

**A BILL TO CONSOLIDATE, AMEND, AND REFORM
THE LAW RELATING TO CONVEYANCING,
PROPERTY, AND CONTRACT AND TO TERMINATE
THE APPLICATION OF CERTAIN IMPERIAL
STATUTES**

Report No 16

Queensland Law Reform Commission
February 1973

QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON

A BILL TO CONSOLIDATE, AMEND, AND REFORM
THE LAW RELATING TO CONVEYANCING, PROPERTY,
AND CONTRACT AND TO TERMINATE THE
APPLICATION OF CERTAIN IMPERIAL STATUTES

Q.L.R.C. 16

CORRIGENDA

Q. L. R. C. 16

Commentary:

At p. 15 - in line 5, before "property" delete "of".

At p. 26 - in s. 35(3), second paragraph, line 2, "Q. L. R. C. 7 "
should read "Q. L. R. C. 8".

At p. 69 - in line 4, delete "b" in "memorandum".

At p. 76 - second last paragraph, "Q. L. R. C. 7" should read
"Q. L. R. C. 8".

Bill:

At p. 6 - in s. 5(c), line 1, add "s" to "interest".

At p. 25 - s. 62 should read "61".

At p. 39 - in s. 88(3), line 2, "voluntary" should read
"involuntary".

At p. 60/1 - in s. 128(8)(a), line 2, delete "n" in "costs".

At p. 104 - in s. 238(1), line 8, "of" should read "or".

REPORT OF THE LAW REFORM COMMISSION

re Property Law Reform

Q.L.R.C. 16

The Honourable W.E. Knox, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

We forward herewith our Report on the above subject comprising draft Bill and Commentary thereto, which embody our recommendations for the reform of the law relating to property in Queensland.

The Working Paper which preceded this Report has been widely circulated and we have received both from members of the profession and other interested persons and institutions a wide range of comments, criticisms and suggestions. Where appropriate, the original draft Bill has been amended or improved in the light of such comments.

There are, however, two provisions of the draft Bill which we feel bound specifically to draw to your attention. One is cl.137 (termination of tenancy of dwelling house), and the other is cl.79(2) relating to second mortgages.

1. Clause 137 - Termination of tenancies:

The Bill contemplates the retention in cl.137 of s.18 of the Termination of Tenancies Act 1970. This section is evidently designed to give some form of protection or security of tenure to tenants primarily of dwelling houses, and it replaced somewhat similar provisions in "The Landlord and Tenant Acts, 1948 to 1961".

It is correct to say that in all the comments received to date the inclusion of a provision in the form of cl.137 has been strongly condemned. There appear to be two principal reasons for this condemnation. One is the unsatisfactory drafting of s.18 and consequently of cl.137 and of the difficulties of application of the provision in practice; the other is that many of the commentators can see no reason why a tenant should enjoy the specially protected position which the legislation confers.

As individuals each member of the Commission agrees with the philosophy which underlies the second of these criticisms and supports the omission of cl.137. But the question whether tenants of dwelling houses in Queensland in 1973 are or are not in need of special protection is, in our view, fundamentally a social and political, rather than a legal, question and one on which the

(ii)

Executive Government and Parliament must make the decision. Clause 137 has been included in the draft Bill not because the Commission considered that it represented a necessary measure of law reform or desirable aspect of legal policy, but only for the reasons which are expressed in the Commentary to that clause in the Report itself.

The first of the above reasons (i. e. the form of the clause) does, however, raise issues on which we, as a Law Reform Commission, do consider ourselves competent to pass an opinion. The drafting of s.18 of the Act of 1970 is unsatisfactory; its operation is uncertain, particularly in view of the last paragraph of s.18(1) or cl.137(1); and it also seems to us that a provision of this kind does not readily or happily find a place in legislation dealing with property rights in general. The necessity for its inclusion in cl.137 arose from the fact that the Termination of Tenancies Act dealt (and dealt badly) with a number of general aspects of the law relating to landlord and tenant, and that it was impossible to prepare proposals for the reform of that branch of the law without providing for the repeal of the Act. Hence, if that Act were to be repealed, some decision was and is necessary with respect to the fate of s.18. In our opinion, however, it is eminently more desirable that, if special protection for tenants is to be granted, separate and distinct legislation along the lines of "The Landlord and Tenant Acts, 1948 to 1961" should be passed, and that it should not be included in a general property law statute of the kind envisaged by this Report.

2. Clause 79(2) - Second mortgages:

Some controversy has arisen about the desirability or otherwise of compelling first mortgagees to permit second mortgages to be given of the mortgaged property. At present, the common form of mortgages is such that such a second mortgage is in practice impossible without the consent of the first mortgagee. Such consent is usually withheld, although it should be emphasised that there is no legal disadvantage at all to a first mortgagee if a second mortgage is granted.

A number of adverse comments on cl.79(2) have been received from finance institutions and, as can be seen from the Commentary on cl.79(2), the proposal in cl.79(2) has created a division of opinion within the Commission itself. The real objection to the proposal is commercial and not legal: it is suggested that, if a first mortgagee cannot prevent a second mortgage, the first mortgagee will be disposed to lend to the mortgagor less than is at present lent in similar circumstances. Whether or not this is likely to happen we find it impossible to say with any degree of certainty, and it is on this question that a minority view has been expressed in the Commission. The majority view is that the present law and practice relating to second mortgages is unsatisfactory and unjust, and that the position should be changed in accordance with cl.79(2). We may add that among the comments on the Working Paper received by the Commission was at least one from a senior solicitor with much experience practising in North Queensland who supported the majority proposal in cl.79(2).

(iii)

In forwarding this Report we have thought it right that we should expressly direct your attention to these two possible areas of contention which may exist in our proposals. The remaining proposals are, we are satisfied, unlikely to be substantially questioned by any legally qualified person having the best interests of the law and of the community at heart.

W. B. Campbell. [Chairman]
(Hon. Mr. Justice W. B. Campbell)

Raymond Smith [Member]
(P. R. Smith)

B. H. McPherson [Member]
(B. H. McPherson)

J. S. Rowell [Member]
(J. S. Rowell)

28th February, 1973.
BRISBANE.

PROPERTY LAW BILL

COMMENTARY

General Introduction

The property law of Queensland must surely rank as amongst the most archaic in the English-speaking world. Based as it is on the common law, it encompasses centuries of judicial exposition of what, at least in theory, is the pre-Norman Conquest common custom of the realm of England, overlaid by doctrines of feudal tenure and by a series of statutes reaching from 1266 (51 Henry 3, St. 4) to the present day. Several of these ancient English or "Imperial" enactments even now remain fundamental to the principles of property law, and particularly real property law, in Queensland. Amongst them are the Statute Quia Emptores of 1290 (18 Ed. 1, St. 1), and Statute of Uses of 1535 (27 Hen. 8, c. 10), and the Grantees of Reversions Act of 1540 (32 Hen. 8, c. 34). The first of these was in 1960 applied by the High Court of Australia to a transaction involving a Queensland off-shore island: see Hall v. Busst (1960) 104 C.L.R. 206; the second was the enactment which, in the words of Maitland, added (and in Queensland still adds) three words to every conveyance "unto and to the use of" creating a trust; and the third was, as recently as 1970, applied by the Full Court of Queensland to the assignment of a lease under The Miners' Homestead Leases Acts, 1913 to 1965: see Re Rakita's Application [1971] Qd. R. 59.

Statutes such as these are expressed in what has now become archaic language and are often not easily accessible. Some of them have been reproduced, sometimes in their original form, sometimes in partial or incomplete form, in local enactments, thus giving rise in some cases to doubts whether the remainder of the statute is applicable in Queensland: see, e.g., ss. 7, 8, and 9 of the Statute of Frauds 1677 which do not appear in the local enactment, the Statute of Frauds and Limitations of 1867, but which by judicial decision have been held to apply in Queensland: see Wilson v. Winton [1969] Qd. R. 536, 539. Others retain the original language of the English statute, such as s. 44 of The Mercantile Act of 1867, which in reproducing the statute 50 Edw. 3, c. 6 of 1376, simply substituted "people of this colony" for "people of this kingdom". On top of this there are some pre-separation New South Wales statutes and a host of Queensland statutes (commencing in 1861) which in varying degrees regulate or affect the law of property in this State. Hence, the applicable provisions are widely dispersed and, for this reason, not infrequently overlooked in practice.

One of the major reforms proposed by the Property Law Bill is the repeal of these enactments or the relevant portions of them. In all, some 40 to 50 Imperial enactments are affected, as well as 4 New South Wales statutes, and nearly 30 Queensland Acts or sections of such Acts. Where any of such provisions still possesses modern relevance, it or its effect has been retained and expressed in modern terminology: see, e.g., cl. 20 which re-enacts the substance of s. 4 of the Tenures Abolition Act, 1660, and cl. 21, which preserves the prohibition against sub-infeudation imposed by the Statute Quia Emptores. The advantages of having in one place all the relevant statute law, and only such as is relevant, hardly needs emphasis.

Another object of reform undertaken by this Bill is the simplification of property law. The law of property embodies two of the unique contributions of the English common law to world jurisprudence. One is the institution of the trust; the other is the concept of estates and interests in land, by means of which, as Maitland said, the common law was able to conceive of and give effect to ownership of land as something "projected on the plane of time". In an era when land was virtually the only form of investment available to a Christian capitalist, these two institutions did, through the ingenuity of conveyancers, produce a degree of flexibility and

elasticity unequalled in any other legal system. What resulted was, however, a body of rules which were not only sophisticated and refined but also complex and often highly technical. In modern society land now serves a rather different purpose and function. It is viewed as a factor of production or as a place of residence or as a site for industry rather than as a means of securing the wealth of present and future generations. Stocks, shares and income-earning plant and chattels attract much of the investment capital of modern industrial society. Hence, many of the earlier concepts, institutions and techniques, having outlived their usefulness, have now become little more than obstacles to the proper understanding and efficient functioning of modern property law. Under these conditions the improvement and progress of industry and of society itself are both impeded and imperilled.

There may even now be individuals who believe they can see advantages in being able to create estates in tail or legal contingent remainders or of levying a distress on the chattels of a defaulting tenant. There may (although it is unlikely) be legal practitioners who appreciate the subtleties of estates pur autre vie, of the Tabula in naufragio, or interesse termini, to say nothing of those who belong to opposing schools of thought on the doctrine of scintilla juris, or who are acquainted with more than the name of the Rule in Shelley's Case. But in Queensland at least they are few in number, and, if they exist at all, their interest in and affection for these topics can only be founded upon legal antiquarianism and not upon any belief in the social utility of the rule or institution for the community as a whole. At all points, therefore, an important purpose of the Property Law Bill is to simplify, as well as to codify and amend, the law of property, as, for example, by reducing the forms of freehold estates by converting estates tail into estates in fee simple (cl. 22) or legal contingent remainders into equitable interests (cl. 30), and by abolishing quasi-entails (cl. 23), distress for rent (cl. 103) or the doctrine of interesse termini (cl. 102).

In England and elsewhere, this process of simplification and improvement has been taking place over a substantial period. Commencing with the Law of Property Amendment Act of 1859 (22 & 23 Vic. c. 35), passing to the Conveyancing Act of 1881 (44 & 45 Vic. c. 41) and subsequent amendments of that statute, the process culminated in the Law of Property Act of 1925 (15 & 16 Geo. 5, c. 20), described by two modern textwriters as "the greatest single monument of legal wisdom which the statute-book can display" (Megarry & Wade: Law of Real Property (3rd ed.) at p. 1120). This course of legislative activity has been followed (other than in Queensland) in Australia and elsewhere. All other States now have adopted legislation exhibiting the principal features of the English reform of property law legislation. New South Wales did so in 1919 and 1930; Victoria no later than 1928; South Australia in 1936; Western Australia in 1969; and Tasmania by a series of enactments beginning in 1881. Similar legislation exists in New Zealand and in the Canadian provinces. Only Queensland remains faithful to a system which as long ago as 1646 was declared by Oliver Cromwell to be a godless jumble. In this State a few of the provisions of the English Act of 1859 found their way into the series of statutes passed in 1867: see, for example, s. 1 of The Mercantile Act of 1867. Apart from this nothing has been done except on rare occasions and then only under the impulse of some judicial decision which demonstrated the manifest defects of a particular rule (see, e.g., the amendment of The Real Property Acts which inserted s. 15A in 1952). What is plain is that if the law is not now changed a stage will soon be reached where it will cease to be possible to do so.

The reason for local reticence in the matter of property legislation is attributable (in addition to the inevitable factor of legislative indifference to legal reform) as much to the existence, from an early date in the State's history, of The Real Property Acts, 1861 to 1963, as to any other cause.

The Torrens system of title registration, which this statute introduced, greatly simplified conveyancing and so made many of the old rules of property law appear irrelevant or insignificant. In the course of time almost all freehold land in Queensland has been brought under the provisions of The Real Property Acts and this process has long been rendered inevitable by provisions of successive Land Acts which require the registration of new Crown deeds of grant in fee simple (see ss. 8 and 9 of the Land Act 1962-1970). In the city of Brisbane (apart from certain inconsequential areas comprising laneways and easements of way) it is almost certainly correct to say that title to all land is now registered under the Torrens system. Nevertheless, there remain some few hundreds, possibly thousands, of acres of "old system" land elsewhere in the State, most of it in the provincial cities and towns of south-eastern Queensland, together with odd pockets of rural or semi-rural land concentrated in places like the old township of Laidley. It remains true, however, that there are a few practising solicitors who have acted in an old system conveyance in recent years, and the number who have the capacity to do so, is, naturally enough, steadily diminishing. For the reasons which are set out in the Commentary to Part XVIII of the Bill, we consider that the time has come to compel registration of all outstanding unregistered land.

Land alienated in fee simple does, however, represent only a small proportion (no more than about 25%) of the total surface area of the State. The remainder is held under some form of lease from the Crown, usually pursuant to the Land Act, 1962-1970, and usually on the terms of some form of rural or pastoral "holding"; but some Crown leases are granted under other statutes, and, in the case of the city of Mt. Isa, the common form of tenure is a lease under The Miners' Homestead Leases Acts, 1913 to 1965. As well there are leases and tenements under The Mining Acts, and other special statutes may affect the position, such as The State Housing Acts. There is a pattern of provisions common to some of these statutes, and in practice the responsible Departments of the Crown appear to administer dealings with such land rather by analogy with the practice of the Registrar of Titles. Some day serious consideration will have to be given to establishing, as in Victoria, a single system of registration of all land, or dealings with respect thereto, based upon the Office of the Registrar of Titles. (It would be possible even under such a system to preserve any Ministerial powers and discretions which may be necessary in the interests of policy and control of Crown land). But in the meantime, divergences and differences in statutes have presented difficulties and problems in effecting yet another object of the Property Law Bill, namely the assimilation of rules of law governing lands under a variety of statutes, wherever this is practicable. It is obviously desirable that uniformity should be attained where possible (e.g. in relation to mortgages, co-ownership, and leases), and we think that our proposals go a long way towards achieving it without, at the same time, interfering with the essential provisions of particular Acts: see for example, cl. 5(1), and the opening provisions of Parts VII and VIII of the Bill. Added to this is the fact that the provisions of the legislation will, unless inappropriate, apply to property other than land: see cl. 5(2), thus producing an element of uniformity in the law of real and of personal property. Because The Real Property Acts have always been something more than simple conveyancing statutes and contain sundry provisions which are substantive in nature or effect (e.g. ss. 82, 90), others which apply to unregistered leases of registered land (ss. 70, 71), and even one (s. 15A) which applies to unregistered land, it has been necessary to repeal certain sections of those Acts in order to re-enact, improve and extend them to property, and particularly land, of all kinds. This will leave The Real Property Acts to serve their primary function, which is that of a title registration and conveyancing statute concerned with effecting land transfers and registrations without in any way interfering with predominant features of the Torrens system, such as indefeasibility and conclusiveness of registered title.

One advantage, certainly the only advantage, of being lost with legislation on a particular topic is that of learning from the mistakes of others. This Working Paper is the product of over two years of investigation, inquiry and research, involving an examination of the property statutes not only of England and the Australian States but of New Zealand and the Canadian provinces, as well as Reports of Law Reform Commissions in England, Northern Ireland and North America. In this way the Commission has been able to extract the best from what has gone before, as well as to introduce improvements and innovations which have not been attempted (although in some cases suggested) in other places. Basically, however, the proposals which we make here are based upon well-tryed provisions of legislation which has been in use for long periods in other jurisdictions, with the consequence that there are numerous judicial decisions and texts providing expositions of particular sections. It is, indeed, one of the principal disadvantages of the present state of the laws in Queensland that decisions and standard texts and precedents appropriate for legislation elsewhere cannot safely be relied upon by legal practitioners in the course of their practice, and that the difficulty, and therefore expense, of ascertaining the existing laws of the State becomes daily greater and greater. In the end, it is the community as a whole which bears the cost of an inefficient system of law and legal process, and it is therefore the community which will principally benefit if the proposals made here are transformed into positive law.

.....

PART I - PRELIMINARY

1. Short title and commencement. The title of the proposed Act is "Property Law Act". This is the same as the title of the corresponding legislation in Victoria (Property Law Act 1958) and in Western Australia (Property Law Act 1969). In New South Wales the corresponding enactment is the Conveyancing Act 1919-1969, but to apply such a title to the legislation here proposed would be misleading because its content is basically substantive law rather than conveyancing and it includes provisions regulating contractual rights and choses in action (which are a species of property) as well as interests in land. Both in England and South Australia the relevant legislation bears the title "Law of Property Act", but the adoption of this name in Queensland might cause confusion with the similar-sounding Real Property Act. Hence, it has been thought desirable to adopt the Victorian and Western Australian legislative title.

It is desirable that, after the Bill has been passed into law, a period of time should be permitted to elapse before it comes into operation so as to allow practitioners to become accustomed to its provisions and to permit of the re-drafting of standard precedents, such as mortgages, etc. This is the reason why cl. 1(2) proposes the postponement of the operation of the Act.

Sub-cl. 1(3) contains a provision, based upon the formula adopted in recent New South Wales legislation (see e. g. s. 10(1) and 11(1) of the Limitations Act 1969) and is an essential provision in Queensland because of s. 13 of The Acts Interpretation Acts, 1954 to 1962.

2. Division of Act. This is self-explanatory. The Bill is divided into eighteen Parts, and has four Schedules, the first of which consists of statutory forms and the fourth of Imperial, New South Wales and Queensland statutes to be repealed.

3. Repeals. The Acts mentioned in the Fourth Schedule will be repealed. The very wide provisions of s. 20 of The Acts Interpretation Acts will operate to preserve rights acquired under any such repealed Act, but particular provision has been made in cl. 3(4) to cover the case of the Statute of Frauds.

4. Interpretation. The interpretation clause is extracted from s. 7 of the New South Wales Conveyancing Act which in turn relies heavily upon the English Conveyancing Act 1881 and the English Law of Property Act 1925 which superseded it. The definitions in this clause of "registered land" and "unregistered land" are essential to the applicability or otherwise of various provisions of the Bill.

5. Application of Act. As explained in the general introduction to this Commentary, the object has been to assimilate so far as possible the rules of law applying to land, whether it be freehold or leasehold and whether registered or unregistered. In order, however, to preserve the peculiar requirements of particular statutes, the provisions of the proposed Act will, unless otherwise provided, apply subject to the provisions of the statute under which the land is held, e. g. the Land Act, or The Miners' Homestead Leases Acts: see cl. 5(1).

Further, the Property Law Act will also, where appropriate, apply to property other than land (e. g. mortgages of chattels but subject to the Bills of Sale Act: cl. 76(1)(c)): see cl. 5(2).

6. Savings in regard to ss. 10, 11, 12 and 59. This clause simply expresses the existing law in preserving from the "Statute of Frauds" provisions, various interests and powers which have never been regarded as within its scope.

PART II - GENERAL RULES AFFECTING PROPERTY

7. Effect of repeal of Statute of Uses. A conveyance or feoffment of land in trust was originally effected and enforced as a conveyance "to the use of" the person or charity intended to benefit, which had the result of vesting legal title in the feoffee to uses and beneficial enjoyment in the cestui que use. Dispositions in this form were recognised and given effect in equity but not at common law, and were utilised for a variety of reasons mostly associated with the avoidance of burdensome feudal duties and evasion of the Statutes of Mortmain which placed restrictions on ownership of land by corporations. One direct consequence was a considerable loss of royal revenue and primarily for this reason the Statute of Uses (27 Hen. 8, c. 10) was passed in 1535. Its principal object and effect was to "execute" all uses, so that under a disposition in favour of A to the use of B the legal estate was taken out of A and vested in B. See, on the history and effect of the Statute, Holdsworth: History of English Law, vol. 4, pp. 407-480.

The immediate object of the Statute was initially accomplished and the evasion of feudal dues was to a large extent prevented by the legislation at least for the time being. But the statutory execution of uses also furnished conveyancers with a variety of new forms of conveyance since the Statute expressly vested in the cestui que use lawful seisin, estate and possession of the land conveyed. As a consequence land became transferable by means hitherto unknown or only imperfectly effective at common law, such as lease and release, and bargain and sale. Since the Statute of Uses has never been repealed in Queensland such forms of conveyance are still available in respect of old system unregistered land in this State, and in fact in 1952 s. 15A of The Real Property Acts, 1861 to 1903, expressly recognised the practice of conveyancing or appointing to uses as a standard form of conveyancing in the case of such land.

One of the remarkable features of the later history of the Statute was that the Court of Chancery again began to enforce uses, now under the name trusts, a result which led Lord Chancellor Hardwicke to remark that the only effect of the legislation had been to add three words to a conveyance. The omission of the necessary additional words will still bring an assurance to uses within the scope of the Statute in Queensland, although, as Cussen J. pointed out in House v. Caffyn [1922] V. L. R. 67, it is difficult to see how the Statute could be applied to land under the Torrens System: see also Wirth v. Wirth (1956) 98 C. L. R. 228, 236, per Dixon C. J.

By enabling conveyances of old system land to proceed by direct grant, clause 7 will render it unnecessary to resort to the conveyancing devices evolved out of the Statute of Uses. This will permit the repeal of what Maitland once described as "that marvellous monument of legislative futility... not a mere Statute of Uselessness but a Statute of Abuses". The Statute of Uses has been repealed in England and New Zealand, and more recently by the Imperial Acts Application Act in New South Wales.

An immediate result of the Statute was to permit the creation at common law as legal executory interests of those forms of future interest known as springing and shifting uses which had hitherto been recognised and enforced only in equity. In England, where since 1925 the only estates in land capable of subsisting or being created at law are an estate in fee simple absolute in possession and a term of years absolute (Law of Property Act, s. 1), s. 4(1) of the legislation of 1925 expressly provides that interests in land which might at law have been created under the Statute of Uses should be capable of being created as equitable interests. We have elsewhere given our reasons for recommending that certain future interests should not hereafter be capable of being created at law in Queensland, and to remove any doubts as to their capability of being created in equity we propose the adoption of the material portions of s. 4(1) of the Law of Property Act: see sub-cll. (1) and (2).

Sub-clause (3) is concerned with a different problem, namely, the effect of a voluntary conveyance or transfer without expression of uses, i.e. one in which no consideration or only a nominal consideration is expressed. Before 1535 it was settled that this gave rise to a presumption of a resulting use in favour of the grantor in respect of the whole estate granted: see Megarry & Wade, *op.cit.*, at p.454. After the Statute of Uses a conveyance in similar form logically resulted in the execution of the resulting use in favour of the grantor so that he again took the legal estate. When the concept of the trust became accepted it might have been expected that a voluntary conveyance in such form would raise a resulting trust in the grantor, but whether this was so created a remarkable division of opinion which has never been finally settled: see the discussion of the authorities by Cussen J. in *House v. Caffyn* (*supra*), at pp.72-80. Since the repeal of the Statute of Uses would restore the pre-1535 doctrine of resulting uses or trusts on a voluntary conveyance, s.60(3) of the Law of Property Act expressly precludes the implication of resulting trusts merely from the fact that the conveyance fails to express a use or benefit in favour of the grantee. It is important that the repeal of the Statute of Uses in Queensland should be accompanied by the adoption of this provision which has its analogue in s.44(1) of the Conveyancing Act (N.S.W.).

8. Lands lie in grant only. At common law a conveyance of freehold land could be made only be a feoffment with livery of seisin - a peculiar ceremony which involved an entry on to the land by the feoffor and feoffee in the presence of witnesses and the uttering of words of feoffment or some act constituting delivery of seisin: see Megarry & Wade, *op.cit.*, p.50. Originally, therefore, a conveyance by deed of freehold land was not possible, but in the course of time, and particularly after the enactment of the Statute of Uses 1535, various other forms of conveyance were devised or perfected, e.g. bargain and sale, lease and release, etc.: Megarry & Wade, p.170. In England since the Real Property Act, 1845, all corporeal hereditaments have been capable of conveyance by grant, and with the Law of Property Act, 1925, s.51, conveyance by deed of grant became practically speaking the only permissible mode of transfer: Megarry & Wade, p.174.

In Queensland livery of seisin was made unnecessary to the validity of any feoffment effected prior to January 3, 1842 by the Titles to Land Act 1858. In respect of conveyances thereafter the deposit with the Registrar of Deeds of a certified copy of the deed of feoffment is equivalent to livery of seisin by virtue of s.25 of the Registration of Deeds Act, 1843. Since, however, registration under this Act is not necessary to give efficacy to the deed where no question of priority arises, it is still theoretically possible to effect a transfer of old system, i.e., unregistered, land in Queensland by feoffment with livery of seisin provided there be a note in writing sufficient to satisfy s.4 of the Statute of Frauds and Limitations of 1867 (s.3 of the Act of 1877). It also appears that the other older forms of conveyance are still possible in this State, although in practice a deed of feoffment is almost invariably used in the case of old system land.

The present clause proposes the adoption of the provisions of s.51 of the English legislation of 1925, which appear as s.51 of the Victorian Property Law Act, 1958, and ss.9 and 10 of the South Australian Property Law Act, 1936-1969. This will render all estates and interests in land capable of being conveyed by grant and preclude the use of other modes of conveyancing in the case of unregistered land. In effect this will mean that a deed of feoffment (whether registered or not) will become in law (as it is in practice) the only mode of conveying title to old system land.

The above is, of course, relevant only to the small area of unregistered land remaining in Queensland. By far the great majority of titles to freehold land are registered under The Real Property Acts. These will not

be affected by the proposed clause but will continue to be transferable only by registered instrument of transfer in accordance with s. 43 of those Acts, the provisions of this clause being applicable to land under The Real Property Acts "but subject to the provisions of those Acts": see cl. 5(1)(a). Similar provision in the lastmentioned clause is made with respect to land under the provisions of other statutes, such as the Land Act, 1962-1970.

9. Reservation of easements, etc., in conveyances of land. At common law a reservation in favour of the grantor in a deed, unless by grant to the use, is ineffective unless the deed is executed by the grantee, in which the reservation operates as a regrant by him. Since easements and other incorporeal hereditaments lie only in grant, the reservation of an easement in a conveyance is effective at law only if the deed is executed by the grantee.

It may have been the difficulties associated with the above rules which prompted the inclusion in s. 23 of The Real Property Act of 1877 of a provision permitting a transfer of land under the Acts "subject to any easement" (cf. also ss. 24 and 28). However, this provision (which is peculiar to Queensland) is seldom resorted to for the creation of easements in favour of a transferor, the almost invariable practice being for the transferee to execute an instrument of transfer in Form W in respect of the easement. A result somewhat similar to that allowed by s. 23 of the Act of 1877 does, however, seem capable of being achieved independently of special statutory enactment under the principle of Dabbs v. Seaman (1925) 36 C. L. R. 538.

The Queensland legislation mentioned above does not directly alter the common law rule, since the statutory form of transfer and charge requires execution by the grantee. In the circumstances we recommend the adoption of the provisions of the New South Wales, English, and Victorian property legislation, which permit the reservation of an easement or other incorporeal hereditament without necessity for a regrant, but this will be made subject to the provisions of The Real Property Acts, so that existing practice will not be disturbed: see cl. 5(1)(a).

10. Assurances of land to be in writing.
11. Instruments required to be in writing.
12. Creation of interests in land by parol.

These provisions are identical with those proposed by the Commission in its Report (Q. L. R. C. 6) on the Statute of Frauds. As pointed out in that Report, the reform of these statutory provisions are an essential aspect of the reform of property law as a whole. Their proper place is in an enactment such as the present, which is where they are located in the legislation of England and of the Australian States.

13. Persons taking who are not parties. The original rule of the common law was that a person could not take an immediate benefit under an indenture unless he was named as a party thereto, and this was so even though he might himself have executed the deed: Scudamore v. Vanderstene (1587) 2 Co. Inst. 673; 10 Halsbury's Laws of England (1st ed.) p. 320, n. (q). The rule never applied to a deed poll and it was later restricted in the case of indentures to an indenture which was expressed to be inter partes: Cooker v. Child (1673) 2 Lev. 74. Subject, however, to the latter qualification the rule continued to apply in England until 1844, when it was abrogated by s. 11 of the Transfer of Property Act, which enacted:-

"That it shall not be necessary in any case to have a deed indented, and that any person, not being a party to any deed, may take an immediate benefit under it in the same manner as he might under a deed poll."

However, this "short workmanlike section", as it was described by Lord Upjohn in Beswick v. Beswick [1968] A.C. 58; [1967] 3 W.L.R. 932, 963, "applied to all covenants, whether relating to realty or personal grants or covenants" (ibid), was, for reasons unexplained, repealed in the following year by the Real Property Act, 1845, s. 5 of which provided:-

"That under an indenture executed after October 1, 1845 an immediate estate or interest, in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture....".

Under this provision it was held that a covenant in an indenture could not effectually be made with persons not in existence at the time of the execution of the deed, as, for instance, future owners of land: Kelsey v. Dodd (1881) 52 L.J. Ch. 34, 39; Forster v. Elvet Colliery Co. Ltd. [1908] 1 K.B. 629, and in the latter case the view was taken (although doubted on appeal: [1909] A.C. 98, 102) that the section was confined to covenants the benefit of which may run with the land.

Section 5 of the Real Property Act, 1845, was replaced by s. 56(1) of the Law of Property Act 1925 which provides that:-

"A person may take an immediate or other interest in land or other property, or benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument".

Section 56(1) has been held to apply to and render enforceable an option to purchase land conferred by a deed upon a person who was neither named as a party nor who executed the deed: Stromdale and Ball Ltd. v. Burden [1952] Ch. 223. See also Chelsea and Walham Green Building Society v. Armstrong [1951] Ch. 853. Beyond this, its scope was, until recently, uncertain: what has been described as the "narrow view" of the s. 56(1) is that expressed by Simonds J. in White v. Bijou Mansions [1937] Ch. 610, 625, namely -

"Just as under s. 5 of the Act of 1845 only that person could call it in aid who, although not a party, was a grantee or covenantee, so under s. 56 of this Act only that person can call it in aid who, although not named as a party to the conveyance or other instrument, purports to grant something or with which some agreement or covenant is purported to be made."

On the other hand, s. 205(1) of the Law of Property Act, 1925, defines the term "property" as including (unless the context otherwise requires) "any thing in action, and any interest in real or personal property", and, on the strength of this definition, Lord Denning M.R. and Danckwerts L.J., in a series of decisions culminating in the decision in Beswick v. Beswick [1966] Ch. 533 in the Court of Appeal, adopted a construction of s. 56(1) which, if it had prevailed, would have meant that the statutory provision permitted the enforcement of an agreement for the benefit of a person not a party thereto.

The decision of the House of Lords in Beswick v. Beswick has finally disposed of the notion that s. 56(1) has accomplished the result contended for by Lord Denning. In England at least, the section seems likely in future to be confined to grants, covenants or agreements affecting real property, and, since s. 56(1) of the Victorian Property Law Act 1958 is in identical terms, it seems probable that this conclusion will also prevail in Victoria (see Bird v. Trustees Executors & Agency Co. Ltd. [1957] V.R. 619) and in South Australia, although the point was left open by Windeyer J. in Coulls v. Bagot's Executor and Trustee Co. Ltd. (1967) 119 C.L.R. 460. In New

South Wales, s. 36C(1) of the Conveyancing Act reproduces s. 56(1), but adds a subsection (2), which is peculiar to New South Wales, viz. -

"Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he had been named as a party to the assurance or other instrument."

It is probable that this does no more than express what is implicit in s. 56(1) of the Victorian and English statutes, but because s. 36C(1), unlike its English and Victorian counterparts, does not appear in a purely consolidating statute, Stuckey (The Conveyancing Act (2nd ed.) at p. 80) surmises that the reasoning of the House of Lords in Beswick v. Beswick does not apply to the New South Wales provision. If this is so, it may be that s. 36C is not limited to covenants, etc., relating to real property but extends to personal property, so as to render covenants and agreements for the benefit of third parties enforceable in that State along the lines suggested by Lord Denning in respect of s. 56(1).

The question is to determine what steps should be taken to improve and amend the common law which still prevails in Queensland. Clearly, the old rule should be abrogated that an executing party to an indenture inter partes is not entitled to enforce a benefit thereby conferred on him simply because he is not expressed to be or named as a party thereto. Likewise, it is plainly desirable that in Queensland the law should go at least as far as it does in England and Victoria in enabling a person, to whom a benefit purports to be given by a covenant or condition relating to real property, to enforce the same even though he is not an executing party to the instrument in question, although it will be necessary to ensure by express provision that the principle of paramountcy of title under The Real Property Acts is not disturbed.

