for taxation purposes is not sufficient on its own.

The notice should be directed to the clerk or municipal manager and be sent by ordinary mail.

Section 25 of the Act allows the registrar 30 days to give the notice, but the notice should be given upon registration of the transfer or transmission.

5. Easements or Covenants

Clause 28(1)(f) allows a council to, by by-law, "acquire covenants or easements relating to heritage matters within the municipality". Section 29 provides as follows:

> 29(1) Any easement or covenant entered into by a council under clause 28(1)(g) may be registered against Municipal Heritage Property affected in the appropriate land titles office.
>
> (2) Any easement or covenant entered into by a council under subsection (1):

(a) may be assigned to any person; and

(b) continues to run with the real property;

and the assignee may enforce the easement or covenant as if he were the council and it owned no other land which would be accommodated or benefitted by such easement or covenant.

The reference in subsection 29(1) to clause 28(1)(g) is incorrect. It should refer to clause 28(1)(f).

Clause 28(1)(f) and section 29 are difficult sections for the land titles system. To acquire an easement or covenant by by-law is like an expropriation. When an easement is assigned under section 13 of The Public Utilities Easements Act, it continues to run with the land, and, yet, section 29 of The Heritage Property Act contains a statement that the easement or covenant continues to run with the land.

Subsection 29(1) provides for registration of the easement or covenant against Municipal Heritage Property, but, normally, such an easement would benefit the designated property requiring registration against other property. There is no authority for registration against the burdened property.

There is also no authority for withdrawal of the easement, in whole or in part.

For all of the above reasons, it is doubtful if a council will use the above powers, and, will choose, instead, to take a common law easement, or enter into an easement under section 59 of The Heritage Property Act, discussed below, or, in extreme cases, expropriate under The Municipal Expropriation Act.

6. Caveat for Costs

The municipality may be required to bear costs to repair or preserve designated property. Where such costs are incurred, the municipality is deemed to have an interest in land and may file a caveat (see subsection 30(3)). A caveat for costs under this section is subject to lapse.

7. Heritage Conservation District

Sections 34 and 35 provide for the designation of areas as heritage conservation districts. There is no authority for the registration of a by-law or other notice of such designation. Subsection 36(2) provides that section 25 (land titles to give notice of change of ownership) applies to lands in a heritage conservation district. This appears to be an error and to be of no effect.

B. Provincial Heritage Property: Part IV, ss. 38 to 59

1. Designation of Property

The Minister may register, in the appropriate land titles office, a notice of intention to designate any real property, of provincial importance, as Provincial Heritage Property (see clause 39(1)(b)). The notice must state that a notice of objection to the designation may be served on the Minister within 30 days of the publication of the notice in a newspaper in the area in which the property is situated (see subsection 39(2)).

Where no notice of objection is received, the Minister may order the designation of all or part of the property described in the notice of intention (see subsection 41(1)). The order takes effect as soon as the Minister has "registered a copy of the order in the appropriate land titles office" (see clause 41(3)(b)).

Thus, there will be two notices on the certificate of title: the notice of intention to designate as Provincial Heritage Property and the actual designation. Both will remain on the title until withdrawn. If the actual notice is withdrawn and the notice of intention is not specifically withdrawn, it should still be discharged by the registrar.

2. Designation of Provincial Crown Property

Section 55 allows the Minister to designate any property owned by the Crown as Provincial Heritage Property. This does not include federal Crown property.

A copy of the designating order may be registered in the appropriate land titles office (see clause 55(3)(b)).

3. Withdrawal of Intention to Designate

Where a notice of objection is received, the Minister is required to refer the matter to the review board for a hearing and report (see section 42). After considering the report the Minister is required to either make the actual designation or withdraw the notice of intention by registering the notice of withdrawal in the appropriate land titles office (see subclause 43(b)(iii)).

The Minister may, by order, revoke an order designating property as Provincial Heritage Property (see subsection 53(1)). The order of revocation takes effect as soon as the Minister has "registered a copy of the order in the appropriate land titles office" (see clause 53(2)(b)).

The Minister may rescind an order designating Crown property as Provincial Heritage property under section 55 and must register a copy of the order in the appropriate land titles office (see subsection 57(3)).

4. No Notice of Change of Ownership is Given

As with Municipal Heritage Property, an owner of Provincial Heritage Property is required to give the Minister notice of intention to sell, but there is no authority for the land titles office to give notice to the Minister if the sale occurs (see section 52).

5. Easements and Covenants

The Minister, a municipality or any other heritage or historical organization may enter into an easement or covenant that has as its purpose the protection of heritage property (see subsection 59(1)). If the easement or covenant is accompanied by a certificate of the municipality or Minister that the easement or covenant is for the purpose of the protection of heritage property, the registrar shall accept the easement or covenant for registration (see subsection 59(2)).

Only one parcel need be described (see subsection 59(3)), but if more than one parcel is described all titles affected should be endorsed. No attempt should be made to determine which are the dominant or servient tenements.

Note that section 59 provides for the registration of a covenant.

Subsection 59(4) provides for the assignment of any easement or covenant.

Since no method of discharge is provided for the easement or covenant, it is likely that a caveat supported by the easement or covenant will be registered instead of the easement or covenant.

6. Caveat for Costs

Section 51 provides for the filing of a caveat for costs borne by the Minister to repair or preserve heritage property. This caveat is subject to the lapsing procedures of The Land Titles Act.

C. Federal Crown or Agency Property Cannot Be Designated

Section 55 is specifically directed at the designation of property owned by the Crown. However, Crown is defined in The Heritage Property Act to mean Her Majesty in right of Saskatchewan or any agent of Her Majesty in right of Saskatchewan including the Workers

Compensation Board. Thus, the Act does not purport to allow for registrations against federal Crown property.

Even if the Act purported to affect federal Crown property, the Act would not be constitutional. On this point see The Queen (Alberta) v. Canadian Transport Commission, [1978] 1 S.C.R. 61 at 71 and 72, and Gauthier v. The King (1918), 56 S.C.R. 176 at 182 and 194. In Burq & Johnson Builders' Supply Ltd. et al. v. Canada Mortgage and Housing Corporation et al., [1982] 6 W.W.R. 278 (B.C. Co. Ct.) property registered in the name of the Canada Mortgage and Housing Corporation was held to be federal Crown land and immune from the operation of provincial legislation so that it cannot be encumbered by builders' liens. This case, by analogy, applies to a heritage property designation.

A heritage property designation purporting to be registered against federal Crown property should be rejected.

D. When Canadian Pacific Railway Property may be Designated

In Canadian Pacific Ltd. v. Sask. Heritage Property Review Board, [1984] 6 W.W.R. 210 (Sask. Q.B.) the CPR wanted to remove a railway station from the respondent town. The town passed a by-law declaring the site and station as Municipal Heritage Property. The CPR sought a declaration that the town had no power to designate the property as Municipal Heritage Property.

In reaching its decision the court stated that the federal government has exclusive jurisdiction to enact laws relating to railways, but the province may pass legislation within its jurisdiction which affect railways. It must be determined if the land affected is a part of or used in the railway system. If it is established that the property is but a convenience and not an essential part of the transportation operation, the court can interfere and the province would have jurisdiction. However, in this case because the site was to be used for operating and maintenance purposes, the town had no power to designate the station as heritage property.

The impact of this case for land titles is that the registrar may accept a by-law or order designating land registered in the name of Canadian Pacific as heritage property, but the court may later direct the registrar to vacate the registration if it is determined that the land designated is an integral part of the railway undertaking.

PART IX - SOME SPECIAL CASES

Chapter 42. Powers of Attorney

A. General

The law as to powers of attorney is a branch of the law of agency. In general, and subject to a number of exceptions in particular cases, it may be said that whatever a person has power to do himself or herself, he or she may do by means of an agent, and conversely, an agent, may not do that which his or her principal has no power to do. A power of attorney is a document whereby a person gives an agent authority to do certain things on his or her behalf.

Section 148 of The Land Titles Act provides "the registrar is hereby empowered to recognize for the purpose for which it was executed, insofar as it concerns any land in his district belonging to the person who executed it, any power of attorney that is in the general form referred to in section 147, and that has heretofore been or is hereafter filed or registered in his office".

In earlier Land Titles Acts only land of which the owner was the registered owner at the time he or she gave the power of attorney could be dealt with, but in later Acts, including the present Land Titles Act, the agent or attorney has authority to deal with land of which the owner may at the time be the registered owner or may subsequently become the owner.

B. The Powers of Attorney Act

Effective December 17, 1982, The Powers of Attorney Act, S.S. 1982-83, c.P-20.1 came into force. This Act accomplishes three main objectives:

(1) anyone dealing with a person acting under a revoked power of attorney who does not know of the termination of the power, is protected from suit (see subsection 2(1));

(2) it protects an attorney acting under a revoked power of attorney if the attorney did not know and with reasonable care could not have known of the termination (see subsection 2(2));

(3) it is possible for a person to give a power of attorney which will continue notwithstanding the mental infirmity of the donor as long as the power of attorney is executed in accordance with this Act (see section 3).

An additional consequence of this Act is to provide protection for the assurance fund. Since the person dealing with an attorney under a revoked power or a power terminated by reason of mental incompetence is protected from suit by the donor of the attorney, this means that any title raised in the name of such person cannot be attacked by the donor. Prior to this Act, the registrar would not know if the power of attorney had been revoked or terminated. This Act confirms the validity of acts performed in reliance upon the power of attorney.

This Act does not change land titles procedure other than that a power of attorney which states that it continues notwithstanding the mental infirmity of the grantee is acceptable for registration.

C. Classes of Powers of Attorney

1. General Power of Attorney

Subsection 147(1) of The Land Titles Act provides for the execution of "a power of attorney in any form heretofore in use for the purpose in which the land or instrument is not specifically mentioned", and for the filing of any such form.

The mention of land causes a general power of attorney to lose its character as a general power of attorney and cannot be registered.

A power of attorney must give at least one given name of the grantee.

Because powers of attorney are difficult to construe, it is standard practice to require the grantor of the power of attorney to refer specifically to the type of instrument the grantee will be allowed to execute, or for the instrument to be included by clearest implication, by the words of the power of attorney. This point is discussed further under the heading of the authority of the attorney.

A general power of attorney does not affect the right of the owner to deal with land (see section 147). It is entered in the general record against the name of the grantor. The instrument is searched each time an instrument executed by the attorney is presented for registration.

2. Specific Power of Attorney: Forms X or Y

(a) General

A power of attorney limited to specific land or to a specified registered lease or mortgage may be registered

(see subsections 147(2) or (4) of The Land Titles Act).

It should be in Form X, or one to the like effect, in the case of a power limited to specific land. It should be in Form Y, or one to the like effect, in the case of a power limited to a specified registered lease or mortgage. A memorandum of the power must be endorsed on the appropriate certificate of title and duplicate. If the grant is to do one thing, the attorney cannot do other tasks.

Until revocation in Form Z the power of the owner of the land (or of the lease or mortgage) to transfer or otherwise deal with the land (or lease or mortgage) is suspended (see subsection 147(5)).

(b) Duplicate to be Produced

Using the power under section 56 of The Land Titles Act the Master of Titles decided that a duplicate certificate of title need not be produced to file a general power of attorney, but that section 57, which requires the production of the duplicate for all instruments except those named, would apply to register a specific power of attorney in Form X. If Form Y is for a lease for which a certificate of title has been granted, the duplicate for the leasehold title must be produced.

(c) Revocation

Subsection 147(5) of The Land Titles Act provides for a form of revocation, but the practice is not to require a revocation when the land is transferred. The power of attorney is not carried forward onto the new title. The reason is that both the grantor's and the grantee's authority is considered at an end once the land is transferred.

If an assignment in bankruptcy or receiving order is filed, the attorney's authority is ended. When the trustee applies for transmission, the power of attorney is not carried forward.

Similarly if the grantor dies, the specific power of attorney is not carried forward on to the title in the name of the executor or administrator.

3. Court Ordered Power of Attorney

Sometimes the registered owner is unable to grant a power of attorney, eg. the registered owner is a company that has been

wound up. In special circumstances the court may be prepared to act in the place of the registered owner to grant a power of attorney (see Q.B. No. 3853 of 1983 out of the Judicial Centre of Saskatoon). A court ordered power of attorney will have to remain in the general record until further order.

4. Universal Power of Attorney

There is another class of agents known as universal agents, whose authority is so general that a registrar should not accept such a document for registration. In any event the Act makes provision for registration only of the two classes of powers of attorney referred to in section 147. Universal powers of attorney have been submitted to land titles offices for registration on a number of occasions, but registration has always been refused. However, it might be well to make a few remarks about a universal power of attorney. A universal agent is one who may be appointed to do all the acts which the principal can personally do, and which he or she may legally delegate the power to another to do, Volume 1 Am. & Eng. Encyc. of Law, page 349. In this Encyclopedia at 349 it is stated, "Such an agency may potentially exist, but it must be of the very rarest occurrence". In Hogg's Australian Torrens System, page 913, reference is made to a Western Australian case, Clazy v. Registrar of Titles (1902), 4 W.A.L.R. 113 where the registrar was held to have rightly refused registration of an instrument purporting to be executed by authority of a power, framed in the widest possible terms, which contained no special reference to The Land Titles Act.

D. Who may Grant a Power of Attorney

1. A Person may Grant a Power of Attorney

Subsection 147(1) provides that a "person" may grant a power of attorney. This includes natural persons and bodies corporate (see the definition of person in The Interpretation Act). A second power of attorney will not be accepted for filing if the first has not been revoked.

2. One Joint Tenant may Grant a Power of Attorney

A power of attorney granted by one joint tenant who holds in joint tenancy is acceptable for registration. A joint tenant with no right of survivorship may be precluded from granting a power of attorney (see subsection 238(1)). A joint tenant with no right of survivorship is the means by which a trust may be created. When such words are inserted on the certificate of title, there can be no transfer or other dealing with the land

without the sanction of a judge of the Court of Queen's Bench. The case of In re Robertson (1943), 44 S.R. (N.S.W.) 103 is authority for the proposition that a transmission application is a dealing within the prohibition of subsection 238(3).

Prior to The Land Titles Amendment Act, S.S. 1963, c.4 which added section 240 to The Land Titles Act, the law in Saskatchewan and in the rest of the common law countries was as set out in Cheshire's Modern Law of Real Property, (12th edition) at page 215:

> A severance may be effected by:
>
> (i) alienation by one joint tenant;
> (ii) acquisition by one tenant of a greater interest than that held by his co-tenants;
> (iii) partition;
> (iv) sale;
> (v) mutual agreement; and
> (vi) "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common".

With a power of attorney, there is no alienation by one joint tenant nor is there any course of dealing sufficient to intimate that the interests of all are mutually treated as constituting a tenancy in common. In the case of Burgess v. Rawnsley, [1975] Ch. 429 at 438-39 (C.A.), Lord Denning indicated that it is not enough to rely on an intention with respect to the particular share, declared only behind the backs of others - you must find "a course of dealing by which the shares of all the parties to the contest have been affected". Further discussion with respect to severance of the joint tenancy may be found in the case of Johnson v. Johnson, [1980] 5 W.W.R. 718 (Sask. Q.B.).

Other cases with respect to severance indicate that the mere granting of a license to occupy without any alienation of title probably does not sever (see Re McKee and National Trust Company Ltd. (1974), 49 D.L.R. (3d) 689 at 694 (Ont. H.C.), reversed on other grounds (1975), 56 D.L.R. (3d) 190 (Ont. C.A.)). Similarly, the case of Sorenson v. Sorenson, [1977] 2 W.W.R. 438 (Alta. S.C.A.D.) indicates that the grant of a life estate by one joint tenant to a third party does not effect a severance. Furthermore, even a land titles mortgage which does not involve a conveyance of title does not effect a severance (see Lyons v. Lyons, [1967] V.R. 168, at 172 (S.C.)).

Note also the case of Re Brooklands Lumber & Hardware Limited and Simcoe (1956), 18 W.W.R. 328 (Man. Q.B.) where it is stated

that "the trend of authorities is that a lien or charge on land either by a co-tenant or by operation of law is not sufficient to sever the joint tenancy, there must be something that amounts to an alienation of the title".

The possibility of a joint tenant acting independently from a co-tenant and without registration of the instrument, prompted the enactment of section 240 of The Land Titles Act.

However, section 240 only addresses itself to what would be considered severance by alienation. Note the wording of subsection 240(2) which refers to "an instrument purporting to transfer the share or interest of any such joint tenant".

Clearly, a power of attorney does not fall into this category.

Accordingly, a power of attorney could not effect a severance and there is nothing in the common law which would preclude one joint tenant from granting a power of attorney. Clearly, subsection 147(1) of The Land Titles Act imposes no such restriction on a joint tenant.

3. An Executor or Administrator cannot Grant a Power of Attorney

Since an executor or administrator is already an agent, he or she cannot appoint an agent under power of attorney to execute land titles instruments.

Certain types of letters of administration actually are grants of letters to an agent but that involves a different principle than what is put forward here.

4. An Infant cannot Grant a Power of Attorney

An infant, being unable to enter into a binding contract, cannot appoint an agent or attorney; and a power of attorney made by an infant is not voidable only, but absolutely void (see Johannsson v. Gudmundson (1909), 11 W.L.R. 180 at 183 (Man. C.A.)).

5. Two or more persons cannot Grant a Power of Attorney

A power of attorney made by several companies appointing one person as agent should not be accepted. The main reason for refusing this type of power of attorney is that it is not a "power of attorney heretofore in use" as that phrase is used in subsection 147(1) of The Land Titles Act. It also raises the question as to whether all of the companies who have granted the power of attorney must be the owners of the interest intended to

be dealt with, and whether all are required to revoke. Separate powers of attorney are required.

6. Wife cannot Grant a Power of Attorney for Homesteads Act

A man can grant a power of attorney to a person to swear the affidavit of the maker (see subsection 7(2) of The Homesteads Act), but the wife's rights under that Act are considered personal rights to be exercised with respect to a particular transaction at the time, or near to, the transaction. Accordingly a woman cannot grant a power of attorney to someone else to allow that person to relinquish homestead rights or to be examined with respect to the relinquishment.

E. Power of Attorney cannot Include Revocation

On June 11, 1959, Meldrum, M.T. directed the registrars not to accept for filing a power of attorney which revokes a previous power of attorney. This decision overruled the previous decision of Milligan, M.T. in Re Land Titles Act, [1918] 3 W.W.R. 139 (Sask. M.T.).

The Land Titles Act contemplates a separate instrument revoking a power of attorney.

Cancelled or revoked instruments, along with the instruments by which they are cancelled or revoked, are required to be filed separately from current or so-called "live" instruments and this cannot, of course, be done if the revocation of authority of one attorney and the appointment of another are included in a single instrument.

F. Power of Attorney cannot be to a Person which expires on the Happening of Event

A power of attorney which grants the power to a named individual for as long as the person named holds a particular position is not registrable. As above, this is two instruments in one but it increases the risk in accepting an instrument executed by the individual.

If the named individual leaves the position, for whatever reason, the individual no longer has the authority to act for the company even though the power of attorney has not been revoked.

It also adds one more instrument to the general record for which a withdrawal may not be received.

G. Power of Attorney cannot indicate it will Survive Death

A power of attorney allowing the grantee to exercise powers after death is not acceptable. A power of attorney containing such a clause has never been "heretofore in use in Saskatchewan".

In Halsbury's Laws of England, Vol. 1, 4th ed., page 529, para. 882, a multitude of cases are cited that provide authority for the proposition that a contracted agency is determined immediately upon the principal's death. These authorities were followed in Canada in the 1859 case of Jacques v. Worthington (1859), 7 Gr. 192. In Chapman v. Gilfillan (1900), 2 N.B.Eq.R. 129, a written authorization to collect, recover and receive proceeds from a sale of property was held to be not an equitable assignment at all, but a power of attorney, which was revocable by the grantor's death.

In McIntyre v. Royal Trust Co., [1946] 1 W.W.R. 210 (Man. C.A.), affirming [1945] 2 W.W.R. 364, it was held, inter alia, that "on P's death before the instructions were fully carried out the defendant's authority to act as his agent came to an end".

The common law has been changed by statute in Ontario.

According to the Appellate Division of the Ontario Supreme Court in Re McCarty (1920), 53 D.L.R. 249, "If a power of attorney contains plain words providing that it "shall not be revoked by the death of the person executing" it, such words must be given effect to and held to be valid and effectual". This decision, though, rested upon the construction of The Powers of Attorney Act, R.S.O. 1914, c.106, s.2, which allows the grantor to state that the power survives the death of the grantor.

However, in Saskatchewan the death of the grantor revokes the power of attorney as at common law. Part V of The Land Titles Act specifies a particular way in which land devolves in Saskatchewan. Section 165 provides that when the owner of land for which a certificate of title has been granted dies, the land shall, subject to this Act, vest in its personal representative. In light of this section a power of attorney cannot continue to survive the death of the grantor. If a power of attorney survived the death of the grantor it would mean that Saskatchewan's probate procedure designed to protect infants, mentally incompetent persons and beneficiaries would be of little effect.

