

LAW REFORM NOTES

#1: October 1992

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The Legal Research Section of the Law Reform Branch is a small unit of the Office of the Attorney General of New Brunswick. Our task is to identify inadequacies in the laws of the Province and to recommend improvements. These may range from small corrections to major overhauls.

"Law Reform Notes" is intended primarily as a vehicle for communication with the legal community in New Brunswick. In it we will briefly describe selected items from our work in progress, sometimes for purposes of information, but more often in the hope of encouraging suggestion and comment. We will also be circulating "Law Reform Notes" to the law reform community outside New Brunswick. To them we offer it as a small contribution to the exchange of ideas on which the law reform process depends, and as thanks for the much more substantial material they send to us.

With the exception of those cases in which reform proposals have already been presented to the Legislature, the views and proposals described in Law Reform Notes are at present merely those of the Law Reform Branch. They should not be taken as indicating that the Department or the Government has formed a view on the subjects discussed. Rather, they represent items on which, in due course and in the light of representations received, we expect to be making recommendations.

Anybody receiving "Law Reform Notes" should feel free to bring its contents to the attention of others. Though "Law Reform Notes" is initially addressed to the legal community, our goal is to serve a broader public, and we would welcome the help of our readers in bringing our proposals to the attention of the people who may eventually be affected by them.

We also always welcome suggestions for other legal subject areas we should examine with a view to possible reform.

1. Succession Law Amendment Act;
Survivorship Act.

We hope that these Acts, which alter some important features of succession law, will be brought into force early in 1993. At present we are reviewing the Acts to make sure that the transition from the old to the new will be as smooth as possible. If practitioners are aware of any problems with the legislation, now is the time to let us know.

2. An Act to Amend the Survival of Actions Act;
An Act to Amend the Fatal Accidents Act.

These amendments allow claims for exemplary or punitive damages to survive the death of the claimant. They apply to deaths occurring on or after January 1, 1993, and are therefore scheduled for proclamation in the fall. Again, if people have identified any flaws in the legislation, we would like to know. (Note that the Act to Amend the Fatal Accidents Act is still in the Legislature at present, awaiting Committee of the Whole.)

3. Mechanics' Lien Act.

We released a discussion paper in August, the main question raised being whether the Act should be repealed. Our suggestion was that it should be. We encourage response, whether agreeing or disagreeing with this suggestion. Copies of the paper are available from this office. We originally asked for response by November 1st, 1992, but responses received throughout that month would still be in good time.

4. Law Reform Act

We have been examining a number of common law rules that we have grouped together under the title "Law Reform Act". We will be consulting on our provisional recommendations shortly, possibly by means of a Bill tabled in the Legislature as a consultative draft. The proposals are:

- abolishing the action per quod servitium amisit
- replacing occupier's liability rules with ordinary principles of liability in negligence
- relaxing rules of privity of contract so that certain third parties will have a limited right to enforce a contract
- eliminating whatever remains of the rule that a wholly executed contract cannot be rescinded
- removing the rule that aggravated or punitive damages in contract can only be awarded when the plaintiff shows an actionable wrong independent of the breach of contract
- clarifying (if necessary) that damages in contract may be reduced where the conduct of the plaintiff contributed to the breach
- altering the law on penalty clauses so that the penalty clause/liquidated damages clause distinction becomes less troublesome.

5. Property Act, Subsection 45(1): Notice of mortgage sales.

A practitioner has written to suggest that s.45 of the Property Act should be amended. The section requires a mortgagee, in exercising the power of sale conferred under the Act, to give notice of the sale to the mortgagor and to publish and post a notice of the sale. It has been suggested to us that this double requirement is excessive. We are inclined to agree, and suggest that publishing and posting should be viewed as a form of substituted service, to be used if personal service fails.

Note that the mortgagee's duty to take reasonable precautions to obtain the true market value of the mortgaged property would survive the amendment described above. That duty is separate from the duty to give notice of the sale. The two are related, in that publishing notice of the sale will help to discharge the duty to attempt to obtain the market value. However, as we understand the law at present, it is wrong to regard compliance with the notice requirements under s.45 as constituting in itself a discharge the mortgagee's duty to attempt to obtain market value.

Before making a firm recommendation on s.45(1), we would appreciate comments.

6. Memorials and Executions Act - Section 6: Renewal of memorials of judgment.

It has been suggested to us that this provision should be amended to clarify that a memorial of judgment may be renewed prior to the expiry of the period of five years from the previous registration. The comment to us was that the present wording of the section, which links renewals with the expression "after that period", implies that a memorial can only be renewed after the initial five-year priority period has lapsed.

We would appreciate comment on this. Our understanding is that it is generally accepted that the Act permits re-registration before the five-year period lapses, and that priority on such a re-registration dates back to the date of the first registration.