Whether the reform should go beyond this is a question which, we believe, is largely concluded by our proposals made elsewhere as to the enforceability of contracts for the benefit of third parties: cl. 55. If our recommendations on this subject are adopted, then it will not be necessary for the provisions of the present section to extend to covenants, conditions, etc., which relate to real property or interests therein, and the scope of cl. 13 will then correspond with that of s. 56(1) of the English Law of Property Act, 1925 as determined by Beswick v. Beswick. In our view it is appropriate to restrict the operation of cl. 13 to land, leaving it to cl. 55 to regulate the general enforcement of contracts for the benefit of third parties.

14. Conveyances by a person to himself. At common law a person could not convey property to himself, nor to himself and his wife since husband and wife were for most purposes regarded as one: Megarry & Wade, The Law of Real Property (3rd ed.) at p. 159. As regards leasehold interests and assignable choses in action the first branch of this inconvenient rule was abrogated in England by the Law of Property Act Amendment Act 1859, s. 21, represented in Queensland by The Mercantile Acts, 1867 to 1896, s. 1, and as regards freehold land in England by The Conveyancing Act 1881, s. 50, which has not been adopted in Queensland although a somewhat similar provision exists in s. 80 of The Real Property Acts, 1861 to 1963. The matter of dispositions to a husband and wife are the subject of the next succeeding clause.

The subject clause follows generally the provisions of the Law of Property Act 1925, s. 72, which in Rye v. Rye [1962] A.C. 492, was held by the House of Lords not to permit of a lease by a person to himself and another (including a lease by two co-owners to themselves) and which is in part a result of the definition of "conveyance" in cl. 4 of the Bill. The decision is criticised in 35 A.L.J. 442 and 36 A.L.J. 45, where it is pointed out that there may be situations, particularly associated with partnership, which make such leases desirable.

We recommend the adoption of s. 72 with the insertion of the words "or lease" after the words "conveyance" or "convey", and the addition of sub-cl. (5), so as to place beyond doubt in Queensland the power of persons, including co-owners, to lease to themselves. This will render obsolete The Mercantile Acts, s. 1, as well as s. 82 of The Real Property Acts, both of which sections may be repealed.

15. Rights of husband and wife. The abolition by The Married Women's Property Act of 1884 of tenancies by entireties did not affect the independent rule of construction, based upon the legal unity of husband and wife, that a conveyance to a husband and wife and third parties, whether as joint tenants or tenants in common, vested in the husband and wife only one actual or potential share between them, the other share or shares being taken by third party or parties: see Megarry & Wade, op. cit., at p. 433; Dias v. De Livera (1879) 5 App. Cas. 123. The rule yields to a contrary intention, e.g. the use and position in the disposition of the copulative "and", and has led to what Megarry & Wade describe as "distinctions of great nicety": op. cit. at p. 434, and examples there given.

The rule was abrogated in New South Wales by the Married Women's Property Act 1901, s. 26, but this provision did not appear in the corresponding legislation in England, where the rule survived (see Re Jupp (1888) 39 Ch. D. 148; Re Jeffery [1914] 1 Ch. 375) until the enactment of s. 37 of Law of Property Act 1925. In Queensland The Married Women's Property Act followed the English model so that the common law position still prevails. It is perhaps surprising that it does not appear to have caused greater difficulty, because it presumably applies to instruments of transfer under The Real Property Acts.

We recommend the adoption of the provision in s. 37 of the English Act.

16. Presumption that parties are of full age. Section 15 of the English Law of Property Act 1925 creates a rebuttable presumption that the parties to a conveyance are of full age. It seems likely that the utility of such a provision is greater in the case of unregistered than of registered land, where the fact and effect of registration is virtually if not completely conclusive. Nevertheless, questions as to the validity of a conveyance by or to a person whose age is not easily discoverable may arise in relation to land which is not under The Real Property Acts, e.g. a transfer of a Crown lease under the Land Act, where a provision in the form of s. 15 might prove useful. Furthermore, because of the wide definition of "conveyance" in cl. 4, the section is capable of applying to the choses in action, e.g. shares in companies, with respect to which questions of capacity quite frequently arise.

Because of provisions such as s. 111A of The Real Property Acts and s. 15(2) of the Land Act (which confer on persons who are 18 years of age capacity to acquire, transfer, mortgage or otherwise deal with land) it is necessary to vary the local form of s. 15 of the Law of Property Act by extending the presumption to such other lesser age as to have capacity to give effect to conveyance.

17. Merger. Prior to the Judicature Act the rule was that upon the vesting in the same person of a greater and a lesser estate in the same land, the lesser estate was destroyed or merged, that is, sunk or "drowned in" the greater: 2 Blackstone's Commentaries 177; Symons v. Southern Ry. Co. (1935) 135 L. T. 98, 101. The rule applied where, for example, a tenant holding a lease acquired the reversion, and it applied at common law irrespective of the intention of the parties. Equity, however, looked to the intention and effect of the transaction and would not recognise a merger where it was not intended: see Capital & Counties Bank Ltd. v. Rhodes [1903] 1 Ch. 631, 652.

The Judicature Act of 1876, s. 5(4), provided that the equitable rule as to merger should prevail, and this provision has in England and Victoria now been transferred into the relevant property legislation in those jurisdictions. It is proposed that this step should be taken in Queensland, with consequential repeal of s. 5(4) of The Judicature Act.

In their Survey of the Land Law of Northern Ireland a working party under Professor Sheridan has recently (1971) recommended that this provision be redrafted in the interests of greater clarity (see Report, para. 268, p. 359). The proposed s. 17 is based upon this recommendation.

18. Restrictions on operation of forfeiture conditions. This clause is intended to resolve a difference between the English Court of Appeal and the High Court of Australia. In McQuade v. Morgan (1927) 39 C. L. R. 222 the donee of a power of appointment appointed to trustees on trust for her children subject to a condition that if any of the children should become bankrupt or suffer his interest or the income therefrom to be charged, the trustees should apply the share of income of that child towards his maintenance or that of his issue. After the deed of appointment had been executed but before the death of the appointor, one of the children charged his interest as collateral security for payment of money. Notwithstanding that the charge was released before the interest vested in possession on the death of the appointor, it was held (Isaacs J. dissenting) that, upon the charge being given, the interest was forfeited and that the rule stated in Jarman on Wills, namely, that no forfeiture takes place if the charge is got rid of before the interest falls into possession, was too widely stated.

A directly contrary conclusion had shortly before been reached by the Court of Appeal in Re Forder [1927] 2 Ch. 324, but at the time of the High Court decision Re Forder was only incompletely reported in the Weekly Notes and, primarily for this reason, the majority of the High Court did not consider it an authority to the contrary.

The position reached by the High Court was reversed in New South Wales by s. 29C of the Conveyancing Act, which in effect accepted the correctness of the English decision and that of Isaacs J. in McQuade v. Morgan. It is considered that the latter is the more convenient rule and one which is more consonant with the intentions of the disponor.

We therefore recommend the adoption of s. 29C in Queensland.

PART III - FREEHOLD ESTATES

19. Freehold estates in land. The law as it now stands recognises three principle forms of estates of freehold in land: (1) estates in fee simple; (2) estates tail; and (3) life estates, which may be either an estate for the duration of the life or lives of the tenant or tenants, or an estate for the duration of the life or lives of some other person (estate pur autre vie). The first and third of these forms of estate existed at common law, whereas estates tail are a product of the Statute De Donis Conditionalibus, 1285, the repeal of which we recommend in this Report. The abolition of estates tail, which, for the reasons given in the commentary thereto, is proposed by cl. 22, will also have the incidental effect of removing base fees, which is a form of determinable fee simple resulting from an imperfectly barred entail. It is a logical step that quasi-entails (which in effect if not in theory amount to entails of estates pur autre vie) should be abolished, and this is also recommended: see cl. 23.

The effect of these proposals will be to limit the forms of freehold estates capable of being created in land in this State to the two forms originally recognised at common law. This will effect a considerable simplification in the theory of the law of real property, although in practice those forms of freehold estates which will be discontinued have long since ceased to be of any legal or social significance.

The purpose of cl. 19 is simply to state in compendious form the effect of the succeeding clauses of this Part of the Bill, i. e., the only freehold estates which will be capable of being created in land after the commencement of the Act will be estates in fee simple and life estates. Any existing estates tail, base fees, and quasi-entails will continue to subsist; but the former will be capable of conversion to estates in fee simple, while quasi-entails will naturally become extinct upon the deaths of the existing cestuis que vie.

20. Incidents of tenure on grant of fee simple. The theory of English law is that all land is owned by the Crown, which, on "alienation", grants to the subject an estate (which may vary in duration) in return for services known collectively as tenure: see Megarry & Wade: Law of Real Property (3rd ed.) at pp. 12-13. This theory of universal ownership of land by the Crown is part of the common law which has been accepted in Australia; see Attorney-General v. Brown (1847) 2 S. C. R. App. 30, so that all titles in this country inevitably originate in a direct grant from the Crown which is thus in the feudal, and therefore legal, sense the "overlord" of all title holders in Australia.

The common law of England recognised a variety of forms of tenure, both free and unfree, of which some, known as tenures in chivalry, bound the tenant to the performance of various military services for the king. By the time of Cromwell the incidents of such tenures had fallen into disuetude, and were abolished by a resolution of the Long Parliament in 1646, later confirmed by the Tenures Abolition Act, 1660; 12 Car. 2, c. 24, which converted such tenures into tenures in free and common socage and provided that all tenures created in the future should be of the same character: see Challis's Real Property (3rd ed.) at p. 23.

Tenure in free and common socage (the word socage being derived from soc meaning "a seeking" and, ultimately, "jurisdiction": Maitland: Domesday Book and Beyond, at p. 115), was the common form of socage tenure. All free tenures were common socage unless otherwise proved and all alienated Crown land in Queensland is necessarily held on this form of tenure by virtue of the provisions of the Tenures Abolition Act. The language of this statute has been described by Challis (op. cit. at p. 23) as "marked by an iteration, always inept and sometimes perversely maladroit"; but, despite its defects, it embodies a fundamental principle of property law which it is necessary to preserve. This is proposed by sub-cl. (1) which follows s. 37 of the New South Wales Imperial Acts Application Act, 1969 in re-enacting in modern language the relevant provisions of ss. 1 and 4 of the Act of 1660.

The only remaining provisions of the Act of 1660 which have any modern relevance in Australia are ss. 8 and 9 which provide for the appointment, powers and duties of testamentary guardians. These matters are now covered in ss. 89, 90 and 92 of The Children's Services Act of 1965, and accordingly the whole of the Tenures Abolition Act may now be repealed.

Escheat and quit rent are the only tenurial incidents which have attached to socage tenure in Australia. In the early days of the colony of New South Wales some Crown grants in fee simple reserved a monetary quit rent in favour of the Crown, but by a series of regulations in 1846 and 1849 provision was made for the relief or redemption of such rents after twenty years of payments: see Helmore: Law of Real Property (2nd ed.) at p. 69. In New South Wales all remaining quit rents have now been released by statute; s. 234 of the Crown Lands Consolidation Act, No. 7 of 1964. In Queensland the Lands Administration Commission has advised that examination of land purchases and grants back to March 1843 discloses no reservation of any monetary quit rent to Crown. On the other hand, there is a remote possibility of such a reservation in some early pre-separation

Crown grant dating to times when a practice of making such reservation existed in New South Wales, and sub-cl. (2) is intended to cover this possibility in terms similar to those of s. 234 of the New South Wales enactment referred to.

Escheat occupies, or until recently has occupied, a somewhat more significant place in the law of Queensland. At common law land held for an estate in fee simple might in certain events pass or escheat to the feudal overlord. Since in Australia the "feudal overlord" is necessarily the Crown, it follows that in Queensland escheat is always in favour of the Crown.

According to Challis's Real Property (3rd ed.) at pp. 33-34, escheats were either by attainder or without attainder: the former included escheats by judgment of death for felony; by implied confession of felony on abjuration of the realm to escape conviction; and by judgment of outlawry. With such escheats there may also for convenience be classified forfeiture to the Crown for high treason. Escheats without attainder take place upon the death of the tenant intestate and without next-of-kin, as well as upon dissolution of a corporation seised of land for an estate in fee simple.

Judgment of outlawry has never existed in Australia: R. v. Governor (1900) 21 L. R. (N.S.W.) 278 (L), and the same may confidently be said of escheat on abjuration. As regards the other form of escheat by attainder, the Corruption of the Blood Act, 1814; 54 Geo. 3, c. 145, provided that no attainder for felony taking place after the passing of the Act, save in the case of treason or murder, should disinherit any heir or prejudice the right or title of any person other than the offender. In Queensland, following the Forfeiture Act; 33 & 34 Vic., c. 23, s. 1, enacted in England in 1870, forfeiture for treason, and all remaining forms of escheat by attainder, were abolished by The Escheat (Procedure and Amendment) Act, 1891; 55 Vic. No. 12, s. 12. (See also ss. 24-26 of The Succession Act of 1867).

This left only escheat without attainder. In this regard, s. 11 of the Act of 1891 extended the scope of escheat to land consisting of any estate or interest, whether legal or equitable, in any incorporeal hereditament or of any equitable estate or interest. This provision was practically a rescript of the English Intestate Estates Act, 1884; 47 & 48 Vic., c. 71, s. 4, which was criticised by Challis, op. cit. at p. 39, as being founded on a complete misapprehension of the relation of escheat to tenure. (For an example of its application, see Re Wood [1896] 2 Ch. 596). At common law a somewhat involved procedure existed for establishing escheat: it was one of the principal objects of the Act of 1891 to simplify these proceedings, and the Act was further amended by The Escheat Amendment Act of 1962 (No. 16 of 1962) to take account of certain deficiencies in the legislation disclosed by the decision in Re Bonner deceased [1963] Qd. R. 488. See, generally on this, 38 A. L. J. 303.

In England, by the Administration of Estates Act, 1925, and in New South Wales by the Administration of Estates Act, 1954, the Crown now takes both the realty and personalty of an individual as bona vacantia, subject in the case of the New South Wales legislation to a proviso saving the right of the Crown out of such property to provide for dependants of the intestate and other persons for whom he might reasonably have been expected to make provision: cf. s. 3A of The Escheat (Procedure and Amendment) Act, 1891, added by the amending Act in 1962. In respect of the estate of a person dying on or after 16th April, 1968, the date of passing of The Succession Acts Amendment Act of 1968, the position in Queensland now appears to be the same as that in New South Wales, in that Part II of the Schedule to that Act, in prescribing the manner of distribution of the residuary estate of an intestate who is not survived by a spouse, by issue, or by next-of-kin, provides that the residuary estate "shall be deemed to be bona vacantia and the Crown is entitled to it". Since by s. 29(1) of The

Succession Acts, 1867 to 1968, added by the amending Act in 1968, "residuary estate" is defined to mean real and personal property of the intestate which is not effectively disposed of by will, or, where there is no will, the real and personal property of the intestate, it seems clear that the intention of the amendment was to ensure that all undisposed of property, whether real or personal, of an intestate dying without spouse, issue, or next-of-kin should pass to the Crown as bona vacantia.

This being so, it is difficult to see what scope can be left for the application of the principle of escheat in Queensland. But this is subject to two qualifications. One is that, since the effect of escheat is that upon the death of the tenant the legal estate devolves immediately upon the Crown, it may be questionable whether, in strict legal theory, the "residuary estate" referred to in s. 29(1) of The Succession Acts is capable of including realty, which by definition has already escheated to the Crown. The simple solution to the foregoing problem would be to abolish escheat in respect of the estates of persons dying on or after 16th April, 1968, thus ensuring to s. 29(1) and the Schedule to The Succession Acts their full and intended field of operation. The other problem associated with escheat is the doubt surrounding the power of the Crown, without express statutory authority, to waive its rights to the escheat or to order payment out of the property in favour of persons in favour of whom those rights had been waived: see 38 A. L. J. at p. 308, and it was principally for the purpose of removing this doubt that the amending Act of 1962 was passed. Section 3A of the Principal Act as amended now provides for a waiver of the Crown's right to property by escheat in favour of, amongst others, dependants, whether kindred or not of the intestate, or of any other persons for whom the intestate might reasonably have been expected to make provision. This extends to a somewhat wider range of individuals than those who might be competent under Part V of The Succession Acts to apply for provision out of the estate of the intestate; but in view of the representations on this subject made by the Public Curator we have decided to retain these provisions in sub-cl. (5) to (8) of the clause. In any event, it now seems impossible satisfactorily to reconcile the provisions of The Succession Acts, as amended in 1968, with those of The Escheat (Procedure and Amendment) Act as amended in 1962 except on the footing that the latter has been impliedly repealed. We therefore consider that the proper course is to abolish escheat entirely in the case of persons dying on or after 16th April, 1968, leaving to those persons who are not issue or next-of-kin of the intestate (i. e., illegitimate or step-children of the intestate) their right to apply under Part V of The Succession Acts for provision to be made out of the deceased estate, which, by virtue of s. 29(1) and the Schedule to those Acts, will include property which formerly escheated but now passes to the Crown as bona vacantia.

The above recommendation, which is embodied in sub-cl. (2), will permit the repeal of ss. 24-26 of The Succession Acts, 1867 to 1968, The Escheat (Procedure and Amendment) Act, 1891, and The Escheat Amendment Act of 1962, as well as the Corruption of the Blood Act, 1814; 54 Geo. 3, c. 145, the other earlier English statutes on this subject having been repealed by the Act of 1891.

The remaining matter for consideration is escheat upon dissolution of a corporation. In the case of companies registered under The Companies Acts, 1961 to 1964, the destination of property, including land, of the dissolved company is now regulated by ss. 309-311 of those Acts: see, generally, The Law of Company Liquidation, at pp. 412-413. Subject to any particular provisions of the statutes by which they are created, however, the realty of corporations not incorporated under The Companies Acts remains subject to escheat on dissolution: Re Strathblaine Estates Ltd. [1948] Ch. 162, and their personalty passes to the Crown as bona vacantia: Re Wells [1933] Ch. 29; Re Prairie Fireboard Ltd. (1962) 36 D. L. R. (2d)

767. The logical step in such cases is, we think, to provide that all such property shall be bona vacantia to which the Crown shall be entitled as in the case of an individual, and this is the effect of the provision contained in sub-cl. (3) of the proposed section.

21. Alienation in fee simple. The power of a tenant, without the consent of the lord of whom he held, to alienate land held in fee simple is said to have been established by the time of Edward I. However, the practice then grew up of effecting alienation by means of sub-infeudation, that is to say, the grantee became the tenant not of the chief lord but of the grantor. In 1290 the statute known as Quia Emptores (18 Edw. I, St. 1, caps. 1, 2, 3) was passed, the purpose and effect of which was to confirm the power of the tenant in fee simple to alienate his holding, but to provide that upon such alienation the grantee would hold of the lord of the grantor and subject to the same incidents of tenure as the grantee: see Challis's Real Property (2nd ed.) at p. 19. A series of statutes culminating in the Tenures Abolition Act 1660 extended the principle of the statute to tenants of the Crown and abolished the prerogative of the Crown to claim payment of a fine or premium as a condition of the alienation: see 17 Edw. 3, St. 2, c. 13; 34 Edw. 3, c. 15 (1361). The details of this legislation and its applicability in Australia are discussed in the Report of the New South Wales Law Reform Commission on the application of Imperial Acts (L.R.C. 1, pp. 52-54).

Megarry & Wade: The Law of Real Property (3rd ed.) at p. 33, say of Quia Emptores that it is "still in force today and may be regarded as one of the pillars of the law of real property", and as recently as 1960 it formed one of the considerations which influenced the High Court of Australia in Hall v. Busst (1960) 104 C.L.R. 206 to hold that a contractual restraint afforded an unenforceable fetter upon alienation of land. Following the recommendations of the New South Wales Law Reform Commission, Quia Emptores, together with the associated statutes mentioned above, has been repealed in New South Wales and re-enacted in simplified form in s. 36 of the Imperial Acts Application Act, 1969.

Clause 21 follows the form of the lastmentioned section.

22. Abolition of estates tail. An estate in fee tail is an estate of inheritance which, however, passes to lineal descendants only of the donee. It may be tail general, i.e., capable of descending to any lawful issue of the donee, or tail special, e.g. to male issue only (tail male). Where the limitation is to a single donee and his or her issue by a particular wife or husband, or is to two donees and their joint issue, it is a special tail, and in these cases if the specified husband or wife, or one of the two donees, dies without issue, the survivor becomes tenant in tail after possibility of issue extinct: see Challis's Real Property (3rd ed.) at pp. 290-291. The position of such a tenant in tail is then similar to that of a life tenant, inasmuch as the tenancy in tail must necessarily come to an end with his death: cf. Megarry & Wade: Law of Real Property (3rd ed.) at p. 100.

Originally a limitation in a form which would now create a tenancy in tail was construed as giving rise to a conditional fee simple, which became absolute when issue was born to the donee. To prevent this the Statute De Donis Conditionalibus; 13 Edw. 1, St. 1, c. 1, was passed in 1285, providing that the tenant might not alienate the land so as to defeat the entail. See Helmore: Law of Real Property (2nd ed.) at p. 74. By this process was brought into existence the estate in fee tail, which was an estate of freehold, but not one known to the common law. The ingenuity of conveyancers was then directed to devising means of barring the entail, i.e., converting it into an estate in fee simple, which was achieved by collusive legal proceedings known as suffering a common recovery and levying a fine. The levy of a fine was, however, incapable of destroying the remainder or reversion expectant on termination of the estate tail, and an estate tail subjected to

this process produced not an estate in fee simple but what was known as a "base fee", i.e., one which was liable to be defeated if there was a failure of issue of the tenant in tail: see Megarry & Wade, *op. cit.*, at p. 90.

The Statute *De Donis* has been recognised as being in force in Queensland: *Allison v. Petty* (1899) 9 Q.L.J. 125, 129, but, since the procedure for suffering a common recovery was never used in Australia (*Allison v. Petty*, *supra*), provision was made in s. 16 of the Registration of Deeds Act 1843 for execution of a deed and acknowledgement which was to have the same effect as if a fine had been levied or a recovery suffered. However, such a deed is not effective in the case of land under *The Real Property Acts* and the registered proprietor of an estate tail in such land, whilst able by transfer to dispose of the estate tail, is unable to bar the estate in remainder expectant on determination of the estate tail: *Allison v. Petty*, *supra*, at p. 132.

In England tenancies in tail are no longer capable of subsisting as legal estates: Law of Property Act, 1925, s. 1, and the creation of such tenancies was first precluded in Victoria in 1885 (see now Property Law Act 1958, s. 249), and in New South Wales by the Conveyancing Act of 1919, s. 19, the effect of which is to convert existing estates tail into estates in fee simple and to require limitations in instruments, which would have created an estate tail (whether legal or equitable), to be construed as creating a corresponding estate in fee simple. A similar step has recently been recommended in Northern Ireland (Report, paras. 44-47).

Estates tail have always been rare in Queensland, and, although a legal institution of long standing ought not to be too readily abolished, such estates have ceased to have any real social or legal utility. Accordingly, we recommend the adoption of s. 19 of the Conveyancing Act (N.S.W.) subject to the following observations and amendments:-

- (1) Section 19 of the Conveyancing Act is as the New South Wales Law Reform Commission has recently pointed out, deficient in that it does not exclude an estate in *reversion* after an estate tail. This has been remedied by the insertion in the New South Wales Act of a new s. 19A by Act No. 31 of 1969, s. 4(4). Rather than adopt the course of enacting two distinct sections, the material words have been added at the end of sub-cll. (1) and (2)(a) of the proposed clause of the Bill.
- (2) New South Wales s. 19(2)(a) was also deficient in that it failed to operate on a limitation in an instrument coming into operation before the commencement of the Act of an estate tail in favour of a person born after the Act: see *Mathers v. Mathers* (15 Dec. 1952, Roper C.J. in Eq., *unrep.*). This too has been remedied by the enactment of s. 19A, and again we have adopted and recommend the course referred to in (1) above.
- (3) New South Wales s. 19(2)(c) preserved estates tail in the exceptional case of mental defectives. The reason for this was, it appears, historical rather than social, and, as the Law Reform Commission in that State has pointed out, the children of such a person are amply protected by their right to apply for testator's family maintenance provision: L.R.C. 7 at p. 99. Accordingly, the provisions of s. 19(2)(c) have been omitted from the clause proposed.
- (4) An estate *pur autre vie*, not being a hereditament, is not entailable under *De Donis*: Challis, *op. cit.* at pp. 362-363, but an estate for the life of X, if granted "to Z and the heirs of his body" creates a quasi-entail to which effect is given in much the same fashion as an estate tail (although in the example given the heirs of Z take not by

descent but as "special occupants": see Megarry & Wade, *op. cit.*, at p. 104). Stuckey: *The Conveyancing Act*, para. 132, suggests that s. 19(1) operates to prevent real estate being devised for an estate in quasi-entail, but Helmore (*op. cit.*) at p. 77, takes the opposite view. It is thought that the latter is probably correct (a quasi-entail is not an "estate tail" within the meaning of s. 19). The prospect of a quasi-entail being created in Queensland is so remote as to be virtually capable of being ignored, but, as a measure of simplification of real property law, it is desirable that interests in this form cease to be capable of being created. This forms the subject of the next succeeding section.

In New South Wales the Statute *De Donis* has been repealed by the Imperial Acts Application Act 1969, and, although this step does not seem strictly necessary in view of the abolition of estates tail and their transformation into estates in fee simple, it seems desirable that a similar repeal be effected in Queensland if only as a measure of simplification of imperial statute law. There are numbers of other early English statutes dealing with the barring of entails, e. g., 34 Edw. 3, c. 16; 1 Ric. 3, c. 7; 4 Hen. 7, c. 24; 32 Hen. 8, c. 36. These statutes were primarily concerned with regulating the procedure for effecting fines and recoveries and may be repealed.

23. Abolition of quasi-entails. Quasi-entails are referred to above. The present clause is intended to ensure that a deed affecting to create a quasi-entail after the commencement of the Act will be construed as conferring on the person in whose favour it is intended to operate the full interest in the estate *pur autre vie* the subject of the proposed quasi-entail. The extreme rarity of estates *pur autre vie* makes it virtually certain that there are no existing quasi-entails in Queensland: even if there are, they will expire in the natural course of events at most within the period of a life or lives after the passing of the Act. For these reasons, we see no necessity for making provision, along the lines of the preceding clause, for the abolition of any existing quasi-entails.

There are two early enactments, 32 Hen. 8, c. 31 (1540) and 14 Eliz. 1, c. 8 (1572), which are directed to preventing the barring of quasi-entails. These statutes may safely be repealed.

24. Liability of life tenant for voluntary waste. This clause follows, with minor modifications, the terms of s. 32 of the Imperial Acts Application Act, 1969 (N. S. W.) which represents a statement in modern language of the provisions of the Statute of Marlborough, 1267; 52 Hen. 3, c. 23, which imposes upon tenants liability for waste.

A life tenancy being a freehold estate, we have adopted the course of severing those parts of s. 32 of the New South Wales Act which deal with the liability of life tenants from the provisions relating to tenancies of other kinds: the latter are contained in a later clause.

For the reasons indicated in the Report of the New South Wales Law Reform Commission (L. R. C. 4 at p. 48), we recommend the adoption of a provision in the form of this clause and the repeal of c. 23 of the Statute of Marlborough, 1267.

25. Equitable waste. This clause does not require expanded comment, since it is simply a rescript of s. 5(3) of *The Judicature Act of 1876* produced by the fusion of courts of law and equity. Its inclusion in the present Bill is justified in the interests of completeness with a view to embodying all relevant statutory provisions relating to tenancies for life in a single statute. The subject clause will involve repeal of s. 5(3) of *The Judicature Act*.

26. Recovery of property on determination of a life or lives. Certain Imperial Statutes entitled the Cestui que Vie Acts (18 & 19) Car. 2, c. 11, of 1666, and 6 Anne, c. 72 (or c. 18) of 1707 were designed primarily to obviate the difficulties associated with proof of death of a cestui que vie, i. e. the person upon whose death an estate pur autre vie came to an end. The application of the second of these statutes is expressly recognised in s. 90 of The Real Property Acts, 1861 to 1963.

Estates pur autre vie are very rare in Queensland but we consider it advisable to adopt this clause, which is a modern adaptation of the provisions of the foregoing Imperial Statutes and which is copied from s. 38 of the New South Wales Imperial Acts Application Act, 1969 (see N. S. W. L. R. C. 4 at p. 56). This will result in the repeal of the Imperial statutes referred to above.

27. Penalty for holding over by life tenant. This represents in part a modernised version of s. 1 of the Landlord and Tenant Act, 1730, which section applies, however, to both life tenants and yearly tenants. Since a life tenancy is a freehold estate in land we consider it convenient to divide the provisions into separate sections, the present providing for life tenancies and a later clause being concerned with other forms of tenancy. A commentary on this provision appears in relation to the latter clause.

28. Abolition of the Rule in Shelley's Case. The Rule in Shelley's Case (1581) 1 Co. Rep. 88b is a common law rule of great antiquity according to which, in a disposition of a freehold estate followed by a limitation, either mediately or immediately, to "the heirs" or "the heirs of the body" of the donee of the freehold estate, the words in question are treated as words of limitation and not of purchase. The operation of the rule is illustrated by Megarry & Wade (op. cit.) at p. 61 by the following examples:-

"to A for life, remainder to his heirs"

"to B for life, and to the heirs of his body".

In these examples, the words "remainder to his heirs" and "to the heirs of his body" are words of limitation, conferring no estate or interest on the heirs, but merely defining the interest taken by A and B, i. e., an estate in fee simple and an estate tail respectively. The effect is to defeat the natural meaning of the words, but since the rule is one of law and not of construction it applies to the exclusion even of an express intention to the contrary.

The Rule does not appear to have been the subject of any reported decision in Queensland owing, no doubt, principally to the prevalence in this State of the system of registered titles and registered conveyancing for which technical words of limitation are generally unnecessary. As a result the Rule tends to be overlooked even in cases to which it might well apply: cf, for example, Bouel v. Cooktown Municipality (1885) 2 Q. L. J. 93. Nevertheless, it may not be correct to regard the Rule in Shelley's Case as quite incapable of applying under a system of registration of title such as that provided by The Real Property Acts, 1861 to 1963. There appear to be at least three situations in which the Rule could or might apply to registered land in Queensland:-

- (1) to a grant or transfer inter vivos if technical words of limitation, even though unnecessary, were in fact used in the instrument of transfer: cf. Hogg: Australian Titles System (1913) at pp. 893-894;
- (2) to a like disposition by will of land under the Acts, since transmission has to be entered in the register in accordance with the legal effect of the testamentary disposition:

cf. Holt v. Deputy Federal Commissioner of Land Tax (1914) 17 C.L.R. 720; Wolfson v. The Registrar-General (1934) 51 C.L.R. 300, 311-312;

- (3) to a disposition of the equitable estate in land effected prior to 1952 by means of a schedule of trusts declared by the schedule or by separate deed and deposited with a nomination of trustees, since the latter is not an "instrument" within the meaning of The Real Property Acts, with the consequence that, prior to the 1952 amendment of the Acts introducing s.15A, technical words of limitation were necessary for the creation of equitable estates in land even if under the Acts.

Hogg (*op. cit.*) at p. 927 considers that the Rule is abrogated by the Acts. Even so it appears preferable to resolve the foregoing problems by abolishing the Rule altogether, as has been done in many other jurisdictions. The Rule in Shelley's Case has been abrogated in England (Law of Property Act, 1925, s.131), Victoria (now Property Law Act 1958, s.130), New Zealand (Property Law Act, 1952, s.51) and New South Wales (Conveyancing Act, 1919-1969, s.17), in respect of instruments coming into operation after the commencement of those enactments. The New South Wales provision differs from those in the other jurisdictions, and we prefer the English and more particularly the Victorian version, which expressly takes account of the abolition of estates tail, a course which is also recommended in this Report.

29. Words of limitation. Words of limitation are the words which in the grant of a freehold estate mark out the quantum of the interest to be taken by the grantee. At common law in Queensland prior to 1952 the appropriate form of limitation in the case of a grant in fee simple of land under the general law was "to A and his heirs". Omission of the words "and his heirs" (e.g. as in the formula "to A in fee simple") resulted in the grant to A of a life estate only. In equity a modified form of this rule prevailed according to which it was only if technical words of limitation happened to be used that a result might ensue different from that which the grantor apparently intended: Re Bostock's Settlement [1921] 2 Ch. 469, followed in Sexton v. Horton (1926) 38 C.L.R. 240.

The necessity for technical words of limitation was abrogated in the case of dispositions by will by s. 60 of The Succession Acts of 1867, and the requirement has never prevailed in the case of transfers of land under The Real Property Acts which simply require that the instrument of transfer contain "an accurate statement of the estate or interest intended to be transferred": s. 48. However, in Walters v. Eldridge (1891) 4 Q.L.J. 118, it was held that a nomination of trustees under s. 77 of the Acts was not an instrument within the meaning of the Acts, and the same presumably applies to a vesting order. Consequently, if in the nomination vesting in trustees land under the Acts technical words appropriate to the creation of a life estate were used, only a life estate resulted irrespective of the evident intention of the grantor: see Re Bennett [1951] St. R. Qd. 202; Re Austin's Settlement [1960] V.R. 532.