The principle would be different if the power of attorney were coupled with an interest and therefore irrevocable.

H. Power of Attorney cannot require Consent of Third Party

At a conference of registrars held on Decmeber 27th, 1911, a conclusion with reference to powers of attorney was that where a power of attorney is given to one individual to be only exercised when countersigned by another individual to whom no power of attorney is given, the power of attorney should be rejected.

I. Power of Attorney can Grant to a Position

In re The Land Titles Act; Royal Trust Company's Case, [1912] 3 W.W.R. 246 (Sask. M.T.) is authority for the practice which allows a power of attorney to be granted to positions rather than named persons. The following points should be noted:

(1) the power must be given not only to the present officer holding the position but to the successors in office, i.e. words like "for the time being and from time to time" connote this;

(2) the affidavit of attestation must indicate that the person executing the instrument holds the position to which the power is granted.

J. Power of Attorney Can Allow Agent to Delegate

Common law supports the ability of an agent to delegate his or her duties and obligations to the principal provided such delegation is expressly allowed by the principal (see Halsbury's Laws of England, Vol. 1, 4th ed., p. 448, and Edgar v. Caskey (1912), 5 A.L.R. 245 (S.C.)). Express authorization, must be articulated in the power of attorney.

Saskatchewan has adopted the common law position in Re Carrogher McKenzie, Mann and Co. Ltd. and Townsite of Sturgis (1913), 3 W.W.R. 1034 (Sask. M.T.). This is binding law in Saskatchewan. There are no other cases in Western Canada or legislative enactments which would alter the position as set forth therein.

This means that if the grantor of a power of attorney specifically states that the attorney may substitute or appoint an attorney to perform one or more or all functions of the attorney, a second power of attorney would be registered which makes reference to the previous power of attorney and specifies the instruments which the second attorney can perform.

The sub-attorney can only assume the power that fell within the scope of the attorney's authority. For the protection of the

grantor, prudent practice dictates that the power of attorney fully and accurately set forth the duties which may be delegated. Accordingly, all powers of attorney proposing delegation should be carefully examined to ensure that the sub-attorney's duties are clearly enunciated and are those contained within the scope of the attorney's authority. The sub-attorney cannot perform more functions than the attorney. By the terms of the first power of attorney, the second attorney may actually be a complete substitute for the first attorney.

In executing an instrument a sub-attorney signs for the original grantor and the grantor who granted the power to the sub-attorney.

K. Does the Attorney have the Authority?

The fundamental rule is that the act being done must be authorized by the power of attorney. A power of attorney must be construed strictly to ensure that the agent is definitely authorized to do what he or she purports to do or the principal may not be bound (see Halsbury's Laws of England, 4th Ed., Vol. 1, page 438, paragraph 730-732. See also Taylor v. Wallbridge (1879), 2 S.C.R. 616 at 678; Re McCarty (1920), 53 D.L.R. 249 (Ont. S.C.); Hayes v. Standard Bank of Canada (1928), 62 O.L.R. 186 (S.C.)).

A general statement in the power of attorney that the agent may act in respect of such other matters as may be necessary to carry out the power of attorney does not help or authorize the doing of anything for which specific authority is not given. In Hogg's book, already mentioned, at page 913, it is stated that an instrument executed by an attorney, that is by an agent, who is in fact not authorized to do so, appears to be of no greater efficacy with respect to the registration effected on the faith of it, than a forged instrument.

A general clause such as "any documents required to be registered in the Land Titles Office or Land Registration Office or other Government office" is acceptable as part of a power of attorney. However, there is a legal rule for interpreting general and specific clauses in legal documents. The legal clause should set out the powers given to the attorney. With some exceptions, the general clause only relates back to the specific clause and does not expand any of the powers specifically listed. The general clause by itself would not be acceptable.

Practice allows an attorney, who has the authority to transfer land and to do all things to enable one to transfer land, to execute an affidavit pertaining to a lost duplicate certificate of title.

It has been decided that a power to discharge a mortgage does not give the power to postpone a mortgage. A power to discharge assumes the amount secured has been paid. A postponement requires the mortgagee to accept a lower priority.

L. A Power to Sell Implies Power to Convey

Land Titles practice until 1976 followed Taylor v. Wallbridge (1879), 2 S.C.R. 616 which held that a power to sell does not include power to convey. This was changed by Truscott, M.T. in 1976 following Land Registry Act re: Rode's Partition (1968), 64 W.W.R. 430 (B.C.S.C.). Henry, J. states at page 433 that it would be "very difficult to imagine a situation in which a valid power to sell real estate would not, under modern conditions, also imply power to convey".

M. A Power to Sell Implies Valuable Consideration

A power to sell or transfer for value does not include a power to give away, or transfer for a nominal consideration. The consideration stated in a transfer therefore becomes of much more importance when it is a transfer executed under a power of attorney.

Where a transfer executed by an agent or attorney of a principal is presented for registration and the consideration is set out at $1.00 the remarks of Taylor, J. in Elford v. Elford, [1921] 1 W.W.R. 341 at 345 (Sask. K.LB.) should be noted. $1.00 is not valuable consideration (see Coventry v. Annable (1911), 1 W.W.R. 148 (Sask. S.C.)). In the Elford case, Taylor, J. was considering a transfer which was registered and had been signed by a party holding a registered power of attorney. He said, "There is no suggestion in the language used either in the portions quoted or elsewhere in the document of a power to make a gift or any conveyance except for value. These transfers recite a nominal consideration only".

A transfer without consideration is looked upon either as a gift or perhaps an attempted gift, but rarely, if ever, would a power of attorney authorize such transactions. A titles researcher examining the document should refer it to an assistant registrar for consideration.

N. Transfer to the Attorney

Express words in the power of attorney are required to enable the registrar to accept a transfer from an agent to himself or herself. This principle is settled by Elford v. Elford, [1922] 3 W.W.R. 339 (S.C.C.); Re Land Registry Act and Shaw (1915), 8 W.W.R. 1270 (B.C.C.A.); and Jarvis v. Jarvis, [1926] 3 D.L.R. 897 (P.C.).

Unless the express words in the power of attorney authorize a transfer for nominal consideration, the registrar is also justified in rejecting the transfer if it is stated to be for nominal consideration.

O. Signature by the Attorney

An agent executes in the name of his or her principal and not in the name of the agent only. A good method of an agent signing is:

"Jane Smith by her attorney Margo Black."

The agent signs the instrument for the principal (see Williams' The Canadian Law of Landlord and Tenant, (4th ed.) p. 31, "An agent to execute should sign in the name of the principal and not in his own name only" see Tanner v. Christian (1855), 119 E.R. 217 (Q.B.); Gibbins v. Smith (1908), 12 O.W.R. 7 (Div. Ct.)).

P. Revocation

1. Form Z

Form Z may be used to revoke a power of attorney "whether filed, registered or unregistered" (see subsection 149(1) of The Land Titles Act).

The reference to the revocation of an unregistered power of attorney was added by S.S. 1949, c.34 and codified an unreported 1912 decision of Milligan, M.T. Milligan, M.T. stated that the intention of the legislature could never have been that a man who had granted a power of attorney could never protect himself by filing a revocation of the power, merely because the power of attorney itself had never been filed or registered, for that would be the equivalent of saying that the attorney was able to take advantage of his own neglect in not filing the power of attorney by preventing the revocation of the power. The Master of Titles said that the registration of the revocation was the only method by which the principal could protect himself, and he would approve of the registrars following that practice.

Where a power of attorney is unregistered, Form Z must contain sufficient details to enable the registrar to identify the power of attorney being revoked (see subsection 149(1)).

2. Revocation by Death

As noted above, at common law which is unchanged by statute on this point in Saskatchewan, death revokes a power of attorney.

If the death of the principal has not come to the knowledge of the registrar, the registrar is justified in proceeding with registration. The registrar should not require the attorney to provide evidence that the principal is still alive, before registering an instrument executed by the attorney.

The principle is different if the power of attorney is coupled with an interest (see F.M.B. Reynolds and B.J. Davenport, Bowstead on Agency, (14th ed.) p. 426).

3. Effect of Corporate Amalgamation or Dissolution

When the partnership of principal dissolves, the power of attorney terminates (see Irvine v. Hervey (1913), 13 D.L.R. 868 (N.S.C.A.)).

When the right of the principal to transact the business is gone, the right of continuing an agent to do that which the principal cannot do himself or herself does not exist. There cannot be a derivative authority with no original authority to support it.

A corporate change of name does not affect a power of attorney.

4. Effect of Bankruptcy

The bankruptcy of the principal or agent terminates the authority (see Roger v. Shannon (1871), 8 N.S.R. 146 (C.A.); and Johnson v. Lollaway, [1934] 1 W.W.R. 516 (P.C.)).

5. No Revocation where Power Coupled with an Interest

There are some powers of attorney which cannot be revoked by the grantor or party giving the power. Such a power is known as a power coupled with an interest and is, therefore, irrevocable (see Ferris v. Nowitskey (1951), 3 W.W.R. (N.S.) 49 at 68 (Alta. S.C.)). A power of attorney coupled with an interest is one given for valuable consideration. Such a power of attorney will usually contain a statement that it is irrevocable. There may not be very many of such irrevocable powers registered, but it is well for a titles researcher to know that such powers exist. When such a power of attorney is accepted for filing, a note should be placed on the document so that it is not inadvertently discharged. An irrevocable power of attorney can, of course, be revoked by the grantor with the consent of the grantee.

6. Effect of Revocation

Subsection 149(2) provides that "after registration of a revocation, the registrar shall not register any transfer or other instrument made by virtue of such power, unless executed prior to the revocation".

7. Destruction of Documents: Powers of Attorney

As a result of subsection 149(2), a power of attorney is retained in the general record for one year after revocation. After one year, it is removed from the general record and set aside for destruction which will occur six years after the removal from the general record (see subsection 29(3) of The Land Titles Act). The microfilm copy remains available.

Chapter 43. Individual Change of Name

A. General

A request to change a name on a certificate of title may be made as a result of:

(1) a formal change of name registered with the Director of Vital Statistics under The Change of Name Act;

(2) a change of name on marriage where a married person elects to take his or her spouse's name and chooses to use the procedure under section 247 of The Land Titles Act;

(3) the election of a married person resident in Saskatchewan who chooses to use his or her spouse's surname or the legal surname which the married person had immediately prior to his or her latest marriage under section 19 of The Change of Name Act;

(4) the production of an affidavit of identity or correction of error (this point is dealt with in chapter 18 at page 106).

B. Formal Change of Name under The Change of Name Act

Section 3 of this Act provides that "except in the case of a party to a marriage assuming at the time of the marriage the surname of the other party to the marriage . . . no change of name shall have any effect unless it is made in accordance with this Act".

The subsequent sections of the Act provide for the procedures on registration of the change of name, and section 15 provides for registration of changes in accordance with the law of any other province or any state or country. A certificate of change of name is issued under section 16. When a certificate has been so issued, section 18 provides that a person whose name has been changed shall, upon satisfactory proof of identity, be entitled to have the new name substituted in lieu of the former name in any and every record, certificate, instrument, document, contract or writing whatever, whether public or private, upon payment of such fees, if any, as are prescribed in that behalf by or under any statute.

When a certificate of change of name is presented to the land titles office, it should not be put in the general record as in the case of a company, but it should be accompanied by: (1) an affidavit identifying the person named therein as the registered owner of particular land; and (2) the duplicate certificate of title to the land. A memorandum of the change of name should then be endorsed

upon the certificate of title and duplicate. The name as it appears on the face of the title should be corrected and the correction dated and initialled.

The registered owner may request a new certificate of title. The old duplicate certificate of title must accompany the request. The fee is the fee for a new certificate of title. No additional fee is charged for the change of name. A search is made in the general record for writs of execution, etc. before issuing the new certificate of title.

C. Effect of Marriage

1. The Change of Name Act, Section 19

The Change of Name Act was amended by The Canadian Charter of Rights and Freedoms Consequential Amendment Act effective April 17, 1985. This amendment did away with the requirement of notice to be given to the Director of Vital Statistics in the Department of Health when a married woman wished to keep a former legal surname. Section 19 was repealed and replaced with the following:

> 19 A married person who is a resident of Saskatchewan may elect to use as a legal surname:
>
> (a) the spouse's surname; or
>
> (b) the legal surname which the married person had immediately prior to the marriage.

Registration of notice is required for a change of name under this section to take effect. Thus this amendment enables a married person to revert back to his or her previous legal name if his or her spouse's name was originally taken, or to keep a pre-marriage name without executing any legal papers. The difficulty lies in the former case. In the latter, no change of name is undertaken.

This is a new and different situation from change of name upon marriage because there are in effect two possible names for a married person to use at any time and upon whim. A married person, who is a resident of Saskatchewan may present himself or herself legitimately to the land titles office using a pre-marriage name whenever he or she wants. However, there are a number of restrictions inherent in section 19:

(1) the person must be a married person, therefore, if the person is divorced, a formal change of name would have to be made;

(2) the person must be a resident of Saskatchewan - if the person has moved from Saskatchewan after making the election but before dealing with the land, there will be nothing available from the other province to support an affidavit or request to deal with land in a former name and, neither, will it be possible for the person to comply with section 19 unless the person can say that he or she made the election while they were a resident of the province;

(3) only the name which was held immediately prior to marriage may be selected.

2. Where one Spouse takes other Spouse's Name

Section 247 of The Land Titles Act continues to govern land titles procedure when a spouse, who owns land, takes the other spouse's name. If land was held in a premarriage name, the title may be changed by submitting an affidavit as described in that section. This section applies to both men and women who on marriage take the name of their spouse.

From and after January 31, 1986, by S.S. 1984-85-86, c.50, if a married person application is made with respect to an instrument other than a transfer, the application is, unless the married person requests otherwise, deemed to be an application for a new certificate of title to issue showing the new surname of the applicant.

3. Where a Spouse Reverts to Name had Immediately Before Marriage

Section 247 does not apply to this situation but the registrar may change the certificate of title if presented with an affidavit which contains statements that:

(1) the person is the same as the person named in a certificate of title to specifically described land;

(2) the person is currently a resident of Saskatchewan;

(3) the person has elected to use the legal surname which he or she had immediately prior to his or her latest marriage;

(4) the changed name was the legal surname of the person immediately prior to his or her latest marriage.

The affidavit should be by the person in his or her changed name and should request the registrar to issue title in the name. When the affidavit accompanies an instrument, a new title need not be requested unless the person wishes to rectify the problem for all future transactions.

4. Where Person Divorced

If the person's name is changed by divorce, a formal change of name is required.

5. Where Non-resident Involved

Sometimes a married person residing in another province owns property in Saskatchewan in a name which the person had before his or her latest marriage, or in a name the person had before an election to use another name under legislation comparable to section 19 of Saskatchewan's Change of Name Act is made.

Nothing in The Change of Name Act or The Land Titles Act addresses this issue. The registrar must be satisfied that the person purporting to deal with the land is the same person shown on the certificate of title. Affidavit evidence will be required on all points.

6. Where Married Person retains Pre-marriage Surname

If land is held in the pre-marriage surname, no issue arises. Nothing is required to allow instruments to be executed in the same name as appears on the certificate of title.

7. Where Married Persons Combine Names

The only legal way for married persons to take a name which is a combination of both their names is to apply for a formal change of name under The Change of Name Act.

A person may acquire land in a name which is in two or more parts. The registrar will not know if this is a legal name or not. Note that section 6 of The Change of Name Act contemplates a change of name of a child to a hyphenated name which is a combination of parents's names.

Chapter 44. Joint Owners

A. General

Land and interests therein, may be held by two or more owners in one of two ways, either as tenants in common or as joint tenants.

The word "tenant" when used in the expressions "tenants in common" and "joint tenants" has a meaning wider than the usual one. In the usual sense, the word "tenant" means one who holds land from another, that is a lessee, or as is sometimes stated, a "renter" under an instrument called a "lease". However, the word "tenant" when used in the phrases "tenant in common" or "joint tenant" is used in its broadest sense, and really means an owner. (See Black's Law Dictionary, (Fifth Edition).) The word "tenant" comes from the Latin word teneo meaning to hold, that is for instance, to hold land, in other words, an owner.

B. Joint Tenants

1. Characteristics

In Cheshire's Modern Real Property, (12th Edition), at pages 211 and 212, the author says, in referring to the characteristics of a joint tenancy "the two essential attributes of joint tenancy are . . .

(1) the absolute unity which exists between joint tenants, and

(2) the right of survivorship."

The absolute unity referred to is that the parties have acquired the same interest, by the same transfer or grant, at the same time, and they both have the same possession or right of possession. Cheshire, page 324, gives an instance of this latter statement by saying that if A. and B. hold two acres of land as joint tenants, A does not possess one acre and B the other, but each of them possesses the two acres. Neither of them has any exclusive right to any particular part of the land. Together they form one person.

The second characteristic is the right of survivorship. Cheshire gives an example of the right of survivorship at page 212. "A. and B. may be joint tenants in fee simple, but the result of the death of B. is that his interest totally disappears and A. becomes owner in severalty of the land". It will be noticed that Cheshire uses the word "disappears". He does not say that it is transferred or vests for the reason that

under the theory of joint tenancy, when both tenants are alive, each owns it all and when one dies no interest passes to the other because that other owns it all.

The main distinction, therefore, between joint tenants and tenants in common is that where owners hold land as "tenants in common" each owns his or her own share, that is each, for example, may have a one-half interest, or if there are two owners one might own a one-third interest and the other a two-thirds interest; if one of these owners or tenants in common dies, his or her share goes to his or her executors who would deal with it in the same way as other parts of an estate. On the other hand, joint tenants, together, as a matter of law, compose but one owner (Williams on Real Property, (19th Edition) page 137), and if the certificate of title or mortgage, or as the case may be, sets out that the owners hold as joint tenants and not as tenants in common, then under the law applicable to joint tenants, when one of the joint owners dies, his or her interest disappears and the remaining joint tenant becomes the sole owner.

It is legally impossible to specify the interest that a joint tenant holds.

As soon as you specify the extent of the interest, the parties hold in tenants in common and there is no right of survivorship. It is an impossibility in law to state that parties hold undivided specified interests as joint tenants.

2. Describing as Joint Tenants

Section 242 of The Land Titles Act is important and for that reason it is quoted now in full:

> 242. When, by letters patent, transfer, conveyance, assurance or other assignment, land or an interest therein is granted, transferred, conveyed or assigned to two or more persons, other than executors or trustees, in fee simple or for any less estate legal or equitable, such persons shall take as tenants in common and not as joint tenants, unless an intention sufficiently appears on the face of the letters patent, transfer, conveyance, assurance or other assignment, that they shall take as joint tenants.

In Re Quaal Estate, [1920] 3 W.W.R. 117 (Sask. C.A.), Newlands, J. in delivering the judgment of the court said, with reference to section 197 of the then Land Titles Act (which corresponds to section 242 of the present Land Titles Act), "This section is one of general application and is not confined to the interpretation of instruments that can be registered under The Land Titles Act. This is shown by the use of the words

"conveyance, assurance or other assignment" which are words of wider meaning than letters patent or transfer, both of which are registrable under that Act".

It will be noted that in section 242 where a transfer, or other instrument, is made simply to two or more persons, such persons shall take as tenants in common and not as joint tenants unless an intention sufficiently appears on the face of the instrument that they shall take as joint tenants. In other words, if nothing is said in the instrument as to whether they take either as tenants in common or joint tenants, then under the section they take as tenants in common. If, on the other hand, it is the desire of the parties that they take as joint tenants, then they should say so by using the clear expression "as joint tenants and not as tenants in common". The word "jointly" is not sufficient to create a joint tenancy (33 Corpus Juris 905). The phrase "as joint tenants" is sufficient, provided the parties clearly understand that they are creating a joint tenancy.

Sometimes an instrument is written in favour of two or more parties as "joint tenants and not as tenants in common, with right of survivorship". The words after "joint tenants" are really not necessary, but their presence does not take away from the effect of joint tenancy. Sometimes the interest transferred by the instrument is to the parties as "joint tenants with right of survivorship". This is acceptable too, but the certificate of title when prepared will describe the parties as joint tenants.

A specified undivided interest can be held by two or more persons as joint tenants. More than one undivided specified interest can be reflected in one certificate of title, i.e. three couples each owning an undivided one-third interest as joint tenants can be shown in one or three certificates of title.

3. Who can be a Joint Tenant

(a) Corporations

A corporation may be a joint tenant. Section 242, above, refers to "persons". A corporation is a legal person. Subsection 241(1) specifically refers to the right of a corporation to apply to be registered as owner following the death of a joint tenant. If a corporation is wound up, a joint tenant with the corporation may also apply.

(b) Infants

An infant may be a joint tenant just as an infant may hold land, but if the other joint tenant dies the infant

surviving joint tenant's application would require the consent and/or execution of the Public Trustee.

The birth date of the infant should be set out in the transfer and on the title.

4. Land or Interests can be held as Joint Tenants

The fee simple or leasehold estate or a mortgage or lease can be held as joint tenants.