Two questions then arise. First, is that interpretation of the Act compatible with the words of s.6? Second, even if there is a problem with the words, is it wise to tinker with them if the settled interpretation, albeit arguably a misinterpretation, accurately expresses what the law should be?

Our present inclination is to leave section 6 alone. The accepted interpretation of the Act appears to us to be supportable, taking into account things like s.4, the fact that s.6 does not specifically bar re-registrations within the five-year period and the different grammatical structures of the French and English versions. The accepted interpretation is also consistent with case-law running back through Carr v. Bank of Nova Scotia (1987) 76 N.B.R. (2d) 220 to Deveber v. Austin (1875) 16 N.B.R. 55 and beyond. This being so, we are hesitant to change the words of the Act to make them state more clearly what they are already generally taken to mean. The risks of producing unintended effects, we believe, are greater than any benefits we would be likely to produce.

We would appreciate comment on this. In particular, we would welcome comment on whether the Act is indeed generally accepted as having the meaning we have described above. If, in fact, the interpretation of s.6 is causing problems, the argument above (essentially, "don't rock the boat") would have less merit and we should reconsider our response.

7. Wills for Infirm Persons

A practitioner has suggested that the Infirm Persons Act should be amended so that a will can be made for an infirm person. We understand that the existing powers of the court or a committee under that Act are generally accepted as not conferring the power to make or amend a will.

The suggestion seems acceptable in principle. The effect of the present law on testamentary capacity is that a person who makes a will and then loses testamentary capacity can thereafter be saddled for all time with a will which, as circumstances change, becomes inappropriate but cannot be altered. The suggestion that was

made to us would provide a way out of this dilemma. We would see the power to make the will as being vested in the court, and that power should be limited to making the dispositions that it believes the infirm person would make if he or she had the capacity to do.

More difficult, though, is the question of how broadly the power should apply. Should it only exist under the Infirm Persons Act or should it apply to other cases of testamentary incapacity? Should it be limited to adult incompetents (as is the case under the English Mental Health Act) or should it extend to everybody who lacks testamentary capacity? The latter would include, presumably, children whose only lack of capacity was that they were not yet 19 years old.

The simple rule in theory would be to say that wherever there was, for whatever reason, a lack of testamentary capacity, the law should provide a means for overcoming it. The Law Reform Commission of New South Wales, Australia, in its 1992 report Wills for Persons Lacking Will-Making Capacity, has recommended that the law should go that far. It has also recommended a broad rule of standing: that with the leave of the court, "any person" should be able to apply for the making of a statutory will. This is to ensure that people like health care workers or solicitors, who may be closely involved with the person for whom a will is to be made or altered, should not be prevented from trying to help. The report, though, like the English case-law, is clear that the power of the court should be limited to doing what it believes the infirm person would want done.

In our view, the response to the suggestion made to us can proceed in two stages. First, there is the question of whether the Infirm Persons Act should be amended to allow the court to direct the making or amending of a will for an infirm person. We think it should be. The power to make a will -- and even more so the power to amend one that has been overtaken by events -- seems to be a natural component of the good administration of the infirm person's property, and this is what a committee of the estate is meant to provide. That power, however, should be guided as far as possible by the infirm person's wishes.

The second stage is to consider whether amending the Infirm Persons Act is a sufficient response to the suggestion put to us, or whether something more wide-ranging is required. On this we would appreciate comments. If the only change made were to the Infirm Persons Act, the new will-making provision would not extend to people who lacked testamentary capacity but were neither 'mentally incompetent' nor 'incapable of managing their affairs'. Is this likely to create a substantial gap? Likewise, under the Infirm Persons Act the new will-making provision could only operate if a committee of the estate was in place. Is this a plus or a minus? A more open-ended approach would enable a wider range of people to try to help, but maybe it is better if the only people who are authorized to offer this particular help are the committee of the estate. They, after all, by taking on that role, have agreed to do their best for the infirm person in life, and have a continuing responsibility for his or her affairs. Perhaps this is the best framework for the exercise of a will-making power.

Overall, we do not at present feel ourselves in a position to propose wide-ranging legislation along the lines recommended by the New South Wales Law Reform Commission. We do feel comfortable, however, with the idea that will-making should be part of the powers of the court under the Infirm Persons Act. In order to know whether we should take matters further we would appreciate comment on what people see as the limitations of an approach that restricts itself to the Infirm Persons Act.

Responses

Responses on any or all of the above should be directed to Tim Rattenbury, Co-Ordinator of Legal Research, at the address given above. We would like to receive comments on items 1 and 2 as soon as possible, on item 3 by December 1st, and on items 5, 6 and 7 by January 1st, 1993. Comments received after those dates will still be considered, of course, if circumstances permit. Suggestions for other items we should be examining are welcome at all times.