In England s. 60 of the Law of Property Act and in Victoria s. 60 of the Property Law Act 1958 (cf. Conveyancing Act (N. S. W.), s. 47) substituted a presumption that a conveyance or disposition of freehold land should pass the fee simple interest unless a different intention appeared. In Queensland, as a consequence of the decision in Re Bennett (*supra*), a somewhat extended form of s. 60 of the English Act was adopted in what became s. 15A of The Real Property Acts inserted in 1952. Paragraph (a) of s. 15A(a) applies to conveyances of unregistered land, whilst the succeeding paragraphs of the subsection are directed to declarations of trust or dispositions of equitable estates in land, whether registered or unregistered. The inclusion of unregistered land made The Real Property Acts a somewhat

inappropriate place in which to include the provision, and we propose that it be repealed and transferred to the Act here under consideration. So far as form is concerned, s. 15A compares unfavourably in point of simplicity with similar provisions in the other jurisdictions mentioned above. The draftsman of the Queensland provision seems to have felt it necessary to make express provision for the case of declarations of trust and also for dispositions of equitable estates or interests as distinct from the provision with respect to dispositions of the legal title to land not under the provisions of The Real Property Acts. The true position is, however, that equity follows the law: consequently, if the rule regulating the disposition of legal estates is altered, it follows automatically that the equitable rule is altered accordingly. This is the principle on which the provision in s. 60 of the Law of Property Act and other similar legislation proceeds (see Megarry & Wade (op. cit.) at p. 136), and for this reason it is unnecessary to make express or separate provision for declarations of trust and dispositions of other equitable interests.

Accordingly, we propose the adoption of the terms of s. 60 of the Victorian Property Law Act 1958 in place of the existing s. 15A of The Real Property Acts. This section uses the word "disposition", which is defined in the definition clause (cl. 4) of this Bill expressly to include a transfer, vesting instrument, declaration of trust, nomination of trustees, and every other assurance of property by instrument. By sub-cl. (3) the proposed section will apply to dispositions of registered land, but, because of cl. 5(1)(a), will be subject to the provisions of The Real Property Acts, so that the particular terms of s. 48 will not be affected by the section which, in respect of dispositions effected after its commencement, will replace s. 15A of the Acts.

PART IV - FUTURE INTERESTS

30. Creation of future interests in land. Future interests are divided into those which are vested and those which are not. The former include reversions, which from their nature are always vested, as well as vested remainders, i. e., a remainder which from its commencement is always ready to take effect in possession forthwith upon the determination of the preceding estate. The latter include contingent remainders, which are remainders which do not vest (if at all) unless and until a particular event happens. The validity of contingent remainders was finally established in 1453 (Megarry & Wade, p. 189) but they were and are subject to a series of "contingent remainder rules", of some complexity, which regulate their validity, and they are liable to be prematurely determined by a number of devices developed for their artificial destruction. A future interest falling outside the contingent remainder rules was originally capable of subsisting only in equity as a use or trust, but one of the effects of the Statute of Uses, 1535, which "executed" all uses, was to permit the creation of legal interests corresponding with the "shifting" and "springing" uses formerly recognised in equity. Future interests created in this way and taking effect in law are known as legal executory interests.

As a result, however, of the decision in Purefoy v. Rogers (1671) 2 Wms. Saund. 380, the rule was established that a legal executory interest capable of subsisting as a contingent remainder must be given effect as such. As such, legal executory interests which satisfied this description became subject to the contingent remainder rules, and so were susceptible to all the disabilities of contingent remainders.

In England, by s. 8 of the Real Property Act, 1845, and again by the Contingent Remainders Act of 1877, a not altogether successful attempt was made to rid contingent remainders of their vices. These provisions have been adopted in Victoria by what are now ss. 191 and 192 of the Property Act 1958, and in New South Wales in somewhat modified form by s. 16 of the Conveyancing Act. In England the effect of the reforms introduced by the Law of Property Act 1925 and in particular s. 4(1) thereof is that after 1925

both contingent remainders and legal executory interests are no longer capable of being created or of subsisting in law but take effect as equitable interests. As such they are not subject to the rule in Purefoy v. Rogers (see Berry v. Berry (1878) 7 C. P. D. 657), nor to any of the rules or other disabilities of contingent remainders or legal executory interests.

In Queensland none of the above remedial legislation has been adopted. Legal executory interests may at present still be created under the Statute of Uses (the repeal of which is however proposed elsewhere in this Report) and are still subject to the rule in Purefoy v. Rogers, whilst contingent remainders remain subject to all the common law contingent remainder rules. Interests of the latter sort are capable of existing in land brought under The Real Property Acts, s. 36 of which expressly provides for their entry in the register and endorsement on the certificate of title. Unlike s. 99 of the Real Property Act (N. S. W.), the Queensland Acts do not, however, contain any express provision which recognises the power of a registered proprietor to create a legal executory interest, and it is rather doubtful whether such an interest can be brought into existence in respect of registered land in this State except perhaps by executory devise in a will. In any event, legal contingent remainders in registered land in Queensland are extremely rare and the Registrar is currently aware of the existence of only one in the Titles Office at Brisbane. It may thus fairly be assumed that instances of legal executory interests are at least as rare in Queensland and that they are as uncommon as they are said to be in New South Wales: see Helmore: The Law of Real Property (2nd ed.), p. 241.

In these circumstances we can see no merit in preserving in this State the power to create at law contingent remainders and legal executory interests. To do so would involve the adoption and improvement of a number of statutory provisions of not inconsiderable complexity in order to maintain a legal institution which is no longer of any real social utility and which has ceased to be employed in practice. Hence, whilst preserving the validity of any existing legal contingent remainders or executory interests already created in this State: see sub-cl. (3), we recommend the adoption of the substance of s. 4(1) of the English Act of 1925, so that any such interest created in the future will take effect in equity only. This will accord with existing conveyancing practice prevailing in Queensland by which such interests are now created as trusts, and will also dispose of the difficulties and disabilities associated with legal contingent remainders, which, as we have said, have no application to such interests if created by trust.

This will involve an amendment to s. 36 of The Real Property Acts (which is proposed in sub-cl. (2) of the clause) so as to prevent in future the registration of contingent remainders, and whilst we are conscious that this will place a future (and therefore necessarily equitable) contingent remainder at some risk of being overreached, the disadvantage is no greater than that which exists in the case of other equitable interests in registered land, which are of course capable of being protected by caveat. We may add that the efficacy of the proposed provision will be increased if the recommendations in the Commission's Report on the Law of Trusts is adopted, since, under cl. 6 and 7 of the Trusts Bill, the person beneficially entitled to possession of the land in which the future interest subsists will have all of the powers and be subject to all of the duties and liabilities of a trustee.

31. Power to dispose of all rights and interests in land. Future interests, including contingent remainders and possibilities of reverter, were not at common law alienable inter vivos, and the same applied to a right of entry for condition broken. In England the common law was altered by s. 6 of the Real Property Act, 1845, which was incorporated as s. 4(2) of the Law of Property Act, 1925. The latter provision has been adopted in South Australia (Law of Property Act 1936-1969, s. 10) and Victoria (Property Law Act, s. 19), and a section with similar effect appears as s. 50(1) of the

Conveyancing Act of New South Wales. Section 4(3) of the English Act now makes the right exercisable by any person so that it may be given to some person, other than the grantor, at the moment of its creation.

As regards land under The Real Property Acts, recognition of legal contingent remainders appears from ss. 36 to 39, which make provision for their registration in certain cases. The precise status under the Acts of some other interests recognised at common law (such as legal executory interests and rights of entry for breach of condition) is, as has been mentioned, more doubtful. The proposed clause will render transferable such of these interests as continue to be capable of creation although subject to the provisions of the Acts, including s. 44 which makes the estate of the registered proprietor paramount over unregistered interests.

One of the reasons for the inability at common law to transfer future interests and possibilities was the mediaeval fear of maintenance, champerty and embracery which were particularly prevalent in the latter part of this period: see Holdsworth: A History of English Law (vol. 7), at p. 50. As part of an attempt to suppress these evils the statute 32 Hen. VIII, c. 9 (variously known as the Pretences Titles Act, the Bill of Bracery and Buying of Titles, and the Maintenance and Bracery Act) was passed in 1540. Sections 2 and 4 of this statute penalised the buying and selling of any pretended titles to lands, tenements or hereditaments, unless the vendor had been seised or possessed of an estate in possession in the land, or of an estate in reversion or remainder, or had taken the rents and profits, for a year before the sale. In New South Wales these sections were repealed by s. 50(3) of the Conveyancing Act but their substance was re-enacted in s. 50(2) of that Act with effects which have been far from happy, particularly as the provision in question appears to apply to land under the Real Property Act in that State: see 43 A. L. J. 400. Section 50(2) has been the subject of a considerable body of judicial authority, of which the most recent is the decision in Wogama Pty. Ltd. v. Harris (1968) 89 W. N. (Pt. 2) (N. S. W.) 62, as well as a good deal of adverse comment: see 31 A. L. J. 450.

The original English statute has been held to be in force in New South Wales (Nichols v. Anglo-Australian Investment Finance & Land Co. (1890) 11 L. R. (N. S. W.) 354), and in Victoria (a'Beckett v. Matthewson (1861) 1 W. & W. (L) 29) and it may therefore be presumed to be applicable in Queensland. The repeal of the operative provisions in ss. 2 and 4 is plainly desirable and necessary. The remaining sections of the Act are obsolete (see Report of the Law Reform Commission of New South Wales: L. R. C. 1 at p. 86) and have been repealed both in that State and in England.

32. Restriction on executory limitations. Prior to the enactment of s. 61 of The Succession Acts, 1867 to 1968, a devise or bequest of realty "to A, but if he die without issue, to B" was construed as a gift to A unless his issue died, which might happen long after B was dead. Since the passing of The Succession Acts such a gift is construed as a gift to A, subject to an executory limitation in favour of B if at the death of A he has no issue living. "The inconvenience of this", as Megarry & Wade point out (*op. cit.*) at p. 512, "is that A could never know during his lifetime whether or not the gift over in favour of B would take effect. Even if A had many children and grandchildren alive, they might all perish in some calamity before his death and so leave him to 'die without issue'".

In England the rule was altered in the case of land by a provision, which in 1925 was extended to all property, according to which the gift over to B becomes void as soon as any issue of A attains the age of twenty-one years: Law of Property Act, 1925, s. 134. A similar provision has been adopted in New South Wales: Conveyancing Act, s. 29B, and in Victoria: Property Law Act, 1958, s. 132. With slight modification, which is necessitated by the proposal that legal executory interests created after the

enactment of the Bill shall take effect as equitable interests only (see cl. 30), the present clause follows the New South Wales form of provision. The effect will be that under a gift in the above form A's interest will become absolute either if any issue attains the age of twenty-one (even if none survives A) or if A dies leaving any issue (even if none attains the age of twenty-one).

PART V - CONCURRENT INTERESTS: CO-OWNERSHIP

Division 1 - General Rules

33. Forms of co-ownership. Four forms of co-ownership of property were recognised at common law: (1) joint tenancy; (2) tenancy at common; (3) tenancy by entireties; and (4) coparcenary. Of these, a tenancy by entireties was essentially a form of joint tenancy which existed only between husband and wife, its peculiarity being that it was indissoluble. The creation of joint tenancies of this kind ceased to be possible after the passing of The Married Women's Property Act in 1884.

Coparcenary is a form of tenancy in common, which has some of the incidents of a joint tenancy, but of which the distinguishing feature is the power of the co-owners to effect a partition. At common law coparcenary may subsist between joint heirs or joint tenants in fee tail: Helmors: The Law of Real Property, at p. 276, two factors being necessary for its creation, namely, descent of land upon intestacy to the heir, and the absence of a male heir, so that the heirs female take as coparceners: Mendes da Costa: Co-ownership under Victorian Land Law, 3 Melb. U.L.R. 137, 168. Descent to the heir on intestacy was abolished in Queensland by The Intestacy Act of 1877 but it is still theoretically possible for coparcenary to result from the death of a tenant in tail, without having barred the entail, leaving no male heir and more than one female descendant in the same degree: da Costa, loc. cit.; cf. also s. 92 of The Real Property Acts, which recognises the possibility of coparcenary in registered land. In view of the rarity of tenancies in tail in Queensland, this possibility is extremely remote.

Co-ownership in the form of a joint tenancy or tenancy in common, may exist in chattels and other personal property as in land: 29 Halsbury's Laws of England (3rd ed.) at p. 380, and, subject to any special provisions or prohibitions in that behalf, the various forms of co-ownership are capable of subsisting in any of the varieties of Crown leasehold possible under statutes such as the Land Act or The Miners Homestead Leases Acts: cf. Joyce v. Joyce [1963] Qd. R. 139.

In practice the only forms of co-ownership encountered in Queensland are joint tenancy and tenancy in common, which may exist either in law or in equity. In England the creation of a legal tenancy in common has ceased to be possible since 1925 (Law of Property Act, s. 34), and the rights of co-owners in England for the most part now take effect in equity, the legal owners holding as joint tenants in trust for sale. The object of this legislation is to simplify conveyancing by facilitating proof and transfer of title and so to assist and protect purchasers: see Megarry & Wade: The Law of Real Property (3rd ed.) at p. 419. The same need does not exist in Australia and particularly in Queensland where most conveyancing takes the form of registered transfers. For this reason we can see no local advantage in the English scheme of transforming the legal rights of co-owners into rights recognised and enforceable only in equity, and we do not recommend its adoption.

Instead, we propose a simple statement in the form of cl. (1) recognising the two principal forms of co-ownership commonly created in practice, followed by provisions which are intended to preclude the creation of coparcenary in the future. The extreme rarity of coparcenary does, we consider, justify its abolition as a measure of simplification of the law of real property, such coparcenary taking effect in the future as a tenancy in common.

34. Power for corporations to hold property as joint tenants. At common law a corporation is incapable of taking or holding as joint tenant, and this rule applies as well to personalty as to land: see Law Guaranty & Trust Society Ltd. v. Governor and Company of Bank of England (1890) 24 Q.B.D. 406, followed in Re Usines de Melle's Patent (1954) 91 C.L.R. 42, 47. Accordingly, at common law "a grant to two corporations or to a corporation and a natural person could create nothing but a tenancy in common": ibid.

The common law rule is a source of some inconvenience and was abrogated in England by the Bodies Corporate (Joint Tenancy) Act 1899; 62 & 63 Vict. s. 20, adopted in New South Wales by the Conveyancing Act, s. 20, and in Victoria by the Property Law Act, 1958, s. 28. In Queensland the common law rule continues to apply except to the extent that it has been altered in particular cases, e. g. in the case of a trustee company by s. 21(1) of the Trustee Companies Act 1968.

We recommend the adoption of the foregoing statutory provisions which apply to both real and personal property, and which are alike in New South Wales and Victoria, except that s. 28(3) of the Victorian Act expressly provides that the section applies to all cases of acquisition or holding of property on or after the date on which the original statutory provision was enacted in that State in 1902. This is probably implicit in the corresponding provision in New South Wales but we consider it preferable that the applicability of the provision be expressly stated as in sub-cl. (3).

35. Construction of dispositions of property to two or more persons. At law there is a presumptive rule of construction in favour of a joint tenancy unless words of severance are used to produce a tenancy in common. The reasons for this presumption are historical, for as Megarry & Wade point out (op. cit.) at p. 410, joint tenancy was in early times more attractive to feudal lords, and to conveyancers coping with the complexities of old system title; but the same rules apply to personalty: 29 Halsbury's Laws of England (3rd ed.) at p. 380. Because of the somewhat arbitrary and often unintended consequences of creating a joint tenancy, particularly the incident of survivorship, the courts, in construing dispositions to two or more persons, and particularly in the case of dispositions in wills, have tended to seize upon the slightest indication that a tenancy in common was intended. This has been productive of many fine and sometimes unreal distinctions, as can be seen, for example, by a comparison of the decisions in Re Rose [1962] Q.W.N. 4 and Re Barbour [1967] Qd.R. 10. Furthermore, equity, whilst following the law, leaned in favour of a tenancy in common, and would presume a tenancy in common of the beneficial interest in certain cases, such as a purchase paid for in unequal shares, advances of money on mortgage, and purchases for partnership purposes.

As long ago as 1861 it was suggested that legislation should be introduced to reverse the common law presumption by requiring the use of express words in order to create a joint tenancy: Williams v. Hensman (1861) 1 J. & H. 546, 557. This suggestion has been given legislative effect in s. 26 of the New South Wales Conveyancing Act, and there are similar provisions in the legislation of the Canadian provinces. We recommend the adoption of the New South Wales provision but with certain amendments as follows:-

- (1) The New South Wales provision in s. 26(1) applies to both real and personal property: Stuckey, op. cit., at p. 52. However, s. 26(1) uses the words "legal estate", which may not be appropriate to all forms of personalty, and we prefer the expression "legal interest".
- (2) The New South Wales provision is confined to "instruments". Since, however, the section applies to dispositions of personalty, and in such cases an instrument may not necessarily be used,

we consider that the section should apply to a "disposition" and not merely to an "instrument". This necessitates the substitution in the provision of the words "shall be construed" in place of "shall be deemed" and an extension of the meaning of the definition of "disposition" to include an oral disposition: see sub-cl. (4).

- (3) Section 26(2) of the New South Wales provision provides that the section shall not apply to persons who are by the terms of the instrument executors, trustees, or mortgagees, etc., these being cases where joint tenancy and survivorship is desirable. This exemption does not, however, apply to dispositions in favour of partners, who, in consequence, in New South Wales take both the legal and beneficial interest as tenants in common: see Stuckey, *op. cit.*, at p. 53, where it is pointed out that "a conveyance to partners of land for partnership purposes should be to them as joint tenants in trust for themselves as tenants in common as part of their partnership estate."

In the Report of the Commission on Trusts and Trustees (Q. L. R. C. 8), we adverted to the disadvantages which resulted upon the death of a member of a partnership holding land as tenants in common: in particular, it follows from the decision in Re Livanos [1955] St. R. Qd. 362, that the share of the deceased co-owner of the land vests in the Public Curator. We noted the Public Curator's suggestion that consideration be given to amending this rule, but pointed out that the difficulty was one which arose from defective conveyancing, i. e. in failing to vest the land in partners as joint tenants, and that a Trusts Act was an inappropriate place in which to effect any such amendment.

However, if a provision in the form of New South Wales s. 26 is adopted in Queensland, it will or may result in an extension of the cases to which the decision in Re Livanos applies. Accordingly, we recommend that the case of disposition for partnership purposes in favour of persons carrying on business in partnership should be expressly removed from the application of sub-cl. (2), and that a particular sub-cl. (3) be introduced to deal with such dispositions. Its effect will be that, unless a contrary intention appears, the legal interest will vest in the partners as joint tenants and the beneficial interest will vest in the partners as tenants in common. This will be subject to the provisions of The Partnership Acts, ss. 23, 24 and 25 of which contain express provisions as to the acquisition, holding, and conversion of partnership property.

The effect of sub-cl. (3) will be to limit, in some degree, the inconvenience resulting from a transfer to partners in the form used in Re Livanos and will produce the form of disposition recommended by Stuckey above in all cases except those in which "a contrary intention appears", i. e., where there is an express or implied disposition of the legal title in favour of partners as tenants in common.

- (4) New South Wales s. 26(2) also excepts from the presumption of a tenancy in common cases in which the instrument "expressly provides that persons are to take as joint tenants or tenants by entireties". The reference to tenants by entireties does not facilitate the creation of tenancies by entireties, which were abolished by The Married Women's Property Acts, but is simply an interpretation provision, i. e., an express limitation to persons as tenants by entireties will exclude the statutory presumption in favour of a tenancy in common and will result in a joint tenancy and not a tenancy by entireties: see Registrar-General (N. S. W.) v. Wood (1929) 39 C. L. R. 46.

The proposed provision will, of course, apply only to dispositions made after the commencement of the Act: sub-cl. (4).

36. Tenants in common of equitable estate acquiring the legal estate. When tenants in common in equity acquire in their own right a legal estate co-extensive with their equitable interest, the equitable interest merges in the legal estate and they become joint tenants both at law and in equity: see Selby v. Alston (1797) 3 Ves. 339; Re Selous [1901] 1 Ch. 921; Helmore: The Law of Real Property (2nd ed.) at p. 270.

As a corollary to the provisions of s. 26 of the New South Wales Conveyancing Act, s. 27 of that Act abrogates the rule in Selby v. Alston and provides that in the circumstances outlined above the persons acquiring the legal estate shall hold, both at law and in equity, as tenants in common unless they otherwise agree. The Bill proposes the adoption of this section in Queensland.

Division 2 - Statutory trusts, sale and division

37 - 40. Statutory trusts, sale and division. At common law the only means by which partition could be compelled was by writ of partition, which was originally available only to coparceners of freehold hereditaments, although later extended by the Statutes of Partition (31 Hen. 8, cap. 1 (1539) and 32 Hen. 8, cap. 32 (1540)) to joint tenants and tenants in common whether in fee, for life, or for years. Because of the cumbersome nature of the procedure by writ of partition equity assumed a jurisdiction to decree partition, and in 1833 the common law writ of partition was abolished by the Real Property Limitation Act (3 & 4 Will. 4, cap. 27, s. 6) adopted in New South Wales by the Act 3 Will. 4, No. 3. See 21 Halsbury's Laws of England (1st ed.) at p. 834, note (v); vol. 6 Queensland Statutes Reprint 1828-1936, at p. 837.

The great disadvantage of proceedings for partition whether at law or in equity was that the courts had no power to refuse partition, or to order sale in lieu thereof. To overcome the absurdities which often accompanied physical division, the Partition Acts, 1868 (31 & 32 Vict. c. 40) and 1876 (39 & 40 Vict. c. 40) were passed in England, and the provisions of these statutes were adopted in Queensland by The Partition Act of 1911 (2 Geo. 5, no. 18), as amended by The Partition Act Amendment Act of 1913 (4 Geo. 5, no. 5).

The effect of the Act of 1911 is to enable the court to decree sale in lieu of partition at the suit of any person who prior to the Act might have maintained an action of partition. An order for sale of the property is generally mandatory unless some good reason is established for ordering partition in the physical sense. Other sections of the Act provide for consequential vesting orders and regulate the application of the proceeds of sale.

A procedure similar to that in Queensland is available in Victoria under the Property Law Act 1958, ss. 221 to 234 of which are evidently derived from the English legislation of 1868 and 1876. The South Australian legislation is similar in form to that of Victoria and Queensland but appears to permit of proceedings for partition by way of application rather than by action: Law of Property Act, 1936-1969, ss. 69-85. In England the transformation of the legal rights of co-owners into equitable interests has rendered partition proceedings unnecessary, the legal title being held on trust for sale for the co-owners.

For reasons which we have mentioned we do not recommend the adoption in Queensland of the modern English legislative scheme of co-ownership. On the other hand, there is no doubt that the present procedure for partition under the Act of 1911 is unnecessarily cumbersome, and there

can be no rational justification for continuing to require a co-owner to incur the expense and formality of a Supreme Court action (to which there is seldom, if ever, any defence) in order to obtain sale of the common property. Instead, we prefer the procedure which prevails in New South Wales and which was introduced in 1930 into the Conveyancing Act of that State by what are now ss. 66F-66I of the Act. Their effect is to preserve recognition of the distinction between joint tenancies and tenancies in common both at law and in equity: s. 66F(1), but to enable a co-owner in possession to apply to court for an order appointing trustees of the property and to vest the same in such trustees on statutory trust for sale or statutory trust for partition: s. 66G(1). Property held on statutory trust for sale is defined in s. 66F(2) as being held on trust to sell the same and to stand possessed of the net proceeds of sale (after discharging costs, expenses, etc.) and subject to such powers and provisions as may be requisite for giving effect to the rights of co-owners. Alternatively, where the court can be persuaded that a physical partition would be more beneficial, it may, with the consent of the incumbrancees (if any) of the entirety, appoint trustees of the whole or part of the property on statutory trust for partition. Hence, in New South Wales, unlike Queensland, the right to sale is a true alternative to an order for partition upon proof of co-ownership without reference to the question whether he might otherwise have been entitled to partition: Re McNamara (1961) 78 W. N. (N. S. W.) 1068.

In his commentary on the Conveyancing Act, Mr. G. P. Stuckey Q.C. says of the foregoing provisions that "the local enactments, while extending the benefit of its provisions to all property other than chattels, has..... avoided alterations in the nature of such interests [scil., undivided shares in land] but has liberalised and cheapened the procedure available for owners of property of this nature for obtaining orders for sale or partition". We respectfully agree with this comment, and recommend the adoption of the New South Wales provisions subject to the following variations:-

- (1) Amendment to New South Wales s. 66G(3)(b) and s. 66G(5)(b) to substitute reference to appropriate local enactments.
- (2) Substitution in ss. 66F(1), 66F(3)(a) and 66F(4) of the word "incumbrancee" in place of "incumbrancer". The expressions "incumbrance" and "incumbrancee" are defined in the interpretation section of the Act, and are referable to persons such as mortgagees, etc., who enjoy the benefit of an incumbrance over the subject property. The evident purpose of s. 66F(1) is to enable a mortgagee of the interest of a co-owner to apply for an order which will result in sale of the property and the realisation of his security, and, for this reason, the consent of the incumbrancee is requisite if the order sought will result in partition rather than sale: s. 66F(4). It seems plain that the reference in these provisions to an "incumbrancer" is erroneous, since, in view of the definition, the incumbrancer is the person who creates the incumbrance, i.e., the co-owner himself, and is not the person who is entitled to the benefit of the incumbrance within the meaning of the definition: cf. also the definition of "encumbrancee" in s. 3 of The Real Property Acts, 1861 to 1963.

It will be noticed that the provisions apply to property of all kinds, whether real or personal other than chattels which are the subject of a particular provision discussed below.

41. Sale or division of chattels. At common law there was no power to order sale or division of a chattel or chattels jointly owned: see Ryan v. King [1932] Q. W. N. 1 (which concerned a jointly owned thresher-reaping machine); MacDonald v. MacDonald [1948] Q. W. N. 47. In England the Law of Property Act 1925, s. 188, in New South Wales the Conveyancing Act, s. 36A, and in Victoria the Property Law Act, s. 187, contain a

common provision, which was adopted in Queensland by s. 13 of The Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952, and which provides for an application by a person "interested to the extent of a moiety or upwards" for an order for division of the chattels according to a valuation or otherwise.

In Re Catley [1955] St. R. Qd. 388, 389, the section was described, following the comment in Jenks' Civil Law, as "one of the least happy sections of the Act". As is there pointed out, the provision does not make clear whether the word "division" is used in the sense of distribution, whether the division is among the co-owners only, and whether the moiety is in values. Stuckey, op. cit. at p. 77, adds the suggestion that the power does not extend to the division of a single chattel; but see Tillack v. Tillack [1941] V. L. R. 151, where an order was made for sale and division of proceeds of a single chattel.

We recommend a new provision in the form of cl. 41, which is intended to ensure that the court may direct sale, and distribution of the proceeds of sale, of one or more jointly owned chattels, or may order division of a number of chattels, or a combination of both of these. There seems to be no good reason for confining the right to apply for such an order to a person owning a moiety of the chattel, and we propose that a co-owner, irrespective of the quantum of his share, should be competent to apply. Since a chattel or chattels in respect of which an order may be required may not necessarily be of great value, we consider that the District Court should be given jurisdiction to entertain applications under the section in the case of chattels of which the value does not exceed \$6,000.

Adoption of the above provision will entail the repeal of Part IV, embodying s. 13, of The Law Reform, etc., Act of 1952, and we also recommend that, by a separate amending statute, the unnecessarily lengthy and cumbersome title of that Act be reduced to the Joint Torts and Contributory Negligence Act.

42. Powers of the Court. In In re Bludhorn (1948) 65 W. N. (N. S. W.) 258 it was held that the Supreme Court in Equity would not, on a summons for appointment of trustees under s. 66G of the Conveyancing Act, determine a question of title of a person claiming to be a co-owner where a substantial dispute exists as to the facts on which such title is based. The principle of this decision was applied in Re Catley [1955] St. R. Qd. 388 to an application for division of chattels under The Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952.

Sub-clause (a) is intended to preserve the above principle whilst enabling the court in appropriate cases itself to determine a question of fact or alternatively to give directions as to how such question is to be determined, e. g. by bringing an independent action.

Sub-clause (b) is intended to ensure that, in cases in which the need arises, the court can direct accounts and inquiries between co-owners so that effect can be given by the trustees to the respective rights of the parties. A jurisdiction to direct such accounts and inquiries at any stage of proceedings in a cause or matter is conferred on the Supreme Court by R. S. C. O. 68, r. 5, but in the District Court no facilities exist for the taking of accounts, and accordingly sub-clause (b) is confined to proceedings in the Supreme Court.

43. Liability of co-owner to account. Accounts between co-owners become necessary where the parties do not stand on an equal footing with regard to the receipt of the rents or profits from the property, or their expenditure upon it: Halsbury, supra, at p. 851. At common law the action of account was not available between co-owners, but by the Administration of Justice

Act; 4 & 5 Anne, c. 3, s. 27 (1705), an action of account was given against a joint tenant or tenant in common who received "more than his just share or proportion" according to his interest in the property: see Henderson v. Eason (1851) 17 Q.B. 701. Apart from this, the Court of Chancery assumed jurisdiction to direct accounts to be taken and inquiries made in proceedings for partition and similar proceedings: see D. Mendes da Costa, op. cit. at pp. 144-145. It seems that it is only in such proceedings that accounts may be taken of expenditure by one co-owner on the common property: see Leigh v. Dickeson (1880) 15 Q.B.D. 60, 67.

It is questionable how far the present-day equitable jurisdiction in such cases depends upon the analogy of the statute of 1705. The New South Wales Law Reform Commission in its Report on the Application of Imperial Acts (L.R.C. 1, at p. 103) concluded that s. 27 of that Act was an unnecessary provision. This is undoubtedly true of the common law action of account but in Re Tolman's Estate (1928) 23 Tas. L.R. 29, where the statute of Anne was treated as applicable in Australia, s. 27 was regarded as affording some justification by analogy for ordering accounts in circumstances in which the applicants were ignorant of the state of accounts and were unable to say whether or not the defendant had received more than his just share; see also Scapinello v. Scapinello [1968] S.A.S.R. 316, 318.

Whilst, therefore, recommending the repeal of s. 27 of the Act of 1705, we think it desirable to replace it with an express provision in form of cl. 43(1). It is not clear whether s. 27 applies to property other than land, but there is no reason why it should not so apply, and sub-cl. (2) will make this clear.

It remains to say something of liability for waste. The Statute of Westminster II; 13 Edw. I, st. 1, c. 22 (1285) conferred on tenants in common an action of waste against one another, and this was later extended to joint tenants: Co. Litt. 200. Occasions for the application of the law of waste to co-owners have not been common, partly because, as da Costa points out (loc. cit. at p. 141), a co-owner who complains of such conduct can seek accounts and the offending co-owner is liable for receipts in excess of his just share. Furthermore, equity appears to exercise a jurisdiction, which is independent of the statute of 1285, to restrain acts of wanton destruction: cf. Job v. Potton (1875) L.R. 20 Eq. 84; Foster: Joint Ownership and Partition (1878) at p. 18.

The New South Wales Law Reform Commission (L.R.C. 1, at p. 73) has taken the view that c. 23 of the Statute of Westminster II is obsolete, and it has been repealed in that State by the Imperial Acts Application Act, 1969. We consider that this step can safely be taken in Queensland.

PART VI - DEEDS, COVENANTS, INSTRUMENTS AND CONTRACTS

Division 1 - Deeds and covenants

44. Description and form of deeds. Deeds are of two kinds, deeds poll and indentures. The former are essentially declarations rather than contracts or covenants and for this reason are almost invariably but not necessarily executed by one party only. Deeds poll are so called because the edge of the document is polled or shaved, as compared with an indenture to which two or more persons are parties and which is written on paper or parchment which is cut with a waving or indented line at the top: see 10 Halsbury's Laws of England (1st ed.) at p. 379.

The requirement that a deed should be physically indented was dispensed with in England by the Real Property Act, 1845 (now s. 56(2) of the Law of Property Act, 1925), in Victoria by what is now s. 56(2) of the Property Law Act 1958, and in New South Wales by s. 38(2) of the

Conveyancing Act. Indenting still appears to be technically necessary in Queensland but in practice is seldom performed. Its original function was to safeguard against forgery by facilitating comparison of the indented edges of the duplicates of the deed (which was originally executed in as many copies as there were parties to the indenture), and the requirement is now quite archaic. Sub-cl. (1) therefore adopts the provisions of the English and Victorian legislation referred to above.

After the Real Property Act of 1845 it seems to have become the practice in England to continue describing a deed as either a deed poll or an indenture: see Halsbury, op. cit., at p. 381. Whether or not this was strictly necessary s. 57 of both the English Act of 1925 and the Victorian Act of 1958 now provide that it shall be sufficiently described either simply as a deed or according to the nature of the transaction thereby intended to be effected. It is convenient that this legislative provision should be adopted in Queensland, for, even though perhaps not strictly necessary, it is desirable that a deed should be recognised rather for what it purports to achieve than by its physical form or technical description.

45. Formalities of deeds executed by individuals. For the efficacy of a deed at common law it is widely believed that it should be signed, sealed and delivered, and in practice these formalities are usually adhered to. The requirement that a deed should be signed has, however, never been clearly established, and the formality of sealing has in practice sunk to a level at which any indication of a seal on a document signed with the intention of executing it as a deed is sufficient: Stromdale & Ball Ltd. v. Burden [1952] Ch. 223. "Delivery" in this context means not physical delivery but an act done by the executing party manifesting an intention to be bound by the deed: Vincent v. Premo Enterprises (Voucher Sales) Ltd. [1969] 2 Q.B. 609.

The passage of time has thus produced the rather anomalous state of affairs in which a deed is distinguished not by any requirement of physical delivery or physical sealing, but rather by the fact that it is signed (which it probably need not be) and declared to be so signed, sealed and delivered. It is also common practice, although not at common law legally necessary, for a deed to be attested by one or more witnesses. In New South Wales attestation has now been made obligatory by s. 38(1) of the Conveyancing Act, and a deed, which is signed and attested in accordance with the statute, is now deemed to be sealed if expressed so to be or if expressed to be an indenture or deed: s. 38(3).