Milligan, M.T. in an unreported decision given on Feb. 3, 1912 decided that a mortgage may be made to two or more parties as joint tenants and not as tenants in common, even though a mortgage is not a transfer of the land thereby charged. This decision of Milligan, M.T. was on a reference from the Registrar of the Saskatoon Land Registration District, and the question was as to whether the mortgage should be accepted, including as it did, the provision that the mortgagees would hold as joint tenants and not tenants in common. The decision indicates that the Master of Titles was concerned about one point, namely, whether the clause making the parties joint tenants was acceptable to the mortgagee who, of course had not signed the mortgage which would have shown consent. The mortgage form does not require the mortgagee to sign. Mr. Milligan came to the conclusion that the mortgagee would be bound without signing. This decision was followed in the case of Hart v. Great West Securities & Trust Co. (1918), 11 Sask. L.R. 336 (C.A.). At page 341, Newlands, J.A. quoted from an English case that a man may be bound by the covenants in a deed in which he is described as a party, though he does not execute it if he assents to it and takes a benefit under it. There is also a quotation from Halsbury's Laws of England, Vol. 12, 4th Ed., p. 540, para. 1360 where the same principle is stated.

On the death of one of the mortgagees, the survivor may then deal with the mortgage (eg. by transfer or discharge) following an application to be registered as owner.

A caveat being merely a claim of an interest in land remains a claim even if the caveators indicate that they are claiming as joint tenants. Furthermore, subsection 241(1) of The Land Titles Act does not provide a mechanism for a survivor to apply to be the owner of a claim under a caveat. Subsection 241(1) only applies to land, mortgages, encumbrances or leases registered under The Land Titles Act and held in joint tenancy.

5. Severance of Joint Tenancy

(a) Section 240

At common law, a joint tenancy could be severed by (among other things) a transfer of his or her interest by one joint tenant. In Halsbury's Laws of England, Vol. 39, 4th ed., p. 349, para. 529 it is stated: "Each joint tenant has an identical interest in the whole of the land and every part of it. The title of each arises by the same act; the interest of each is the same in extent. Footnote: That is, until severance, each has the whole, but upon severance each has an aliquot part - half or less - according to the number of joint tenants." Again at para. 534 "The joint tenancy may be severed either by one tenant as to his own share or generally by all of the joint tenants." At page 536, Halsbury's states that "the severance results from the destruction of unity of title resulting from the actual disposition of his share by a joint tenant".

Prior to The Land Titles Amendment Act, S.S. 1963, c.4 which added section 240 to The Land Titles Act, the law in Saskatchewan and in the rest of the common law countries was as set out in Cheshire's Modern Law of Real Property, (12th Edition) at page 215:

> A severance may be effected by:
>
> (i) alienation by one joint tenant;
> (ii) acquisition by one tenant of a greater interest than that held by his co-tenants;
> (iii) partition;
> (iv) sale;
> (v) mutual agreement, and
> (vi) "any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common".

Other cases with respect to severance indicate that the mere granting of a license to occupy without any alienation of title probably does not sever: see Re McKee and National Trust Company Ltd. (1974), 49 D.L.R. (3d) 689 at 694 (Ont. H.C.) reversed on other grounds (1975), 56 D.L.R. (3d) 190 (Ont. C.A.). Similarly, the case of Sorensen v. Sorensen, [1977] 2 W.W.R. 438 (Alta. S.C.A.D.) indicates that the grant of a life estate by one joint tenant to a third party does not effect a severance. Furthermore, even a land titles mortgage which does not involve a conveyance

of title does not effect a severance: see Lyons v. Lyons, [1967] V.R. 168 at 172 (S.C.).

Note also the case of Re Brooklands Lumber & Hardware Limited and Simcoe (1956), 18 W.W.R. 328 (Man. Q.B.) where it is stated that "the trend of authorities is that a lien or charge on land either by a co-tenant or by operation of law is not sufficient to sever the joint tenancy, there must be something that amounts to an alienation of the title".

It was the case of Stonehouse v. Attorney General of British Columbia (1962), 37 W.W.R. 62 (S.C.C.) which resulted in the 1963 amendment making it impossible in Saskatchewan to sever a joint tenancy without the consent of the other joint tenant and without registration. The facts of the Stonehouse case are simple. In 1956 Mrs. Stonehouse, a joint tenant with her husband, conveyed all her interest in property to a daughter "without telling her husband what she was doing". The deed remained unregistered until the day following Mrs. Stonehouse's death in 1959 when the daughter submitted the deed for registration at the land titles office in Vancouver. The registrar acted upon the deed and issued a certificate of indefeasible title to the daughter. The husband, without seeking to attack the title of the daughter, commenced action to recover from the assurance fund under the British Columbia Land Registry Act. The Supreme Court of Canada found that the husband could not succeed on the basis that the joint tenancy in question was severed at the time of the execution and delivery of the deed even though it remained unregistered until after the death of the joint tenant. The possibility of a joint tenant acting independently from his co-tenant and without registration of the instrument prompted the enactment of section 240 in Saskatchewan.

However, section 240 only addresses itself to what would be considered severance by alienation. Note the wording of subsection 240(2) which refers to "an instrument purporting to transfer a share or interest of any such joint tenant". Not all instruments are covered by this phrase. For example, a power of attorney granted by a joint tenant does not purport to transfer a share or interest, and accordingly the consent of the other joint tenant is not required. See page 430 of this manual.

(b) Effect of Death or Severance By One Joint Tenant on Other Joint Tenants

The law appears well settled that where one of several

joint tenants dies or where one of several joint tenants severs his or her interest, the joint tenancy continues for the remaining joint tenants. In Donne I. Bowyer v. Judge (1809), 11 East 288 (K.B.) five people were named devisees in trust and joint tenants in some land. A conveyance of the land was purported to be executed by the five, but only execution by three could be proved. The conveyance was taken to be by the three only, thus severing the joint tenancy and conveying three-fifths of the estate, to be held in common with the two remaining parties, as joint tenants. Reference may also be made to Williams v. Hensman (1861), 1 J & H 546 (V.C. Ct.) where an agreement was executed by eight joint tenants, three of whom were minors. The agreement was held to be binding only on the five of majority and not on the other three, and to have severed the five shares from the three, but not from one another. (See also Anger and Honsberger Real Property (2nd ed.) p. 802 and Megarry and Wade's The Law of Real Property (4th ed.) p. 404.)

The interest that is held is an undivided fractional interest in proportion to the total number of tenants, i.e. if one of three joint tenants severs his or her interest, the severing joint tenant owns an undivided one-third share (see the references to Halsbury's on page 449 of this manual).

(c) Application of Section 240 to Transfers

Section 240 has a three-fold effect:

(1) no instrument can sever a joint tenancy unless the instrument has been registered;

(2) the registrar cannot accept any instrument "purporting to transfer the share or interest of any joint tenant unless it is accompanied by the written consent of the other joint tenant or joint tenants, duly attested";

(3) the consent must comply with The Homesteads Act.

In 1965 the Master of Titles decided that where a husband and wife, as joint tenants, transferred his or her interest under the joint tenancy to the other, the consent of the spouse receiving the interest would not be required. The basis of this decision was that the receiving spouse could not be prejudiced in any way.

Since husband and wife are involved, no homesteads compliance would be required other than the statement that the woman is his wife, if the husband is the transferor. A request for consolidation is presumed by the registrar and fees charged accordingly.

If a husband and wife hold land as joint tenants with a third or fourth party, and so on, who are holding with them as joint tenants, a transfer from the husband to the wife or the wife to the husband requires the consent, duly attested, with the appropriate homesteads compliance from the other joint tenants.

Where a man alienates his undivided interest as joint tenant to a person, other than his wife, the following documents are needed:

(1) a duly executed transfer with compliance with The Homesteads Act;

(2) the consent of the other joint tenant with the appropriate compliance under The Homesteads Act; and

(3) an affidavit of attestation for the consent.

Where a woman alienates her undivided interest as joint tenant to a person, other than her husband, all of the above documents are needed except no compliance with The Homesteads Act is required.

The transfer should read as follows:

> I, AB of _____ in the Province of Saskatchewan, _____, being one of the registered owners as joint tenants, along with CD of in the Province of Saskatchewan,_____ of an estate in fee simple in that piece of land described as follows: (here describe the land) _____ do hereby in consideration of the sum of _____dollars paid to me by EF, the receipt of which sum I hereby acknowledge, transfer to the said EF of _____ in the Province of Saskatchewan, all my estate and interest in the said piece of land being an undivided one-half interest therein.
>
> _____ _____
> Witness Signature

The consent should read as follows:

> I, CD of (here set forth address) being one of the registered owners in joint tenancy along with AB of that piece of land described as: (here describe land) do hereby consent to a transfer by AB to EF of the share in the said land held by the said AB as joint tenant and being an undivided one-half interest therein.
>
> In witness whereof I have hereunto subscribed my name this _____ day of _____, 19____.
>
> Signed by the said CD in the presence of
> _____
> _____
> Signature

The following should be noted:

(1) the fractional interest being severed by the unilateral action of one joint tenant would be the interest in the land held in joint tenancy divided by the number of the joint tenants (see page 449 of this manual);

(2) if, there are only two joint tenants, alienation by one of them by way of transfer of an undivided one-half interest would result in the joint tenancy being completely broken and there would result two certificates of title, each covering an undivided one-half interest;

(3) unless the requirements of The Homesteads Act can otherwise be met, the wife of the consenting owner would have to sign the required declaration, if the declaration is on the same page as the consent and if not on the same page, sign both the consent and the declaration annexed to the consent in Form A of The Homesteads Act, and be accompanied by the certificate of examination in Form B, of The Homesteads Act.

Because of the complexity of dealing with a consent which must be witnessed and must also comply with The Homesteads Act, the practice is usually to have all joint tenants execute the transfer but fees must be paid on the total value of the interest that is being transferred.

(d) Application of Section 240 to Mortgages or Leases

Persons registered as owners as joint tenants may together mortgage their interest in the land, but one joint tenant may not mortgage his or her own interest separately, unless the joint tenancy is first severed.

Where titles are registered in the names of two or more parties as joint tenants, a mortgage by one of the parties, or any number less than all should not be accepted. Sometimes a registrar is asked by one of several joint tenants whether one can mortgage or dispose of his or her share apart from the others. As far as The Land Titles Act is concerned, this cannot be done. As a matter of law joint tenants are considered as one person and it is obvious, therefore, that one joint tenant alone could not give a mortgage under our system. Under the deeds system, used in some other provinces or countries, there is law with reference to joint tenancy which is not applicable under the Torrens system. See Kerr, page 41, also 11 Am. & Eng. Encyc. of Law, page 1018.

If a mortgage is submitted for registration with the consent duly witnessed and attested and complying with The Homesteads Act, in accordance with section 240, the registration of the mortgage will operate as a severance. This should be duly noted on the certificate of title that the tenancy is severed as far as the person mortgaging is concerned, i.e. if there were three joint tenants, the joint tenancy exists for the two remaining tenants.

The same rule applies to leases.

(e) Severance by Enlargement

One way a joint tenant could sever the tenancy would be to request an enlargement. This appears to be contrary to the intent of section 240, and accordingly, the practice has been to require the appropriate consent from the other joint tenant to allow the application to be made.

(f) Application of Section 240 to Writs of Execution

Prior to 1963 the share of a joint tenant in land could be seized and sold under a writ of execution against him (see Re Craig (1928), 63 O.L.R. 192 (S.C.), Re Brooklands Lumber & Hardware Limited and Simcoe (1956), 18 W.W.R. 328 (Man.

Q.B.), Morrow v. Eakin (1953), 8 W.W.R. (N.S.) 548 (B.C.S.C.)). In such cases the transfer by the sheriff was accompanied by an order of the court or judge severing or partitioning the share of the joint tenant and approving the sale. The order and transfer was a sale under "process of law" within the meaning of subsection 185(2) of The Land Titles Act.

It appears that as a result of section 240 an execution creditor may not move to have the sheriff seize the property and sever the joint tenancy. Sask. Co-op Credit Society v. Ash, [1980] Sask. D. 3867-01 (Sask. Q.B.) held that a writ of execution was not covered by section 240, but Royal Bank v. Friesen, [1980] 2 W.W.R. 850 (Sask. Q.B.) and R. in Right of Canada v. Peters, [1983] 1 W.W.R. 471 (Sask.. Q.B.) held that an execution creditor could not sever the joint tenancy.

Section 240 is peculiar to Saskatchewan. Recent cases like McNeil v. Martin, [1983] 2 W.W.R. 198 (Alta. C.A.) and C.I.B.C. v. Muntain, [1985] 4 W.W.R. 90 (B.C.S.C.) demonstrate the differences between Saskatchewan law and the law of the other provinces on this point. A. J. McLean, the author of Severance of Joint Tenancies (1979) 57 C.B.R. 1, is critical of section 240 (see page 38).

During the lifetime of an execution debtor, an execution binds the interest of a joint tenant in lands. In the case of a transfer by or to joint tenants, the normal procedure of searching the general record as to encumbrances against the transferor and against the transferee is followed. A writ of execution or maintenance order found against one of the joint tenants should be endorsed on the new title "as against the interest of AB only" (see subsection 180(3) of The Land Titles Act).

(g) Application of Section 240 to Bankruptcy

Re White, [1928] 8 C.B.R. 544, 33 O.W.N. 255 (S.C.) held that a trustee in bankruptcy is entitled to the share in the land held by a joint tenant as the bankrupt. In Re Chisick (1968), 62 W.W.R. (N.S.) 586 (Man. C.A.) the court held that on assignment, the bankrupt lost the right to dispose of his or her property which right passed to the trustee. The trustee was held to one-half of the proceeds even though the sale took place 10 years after the assignment. Similarly, in Re Ruston, [1971] 2 All E.R. 937

(Ch.D.) the court held that bankruptcy severed the joint tenancy. The assignment or receiving order effects a severance of the joint tenancy, so that in the case of two joint tenants, one of whom becomes bankrupt, the trustee is entitled to ask for transmission into the name of the trustee of the resulting undivided one half interest of the bankrupt.

Section 240 does not change this law. The trustee in bankruptcy continues to have the authority to apply for the undivided one-half interest of the bankrupt or whatever fraction would be appropriate, i.e. if three joint tenants, the trustee would apply for an undivided one-third share. No consent from the other tenants is required.

For further details about bankruptcy, see chapter 33 commencing at page 326 of this manual.

6. Application for Survivorship: Form 00

(a) The Application

Subsection 241(1) of The Land Titles Act provides, "Where any land, mortgage, encumbrance or lease registered under this Act is held in joint tenancy, and one of the owners dies or one of the owners is a company that is dissolved, the survivor or survivors may make application to the registrar to be registered as owner or owners thereof". The application may be in Form 00.

The application by the surviving joint tenant is not an application for transmission, since no transmission is involved. It is merely an application for a new certificate of title in the name of the survivor. The application should be signed personally by the survivor, and should be witnessed and attested. It must be accompanied by evidence of the death of the other joint tenant (a death certificate attached to an affidavit identifying the person named in the death certificate with one of the registered owners is the usual form). Proof of death may be either a death certificate or previously filed letters probate or letters of administration.

Subsection 241(3) of The Land Titles Act specifically requires "proof of the death and identity of the deceased joint tenant". This proof of identity in affidavit form is

not just required when there is a discrepancy in names but is required to state that the person who is named in the certificate of title is the same as the person named in the death certificate. The reason for this caution is due to the extraordinary nature of the application by the surviving joint tenant which allows someone to become the registered owner of land without the consent of the heirs of the deceased.

The affidavit should be sworn by the surviving joint tenant except in exceptional circumstances. It would be up to the registrar to determine whether some other person, such as a solicitor, could swear it in cases where, perhaps, the solicitor is signing the application for transmission and appears to be handling all other estate matters. The registrar would have to exercise discretion on a case by case basis.

When both registered owners die before the application is made, there should still be an application by surviving joint tenant executed by the personal representative of the person who has died last, or who, according to a court order is declared law to have died last (see page 503 of this manual). The two step approach shows a more complete chain of title. It also addresses the question as to whose estate should be probated where both died at the same time.

A complete mailing address is required for the survivor on the application for the surviving joint tenant (see section 252 of The Land Titles Act). Discretion can be used to waive the requirement of an address where the title will be immediately cancelled as a result of an accompanying instrument.

(b) Writs of Execution

Upon the death of one joint tenant, the survivor owns the whole parcel absolutely subject only to the encumbrances or caveats which are claimed against the survivor. This has always been the position at common law and was confirmed in legislative form by an amendment to section 180 of The Land Titles Act made in 1963. This amendment added, what is now subsection 180(4), which reads as follows:

> 180(4) The registration of a writ of execution shall not of itself have the effect of suspending or of

severing the joint tenancy in respect of any land the title to which is held by the execution debtor and another person or other persons as joint tenants, and upon the death of the execution debtor the writ of execution shall cease to bind and form a lien and charge on any such land.

However, if the survivor is the execution debtor all writs against the debtor bind the whole interest.

C. Joint Tenants with No Survivorship

Section 238 of The Land Titles Act read as follows:

238(1) Upon the transfer to two or more persons as joint owners of any land for which a certificate of title has been granted to be held by them as trustee, it shall be lawful for the transferor to insert in the transfer or other instrument the words "no survivorship", and the registrar shall in such case include those words in the duplicate certificate issued to the joint owners pursuant to the transfer and in the certificate of title.

(2) Any two or more persons so registered as joint owners of any land held by them as trustees may, by writing under their hand, authorize the registrar to enter the words "no survivorship" upon the duplicate certificate and also upon the certificate of title.

(3) In either case, after such entry has been made and signed by the registrar it shall not be lawful for any less number of joint owners than the number so entered to transfer or otherwise deal with the land, without obtaining the sanction of the court or a judge by an order on motion or petition.

The words "no survivorship" are not often used, but registrars should be sure to see that if they appear in a transfer, they are prominently inscribed on the certificate of title, and that no application by a survivor is accepted. The effect of section 238 is discussed at pages 491 and 492 of this manual.

D. Tenants in Common

Where owners hold land as 'tenants in common', each owns his or her own share. Each may, for example, own an undivided one-half

interest or if there are two owners, one might own an undivided one-third interest and the other an undivided two-thirds interest. If one tenant in common dies, his or her share devolves upon his or her executors or administrators, like any other interest in land; it does not go to the survivor, as in the case of joint tenants. An application for transmission has to be made in the usual way in respect of "the undivided [one-half] interest of (the deceased) in _____".

What the tenant in common owns is a share in the whole; the tenant does not have exclusive possession of any part. When two persons own a quarter section as tenants in common as to an undivided one-half interest each, neither can say, "This half of the quarter section is mine; that is yours". They each own an undivided one-half share in the whole quarter section.

Sometimes a certificate of title is issued in favour of two or more persons as tenants in common, without specifying what their respective shares are. This is not in itself a problem, but it means that a registrar must not allow a separate title to be issued for any such share. If separate titles were allowed to exist for unspecified fractional interests, no one could tell how many of them make up the whole interest in the land. If the unspecified interest of one tenant in common has to be dealt with (e.g. on death), the new certificate of title must immediately be consolidated with the interest remaining in the old certificate of title.

Section 59 of The Land Titles Act gives power to the registrar to reject instruments transferring, mortgaging or otherwise disposing of an undivided fractional interest in a parcel of land containing mines and minerals, or any mineral, that is less than an undivided one-fourth of the whole interest. Section 59 is discussed in detail at pages 77 and 78 of this manual.

Care should be taken, in dealing with an undivided interest, to avoid ambiguity or error arising from the use of a fraction of a fraction. If A, being registered owner of an undivided one-half interest in certain land, transfers an undivided one-half interest in all of his or her estate and interest, therein, what he or she is transferring is one-fourth, not one-half. Again, if a certificate of title states that A, B and C are registered owners as tenants in common of an undivided one-third interest in certain land and goes on to say, "as to an undivided one-third interest each", questions may arise as to whether what each owns is a one-third or a one-ninth interest. In such a case, it is better to say "with equal interests", rather than "as to an undivided one-third interest each".

Where two or more persons together own an undivided fractional interest in land, the registrar must therefore, always take care to avoid error or confusion through use of double fractions. Further detail about transferring fractional interests in mines and minerals is provided at pages 82 and 83 of this manual.

Chapter 45. Corporations

A. General

Corporations carrying on business in Saskatchewan fall broadly into one of four categories:

(1) business corporations incorporated or registered under The Business Corporations Act;

(2) non-profit corporations incorporated or registered under The Non-profit Corporations Act;

(3) corporations created by the legislature like co-operative corporations incorporated or registered under The Co-operatives Act;

(4) corporations created by a private or special Act of the provincial legislature or federal parliament.

Use of the corporate seal and execution generally is dealt with in the chapter on execution and attestation.

There are many corporations created by the legislature, eg. Credit Unions, Trust and Loan Companies, Crown Corporations. Only co-operatives are discussed in this manual.

B. The Business Corporations Act (Saskatchewan)

1. General

This Act came into force on October 1, 1977. After that date no corporation could be incorporated or registered under The Companies Act, and all corporations previously incorporated under The Companies Act were required to continue under the new Act.

Part I of the Act which contains sections 3 to 260 applies only to corporations with share capital incorporated or continued under the Act. Parts II and III which begin at section 261 and 279 respectively apply to both Saskatchewan and extra-provincial corporations with or without share capital.

2. Need to Register

Section 262 of the Act requires all corporations carrying on business to be registered in order to carry on business. Subsection 262(2) provides that a corporation is deemed to be carrying on business if it "holds any title, estate or interest in land registered in the name of the corporation under

The Land Titles Act". However, section 278 provides that no holding of title to land or of any interest in land is invalid by reason only that the corporation was not registered under the Act.

The Land Titles System does not maintain a procedure to determine whether a corporation exists or the accurate name is used, unless from an instrument submitted, a question is raised as to whether the body is incorporated or named accurately. If a certificate of title is granted to a non-existent or inaccurately described corporation a court order may be required (see page 349 of this manual).

The director of the Corporations Branch may issue a certificate of status as proof of whether a corporation is registered or not. This can be used for instance to determine whether on any particular date a corporation of a certain name was registered.

3. Name

Subsection 10(1) of the Act provides that "Limited", "Limitee", "Incorporated", "Incorporee" or "Corporation" or the abbreviation "Ltd.", "Ltee." "Inc." or "Corp." shall be part of the name of every corporation but a corporation may use and may be legally designated by either the full or the abbreviated form. Subsection 10(4) provides that a corporation may set out its name in its articles in an English form, a French form, an English form and a French form or in a combined English and French form, and it may be legally designated by any such form. Section 11 allows a corporation to use a number as a name. The title follows the transfer and reflects the name or number shown, including both French and English names.

Clause 193(b) states that the name of a corporation shall not be identical to the name of a corporation heretofore incorporated in Saskatchewan. Federal corporations may take the same name as a previously registered corporation.

4. Name Change

Clause 167(1)(a) allows a corporation by special resolution to amend its articles to change its name. The amendment is required to be filed with the director of the Corporations Branch (see section 171). The director then issues a certificate of amendment (see sections 172 and 255). The amendment is effective on the date shown on the certificate (see section 173).

An extra-provincial corporation that changes its name in the jurisdiction of incorporation and, that is registered in Saskatchewan, may file proof of change of name with the director. The director will then issue a certified true copy of the document of change of name or a certificate of authentication (see section 286).

Subsection 286(2) requires a certificate or certification to be signed by the director or deputy director. Subsection 286(2.1) allows such a signature to be printed or otherwise mechanically produced.

Unlike under the old Companies Act, there is no specific provision for the filing of corporate name changes in the general record. However, the practice is to accept certificates of amendment and authentication for filing in the general record. A corporation using its new name may then deal with interests or land that it holds.

The corporation or its solicitor may provide a list of lands or interests held by the corporation, produce all necessary duplicates and request the name to be changed for a fee. This application may be made after filing the necessary documentation in the general record or concurrent with the filing. A new certificate of title may be issued upon request of the corporation or its solicitor, identified as such, upon payment of the required fee. No formality to the request is required. It need not be witnessed or attested.

Sometimes it happens that an extra-provincial corporation is not registered to carry on business in Saskatchewan, but it owns land or holds an interest in land in Saskatchewan, and it has changed its name in its jurisdiction of incorporation. In such a case the registrar may accept evidence of the appropriate officials in the other jurisdiction, similar to what is provided in Saskatchewan, as to the change.

As with individuals, the registrar's obligation is to be satisfied, with respect to a change of name, by what proof the registrar deems necessary, whether the corporation dealing with the land is in fact the owner of the land.

5. Amalgamation

Section 175 provides that two or more corporations may amalgamate and continue as one corporation. Section 295 allows the amalgamated corporation to have the name of one of the amalgamating corporations, a distinctive combination of the names of the amalgamating corporations or a distinctive new name.

The director will issue a certificate of amalgamation which sets out the names of the amalgamating corporations and the name of the new corporation (see subsection 179(4)).

The original records for extra-provincial corporations will always be provided from outside the province. Therefore if such a company amalgamates, it files the proof of an amalgamation in Saskatchewan. This document is available from the Corporations Branch and would be attached to a certificate of amendment.

As with name changes, the certificate of amalgamation and the certificate of amendment evidencing the amalgamation may be filed in the general record. The procedure to allow the corporation to deal with land and interests is the same as for changes of name.

6. Liquidation

Section 4 of the Act provides that The Companies Winding Up Act does not apply to a corporation incorporated or continued under The Business Corporations Act. Sections 201 to 219 of The Business Corporations Act deal with liquidation and dissolution.

Subsection 204(4) allows a corporation, by special resolution, to liquidate and dissolve.

Where the liquidation is voluntary, an application may be made to the court to supervise the liquidation under subsection 204(8), or the court may order the liquidation under sections 206 and 207.

The powers of the court are set out in section 210. The court may appoint a liquidator, who, under section 213, may be a body corporate or any person. Clause 214(c) requires the liquidator to take into the liquidator's custody and control, the property of the corporation. Clause 215(1)(d) gives the liquidator the power to sell any property of the corporation.

The order appointing the liquidator is filed in the general record. If a list of lands is attached, a memorandum of appointment of the liquidator may be made on any certificate of title. After filing in the general record, no instrument executed by the company may be accepted.

No transmission is required or allowed under the Act. Re Land Titles Act, Yorkton Gas Company Limited, [1918] 3 W.W.R. 15 (Sask. M.T.) appears to still be good law on this point. Milligan, M. T. had before him a reference from the registrar

of the Yorkton Land Registration District, and on July 30, 1918 gave this decision:

> In my opinion the application for transmission should be rejected by the registrar. The liquidator has power to transfer the land registered in the name of the company in which he is liquidator, and should do so in the name of the company by himself as liquidator under the seal of the company, and there is not only no need of transmission to the liquidator as such, but in my opinion, it would be improper to permit the land registered in the name of the company in liquidation, to be transmitted to the liquidator.

With respect to whether the seal of the corporation and the seal of the liquidator are required will depend on the authority under which the corporation and the liquidator are incorporated. If both are incorporated under The Business Corporations Act attestation will be proven by affidavit attesting to the position and authority of the liquidator signing on behalf of the corporation. Nothing, however, precludes the use of both seals.

Prior to The Business Corporations Act, the only way a company could act was under its seal. The liquidation of a bank or other body corporate would still require the use of a seal in the absence of a court order. For an example of a court order dispensing with the seal of a bank in liquidation (see Q.B. No. 262 of 10, 1986, Judicial Centre of Saskatoon).

All land titles instruments are drawn in the name of the corporation being dissolved as the corporation continues (see clause 212(1)(a)), but the powers of the directors and shareholders cease and vest in the liquidator, except as specifically authorized by the court (see clause 212(1)(b)).

C. The Canada Business Corporations Act

A corporation may choose to incorporate under the federal Act. The two Acts, with respect to name, name change, amalgamation and liquidation are almost identical. Articles of amendment are required under section 177 to be sent to the director. Upon receipt, the director is to issue a certificate of amendment in accordance with section 262 (see section 178). A certificate is required to be signed by the director or deputy director (see section 256). Subsection 262(4) provides that a signature on a certificate may be printed or otherwise mechanically reproduced thereon. Subsection 267(2) provides that where records are maintained other than in written form i.e. in a system of

electronic data processing, the signature is required to be the original.

One difference exists with respect to liquidation. An order of the court granted under the federal Act, being of national authority could be granted anywhere in Canada and be registered in Saskatchewan. The decision of Milligan, M. T., [1918] 3 W.W.R. 348 (Sask. M.T.) speaking of the Winding Up Act (Canada) is applicable here:

> Under the Dominion Winding-up Act a judge of a superior court of any province in the Dominion, in which there are assets of the company, has power to make winding-up orders appointing the liquidator and once the liquidator has been appointed by a court of competent jurisdiction in one province, no court in another province with concurrent jurisdiction will interfere, so that for this purpose the order of a judge appointing a liquidator is not the order by a foreign court, but the order of a court having competent jurisdiction which should be respected by the registrar.

Land titles procedure for a federal business corporation is otherwise the same as under the provincial Act.

D. The Non-profit Corporations Act

1. General

Clause 2(1)(m) defines corporation in this Act to mean a body corporate without share capital, heretofore or hereafter incorporated by or under an Act of the Legislature. Part III also applies to an extra-provincial corporation.

This Act replaces The Societies Act and came into effect October 1, 1979. A certificate of incorporation may be issued (see sections 8 and 236).

2. Name

Subsection 10(1) provides that the word "Incorporated", "Incorporee" or "Corporation" or the abbreviation "Inc." or "Corp." shall be part of the name of every corporation but a corporation may use and may be legally designated by either the full or the abbreviated form.

Note that one distinguishing feature between a business corporation and a non-profit corporation is that "Limited" does not form part of the name. However, a non-profit corporation created prior to 1979 as a society that used the word "Limited"

as part of its name was allowed to continue under the new Act with the same name.

Subsection 10(3) allows a corporation to set out in its articles English and French forms.

A number is not allowed to be used for a name.

3. Name Change

Clause 156(1)(a) allows a non-profit corporation, by special resolution to change its name by amending its articles. The articles of amendment must be sent to the director of the Corporations Branch (see section 159).

Under section 160 the director is required to issue a certificate of amendment in accordance with section 235. The certificate is effective on the day shown in the certificate of amendment.

The land titles procedure for a change of name of a non-profit corporation is the same as for a business corporation.

4. Amalgamation

Two or more corporations may amalgamate and continue as one corporation (see subsection 163(1)). Upon receipt of articles of amalgamation, the director is required to issue a certificate of amalgamation (see subsection 167(4)).

Land titles procedure is the same as for a business corporation.

5. Liquidation

A non-profit corporation may liquidate and dissolve by special resolution of the members (see subsection 185(3)).

Section 4 of the Act provides that The Companies Winding up Act does not apply to a corporation incorporated or continued under the Act. Sections 181 to 203 of The Non-profit Corporations Act deal with liquidation and dissolution.

Subsection 185(3) allows a corporation, by special resolution, to liquidate and dissolve.

Where the liquidation is voluntary, an application may be made to the court to supervise the liquidation under subsection 185(3), or the court may order the liquidation under sections 187 and 188.

The powers of the court are set out in section 191. The court may appoint a liquidator who, under section 194, may be a body corporate or any person. Clause 196(c) requires the liquidator to take into his or her custody and control, the property of the corporation. Clause 197(1)(d) gives the liquidator the power to sell any property of the corporation.

Land titles procedure is the same as for a business corporation.

E. The Co-operatives Act

1. General

The Co-operatives Act, S.S. 1983, c.37.1, proclaimed October 17, 1983 replaced The Co-operative Associations Act, The Co-operative Marketing Associations Act and The Co-operative Production Associations Act. Clause 2(1)(i) defines a "co-operative" to mean body corporate that is organized and operated on a co-operative basis and is incorporated under the Act. Part of the Act also applies to an extra-provincial co-operative.

This Act is very similar to The Business Corporations Act and The Non-profit Corporations Act.

2. Name

A co-operative is distinguished from other corporations by its name which must include "Co-operative" in its name and "Limited" or "Ltd.", or "Limitee." or "Ltee." (see subsection 13(1)). A co-operative may set out its name in a French or English form or combination thereof (see section 14).

3. Name Change, Amalgamation or Dissolution

The Act provides for the registrar of Co-operatives and the term registrar includes the deputy registrar (see clause 2(1)(kk)). The registrar issues certificates of amendment and amalgamation pursuant to section 279 for a name change under section 145 or an amalgamation pursuant to section 151. Pursuant to subsection 279(5), the registrar's signature may be printed or otherwise mechanically produced. Extra-provincial co-operatives registered under the Act may file a change of name or amalgamation agreement and the registrar may issue a certificate with respect thereto (see sections 211 to 213). Sections 160 to 179 also provide a similar dissolution procedure. Section 289 provides that The Winding Up Act does not apply. Land titles procedure is the same as for a business corporation.

F. Bodies Corporate created by Special or Private Act

There are many of these bodies each with its own statute that prescribes a name and, sometimes, special procedures for dealing with land. A few representative examples are discussed here. Often there is both a federal and a provincial statute.

1. Royal Canadian Legion

An Act respecting the Holding of Real Property by the Saskatchewan Command and Branches of the Canadian Legion of the British Empire Service, S.S. 1949, c.133 was amended by S.S. 1962, c.75 to change the name of the body to "The Royal Canadian Legion Saskatchewan Command".

By section 3 thereof the proper designation of a Branch is "The Royal Canadian Legion (____ Saskatchewan No. ____) Branch".

In Saskatchewan the power to hold land is in the Provincial Command or in its local branches. Each is independent and each executes documents under its seal as affixed and attested by the proper officers. There is no provision for land to be held by a Ladies' Auxiliary of a Branch. The auxiliary is subject to the control of the Branch and only the Branch is entitled to hold property under The Land Titles Act. If the charter of the Branch is suspended, then under section 7 of the 1949 statute, the Provincial Command can prove the suspension and acquire title to the lands of the Branch. Otherwise there is no control by the Provincial Command over the property of a Branch.

Section 6 of the 1949 statute gives wide powers for acquiring title to lands held by individuals but really in trust for the use of a Branch. The safeguard is the certificate of the secretary of the Provincial Command and the affidavit of the President of the Branch that such lands are so held in trust. On such applications Mr. Stewart, as Master of Titles, by circular letter S 342 dated April 29, 1949, allowed the fee to be the same as for a new title to issue following a change of name. Any lands acquired by transfer would be subject to the usual fees.

2. The Army, Navy and Air Force Veterans in Canada

The Army and Navy Veterans in Canada was first established by S.C. 1917, c.70. The Association and branches were authorized, under such title and designation and subject to such conditions and provisions as the Association may determine by by-law, to hold, mortgage, lease or acquire real property. By S.C. 1946, c.81 the name of the Association was changed to The Army, Navy and Air Force Veterans in Canada. Often, this will be followed by a unit number.

In 1920, a ladies auxiliary was formed and constituted a branch for all purposes. The name of this body was changed to "The Dominion Association of the Ladies Auxiliary of The Army, Navy and Air Force Veterans in Canada" in 1946 by the above statute.

3. Elks Lodges

Section 1 of The Grand Lodge of the Benevolent and Protective Order of Elks of the Dominion of Canada, S.C. 1913, c.110 creates the body corporate.

Section 6 authorizes the creation of branches under the name of "Lodges" which may be established under the title or number designated in the charter.

Section 8 provides:

> Subject to provincial laws, the society or any branch thereof may acquire by devise, bequest, purchase, gift or lease, such real property, not exceeding in the aggregate the value of one hundred thousand dollars, as is required for the actual use and occupation only, and may sell, lease or otherwise dispose thereof.

It should be noted that many Elks Lodges have incorporated under The Societies Act and continued under The Non-profit Corporations Act.

G. The Winding Up Act: Liquidation

There is a Winding-up Act (Canada) and a provincial Companies Winding Up Act. These Acts do not apply to business corporations, non-profit corporations or co-operatives or any other corporation whose authorizing statute prescribes a liquidation procedure. The federal Act applies to banks. Both Acts apply to corporations created under special or private Acts. An example of a court order under the federal Act is 85RO8950 registered in Regina for Pioneer Trust.

The land titles procedure is the same as is outlined for a court order appointing a liquidator under the provincial Business Corporations Act. However, corporate seals will be required for both the corporation and the liquidator unless the liquidator is a corporation created by a statute not requiring a corporate seal.

Chapter 46. Religious Societies and Churches

A. General

An organization with religious objectives may organize itself for the purposes of holding land under The Non-profit Corporations, appoint trustees under The Religious Societies Land Act or become incorporated by a special or private Act of the legislature or parliament, or sometimes both. In the latter case the federal Act provides for incorporation and the provincial Act provides for the acquisition and disposition of land.

B. Religious Societies Land Act

1. General

This Act provides one of the few instances in which a certificate of title may be issued to trustees and held in trust notwithstanding the provisions of section 73 of The Land Titles Act.

A religious society is defined as a "church, congregation or other religious organization of persons professing or adhering to a religion or religious faith" (see clause 2(b)).

Section 2.1 allows a religious society to, in the name of trustees, be the registered owner of land. Since S.S. 1983, c.61, there is no limitation on the amount of land that a religious society may hold.

Under the Act, and as a result of judicial opinion, the trustees are created what might be called a semi-corporation. They have not the full powers of an ordinary corporation, but they have certain powers and attributes which corporations usually enjoy. It should be emphasized that the trustees, and not the congregation itself, which are the semi-corporation. See Kicul v. Bulycz, [1933] 1 W.W.R. 45 at 49 (Sask. K.B.). Also see The Ukrainian Greek Orthodox Church of Canada v. The Trustees of the Ukrainian Greek Orthodox Cathedral of St. Mary the Protectress et al., [1940] S.C.R. 586 at 603.

Special procedures are provided with respect to transfers to avoid land being taken by or transferred to a break away group (see Stein v. Hauser (1913), 5 W.W.R. 971 (Sask. S.C.) and First German Evangelical Lutheran Zion's Congregation v. Reiker, [1921] 1 W.W.R. 794 (Sask. K.B.)). Although a court order is no longer required to accompany a transfer, a special two-thirds majority resolution is required for all transfers including a transfer to a corporation under section 14 (see page 473 of this manual).

2. Appointment of Trustees

Section 2.2 provides that a religious society may, at any annual or special meeting, adopt a resolution appointing trustees for the purposes of holding land, and also indicates the way in which the trustees should be described. The resolution must designate the trustees as "Trustees of (name of religious society), a religious society, in the (city, town, village or rural municipality) of (name of municipality), in the Province of Saskatchewan" and must list the names and addresses of the trustees.

3. Changing or Amending Names of Trustees

Section 2.3 provides that a religious society may by a majority vote of the members present at an annual or special meeting adopt a resolution changing or amending its name or removing any trustee and appointing another in his or her place. Section 13 provides that a copy of any resolution certified as a true copy by a minister or other presiding officer shall be accepted by a land titles registrar as conclusive proof. The name change is handled the same as for an individual name change. A fee is charged for each name changed. Names of trustees are rarely changed until the land is dealt with. It is not necessary to amend the title if the land is being transferred, as long as the registrar is satisfied that the transfer is being executed by all the present trustees.

4. Dealing with the Land

The trustees may mortgage the land (section 4) or lease the land (section 5).

Prior to S.S. 1983, c.41, a court order was required to allow trustees to transfer land, and a transfer had to be registered within 12 months after execution.

Since 1983, pursuant to section 10, a religious society may sell land if the sale is approved by special resolution of the religious society passed by a majority of not less than two-thirds of the votes cast by the members of the religious society who voted in respect of that resolution. The trustees must give at least fifteen days notice specifying the intention to propose the resolution as a special resolution and the nature of it. Section 10 does not indicate to whom notice must be given or the method of giving notice.

Section 11 provides that a transfer of land submitted for registration must be accompanied by a certified true copy of the special resolution of the religious society and the special resolution must indicate passage by the requisite two-thirds and that fifteen days notice has been given.

Section 13 requires the copy of the resolution to be certified to be true by the minister or other presiding officer. If the names of the trustees have changed, a certified copy of the resolution under section 2.3 will be required.

There is no need to show any transmission from the trustees named in the certificate of title to those executing the transfer. All that is necessary is for the registrar to be satisfied by the terms of the resolution that the trustees executing the transfer are in fact the present trustees of the society.

Only a majority of the trustees are required to execute a transfer for the purposes of incorporation under section 14. Section 11, which deals with transfers other than to the incorporated religious society, requires the "trustees" to execute the transfer. This implies all trustees unless another resolution removing some of the trustees is presented to the registrar.

5. Uniting of Religious Societies

When religious societies unite, the land may be transferred to the united religious society or the other religious society, but the procedure is the same as for a transfer in the ordinary course (see section 15).

6. Transfer upon Incorporation

Sometimes land is registered in the name of trustees of a religious society which later becomes incorporated, usually under The Non-profit Corporations Act. The trustees, or a majority of them, may then transfer the land to the new corporation under section 14 of the Act.

The procedure outlined above with respect to transfers in the ordinary course applies. Section 14 does not permit transfers to a corporation formed by a minority. Note that the section contemplates a transfer to a corporation formed by the whole society or congregation. It does not permit a transfer to a corporation formed solely by the majority.

C. United Church of Canada

The United Church of Canada was incorporated by The United Church of Canada Act, S.S. 1924, c.64. The federal Act gave the United Church a status all over Canada, but inasmuch as the church was concerned also with property, which under the British North America Act is under the jurisdiction of provincial legislatures, Acts similar to that of the Dominion were passed by the provinces, including the province of Saskatchewan, in 1924. The Saskatchewan Act is c.64 of the Statutes of Saskatchewan, 1924. The United Church of Canada was incorporated by the Dominion, and not by the Provincial Act.