In the latter State, as well as in England and Victoria, signature has been made a statutory requisite to the validity of a deed, although the legislation in the latter two jurisdictions permits an individual the alternative of making his mark, which is appropriate where he is unable to sign his name.

Plainly the requirement of signature (or making of a mark) should now be clearly stated to be necessary for the validity of a deed. Furthermore, the act of physical sealing, having become a bare formality which has completely lost its significance and which is not infrequently overlooked, should also be dispensed with in favour of a simple declaration that the document has been signed and sealed or is expressed to be a deed or indenture, as in New South Wales. On the other hand, we prefer not to adopt the New South Wales expedient of making attestation essential to the validity of any and all deeds as such, but consider that the requirement of attestation, if fulfilled, should, in conjunction with the declaration or expression referred to above, be sufficient due execution of the deed without the necessity for sealing in fact.

Hence, the effect of what we propose may be summarised as follows:-

- (1) Signing will be requisite to the validity of all deeds.

- (2) Sealing and delivery will remain necessary unless the deed is declared to be a deed or indenture or to be sealed (even if no indication of a seal appear) and is attested in the appropriate form. (By virtue of s. 26A of The Evidence and Discovery Acts, proof of attestation may now be accomplished without the necessity for calling an attesting witness).

None of the above will affect the power of an individual to deliver the deed conditionally, i. e., as an escrow, in which case it will be binding and effective only if and when the condition is fulfilled: see Vincent v. Premo Enterprises (Voucher Sales) Ltd., *supra*. In addition, we think it necessary to retain the somewhat more formal attestation requirements of s. 115 of The Real Property Acts, 1861 to 1963, in respect of instruments executed pursuant to the provisions of those Acts, which we believe exist for the purpose of reducing so far as possible opportunities for forgeries and frauds in relation to the register of titles. The special provisions of s. 20 of the Bills of Sale and Other Instruments Act 1955-1971 will also be expressly preserved.

46. Execution of instruments by or on behalf of a corporation. At common law a deed can be validly executed by a corporation aggregate only by affixing the seal thereto at a duly convened meeting of the corporation. In practice, this highly inconvenient requirement is almost invariably displaced by express provisions in the constitution of the corporation which delegate authority to affix the corporate seal to specified officers of the corporation. In the case of companies registered under The Companies Acts, cl. 96 of the articles of association in Table A provides for affixation of the seal to be authenticated by the signature of a director and of the secretary or of a second director or some other person appointed by the directors for that purpose. Unfortunately the requirements imposed in this regard by company articles may, and sometimes do, depart from the standard form, with consequential invalidity for the transaction if the required formalities have not been complied with. Thus, in Equity Nominees Ltd. v. Tucker (1967) 41 A. L. J. R. 80 a guarantee under the seal of a company was held void because the seal had been affixed and attested by one director and the company secretary instead of by two directors and the secretary as required by the articles.

One of the principal objects of the clause here proposed is to prescribe uniform procedure which, if complied with, will operate to protect a purchaser from the corporation irrespective of the particular provisions of its constitution. It is not intended to provide, and does not provide, a substitute for the mode of affixing the seal which is prescribed in the constitution or articles and which *prima facie* remains the only valid mode of affixing the seal. Its effect is simply to relieve a purchaser of the need to scrutinise the provisions of the articles for unorthodox requirements as to sealing, and to enable him to rely as against the corporation on an instrument which has been duly sealed in accordance with the statutory provisions.

The subject clause is common to the property legislation of England, Victoria and New South Wales, where it has given rise to no difficulties in practice, and it is desirable that it should be adopted in Queensland. One of its additional effects is that an instrument sealed in accordance with its provisions is deemed to have been duly executed, and therefore "delivered", by the corporation: see Beesly v. Hallwood Estates Ltd. [1961] Ch. 105; D'Silva v. Lister House Development Ltd. [1970] 2 W. L. R. 563, 571.

47. Delivery of deeds. As previously mentioned, the expression "delivery" in the context of the law of deeds means, not physical delivery, but conduct of the maker of the deed manifesting an intention to be bound by the deed: Vincent v. Enterprises (Voucher Sales) Ltd. [1969] 2 Q. B. 609. It is probably fair to say that this peculiarity of a deed is not known to many

practitioners, but, as was said by Lord Denning M. R. in the Vincent case -

"A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, sealed and delivered.

'Delivery' in this context connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or his solicitor, he is bound by it if he has done some act evincing an intention to be bound.... He may, however, make 'delivery' conditional: in which case the deed is called an 'escrow' which becomes binding when the condition is fulfilled."

The problem is compounded by the fact that in the case both of deeds executed by individuals and of deeds executed by corporations, delivery of a deed will be inferred or presumed from the fact that the deed is duly sealed: see Halsbury's Laws of England (1st ed.) at pp. 386, 392. Hence, it is one of the consequences of the provision in s. 74 of the Law of Property Act (namely, that a document in the form prescribed by that section is deemed to be "duly executed" by a corporation) that delivery is presumed from the fact of execution in that form: see Beesly v. Hallwood Estates Ltd. [1960] 1 W. L. R. 549; affd. [1961] Ch. 105; D'Silva v. Lister House Development Ltd. [1970] 2 W. L. R. 563, 571. Because the expression "duly executed" is also used in cl. 45, a similar result will follow in the case of a document executed by an individual in the form of a deed in accordance with the provisions of that clause.

Thus, in either case, whether the question is regulated by the common law presumption founded upon due sealing of the document or by the proposed statutory provision as to due execution, an inference of delivery arises from the mere fact that the document is in the form of a deed. Although it is possible to rebut this inference by proof that the maker of the deed did not intend to "deliver" it (in the sense of making it immediately binding on himself), it is often extremely difficult to establish that such negative intention exists, as is demonstrated by the facts of the three decisions referred to above. This leads to an almost intractable practical difficulty, which is well expressed by a writer in 43 A. L. J. at pp. 398-399 -

"solicitors and their clients.... are forced to refrain from having documents executed until the last moment or to impose satisfactory and clearly evidenced escrow conditions to ensure that they are not bound before they want to be. They must in addition remember that it is not possible to make the escrow condition the will of the party creating the escrow. The closest that might be approached to retaining the power to revoke would seem to be for the executing party not to deliver the deed at all himself but to give that power, by deed or power of attorney, to his solicitor or to some person on his behalf."

It is apparent that for the law to require such a procedure in order to prevent the deed from binding the maker is, as another writer has expressed it (44 A. L. J. at p. 291), to allow "the law relating to the binding and effective nature of deeds [to assert] itself as the master instead of the servant."

Plainly, the law as to delivery of deeds is in need of reform. The question is the form which this should take. In Vincent v. Premo Enterprises (Voucher Sales) Ltd. (supra) [1969] 2 W. L. R. at p. 1267, Winn L. J. said:-

"it might be very helpful in modern life if there were some modification of the law, departing somewhat from the strictness of the old rule the effect of which my Lord has indicated, viz., that a man becomes bound when he executes a deed in the form usually adopted; there are evidentiary difficulties which from time to time must be met in establishing whether or not a man did speak or use some words or do some act sufficient to negative the prima facie presumed intention that by executing a document under seal and declaring that it is 'delivered' he has adopted it as immediately binding upon him. I think it might be more realistic to depend upon physical movement or legal control of the document after the time when it is sealed, so that it would become the law that some adoptive demonstration is required additionally to the mere affixing of the seal. Concentration upon the movement of the deed thereafter would make it easier to solve the question, has the maker by parting with it to such extent and in such manner as may be proved expressed an intention - indicated, demonstrated an intention - for it to be immediately binding, or demonstrated a suspensive intention that it shall not be immediately binding upon him but only if some particular event does occur?"

In our view the desired result may be achieved by displacing the presumption of delivery which at present arises from sealing or due execution of a document. The question whether a deed had been delivered, i.e., was intended to be legally binding, would and should then be allowed to depend upon whether there were words or conduct demonstrating the presence of an intention to be bound instead of depending as it does now upon proof of words or conduct which show an intention not to be bound.

The proposed clause is therefore designed to remove the common law presumption of delivery which arises from mere sealing or execution of a document as a deed and to permit the matter to be determined according to whether there is evidence indicative of delivery, "delivery" here bearing its common law meaning of intention to be legally bound. In this connexion it must, however, be pointed out that the use of the common formula "signed sealed and delivered" in a deed executed by an individual will continue to produce a presumption of delivery, since the presence of the words "and delivered" will itself be an indication of delivery and therefore of intention to be bound. However, there is, we think, no legislative solution to this difficulty. It must remain open to an individual to make his deed binding upon execution if he so wishes, and it would be quite wrong by legislation to declare that a deed, which on its face is expressed to have been delivered, is not delivered. This result will, however, be capable of being avoided, for example, by the simple expedient of declaring in the attestation clause that the document is merely "signed and sealed" and not "signed sealed and delivered". Thus, the question whether a deed or document in the form of a deed is or is not intended to be binding upon execution will depend upon the inclusion or omission of a reference to the deed having been delivered, a result which will accord with the natural purport of the deed itself.

48. Construction of expressions used in deeds and other instruments. Sub-cl. (1) of this clause is taken from s. 61 of the English Law of Property Act and has its analogue in the similar provisions of The Acts Interpretation Acts, 1954 to 1962, which, of course, apply only to statutes. It expresses what may seem obvious but is sometimes overlooked; thus, for example, at common law "month", unless otherwise specified in the instrument, means lunar and not calendar month. In Kodak (Australasia) Pty. Ltd. v. Hally [1960] Qd. R. 452 this inconvenient and unexpected rule was applied by the Full Court to invalidate a notice to quit which had erroneously been based upon measurement in calendar rather than lunar months. See also Development Underwriting (Queensland) Pty. Ltd. v. Weaver [1971] Qd. R. 182 (use of "month" in contract for the sale of land).

Sub-cl. (2) is based on similar provisions in the English and other property legislation, and is designed to apply the above rules of construction to covenants implied by statute.

49. Implied covenants may be negated. This clause, which is adopted from s. 74 of the N.S.W. Conveyancing Act, simply makes provision as to the effect of implied covenants and provisions, and empowers them to be varied or excluded by the parties.

50. Covenants and agreements entered into by a person with himself and another or others. At common law a person cannot effectively contract with himself, and the same is true even if the agreement is entered into with himself and another or others: Halsbury's Laws of England (3rd ed.), vol. 8, p. 59. This is an inconvenient rule: it prevents for example an effective contract from being made between two partnerships having a member common to both: cf. Stewart v. Hawkins [1960] S.R. (N.S.W.) 104; or by one member of an incorporated club with the other members: Middlemiss v. Broderick [1964] A.R. (N.S.W.) 327, 335. The rule has, so far as concerns a contract made by a person with himself and another or others, been abrogated in England, New South Wales and Victoria, and this step seems to be a necessary corollary of permitting a person to convey or lease to himself and another or others, which is proposed by cl. 14. A consequence of the introduction of this provision is, as the abovementioned cases show, to render possible contracts of the foregoing kind.

51. Receipt in instrument sufficient. Stuckey (op. cit. at p. 91) remarks that, prior to the enactment of the corresponding New South Wales provision, "it was the practice to indorse a receipt for purchase money as well as to acknowledge its payment in the conveyance itself". The proposed clause, following the English, Victorian, New South Wales and Western Australian precedents, is, like the next succeeding provision, intended to obviate the necessity for making inquiries as to payment of the consideration money; but a receipt in any form is sufficient only when payment or delivery is in fact made and it remains open to the vendor, mortgagor, etc. to show that no such payment was received: see Stuckey, op. cit., at p. 91, citing Capell v. Winter [1907] 2 Ch. 376.

52. Receipt in instrument or indorsed evidence. Apart from this clause, which follows legislation in England and elsewhere, a purchaser is put upon inquiry by the absence of an indorsed receipt upon a deed or by any unusual feature in the receipt, and so may have constructive notice of non-payment: see Stuckey, op. cit., at pp. 91-92. The function of this clause is to relieve a bona fide purchaser of constructive notice in cases falling within its scope: Helmore: Law of Real Property (2nd ed.) at pp. 310-311.

Both this and the preceding provision have been extended to include instruments as well as deeds.

53. Benefit and burden of covenants relating to land. This clause is concerned with the passing upon an assignment of an estate of the benefit and of the burden of covenants which "touch and concern the land". These provisions merely affirm the common law as stated in Spencer's Case (1583) 5 Co. Rep. 16a (see Helmore, op. cit., at p. 124), but dispense with the necessity for express reference in the instrument to the covenantor's successors in title. They are thus essentially "word-saving" provisions: see Megarry & Wade, op. cit., at pp. 727-728, although these clauses also nullify the common law rule that the assignee must have had the same estate as the covenantor: Megarry & Wade, loc. cit., citing Smith v. River Douglas Catchment Board [1949] 2 K.B. 500.

The clause is adopted from ss. 78 and 79 of the English Law of Property Act 1925 which appear as ss. 70 and 70A of the New South Wales Conveyancing Act. The latter are expressly applied to land under the Real

Property Act in that State; but in view of the desirability of maintaining the principle of indefeasibility of title of a registered proprietor against unregistered interests and equities, it seems necessary to provide expressly that this clause of the Bill should be subject to the provisions of The Real Property Acts, 1861 to 1963 (cf. Friedman v. Barrett [1962] Qd.R.498).

54. Effect of joint contracts and liabilities. At common law an obligation on the part of two or more persons may be joint or joint and several. If joint, it is regarded as a single promise giving rise to a single cause of action against the joint obligors. This has a number of inconvenient consequences, among which are that on the death of one joint obligor the obligation of the deceased is extinguished and the whole obligation is borne by the survivors; all joint obligors must be joined in an action to enforce the obligation, and a judgment against one only discharges the other or others: Kendall v. Hamilton (1879) 4 App.Cas.504. Indeed, the general principle is that any event which discharges one joint obligor discharges all, since there is in theory only one obligation: Re Hodgson, Beckett v. Ramsdale (1885) 31 Ch.D.177, 178; Glanville Williams: Joint Obligations at p. 92.

The result is a series of rules of incredible technicality and complexity of which the practical implications are serious enough; but matters are made worse by the rule that a promise made by two or more persons is presumed to be joint unless words are used indicating that each is to be bound individually, in which case liability is joint and several. The rule in equity is the same: Levy v. Sale (1877) 37 L.T.709. As Glanville Williams remarks (op. cit. at p. 35), "It is somewhat odd that, whereas any would-be creditor who is versed in the law would insist on the obligation being made joint and several rather than joint, the law makes it only joint unless special pains are taken to render it joint and several".

In England and Victoria (but not New South Wales) the common law presumption has been reversed in the case of contracts under seal, in relation to which the presumption now is that joint promises are, unless a contrary intention is expressed, to be construed as joint and several promises: see Law of Property Act 1925, s. 81; Halsbury's Laws of England (3rd ed.), vol. 8, at p. 61. In Queensland the rule of the common law retains its original force, although there have been minor statutory incursions into the principle that judgment against one joint promisor discharges the others, e.g., in the case of judgment by default: The Rules of the Supreme Court, O.15, r.14, and in the case of covenants implied under The Real Property Acts by s. 74 of those Acts.

Examples of joint contracts are those made by partners, members of an unincorporated association, the committee of an unincorporated club, and the joint makers of promissory notes, but, as Glanville Williams (op. cit. at p. 37) says, it is not possible to give an exhaustive list of joint contracts because all contracts made by two or more persons are joint unless worded to be joint and several. In the case of partnerships, the principle of joint liability is based on contract: see The Partnership Act of 1891, s. 12. Furthermore, there is a special practice, in the case of mortgages to secure loans by two or more persons, of inserting a joint account clause which enables the mortgagor to obtain a good discharge from a surviving mortgagee, and this has been given statutory effect in England: Megarry & Wade: The Law of Real Property (3rd ed.) at p. 947, and in respect of land under The Real Property Acts in Queensland by s. 21 of the Act of 1877.

We consider that the common law presumption in favour of joint rather than joint and several promises should be reversed by legislation but that this should not be limited, as in England and elsewhere, to contracts under seal. Sub-clause (1)(a) is designed to this end, but is expressed to be "subject to this or any other Act" in order to preserve the joint liability of

partners and the joint account provision in mortgages. (It may be doubted whether the continuation of joint liability for partnership contracts is desirable: see Glanville Williams at p. 36, n.1, but this is not the appropriate point at which to reform that rule).

In addition, sub-cl. (1)(b) will assimilate the incidents of joint liability with those of joint and several liability so far as discharge of the liability and extinction of the cause of action is concerned. It may be questioned whether, in view of the provisions of sub-cl. (1)(b), sub-cl. (1)(a) is really necessary; but it is desirable that the legislation should deal specifically and distinctly both with the presumption in favour of joint liability and with the incidents of that liability. In fact, the practical effect of sub-cl. (1)(b) will be to remove most of the distinctions between joint and joint and several liability other than in the excepted cases specifically mentioned.

55. Contracts for the benefit of third parties. It must now be taken as settled that the common law of England does not permit a person to enforce a benefit conferred or purporting to be conferred upon him by a contract to which he is not a party: see Dunlop v. Selfridge & Co. Ltd. [1915] A.C. 547; Scruttons Ltd. v. Midland Silicones Ltd. [1962] A.C. 446, and Beswick v. Beswick [1968] A.C. 58. This principle of English law, which has been adopted in Australia (Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd. (1956) 95 C.L.R. 43, and Coulls v. Bagot's Executor & Trustee Co. Ltd. (1967) 119 C.L.R. 460; 40 A.L.J.R. 471), is sometimes attributed to the fact that, in contracts of this kind, no valuable consideration is furnished by the third party to the promisor; but, although historically the requirement of consideration has played a part in the development of this branch of law, the rule which precludes a stranger to a contract from enforcing it for his benefit now has an independent existence.

In this respect the law of England and of the Australian States differs from that of almost all other legal systems in the world, e.g. that of France, see Ryan: An Introduction to the Civil Law, pp. 67-69; Germany, Ryan, op. cit., at pp. 69-71; and South Africa, Lee's Introduction to Roman-Dutch Law (5th ed.) pp. 437-440; and even the common law jurisdictions of the United States, whilst they have accepted English law, have nevertheless rejected the rule which prevents the enforcement of a contract by a third party for whom it was intended: see Restatement of the Law of Contracts, vol. 1, arts. 133-147. There was, indeed, a time when English law was different (see the authorities collected and discussed in the judgment of Windeyer J. in Coulls' case at pp. 497-499), but, by about the middle of the eighteenth century, the present rule came to be accepted and is now finally established despite the persistent efforts of certain judges to dislodge it.

Even in English law certain real or supposed exceptions to the rule exist. Prominent among these are covenants running with estates or interests in land, and restrictive covenants as to user of land, which are enforceable under the doctrine of Tulk v. Moxhay (1848) 2 Ph. 774; and by s. 5 of the Real Property Act, 1945 (now s. 56(1) of the Law of Property Act, 1925) a person not named as a party to a deed may nevertheless take the benefit of a covenant or agreement relating to land: see Beswick v. Beswick (supra) and the discussion of the foregoing provisions in the commentary on cl. 13 above.

These do, however, represent qualifications within a very limited and particular area and are probably attributable to the traditional tenderness of English law for the interests of property owners. Outside this narrow field the rule continues. It is otherwise if the person to whom the promise is made is constituted a trustee thereof for the third party for whom the benefit is intended; but an intention to create a trust will not be lightly inferred, and "an intention to provide benefits for someone else or to pay for them does not in itself give rise to a trusteeship": Green v. Russell

[1959] 2 Q.B.226, per Romer L.J. Likewise, although there are strong suggestions in two recent decisions that the promisee may be entitled as against the promisor to a decree of specific performance of a promise (and even of a promise to pay a sum of money) for the benefit of a third party (see Beswick v. Beswick and Coulls' case, *supra*), it is extremely doubtful whether, in the normal way, the promisee is able to recover any more than nominal damages for breach of such a promise.

There is little doubt that in general the rule is highly inconvenient and that it defeats the reasonable and justifiable expectations of the parties, enabling persons to escape from obligations which they have, often for value, deliberately undertaken. Admittedly, it is occasionally capable of producing what appears to be a beneficial or just result, inasmuch as one of its consequences is that an agreement which purports to confer on a third party an exemption from liability to, or a privilege from suit by, a person who is a party to that agreement is unenforceable by that third party. Hence the master of a ship is not entitled to rely upon a clause in a contract between the shipowner and a passenger which purports to relieve him of personal liability for acts of negligence on his part which result in injury to the passenger: Adler v. Dickson [1955] 1 Q.B.158; and a stevedoring company is not entitled to claim the benefit of an exemption clause appearing in a bill of lading effective between a shipowner and consignee: Scruttons Ltd. v. Midlands Silicones Ltd.; Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd., *supra*. Apart from this quite incidental windfall, however, the rule is invariably a source of serious injustice: hence, a promise given for consideration to discharge the debt of another is unenforceable by the latter: Crow v. Rogers (1724) 1 Stra.592; Olsson v. Dyson (1969) 43 A.L.J.R.77; as is a promise by a man to pay his future son-in-law a sum of money given in consideration of a like promise by another person: Tweddle v. Atkinson (1861) 1 E.&S.393; a promise to a husband to pay to his widow an annuity after his death: Beswick v. Beswick, *supra* (cf. also Coulls' case); or by a partner to pay an annuity to his partner's daughter: Re Miller's Agreement [1947] Ch.615; a promise by an insurer to pay policy moneys to a relative of the insured: Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q.B.147, 152; and a promise by a father to a mother to pay weekly maintenance to his epileptic son: Viles v. Viles [1939] S.A.S.R.164. In addition, the existence of the rule continues to cast a serious doubt upon the legal validity of a number of standard commercial institutions, such as commercial letters of credit.

In 1937 the Law Revision Committee under the chairmanship of Lord Wright recommended in its Sixth Interim Report that the law in England should be changed, and that:-

"where a contract by its express terms purports to confer a benefit directly on a third party, it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides, it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it either expressly or by conduct."

To the regret of legal commentators and others, this recommendation has never been adopted in England. It has recently been adopted in Western Australia by s.11(2) of the Property Law Act, 1969, and we believe that the time has now come when it should be given legislative form and effect in Queensland. In making this proposal we are persuaded that the rule which at present prevents a third party from himself enforcing a promise made for his benefit is a source of serious injustice in many cases and that it represents a real defect in the law, and we are influenced by the fact that the legal systems of the United States, Scotland and South Africa (all of which possess a conceptual framework similar in this context to our own) have proved quite capable of developing and coping with a principle such as

that recommended. It is true that one consequence of the proposed change may be that exemption clauses may become enforceable by persons who are not themselves parties to the contract which provides the exemption, but we believe that this consideration should not deter a reform which is necessary and will be beneficial in the broad context of the legal system: in particular, we are influenced by the fact that the subject of the scope and effect of exemption clauses is one which requires special and independent consideration in the context of the law of contract as a whole, and is not one which should fall to be dealt with according to the collateral and legally irrelevant question of whether the person seeking to rely upon the exemption or is not a party to the contract which creates the exemption; that from the social point of view there is much room for criticism of a rule which relieves an entrepreneur of liability but permits the same liability to be enforced against his employee; and that, in any event, it is already becoming a practice for contracting parties to circumvent the rule in Adler v. Dickson by expressly contracting as and constituting themselves trustees for their employees in respect of the benefit of the exemption clauses in the contract.

Our proposals are to be found in concrete form in the draft clause which accompanies this commentary. In essence we propose the adoption of the recommendation made by the English Law Revision Committee in 1937 that a contract conferring a benefit on a third person should be enforceable by him in his own name; but in formulating our draft we have also been influenced by the American Restatement on this subject and by the experience of the South African courts in dealing with the problem under the Roman-Dutch legal system. The following represent our detailed comments on the proposed clause and our reasons for casting it in this form:

- (1) In sub-cl. (1) we have used the expression "promise" rather than "contract", since in the overwhelming majority of cases a contract comprises a promise or series of promises made by one party in return for a promise or series of promises by the other party. It is, we think, more precise, and more consistent with legal theory, to speak of a promise for the benefit of a third person (or "beneficiary") rather than a contract for such benefit, since a benefit may be promised by one or even by each of the original parties. In this respect the language of sub-cl. (1) is consistent with that of the Restatement; cf. art. 133.
- (2) "Promise" is defined in sub-cl. (6(a)) to mean a promise which is or appears to be legally binding, so as to prevent the proposed provision from being used to enforce a promise which is not intended to have legal effect, e.g., a mere statement between relatives of an intention to do an act for another, and this again is consistent with general contractual theory in this field: cf. Balfour v. Balfour [1919] 2 K.B. 571. The expression "promise" is also limited by the definition to a promise which is or appears to be intended to be enforceable by the beneficiary, because there may be cases where the incidental effect of the promise may be to benefit a third person although the promisor and promisee have no intention that it should be enforceable by him, e.g., an agreement between the vendor and purchaser of land that the latter will pay arrears of rates to the local council is not ordinarily intended to confer on the council a contractual right of action to recover those rates from the purchaser: cf. Restatement, art. 147; and see the South African case of Baikie v. Pretoria Municipality 1921 T.P.D. 376. It was apparently in order to avoid this difficulty that the English Law Revision Committee recommended that enforceability should be restricted to a contract which "by its express terms" purports to confer a benefit; but we consider that such a limitation might well have the effect of excluding the case where by necessary implication a

benefit can be seen to be intended, even though it is not couched in terms which can be described as "express".

- (3) We have expressly retained the requirement of a valuable consideration moving from the promisee, (which by implication and in the context of the sub-clause excludes the necessity for a consideration from the beneficiary). We think it right not to interfere, so far as the formation of the principal bargain is concerned, with what is a fundamental requirement for the validity of all simple contracts at common law, and which also has important implications in the field of equitable relief ("equity will not assist a volunteer").
- (4) Assuming such a promise, sub-cl.(1) proposes that upon "acceptance" a duty shall be imposed upon the promisor to perform his promise. Acceptance in this context means an assent, whether by words or conduct, communicated by the beneficiary: sub-cl.(6)(a). This follows both the English recommendation and the American Restatement, but departs from the latter by requiring an assent by the beneficiary even where he is what the Restatement describes as a "donee beneficiary" (i.e. one to whom a gift is intended: art.133), in which event no assent is required: see Comment (a) to Restatement, art.135. The desirability of making enforceability subject to the beneficiary's acceptance of the promise may be open to question: cf. Ryan (*op.cit.* at p.71), but we feel it is prudent to advance with some degree of caution in proposing this reform.
- (5) Prior to but not after acceptance by the beneficiary, the promisor and promisee will be at liberty to vary or discharge the duty created by the promise: sub-cl.(2) and (3)(a) (cf. the Law Revision Committee's recommendation above).
- (6) Once the conditions specified by sub-cl.(1) are fulfilled, sub-cl.(3)(a) will enable the beneficiary in his own name to enforce the duty of the promisor by such remedies or relief as may be "just and convenient". We have used the latter expression (cf. The Judicature Act of 1876, s.5(8)) because we do not think it desirable to spell out in express terms what remedies or relief should be granted by the courts to enforce the beneficiary's duty: the expression confers a judicial discretion which the courts can be expected to exercise, by analogy with other contracts, by granting specific performance, injunction, or damages, according to what is appropriate in the particular case.

Since the promise of the promisor may not be "unconditional", i.e., since it may be a promise which requires as its price the doing of something by the beneficiary, it is both logical, necessary, and just that acceptance by the beneficiary should bind him as well as the promisor. As was said by Innes C.J. in McCulloch v. Fernwood Estate Ltd. (1920) A.D.204, at p.439 -

"It may happen that the benefit carried with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. The third person having once notified his acceptance and thus established a vinculum juris between himself and the promisor would be liable to be sued as well as entitled to sue".

- (7) Sub-cl.(4) is intended to ensure that defences such as mistake, fraud, misrepresentation, Statute of Frauds and Statute of Limitations, payment, etc., which may be available to the

promisor against the promisee are also available to the former against the beneficiary (cf. Law Revision Committee's recommendation, above). It seems rather unlikely that circumstances will arise in which the beneficiary will have reason to resort to these defences, but sub-cl. (4) is couched in terms wide enough to cover this possibility.

- (8) It is possible that one result of enforcing a promise under the proposed section will be to confer on a beneficiary an interest in land, e. g., where the promise is to grant the beneficiary an option to purchase land, which is accepted by the beneficiary, and which, according to established principles, creates an equitable interest in land. Sub-cl. (5) is intended to ensure that this will not affect the paramountcy provisions of The Real Property Acts.
- (9) The remaining comment is directed to the definition of "beneficiary" in sub-cl. (6)(b), which includes a person who at the time of acceptance is identified and in existence although he was not so identified or in existence at the time the promise was given. So far as identification is concerned, this is consistent with art. 139 of the Restatement. The reference to the existence of the beneficiary will cover not only the case of an unborn child beneficiary, but also the very much more common case of the unincorporated company, which is often a source of great practical difficulty because of the rule which precludes an agency relationship on behalf of a non-existent principal: Natal Land Co. v. Pauline Syndicate [1904] A. C. 120. Under the Roman-Dutch law of South Africa a contract for the benefit of a company to be formed is enforceable if accepted by the company after incorporation: McCulloch v. Fernwood Estate Ltd. 1920 A. D. 120, and the definition of beneficiary in sub-cl. (6)(b) is designed to permit this result to be achieved under the proposed section.

It may be added that the foregoing proposals are not likely to affect the incidence of succession duty since by ss. 10F and 10G of the Succession and Probate Duties Act 1892-1969, introduced by amendment in 1969 (No. 13 of 1969) beneficial interests arising under annuities and other interests purchased or provided "in concert or by arrangement" with the deceased, or under a disposition arising under the terms of an agreement made by the deceased, are liable to duty even though the arrangement, agreement, etc., may not be enforceable by the person for whose benefit it was made. This effects a statutory reversal of the decision in Re Miller's Agreement (*supra*) so far as liability for duty is concerned, and in a sense represents a legislative recognition of the utility of contracts for the benefit of third parties.

56. Guarantees to be in writing. For commentary, see cll. 10, 11, 12 and the Commission's Report on the Statute of Frauds (Q. L. R. C. 6).

57. Recovery of sums paid under discharged contract.

This provision was to have dealt with the recovery of sums paid under discharged contracts, as to which see pp. 41-48 of the Commentary in the Commission's Working Paper No. 10. However, in deference to the cogent criticisms of and comments made on the draft clause 57 by Mr. C.W. Pincus of Counsel, the Commission has decided that it would be preferable to omit this provision altogether.

58. Effect of provisions as to conclusiveness of certificates. There is a steadily growing practice of inserting in guarantees, mortgages, leases, hire agreements and other contracts and instruments issued in standard form a provision to the effect that a certificate or statement of a specified person (usually an officer of the party from whom the standard form emanates) shall be conclusive evidence that a debt is owing or that a specified state of affairs exists. In England it has recently been held, following certain dicta of Scrutton L.J. in Czarnikow Ltd. v. Roth Schmidt & Co. [1922] 2 K.B. 478, 488, that a provision to this effect is contrary to public policy and void as an attempt to oust the jurisdiction of the court: see Re Davistone Estates Ltd's Leases [1969] 2 W.L.R. 1287. However, the validity of such a provision had earlier been upheld by the High Court of Australia in National Bank of Australasia Ltd. v. Dobbs (1935) 53 C.L.R. 643, and a Queensland court would be bound to follow this decision.

The particular vice of such a provision is that it precludes the other party from challenging such a certificate even though he is in possession of evidence which shows that it is inaccurate or erroneous. As was said in the Dobbs case -

"the clause means what it says, that a certificate of the balance due to the bank by the customer shall be conclusive evidence of his indebtedness to the bank".

Only two exceptions to the conclusive effect of the certificate were recognised in that case, namely, illegality (at p. 651) and fraud (per Starke J. at p. 656).

We regard this as a highly undesirable state of affairs, and, in view of the increasing use which is being made of such provisions, we consider that the matter is one which justifies legislative intervention. It would, however, be going too far, in our opinion, to provide that provisions of the foregoing kind should be allowed no effect whatever. In the first place, it is often extremely difficult, not to say expensive, for an institution such as a bank or other institutions handling a large volume of transactions to prove strictly, in the manner required by law, each item which goes to make up a balance in a particular account. A defendant, knowing of these difficulties of proof, will often defend such an action in the hope simply that the plaintiff will be unable to prove its case, a course which is much less justified now that such accounts are commonly maintained by electronic process, which reduces, although it does not entirely eliminate, the possibility of error.

There is probably not much doubt that it is considerations of the foregoing kind which have led to the increasing use of certification provisions of the nature mentioned above. We consider that justice would be done to all parties if, whilst not prohibiting outright the use in the future of such provisions, their function was limited to conferring a prima facie evidentiary effect upon the relevant certificate or opinion, thus leaving it open to the defendant to establish by proof in the ordinary way that the certificate is incorrect. In recommending this course we are fortified by the fact that the Law Reform Commission in South Australia has recently proposed that a similar step be taken in relation to certification provisions in mortgages in that State (see Seventeenth Report, p. 7).