Property held by individual congregations is held also by trustees eg. "The Trustees of the Humboldt Congregation of the United Church of Canada, John Smith, William Jones and Joseph Doe (giving their respective addresses) being the present trustees".

To transfer land the presbytery of the church within whose district the property is located must consent. If the presbytery gives consent, this consent must be signified as far as the land titles office is concerned by a certificate of the secretary or clerk of the presbytery. A certificate of the secretary or clerk of the presbytery is conclusive evidence of such consent. See Schedule A to the provincial Act, paragraph 6. Subsection 20(1) provides that when the title to any property stands in the name of any individual or individuals whether such persons, or any of them, be deceased or not, a certificate of the secretary or clerk of the presbytery within the bounds of which such property is situate, together with a certificate of the minister in charge of any congregation, to the effect that such property belongs to or is held in trust for, or to the use of such congregation shall be accepted by the registrar of land titles as conclusive evidence of the fact, and the registrar shall thereupon cancel the existing certificate of title and issue a new title for the property in the names of the then trustees of such congregation.

Subsection 20(2) provides that transfers, mortgages and other documents may be validly executed by the trustees or a majority of them provided the minister in charge of the congregation certifies that they were, at the date of the instrument, trustees for the congregation. The certificate should be witnessed and attested. If there is no such minister, the certificate may be given by the clerk of the presbytery.

This Act also provides for land to be owned by the central body.

D. Other Special or Private Acts

Other churches incorporated by special Act which can hold title to land include:

(1) Free Methodist Church in Canada - incorporated by S.C. 1926-27, c.107;

(2) Pentecostal Assemblies of Canada - incorporated by Letters Patent on May 17, 1919;

(3) Synod of Evangelical Church of Canada - incorporated by S.C. 1885, c.32;

(4) Evangelical Lutheran Church of Canada - incorporated by S.C. 1951, c.76;

(5) The Governing Council of the Salvation Army, Canada West, S.C. 1916, 6.64, Canada East, S.C. 1916, c.63;

(6) Ukrainian Catholic Church - An Act to Incorporate the Ruthenian Greek Catholic Episcopal Corporation of Canada, S.C. 1913, c.191; S.C. 1951, c.79 whereby the Act respecting the Ruthenian Greek Catholic Episcopal Corporation of Canada was amended; S.C. 1951, c.82 incorporating the Ukrainian Catholic Episcopal Corporation of Saskatchewan; An Act to Incorporate the Ruthenian Greek Catholic Parishes and Missions in the Province of Saskatchewan, S.S. 1913, c.73; An Act to amend an Act to incorporate the Ruthenian Greek Catholic Parishes and Missions in the Province of Saskatchewan, S.S. 1952, c.110 - creates a body corporate to be described as "Ukrainian Greek Catholic Parish of _____" according to the name given to it at the time of its canonical erection;

(7) La Corporation Episcopale Catholique Romaine de Gravelbourg, S.S. 1931, c.96 - Bishop must sign and the seal must correspond to the name of the church;

(8) La Corporation Episcopale Catholique Romaine de Regina, S.S. 1912, c.66 amended by S.S. 1934-35, c.95 to change name to Archiepiscopal Corporation of Regina;

(9) Anglican Church - An Act respecting the Synod of the Diocese of Saskatchewan and to change its name to "Synod of the Diocese of Saskatoon", S.C. 1933, c.67; An Act to incorporate The Synod of the Diocese of Saskatchewan, S.S. 1933, c.86 and An Act to amend Ordinance No. 38 of 1894 and to repeal Ordinance No. 8 of 1881, S.S. 1933, c.87.

Chapter 47. Cemeteries

A. Establishment of a Cemetery

Sections 3 and 4 provide that no cemetery, crematorium, columbarium or mausoleum shall be established, enlarged, altered or used without the approval of the Registrar of Cemeteries. This provision will not normally be enforced by the land titles registrar as the land titles office does not record land use. An exception is made for commercial cemeteries.

B. Commercial Cemeteries

Section 54 of The Cemeteries Act reads in part as follows:

> 54(1) Unless the registrar consents in writing:
>
> > (a) a cemetery or land used for a columbarium or mausoleum shall not be transferred, sold, mortgaged, pledged, hypothecated, charged or encumbered by the owner thereof or any person having an interest therein.
>
> (2) Any transfer, sale, mortgage, pledge, hypothecation, charge, encumbrance or allotment made in contravention of subsection (1) is void.

"Registrar" as used in this section is defined by clause 2(o) to mean:

> 2(o) "registrar" means the member of the public service designated as registrar by the minister.

This registrar is usually called the Registrar of Cemeteries and is an officer within the Department of Consumer and Commercial Affairs.

Section 54 is contained in Part II of The Cemeteries Act and section 21 of that Act limits the application of Part II as follows:

> 21 This Part applies to every cemetery, columbarium or mausoleum the owner of which is a company, association or partnership formed for the purpose of carrying on the business of operating a cemetery, columbarium or mausoleum with the object of acquisition of gain by the company, association or partnership or by the individual members thereof, or is an individual carrying on such business with the same object, and applies, also, to any cemetery, columbarium or mausoleum or class thereof to which this part has been declared by the regulations to apply.

Thus, section 54 is limited to what is usually called "commercial cemeteries". There are only ten such cemeteries in the province.

Each of the registrars has marked the jackets of the titles affected pursuant to a Master of Titles' circular dated April 12, 1982.

The prohibition in section 54 relates to the use of land which is a matter not recorded in a land titles office. In this respect it differs from other cases where consents are required, i.e. The Education Act where the necessity of consent is related to the particular authority or body of persons which is the transferor. Since the registrar has no means of knowing that the land is held for cemetery purposes or that the company who owns the cemetery is commercial cemetery, the registrar must rely on the Registrar of Cemeteries to provide the necessary information.

The effect of section 54 is to require the registrar to reject any instrument which transfers, sells, mortgages, pledges, hypothecates, charges or encumbers the land described above unless the instrument is accompanied by the written consent of the registrar appointed under The Cemeteries Act. Since subsection 54(1) refers to the verbs associated with "a mortgage, charge or encumbrance" the issue of whether an instrument like a caveat is an encumbrance does not arise. The question that the registrar asks is whether the instrument accomplishes any of the things prohibited by the section, i.e. does it mortgage? Thus, a caveat which secures a mortgage requires the consent of the registrar because a mortgage caveat mortgages property as effectively as a land titles mortgage and could lead to a successful foreclosure of the property (see Falconbridge on Mortgages, (4th ed.) pp. 448 and 532). This section also requires the consent of the Registrar to the registration of a builders' lien. An easement does not require the consent of the Registrar.

The reason why the land titles registrar is concerned to prevent the registration of an instrument in contravention of section 54 is linked closely to the principles of the Torrens System. If a transfer were registered without consent, it can be set aside. Although the purchaser may not have a claim against the assurance fund because a court may impute the purchaser with knowledge of section 54 and the illegality of the sale, any person dealing with the purchaser either as a subsequent purchaser or mortgagee may have a claim against the assurance fund. Thus, even though section 54 makes no mention of the land titles office or the assurance fund, the registrar is involved because of the nature of the Torrens System.

Chapter 48. Infants

A. Meaning of Infant

"Infant" in Saskatchewan is defined by The Age of Majority Act. Subsection 2(1) of that Act provides that every person attains the age of majority and ceases to be a minor on attaining the age of 18 years.

B. Consequence for Land Titles: Affidavit as to Age

At common law, an infant could not make a binding contract except for necessaries. If an infant did purport to contract, upon attaining the age of majority, the infant could repudiate the contract. This is true with respect to land as well. Kerr in Australian Land Titles Torrens System at 174 says there would seem to be no doubt that if a person takes a transfer from a minor the immediate taker is subject to the principle that a minor on attaining majority may repudiate the transfer. The author adds that a third person becoming registered would, of course, be protected. In making this latter statement, the author undoubtedly means providing that the third person purchased the property for value and without notice of any defect.

To prevent this problem from occurring, every instrument registered in the land titles office, with some exceptions, is required to be accompanied by an affidavit stating that the party signing, is, in the belief of the witness, of the full age of 18 years. Of course, an affidavit that says the person signing is an age older than 18 years satisfies this requirement, i.e. an affidavit that says the person is 19 years of age or older is acceptable.

C. Infant can hold Land but Public Trustee must consent to Dealing

Land may be transferred to an infant. When land is transferred to an infant, the transfer should disclose the date of birth which, in turn, should be shown on the certificate of title. This will assist the registrar to prevent the infant from dealing with the land without the Public Trustee's consent.

Where an infant is the registered owner of land, the land cannot be transferred without the Public Trustee's consent. Subsection 10(1) of The Public Trustee Act, S.S. 1983, c.P-43.1 provides as follows:

> 10(1) Subject to subsection (2), where an infant has an interest in land and a sale, lease, mortgage or other disposition of the land is proposed to the public trustee by:

(a) the infant's parent or guardian;

(b) an executor or administrator;

(c) any responsible adult who appears to be acting in the infant's best interest; or

(d) the infant;

the public trustee may, if he considers it in the best interest of the infant, consent on behalf of the infant to the sale, lease, mortgage or other disposition on any terms and conditions that he considers expedient, and for that purpose the public trustee may execute the transfer or other instrument in place of the infant.

The execution by the Public Trustee will usually read:

"The Public Trustee for the infant, John Smith."

Section 28 of The Public Trustee Act further confirms the authority of the Public Trustee to execute any land titles instrument on behalf of an infant.

Where the Public Trustee refuses to consent to the sale, mortgage or lease of property, an application may be made to the court for approval of the disposition. If the court approves the disposition it "may issue a vesting order or authorize a person to execute any instrument on the infant's behalf" (see subsection 12(3)). The land titles office would then be governed by the court order. Thus, if there is a title which indicates that one of the registered owners is an infant, the Public Trustee may sign the instrument, or some other person may sign if there is a court order authorizing him or her to do so which accompanies the instrument, or the court may vest title to the property in some other party.

The need for the Public Trustee's consent under clause 172(1)(b) of The Land Titles Act, to protect infants of deceased persons, is discussed in chapter 32 commencing at page 322 of this manual.

D. Homesteads Compliance

Section 46 of The Public Trustee Act provides the following rules:

(1) where a male infant is the registered owner of land, the Public Trustee may swear the male's affidavit which affidavit must be modified to say that the Public Trustee "is satisfied after a reasonable effort to ascertain the facts" necessary to swear the affidavit;

(2) notwithstanding section 21 of The Homesteads Act, where a female infant is a wife, the Public Trustee may be examined in the place of the wife for the purposes of relinquishing the infant wife's rights in the homestead;

(3) where a male infant is the registered owner of land and has a wife who refuses to sign the instrument or whose whereabouts is unknown and who cannot be found after reasonable search, the Public Trustee may obtain an order of the court dispensing with the signature and acknowledgement of the wife which order may accompany any transfer, lease, mortgage or other instrument.

Chapter 49. Mental Infirmity

A. General

Land titles issues arise with respect to mental infirmity in one of two ways:

(1) under The Public Trustee Act where the Public Trustee deals with land of a mentally incompetent person;

(2) under The Mentally Disordered Persons Act where the court appoints a person to act as committee of a mentally disordered person's estate including land.

B. The Public Trustee Act

1. Appointment of the Public Trustee as Committee

When a certificate of incompetence has been issued under The Mentally Disordered Persons Act, the Public Trustee may become the committee of a mentally incompetent person's estate in the following circumstances:

(1) where no other person applies or appears to be interested in making an application to be committee (see subsection 29(2) of The Public Trustee Act;

(2) where another person applies to be committee and the court decides with the consent of the Public Trustee to appoint the Public Trustee instead (see subsection 29(3) of The Public Trustee Act);

(3) the Public Trustee may apply to the court for an order declaring that a person is a mentally disordered person and at the same time be appointed committee (see section 5 of The Mentally Disordered Persons Act and subsection 29(5) of The Public Trustee Act).

2. Notice of Authority of The Public Trustee

When the Public Trustee decides to act as the committee of the estate of a mentally disordered person, the Public Trustee signs an acknowledgement to act in the prescribed form (see subsection 29(1) of the Act). No longer does the Attorney General appoint the Public Trustee to act as was the case under The Administration of Estates of Mentally Disordered Persons Act.

Whether the Public Trustee signs an acknowledgement to act or the court appoints the Public Trustee, the Public Trustee "must submit a notice of authority to the land titles office for each

land registration district wherein is situated land in which, in the Public Trustee's opinion, the mentally incompetent person has an interest," which notice must contain a description of the land (see subsection 35(1)). This notice is called "Notice of Authority of Public Trustee".

When the "Notice of Authority of Public Trustee" is received the registrar is required to enter the notice in the instrument register and enter a memorandum thereof upon any certificate of title to land described in the notice (see subsection 35(2)). Since, there is no appointment as such, the memorandum endorsed on the certificate of title should not refer to appointment but should refer to the authority of the Public Trustee as committee of the estate of _____.

3. Effect of Registering the Notice

As under The Administration of Estates of Mentally Disordered Persons Act, the notice of authority prevents any dealing with the land unless the Public Trustee executes or authorizes the instrument in writing (see subsection 35(3)).

Subsection 35(4) provides that this prohibition does not apply to the following:

(1) a court order;

(2) a certified copy of a writ of execution or a withdrawal of a writ of execution;

(3) a caveat or a withdrawal of caveat;

(4) a lis pendens or certificate vacating a lis pendens;

(5) a document filed pursuant to The Tax Enforcement Act.

Upon registration of the "Notice of Authority", the registrar is required to send, without fee, a certified copy of any instrument named in subsection 35(4) to the Public Trustee (see subsection 35(5)).

The Notice of Authority will be signed by the Public Trustee. No affidavit of attestation is necessary, since section 63 of The Land Titles Act excepts documents issued by the Crown under statutory authority.

4. Amendment or Withdrawal of the Notice of Authority

The Public Trustee may amend any notice (see subsection 36(2)).

Where the variation is in the land description, there will be some land deleted and/or some land added. In the case of the

land deleted, the entry on the certificate of title should be the same as in the case of a withdrawal. It may, of course, be only a partial withdrawal and in this event the memorandum will have to be marked "as to _____ only". In the case of land which is added, the memorandum will be the same as in the case of a Notice of Authority, except that the instrument will be referred to as a supplementary notice and not as a notice of authority. It will be observed that it will often be necessary, in the case of variations of land descriptions, to have two endorsements arising from one instrument (i.e. one taking land off and the other making land subject to the notice.) They may be both on one certificate of title, or more usually, on different certificates of title. It is unusual (though not unknown) for one instrument to involve two endorsements in this way, but there should be no difficulty, as long as care is taken to reflect accurately in the certificates of title the effect of the supplementary notice.

In the case of other variations the registrar must be guided by the circumstances of the case as to the appropriate endorsement to make.

The Public Trustee is required to withdraw the notice of authority in certain named situations listed in section 36 eg. when another person is acting as committee or when the mentally incompetent person becomes competent or dies (see section 38). This last point makes it clear that the registrar does not act independently upon the death of the mentally incompetent person. There must be a withdrawal of the notice by the Public Trustee. The Public Trustee may want to apply for letters of administration under section 31.

Subsection 36(3) is a new provision provided to ensure that a transfer signed by the Public Trustee acts as a withdrawal of the notice of the appointment of the Public Trustee with respect to that land. No further withdrawal is required.

5. Dealing with the Land

Clause 30(1)(a) gives the Public Trustee the authority to do all things that the person could do if competent, including the power to sell, mortgage or otherwise dispose of the land of the person and to execute any transfer, lease, mortgage or other document which would be considered an instrument for the purposes of The Land Titles Act. The execution by the Public Trustee will usually read:

> The Public Trustee, as committee for the estate of Janet Jones.

It is no longer necessary for the Minister of Justice to endorse his or her approval on the instrument disposing of the interest of the mentally incompetent person. The Public Trustee has the authority to sign the instrument. There must, of course, be registered a notice indicating the authority of the Public Trustee to act pursuant to section 35 before the Public Trustee can execute any instrument.

6. Compliance with The Homesteads Act

Section 46 of The Public Trustee Act provides the following rules:

(1) where a male registered owner is mentally incompetent and a notice of the authority of the Public Trustee has been registered pursuant to section 35, the Public Trustee may swear the male's affidavit, which affidavit must be modified to say that the Public Trustee "is satisfied after a reasonable effort to ascertain the facts" necessary to swear the affidavit;

(2) notwithstanding subsection 3(2) of The Homesteads Act, where a female mentally incompetent person is a wife, the Public Trustee may be examined in the place of the wife for whom the Public Trustee is committee for the purposes of relinquishing the mentally incompetent wife's rights in the homestead;

(3) where a male mentally incompetent person is the registered owner of land and has a wife who refuses to sign the instrument or whose whereabouts is unknown and who cannot be found after reasonable search, the Public Trustee may obtain an order of the court dispensing with the signature and acknowledgement of the wife which order may accompany any transfer, lease, mortgage or other instrument.

7. Patients Outside Saskatchewan

An owner of Saskatchewan land or any interest in Saskatchewan land may become a mentally incompetent person in another province of Canada. The official of the other province, who holds the same position as the Public Trustee, may be appointed with respect to the estate. In such a case, the Minister of Justice has the authority to appoint the official from the other province as the committee of the estate of the mentally incompetent person resident outside of Saskatchewan with respect to Saskatchewan land (see section 37). The official so appointed has all of the powers of the Public Trustee upon

registration of a notice of authority accompanied by the Minister's order of appointment or a copy certified by the Minister of such order. Like the Public Trustee, this official would not be required to obtain the consent of the Minister to transfer, mortgage or otherwise dispose of the land of the mentally incompetent person.

This arrangement is in the nature of reciprocal treatment of these estates as between provinces and does not apply beyond Canada. An administrator or committee appointed outside of Canada would require validation of the appointment by a court order from the Saskatchewan court under The Mentally Disordered Persons Act. See In re Thon Estate, [1949] 2 W.W.R. 1231 (Sask. K.B.). Neither under The Mentally Disordered Persons Act or under The Public Trustee Act is a transmission of lands necessary or authorized in land titles offices.

8. Lien for Expenses

Section 21 of The Administration of Estates of Mentally Disordered Persons Act, R.S.S. 1978, c.A-5 allowed the Administrator of Estates to file a notice which contained no legal description but which claimed a lien for expenses incurred in the administration of the estate of a mentally incompetent person. This notice was required to be filed in the general record and to be treated in all other respects like a writ of execution. The Administration of Estates of Mentally Disordered Persons Act was repealed by The Public Trustee Act. Under section 40 of The Public Trustee Act, where money has been expended or loaned in the administration of the estate of a mentally incompetent person, the statement will indicate the name of the mentally incompetent person, the legal description of the land to be charged with the lien and refer to subsection 40(1) of The Public Trustee Act.

9. Death of Mentally Disordered Person

When the mentally disordered person dies, the Public Trustee is entitled to retain possession of the property of the deceased and has a priority of right to apply in the Surrogate Court for letters of administration or for letters of administration with will annexed (see section 31 of The Public Trustee Act). Henceforth, the Public Trustee, in the name of the office of the Public Trustee, acts under the grant from the Surrogate Court. The Public Trustee follows the usual procedure of making an application for transmission of the lands, complying with The Infants Act as to a Public Trustee's Certificate, etc., and, subject to the provisions of The Homesteads Act, transfers the lands.

C. The Mentally Disordered Persons Act

1. Appointment of Committee

Not all cases of mental incompetence come under The Public Trustee Act. Application can also be made to the Court of Queen's Bench under The Mentally Disordered Persons Act for a declaration of mental disorder and the appointment of a "committee of the estate". The jurisdiction of the court is provincial and an order made in another province or country would have to be validated by the court in Saskatchewan. See In re Bulger (1911), 1 W.W.R. 248 (Man. K.B.).

2. Registering Notice of Authority

The court makes orders with respect to the appointment of committees of the estates of mentally disordered persons (see section 3).

Subsection 12(1) requires a committee or the commitee's solicitor to submit a Notice of Authority to act to the appropriate land titles office. The notice must contain a description of the land. There is no form for the notice. It need not be witnessed and attested (see section 63 of The Land Titles Act). The court order need not accompany the Notice of Authority.

Prior to the coming into force of S.S. 1963, c. 11 on January 29th, 1966, an order appointing a "committee of the estate" without describing specific lands was filed in the general record against the name of the person declared a "lunatic". If the order described specific lands, then it was also registered against the described lands. The law was changed in 1963 to provide for the registration of a notice which could be varied after the taking out of the order to reduce the types of instruments filed in the general record and because, at the time of obtaining the order, it is not always possible to ascertain accurately the extent of the estate involved. The Notice of Authority provides more flexibility.

Note that the Notice of Authority can be submitted by the solicitor of the committee. This means that the solicitor may sign the notice. A memorandum of the notice will be entered on the certificate of title in the same way as with the Notice of the Authority of the Public Trustee (see subsection 12(2)).

3. Effect of Registering the Notice

After registering the Notice of Authority, the registrar shall not accept for registration any instrument unless executed by the committee or authorized by the committee in writing (see subsection 12(3)). Subsection 12(4) provides the following list of exceptions:

(1) a court order;

(2) a certified copy of writ of execution or withdrawal of writ of execution;

(3) a caveat or withdrawal of caveat;

(4) a lis pendens or certificate vacating lis pendens; or

(5) a document filed pursuant to The Tax Enforcement Act.

No transmission is required into the name of a committee for the reason that on such an appointment the land does not vest in or devolve upon the committee. The committee, under the direction of the court, merely acts for and on behalf of the owner until he or she recovers from his or her mental disability. See In re Polgreen (1914), 7 W.W.R. 1184 (Sask. M.T.); and In re Barron (1953), 9 W.W.R. (N.S.) 218 (B.C.S.C.).

In Re Patients' Estate Act Re MacKay (1963-64), 45 W.W.R. 702 (B.C.S.C.), Wilson, C. J. of the Supreme Court of British Columbia discussed the former Lunacy Act of British Columbia, which is similar to The Mentally Disordered Persons Act of Saskatchewan. He said at page 702:

> .....a committee under The Lunacy Act had no powers other than those given him by the court. The property of the lunatic was not vested in him, he was not a trustee of all the lunatic's property and did not have the powers of a personal representative. He was a statutory agent of the lunatic but could only exercise such powers as were entrusted to him by the court. Thus he could not, save by direction of the court, dispose of any part of the lunatic's estate.

4. Amendment and Withdrawal of the Notice

Section 13 provides for withdrawal or correction of notices similar to those registered by the Public Trustee.

Supplementary notices setting forth the alterations or corrections that are required to be made to the Notice of Authority are processed in the same way as a supplementary notice received from the Public Trustee.

One question that may arise with the change to section 13 is who can withdraw the notice once it has been registered. Subsection 13(1) of The Mentally Disordered Persons Act provides that "the person who filed the notice shall file...a withdrawal...or a supplementary notice". If a solicitor has previously signed the Notice of Authority, the committee may execute an amendment or withdrawal. However, if the committee has signed the notice, the withdrawals or supplementary notices should be signed by the committee. If a solicitor has signed the notice, and the committee changes solicitors or the solicitor cannot for some reason sign a withdrawal or supplementary notice, the committee should sign the notice. Of course, all other instruments dealing with the land of the mentally disordered person for which authority is granted under section 18 must be executed by the committee of the estate of the mentally disordered person.

Registration of a transfer executed by the committee is deemed to be a withdrawal of the notice of authority with respect to the land transferred (see subsection 13(3)). The notice of appointment of committee is discharged by means of the statute. It is not carried forward to the new title, in the same manner as a specific power of attorney is not carried forward when a transfer of the land by the attorney is registered.

A Notice of Authority may be cancelled from the certificate of title upon receipt of an application together with a death certificate indicating the death of the mentally disordered person (see subsection 13(4)). No formality is required for the application. It need not be witnessed and attested. The section mentions proof of death by means of the death certificate but letters probate or letters of administration also prove death and are acceptable.

5. Dealing with the Land

Pursuant to section 18 of the Act, the court may, by order, authorize and direct the committee of the estate of a mentally disordered person to do all or any of a series of things including the following:

(1) sell land (see clause 18(a));

(2) make an application as surviving joint tenant (see clause 18(b.1));

(3) execute any documents for the purposes of The Homesteads Act (see clause 18(b.2));

(4) grant leases of land (see clauses 18(d) to (g)).

The usual practice is for the court to appoint the committee with certain powers to arrange the legal affairs of the mentally disordered person. At some later time, the committee approaches the court for the specific authority to sell in relation to a particular piece of land.

Whenever an instrument executed by the committee, other than the Notice of Authority or a Notice of Withdrawal, is submitted for registration, it must either be accompanied by a court order authorizing the dealing or refer to a previously registered instrument number assigned to an instrument which contains the order of the court.

Sometimes the appointment and the power to sell are contained in the same order. This is acceptable. No further order is required. If the Notice of Authority, order of the court and transfer are submitted together, the Notice of Authority is still required to be filed before the transfer.

6. Compliance with The Homesteads Act

Section 18.1 of The Mentally Disordered Persons Act provides detail as to the powers of a committee who has been given the authority by the court, pursuant to clause 18(b.2), to execute documents on behalf of the mentally disordered person that are necessary to comply with The Homesteads Act. The law continues to be that, where the mentally disordered person has a wife who refuses to sign the instrument or whose whereabouts are unknown and who cannot be found after a reasonable search, a court order must be obtained dispensing with the signature and acknowledgement of the wife. But, under section 18.1, where the mentally disordered person is the husband, the committee can be given the authority to swear an affidavit stating either that the land is not the homestead of the mentally disordered person or the mentally disordered person has no wife or the mentally disordered person's wife does not reside in Saskatchewan and has not resided there at any time since the marriage. Where the mentally disordered person is the wife, the committee may act as the wife and give up her rights before a solicitor, justice of the peace or notary public.

7. Senility

Under section 42 of The Mentally Disordered Persons Act the court may make an order with respect to a person who is not

mentally disordered but who is incapable of managing his or her affairs. This type of order will include a general authority to act. General powers are not usually given to a committee. A notice of appointment is required to be submitted pursuant to subsection 12(1) in the same way as for a court order under section 3.

8. Effect of Death of Mentally Disordered Person

Subsection 13(4) provides that where the registrar receives an application together with a death certificate indicating the death of a mentally disordered person, the registrar cancels any memorandum of the notice submitted pursuant to subsection 12(1) entered on any title. No formality is required for the application. The Act does not state who can make the application, but the executor or administration or solicitor applying for transmission would be appropriate parties. It need not be witnessed or attested. The section mentions proof of death by means of the death certificate but letters probate or letters of administration also prove death and are acceptable.

Chapter 50. Trustees

A. No Notice of Trusts

Section 73 of The Land Titles Act states that no entry shall be made upon a certificate of title, or upon the duplicate thereof, of any notice of trusts, and that if any instrument, for instance, a transfer of mortgage, contains any such notice, the registrar is required to treat such instrument as if there was no trust, and the trustees shall be deemed to be the absolute and beneficial owners of the land for the purposes of The Land Titles Act. There was a similar provision in the Alberta Land Titles Act, and a transfer containing a notice of trust was submitted to the registrar for registration. The registrar made a reference for a decision to a judge of the Supreme Court of Alberta. The case was Re The Land Titles Act and Allan and O'Connor, [1918] 1 W.W.R. 440 (Sask. K.B.). Harvey, C. J. decided that a transfer setting out the terms of a trust may be registered although the trust, except in the case of executors and administrators, must be disregarded by the registrar and that the public generally need not be concerned with the trust. The practice is the same in Saskatchewan.

In the case of executors and administrators, section 169 of The Land Titles Act states that when land of a deceased person is transmitted, the registrar shall issue or grant to the executor or administrator as such, a new certificate. In Ficke v. Spence and Olson, [1922] 1 W.W.R. 1271 (Sask. K.B.), Bigelow, J. referred to the provision in The Land Titles Act that no entry should be made upon a certificate of title of any notice of trust, but he pointed out that an exception had been made in the case of land held by a personal representative.

There is another exception to the provisions that no entry of trusts should be placed on a title under The Religious Societies Land Act. The names of trustees should be inserted in transfers and titles of property held by religious organizations, where the organizations are, for instance, under either The Religious Societies Land Act or The United Church of Canada Act. Both Acts are discussed in chapter 46 commencing at page 471.

B. No Survivorship

It is also permissible for a title to be held by parties as trustees where land is transferred to joint tenants with no right of survivorship. Section 238 of The Land Titles Act provides that upon the transfer to two or more persons as joint owners of any land for which a certificate of title has been granted, to be held by them as

trustees it shall be lawful for the transferor to insert in the transfer or other instrument the words 'no survivorship', and the registrar shall in such case include the words in the certificate of title and in the duplicate certificate of title issued to such joint owners. Provision is also made whereby any two or more persons so registered as joint owners of any land held by them as trustees, may authorize the registrar to enter the words 'no survivorship' upon the title and duplicate title. The effect of entering the words 'no survivorship' is set out in subsection 238(3), namely, after the words 'no survivorship' have been placed on the title and signed by the registrar, the registrar must refuse to allow any dealing with the land by any less number of joint owners than the number entered on the title, without obtaining the sanction or permission of the court or judge. It is not very often that the words 'no survivorship' appear on a certificate of title, but it is well, if it has or should happen, to keep the provision of section 238 in mind. The expression 'no survivorship' was considered in Main v. District Registrar, [1939] N.Z.L.R. 220. In this case Cooper, J. says that a certificate of title in the names of two or more persons with the entry of the words 'no survivorship' indicates, in his opinion, that the property is trust property and that the prohibition contained in the section of their Act, which corresponds to section 238 of the Saskatchewan Act, is inserted for the protection of the beneficial owners.

It would appear that if two or more persons were registered owners as joint tenants and not as tenants in common, with no reference in the title to the parties holding as trustee, but the words 'no survivorship' appeared on the title, such expression 'no survivorship' indicates that the land is trust property, and in the case of the death of one of the trustees the title cannot be dealt with by any less number than the number originally stated in the title, without an order of the court, and no application for survivorship may be accepted.

Baalman at page 299 deals with the sections in the New South Wales Act corresponding to sections 238 and and 239 in The Land Titles Act of Saskatchewan. He states that this provision does not destroy the element of survivorship in a joint tenancy or transform it into a tenancy in common. All the section does is what it expressly purports to do, and that is to cast on those proprietors who remain after one of their co-proprietors has died, the obligation of approaching the court, for an order enabling the survivors to deal with the land. Should the title for any land, with the expression 'no survivorship' marked on it, be required to be dealt with by any instrument presented for registration, the titles researcher would be well advised to refer the matter to an assistant registrar.

C. Powers of Attorney

At various times in the past, and the same circumstances will likely happen in the future, the registrar is requested to register a power of attorney from one of several executors. A power of attorney cannot be accepted from a personal representative. A personal representative is in reality a trustee entrusted with the legal ownership of lands for the benefit of others.

By reference to section 44 of The Trustee Act, it will be noticed what authority trustees, including personal representatives, have to delegate their authority, or any part of their authority, to any agent or agents. These authorities include the appointment of a solicitor by a trustee to be the trustee's agent to give a discharge for any money, but the trustee must not allow the money to remain under the control of an agent for any period longer than is reasonably necessary. Likewise it is lawful for a trustee to appoint a chartered bank or solicitor to receive and give a discharge of money payable to the trustees under any policy of assurance, but the trustee must assume control of the money just as soon as it is reasonably possible. It is submitted that the naming of certain cases where trustees may appoint agents exclude the appointment of agents for other purposes following the principle of law that the express mention of one thing causes the exclusion of another.

It might be mentioned that in 1942, representations were made to the Saskatchewan Government to widen the authority of powers of delegation by trustees in Saskatchewan. The Saskatchewan Legislative Counsel asked the legislation committee of the Law Society of Saskatchewan to express its opinion as to suggested amendments to The Trustee Act considerably enlarging the power of personal representatives to delegate their duties. This reference to the legislation committee is reported in the Saskatchewan Bar Review of June, 1942 at page 22 where it is stated that the committee expressed opposition to the proposed amendment.

The appointment of an executor or an administrator is one of great trust and confidence. The view generally held is that such appointees should not have the authority to delegate or appoint any other person to carry out the trust, except where authorized by The Trustee Act. If the circumstances should arise whereby the trustee or other appointees are unable to act, then application should be made to the court for its direction as the court has authority, under certain circumstances, to appoint new trustees. The court is particularly concerned about the administration of trusts of any nature and under section 79 of The Trustee Act, trustees whether executors or administrators or otherwise may apply to a judge of the Court of Queen's Bench for advice or direction.

D. Judicial Trustee

Section 85 of The Trustee Act makes provision for the appointment by the Court of Queen's Bench, or a judge thereof, of a judicial trustee. The court, for cause, has authority to remove a trustee, including of course an executor or administrator, from his office as such trustee, executor or administrator, and appoint a judicial trustee. The court or judge has the authority to vest the title to any land standing in the name of the trustee, including an executor or administrator, and to direct that the existing certificate of title of such trustee be cancelled and a new title issued to the judicial trustee. In Small et al. v. Packard, [1925] 1 W.W.R. 897 (Sask. K.B.), MacKenzie, J. heard an application for the removal of an executor and the appointment of a judicial trustee. It was shown by the applicants that the executrix, the defendant, was not properly administering the estate and consequently an order was made appointing a trust company as sole judicial trustee to administer the estate instead of allowing the executrix to continue. The administration by the trust company was to be under the direction of the court. In Northern Crown Bank v. Woodcrafts Limited et al., [1919] 2 W.W.R. 347 at 349 (Alta. S.C.A.D.), Stuart, J. said that by the appointment of a judicial trustee the court "has already laid its hands upon the estate". In Alexander v. Royal Trust Company and Stipe, [1949] 1 W.W.R. 867 (Alta. S.C.A.D.), the Alberta Court of Appeal was concerned with the matter of an appointment of a judicial trustee, and draws attention to the provision in the Alberta Trustee Act that a judicial trustee shall be subject to the control and supervision of the court as an officer thereof. Exactly the same provision appears in subsection 85(3) of the Saskatchewan Trustee Act. Parlee, J. stated in his judgment at page 883 that a judicial trustee should be appointed only for special reasons and where the circumstances would warrant, for example, where an administration of property by a trustee had broken down, or where the administration was being unduly prolonged and where the court did not consider it proper itself to undertake the administration. Under certain circumstances the court has authority to take over entirely the administration of an estate by appointing a judicial trustee. The court may take a somewhat middle course whereby the judicial trustee appointed is declared to be a court officer, yet is responsible for his or her own actions with liability to account to the court when necessary in connection with his or her administration. It is not necessary for a judicial trustee to seek the advice of the court in every step necessarily taken in the administration of the estate.

Chapter 51. Receivers and Receiver-Managers

A. Definition and Background

A receiver is a person appointed either by the court or pursuant to an agreement between the parties to collect and receive rents, issue, profits and proceeds of real and personal property and to distribute them among the persons entitled thereto. A receiver-manager has broader powers than a receiver and may carry on the business of the corporation on a day-to-day basis.

The text Canadian Companies by Wegenast (1931) at pages 675-687 outlines the history with respect to the appointment of receivers. The appointment of receivers arose out of the practice of the Court of Chancery. An equitable mortgagee, that is a mortgagee who had not a legal title enabling him or her, upon default, to take possession of the mortgaged property, could obtain from the Court of Chancery the appointment of a "receiver" empowered to collect the rents and profits of the mortgaged property for the benefit of the mortgagee. Now under statutory provisions in most of the provinces (see The Queen's Bench Act, section 45.8 which follows the English Judicature Act), a mortgagee may obtain the appointment of a receiver by the court "in all cases in which it appears to the court to be just and convenient". The remedy of a receivership, which was thus made available for mortgagees generally, is peculiarly suitable in the case of debenture holders, who are usually a numerous and changing body of persons. Where the security is a floating charge, the interest of the bond holders, and their trustee, if any, is an equitable interest, and the remedy of a receivership is in order, quite apart from any question as to the scope of the provisions of The Queen's Bench Act. The practice of having the court appoint a receiver appears to have suggested to conveyancers the possibility of provision in the mortgage itself for the appointment of a receiver either by the mortgagee or by a trustee for the mortgagee and such provisions came into general use, especially in debenture mortgages and deeds of trust. The practice indeed became so common in England that it was standardized in a section of the Conveyancing Act. In 1976, The Business Corporations Act, sections 89 to 96 memorialized the position of the instrument appointed receiver on behalf of corporations. In 1979, The Non-profit Corporations Act, S.S. 1979, c.N-4.1, sections 78 to 84, provides for the appointment, duties and powers of a receiver or receiver-manager with respect to the assets of a non-profit corporation. The forerunner of The Business Corporations Act and The Non-profit Corporations Act was the Canada Business Corporations Act, R.S.C. 1985, c.C-44 sections 94 to 101, which provide for the appointment of a receiver or receiver-manager. When reference is made to The Business Corporations Act in this chapter, it may be assumed that a comparable provision exists in The Non-profit Corporations Act, The Co-operatives Act and the Canada Business Corporations Act.

B. Whether an Instrument Appointed Receiver or Receiver-Manager can Execute Land Titles Instruments

A receiver or receiver-manager cannot execute transfers, mortgages, leases or other like instruments unless the receiver or receiver-manager holds a properly registrable power of attorney or is authorized to execute such documents by a court order.

In Price Waterhouse Limited v. Saskatchewan Economic Development Corporation (1983), 25 Sask. R. 101 (Q.B.) Mr. Justice Gerein considered whether a receiver-manager could execute a transfer of real property for the purposes of registration in a land titles office. The court concluded that the receiver-manager, unless authorized by the court to execute the transfer, could not do so. In addition, several unreported decisions from Alberta would support this view: Femco Financial Corporation Ltd. et al. v. Femco Ventures Ltd. et al. (1983), 24 Alta. L.R. (2d) 374 (Q.B.) and Province of Alberta Treasury Branches and Coopers & Lybrand Limited v. Ryan Construction Ltd. et al., [1983] 3 W.W.R. 137 (Alta. Q.B.). Again in obiter, our Court of Appeal in the case of Roynat Ltd. v. Denis, [1982] 5 W.W.R. 509, Tallis J.A., makes this comment at page 522:

> In some jurisdictions, the receiver-manager is able to confer title on a purchaser free of encumbrances. However, in Saskatchewan a receiver-manager is not able to exercise the power granted to him in the debenture to confer title. An appropriate court order must be obtained but this does not preclude the taking of possession pursuant to the terms of the debenture.

The recent case of Re First Canadian Land Corporation (Receiver Of); Re Land Registry No. 782216874A (1988), 60 Alta. L.R. (2d) 251 (Alta. Q.B.) takes a different approach. In this case Marshall, J. directed the registrar to register a transfer of land executed by a receiver appointed under a debenture which contained a power of attorney. Without similar case authority in Saskatchewan, or legislation, it is doubtful whether the practice established by Marshall, J. will be followed.

There is no specific legislation on point governing the interaction of a land titles office and receivers and receiver-managers. Accordingly, the provisions of The Land Titles Act requiring transfers and other like instruments to be executed by the registered owner or by a lawfully appointed attorney under a power of attorney cannot be ignored. An analogy can be drawn between a receiver or receiver-manager and many other officers who are able, through specific legislation and by court approval, to execute transfers i.e. executors, committees, trustees in bankruptcy, liquidators. In the first two cases, it may be presumed that the officer is acting according to the best interests of the estate which is being administered. In the latter two cases, the officers act not only on behalf of the debtor but on behalf of all secured

and unsecured creditors and yet special rules exist to enable such officers to transfer land.

There are issues which the court must consider which the registrar cannot. For example, the appointment of a receiver/receiver-manager is dependent upon default. Whether default has occurred in any given case is usually a question of mixed fact and law dependent upon an analysis of the agreement and the actions of the mortgagor. Even with proof of the appointment being given to the registrar, it may well be that a court will say that the debtor is not in default or, if in default, the debtor should have time to reinstate or redeem the mortgage debt.

Also, section 93 of The Business Corporations Act makes it clear that a receiver or receiver-manager appointed under an instrument shall act in accordance with that instrument. Section 91 indicates that only those powers which the receiver or receiver-manager is authorized to exercise are taken from the directors by the appointment of the receiver/receiver-manager. In order for the registrar to know whether or not the execution of the particular transfer in front of them is in accordance with the provisions of the instrument, the registrar must construe the instrument. This is beyond the mandate of the registrar.

Even if the receiver or receiver-manager executes under the seal of the corporation it is doubtful if the registrar could rely on clause 207(d) of The Land Titles Act. If the appointment of the receiver was invalid or the sale improper, clause 207(d) would be construed strictly, and possibly, such a construction would place a limitation on clause 207(d) which would render the assurance fund liable.

C. Court Order Empowering Receiver or Receiver-Manager

A court order authorizing a receiver/receiver-manager to perform certain functions including the execution of land titles documents is not placed in the general record. It must accompany the document which is to be registered under the signature of the receiver/receiver-manager or where, the court order has accompanied a previously registered instrument, the receiver/receiver-manager may refer to the previously registered instrument by number.

Chapter 52. Non-resident and Corporate Ownership of Land

The Citizenship Act, R.S.C. 1985, c.C-29 section 35 provides that real and personal property of every description may be taken, acquired, held and disposed of by a person who is not a citizen in the same manner in all respects as by a citizen; and a title to real and personal property of every description may be derived through, from or in succession to a person who is not a citizen in the same manner in all respects as through, from or in succession to a citizen. Reference might also be made in this connection to the case of In re Kvasnak Estate (1951), 2 W.W.R. 174 (Sask. C.A.).