An additional problem is whether the foregoing recommendation should be applied generally to all certification provisions. In South Australia the recommendation relates only to mortgages, but this was because the Report in question was confined to that topic. The difficulty, however, is that it is extremely common for such a provision to be included in building and engineering contracts, where a "final" certificate of the supervising architect or engineer is usually made conclusive evidence of due performance of the contract work and of the amount owing under the contract: see, for example, *Tullis v. Jackson* [1892] 3 Ch. 441; *Arthur H. Stephens (Queensland) Pty. Ltd. v. Council of the Town of Dalby* [1969] Qd. R. 306. To allow conclusive effect to such a provision is much less objectionable because the architect or engineer in such a case is under a duty to act as an arbitrator or quasi-arbitrator in forming his opinion, and this requires that he should act fairly towards both parties: *Hosier & Dickinson Ltd. v. P. & M. Kaye Ltd.* [1970] 1 W.L.R. 1611, 1616. In view of this, and because such provisions form an important part of the scheme of administration of such contracts in which certainty is desirable, we think that contracts embodying such provisions should, where an arbitral or quasi-arbitral duty exists, be excluded from the provisions of the proposed section. Similar considerations do, we think, also apply to cases in which the parties agree, after a dispute has arisen, to accept the opinion of a third party, e.g. a valuer, as conclusive evidence of a particular fact or matter.

Division 3 - Sales of land

59. Contracts for sale etc. of land to be in writing. See as to this, the commentary to cll. 10, 11 and 12 above, and the Commission's Report on the Statute of Frauds (Q. L. R. C. 6).

60. Sales of land by auction. The employment of what are described as "puffers" at an auction sale of land has been held to vitiate any resulting contract at common law; see Bexwell v. Christie (1776) 1 Cowp. 395. One would expect the rule to be the same in equity, but in Mortimore v. Bell (1865) 1 Ch. App. 10, it was suggested that a different rule might exist, and that vendors were considered by courts of equity to be at liberty, without express stipulation, to reserve to themselves a right to bid, or, in other words, to employ a person to bid for them up to a reserve price. In consequence probably of this decision the Sale of Land by Auction Act of 1867 (30 & 31 Vic. c. 48) was passed in England, the principal effect of which was to render voidable at the instance of a purchaser a sale at which the vendor had bid, either personally or by another, without notification that he had reserved the right to do so.

The relevant terms of the Act of 1867 have in substance been adopted in Queensland by s. 59(3) of The Sale of Goods Act of 1896, but there is no statutory enactment on the subject of auction sales of land in this State. The accompanying clause is therefore adopted from s. 65 of the N. S. W. Conveyancing Act.

61. Conditions of sale of land. Sub-cl. (1) of this clause is adopted from s. 57(1) of the N. S. W. Conveyancing Act and is expressly confined to registered land. The provisions of paragraph (a) thereof are based on established usage of conveyancers in that State prior to the statutory enactment: see Stonham: Vendor and Purchaser at pp. 399-400. In Queensland contracts for the sale of land are usually prepared by real estate agents and the particulars of title which appear therein are not always accurate. Consequently we think that the statutory implication by sub-cl. (1)(a) of a right to obtain particulars of title necessary for the preparation of the instrument of transfer represents a useful addition to the powers of the purchaser. Both the implication in paragraph (a) of sub-cl. (1) and those contained in paragraphs (b) and (d) are directed to matters which commonly form the subject of requisitions on title and inquiries in conveyancing transactions in Queensland. Paragraph (c) will prove useful in cases where, for example, the interest sold is less extensive than the full freehold estate in the land.

Sub-clause (2) proposes the implication into a contract for the sale of any land of a term that payment or tender may be made by bank cheque. The proposed new draft contract for the sale of land in the course of preparation by the Law Society contains a similar provision (although it refers to a cheque "issued" by a bank), but, in the absence of such a provision, it is always necessary for the purchaser to pay or tender the price in cash. This is a costly, and inconvenient, but legally necessary, formality in cases where it is evident that the vendor is unlikely to complete, and it is desirable that the ability to tender by bank cheque be made generally available. It is not, of course, competent for State legislation to change the definition of legal tender which is laid down in the Commonwealth Coinage Act 1909-1947, but the statutory implication of a term permitting the use of an alternative method is not open to the same constitutional objection.

Sub-clause (2)(b) is intended to give effect to the practice whereby a vendor gives a title "free of incumbrance" by discharging any such incumbrance out of the purchase moneys on settlement. The practice is a most convenient one but its validity is perhaps less clear since the obligation of the vendor ordinarily is to exchange a title free from incumbrance in return for the purchase money, and a purchaser appears to be contractually entitled to insist on a clear title before the purchase money is paid. Sub-clause (2)(b) is intended to confer validity on the present convenient practice.

Sub-clause (2)(c) is designed to avoid disputes which sometimes arise as to the proper place for settlement, but leaves it open to the parties or their solicitors to select a place which is suited to their convenience.

All of the above provisions are, by sub-cl. (3), subject to the expression of a contrary intention in the contract, so that the parties may exclude them if they wish.

62. Stipulations not of the essence of the contract. This clause is simply a rescript of the provisions of s. 5(7) of The Judicature Act of 1876 as to the prevalence of the equitable rules regulating the essentiality of stipulations, principally as to time, in contracts. The enactment of this clause will involve the repeal of the above provision of The Judicature Act.

63. Application of insurance money on completion of sale or exchange. The effect of a contract for the sale of land is, before completion, to transfer to the purchaser an equitable interest corresponding to the legal interest agreed to be purchased as well as the risk of accidental loss or destruction of the subject-matter: cf. Fletcher v. Manton (1940) 64 C.L.R. 37, 45. Hence, a purchaser is not entitled to refuse to complete on the ground that between the date of contract and completion improvements, such as a house, have been destroyed by fire. Furthermore, he is not entitled as against the vendor to the benefit of any insurance which the latter may have effected on the subject property: see Rayner v. Preston (1880) 14 Ch.D. 297, although a contract of fire insurance, being intended only as an indemnity, the insurer can recover policy moneys paid in respect of the destruction to the vendor if the latter receives the purchase moneys from the purchaser: Castellain v. Preston (1883) 11 Q.B.D. 380.

A policy of fire insurance, being personal to the insured, cannot be assigned without the consent of the insurer, and the only course open to the purchaser is himself to insure the property pending completion, for which purpose he has a sufficient insurable interest: see Davjoyda Estates Pty. Ltd. v. National Insurance Co. of New Zealand Limited (1965) 69 S.R. (N.S.W.) 381, and generally on this subject, see article in 45 A.L.J. 30.

In England s. 47 of the Law of Property Act, which has been adopted in Victoria, in effect reverses the principle in Rayner v. Preston (supra) by declaring that insurance moneys received by the vendor shall on completion of the contract be held on behalf of the purchaser and paid to him on completion. This provision is subject in s. 47(2)(b) to "any requisite consents" of the insurers, so that it really leaves untouched the principle in Castellain v. Preston (supra); furthermore, it remains open to the insurer to argue that it is not liable since the risk has passed to the purchaser. For these reasons the Northern Ireland Report on Land Law recommends (para. 167) the omission of s. 47(2)(b) and the insertion of a sub-s. (2) which will preclude arguments based on the passing of the risk. We favour these changes, which have been incorporated in the draft cl 63.

Subject to the foregoing, we propose the adoption of s. 47 of the English Act, noting that the scope for its application will be diminished by the provision in the Law Society's proposed new draft contract, which will permit the purchaser of a dwelling house to rescind in the event of destruction or damage prior to completion.

64. Rights of purchaser as to execution. An aspect of conveyancing practice established by Viney v. Chaplin (1858) 2 De G. & J. 468 is that a purchaser is entitled to require the most complete proof of a conveyance and so may be entitled to insist upon execution of the conveyance in his presence or that of his solicitor. This requirement was modified by the Conveyancing Act, 1881, replaced by s. 68 of the Law of Property, and adopted in Victoria (s. 68 of the Property Law Act 1958) and New South Wales (s. 59 of the Conveyancing Act). In Queensland the right of the purchaser to insist upon execution of a transfer in his presence is probably impliedly dispensed with by contract which commonly includes a clause requiring production on settlement of a duly executed and registrable memorandum of transfer. Nevertheless, it seems prudent that the above provisions should be adopted in this State.

65. Receipt in instrument or indorsed authority for payment. In Viney v. Chaplin (1858) 2 De G. & J. 468 it was said that a purchaser had a strict right

to require that purchase moneys be paid by him only to the vendor personally or in his presence, and that the possession of an executed conveyance, with a signed receipt for the purchase money indorsed thereon, was not itself an authority to the solicitor of the vendor to receive the purchase money. Hence, if the purchaser paid the purchase money to the vendor's solicitor who failed to account for it to the vendor, the purchaser might be required to pay again.

This principle was displaced in England by s. 56(1) of the Conveyancing Act 1881 which provided that the production by a solicitor of an executed deed with a receipt for the consideration indorsed thereon should be a sufficient authority for payment to the solicitor. The foregoing provision now appears as s. 69(1) of the Law of Property Act in England and s. 69(1) of the Victorian Property Law Act 1958.

In Queensland it seems to be not uncommon for the purchaser to pay the purchase moneys to the vendor's solicitor or his trust account without any further or other authority than the production of a duly executed memorandum of transfer in Form W which contains an acknowledgement by the vendor of his having received the consideration. On the authority of Viney v. Chaplin (*supra*) and Re Shanks, ex parte Swinbanks (1879) 11 Ch.D. 525, it appears that this may not be an altogether safe course, and it is desirable that the law be brought into conformity with the existing practice by the adoption of a provision similar to those mentioned above.

In this regard, the form of s. 69 of the Victorian Act is, with slight adaptation necessary for local conditions, more appropriate than the English provision, since the former makes express provision for: (i) instruments executed under the Torrens system, including a discharge of mortgage, and (ii) receipts by bankers as well as solicitors. In accordance with the policy adopted throughout these recommendations, the word "instrument" has been substituted for "deed" in adopting the Victorian section.

66. Restriction on vendor's right to rescind on purchaser's objection. The standard forms of contract in use in Queensland for the sale of land (as well as the proposed new standard form) contain a clause permitting the vendor to rescind the contract upon receipt of a requisition on or objection to title which the vendor is unable or unwilling to remove or comply with. This is a power of rescission which the vendor is bound to exercise reasonably, e. g., on grounds such as that compliance with the requisition will involve him in litigation or in expense not reasonably contemplated: Duddell v. Simpson (1866) L. R. 2 Ch. App. 102, and see, generally, Stonham: Vendor and Purchaser, at pp. 529-530. The standard form of contract referred to above also requires the vendor, as a condition precedent to exercising his power of rescission, to give notice to the purchaser of his intention in that behalf so as to give the latter an opportunity of withdrawing the requisition or objection and so saving the contract.

This right of withdrawal or waiver is not, however, a statutory right in Queensland as it is in New South Wales, where a similar contractual provision is in use, but where s. 56 of the Conveyancing Act prevents exclusion of the right of the purchaser to waive his objection or requisition. We consider that there is some advantage in placing the position on a statutory basis and in adopting the provisions of the New South Wales section. In both States the relevant period in the standard contract form as the period within which the requisition may be withdrawn is seven days. Stuckey (*op. cit.* at p. 128) remarks that this does not appear to have been challenged as unreasonable in any reported case, and it therefore seems safe to conclude that no change in common practice will result from the enactment of the proposed clause in Queensland.

67. Damages for breach of contract to sell land. A vendor who in breach of contract fails to perform a contract to sell and convey land is like any other contracting party liable in damages to the other party for breach of contract. This may in proper case include the purchaser's loss of bargain, i. e., the difference between the contract price of the land and its value at the time when it ought to have been conveyed to him. However, by a special exception to this rule, the existence of which was affirmed by the House of Lords in Bain v. Fothergill (1874) L. R. 7 H. L. 158, the liability of a vendor, who has not expressly undertaken to deduce good title and is unable, acting in good faith, to make good title, is limited to the expenses incurred by the purchaser in investigating title and does not extend to the purchaser's loss of bargain. This is subject to the qualification that where the vendor, at the time of entering into the contract, knew that he had no title and no means of acquiring one, the purchaser may be entitled to recover damages for deceit.

The Rule in Bain v. Fothergill, which applies to sales of leasehold as well as freehold interests, is said to be founded on "the peculiar difficulty of making a title to land in England"; Elliott v. Pierson [1948] 1 All E. R. 939, 942. It has been held to apply to land the title to which is registered under The Real Property Acts: see Merry v. Australian Mutual Provident Society (1872) 3 Q. S. C. R. 40; Boardman v. McGrath [1925] Q. W. N. 8, although it is difficult to appreciate the justification for these decisions particularly in view of recent decisions as to the conclusiveness of the register on matters of title: cf. Fleming v. Munro (1908) 27 N. Z. L. R. 796.

We consider that in view of the origin and history of the Rule in Bain v. Fothergill it is inappropriate to a system of registered conveyancing such as that which now prevails in Queensland. We accordingly propose that in the case of contracts for the sale of land (other than unregistered or "old system" land, where difficulties of making title are notorious) the ordinary measure of damages applicable to breaches of other contracts should prevail, and that a vendor should not, unless the contract otherwise provides, escape liability for damages for failure to transfer land agreed to be sold simply because of an inability to fulfil a contract which, although perhaps not occasioned by default on his part, is even less due to any fault on the part of the purchaser. As between the two parties to the contract, it is difficult to see why the purchaser should carry the risk of the vendor's inability to make good title.

68. Rights of purchaser where vendor's title defective. Where a vendor defaults in the performance of a contract for the sale of land, the purchaser is entitled to rescind and recover his deposit and any instalments paid under the contract. However, the right to rescind may be excluded where, for example, the contract provides that the vendor's title shall not be objected to. In such case a court of equity will not grant specific performance which would have the effect of forcing a defective title on an unwilling purchaser, but the contract remains binding at law and the purchaser is unable to recover his deposit: Re Scott & Alvarez' Contract [1895] 2 Ch. 603; Re National Provincial Bank & Marsh [1895] 1 Ch. 190.

This unreasonable result is avoided by s. 55(1) of the New South Wales Conveyancing Act, which confers on a purchaser a right to recover his deposit and any paid instalments and to be relieved from contractual liability where specific performance would not be enforced against him by reason of a defect in the vendor's title although the purchaser may not be entitled to rescind. The subsection does not, however, apply where the contract discloses the defect in question and contains a stipulation precluding the purchaser from objecting thereto.

Section 55(1) now forms merely part of a provision in the Conveyancing Act which is intended to enable a purchaser to recover his deposit although

he may have no legal or equitable right thereto. Section 55(2A) adds a discretionary power derived from the English Law of Property Act which has been held to be not confined to cases in which specific performance is refused. For reasons which are discussed in relation to cl. 57 we do not favour a general discretionary power to order the return of a deposit to a defaulting purchaser. But the situation provided for in s. 55(1) is extraordinary and merits reform. We therefore recommend the adoption of s. 55(1) and also s. 55(2), which enables the purchaser to recover his expenses of investigating title where the defect is one which is or ought to have been known to the vendor at the date of the contract. Section 55(1) has, however, been held to apply only where the Court would refuse specific performance because the vendor's title is defective and not where it is merely doubtful (*Bennett v. Stuart* (1927) 27 S.R. (N.S.W.) 317, 327-8), and it is proposed that the provision as adopted in Queensland be specifically altered so as to enable the deposit to be recovered in this case as well.

69. Applications to Court by vendor and purchaser. This clause has its origin in s. 9 of the Vendor and Purchaser Act (37 & 38 Vict. c. 78) passed in England in 1874. Its object is to provide a summary way of obtaining the determination of the Court on an isolated point arising on a contract without the necessity for instituting a suit for specific performance. The exception in respect of questions affecting the validity or existence of the contract refers to the validity or existence of the contract in its inception, and the Court may under the section make an order which gives effect to its determination, e.g., by ordering the return of a deposit. Speaking of the English section Cotton L. J. in *Hargreaves & Thompson's Contract* (1886) 32 Ch.D. 434, 457, said:-

"There is authority given to us not only to decide the question asked, but to make an order which would be just, as the natural consequence of what we have decided."

It may be that the jurisdiction conferred by this provision does not add greatly to that already exercisable under O. 64, rr. 1A and 1BB of The Rules of the Supreme Court, but, unlike the latter, the existence of a disputed question of fact will not suffice to oust jurisdiction: see, generally, Voumard: The Sale of Land (2nd ed.) pp. 526-527.

Division 4 - Instalment sales of land

70 - 75. Instalment sales of land. Where a person buys land for a price payable otherwise than in cash on taking possession, there are two principal means by which the transaction may be effected. One is for the vendor to transfer the land and to take from the purchaser a mortgage over the land to secure payment of the unpaid price: in this situation the contract of sale is brought to an end upon transfer, either because it merges with the conveyance (*Johnstone v. Veitch* [1957] Q.W.N. 18), or because the contract is discharged by the transfer, the relations of the parties thereafter being regulated by the terms of the mortgage. The other method is for the vendor to retain title until the purchase price, which is usually payable in instalments over a period of time, is paid in full. This procedure, which is commonly referred to as a "terms contract" or instalment contract has obvious analogies with an agreement for hire-purchase of chattels. It is, or, at any rate, prior to 1962 was, the form more commonly in use in Victoria, whereas the practice of transferring title subject to a mortgage in favour of the vendor is said to be more common in New South Wales. In Queensland both methods are in use, although it is probably true to say that "terms contracts" are uncommon in the case of relatively expensive or high-priced land.

A purchaser who buys in the above manner under a terms contract is placed at some risk. In particular, he may pay the whole of the price and then discover that the vendor has sold and transferred or mortgaged the land to another between the date of the terms contract and the date fixed for its

completion and so is unable to transfer title to the purchaser. A sale by a vendor in disregard of an existing terms contract is a breach of the vendor's obligation under the terms contract although a mortgage does not constitute such a breach provided that the vendor is able to complete on the contractual date for completion: *Burges v. Williams* (1912) 15 C.L.R. 504. In either event the fact that the vendor is or is not in breach of contract is of little moment if he is a man of straw and the transfer or mortgage is registered in favour of the second purchaser or mortgagor.

A second disability to which the purchaser under a terms contract is subject is that if he defaults in payment of any instalment of price the vendor will generally have and exercise the power of forthwith rescinding or discharging the contract and of retaking possession of the land. It seems sometimes to be thought that this carries with it a power or right to "forfeit" and retain all payments made by the purchaser pursuant to the contract, but there is little doubt that this is incorrect: see the discussion of this point in the commentary to cl. 57.

It was with a view to removing these disabilities, real or supposed, of a purchaser under a terms contract that The Contracts of Sale of Land Act of 1933 was passed, an account of which appears in (1962) 4 U.Q.L.J. 167. This statute, which has been described as "remarkably ill-conceived and remarkably ill-drawn" (*Rainey v. Lipphardt* [1960] Q.W.N. 43, per Townley J. at p. 60), has encountered a great deal of criticism, both from the judiciary and the profession, and is one of the specific items on the approved programme of the Law Reform Commission. Because the matter is one which falls fairly readily into place as part of a general enactment concerned with property law, we have thought it preferable to include our recommendations on this topic in the present Report rather than to make it the subject of a separate Report or legislative recommendation.

The Act applies to every "contract for the sale of land", an expression which is defined in s. 3 in a most incomprehensible fashion. However, after grappling with the definition over a considerable period, the courts have decided that what is contemplated by the definition, and therefore what is within the scope of the Act as a whole, is "the case where the purchaser is required to make a payment or payments (apart from a 'deposit') without receiving a conveyance or transfer in exchange therefor.": see *Petrie v. Dwyer* (1954) 91 C.L.R. 99, at p. 109, applied in *Cohen v. Mason* [1961] Qd.R. 518. In addition to "cash" contracts and contracts completed forthwith by transfer to the purchaser subject to a mortgage to the vendor, this has the effect of excluding from the scope of the statute all contracts for the sale of land other than those in which the purchaser is required to make a payment, over and above a deposit, between the time of the contract and the time at which he receives a transfer or conveyance: cf. *Cohen v. Mason* [1961] Qd.R. at p. 534, per Wanstall J.

Prima facie a person who sells land under a contract of this kind is required by s. 4 of the Act to take out a fidelity bond or to deposit security with the Crown, but s. 5 introduces a number of exemptions of which the most important are those in s. 5(b)(i) and (ii) in favour of sales of unimproved land where the consideration exceeds £500 and improved land where the consideration exceeds £1500. Rising land values since the Act was passed in 1933 have rendered this exemption virtually all-embracing, and there must be few transactions which now fall within the scope of s. 4. This is borne out by the fact that there have in recent times been no entries in register of contracts which by s. 11 of the Act is required to be kept by the Registrar of Titles.

There is no doubt that the purpose of s. 4 is to ensure that if a vendor defaults in performing his obligations under a terms contract, the purchaser will have the protection of the bond or deposit which the statute requires. But, as we have seen, the exemptions under s. 5 are so extensive as to

render that protection of little practical importance in most cases of such contracts. Section 9 of the Act is not, however, subject to these exemptions, and it provides that, in the case of land under The Real Property Acts, a purchaser who has paid an amount equal to one third of the price has certain further rights. In particular, he may require the vendor to execute a transfer in favour of the purchaser, and take a charge or a bill of mortgage for the balance of purchase money which remains unpaid; or he may require the vendor to consent to lodgment of a caveat forbidding dealings with the land during the period of the contract. It is a consequence of the latter provision and of s. 39 of The Real Property Act of 1877 that such a caveat will not automatically lapse after the expiration of three months from the date of its lodgment.

In addition to the foregoing protective provisions, s. 18 of the Act imposes on a vendor the obligation of notifying the purchaser or intending purchaser of any mortgage, encumbrance, lien or charge on the subject land; but this section applies only to unregistered or "old system" land: Parry-Okeden v. MacRae [1949] Q.W.N. 38. In the case of registered land any such encumbrance will, of course, appear upon the register.

The second objective of the statute (the protection of the purchaser's "equity" in the land) was sought to be achieved by the provisions of Part III of the Act, which contains a complicated series of provisions designed to ensure (1) that the vendor's right of rescission of the contract in the event of default of payment of instalments by the purchaser should be exercisable only upon the expiration of 30 days after service of a statutory notice of rescission, during which period the purchaser might remedy his default; see ss. 13(1), 13(2) and 13(3) of the Act; (2) that the benefit of any deposit and instalments paid to the vendor should not be lost to the purchaser: s. 13(5); and (3) that the court should possess a power to "review" the contract: see s. 13(9). The latter provision has been held by the High Court in Priebe v. Green (1942) 66 C.L.R. 137 not to authorise a "review" of the contract between the vendor and purchaser but only a contract of resale by the vendor after rescission of the terms contract. The same case decides that the Act does not interfere with the power of the vendor to sue for sums due under the terms contract, or, presumably, to claim specific performance or damages. As to (2) above, it is sufficient at this point to say that the draftsman of the Act, when he inserted s. 13(5), misconceived the equitable rights and reliefs available to a defaulting purchaser: see Petrie v. Dwyer, *supra*, and *ante*, cl. 57. The requirement of a 30-day "redemption" period is, however, an innovation and its effect is such that failure to give the requisite notice in the prescribed form is fatal to the vendor's attempt to rescind: Rainey v. Lipphardt, *supra*.

So far as the Act itself is concerned, the drafting is so bad, and its provisions so uncertain and incomprehensible, that there is no doubt that the judicial and other criticisms which have been made of the legislation are fully justified. On this count alone we have no hesitation in recommending that the legislation be repealed. On the other hand, we do not consider that the difficulties and dangers which the Act set out to remove can be completely ignored. A purchaser who buys subject to a terms contract is subject to a real risk and may suffer substantial loss if the vendor effects a transfer or mortgage before completion. In this connexion it is worth pointing out that in 1962 the Victorian Parliament enacted legislation, which though much better drafted, has amongst its objects the protection of terms contract purchasers against the possibility of defaulting vendors: see Sale of Land Act 1962. Section 7(1) of this statute prohibits a vendor from mortgaging land subject to a terms contract, while s. 4 and s. 7(2) contain provisions similar to those in s. 9 of the Queensland Act in effect requiring completion of the contract by transfer subject to mortgage in favour of the vendor. On this enactment, see, generally, Voumard: The Sale of Land (2nd ed.) pp. 106-110, and an article in 38 A.L.J. at p. 173. In Western Australia legislation has recently been passed which corresponds in its objects and effects

with the Queensland and Victorian Acts: see Sale of Land Act 1970. New South Wales has also legislated on the subject of terms contracts: Land Vendors Act 1964 (on which see 39 A.L.J.22), although this is limited to sales of lots in subdivision. In Queensland, the problem of sales of land in a proposed subdivision is now ^{to be} regulated by s. 67 of the Auctioneers and Agents Act 1971 (see, formerly, s. 24AB of The Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Acts, 1922 to 1961). This is confined to sales effected by auctioneers or real estate agents, but purchasers under other such contracts probably derive a measure of protection from s. 34(19)(iv) of the Local Government Act in conjunction with the provisions of The Trust Accounts Acts, 1923 to 1959.

As regards the requirement of notice before rescission imposed by s. 13(1) of the Act, we think there is some merit in affording to a purchaser who defaults in the payment of an instalment an opportunity to rectify that default before the contract is rescinded. Most contracts for the sale of land contain a provision making time of the essence, with the consequence that payment of one instalment a day later than the contractual date for payment renders the contract liable to be rescinded by the vendor even though the instalment may be only one of many payable under the contract. It is true that a renegade purchaser could deliberately cause trouble and expense by paying late on every occasion, but there is no evidence that such behaviour has been taking place under the existing Act. Moreover, this problem could be overcome by conferring on the vendor a corresponding right to require transfer of the land to the purchaser subject to a mortgage in his favour.

In the result we recommend the repeal of The Contracts of Sale of Land Act of 1933 but the retention in cl. 70 to 75 of provisions in better drafted form of principal features of such legislation. The definition of "instalment contract" in cl. 70(2) is essentially a reproduction in legislative form of the definition arrived at in Petrie v. Dwyer and Cohen v. Mason, *supra*, the other definitions being derived in the main from the Victorian legislation of 1962 and 1964. Subclause (3) provides for the case, not infrequently met with in practice, in which the contract confers on the purchaser an option to perform the contract in one of two or more ways, and performance in one of those ways will render it an "instalment contract" within the terms of the definition, in which case it will be presumed to be an instalment contract until the purchaser elects to perform it in a way which will not render it an instalment contract.

Clause 71 is intended to preserve the effect of the requirement imposed by s. 13(5) of the existing Act that an instalment contract may be rescinded for default in payment of instalments by the purchaser only after notice in the statutory form (or to like effect) has been given followed by a period of 30 days grace within which the purchaser may make good his default. Clause 73 will prohibit the sale or mortgage by the vendor of land subject to the instalment contract except with the consent of the purchaser. A breach of this provision will amount to an offence, and will also confer on the purchaser a right to avoid the instalment contract (cf. s. 7(4) of the Victorian Act) although this right will not affect a bona fide purchaser without notice of the instalment contract or the provisions of The Real Property Acts.

Clause 73 is intended to facilitate the lodging of a "consent" caveat by a purchaser, and is based upon s. 9(c) of the existing Act. It is, of course, necessarily confined to sales of land under The Real Property Acts, since there is no statutory procedure for caveats with respect to land under the Land Act and other statutes.

Clause 74 is based in part upon s. 9(b) of the existing Queensland statute and partly upon ss. 4 and 7 of the Victorian Acts. Its object is to encourage and facilitate the "conversion" of instalment contracts to

transfers which are subject to a mortgage to secure the unpaid balance of the purchase price. Section 9(b) of the present Queensland Act is deficient in that it permits only a purchaser to require transfer subject to mortgage and this only when one third of the price has been paid. These limitations do not appear in the Victorian legislation and we can see no justification for their existence. Furthermore, the present Queensland section is defective in that it fails to specify what are to be the terms of the mortgage. In Victoria there is provision for arbitration in the event of disagreement on this subject and sub-cll. (5) and (6) of the draft clause are also intended to provide for this contingency.

Clause 75 represents an attempt to reproduce one of the features of the 1933 Act, namely the depositing of the certificate of title "in escrow" with a prescribed authority pending completion of the contract. Although not all members of the Commission favoured retention of this procedure, it has been represented to us that there is great practical advantage in obtaining in this way an executed memorandum of transfer and title deeds in the case of a long-term contract where, as experience shows, the vendor may not be easy to locate when the time for completion arrives.

PART VII - MORTGAGES

76. Application of Part and interpretation of terms. The subject of mortgages in Queensland is complicated by the variety of forms of title to land which exist in this State with consequent variation in the forms of mortgage which are possible or permissible. Mortgages of old system or unregistered land continue to take the form of an outright conveyance of the legal estate subject to an equity of redemption, but mortgages of land based on some form of registered or statutory title are uniform in treating a mortgage as a security interest only not involving transfer of legal title: see Land Act 1962-1970, s. 276; The Miners Homestead Leases Acts, 1913 to 1965, s. 29(5), and Reg. 127 of the Regulations under The Mining Acts, 1898 to 1967, all of which have a common origin in s. 60 of The Real Property Acts, 1861 to 1963. Beyond this point the extent of the uniformity is slight however, since, although these statutes are at one in permitting a mortgagee to take possession and to sell on default, The Real Property Acts contain fairly detailed provisions as to the implied obligations of mortgagors and the powers of mortgagees which, in the case of the Land Act and other Acts, are left to be provided for in the individual mortgage. Furthermore, for reasons of policy underlying the provisions of the lastmentioned Acts a mortgagee of such property does not possess certain remedies available to a mortgagee of land under The Real Property Acts, e.g. the right to foreclose: see Tannock v. North Queensland Securities Ltd. [1932] St. R. Qd. 285, 298, and the statutory provisions regulating exercise of the mortgagee's power of sale, although to a large extent variable in the case of mortgages of land under The Real Property Acts, are mandatory and therefore invariable in the case of mortgages of land subject to those special statutes: see Plastic Enterprises Pty. Ltd. v. The Southern Cross Assurance Co. Ltd. [1968] Qd. R. 401.

Subject to particular requirements of the latter kind and subject generally to the provisions of those special statutes, we can see no reason why a uniform set of provisions applicable to all mortgages of land, whether registered or unregistered and whether freehold or leasehold Crown land, should not exist. Uniformity of provision has advantages which need no emphasis, and will lead to an essential simplification of the law and a degree of certainty which is at present plainly lacking. This proposal will involve the repeal of s. 57 and part of s. 59 of The Real Property Acts (which provide and regulate the mortgagee's power of sale), as well as s. 69 (implied covenants in mortgages) and s. 21 of The Real Property Act of 1877 (joint account clause), and the substitution in the proposed property legislation of general provisions based on the English Law of Property Act 1925 and the

New South Wales Conveyancing Act, which will apply to mortgages in general. Apart from these sections, this Part also provides for the repeal of s. 5(5) of The Judicature Act of 1876 (power for mortgagor to sue for possession of the mortgaged property) and ss. 138 and 139 of The Distress Replevin and Ejectment Act of 1867.

Sections 138 and 139 of the Distress Replevin and Ejectment Act of 1867 contain provisions enabling a mortgagor, in proceedings by the mortgagee for possession of the mortgaged land, to redeem the mortgage by paying the principal moneys, interest and costs to the mortgagee or into court. These provisions originated in ss. 1 and 2 of the Mortgage Act 1733 (7 Geo. II, c. 20) and were repeated in s. 219 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). Their purpose was to enable a court of common law to stay proceedings without the necessity for resorting to equity in order to obtain relief. The legislation thus represents, as Holdsworth says, an early attempt to bring together the divergent principles of law and equity and to break down the barriers between law and equity: 11 History of English Law, p. 593.

The Judicature Act of 1876 removed the need for such legislation by fusing the administration of law and equity, and, as is said in Fisher & Lightwood's Law of Mortgages (8th ed.) at pp. 230-232, the court now possesses an inherent power to stay proceedings in the foregoing circumstances. According to the same source (*ibid.* at p. 232) the statutory jurisdiction under the Act of 1733 is now quite obsolete. The same is plainly also true of s. 219 of the English Common Law Procedure Act, 1852, although that section has not been formally repealed in England. At least until as late as 1970 there were similar provisions in ss. 106 and 107 of the New South Wales Conveyancing and Law of Property Act 1898, these having doubtless been retained because of the separate administration in that State of law and equity.

We are satisfied that the Supreme Court possesses the necessary inherent jurisdiction to grant a stay of proceedings for possession by a mortgagee where the mortgagee offers to redeem, and we therefore recommend that the Act of 1733 and ss. 138 and 139 of the Queensland Act of 1867 be repealed and not re-enacted.

The application of a series of general provisions to chattel mortgages and to mortgages under The State Housing Acts, 1945 to 1966, The Workers' Homes Acts, 1919 to 1957, and the War Service Homes Act 1918-1966, present peculiar but not insuperable difficulties. The second of the Acts mentioned has been repealed by The Workers' Homes Acts Repeal Acts, 1961 to 1964, which however has the effect of preserving mortgages regulated by the repealed Acts. Both this and the State Housing Acts can be adequately dealt with by making the general provisions subject to the provisions of each of those Acts even though one of them is repealed. The War Service Homes Act, being a Commonwealth statute, cannot for constitutional reasons be subjected to the provisions of a State Act (*cf. Bielefield v. Bielefield* [1956] Q.W.N. 4), but within limits the Director of War Service Homes can take advantage of the ordinary law governing the relationship of mortgagees and mortgagors.

Chattel mortgages raise a question of a different kind. Such mortgages follow the form of an old system mortgage of land, in the sense that it involves an outright assignment of title subject to a proviso for retransfer, the mortgagor retaining an equity of redemption. Chattel mortgages are, of course, for the most part governed by the Bills of Sale and Other Instruments Act 1955-1970, which embodies its own provisions on a number of matters as to which provision is also proposed in the present legislation. Whilst it is not intended to exclude chattel mortgages from the scope of this Part, which will apply to mortgages of land "or other property", there are a number of its provisions which are by their terms or context or their

nature or subject-matter, not applicable or appropriate to a mortgage of chattels. On the other hand, there are some sections which may conveniently be so applied: these include, for example, the mortgagee's duty as to sale price; effect of mortgagee's receipts; advances on joint account; the right of a mortgagor to require transfer instead of discharge; relief against acceleration of payments; effect of acceptance of interest on overdue mortgages; period of notice for redemption; right to redeem before time fixed; abolition of the right to consolidate, and redemption in the case of unknown or absent mortgagees. These provisions will apply to chattel and other forms of mortgages of personalty, subject to the terms of any other statute such as the Bills of Sale and Other Instruments Act.

77. Implied obligations in mortgages. Section 69 of The Real Property Acts implies against the mortgagor a covenant to pay principal and interest secured by the mortgage and a covenant to repair and keep in repair all buildings and improvements on the land with a corresponding right on the part of the mortgagee to enter and inspect the state of repair. The first of these covenants is not a necessary part of a mortgage, which in itself implies a loan, and the only practical function of the implied covenant is to attract the longer period of limitation appropriate to debts under seal: Fisher & Lightwood's Law of Mortgages (8th ed.) at p. 26. The second of these covenants, i. e., as to repair, appears in almost identical terms in s. 80 of the New South Wales Conveyancing Act.

Because mortgages are almost invariably executed in formal fashion, usually in standard form, occasions for resorting to the statutory implied covenants must be rare. But these provisions have for so long formed part of the law that it would be unwise to abolish them altogether. We therefore propose that covenants such as those in s. 69 of The Real Property Acts should be implied in all mortgages whether or not the subject lands are under those Acts; that obligations in the form of those covenants should be implied in all instruments and take effect as covenants in the case of mortgages by deed; and that s. 69 of The Real Property Acts should be repealed.

78. Variation or postponement of mortgage. Section 63 of The Real Property Acts, 1861 to 1963, provides for discharge of a mortgage by an indorsement thereon signed by the mortgagee and attested by a witness, a notation of which discharge is to be entered in the register on production of the bill of mortgage so indorsed. Similar provisions appear in s. 275 of the Land Act, and Reg. 133 of the Mining Act Regulations. There are also some particular provisions in The Building Societies Acts (s. 39), The Friendly Societies Acts (s. 33), and The Industrial and Provident Societies Acts (Sch. III), as to discharges by receipt indorsed on or annexed to the mortgage.

However, none of these statutory provisions covers the case of a variation in the mortgage, whether in relation to the rate of interest payable, the amount secured by the mortgage, or the term or currency of the mortgage. This is a cause of considerable inconvenience since it means that if, in the case of land under The Real Property Acts, it is desired to vary the mortgage in any of the foregoing respects it is necessary to discharge the existing mortgage and execute a fresh one.

Section 91 of the New South Wales Conveyancing Act provides that such variations may be effected by memorandum indorsed on the mortgage, signed by the parties, attested by a witness, and, in the case of registered land, registered under the Real Property Act. The present clause, together with the relevant forms in the Schedule, are based upon the New South Wales section and forms. It is not proposed to make any alteration in the provisions respecting discharge in s. 63 of The Real Property Acts or other legislation referred to above.

The N. S. W. Conveyancing Act in the provision mentioned does not expressly permit of variation of a mortgage (e. g., as to the terms of a covenant or condition therein) in a respect other than those mentioned above, nor does it enable the priority of one mortgage to be postponed to that of any other. It has been suggested by a senior legal assistant in the Conveyancing Department of the Crown Law Office that cl. 78 should be extended to provide for such matters. We accept this suggestion and, in recommending the adoption of s. 91 of the New South Wales Act, we have modified that provision accordingly.

79. Inspection and production of instruments. Apart from statute or special provision in the mortgage, a mortgagor is not entitled to see the title deeds after he has delivered them to the mortgagee: Chichester v. Marquis of Donegall (1870) 5 Ch. App. (1870) 5 Ch. App. 497; Bank of New South Wales v. O'Connor (1889) 14 App. Cas. 273, 283. In England, New South Wales, and Victoria there are statutory provisions which confer on the mortgagor a right to inspect or make or, in the case of New South Wales, to be supplied with copies or abstracts of or extracts from the documents of title to the mortgaged property upon payment to the mortgagee of his expenses in that behalf. In New South Wales this power is also conferred on the mortgagor's solicitor and extends not only to documents of title but also to other documents relating to the mortgaged property. The New South Wales section (s. 96 of the Conveyancing Act) also entitles a mortgagor of land under the Real Property Act to require lodgment of the certificate of title or other document of title to allow of registration of any authorised dealing by the mortgagor with the land.

In Queensland it has been held that a registered mortgagee is not entitled to the certificate of title, and that the mortgagor as registered proprietor can execute a second mortgage although not in possession of the certificate of title: Clarkson v. Mutual Life Association of Australia (1879) 5 Q. S. C. R. 165. However, without such certificate of title, a second or subsequent mortgage is incapable of registration, and the standard form of mortgage now expressly provides that the mortgagee is entitled to possession of the title deeds and other documents of title. This has the consequence that a second or subsequent mortgage cannot in practice be effected without the consent of the first mortgagee and production of the certificate of title, and first mortgagees are generally reluctant to consent to a second mortgage,

It is difficult to understand such reluctance as a matter of law. Legally speaking, a registered first mortgagee cannot possibly be prejudiced by registration of a second or subsequent mortgage, which is in all respects subject to the prior mortgage. It is true that notice of the subsequent mortgage may prevent effective tacking of further advances to the possible prejudice of the later mortgagee, but such tacking is in any event the subject of a recommendation elsewhere in this Report. The unwillingness of first mortgagees to consent to a second mortgage appears to be based entirely upon extra-legal considerations, such as that a mortgagor who wishes to give a second mortgage is often over-extended so far as credit is concerned, and a second mortgage is (in the opinion of the first mortgagee) likely to be beyond his means. Hence (so the reasoning proceeds) the first mortgagee may be obliged to realise the mortgage and so may ultimately incur the commercial stigma of enforcing sale of the mortgaged property.

We do not believe that first mortgagees should be permitted in this manner to remain the arbiters of the financial affairs of mortgagors, and we recommend the adoption of s. 96 of the New South Wales Act with the addition of an explicit provision in sub-s. (2) thereof, which will make it clear that a mortgagor is entitled to require production of the certificate of title at the Titles Office to enable a second or subsequent mortgage to be registered. We also propose that, as in New South Wales, these provisions should not be capable of being excluded by means of a stipulation to the contrary.

Sub-clause (4) is common to both the English and Victorian legislation and is designed as a protection to the mortgagee.

Dissenting Memorandum of J. J. Rowell, Esq.

Whilst I appreciate the reasons that have prompted the inclusion of this provision, my experience dictates that it will prove unsatisfactory in practice from the mortgagee's point of view. I consider that its adoption would result immediately in a considerable reduction in the amount of

(Dissenting memorandum - continued)

finance which any lending organisation in Queensland would make available to an intending borrower on a particular security.

Most lending bodies in Queensland will advance about 65% of their own valuation of the relevant property. This figure fluctuates with circumstances, e. g., the financial standing of the borrower, his ability to repay a minimum amount monthly or quarterly, and the ability to provide additional security. In some instances advances are made as high as 75% of the value and, if supported by a guarantee, 80%.

If, however, it were made mandatory for a first mortgagee to consent at any time to a second mortgage on the property, irrespective of the identity of the second mortgagee, or the terms of such second mortgage, and to produce the title deed on demand, it would undoubtedly result in an immediate reduction of the above percentage. In fact, some lenders would be likely to withdraw from the field altogether as they only lend money incidentally to their main avenues of business.

Whilst the granting of a second mortgage would have no effect in law on the first mortgagee's rights, it would undoubtedly be reflected in the ability of the mortgagor to keep up his repayments under the first mortgage. The tendency of a financially embarrassed borrower to over-reach himself is notoriously well known.

Such a provision would also place lending institutions, for example banks and life assurance societies, in an embarrassing position. Not unnaturally, such bodies are loath to figure in foreclosure proceedings or as a mortgagee exercising power of sale unless all other avenues of recovery have proved abortive. As more mortgagors defaulted so would the position worsen.

It must also be remembered that War Service Homes Division only in rare cases permits a second bill of mortgage. The proposed legislation would not affect the Division and would result in War Service being placed in a far stronger position than any other lending body.

Another factor that should be taken into consideration is that possession of the relative title deed enables a mortgagee to determine which, if any, subsequent dealings it will approve, e. g., a lease or a grant of easement might be lodged in the Real Property Office but without the deed cannot be registered. Compulsory production of the deed at the insistence of the second mortgagee will result in the immediate registration of all such dealings, although admittedly subsequent to registration of the second mortgage. The problem could probably be overcome by adopting s. 33A of the New South Wales Real Property Amendment Act 1970 but would only be an additional burden to the first mortgagee.

Yet another difficulty the first mortgagee would face would be that of notice, and the attendant obligations in every instance to protect the second or subsequent mortgagees upon payment out of the first security.

80. Actions for possession by mortgagors. Section 98(1) of the English Law of Property Act, 1925, s. 98(1) of the Victorian Property Law Act 1958, and s. 11 of the New South Wales Conveyancing Act contain a provision which confers on a mortgagor entitled to possession a right of action for damages for trespass. This provision is identical with s. 5(5) of The Judicature Act of 1876 (Qld.) and, indeed, all such provisions have a common origin in the Judicature legislation. The English and Victorian legislation adds a further subsection which is intended to preserve any other power of a mortgagor to take proceedings in his own name.

The purpose of these provisions is to enable a mortgagor who is entitled (before entry by the mortgagee) to possession but is not in fact in possession of the mortgaged property to maintain proceedings where formerly the only title to do so was in the mortgagee as owner of the legal estate: see Sykes: Law of Securities, at pp. 58-59. The section is therefore of importance mainly, if not only, in the case of mortgages of old system land. It is, however, more conveniently placed in a property statute rather than in The Judicature Act, and we therefore recommend the repeal of s. 5(5) and the enactment in the proposed Act of a section in the form of those in the English and Victorian statutes.

81. Tacking and further advances. Under the general law tacking by mortgagees may assume one of two forms. One of these is where a legal mortgage is given to A, followed by an equitable mortgage to B, and a further mortgage to C. Priority between competing equitable interests is regulated by the time at which they arise. Hence, in the example given, B's mortgage enjoys priority over that of C. But if C succeeds in obtaining the legal estate by obtaining a transfer of A's mortgage, he is able to tack the third mortgage to the first mortgage and so "squeeze out" B's second mortgage. This is described as the third mortgagee's tabula in naufragio and the doctrine of tacking so applied has the effect of altering the ordinary rule as to priorities: see Fisher & Lightwood, at p. 395.

The other and more common application of the doctrine of tacking is with respect to further advances made by the mortgagee to the mortgagor after execution of the mortgage. In the case of land under the general law a legal mortgagee may by virtue of his legal estate tack a further advance to the existing mortgage and so acquire priority for that advance as against a later equitable mortgagee. This power also extends to an equitable mortgagee if the intervening mortgagee agrees to the transaction or if the prior mortgage makes express provision for the further advance. But in each instance notice of the subsequent mortgage at the time of the further advance precludes the prior mortgagee from effectively tacking the further advance: see Hopkinson v. Rolt (1861) 9 H. L. C. 514.

In England tacking in the first form (tabula in naufragio) has been abolished by s. 94 of the Law of Property Act. It is, as Fisher & Lightwood point out, unjust to the mesne incumbrancee and depends upon the accident of the later incumbrancee's acquiring the legal estate. The same step has been taken in Victoria: Property Law Act, 1958, s. 94.

The foregoing legislation has also modified and altered the power to tack further advances. By virtue of s. 94(1) of the above Acts tacking is now possible in England and Victoria, whether the mortgage is legal or equitable, if (a) an arrangement is made to that effect with the subsequent mortgagees; (b) the prior mortgagee had no notice of such subsequent advances at the time he made the further advance; or (c) the mortgage imposes on the mortgagee an obligation to make further advances. As Fisher & Lightwood remark at p. 400, this in one respect effects an extension of the power to tack since it is no longer dependent upon possession of the legal estate or, in the case of an equitable mortgage, upon a contract to make further advances.

The principle that notice precludes tacking is, however, preserved in case (b) above, but s. 94(2) qualifies the rule that registration constitutes constructive notice. In the case of a current account, e. g., with a bank, further advances may, notwithstanding registration and hence constructive notice of the subsequent mortgage, be effectively tacked if either (i) the subsequent mortgage was not registered at the date of the original advance, or (ii) it was not registered at the date when the last search (if any) was made by or on behalf of the mortgagee.

Because in the case of the first of these forms of tacking, priority is dependent on acquisition of the legal estate, it has no application to mortgages which take their priority according to the dates of their registration and under which the mortgagee acquires a security interest only and not the legal estate. Such is the case with mortgages under The Real Property Acts, the Land Act, and The Miners' Homestead Leases Act. Accordingly, tacking in the first form may safely be abolished in Queensland since it is now capable of affecting only old system land.

The practice of tacking further advances remains possible under a system of registered conveyancing, but its utility is greatly diminished by the fact of registration, which constitutes constructive notice to the prior mortgagee of the existence of the subsequent incumbrance. In this regard we recommend the adoption of the English and Victorian sub-s. (3) which will preserve the facility of tacking particularly in the case of current bank accounts. The relevant provision in the proposed clause has accordingly been reformulated to accommodate the provisions for registration which exist under the various property statutes in Queensland.

It should be added that s. 8 of the Bills of Sale and Other Instruments Act 1955-1971 has adopted a different approach to the present problem. Section 8(2) of that Act expressly provides that registration shall not constitute notice of the existence of an instrument or of its contents to the grantee of any prior instrument relating to the same chattels. However, the proposed clause is confined to land (sub-cl. (5)), and second mortgages of the same chattels are so uncommon as to justify this divergence between the two systems.

82. Powers incident to the estate or interest of mortgagee.

Sale. A mortgagee of registered land in Queensland enjoys a statutory power of sale in the case of default in payment of principal money or interest secured by a registered bill of mortgage: The Real Property Acts, 1861 to 1963. The standard form of mortgage in use in this State also includes a power on sale to grant or dedicate roads, ways and easements, a power to sell in subdivision and to allow the purchaser time for payment. A statutory power of sale is also conferred on a mortgagee of a Crown lease under s. 279(1)(b) of the Land Act, on a mortgagee of a miner's perpetual homestead lease by s. 29(6)(ii) of The Miners' Homestead Leases Acts, and by Reg. 129 of the Mining Act Regulations in the case of a mining lease, although in each of these cases the powers of sale are subject to statutory restrictions as to the mode of their exercise.

The property statutes of other Australian States have general provisions which are based upon or are similar to the provisions of s. 101 of the English Law of Property Act and which derive from s. 19 of the English Conveyancing Act of 1881. In Victoria, Western Australia, South Australia and New South Wales the power of sale includes a power on sale to dedicate roads, grant easements, etc., and to sell for a sum payable by instalments, and in New South Wales it includes a power to sell in subdivision or otherwise. We recommend the adoption of these general provisions with the addition of the further incidental powers included by the statutes of the lastmentioned States.

Insurance. The standard form of Queensland mortgage imposes on the mortgagor an obligation to insure against damage by fire and in default confers on the mortgagee a power to insure and charge the cost thereof to the mortgagor. No statutory power exists in Queensland, although the other States each have a provision which is adopted from s. 101(1)(ii) of the English Act. This statutory power is similar to that contained in the standard form mortgage in Queensland (although exercise of the power is not limited to default by the mortgagor), and we propose that it should be adopted here but extended to insurance against storm and tempest damage. This power is naturally applicable to mortgages of Crown leasehold and miners' homestead leases.

Receiver. In Queensland there is no statutory power of appointing a receiver, although such a power is conferred by the English and State Acts, that contained in the New South Wales Conveyancing Act being slightly less extensive than its counterparts elsewhere. In Queensland the standard form does not include power to appoint a receiver and an application for and appointment by the court appears necessary. The statutory power which exists in other States should therefore be adopted since its inclusion appears to create no problems in the case of registered land.

Timber. The English and New South Wales provisions confer on the mortgagee a power to cut and sell timber. The statutes of the other States do not include this power, nor does the standard form mortgage in Queensland although it does contain a prohibition against felling and removal of timber without the consent of the mortgagee. The English and New South Wales provisions can usefully be adopted, although in the case of Crown lands the power to fell and remove timber will remain subject to the provisions of the Land Act.

Fixtures. Section 109(1)(e) of the New South Wales Conveyancing Act confers an express power to sever and sell fixtures on the mortgaged property, and this is declared by s. 109A of that Act not to constitute the mortgage a bill of sale under the Bills of Sale Act or subject to avoidance under that Act or the Companies Act. The standard form of mortgage in Queensland includes fixtures as part of the security and prohibits their removal by the mortgagor, but does not expressly confer a power of severance and sale by the mortgagee. It follows that under this power fixtures may not be severed and sold separately: Re Yates; Batchelder v. Yates (1888) 38 Ch.D. 112. However, the inclusion of a power similar to that conferred by s. 109(1)(e) of the New South Wales Act would in Queensland render the mortgage of fixtures registrable as a bill of sale within the meaning of the Bills of Sale and Other Instruments Act 1955-1970; see definition of chattels in s. 6(1) of the Act. In New South Wales s. 109A of the Conveyancing Act contains an express declaration that a mortgage conferring a power to sever and sell fixtures separately is not a bill of sale; but the New South Wales Bills of Sale legislation differs materially from that of England: see Stuckey, op. cit. at p. 232. By contrast the English and Queensland legislation are alike in this respect (see generally Fisher & Lightwood at pp. 67-70), and for this reason it would be inappropriate to confer a statutory power to sever and sell fixtures such as that contained in s. 109(1)(e) of the Conveyancing Act.

Sale of easements. In New South Wales the Conveyancing Act includes power to sell an easement right or privilege over or in relation to the mortgaged property. This presumably authorises sale by the mortgagee of, for example, a profit a prendre. We recommend the inclusion of such a power.

Application of section. The proposed provision will apply only to mortgages executed after the commencement of the Act and may be varied or excluded by the terms of the mortgage itself. In the legislation elsewhere, the statutory powers are available only in the case of a mortgage by deed, but, in conformity with the policy adopted here, of substituting instruments in writing for deeds, the proposed clause will apply to any instrument of mortgage whether by deed or not.

In all States the statutory powers extend and apply, to a greater or lesser degree, to land under the Torrens system: see N.S.W. s. 109(4) and S.A. s. 48, and compare Vic. s. 102 and W.A. s. 58, where the extension to Torrens system mortgages is the most limited. In accordance with the policy explained earlier, we think it desirable that, so far as possible, there should be uniformity in the powers and provisions regulating mortgages, irrespective of differences in tenure and in the terms of the statute under which title is acquired. Accordingly, we propose that the above

provisions should extend to mortgages of land under the Land Act, The Miners' Homestead Leases Acts and The Mining Acts and Regulations thereunder, although subject to the provisions of those Acts or Regulations. This will mean that a mortgagee of a Crown leasehold will, for example, be entitled to appoint a receiver of rents and profits during, but only during, the period of a year for which by s. 279(2) the mortgagee is permitted to retain possession prior to sale.

83. Regulation of exercise of power of sale. In all jurisdictions there are legislative provisions regulating the exercise of the power of sale, although there is considerable divergence between the various provisions with respect to the periods of, and necessity for, notice as a condition precedent to sale. The position in Queensland is that, in the case of mortgages of land under The Real Property Acts, the statutory power of sale is exercisable if default has been made for the space of a calendar month in the payment of principal or interest or in the observance of a covenant expressed or implied in the mortgage: see s. 57. The same section requires continuation of the default for a second period of one month after service of the notice and before the power is exercised. Section 59 authorises a variation of the second period of one month and the standard form of mortgage reduces this period to one day. But it has been held that the requirement of a second period of notice may not be entirely dispensed with, nor may the first period of one month be reduced: cf. Hall v. Hall [1956] Q.W.N.28; and cf. Jaffe v. Premier Motors Ltd. [1960] N.Z.L.R.146. The first prescribed period of one month does not, however, apply to default in performance of covenants other than payment of principal or interest. In other States, with the exception of New South Wales, the position seems to be that the period of the statutory notice required in the case of registered land may be shortened but not altogether dispensed with: see Sykes: Law of Securities, pp.187-188. In New South Wales s.111 of the Conveyancing Act expressly incorporates the provisions of the Real Property Act in that State relating to notice before sale but, since 1930, s.58A of the latter Act has permitted both the period of notice and the notice itself to be dispensed with.

In the case of mortgages of Crown leases in Queensland, s.279(1)(b) of the Land Act requires publication, both in the Gazette and in a newspaper, of not less than 30 days notice of intended sale. An identical requirement appears in s.29(1)(6)(ii) of The Miners' Homestead Leases Acts, 1913 to 1965 and in Reg.129(ii) of the Mining Act Regulations. Compliance with these statutory provisions has been held to be mandatory: Plastic Enterprises Pty. Ltd. v. The Southern Cross Assurance Company Limited [1968] Qd.R.401, and variation of or dispensation with these requirements of notice is therefore not possible.

Apart from special enactments such as the foregoing, the property legislation in England and the Australian States contains general provisions requiring notice before exercise of the power of sale, all of which are derived ultimately from the English Conveyancing Act, 1881. In England the requisite period of notice is three months after service of notice in the case of principal, or two months default in payment of the same amount of interest. In New South Wales the periods are two months and one month respectively, and in Victoria and South Australia, the respective periods are one month in each instance. In each of these jurisdictions both the periods and the requirement of notice may be modified or dispensed with, and Fisher & Lightwood (op. cit.) at p.307 remark that this is commonly done in England. The Western Australian provision differs slightly from the others in that s.59 of the Property Law Act 1969 of that State omits reference to arrears of interest and excepts from the requirement of notice the case of principal money payable on demand: s.59, although both the period and the length of notice appear to be capable of being varied or dispensed with as in other States.

The result is that, except in the case of mortgages of Torrens title land (and, in New South Wales, even in this instance), there is no general legislative power of sale, and in no case is the period of notice invariable. However, most mortgages in Australia are of Torrens title land so that, with the exception of New South Wales, a statutory obligation to give notice exists as a prerequisite to sale of the mortgaged property. The purpose of notice is to confer on the mortgagor a final opportunity of paying off the debt, and in one case decided before the enactment in England of the Conveyancing Act 1881 it was said that a provision conferring a power of sale without prior notice was of an oppressive character: see Miller v. Cook (1870) L.R. 10 Eq. 641. Notice, in our view, therefore performs a useful and justifiable function and we are reluctant to allow it to be dispensed with altogether, particularly since it has for so long formed part of the law relating to mortgages under The Real Property Acts. On the other hand, we consider that a single notice followed by a period of one month (or preferably 30 days) represents a sufficient protection to the mortgagor and that there is no justification for requiring an additional period of one month before exercise of power of sale particularly in view of the fact that the second period is in practice invariably reduced to one day.

Finally, there is the question of notice before sale where the default consists of some breach other than failure to pay principal or interest. At present the position under s. 57 of The Real Property Acts is that a breach, and even a trivial breach, of this kind entitles the mortgagee to proceed to sale forthwith even though such default has not continued for one month, provided, of course, that the second period of one month has (as invariably is the case) been reduced to one day. The distinction is perhaps founded on the possibility that the default may be endangering the mortgaged property, so as to justify immediate action by the mortgagee. But it is difficult to see why such action should take the form of sale, since the mortgagor usually possesses powers of entry and other remedies which will enable him to protect the subject property. In this regard we prefer to impose a general requirement of 30 days notice as a prerequisite in all cases to exercise of the power of sale.

The particular provisions of the Land Act and of The Miners' Home-stead Leases Acts and Mining Act Regulations need to be preserved. These provisions are special and appear to be intended as much for the protection of the public interest in Crown lands as for the benefit of individual mortgagors: see Plastic Enterprises Pty. Ltd. v. The Southern Cross Assurance Company Limited (supra) at pp. 405-406. Accordingly, mortgages of land under these Acts will be exempt from the provisions of the proposed new section.

84. Duty of mortgagee as to sale price. It is well settled that a mortgagee in exercising his power of sale is not in the position of a trustee for the mortgagor: see Cuckmere Brick Co. v. Mutual Finance Ltd. [1971] 2 W.L.R. 1207, at p. 1218. Beyond this, however, there is a remarkable divergence in the authorities and textbooks in defining the nature of the mortgagee's duty. In Farrar v. Farrar's Ltd. (1888) 40 Ch.D. 395, 411, Lindley L.J. said that the mortgagee was under a duty to take reasonable precautions to obtain a "proper price" for the property, and a like view of the mortgagee's obligation was taken by the Court of Appeal in Tomlin v. Luce (1889) 43 Ch.D. 191 and by the Privy Council in McHugh v. Union Bank of Canada [1913] A.C. 299. At times the expression "best price" is substituted for proper price in this context: see Reliance Permanent Building Society v. Harwood-Stamper [1944] Ch. 362, 364, 365. See also Fisher & Lightwood, op. cit. at pp. 310-314.

On the other hand, in Kennedy v. de Trafford [1896] 1 Ch. 762; affd. [1897] A.C. 180, there are statements which suggest that the mortgagee's duty is satisfied if he does not act in bad faith or "recklessly", or, as is sometimes said, if he does not "wilfully sacrifice" the interests of the mortgagor.

In Barnes v. Queensland National Bank Ltd. (1906) 3 C.L.R. 925 the statements in Farrar v. Farrar's Ltd. and Kennedy v. de Trafford were cited by Griffith C.J. at pp. 942-943 almost as though they both expressed a single principle (see also Pendlebury v. Colonial Mutual Life Assurance Society (1912) 13 C.L.R. 676, 680). However, it is probably true to say that in Australia a mortgagee's legal duty in exercising his power of sale is generally regarded as satisfied if he acts bona fide and not in "reckless disregard" of the interests of the mortgagor: see Sykes: Law of Securities at pp. 72, 184.

The question has recently been considered at some length by the English Court of Appeal in Cuckmere Brick Co. v. Mutual Finance Ltd. [1971] 2 W.L.R. 1207, where the Court expressed a preference for the test laid down in Farrar v. Farrar's Ltd., rather than for that applied in Kennedy v. de Trafford, holding that the mortgagee is under a duty to the mortgagor "to take reasonable care to obtain a proper price" or, as Salmon L.J. preferred to express it, "the true market value" in respect of the property sold. It is noteworthy that in England an obligation is imposed on building societies to secure "the best price reasonably obtainable": Building Societies Act 1962, s. 36, replacing an earlier statute, and, in para. 228 of the Report to the Director of Law Reform in Northern Ireland, it has recently been recommended that this obligation be extended to all mortgagees.

It seems to us that, on a matter of such importance, clarity and certainty are essential and that the conflict of authorities referred to above should be resolved in favour of the imposition of a duty to take reasonable care to ensure sale of the mortgaged property at the "market value". In Cuckmere Brick Co. v. Mutual Finance Ltd. (supra) Salmon L.J. expressed the view that the terms "proper price" were somewhat nebulous and suggested that the phrase "best market value" was preferable. Whilst respectfully agreeing with this stricture, we think that inclusion in the formulation of the duty of care of the word "best" might perhaps be capable of being construed as imposing too precise and exacting an obligation upon a mortgagor, although we note that adoption of the expression "best price" has recently been recommended in Northern Ireland. On the whole, we consider that "market value" best states the standard which should be attained by a mortgagee exercising power of sale.

With the above variation, the proposed clause is derived substantially from the terms of the provision recommended in Northern Ireland (see cl. 126 of that Report) and, like it, incorporates a statutory obligation on the part of the mortgagee to notify the mortgagor of particulars of the sale within 28 days of its completion.

We may add that we do not believe that our recommendation, if put into effect, will significantly affect the procedures at present in use by banks, finance houses and other large-scale lenders, which, in exercising mortgagee's powers of sale, do in practice conform to the projected standard by taking reasonable steps to obtain a proper sale price.

85. Effect of conveyance on sale. There is no right, either at common law or in equity, for a mortgagee to sell the mortgaged property free from the equity of redemption, and any conveyance made by him in the exercise of his power of sale leaves the equity of redemption vested in the mortgagor: see Megarry & Wade, *op. cit.*, at pp. 903. In England it became the practice to confer in the mortgage deed a power to sell the subject property free of the equity of redemption, and similar powers were later conferred by statute, beginning with Lord Cranworth's Act in 1860 (23 & 24 Vict. c. 145, ss. 11-16), and now by s. 104(1) of the Law of Property Act. This and other provisions of that Act enable a mortgagee by subdemise of a leasehold to transfer the nominal reversion of the mortgagor, but there is no statutory provision which enables an equitable mortgagee to convey the legal title, and in England it remains necessary either to obtain a court order for sale or to take a power of attorney from the mortgagor.

The effect of a sale of land under the provisions of The Real Property Acts is governed by s. 58 of those Acts which provides that "upon such sale as aforesaid" (i. e., under the power conferred by s. 57) and upon registration of any memorandum or instrument of transfer executed by the mortgagee, the estate or interest of the mortgagor described as to be conveyed shall pass to and vest in the purchaser freed from all liability on account of such mortgage or any mortgage registered subsequent thereto.

In the case of the Land Act, s. 279(4) provides that upon sale of a holding under the power conferred by that section the mortgagee may transfer the lease to the purchaser. A similar provision appears in s. 29(7) of The Miners' Homestead Leases Acts and in Reg. 131 of the Regulations under The Mining Acts. It seems reasonably clear that the effect of these statutory provisions is to enable a mortgagee exercising power of sale to effect a transfer free of the equity of redemption of the mortgagor.

The legislation of the Australian States contains provisions similar in purpose and effect to those of s. 104(1) of the Law of Property Act although there is a certain amount of diversity. Section 60(1) of the Western Australian Property Law Act 1969 (which is based on Lord Cranworth's Act) is the widest of these provisions and is intended to enable even an equitable mortgagee to transfer legal title without the necessity for a court order. We propose the adoption of this provision in sub-cl. (1), although confining it to unregistered land. Since it is not proposed that s. 58 of The Real Property Acts should be repealed, it is not necessary to repeat in this clause the terms of that section; but, in order to avoid difficulties in the construction of the words "upon such sale as aforesaid" in s. 58 arising from the repeal of s. 57, we consider that s. 57 should be replaced by a provision expressly enabling the mortgagor of land to exercise the statutory power of sale conferred by the proposed Property Law Act, to read as follows:-

"57. Remedy when mortgagor or encumbrancer is in default. Power to sell. The mortgagee or encumbrancee shall have and may exercise the power to sell conferred by the Property Law Act, 197 ."

Furthermore, we propose by sub-cl. (2) to retain a provision, in terms similar to the operative part of s. 57, which is intended to confirm the existing power of the mortgagee to sell all or part of the estate or interest of the mortgagee in the mortgaged land.

The provisions of the Land Act, The Miners' Homestead Leases Acts, and the Regulations under The Mining Acts form an important part of the scheme of those Acts and should, we consider, not be brought within the scope of this clause.

86. Protection of purchasers. The Law of Property Act, s. 104(2), in England and similar legislation in the Australian States contain provisions designed to protect the purchaser's title against impeachment on the ground that the power of sale of the mortgagee from whom he purchases has not arisen or become exercisable. (A power of sale arises when the mortgage money is due, but such power becomes exercisable only after the requisite conditions, such as the giving of notice, etc., are fulfilled: see Megarry & Wade, op. cit., at p. 903). In the case of The Real Property Acts, s. 57 relieves the purchaser of the obligation of inquiring whether the requisite default or notice has been made or given in accordance with that section. There is considerable variation in the corresponding provisions of Torrens statutes in other States, but it seems likely that all such provisions would now be construed as affording protection to a purchaser in the period before registration, since, in view of the decision in Fraser v. Walker, [1967] 1 A.C. 569, the title of the purchaser after registration is protected by provisions such as s. 44 of the Queensland Acts and so is unimpeachable: cf. Sykes, op. cit., at pp. 188-191.

There is no comparable section in the Land Act, The Miners' Homestead Leases Acts or the Regulations under The Mining Acts. In one respect this is understandable since these statutes require advertisement in the Gazette, with the consequence that it is not difficult to determine whether this condition for exercise of the power has been fulfilled. But in at least one other respect, i. e., whether the power to sell has arisen, it seems desirable to extend the protective provisions of this clause to mortgagee's sales under the statutory powers conferred by those statutes, and this is the object of sub-cl.(3).

87. Application of proceeds of sale. Section 105 of the Law of Property Act in England and similar provisions in the legislation of the Australian States prescribes the order of application of money on sale by a mortgagee, i. e., after appropriating any sum required to meet prior incumbrances, it is to be applied first in discharge of the costs and expenses of sale or attempted sale, and secondly in discharge of the mortgage money, interest and costs and any other money due under the mortgage. The residue is then to be paid to the person "entitled to the mortgaged property, or authorised to give receipts for the proceeds of sale thereof". As Fisher & Lightwood point out (*op. cit.* at p. 315, note (a)), the person entitled to the property at the time of division of the surplus is, strictly speaking, the purchaser; but the section clearly intends to refer to the subsequent incumbrancee, if any, or to the mortgagor or his successors in title, and there is authority that the duty of the mortgagee is to pay to the incumbrancee next in order: Re Thomson's Mortgage Trusts [1920] 1 Ch. 508.

In Queensland s. 57 of The Real Property Acts contains a provision requiring appropriation of purchase moneys arising from a mortgagee's sale first in payment of expenses occasioned by the sale; secondly, in payment of moneys due to the mortgagee; thirdly in payment of subsequent mortgages, and finally the surplus is to be paid to the mortgagor. This is somewhat more explicit than the English section, and the proposed draft clause includes a reference to subsequent mortgages which will avoid the interpretation problem mentioned by Fisher & Lightwood. Otherwise we recommend the adoption of s. 105 of the English Act with the addition of the words "in fact" after "money which" in the first line of the section.