The Saskatchewan Farm Security Act S.S. 1988, c.S-17.1 repealed and replaced The Saskatchewan Farm Ownership Act, effective Sept. 1, 1988. The Saskatchewan Farm Ownership Act and the new Act, sections 76 to 100, both restrict non-residents and non-agricultural corporations from retaining ownership of farm land. Neither Act is administered by the land titles offices. (Note that section 12 of The Land Titles Amendment Act, R.S.S. 1978 (Supp.) c.35 which would have required the land titles offices to take an active role in enforcing The Saskatchewan Farm Ownership Act was never proclaimed in force.) The Saskatchewan Farm Ownership Board has access to all land titles records for the purposes of enforcing the Act.

A. Transmission to the School Division

The Education Act, S.S. 1978, C.E-0.1 (Supp.) was proclaimed in force January 1, 1979. Section 19 provided that all school districts, separate school districts, larger school units and high school districts "shall be designated as school divisions by order of the Minister and each such order shall be published in the Gazette". Some school districts under The School Act R.S.S. 1965, c.129 had previously been established as school units under The Larger School Units Act, S.S. 1944 (2nd Session), c.41.. The 1979 Act applies to both notwithstanding the fact that a transmission from the district to the unit had not been made.

Section 117 of the Act provides that upon a school division being established, all the assets of the school district or unit, as the case may be, are vested in the division, subject to the encumbrances affecting the land.

Since the Act and the Minister's order effected a name change, it was necessary to change the name of the registered owner on the titles to the land involved. The method used was to have the board of the new division submit the Minister's order plus an application for transmission referring to the transmission from the district or unit to the division. The application for transmission had to be an instrument separate from the Minister's order. The order could not form as schedule to the application for transmission. No formality of execution was required for the application for transmission. It was treated like an application for transmission involving an estate. The secretary-treasurer of the division was allowed to execute the application as agent of the division even though clause 105(1)(d) of the Act authorizes the chairman of the board of the division to execute agreements. Few transmissions remain.

The fees were waived by Order in Council 1596/79 made under section 78 of The Department of Finance Act, 1983, S.S. 1983, c.D-15.1 (which is the equivalent of section 60 of the present Department of Finance Act, S.S. 1983, c.D-15.1).

A more simple procedure would have been to have the statute change the name of the districts or units upon presentation of the Minister's order and a list or lists certified under the seal of the secretary-treasurer and for the statute to have waived the fees.

It should be noted that the phrase "school district" is retained in the Act. Sections 120 to 131 provide for the establishment of

school districts in former school units. These are advisory bodies and do not have any power to hold land.

B. Minister's Power to Vest Land

The Minister may, by order, vest land in the name of a board of education of a division to which land is transferred. Upon presentation of a copy of the order duly certified by the Minister and the duplicate certificate of title, the registrar is required to issue title to the board of education as the owner of the land (see subsection 118(2) of The Education Act). Subsection 118(2) also provides that no assurance fund fees will be paid. Since 1983, this provision is virtually meaningless as the amount of the assurance fund fees are 1% only. It may be that where a reduction of fees is required, an application will be made to the Minister of Finance under section 60 of The Department of Finance Act, S.S. 1983, c.D-15.1.

C. Authority of the Board to Deal with Land

Section 32 of The Education Act establishes a board of education in each school division. Subsection 33(1) constitutes the members of the Board of Education as a corporation called the "Board of Education of the _____ School Division No. _____ of Saskatchewan". Subsection 33(2) provides that the corporation shall have a common seal and may exercise all of the powers of a corporation given by The Interpretation Act.

Clause 92(j) provides that a board of education may "subject to section 350 and to the regulations, dispose of or lease property of the division and grant easement over any of the real property of the division". Subsection 117(1), after vesting all of the assets of the district or unit in the division, provides that "the board of education may ...subject to the approval of the minister, sell, lease or otherwise dispose of the real property so vested in the board". This latter section appears in conflict with section 350 which, after stating that a board of education may lease or sell any of its real property, requires the approval of the Minister for the lease or sale of any lands used for the instruction or accommodation of pupils, where a school division is located in the Northern Saskatchewan Administration District, or as a teacher's residence. Section 350 seems to only require the Minister's approval in limited circumstances. One method of reconciling the two sections is to confine the application of subsection 117(1) to lands owned by divisions as of January 1, 1979. However, since the registrar will not know which lands have schools or teacherages, the approval of the Minister of Education or the Deputy Minister is required on all transfers or leases of land executed by a board of education.

D. Execution of Instruments by a Board

Subsection 105.1(2) of The Education Act enlarges the number of persons who can execute agreements by or on behalf of a Board of Education.

Under subsection 105(1) the chairman of a board of education exercises general supervision over the affairs of a division. This means that the chairman may execute instruments, but under subsection 105.1(2) a board of education may delegate to any special or standing committee the management of any administrative matters including executing agreements authorized by and on behalf of the board. The persons signing must indicate that they are part of a special committee of the board with the authority to execute instruments.

Subsection 33(2) of The Education Act provides for a common seal. Therefore, attestation of an instrument executed either by the chairman or the members of a special committee must be under seal.

E. Change of Name or Number of a Board

Section 29 establishes a procedure for the Minister to change the name or number of a school division. Where the name or number is changed, the seal continues until changed by the board. The certificate of title may be changed upon presentation of the order and the duplicate, and payment of the applicable fee.

F. Expropriation of Land

Section 348 gives a Board of Education the authority to expropriate land with the consent of the Local Government Board. On written demand authorized by resolution of the board, the registered owner of any land is required to execute a transfer. If the registered owner fails to do so the Local Government Board is required to forward to the registrar a notice, signed by the chairman of the board. The notice must state that the land has been expropriated by the board under section 348 of The Education Act. Upon receipt of the notice, the registrar is required to cancel the certificate of title to the land described in the notice and to issue title to the board. See also section 349.

G. Transfer of Land in the Name of the Crown

Some titles exist in the name of Her Majesty the Queen (Saskatchewan) which actually encompass lands for school purposes. The address portion usually is the Department of Public Works, Municipal Affairs or Northern Saskatchewan, all of which departments

no longer exist. If such land is to be transferred, the duplicate should be located and administration and control transferred to the appropriate party which is usually the Department of Agriculture, by letter of request changing the address to that of the Department of Agriculture (see page 136 of this manual). The Minister or Deputy Minister may then transfer the land to the appropriate school division.

Chapter 54. Presumption of Death

The Survivorship Act provides that where two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, subject to certain provisions, be presumed to have occurred in the order of seniority and the younger shall be deemed to have survived the older. It is not within the authority of a registrar to make any decision in connection with the circumstances of the deaths and as to whether this Act applies to such deaths. On a number of occasions applications have been made by solicitors to a judge of the Court of Queen's Bench. It is submitted that solicitors should follow this procedure and obtain, if the facts warrant it, a declaration by the court that the parties died under circumstances rendering it uncertain which of them survived the other and that, therefore, The Survivorship Act applied.

Mr. Justice Davis of the Court of Queen's Bench made an order dated the 16th day of April, 1957 in the matter of the estate of John Williams, deceased, and in the matter of the estate of Julia Margaret Williams, deceased, and which accompanied an application for transmission registered in the land titles office for the Regina Land Registration District on the 2nd day of May, 1957 as No. FS 6092.

Chapter 55. The Escheats Act

Sometimes it happens that a person dies intestate and without heirs, or a corporation or an association ceases to exist, and in either case, land is registered in the name of the intestate, corporation or association. This can occur quite frequently with respect to mines and minerals under streets and lanes which are not subject to forfeiture under The Mineral Taxation Act.

One remedy for this problem is found in The Escheats Act which allows the Attorney General to demand payment, delivery or possession of land, in these circumstances, and if the demand is not complied with, may cause an action to be brought for the recovery of the land (see section 3). If the court orders the land to be vested in the name of Her Majesty the Queen (Saskatchewan), an order of the court will be presented to the registrar directing the registrar to cancel the certificate of title and issue a certificate of title in the name of Her Majesty the Queen (Saskatchewan). Thereafter the Crown may deal with the land as it sees fit.

PART X - FEES

Chapter 56. Registration, Filing and Searching Fees

A. Structure of Fee Tariff

Section 233 of The Land Titles Act directs the registrar to demand and receive the fees for services provided in the Act as fixed by a tariff to be prescribed by the Lieutenant Governor in Council. The present fee tariff is passed by The Land Titles Fees Regulations, c.L-5 Reg. 1 appearing in the July 15, 1983 Gazette. It is amended from time to time.

The fee tariff provides for four basic types of fees:

(1) ad valorem fees which are fees based on an affidavit of value of the land, eg. mortgage, mortgage caveat, lease, transfer and transmission fees are based on an affidavit of value of the land;

(2) a flat fee to issue a certificate of title, eg. from a plan or on request when the name of the registered owner changes;

(3) a flat fee for instruments other than those above mentioned, eg. a caveat other than a mortgage caveat;

(4) searching fees.

B. Fees Based on Value

1. Transfers and Transmissions

(a) Calculation

The fees for the registration of a transfer are ad valorem fees which means the fees are based on the value of the land. The amount of the fee is specified in clause 9(b) of The Land Titles Fees Regulations.

(b) Affidavit of Value

Subsection 234(2) of The Land Titles Act provides that where a "fee is determined according to the value of land or and interest in the land, the value shall be ascertained by the oath or affirmation of the applicant, owner or person acquiring the land or of such other person as the registrar believes to be acquainted with its value and whose oath or affirmation he is willing to accept".

There is no form for the affidavit of value. It is acceptable for the deponent to state "in my opinion" as to the value but cannot rely on extraneous evidence not of his or her own belief. The affidavit of value must convey the meaning that the value is as of the date of execution. As a matter of land titles practice, it cannot be sworn more than six months before the presentation of the instrument for registration.

(c) Incorrect Value Sworn for Transfer or Transmission

The affidavit of value may be corrected after the registration of a transfer or transmission if the deponent made an error in the amount. A new affidavit must be sworn by the same person who swore the incorrect affidavit and must outline the basis of the error and the correct particulars. The affidavit is to be given a registration number and endorsed on the back of the certificate of title as "corrected affidavit of value re transfer number ". The appropriate additional charge should be made. If a refund is in order, the refund may be made directly by the registrar if the error is drawn to the attention of the registrar within 60 days. The deposit account should be credited or if the person does not have an account, cash payment (cheque) should be made and appropriately identified in the accounting records.

The 60 day rule is to avoid stale dated claims. It is within the discretion of the registrar to waive the time limit in deserving cases.

The registrar need not accept the affidavit if the registrar is not satisfied as to all circumstances.

Upon registration of the corrected affidavit of value, the value on the front of the certificate of title should be changed. If the parties wish the title to be renewed, a renewal fee must be charged.

(d) Decrease in Value

Subsection 234(2) of The Land Titles Act provides that "If the registrar is not satisfied as to the correctness of the value so sworn to or affirmed, he may require the applicant, owner or person acquiring the land to produce a certificate of the value under the hand of a sworn valuator appointed by the registrar or a judge, which certificate shall be received as conclusive evidence of the value". This is the registrar's authority to question a sworn affidavit.

The economy determines when the registrar will question a decrease in value. From 1966 until 1984, the practice was that in any transfer or transmission of land where the value of the land which is shown in the affidavit of value is less than the consideration shown in the affidavit of true consideration, or if the said sworn value is less than the value shown in the last preceding transfer of the same land, the person swearing the affidavit must also set out, in the affidavit, the reason for such difference or decrease in value.

The economy of the early 1980's required a modification to this practice. Decreases greater than 10% required explanations. Since 1987, the directive has been to have a flexible policy leaving the matter entirely to the registrar's discretion according to local conditions. This should result in few rejections for a decrease in value involving farm land especially in foreclosure matters. However, the registrar has the authority to question an affidavit reflecting a decrease in value. In order to avoid a rejection, a solicitor preparing an affidavit of value should simply, as a matter of practice, include a statement that "the reason for the present sworn value being lower than the previous value (or as the case may be) is that (here insert the reason for the discrepancy).

Wherever there is a higher amount shown as the consideration than in the affidavit of value, an explanation must be provided.

2. Leases

The valuation of a lease can be problematic. Subsection 234(3) of The Land Titles Act provides that the value of a lease shall be either:

(1) the value of the portion of the term of the lease unexpired at the date of the issue of the title for the lease or of the registration of the instrument; or

(2) if the value of the unexpired portion cannot be determined, the value shall be the value of the fee simple estate plus the value of the leasehold improvements.

3. Mortgages

(a) Generally

Fees for mortgages are generally based on the amount of the principal sum secured (see subsection 15(1) of The Land Titles Fees Regulations).

(b) Where the Value is less than the Principal Sum

Subsection 15(2) of the Regulations provides as follows:

> Where the value of the land in Saskatchewan, charged by the mortgage together with any improvements on the land or intended to be made to the land, using the proceeds of the mortgage, is less than the principal sum secured, the fee provided in subsection (1) may be calculated on the value of the land charged by the mortgage, together with any improvements on the land or intended to be made to the land, using the proceeds of the mortgage, as proven by the affidavit of a person mentioned in subsection 234(1) of the Act.

A special form for the affidavit is provided by the Regulations. It must be followed. Note the need to refer to future improvements. All mortgages are entitled to obtain this break in fees.

(c) Mortgages Registered in more than one District

Where a mortgage is registered or filed with respect to land situated in more than one district, the person submitting the mortgage may request that the total fees be paid in the first district. The registrar will provide a certificate that the fees have been paid (see subsection 15(4) of the Regulations). In the subsequent offices the fee will be the flat fee plus a flat fee for each additional title affected.

The registration stamp, in each district, on the mortgage and duplicate, if any, must qualify the certificate of registration, to show that the instrument has only been registered so far as that portion of the land which is in the registrar's district is concerned.

(d) Mortgage Discharged to Accommodate Plan

Subsection 15(4) of The Land Titles Fees Regulations provides for a reduced fee where a mortgage is required to be discharged and re-registered to accommodate a plan. This provision was originally inserted to accommodate The Planning and Development Act which used to require the discharge of a mortgage before a plan of subdivision affecting part only of the land covered by the mortgage was registered. Under that Act, the direction to the registrar was to not register any instrument which may have the effect of subdividing land. These general words made it appear as if the registrar had to insist on the discharge of any mortgage before a plan of subdivision was registered

to prevent an order for foreclosure subdividing the land at some future date. The new Act, however, is very specific. Such a court order will not require approval. The new Planning and Development Act proclaimed in force April 17, 1984 no longer requires mortgages to be discharged when a plan is registered.

Subsection 15(5) is now used to facilitate the discharge and re-registration of plans according to the discretion of the registrar.

(e) Mortgage following Caveat

Subsection 15(b) of the Regulations provides that a reduced fee will be charged for the registration of a mortgage where it is shown, to the satisfaction of the registrar, that a caveat has already been registered claiming an interest under the same mortgage.

(f) Subsequent Mortgage

Where a subsequent mortgage is being registered claiming the same interest as a mortgage which is already registered, it is the policy of the Master of Titles to not charge fees for the second mortgage if the mortgage is accompanied by an affidavit swearing that no further monies are being advanced.

4. Mortgage Caveat

(a) Caveats attracting Mortgage Fees

Mortgage fees are required to be paid on a caveat which claims an interest under an unregistered mortgage of a fee simple or leasehold estate or under an agreement to which section 177 of the Bank Act (Canada) (see subsection 16(2) of The Land Titles Fees Regulations).

(b) Affidavit of Value

Where the value of the land affected by the caveat together with any improvements on the land or intended to be made on the land, is less than the principal sum secured, or the mortgage or agreement is for an ascertainable amount, the fee may be calculated on the value of the land affected by the caveat (see subsection 16(3)). Form A to the Regulations must be followed.

(c) Multiple Caveats in one District

Where more than one caveat is being registered in the same land registration district with respect to the same

mortgage or section 177 agreement, the fee may be calculated on the total value of the land affected by the caveats being registered as proven in one affidavit (see subsection 16(4)).

(d) Caveats in More than one District

The Master of Titles has the authority to issue a direction that the ad valorem fees be paid in one district, in the same way as for mortgages (see subsection 16(6)). The reason why the Master of Titles issues a direction rather than the registrar issuing a certificate of fees paid is to maintain control at one central point as to the total number of caveats supported by the mortgage.

Caveats and transfers are two of the types of instruments that can only affect land in one land registration district. The registrar cannot register a caveat which includes land in more than one district. Section 16 of The Land Titles Fees Regulations is intended to enable one mortgage to be the subject matter of a series of caveats in two or more land titles offices. In such a case, the Master of Titles' directive is always required.

All caveats are forwarded to the Master of Titles, and the Master of Titles' stamp is placed on all caveats. The registrar, in the office where the fees are paid, also stamps all caveats.

5. To Receive Duplicate Following Registration of Grant

Clause 9(a) of The Land Titles Fees Regulations requires the payment of ad valorem fees on registration of a grant from the Crown prior to releasing the duplicate certificate of title. On registration of the grant, the registrar forwards a form notice to the registered office advising that an affidavit of value and the appropriate fees required before the duplicate will be released. When the affidavit and the fees are received, the value is endorsed in the upper left hand corner of the title. The certificate of title is microfilmed again, and the duplicate is released.

C. Fees for Titles Affected

Section 21 of The Land Titles Fees Regulations provides as follows:

21 Where any instrument:

(a) affects more than one certificate of title, the fee payable for each additional certificate of title affected is $5; or

(b) affects more than one instrument, the fee payable for each additional instrument affected is $5.

It is intended that all instruments, other than ad valorem instruments, are to be classified as instruments that affect more than one certificate of title or affect more than one instrument. One either adds up titles or the instruments and multiplies by five, under the present tariff. Another way is to think of each separate transaction as attracting $5, i.e. two changes of addresses on two caveats is two transactions each attracting $5.

The following are examples of the rule that you charge either for instruments or for titles affected:

(1) change of address on one caveat on one certificate of title:
- $5;

(2) change of address on one caveat affecting two certificates of title:
- fee for change of address on two certificates of title will be $10;

(3) change of address changing address on two caveats affecting two certificates of title:
- fee for a change of address on two certificates of title will be $10.

This rule does not apply where fees are being charged for an instrument based on an affidavit of value by the office collecting the "for value" fees, i.e. mortgages attract "extra title" fees when the mortgage fees are collected by another office.

D. Fees for Copies and Searches

The Land Titles Act and Regulations make provision for supplying certified and uncertified copies. If a person requests a copy or photocopy, an uncertified copy is provided.

E. Free Work

1. Government Departments and the Universities

Section 7 of The Land Titles Fees Regulations establishes that "no charge shall be made for any services rendered to the University of Saskatchewan, the University of Regina or the Crown in right of Saskatchewan except when those services are performed for any Crown Corporation".

Note that the services must be rendered "to" the agency involved. As a general rule, the agency or its solicitor must submit the work or must be seen to be acquiring an interest in the property as a transferer, etc. in order to be entitled to have its work processed without fee.

2. The Prairie Farm Rehabilitation Act

This Act was passed by the Government of Canada and originally appeared as Ch. 23 of the Statutes of Canada, 1935. This Act is commonly referred to as the P.F.R.A. The Lieutenant Governor in Council of Saskatchewan passed an Order-in-Council No. 386 of 1936 dated April 8, 1936 whereby the executive council advised that no fees should be charged for the examination and registration of plans and all instruments filed or registered in the land titles office, nor for any service furnished by the registrars to or for the Advisory Committee of the P.F.R.A. in connection with the lands included in the projects conducted under the supervision of the Committee.

3. The Veterans' Land Act

After World War I the Dominion Government passed the Soldier Settlement Act for the purpose of buying land for veterans or lending money to veterans under mortgage. This Act until the revision of 1985 was known as the Veterans' Land Act. By arrangements made between the Saskatchewan Government and the Soldier Settlement Board of Ottawa, the land titles offices were instructed by the Master of Titles by letter dated April 16, 1918, that searches by the Board could be obtained free and also that no charge would be made for abstracts and certificates as to executions. This arrangement still continues. The Board, however, pays for the registration of any document that it requires to be registered, but where there are no registrations involved, no charge is made for services given the Board.

4. The Farming Communities Land Act

Section 11 of The Farming Communities Land Act, R.S.S. 1978, c.F-10 reads as follows, "No fees shall be charged by a clerk of the court, registrar of land titles or the chief surveyor of land titles office for any service under this Act".

5. Sheriffs

Effective the registration date of April 1, 1985, the sheriffs do not submit fees with writs of execution, withdrawals, partial discharges, postponements or any other instrument submitted by the sheriff. The sheriffs collect the fees for this type of instrument pursuant to subsection 180(1) of The Land Titles Act in conjunction with a new fee tariff for sheriffs which came into effect April 1, 1985, appearing in the March 8, 1985 Saskatchewan Gazette. The sheriffs' fee tariff creates block fees. Thus, the fee for registration on the sheriffs' side includes the withdrawal and any partial discharge or postponement. None of the fees collected are remitted to the land titles office. These fees are credited to Court Services'

revenue. The collection of fees on the sheriffs' side will of course be subject to their free work policy.

6. Other Instruments Processed Free

Specific items in other pieces of legislation are specified to be processed free. For example, subsection 37(2) of The Local Government Board Act provides that searches of land titles records including the preparation of certified copies are provided free to the board. Other examples are discussed throughout this manual, eg. homesteads caveats, seed grain lien caveats, etc.