In the case of mortgages under The Miners' Homestead Leases Acts and Regulations under The Mining Acts, s. 29(6) and Reg. 129 respectively require payment of the balance of the proceeds of sale to the mining warden on behalf of the persons interested, and sub-cl.(2) is intended to ensure that this requirement is not disturbed.

As to the Land Act, s. 279(3) was amended in 1968 to prescribe in some detail the order in which, and the persons to whom, the proceeds on a sale by a mortgagee are to be disposed of. This prescription is very similar in effect to that proposed in the present clause, although it also expressly includes provision for payment of charges taking priority over the mortgage. Because of this difference, it seems preferable to preserve the particular order prescribed in s. 279(3) by excluding from the proposed clause sales by mortgagees under the Land Act.

88. Provisions as to exercise of power of sale. The form of statutory power of sale conferred by legislation modelled on the English Conveyancing Act and s. 106(1) of the Law of Property Act provides for the exercise of that power by the person for the time being entitled to receive and give a discharge for the mortgage money. This is, of course, ordinarily the mortgagee himself, but the effect of this provision is to extend that power to the mortgagee's heirs or administrators, at least once transmission has been entered up.

All legislation in Australia based upon the English Conveyancing Act and Law of Property Act also contains provisions in the form of s.106 of the latter Act providing (1) that exercise of the power of sale does not affect the right to foreclose; (2) that the mortgagee is not answerable for any involuntary loss happening in (a) the exercise of the power of sale, or (b) of any trust connected therewith, or (c) of any power or provision in the mortgage; and (3) entitling the mortgagee on exercising his power of sale to demand all deeds and documents relating to the property which a purchaser under the power of sale would be entitled to demand and recover from him.

So far as (1) is concerned, the right to sell is exercisable only by leave of the court after decree nisi for foreclosure: Stevens v. Theatres Ltd. [1903] 1 Ch.857. As regards (2), Stuckey, *op.cit.* at p.538, defines involuntary loss as a loss arising in circumstances in which the mortgagee had neither intended to bring it about nor acted in such a way as to cause it, and states that "the section does not appear to have altered the law as regards liability for loss". The standard form bill of mortgage in Queensland contains a like provision. We consider that this should be made subject to the statutory duty imposed by cl.84 as to selling at market value.

With respect to (3) (documents of title), s.58 of The Real Property Acts expressly entitles the purchaser from a mortgagee exercising power of sale to receive a certificate of title for the land purchased, so that this additional right in the mortgagee probably does not add significantly to the efficacy of mortgagee's power of sale, particularly when it is borne in mind that under the standard form bill of mortgage the mortgagee is entitled as from execution of the mortgage to possession of the title deeds and other documents of title to the land.

89. Mortgagee's receipts, discharges, etc. Section 107(1) of the Law of Property Act provides a statutory power on the part of the mortgagee to give receipts, and relieves the person paying money or transferring securities from the obligation of inquiring whether any money remains due under the mortgage. The Victorian, New South Wales, South Australian and Western Australian provisions are similar but add a further clause relieving the payee or transferee from seeing to the application of the money or securities so paid or transferred. This avoids the necessity for inquiry as to application of trust funds, etc., and is similar to the provision contained in s.57 of The Real Property Acts. There is no comparable provision in the Land Act, The Miners' Homestead Leases Acts, or the Regulations under The Mining Acts.

Section 107(2) of the English Act of 1925 contains a provision, adopted in the legislation of the Australian States, which prescribes the order of application of moneys received by the mortgagee under the mortgage or in the exercise of an express power of sale. It is similar to the order prescribed for application of moneys received on exercise of the statutory power of sale.

It is proposed that the English section be adopted with the addition to sub-s.(1) which appears in the State legislation.

90. Amount and application of insurance money. Related to the proposed statutory power to insure against damage by fire conferred upon the mortgagee, is a provision which appears as s.108 of the Law of Property Act, 1925 and in similar form in the legislation of Victoria, New South Wales and Western Australia. There is a difference between the English and other sections in that the former limits the amount of insurance to that specified in the mortgage deed, or, if none is specified, to two thirds of the amount required, in case of total destruction, to restore the property insured, whereas the Australian legislation provides for insurance to the full insurable value of the buildings or the amount owing to the mortgagee. The succeeding provisions of all sections are alike in prohibiting insurance by

the mortgagee where the mortgage deed declares that no insurance is required, or where an insurance is kept up by the mortgagor in accordance with the mortgage deed, or where the insurance is kept up by the mortgagor with the consent of the mortgagee. Such insurance money is, if the mortgagee so requires, to be applied by the mortgagor in making good the damage, or in discharge of the mortgage money. The reference in sub-cl. (4) to "any obligation to the contrary imposed by law" is to s.83 of the Fires Prevention (Metropolis) Act, 1774, which gives to persons interested a right to have insurance moneys expended in rebuilding. See, generally, Fisher & Lightwood, op. cit. at pp. 30-31.

There is no comparable statutory provision in Queensland, although the short form of covenant to insure in s.73 of The Real Property Acts provides for insurance against loss or damage by fire to the full value of the buildings if no amount is specified in the mortgage. This form of covenant is similar in effect to that in the statutory provisions mentioned above, but is replaced in the standard form bill of mortgage by a much more detailed provision.

Statutory adoption of the subject clause in the form in which it appears in the legislation of Victoria, New South Wales, and Western Australia will not disturb either the express provision in the standard bill of mortgage or that contained in the short form under s.73, since the statutory provision is confined to insurances effected under the power conferred by the Act.

91. Appointment, powers, remuneration and duties of receiver. Clause 91 provides a power to a mortgagee to appoint a receiver. The present clause, which appears substantially in this form in all the modern ^{Property} statutes in other jurisdictions, defines the powers, etc., of a receiver so appointed.

There is in Queensland no general statutory power in a mortgagee to appoint a receiver, and, in the absence of express provision in the instrument of mortgage, an application to court is necessary under s.5(8) of The Judicature Act of 1876.

The New South Wales Conveyancing Act, s.115(1) provides for registration of the appointment of a receiver as a condition precedent to his powers becoming exercisable. Presumably this is required for the reason, amongst others, that a puisne mortgagee is entitled to enter into possession of the rents and profits of the mortgaged land without accounting to a prior mortgagee until the latter intervenes: see Stuckey, op. cit. at pp. 244-45.

We recommend the incorporation of this requirement as sub-cl. 9(b). The relevant form is based on that prescribed in New South Wales: see Stuckey, at p. 397.

92. Effect of advance on joint account. Under the general law conveyancing was facilitated if two or more mortgagees took title as joint tenants so that, upon the death of one, his interest passed to the survivors who could reconvey the legal estate on redemption. Since, however, equity presumed a tenancy in common, it was necessary for the personal representatives of a deceased co-mortgagee to join in the reconveyance in order to ensure that title passed and to enable the mortgagor to obtain a good receipt for the mortgage money: see Megarry & Wade, op. cit., at pp. 946-947, where it is pointed out that the same problem arose where the mortgagees were trustees, in which event the beneficiaries, being the persons entitled to the money in equity, had to join in giving the receipt.

This difficulty was in practice met by a provision in the mortgage to the effect that the mortgagee money belonged to the mortgagees jointly in equity as well as at law. Such "joint account clauses" did not affect the rights of the mortgagees inter se but enabled surviving co-mortgagees to

give a complete discharge for the mortgage moneys: Megarry & Wade, supra.

In those jurisdictions in which modern property legislation has been adopted there is now an express provision incorporating a joint account clause, which unless expressly excluded, enables the survivors to give a good discharge for the mortgage money: see Law of Property Act 1925, s. 111, and s. 99 of the New South Wales Conveyancing Act, of which sub-s. (2) requires, in the case of land under the Real Property Act, compliance with the provisions of that Act.

In Queensland s. 21 of The Real Property Act of 1877 permits the inclusion in the mortgage of a specified form of joint account clause, which has the effect of transmitting to the surviving co-mortgagees the right to receive and give a good discharge for the mortgage money and interest and to exercise and enjoy the powers and privileges vested in mortgagees by The Real Property Acts, 1861 to 1963. Such transmission is, however, not to take effect until registered in accordance with the Act of 1877.

We recommend the adoption of a provision in the form of that in s. 111 of the Law of Property Act, 1925, with appropriate additional provision to preserve the requirement of registration in case of transmission. This recommendation will involve the repeal of s. 21 of The Real Property Act of 1877, but, since the proposed section will apply only to mortgages made after the commencement of the new Act, the effect of s. 21 will be preserved in the case of mortgages, containing the joint account clause which were made before the commencement of this Act: see s. 20(1) of The Acts Interpretation Acts 1954 to 1962.

93. Obligation to transfer instead of discharging mortgage. Under the general law a mortgagee is bound upon redemption of the mortgage to convey only to the owner of the equity of redemption: *James v. Brou* (1819) 3 Swans. 234. In England the Conveyancing Act 1881, s. 15, conferred on a mortgagor entitled to redeem a statutory right to require the mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to some other person as directed by the mortgagor. This provision was amended by s. 12 of the Conveyancing Act 1882 and re-enacted in s. 95 of the Law of Property Act, 1925. Similar provisions appear in s. 95 of the Victorian Act, and s. 45 of the South Australian Act, and s. 94 of the New South Wales Conveyancing Act. Section 94(1) of the latter Act refers to "transfer" instead of "assign" and "convey" and "discharge" instead of "reconvey" and "surrender", and this language is better adapted to the requirements of The Real Property Acts, 1861 to 1963, s. 63 of which provides for discharge of a mortgage and s. 65 for transfer of mortgage. See also s. 275 of the Land Act 1962-1970. We therefore recommend adoption of this New South Wales provision.

Subsection (2) of the English and Victorian sections has the effect of enabling the mortgagor to exercise this right notwithstanding the existence of an intermediate incumbrance, such as a second mortgage. This overrules the decision in *Teevan v. Smith* (1882) 20 Ch. D. 724, which was based on sub-s. (1) as it appeared in the Conveyancing Act. *Fisher & Lightwood (op. cit.)* at p. 483 say that the subsection throws on the mortgagee the burden, to which he was formerly not subject, of determining which among several other incumbrancees is entitled to priority, but this does not present difficulties under a system of registered conveyancing such as the Torrens system or under the Land Act. In New South Wales there is an identical provision, but it appears, perhaps somewhat unnecessarily, as a separate section (s. 95). We prefer the English and Victorian precedent in this respect. In a case where there is a second mortgage, the mortgagee should not, it has been held, transfer without the consent of the second mortgagee where he has notice of that mortgage: *Re Magneta Time Co. Ltd., Molden v. The Company* (1915) 84 L. J. Ch. 814.

Each of the above sections exempts from the statutory obligation to transfer the case of a mortgagee who is or has been in possession. This is because such a mortgagee cannot by transferring under this section rid himself of the obligation to account to the mortgagor: see cases cited in Fisher & Lightwood at p. 483, n. (i).

94. Relief against provision for acceleration of payment. It is not altogether uncommon for a mortgage to contain a provision for acceleration, that is, a provision that in the event of default in payment of instalments of principal or interest or of some other breach of covenant, the full amount of principal shall forthwith become due and payable. It appears to be not within the power of equity to relieve against an acceleration provision of this kind (cf. Lamson Store Service Co. Ltd. v. Russell Wilkins & Co. Ltd. (1906) 4 C. L. R. 672), although any prejudice to the mortgagee arising from a single non-punctual payment of an instalment of principal or interest plainly bears no relation to detriment which is suffered by a mortgagor who is suddenly faced with a liability for the full amount of principal and interest which would otherwise have been payable over a period of years. Furthermore, although there was formerly thought to be a power in the court, to which an application had been made for an order for delivery of possession of the mortgaged property, to stand the application over generally on terms that the mortgagor would make good the arrears and keep up payments in the future, it now appears that the court has no such general jurisdiction: Birmingham Citizens Permanent Building Society v. Caunt [1962] Ch. 883. As was said in that case by Russell J. at p. 912 -

"where... the legal mortgagee under an instalment mortgage under which by reason of default the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring."

This state of affairs has recently attracted the attention of the Law Reform Committee in South Australia which in its Seventeenth Report has recommended (pp. 4-6) legislation, similar to that applying in the case of landlord and tenant, and enabling the mortgagor by paying arrears due and any costs of the mortgagee to reinstate the mortgage as if the default had not occurred. A partial step in this direction has recently been taken in England by s. 36 of the Administration of Justice Act 1970, which authorises the adjournment of the proceedings or the staying of judgment on terms or otherwise where it appears likely that the mortgagor will be able within a reasonable period to pay any sums due under the mortgage or to remedy any other default under the mortgage. We respectfully agree with the view of that Committee that this provision (which is confined to mortgages of land which includes a dwelling house) does not go far enough and that mortgagors should be given the benefit of protection similar to that accorded to lessees against forfeiture of lease for non-payment of rent.

In none of the Australian States is there at present any legislation which enables relief to be had by a mortgagor against the operation of an acceleration clause in circumstances of the kind outlined above. However, such statutory provision exists in Ontario, where s. 20 of the Mortgages Act 1960, c. 245, confers on the mortgagor an automatic right to relief, at any time before sale or commencement of an action to enforce the rights of the mortgagee, upon payment of the moneys due under the mortgage, exclusive of the money not payable by reason merely of lapse of time. Where an action has been commenced it is necessary for relief to be sought by the

mortgagor in the action, such relief being available prior to judgment on terms that the mortgagor pays the moneys due together with the costs of the action, whereupon the action is stayed. The section also provides that if default again occurs the court may on an application remove the stay. This, as the Ontario Law Reform Commission has recently remarked (Interim Report on Landlord and Tenant Law, at p. 52) means that -

"the interest of the mortgagee is thus protected by the requirement that the dismissal of the action or stay of proceedings is not ordered by the court until the unaccelerated arrears are paid or until the other breaches of covenant are remedied."

We consider the Ontario section a salutary provision and recommend the adoption of a form of provision based on that in s. 20 of the Mortgages Act, 1960.

95. Mortgagee accepting interest on overdue mortgage not to call up without notice. This clause is concerned with the case of default in payment at redemption date of principal and interest due under a fixed term mortgage. Under the law as it now stands such default entitles the mortgagee to enforce payment by action on the covenant or by realising his security without prior notice to the mortgagor even though he has accepted payments of interest after the time for redemption.

The purpose of the present clause is, in cases where the mortgagee has accepted interest for a period of not less than three months after default, to require the mortgagee to give to the mortgagor not less than three months notice of intention to take proceedings to recover the principal sum or to realise his security. This provision is taken from s. 92 of the New South Wales Conveyancing Act which is itself founded on s. 68 of the New Zealand Property Law Act, 1908, No. 152; cf. New Zealand Property Law Act, 1952, s. 90.

96. Period of notice for redemption after default. In the case of a mortgage for a fixed term, the rule is that a defaulting mortgagor is not entitled to redeem after the time fixed for redemption but only after giving to the mortgagee reasonable notice of his intention to do so. In equity a period of six months has traditionally been regarded as reasonable to enable the mortgagee to find a new security for his money, and the mortgagor must therefore either give such notice or pay six months interest in lieu thereof: see Fisher & Lightwood at pp. 475-476.

The period of six months was established early in the last century and has been criticised in recent times as unnecessarily long and harsh, having regard to modern conditions, and one which the legislature might think fit to alter: see Cromwell Property Investment Co. v. Western & Toovey [1934] Ch. 322, at pp. 331-332, per Maughan J.

The purpose of the present clause is to reduce the period from six to three months. We have selected this period because it coincides with that prescribed in the preceding clause, and it is clearly proper that both should be the same. The equitable rule does not apply in all circumstances, e.g., to an equitable mortgage by deposit of title deeds, which is regarded as temporary, or where the mortgagee has taken steps to enforce the mortgage. Sub-clause (2) is intended to ensure that mortgagor's rights in this respect are not affected.

97. Right to redeem before time fixed for redemption. Where a time is fixed for redemption a mortgage is not redeemable until that time has arrived: see Fisher & Lightwood at p. 460. Hence, a mortgagor may not redeem prior to the time fixed for redemption even though the mortgagor tenders interest during the intervening period: Brown v. Cole (1845) 15 Sim. 427; see also Stuckey, op. cit., at p. 205. The position is otherwise if

the mortgagee has taken steps to recover payment, e. g., by taking possession of the property.

The present clause is derived from s. 94 of the New South Wales Conveyancing Act which in turn is based on the New Zealand Property Law Act, 1908, No. 152, s. 70(2); cf. New Zealand Property Law Act, 1952, s. 81(2); s. 81(4). Its purpose is to enable the mortgagor to anticipate the date of redemption on paying to the mortgagee the interest which would have been payable had the mortgage run its full term. Such early redemption is not, however, to affect any collateral advantage to which the mortgagee would have been entitled had the mortgage been paid off at due date: see proviso to sub-cl. (1).

98. Abolition of consolidation of mortgages. Consolidation is a rule whereby a mortgagee holding separate mortgages on different properties, originally created by the same mortgagor, is entitled to demand that the mortgagor who is in default must, if he wishes to redeem, redeem all the mortgages: see Sykes: Law of Securities, at p. 116. The rule was found to cause hardship and in England it was abolished by s. 17 of the Conveyancing Act unless a contrary intention was expressed in the mortgage deed or one of them. This statutory provision was preserved in s. 93 of the Law of Property Act, 1925, and it now appears in the property legislation of New South Wales, Victoria and Western Australia. These Australian States are, however, uniform in abolishing consolidation altogether without permitting, as does the English section, the right of consolidation to be preserved by express stipulation in the mortgage.

It has been held that the doctrine of consolidation does not apply to mortgages of Torrens title land; Greig v. Watson (1881) 7 V. L. R. (E.) 79, and in proposing its abolition generally we have followed the terms of s. 56 of the Western Australian Property Law Act.

99. Sale of mortgaged property in action for redemption or foreclosure. Apart from statutory provisions there is no right to a judicial sale in the case of a simple equitable mortgage (e. g. by deposit of title deeds) and in such cases the proper remedy of the mortgagor is foreclosure. However, by s. 74 of The Equity Act of 1867 the court in foreclosure proceedings may at the request of the mortgagee or subsequent incumbrancer, or of the mortgagor or a person claiming through him, direct sale of the property instead of foreclosure. The origin of this provision is s. 48 of the Chancery Procedure Act, 1852 which in England was repealed and re-enacted in s. 25 of the Conveyancing Act 1881 which also extended the power to order sale in an action for redemption. The provisions of the last-mentioned statute are not reproduced in s. 91 of the Law of Property Act, 1925 and similar sections in Victoria, New South Wales, South Australia and Western Australia.

We propose the adoption of the foregoing section and the repeal of s. 74 of The Equity Act of 1867.

100. Realisation of equitable charges by the court. This clause is simply ancillary to the preceding clause and enables the court, upon ordering a sale in reference to an equitable mortgage, to make an order vesting the legal estate in the mortgagee to enable him to carry out the sale. Similar provisions appear in the Victorian, South Australian, and Western Australian legislation and have a common origin in s. 90 of the Law of Property Act, 1925.

A similar vesting power is proposed in cl. 88 of the Trusts Bill (Q. L. R. C. 3).

101. Facilitation of redemption in case of absent or unknown mortgagees. This clause is based upon s. 98 of the New South Wales Conveyancing Act and is designed to provide a procedure for redeeming mortgages in cases where

the mortgagee cannot be found or is absent or for some other reason cannot be served with proceedings. A similar provision formerly existed in s. 22 of The Trustees and Incapacitated Persons Act of 1867, but this has been repealed, and the Public Curator now has similar powers under s. 56 of the Public Curator Act 1915-1971. The provisions of s. 56 will not be affected by this clause, which is intended as an additional alternative to that section.

PART VIII - LEASES AND TENANCIES

Part VIII of the Bill is the largest Part comprising some sixty-six clauses dealing with leases and tenancies, subdivided into six Divisions comprising the following:-

- Division 1 - Rights, powers and duties (cll. 102 to 112)
- Division 2 - Surrenders, assignments and waiver (cll. 113 to 122)
- Division 3 - Relief from forfeiture (cll. 123 to 128)
- Division 4 - Termination of tenancies (cll. 129 to 139)
- Division 5 - Summary recovery of possession (cll. 140 to 152)
- Division 6 - Agricultural holdings (cll. 153 to 167).

Of these, the first, second and third Divisions have already been the subject of extensive research and recommendation for reform, which were the subject of the Commission's Report (Q. L. R. C. 1) on Leases and Tenancies. After that Report had been presented, the Termination of Tenancies Act 1970 (No. 12 of 1970) was passed and came into force on 1st January, 1971. It attracted a good deal of criticism from both of the professional legal associations in Queensland, and its conceptual and drafting defects were highlighted in a paper delivered by Mr. J. B. Thomas of Counsel at the Law Society's annual convention in March, 1971. It is evident that the Act was drafted and passed with undue haste, and a number of the general provisions which it contained took no account of the proposals of this Commission in the Report referred to which were based upon comparable and well-proven sections of legislation in England and the Australian States. We have here sought to preserve what we believe to be the policy of the Act, whilst at the same time attempting to improve the drafting and general comprehensibility of this legislation. Our recommendations in this regard form the substance of the provisions of Divisions 4 and 5 of this Part, and we particularly invite attention to the commentary on cl. 137, which represents a slightly improved form of the controversial s. 18 of the Act of 1970 dealing with termination of tenancies of dwelling houses. In addition, we have in our draft eliminated one or two of the less defensible features of that Act, such as s. 16(a) and s. 16(b), dealing with the presumption of a tenancy from the fact of payment of rent. These subsections are unnecessary and involved provisions which represent no advance on or improvement over the common law, and which seem to have been introduced only with a view to facilitating termination of the tenancies to which they refer. Our own proposals on this subject, which are based upon some particularly lucid Canadian legislation, will, we believe, avoid both the difficulties which s. 16(a) and (b) were designed to resolve, as well as those which that section has itself brought about. Likewise, cl. 16(c) has been omitted because it was included in the Act in apparent ignorance both of the provisions of the existing s. 128 of the Distress Replevin and Ejectment Act and of more modern provisions such as s. 151 of the English Law of Property Act, which are the subject of cl. 114 of the present Bill.

Division 6 consists of what is at present The Agricultural Holdings Act of 1905, which is included here primarily for reasons of completeness and in respect of which only a few minor alterations are recommended.

This Part of the Bill will facilitate the repeal of some thirty or so existing statutes, of which some nineteen comprise Imperial enactments which are wholly repealed. In a few instances (principally

the Landlord and Tenant Acts of 1707 and 1730, and the Distress for Rent Act, 1737) particular provisions which remain of current legal importance have been preserved and are included in the Bill with some slight variations of language and form.

The principal local statute affected is the Distress Replevin and Ejectment Act of 1867 and the reforms recommended by the Bill will enable this statute to be repealed in toto. Later portions of this commentary indicate the extent to which and manner in which particular sections of the Distress Replevin and Ejectment Act have been affected, but a few of the repealed sections are not specifically adverted to and deserve mention at this point. These are the whole or portions of ss. 133, 134, 135, 136, 137, 140, 142, 143, 144 and 145, all of which are concerned with procedural provisions which have long since been superseded by The Judicature Act of 1876 and the detailed rules of the three courts of civil jurisdiction in Queensland (e.g. s. 140 is in part concerned to affirm the abolition of the technique by which actions for ejectment were tried upon a fictitious allegation of entry and ouster). Of these sections, only s. 134 requires more specific mention. It is based upon the statute 1 Geo. IV c. 87, s. 2, of 1820 (which was carried into s. 214 of the English Common Law Practice Act) and is directed to ensuring that mesne profits or damages for trespass may be awarded down to the day of judgment or verdict in an action by a landlord for recovery of possession. The matter is now in part covered by provisions of The Rules of the Supreme Court and the Schedule of Forms thereto (see e.g. forms 71 and 72) and The District Courts Act and Rules, and the practice since The Judicature Act is in proper case to award mesne profits down to the date for possession: see Southport Tramways Company v. Gandy [1897] 1 Q.B. 66; Dunlop v. Macedo (1891) 8 T.L.R. 43. (Section 89 of The District Courts Act limits this to the date appointed for hearing and this may require consideration in the future). Both in England and in Victoria, the abolition of provisions corresponding to s. 134 has been held not to affect the above jurisdiction and practice: see Southport Tramways Company v. Gandy, *supra*, and Lynch v. Port Jackson Trading Corporation Pty. Ltd. [1950] V.L.R. 153, and it seems reasonable to suppose that the same result will follow in Queensland.

In addition to the above, some reference must be made to s. 14 of the Distress for Rent Act, 1737 (11 Geo. II c. 19), represented in Queensland by s. 7 of the Common Law Practice Act, 1867-1970, which was intended to overcome the procedural problem which arose when, in proceedings to recover compensation for use and occupation of premises, it appeared that the defendant was in occupation by virtue of an express agreement in that behalf. Section 14 of the Act of 1737 was designed to avoid the rule that in such event the plaintiff's claim was defeated. However, under the provision as it now stands, a claim for use and occupation may in theory still be defeated by proof of the existence of a demise under seal: see Spektor v. Lees [1964] V.R. 10, at p. 18, per Sholl J.; although in practice the wide powers of amendment available in all courts of law will invariably be exercised to avoid this result.

Both in Victoria (Landlord and Tenant Act 1958, s. 8) and New South Wales (Imperial Acts Application Act, 1969, s. 31) the latter rule was preserved. But there seems to be no good reason why, under modern conditions of emphasis on the substance rather than the forms of action, this should be so, and this view of the matter has now been adopted in the recent procedural reforms introduced in New South Wales in the course of adoption of the Judicature system in that State.

Accordingly, we are now satisfied that there no longer exists any reason for the retention of s. 7 of the Common Law Practice Act or of its Imperial predecessor of 1737, and, in formulating this Part of the Bill, we have omitted the recommendation previously made in cl. 9 of the Leases and Instruments Bill (Q.L.R.C. 1).

Division 1 - Rights, powers and duties

102. Abolition of interesse termini. The common law rule, which prevails in Queensland, is that, prior to actual entry into possession, a lessee acquires only a right of entry or interesse termini which falls short of an estate in the subject land. This prevents the creation of an effective reversionary lease, with resultant difficulties indicated by Megarry & Wade, op.cit., at p. 638.

The present clause of the Bill, which is modelled on s.120A of the Conveyancing Act (N.S.W.) and English Law of Property Act, s.149, proposes the abolition of the doctrine and consequently avoids a term limited to take effect more than 21 years from the date of the instrument purporting to create it, and any contract to create such term. This provision does not affect an option for renewal of a lease which may be exercised more than 21 years after creation of the lease: Weg Motors Ltd. v. Hales [1962] Ch.49.

103. Abolition of distress for rent. Distress is the extra-judicial remedy which enables a lessor when rent is in arrear to seize and sell chattels found on the leased premises. In the past, when modes of execution and the officers who enforced them were much less reliable than they are now, distress was accounted a valuable remedy and, in consequence, it was the subject of a series of statutes, of which the first are the statute 51 Henry 3, St. 4 (1266) and the Statute of Marlborough (52 Henry 3) in 1267. However, the tendency in mature systems of law is limit and, so far as possible, suppress forms of self-help such as distress, and we consider that this step should now be taken in Queensland. Amongst the reasons justifying this course are the following:-

- (a) The availability of the remedy is at present severely limited by statute. Section 21 of the Termination of Tenancies Act 1970 prohibits the levy of distress in the case of a dwelling-house; in other cases its utility is greatly diminished by the fact that it is not available in the case of insolvent individuals and companies; and it is further circumscribed by the provisions of The Law of Distress and Other Acts Amendment Act of 1934, a statute which is exceedingly ill-drawn and difficult to interpret.
- (b) In practice distress is seldom resorted to. Inquiries made of the Sheriff and immediate past Sheriff indicate that warrants of distress are very rarely encountered by that officer and his staff.
- (c) The law of distress developed at an early stage and at a time when land was the principal, if not the only, form of investment: cf. Holdsworth: History of English Law, vol. 3 at p.215. Under modern conditions there is no longer any real justification for affording to a landlord in respect of his rent special privileges over and above those conferred on other creditors of the tenant. In assessing the creditworthiness of a tenant, a landlord is in no different position from that of any other person, and in some respects his position is in fact superior, both because of the form in which covenants to pay rent are customarily drawn and because of the relative expedition with which he can eject a non-paying tenant and so reduce the loss which he will suffer.
- (d) The law of distress is embodied partly in the common law and in part in a series of no less than fourteen statutes (of which some ten such statutes are old Imperial enactments ante-dating settlement in Australia), including some fifty sections of The Distress Replevin and Ejectment Act. These do no more than add unnecessary complexity and hazard to the ordinary processes of execution.

To attempt to codify or even consolidate the law of distress, and the associate remedy of replevin for wrongful distress, is a task which would not be justified either by the nature of the remedy or its present-day utility; and we therefore recommend that the law of Queensland in this respect be brought into harmony with that of New South Wales, Victoria and other Australian States where distress has been abolished. These remarks apply equally to the rights of distress conferred upon mortgagees and incumbrancees by ss. 60 to 61A of The Real Property Acts 1861 to 1963.

The considerations which favour this step apply equally to distress for rent-seck (i. e. rent due on a rent-charge, for which distress was first made available in 1730 by the Landlord and Tenant Act, s. 5), distress for rates under s. 27(9) and distress for services of an undertaking under s. 27(14) of the Local Government Act, 1936-1970, and under s. 100(3) of The Metropolitan Water Supply and Sewerage Acts, 1909 to 1962. As to the latter enactments, it is clear that local authorities are already sufficiently well protected by the available remedies of action and statutory charge on the premises in respect of unpaid rates.

If distress is abolished the following statutes will become obsolete and may be repealed:-

1266	51 Henry III St. 4.
1267	52 Henry III c. 1, 2, 4, 15, 21, 23.
1275	3 Edward I, c. 16.
1285	13 Edward I, St. 1, c. 2, 37.
1554	1 & 2 Phillip & Mary, c. 12.
1605	17 Charles II, c. 7.
1689	2 William & Mary, Sess. 1, c. 5.
1709	8 Anne, c. 14 (or 18), ss. 1 to 8 (inclusive).
1737	11 Geo. II, c. 19, ss. 1 to 10 (inclusive), 19, 20, 22, 23.
1817	57 Geo. III, c. 93.
1861	<u>Real Property Acts, 1861 to 1963, ss. 61, 61A, 135, 136.</u>
1867	<u>Distress Replevin and Ejectment Act of 1867, ss. 32 to 37</u> (inclusive), ss. 41 to 77 (inclusive).
1909	<u>The Metropolitan Water Supply and Sewerage Acts, 1909</u> to 1962, s. 100(3).
1934	<u>The Law of Distress and Other Acts Amendment Act of 1934.</u>

Sub-clause (2) is a transitional provision designed to avoid difficulties in the case of a distress which is under way at the time the Act comes into force.

104. Voluntary waste. This clause follows, with minor modification, the terms of s. 32 of the Imperial Acts Application Act, 1969 (N. S. W.) representing a statement in modern language of the provisions of the Statute of Marlborough (1267); 52 Henry 3, c. 23, which imposed upon tenants liability for waste. The liability of tenants for life in respect of waste is governed by a similar but separate provision in Part II of the Bill.

For the reasons indicated in the Report of the New South Wales Law Reform Commission (L. R. C. 4 at p. 48), we recommend the adoption of a provision in the form of this clause and the repeal of c. 23 of the Statute of Marlborough, 1267.

105. Obligations of lessees. Section 70 of The Real Property Acts, 1861 to 1963, implies on the part of a lessee of land under those Acts a covenant to pay the rent and all rates and taxes payable in respect of the property, and a covenant to keep the premises in good repair. It has been held (Leahy v. Canavan [1970] Qd. R. 224) that these implied covenants apply to an unregistered parol lease of land under the Acts for periods of less than three years, although this decision has not escaped criticism: see 1 Queensland Law Society Journal 11. In any event it is clearly convenient that there

should be an appropriate implication of obligations in all leases, particularly in view of the need for an express power of re-entry in the event of breach of covenant by the lessee: see discussion of this question in relation to cl. 107.

It is our view that the question should by legislation be resolved in favour of the approach adopted in *Leahy v. Canavan* and that, subject to the next succeeding clause, there should be in all leases, whether of land under The Real Property Acts or otherwise and whether registered or by parol, a statutory implication of obligations on the part of the tenant to pay the rent and to repair the premises. The subject clause is based upon s. 84 of the N. S. W. Act, which contains a proviso for cesser of the obligation to pay the rent in the event of destruction of the premises by fire, etc., which corresponds with the provisions of s. 31 of The Real Property Act of 1877.

The enactment of the proposed clause will make s. 70 of the Act of 1861 and s. 31 of the Act of 1877 unnecessary, and these sections may be repealed.

106. Fitness of premises for human habitation. The general rule of English law is one of caveat emptor, i. e., as it has been expressed, that "there is no law against letting a tumble-down house". Hence, there is in a lease of a dwelling house, no implied undertaking by the landlord in a lease of a dwelling house that it is fit for human habitation: *Hart v. Windsor* 12 M. & W. 68, or that he will do any repairs: *Sleafer v. Lambeth Borough Council* [1960] 1 Q. B. 43. An exception exists in the case of the letting of a furnished house, where there is an implied obligation of fitness for habitation: *Smith v. Marrable* (1843) 11 M. & W. 5, but even this is limited to the commencement of the term: *Sarson v. Roberts* [1895] 2 Q. B. 395, 397.