F. Fees Paid in Error

1. Registrar's Error

Section 27 of The Land Titles Fees Regulations provides that the Master of Titles may direct a refund of fees collected in error.

2. Client's Error

The Master of Titles and the registrar have some discretion where the overpayment to the Government is as a result of a client's error as a result of the unreported decision of Mr. Justice MacLeod in A & U Holdings Ltd. v. Registrar, Regina Land Titles Office, Q.B. No. 440 of 1986, March 16, 1987.

Section 60 of The Department of Finance Act, S.S. 1983, c.D-15.1 is the main mechanism which the government has to remit fees. The Minister of Finance may remit fees in any case where the Minister considers it to be conducive to the public good or that a great public inconvenience or great hardship or injustice to any person would ensue in the event that the fee was not remitted. Application is made to the Director of Administration in the Department of Finance, Regina.

Chapter 57. History of Mineral Rights in Saskatchewan*

A. Background

On May 2, 1670 a charter was granted to "the Governor and Company of Adventurers of England Trading into Hudson's Bay" (Hudson's Bay Company) of lands which in part covered most of Western Canada.

The company held this charter and exercised the privileges conferred by it for slightly over 200 years, which included rights of governing and legislation together with the property of lands including precious metals.

These rights the company held were surrendered to Canada on June 22, 1870, with compensation (see the Rupert's Land Act, S.C. 1868, c.105, and were transferred to Canada on July 15, 1870).

The compensation was in the form of cash and land. Hudson's Bay Company agreed to accept 300 English pounds, certain blocks of lands not to exceed 50,000 acres in the vicinity of their trading posts, and 1/20 of the lands in the so-called "fertile valley land belt" which consisted of the following area:

> On the south by the United States-Canada Boundary; on the west by the Rocky Mountains; on the north by the northern branch of the Saskatchewan River; and on the east by Lake Winnipeg, the Lake of the Woods and the waters connecting them.

The method of reservation for the 1/20 of the "fertile valley land belt" was fixed by the Dominion Lands Act of 1872.

Section 8 and three quarters of section 26 (usually the S 1/2 & NW) were to be reserved to "the Company" and in townships divisible by 5 all of 8 and 26 were allotted.

It was estimated that this final settlement gave the company 7,031,257 acres of which 3,352,958 acres were located in Saskatchewan. In most cases when "the Company" sold their lands to settlers, they retained the mines and minerals.

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*This material has been prepared from the text of a speech given by Mr. Con Dumba, who was Director of the Mineral Rights Branch prior to his retirement on May 31, 1987 and who was involved in mineral land ownership and mineral rights taxation from January 23, 1954 until his retirement.

In some areas of the province, the Company held large tracts of lands north of the North Saskatchewan River. This was due to the fact that exchanges were made for the southern lands especially those near the United States border for quarantine areas needed for agricultural purposes by the federal government.

Hudson's Bay Company subsequently divested its large tracts of mineral rights and today these mineral rights, totalling 2,340,101 acres, are held by Dome Petroleum Limited and its subsidiaries.

After the transfer of the Hudson Bay lands to Canada in 1870, a dominion lands policy was put into effect to expand settlement in the Canadian West. This policy was basically a land grant system to railways, homesteaders and large land development corporations.

B. Railway Grant System

The railways were to receive 31,780,000 acres of land grants to subsidize their costs of building railroads and out of the 3,630 miles of railways subsidized less than 336 miles or 24% of the railways built were in Saskatchewan.

However, more than 15,193,000 acres of lands or nearly 1/2 of the railway land grants were selected from Saskatchewan.

Six land grant railways, with no constructed mileage in Saskatchewan, selected over 1.3 million acres in the province.

C. Canadian Pacific Railway

The Canadian Pacific Railway including its subsidiaries received land grants in Saskatchewan totalling 9,865,334 acres more or less. The original grant was to be taken in alternate sections per township (all odd numbered except 11 and 29), extending back 24 miles deep on either side of the main line from Winnipeg to Jasper House. (Sections 11 and 29 were set aside under the Act to provide for the building of schools. Monies realized from the sale of these lands held back by the Federal Crown were to be used for schools and education purposes.)

The Company was also to select additional lands thus explaining over 1 million acres of land held in the Battleford Land Registration District in the north west area of the province.

After the settlement was completed, C.P.R. and its subsidiaries held approximately 2.9 million acres of lands in Saskatchewan, which included the minerals.

The Company presently holds approximately 1,159,656 acres of mineral rights in the Province of Saskatchewan but this figure is diminishing.

D. Canadian National Railway

No fewer than 10 small railway companies were eventually combined to form the Canadian Northern Railway Company, the forerunner of today's Canadian National Railway Co. Land grants totalling 5,728,192 acres were issued to these companies much along the same basis as was used for the C.P.R.

After the settlement was completed, the C.N.R. held a total of 3,167,129 acres, and presently holds 2,230,761 acres in the province.

E. Land Companies and Homestead Grants

Various land holding companies were granted sizeable tracts of lands, under the premise of bringing in settlers. Some of the notable ones who received grants in Saskatchewan were Canada North West Land Company, Winnipeg Western Land Corporation and Carrot River Valley Land Company.

In most cases the companies retained the mineral rights, when the land was transferred to the settler.

The homestead grant system set aside even numbered sections (except 8 and 26) for settlement.

When a settler applied for a homestead the following rules regarding mineral rights applied:

Lands Lying East of the Third Meridian

The mineral rights were not reserved to the Crown in any homestead grants issued up to the 11th of January 1890 except gold and silver (see the Dominion Lands Act, S.C. 1872, c.23, section 36).

After the 11th of January 1890 the mineral rights for lands in this area were reserved to the Crown under the provisions of an Order-in-Council dated the 17th day of September 1889 (see the Dominion Lands Act, R.S.C. 1886, c.54, sections 47 and 48 and section 8 of the Regulations passed thereto). On this point see also Jaegle et al. v. Feuerborn (1925-26), 20 Sask. L.R. 241 at 243 (Sask. C.A.).

Lands Lying West of the Third Meridian

The mineral rights were not reserved up to the 31st of October 1887, excepting gold and silver. After this date any homestead grants issued did not convey the minerals under the provisions of an Order-in-Council dated the 31st day of October 1887.

As a result of these two Orders-in-Council any homestead grant made after these dates should not have included the mineral rights.

An early settlement, prior to 1890, took place in south eastern Saskatchewan, and a high percentage of freehold mineral rights exist in this area. The lands in this area lie within the Williston Basin which has yielded the Weyburn, Midale, Steelman oil fields, and numerous small pools.

Prior to 1887 a copy of the grant or deed was given to the owner of the land retained by him as proof of ownership.

The date and number of the grant was recorded in the lands patent register at Ottawa.

In 1887 The Territories Real Property Act was passed (see page 7 of this manual). At this time all owners were required to turn in their deeds and have them registered in one of the newly established land titles offices and in turn duplicate certificates of title were issued to each owner.

In 1905 when Saskatchewan became a province it assumed control of the land registration districts and all land titles records were transferred to the land titles offices, but the ownership of Crown lands and mines and minerals thereunder remained in the federal Crown (see the Saskatchewan Act, S.C. 1905, c.42, section 21).

The Dominion Government continued to administer Crown lands until October 1930, and certificates of title were issued based on the terms of the dominion grants. The natural resources were transferred to the control of the province in October of 1930, by the Saskatchewan Natural Resources Act, S.C. 1930, c.41, and all records respecting Crown lands were transferred to the Department of Natural Resources. Until 1946 all Crown land grants were issued by the Lands Branch of the Department of Natural Resources.

In 1946 the Lands Branch together with all the records were transferred to the Department of Agriculture. On April 1, 1953 the Department of Mineral Resources was formed and assumed all administration of Saskatchewan Crown mineral rights.

After 1930 when the province had gained control over Crown land, it was found that when titles to lands were being transferred to individuals the minerals were also included. The province consequently took steps to remedy this situation by adding certain sections to The Land Titles Act, which provided that where any sale of Crown lands took place, the mineral rights were to be retained by the Crown. See The Land Titles Act, 1938, S.S. 1938, c.20, section 78a., The Mineral Resources Act, S.S. 1931, c.16, section 3, and The Provincial Lands Act, S.S. 1931, c. 14, sections 4, 5, 9 and 13.

The total area of the Province of Saskatchewan is 251,700 square miles or approximately 160 million acres. The surveyed area of the province is approximately 79.81 million acres, with the province receiving 54.87 million acres of mineral rights at the time of the transfer in 1930. The mineral rights transferred were unpatented minerals or those reserved in the original grants. Any federal monies expended on lands which included the mineral rights were to remain with the Dominion Government.

In this latter category there are lands which are held by various jurisdictions namely the Soldier Settlement Board (now handled by the Veterans Land Act), the Department of Transport, Military Reserves and a Federal Park.

Also mineral rights in all Indian Reserves were to remain under the administration of the Federal Government. At the present time Ottawa through its various agencies still administrates 2.5 million acres of mineral rights in Saskatchewan.

At the time of the transfer in 1930, there were approximately 24.7 million acres of freehold rights in the province. Today this figure stands at 18.7 million acres, due mainly to foreclosures and transfers under the provisions of The Mineral Taxation Act.

A breakdown of the freehold acreage as to jurisdiction is as follows:

Large Corporations	=	5.6 million
Federal Government	=	2.5 million
Small Corporations and Individuals	=	10.6 million
Total	=	18.7 million

The government administers 61.3 million acres of mineral rights in the surveyed area of the province. In the unsurveyed area, the government has virtually control of all minerals with the exception of some Hudson's Bay Company reserves.

When the province began administration of its resources under the 1930 agreement, the minerals under its jurisdiction were those that were reserved in the original grant. The surface title bore the notation "Minerals in the Crown" and no title was issued for these minerals. The next 58 years has seen certain legislation passed and decisions made that account for the various types of Crown mineral lands that exist today. The following three areas are discussed in detail:

1. The Mineral Taxation Act;

2. The Oil and Gas Conservation, Stabilization and Development Act, 1973 (Bill 42), repealed and now under The Crown Minerals Act;

3. acceptance of transfer of freehold mineral titles subject to trust interest in lieu of taxes owing.

F. The Mineral Taxation Act

The Mineral Taxation Act became effective on January 1, 1945 and levied a tax on all mineral owners of 3 cents an acre per year or a minimum of $1.00 per title, if a title was less than 33 acres more or less.

In 1943, the Canadian Pacific Railway Company commenced a court action to test the validity of The Mineral Taxation Act. An injunction was granted at this time forbidding the forfeiture of any C.P.R. mineral rights for nonpayment of taxes until the case was finally resolved.

When the injunction was granted the Provincial Government suspended the enforcement provisions of the Act, and no bills were sent out until 1954. However, enforcement of the Act had commenced in 1947 in the Moose Jaw and Regina Land Titles Offices, and continued until the suspension in 1948.

About 3,000 individuals allowed their rights to be forfeited but in 1950 and 1951, these forfeited rights were offered for revestment. About 97% of these rights were restored to the original owners, and the mineral titles that were issued under this revestment bear the wording "which were acquired by His Majesty the King". At first glance one would assume that the minerals are held by the Crown, but the title is so constructed that the minerals are in fact in the original owner's name.

In July 1952, the Supreme Court ruled that the mineral tax was a land tax and that The Mineral Taxation Act was valid in every respect (see Canadian Pacific Railway Company v. Attorney General for Saskatchewan, [1952] 2 S.C.R. 231). An appeal to the Privy Council was dropped, and the administration of the Act continued.

Enforcement of the forfeiture proceedings was postponed until 1958, when all tax payers in arrears began to receive a warning of impending forfeiture of minerals, and minerals were in turn forfeited to the Crown.

Effective January 1, 1964, individuals who held title to minerals were dropped from the tax rolls.

A subsequent amendment provided that an individual would be taxed on any acreage held in excess of 3,200 acres.

If certain mineral rights are in a taxable position, the only way an individual can gain the exemption, is to own the surface at the time of the transfer of the minerals to him or her, and provided the 3,200 acre exemption still exists with the amount of acreage owned.

The tax has increased four times since its inception with figures of 10 cents, 20 cents, 50 cents and the present rate of $1.00 an acre, which has been in effect since May 15, 1987.

Since 1958 to the 1987 tax year approximately 6 million acres have been either forfeited or transferred to the province in lieu of mineral land taxes owing. The province has title to these forfeited minerals which may be for all minerals or for specific minerals i.e. coal; coal and petroleum; and coal, petroleum and valuable stone.

G. The Oil and Gas Conservation, Stabilization and Development Act, 1973

Effective January 1, 1974 legislation was passed that empowered the Crown to acquire certain oil and gas rights from producing freehold properties.

The oil and gas rights were acquired from owners who had more than 1,280 net producing acres. All oil and gas rights down to and including the producing horizon were acquired and for the spacing unit the producing well was situated on. It should be pointed out that if the well produced oil or gas only, both rights were acquired. The Crown also honoured the freehold lease in existence at the time of the transfer and compensation to the previous owner is based on the freehold royalty rate. If no freehold lease was in existence at the time of the transfer, a Crown lease was issued and compensation in these cases was based on the Crown lease. The Crown had 1,100 mineral titles issued for this stratified acquisition which covered approximately 180,000 acres of producing lands and affected the mineral rights of 13 corporations. Land titles procedure under this Act is discussed at pages 75 and 76 of this manual.

H. Trust Lands

In the late 40's and early 50's small land companies engaged in a program of buying minerals from individuals in the province. Many of these agreements left the individual with a trust certificate entitling the original owner to a certain percentage of the mineral rights. In most cases the trust certificate was for 20% and in some cases the original owner was issued two certificates; one for 25% of the oil and gas rights and the other for all mines and minerals except the oil and gas rights.

In 1962 a Mineral Rights Renegotiation Board was established to review these transactions. As a result an offer was made wherein the trust certificate holder could exchange his or her trust certificate for a gross overriding royalty certificate which in most cases was 4% of all oil and gas produced. Some holders of these certificates converted their 1/5 or 1/4 beneficial ownership to the royalty certificates, while a numerous amount did not.

By a certificate of amalgamation dated the 1st of October 1964, all these small companies involved in these transactions along with other small land corporations came under the ownership of Scurry Rainbow Oil (Sask.) Ltd.

In 1976 Scurry decided to transfer certain acreages to the province in lieu of mineral taxes owing. The Crown accepted the transfers to these mineral rights subject however to the beneficial or trust interests.

If one wishes to post these lands at a Crown Petroleum and Natural Gas Sale, the Crown will instruct the party who has requested the posting that the trust holder must be contacted if he or she has not already selected one of the options open to the trust holder. The options the trust holder has are as follows:

1. to lease the 1/5 ownership on his or her own terms but the Crown must also sign the freehold lease as trustee;

2. to authorize the Crown to act as his or her agent, wherein the trust holder would receive 1/5 of all the benefits the Crown derives.

Further information on the options available to trust holders is available from the Mineral Rights Unit of the Department of Energy and Mines.

Chapter 58. Legislative History of Land Titles Acts in Saskatchewan

The Land Titles Act, S.S. 1906, c.24 (Came into force September 8, 1906)

amendments: 1907 - The Statute Law Amendment Act, 1907, S.S. 1907, c.32, s.5-10
1908 - S.S. 1908, c.29
1909 - S.S. 1908-09, c.9
1909 - S.S. 1909, c.20

The Land Titles Act, R.S.S. 1909, c.41

amendments: 1911 - S.S. 1910-11, c.12
1912 - S.S. 1912, c.16
1913 - S.S. 1912-13, c.16
1913 - S.S. 1913, c.30
1914 - The Statute Law Amendment Act, 1914, S.S. 1914, c.20, s.3
1915 - S.S. 1915, c.30
1916 - S.S. 1916, c.28
1917 - The Statute Law Amendment Act, 1917, S.S. 1917, c.34, s.8

repealed: The Land Titles Act, 1917, S.S. 1917, (Sess.2), c.18

The Land Titles Act, 1917, S.S. 1917, (Sess.2), c.18

amendments: 1919 - S.S. 1918-19, c.19
1920 - S.S. 1919-20, c.15

The Land Titles Act, R.S.S. 1920, c.67

amendments: 1920 - S.S. 1920, c.30
1922 - S.S. 1921-22, c.29
1923 - S.S. 1923, c.24
1924 - S.S. 1924, c.9
1925 - S.S. 1924-25, c.16
1926 - S.S. 1925-26, c.15
1927 - S.S. 1927, c.13
1928 - S.S. 1928, c.25

repealed: The Land Titles Act, 1929, S.S. 1928-29, c.23

The Land Titles Act, 1929, S.S. 1928-29, c.23

amendments: 1930 - S.S. 1930, c.26

The Land Titles Act, R.S.S. 1930, c.80

amendments: 1931 - S.S. 1931, c.32
1932 - S.S. 1932, c.19
1933 - S.S. 1933, c.19
1935 - S.S. 1934-35, c.23
1936 - S.S. 1936, c.27
1937 - S.S. 1937, c.20

repealed: The Land Titles Act, 1938, S.S. 1938, c.20

The Land Titles Act, 1938, S.S. 1938, c.20
amendments: 1939 - S.S. 1939, c.23
1940 - S.S. 1940, c.40

The Land Titles Act, R.S.S. 1940, c.98
amendments: 1941 - S.S. 1941, c.19
1942 - S.S. 1942, c.20
1943 - S.S. 1943, c.19
1945 - S.S. 1945, c.30
1946 - S.S. 1946, c.24
1947 - S.S. 1947, c.37
1949 - S.S. 1949, c.34
1950 - S.S. 1950, c.27
1951 - S.S. 1951, c.34
1952 - S.S. 1952, c.42
1953 - S.S. 1953, c.39

The Land Titles Act, R.S.S. 1953, c.108
amendments: 1954 - S.S. 1954, c.20
1955 - S.S. 1955, c.29
1957 - S.S. 1957, c.36
1958 - The Statute Law Amendment Act, 1958, S.S. 1958, c.99, s.5
1959 - S.S. 1959, c.104
repealed: The Land Titles Act, 1960, S.S. 1960, c.65

The Land Titles Act, 1960, S.S. 1960, c.65
amendments: 1961 - S.S. 1961, c.71
1963 - S.S. 1963, c.4
1964 - S.S. 1964, c.49
1965 - S.S. 1965, c.77

The Land Titles Act, R.S.S. 1965, c.115
amendments: 1966 - The Statute Law Amendment Act, 1966, S.S. 1966, c.86, s.5
1967 - The Statute Law Amendment Act, 1967, S.S. 1967, c.92, s.5
1968 - S.S. 1968, c.37
1970 - The Coming of Age Act, 1970, S.S. 1970, c.8, s.9
1971 - The Statute Law Amendment Act, 1971, S.S. 1971, c.50, s.4
1972 - The Age of Majority Act, 1972, S.S. 1972, c.1, s.22
1973 - S.S. 1973, c.52
1974 - S.S. 1973-74, c.54
1975 - S.S. 1974-75, c.23
1977 - The Statute Law Amendment Act, 1977, S.S. 1976-77, c.81, s.2

The Land Titles Act, R.S.S. 1978, c.L-5

amendments:
1978 - The Land Titles Amendment Act, R.S.S. 1978, c.35 (Suppl.)
1980 - The Municipal Reference Act, S.S. 1979-80, c.M-32.01, s.23
1980 - The Queen's Bench Consequential Amendment Act, S.S. 1979-80, c.92, s.48
1981 - S.S. 1980-81, c.25
1981 - The Statute Law Amendment Act, 1981, S.S. 1980-81, c.83, s.24
1982 - The Statute Law Amendment Act, 1982, S.S. 1982-83, c.16, s.29, 30
1982 - The Freehold Oil and Gas Production Tax Consequential Amendment Act, S.S. 1982-83, c.34, s.3
1983 - The Government Reorganization Consequential Amendment Act, S.S. 1983, c.11, s.44
1983 - S.S. 1983, c.50
1983 - The Northern Municipalities Consequential Amendment Act, S.S. 1983, c.77, s.38
1983 - The Public Trustee Consequential Amendment Act, S.S. 1983, c.80, s.12
1983 - The Highways and Transportation Consequential Amendment Act, S.S. 1983-84, c.6, s.6
1983 - The Mineral Taxation Consequential Amendment Act, S.S. 1983-84, c.9, s.3
1984 - The Statute Law Amendment Act, 1984, S.S. 1983-84, c.54, s.12
1984 - The Water Corporation Consequential Amendment Act, S.S. 1983-84, c.63, s.7
1984 - S.S. 1984-85-86, c.7
1985 - S.S. 1984-85-86, c.50
1985 - The Enforcement of Maintenance Orders Consequential Amendment Act, S.S. 1984-85-86, c.77, s.8
1985 - The Crown Minerals Consequential Amendment Act, S.S. 1984-85-86, c.45, s.6
1987 - S.S. 1986-87-88, c.11
1988 - S.S. 1988, c.28

Chapter 59. Index of Cases

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