In England by statute (Housing Act, 1957, s. 6) a condition of fitness for human habitation is now implied in a lease of a house at a low rent, and s. 32 of the Housing Act 1961 implies a covenant by the landlord to repair the structure and exterior of a dwelling house let for less than seven years. More recently in Ontario s. 96 of the Landlord and Tenant Act (c.236 of 1970) has imposed on the landlord, in the case of a residential tenancy, the responsibility of providing and maintaining the rented premises in a good state of repair and fit for habitation during the tenancy.

In Queensland the only comparable provision was that contained in s. 35 of The Landlord and Tenant Acts, 1948 to 1961, which prohibited the letting of a dwelling house known not to be in a fair and tenantable state of repair, but this statute was repealed in 1970, and the common law rule now prevails in this State. The rule was one which became established in England at a time when long leases of residential houses were common, as they still are now; but this has never been the case in Queensland, where residential leases are almost invariably periodic tenancies of the weekly or monthly variety. The common law rule is therefore unsuited to Queensland conditions, and we propose the adoption of the principles of the Ontario and English legislation, confining, however, the obligation so imposed to tenancies for periods of three years or less. This is all the more necessary because the preceding clause would otherwise now ordinarily impose on the tenant an implied obligation to repair.

As regards the tenant, sub-cl. (1)(b) simply expresses the common law as stated by Denning L. J. in *Warren v. Kean* [1954] 1 Q. B. 15, namely, that he must abstain from acts of waste and do "the little jobs about the place which a reasonable tenant would do." Cf. also s. 96(2) of the Ontario Act of 1970.

107. Powers in lessor. Section 71 of The Real Property Acts implies in favour of a lessor powers of entry to view the state of repair and to determine the lease for non-payment of rent, for failure to repair, and for

breach of other covenants in the lease. In *Leahy v. Canavan* (supra) it was held, following *Hill v. Cox* (1882) 1 Q.L.J. 78, that the power of re-entry implied by s. 71 applied to unregistered parol leases of registered land. Apart from this, the only statutory power of re-entry is for non-payment of rent conferred by s. 130 of *The Distress Replevin and Ejectment Act of 1867*, which is of very limited utility because of the practical difficulties of complying with its terms. Sub-clause (4) which, together with the remainder of this clause, is taken from s. 85 of the N.S.W. Act will imply a power of re-entry and determination of the lease where rent is in arrear for one month or default for two months in fulfilling some other obligation. In addition the clause provides for a right of entry to view and to carry out repairs upon giving two days notice to the tenant. A rather similar provision is now contained in s. 22 of the *Termination of Tenancies Act 1970*.

In view of this, s. 71 of the Act of 1861 may be repealed.

108. Recovery of possession where half-year's rent is due. The first part of s. 130 of *The Distress Replevin and Ejectment Act of 1867* is taken from s. 210 of the *English Common Law Practice Act* which in turn re-enacts s. 2 of the *Landlord and Tenant Act 1730*. Its object was to relieve lessors of the necessity for compliance with the extremely technical and formal requirements of the common law relating to demands for rent in arrears, as laid down in *Boroughe's Case* (1596) 4 Co. Rep. 72b; see *Woodfall, op. cit.*, at p. 889-890; *Holdsworth: History of English Law*, vol. 7 at p. 268. The effect of the provision in s. 130 was and is to dispense with formal demand for rent in cases where the lease contains no provision in that behalf, and (i) six months rent is in arrear; (ii) the lease contains a proviso for re-entry in the event of non-payment of rent; and (iii) no sufficient distress can be found to cover such arrears. Similar provision appears in s. 90 of the *District Courts Act 1967-1969*.

In view of the proposals in the preceding clause, there may appear to be little purpose in retaining a section such as s. 130, but the provision is, we think, still capable of serving a useful function in cases where for some reason the express or implied power of re-entry has been excluded. The clause proposed, like s. 90 of the *District Courts Act*, omits the requirement of an insufficient distress and is necessarily consequential upon the proposal to abolish distress, referred to hereafter.

Prior to ss. 2 and 4 of the *Landlord and Tenant Act, 1730* there was no limit upon the time within which a tenant might seek relief in equity against forfeiture for non-payment of rent. The object of the provision made by that Act was to limit such time to six months from execution and so relieve the lessor of the inconvenience of continuing uncertainty as to his right to possession; see *Doe d. Hitchens v. Lewis* (1751) 1 Burr. 614 at p. 619. This policy is continued in the latter parts of s. 130 and by ss. 131 and 132 of *The Distress Replevin and Ejectment Act*, which require payment in full by the lessee of the rent in arrear together with the lessor's costs of proceedings for recovery of possession. Rule 169 of the *District Court Rules* is similar, but further limits the tenant's right to relief by requiring payment five clear days before the hearing of the action for recovery of judgment; and in either case a full six months rent must be in arrear: see *Standard Pattern Co. v. Ivey* [1962] Ch. 432.

There is some justification for preserving the peremptory form of relief which is afforded to tenants by the existing provisions of ss. 130, 131 and 132 in cases where the lessor has allowed as much as six months rent to fall in arrear without instituting proceedings; but in view of the very wide powers of relief against forfeiture which are proposed by this Bill, we recommend that the time within which peremptory relief may be obtained under sub-cl. (2) be limited to the period before judgment is given. Sub-clause (4) is intended to preserve the jurisdictional limitation in amount which is imposed in the District Court by s. 90.

109. Short forms of covenants and obligations of lessees. Short forms provided by statute are intended to furnish an abbreviated statement of the duties of, in the instance of leases, the obligations of the lessee in any lease in which the short form is used, the object being to reduce unnecessary verbiage and cost. In Queensland there are at present two sources of such forms: one is an old New South Wales statute, the Leases Act of 1847 (11 Vic. No. 28), the other is s. 73 of The Real Property Acts, which prescribes forms for adoption in mortgages as well as leases.

In New South Wales the Act of 1847 has been superseded by the provisions of s. 86 of the Conveyancing Act and Part Two of the Fourth Schedule. Inquiries in Queensland indicate that the forms in the 1847 Act are still utilised by some conveyancers, and the use of the abbreviated terms in s. 73 is not altogether uncommon in leases of land under The Real Property Acts.

Section 86 of the Conveyancing Act and the accompanying Schedule forms are more complete and up to date than the forms contained in the 1847 Act, and we propose the adoption of the former in Queensland. We also propose the retention of the abbreviated forms of expression in s. 73 of The Real Property Acts, since these will necessarily continue to apply to mortgages. As to the procedure for incorporating and varying the short forms under the N. S. W. Act, see article in 1 A. L. J. 111.

On the adoption of the foregoing proposal, the Act of 1847 may be repealed.

110. Cases in which statutory obligations not implied. This clause, corresponding to s. 37 of the New South Wales Conveyancing Act, provides for the exclusion of the statutory implied obligations when the corresponding short form in the Schedule of words is struck out.

111. Lessee to give notice of ejectment to lessor. This clause, which has a long legislative history, serves to ensure that a lessor is informed by his tenant of any process served on the premises for recovery of the subject land, so as to afford the lessor proper opportunity of defending such proceedings.

The preservation of this provision is rendered necessary by the proposal to enlarge the power of the court to grant relief from forfeiture under later clauses of this Bill. At present the lessor is entitled to a penalty of one year's rent under r. 170 of the District Court Rules and three years' rent under s. 129 of the Distress Replevin and Ejectment Act. This seems both arbitrary and unnecessarily harsh and we prefer the provision in the Ontario Landlord and Tenant Act 1970, s. 29 of which limits the liability of the tenant to the damages sustained by the lessor.

The foregoing statutory provisions will then become redundant and may be repealed.

112. Provision as to covenants to repair. A lessee who, during the currency of the lease, is liable for breach of a covenant to repair, may be required to pay damages measured by reference to the resulting diminution in the value of the reversion; if the lease has expired, the damages are measured by reference to the cost of the repairs and it is irrelevant that the lessor intends forthwith to demolish the premises: Joiner v. Weeks [1891] 2 Q. B. 31; Megarry & Wade, op. cit., at p. 705.

The present clause, which is founded on s. 18 of the English Landlord and Tenant Act 1927, places an upper limit on the amount of damages recoverable and in effect provides that these shall in no case exceed the value of the reversion (i. e., the difference between the value of the reversion with the repairs and its value without): see Woodfall, op. cit., at pp. 671-2.

This provision also disposes of Joiner v. Weeks, *supra*, by enabling account to be taken of the fact that the premises are about to be demolished.

Division 2 - Surrenders, assignments and waiver

113. Head leases may be surrendered without surrendering under-leases. If a lessee for a term, who had sub-let for a lesser term, surrendered his term to the lessor, this surrender of the head lease destroyed the reversion of the under-lease and the under-lessee's liability for rent ceased: see Hammond and Davidson's Law of Landlord and Tenant (4th ed.) at p. 263.

This clause will allow a lessee to surrender his lease for a new lease without surrender of any under-lease.

114. Provision as to attornment by tenants. "Attornment is the act of the tenant's putting one person in the place of another as his landlord" - per Holroyd J. in Cornish v. Searell (1828) 8 B. & C. 471, at p. 476. Prior to the statute 4 & 5 Anne c. 3 (or c. 16) in 1709 an attornment was necessary, where the lessor assigned his reversion, in order to complete the title of the reversioner: Hammond and Davidson, op. cit., at p. 22. Woodfall, op. cit., at p. 825, attributes this requirement to the Statute *Quia Emptores* 1290.

Clause 17 follows the provisions of s. 151 of the English Law of Property Act 1925 and renders obsolete 4 & 5 Anne c. 3 (or c. 16), ss. 9, 10 and The Distress for Rent Act, 1737; 11 Geo. II c. 19, s. 11, which was re-enacted in Queensland in s. 128 of The Distress Replevin and Ejectment Act of 1867. All these provisions may be repealed.

115. When reversion on a lease is surrendered the next estate to be deemed to be the reversion. This clause of the Bill makes provision ancillary to that in the preceding clause by ensuring that, upon surrender or merger of a head lease, the covenants of the under-lease will be preserved for the benefit of the reversioner or his grantee. This obviates the common law rule exemplified in Webb v. Russell (1789) 3 T.R. 393 that merger or surrender destroyed all the incidents to the reversion: see Megarry & Wade, op. cit., at p. 741; Hammond & Davidson, op. cit., at p. 258.

116. Apportionment of conditions on severance. This clause is necessary because of the curious common law rule, laid down in Dumpor's Case (1603) 4 Co. Rep. 119b, that conditions unlike covenants are incapable of severance, and hence that rights of re-entry dependent on conditions were not apportionable if the reversion were severed: see Holdsworth, op. cit., at pp. 269, 282-4.

117. Rent and benefit of lessee's covenants to run with the reversion. This clause (which is taken from s. 141 of the English Law of Property Act 1925) is a re-statement of the provisions of the Grantees of Reversions Act 1540 (32 Hen. 8, c. 34) which enable assignees of reversions, whether of the whole or a part, to sue on such of the lessee's covenants as touch and concern the land. The Act of 1540 was held only to apply to a demise by deed: Standen v. Christmas (1847) 10 Q.B. 135; but in Queensland has been held to apply to a sub-lease under hand only of land under The Miners' Homestead Leases Acts: see Re Rakita's Application [1971] Qd.R. 59. The provision proposed here will extend it to all leases since "covenant" is not confined to a promise under seal: Weg Motors Ltd. v. Hales [1962] Ch. 49, and the use of the word "obligation" will ensure that this interpretation is maintained. Sub-clause (2) overrules the decision that, before apportionment of rent, the assignee could not give notice to quit that portion: Woodfall, op. cit., at p. 807.

As to the scope of this provision, see London & County Ltd. v. Wilfred Sportsman Ltd. [1970] 3 W.L.R. 418.

118. Obligation of lessor's covenants to run with reversion. This clause is directed to ensuring that the burden as well as the benefit of the covenants in the lease pass to the assignee of the reversion.

119. Waiver of a covenant in a lease. Another consequence of the rule in Dunpor's Case, *supra*, that conditions were not severable, was that waiver of a condition was treated as a waiver of all future breaches: see Holds-worth, *op. cit.*, at p. 282 et. seq.; and this applied also to an express licence: *ibid.* This rule was overcome by ss. 124 and 125 of The Distress Replevin and Ejectment Act (which was based on English legislation passed in 1859 and 1860) and which came into force on 28th December, 1867.

120. Effect of licences granted to lessees. This clause provides for the case of licences mentioned above.

121. Provisions as to covenants not to assign without consent. Apart from express provision forbidding it, a tenant may assign or underlet without the landlord's consent. Leases, however, commonly contain a prohibition upon such assignment or underletting without consent, which may be absolute, or qualified by the requirement that such consent shall not be unreasonably withheld.

Clause 121(1)(a) (which in substance follows s. 19 of the English Landlord and Tenant Act 1927 and s. 133B of the New South Wales Conveyancing Act) will make it impossible for the landlord to withhold his consent unreasonably, the onus of proving unreasonableness being on the tenant: see Mills v. Cannon Brewery Co. Ltd. [1920] 2 Ch. 38, at p. 46; Megarry & Wade, *op. cit.*, at pp. 698-702.

Clause 121(b) (which is based on s. 132 of the New South Wales Act and s. 144 of the English Law of Property Act) will prevent the landlord from making payment of a premium a condition of granting his consent unless the lease expressly so provides; but in all cases the landlord may require payment of his reasonable legal and other expenses incurred in connection with the licence or consent.

Sub-clause (2) extends the principle of the above legislation to covenants etc. against making of improvements without consent, and sub-cl. (3) does the same in respect of covenants against user or alteration of the premises without consent, where no structural alteration is involved.

122. Involuntary assignment no breach of covenant. Section 133 of the N. S. W. Conveyancing Act deals with cases where an assignment takes place without any act on the part of the lessee, e. g. in case of bankruptcy. The present clause follows that provision which saves such assignments from constituting a breach of covenant.

Division 3 - Relief from forfeiture

123. Interpretation. This clause forms part of the Division dealing with relief against forfeiture, as to which see below.

Because of the policy considerations which apply to Crown leases under the Land Act and similar statutes it is necessary to exclude such leases from the operation of the power to grant relief, without, however, withholding the benefit of the Division from under-lessees of such land where the head-lessee seeks to forfeit the under-lease.

The definition of "proceedings" is defined to include an application by originating summons thus reversing the decision in Hebbard v. Lang [1937] Q. W. N. 42, but without affecting the general judicial discretion conferred by O. 64, r. 1C of The Rules of the Supreme Court.

124. Restriction on and relief against forfeiture. Ever since the decision in Hill v. Barclay (1811) 18 Ves. 56 the power of equity to relieve against re-entry or forfeiture of a lease by reason of a breach by the lessee of a covenant or condition has been virtually limited to the case of non-payment of rent: see Holdsworth, op. cit., vol. 8, at p. 298. In Queensland there is a very limited additional power conferred by ss. 63 to 68 of the Equity Act of 1867 to relieve against breach of covenant to insure, but in other respects a lease remains liable to forfeiture without relief for even the most trivial breaches of covenant. This can and does lead to the most serious injustice (particularly in the case of long leases where considerable improvements may have been effected by a lessee who may also have paid a heavy premium for the lease) and in Baier v. Heinemann [1962] Qd. R. 192, at p. 204, Gibbs J., in describing the law of Queensland as in this respect "seriously defective", remarked on the desirability of adopting of statutory provisions such as those contained in s. 146 of the English Law of Property Act 1925, which have a history dating as far back as the Conveyancing Act 1881.

The proposed provisions are derived from the New South Wales Conveyancing Act, which in turn is modelled on the English legislation mentioned above. A minor but important provision is sub-cl. (3) which is intended to avoid the conclusion reached in David Jones Ltd. v. Leventhal (1927) 27 S.R. (N.S.W.) 350, and Woods v. Tomlinson [1964] N.Z.L.R. 399, that an application for relief could not be made without an admission on the part of the lessee that he was in breach of a covenant or condition and that the notice required by cl. 124(2) has been duly served. The above decisions have the effect that a lessee may not safely seek a determination as to whether or not a breach has been committed, and only if so that relief be granted. The position has been strongly criticised (see 38 A.L.J. 67) and is clearly productive of great inconvenience.

A provision in the form of this clause has been held in other jurisdictions to confer on the court a complete discretion as to whether relief should be granted, and if so, on what terms: see Hyman v. Rose [1912] A.C. 623; although in practice the court will take into account a variety of circumstances (including the past conduct of the parties to the lease) as is recognised by the foregoing decision of the House of Lords and in the decision appealed from in that case.

Sub-clause (6) follows the comparable English and New South Wales provisions in withdrawing from the court's power to relieve against forfeiture some specific instances of forfeiture including, in sub-cl. (6)(c), forfeiture in the event of bankruptcy. The latter may seem unnecessary because s. 301 of the Bankruptcy Act 1966 renders such conditions altogether void; but the definition in cl. 4 extends the meaning of "bankruptcy" to include the winding up of a company in respect of which there is no provision similar to s. 301. The above restriction on the court's power in the event of forfeiture for bankruptcy differs from the English model which is confined to houses let as a dwelling house "with the use of any furniture, books, works of art, or other chattels in the nature of fixtures", but we can see no good reason for reproducing this limitation in Queensland, and accordingly sub-cl. (6)(c)(iv) has been drawn in the form in which it appears in the Bill.

Sub-clause (8) preserves the long-standing equitable power of the court to relieve against forfeiture in the case of non-payment of rent.

125. Power of court to protect under-lessee on forfeiture of superior leases. This provision enables an under-lessee, as defined in sub-cl. (2) to obtain an order vesting in him a head lease or other superior lease which is in danger of forfeiture through some default on the part of a superior lessee.

126. Costs and expenses. Since relief by the court against forfeiture or the possibility of such relief is a privilege which may involve the lessor in

expense, this clause ensures that such expense is borne by the defaulting lessee.

127. Relief against notice to effect decorative repairs. This clause is a particular provision intended to enable the court to relieve a lessee from liability to effect decorative repairs where such repairs are unreasonably required by the lessor.

128. Relief against option to renew, etc. Options for renewal or extension of leases, or for purchase of the reversion, are commonly conferred in or in conjunction with leases. Where, as is usual, the exercise of such options is made dependent or conditional upon due performance and observance by the lessee of all conditions, covenants, and agreements in the lease, the rule is that such options are strictly construed and will be lost to the lessee by reason of even the most trivial breach of his part, e.g., a single late payment of rent: see Gilbert J. McCaul (Aust.) Pty. Ltd. v. Pitt Club Ltd. (1957) 59 S.R. (N.S.W.) 122. In such cases the lessor would very often not be entitled to utilise the breach as a ground for forfeiture, but can and does take advantage of it for the purpose of destroying the option he has conferred.

The Commission has received requests from members of the practising professions that the law in this regard should be amended, and we propose that, with the addition of sub-cll. (5) and (6), a provision be adopted along the lines of that recommended by the New South Wales Law Reform Commission in its report numbered L. R. C. 5 and now enacted in ss. 133C to 133G of the Conveyancing Act (see Conveyancing (Amendment) Act, 1972).

129. Abolition of yearly tenancies arising by implication of law. The rule at common law is that where there is a tenancy and no express agreement as to its duration the law will imply a periodic tenancy from year to year provided the rent is measured by reference to a yearly holding, irrespective of the fact that it may be payable at intervals of less than a year, e.g. quarterly.

This is a source of some inconvenience since the period of notice required in order to determine such a tenancy is six months, and the rule has been held to apply to unregistered long tenancies of land under The Real Property Acts: see Hill v. Cox (1881) 1 Q.L.J. 78.

We favour the abolition of the legal implication of yearly tenancies in the circumstances outlined above, and in this respect the present clause follows the terms of s. 127 of the New South Wales Conveyancing Act which has applied in that State since 1920. Its effect is to substitute a tenancy at will determinable by one month's notice in place of the yearly tenancy implied at common law, and it should be noticed that the proposed section is limited in its operation to cases in which, apart from its terms, a yearly tenancy would have arisen and not otherwise: see Turner v. York Motors Pty. Limited (1951) 85 C.L.R. 55; Rowston v. Sydney County Council (1954) 92 C.L.R. 605, at pp. 615-616; Helmors: The Law of Real Property (2nd ed.) at pp. 91-92. There is a similar, though less precisely drawn, section in s. 19 of the Termination of Tenancies Act 1970.

The present provision will not apply to tenancies which have arisen prior to the commencement of the Act, subject however to the proviso that a tenancy which has arisen by implication prior to the Act and of which the date of its creation is unknown shall be determinable by six months written notice

expiring on a date after the commencement of the Act (which will not be capable of being fixed until it becomes apparent when the Bill is likely to be passed into legislation) or any date thereafter.

130. Notice of termination of tenancy. Clause 130 and the following clauses are directed to the termination of tenancies by either the landlord or the tenant by notice to quit, here called a "notice to terminate". Clauses 130 to 135 are based upon ss. 98 to 103 of the Ontario Landlord and Tenant Act 1970, which have their origin in a common series of provisions in the legislation of the Canadian provinces (see eg., ss. 52 to 57 of the Landlord and Tenant Act, 1948, of British Columbia) and which are noteworthy for their particularly lucid drafting. They are adopted here with the qualification made necessary by cl. 129 (abolition of yearly tenancies by implication) referred to in cl. 130(2), which provides for termination of tenancies at will and other tenancies determinable by notice other than periodic tenancies.

In Queensland the Termination of Tenancies Act 1970 introduced a number of provisions which were intended to simplify the termination of tenancies by notice to quit (see particularly ss. 17 and 16(b) of the Act), but these provisions are not well conceived or well drafted and have been subjected to severe criticism by all legal professional bodies in the State. We prefer the clarity of expression of the Canadian legislation.

131. Form and contents of notice. At common law a notice to quit may be either oral or written. Clause 131 will continue this policy, with the qualification that a landlord who wishes to take advantage of the summary ejectment procedure afforded by Division 5 will be obliged to give written notice to terminate. Clause 131(2) specifies the contents of the notice and sub-cl. (4) prescribes forms of notice which, if employed, will suffice for the purpose of terminating the tenancy.

Clause 131(3) is concerned with the date at which the tenancy is to terminate. At common law the rule was that a periodic tenancy could be determined only by a notice to quit which expired coincidentally with the last day of the ensuing period of the tenancy: Queens Club Garden Estates Ltd. v. Bignell [1924] 1 K.B. 117. This was not always easy to ascertain, particularly if the rent were payable on some date other than the first (or last) day of the tenancy, although in practice the difficulty can always be avoided by specifying the date of termination and adding some formula such as "or at the expiration of the period of the tenancy expiring next after service of this notice": see Sidebotham v. Holland [1895] 1 Q.B. 378, per A.L. Smith L.J. Section 17 of the Termination of Tenancies Act has attempted, in a somewhat imprecise fashion, to alter the foregoing rule by validating a notice to quit expiring at any time if given for the period required by the tenancy agreement or, if there is none, for the period required by law. Even if this does achieve its intended object, it may be questioned whether it operates justly in favour of either landlord or tenant where the tenancy is terminated half way through a current period. Particularly is this so where the tenancy is a yearly tenancy of agricultural land and the tenancy is terminated in the middle of a cultivation season, and somewhat similar difficulties may arise from the termination of a business tenancy otherwise than at the end of a monthly or yearly period of the lease.

Whilst, therefore, appreciating the reasoning underlying s. 17 of the Act of 1970, we consider that the solution adopted to resolve it is productive of more harm than good and the difficulty arising from the rule that the expiration of the notice to quit must coincide with the last day of the tenancy can be solved by the less radical means suggested here.

132. Manner of giving notice. Service of the notice to quit will be effected in accordance with cl. 132, which is substantially a combination of s. 100 of the Ontario Act and s. 20 of the Queensland Act of 1970.

133. Notice to terminate a weekly tenancy. At common law such notice has to be given on or before the last day of the week to take effect at the end of the following week. Clause 133 will preserve this rule, but the difficulty of determining the commencing date of the tenancy week will be largely if not entirely resolved by sub-cl. (2), which provides that the week shall begin on the day on which the rent is payable unless otherwise expressly agreed.

134. Notice to terminate monthly tenancy. Similar observations apply to this clause as to cl. 133.

135. Notice to terminate yearly tenancy. This clause applies only to tenancies from year to year created by agreement, cl. 129 having in effect abolished yearly tenancies arising by implication of law.

At common law the notice required is a "half year" which, with certain exceptions immaterial to Queensland, ordinarily means 182 days: see Megarry & Wade, at p. 642. In Ontario s. 103 of the Act mentioned above has reduced this to sixty days, but we do not see any particular merit in this reform, having regard particularly to the reform proposed by cl. 129 and also to the fact that many yearly tenancies are of agricultural land. However, in place of the common law period of 180 days we propose a requirement of six months notice, which will facilitate calculation of the notice period and will also ensure correspondence with cl. 129(2).

136. Notice to terminate other periodic tenancy. The Ontario Act does not specifically deal with other periodic tenancies, which are therefore terminable at will by virtue of cl. 130(2). However, in Queensland at least, fortnightly tenancies are not unknown and it seems preferable in such cases to maintain the common law rule which requires notice equivalent in length to the length of the period itself.

137. Termination of tenancy of dwelling-house. This clause is based on s. 18 of the Termination of Tenancies Act 1970 which reproduced in a most emasculated form the principles of The Landlord and Tenant Acts, 1948 to 1961, and similar statutes, commonly known in Queensland as "fair rent" legislation. In general terms the policy of that legislation may be summed up as being (1) the "pegging" of rents payable in respect of dwelling-houses held usually on short periodic tenancies; and (2) maintaining security of tenure by restricting the giving of notices to quit to certain specified grounds. Such legislation has been almost universal throughout the English-speaking world and has been associated with or the consequence of wartime and other housing shortages and restrictions. In Queensland these conditions were believed to be largely at an end by the closing years of the nineteen-fifties and ^{an} amendment in 1957 meant that the legislation ceased to apply to houses let for the first time in 1958 or thereafter. By the time of the passing of the Termination of Tenancies Act in 1970 it seems to have been accepted that there were very few privately owned premises to which the legislation continued to apply (see Hansard, 1970, p. 2904).

Probably this was due to the relatively high proportion of occupier-owned houses in Queensland, which according to the 1966 census stood at nearly 79% (Census Bulletin No. 32) whilst a further 3.37% of the remainder were occupied by tenants of the State Housing Commission, which was not subject to the Act. Of the 14.19% of houses which were tenanted in 1966 it is perhaps fair to surmise that a proportion of these were let by institutions such as banks and mining companies which not uncommonly provide housing for staff in rural areas, and that a further proportion of the balance were occupied by persons such as university staff or students whose occupation is not generally intended to be permanent. Unfortunately, there have in Queensland been no informative surveys such as those undertaken in Melbourne (see 7 Melbourne Uni. Law Review 258) and in Ontario (Interim Report on Landlord and Tenant Law: 1968) to offer any guidance on the

question whether legislation, and of what kind, is necessary in order to protect the security of tenants.

What was done by the Act of 1970 was to abolish The Landlord and Tenant Acts, together with the procedure for restricting rents, but to retain in s.18 of the new statute the requirement of a "ground" as a prerequisite to giving a notice to quit. The section was evidently hastily drafted for it does not make clear whether its operation can be excluded by agreement of the parties, although it is difficult to believe that it was intended to be capable of exclusion and the better view almost certainly is that it was not. At the same time, the section did not reproduce quite all of the grounds for notice previously embodied in s.41(5) of the repealed Acts, although again it is difficult to believe that this was the result of deliberate policy, particularly when one finds that it is now provided that "any other proper and sufficient ground" will suffice if the court so finds. In addition, the Act contains a curiously complex provision the effect of which is to require only seven days notice to quit except in the case of the last three of the grounds mentioned in s.18(2), in which case a minimum period of 28 days and a maximum of three months is required by s.18(4). The practical result of these provisions is, for example, that a monthly tenant of a dwelling house may be given seven days notice if he fails to take reasonable care of any goods let with the premises, but must be given notice varying in length from between 28 days and three months if he is a weekly tenant of premises which are reasonably required by the landlord for occupation by himself or if the premises have been condemned by a local authority. It is difficult to perceive either logic or policy in this, and the practical difficulties of fixing on the proper length of notice to quit are compounded by the fact that it varies with the length of occupation of the tenant, a fact which may not be readily or indisputably ascertainable. Finally it should be observed that, since by definition in s.3 "notice to quit" includes a notice of intention to quit, it follows that a tenant may not himself terminate the tenancy except upon one or more of the statutory grounds.

One is impelled to the conclusion that there are numbers of serious oversights and defects both in the conception and the drafting of the Act, and that for the reasons given both in the commentary to this clause and elsewhere, it is essential that the criticisms levelled against the Act by the Law Society, the Bar Association, and the Law Reform Commission should be given effect by repealing the Act and substituting something better. However, simply to remove s.18 without in some fashion preserving the security of tenure which it is supposed to confer upon tenants of dwelling houses would be to recommend a step having possible social and political implications on which this Commission is neither constituted nor sufficiently well informed nor competent to pass judgment. All the members of the Commission, as well as the many comments received in response to the Working Paper, are strongly opposed to the retention of a form of provision such as that in s.18 but, for the foregoing reason, we are not prepared simply to omit it from this draft Bill. Whilst, therefore, doubting the efficacy of the existing s.18 as a means of protecting security of tenure of periodic tenants of dwelling houses in this State, we have in the draft Bill included that section with such amendments as are plainly necessary to clarify its meaning and confine its scope to the purpose which it was evidently designed to achieve. This will leave to Parliament the decision whether or not this or some comparable provision should be retained, as well as the question whether or not the provisions of the section should be capable of exclusion by agreement between the parties: see cl.137(2). In addition to matters already mentioned, this will involve the exclusion from the definition of "dwelling house" of both holiday premises and tenancies arising by attornment under mortgages and contracts of sale, all of which fell outside the scope of the 1948 Acts but which were, obviously by oversight, not excluded from the ambit of the 1970 Act.

138. Tenants and other persons holding over to pay double the yearly value. The purpose of s.1 of the Landlord and Tenant Act 1730 is to discourage tenants from holding over after determination of their lease or tenancy by penalising them at the rate of double the yearly value of the premises: cf. Woodfall on Landlord and Tenant (26th ed.) vol.1, at p.990, Soulsby v. Neving (1808) 9 East.310. This section, (which is not reprinted in the Queensland Statutes, but is set out in Woodfall at p.989), has been held to apply in Queensland: see Public Curator v. L. A. Wilkinson (Northern) Ltd.

[1933] Q. W. N. 28, and Trivett v. Hurst [1937] St. R. Qd. 265, and in Victoria is re-enacted in the Landlord and Tenant Act 1958, s. 9.

In its present form the Act does not apply to weekly tenancies or periodic tenancies for any period less than from year to year: Lloyd v. Rosbee (1810) 2 Camp. 453, but has been held to apply to tenancies from year to year: Ryall v. Rich (1808) 10 East. 4; it requires a written demand for possession; and it applies only where the holding over is "wilful", i.e., without bona fide claim of right: French v. Elliott [1960] 1 W. L. R. 40; Megarry & Wade, op. cit., at p. 647.

There does not appear to be any real justification for extending the provisions of the Act to weekly and other short periodic tenancies. Such tenancies are generally of less valuable premises; they can be readily determined; there are summary procedures for recovery of possession; and, apart from the Act in question, the lessor in such cases remains entitled to damages in the form of mesne profits (which may be greater than the rent payable where the market value is higher than the agreed rent: Clifton Securities Ltd. v. Huntly [1948] 2 All E. R. 283, at p. 284) during the period of holding over.

The enactment of this clause of the Bill will permit the repeal of s. 1 of the Act of 1730.

139. Tenant holding over after giving notice to be liable for double rent. Section 18 of the Distress for Rent Act 1737 was intended to provide for the converse case, i.e. where a tenant gives notice of his intention to quit but fails to deliver up possession on due date, and this section has been re-enacted in Queensland in s. 38 of The Distress Replevin and Ejectment Act of 1867.

By contrast with the earlier statute, the notice contemplated by the Act of 1737 need not be in writing; the better view is that short periodic tenancies are within its scope: see Woodfall, op. cit., at p. 993, n. 75; and the lessor's claim is limited to double rent, which may be less than the value of the premises on the open market.

The proposed clause, read with the definition of "lease" and "lessee" in cl. 4, will confirm the view advanced in Woodfall (supra) and will result in repeal of s. 18 of the Act of 1737 and of s. 38 of the Queensland statute.

Division 5 - Summary recovery of possession

140. Interpretation. Prior to the Termination of Tenancies Act 1970 proceedings to recover possession of premises in respect of which the lease had expired or the tenancy had been determined by notice to quit could be taken under The Summary Ejectment Act of 1867, a statute which was based upon an earlier English enactment, the Small Tenements Recovery Act, 1838 (as to which, see Woodfall, op. cit., at p. 1032).

The procedure for summary ejectment under the statute of 1867 was available only in the cases mentioned above and not where, for example, a lease was determined by the lessor by forfeiture for breach of condition or covenant followed by entry, whether actual or constructive: see, e.g., Loynes v. Hanman [1922] St. R. Qd. 220.

The Act of 1970 repealed The Summary Ejectment Act of 1867 and substituted a procedure and a series of provisions scarcely distinguishable in substance from those of the earlier enactment. It enables a court exercising jurisdiction under The Justices Acts to issue a warrant for possession upon a complaint by a landlord against a tenant who is "unlawfully holding over" - an expression which, although it appears in the title to the Act of 1867, is not particularly happily chosen, since it has connotations of

criminality on the part of the tenant, whereas the jurisdiction exercised under both statutes is in fact entirely civil in character. In the course of defining land unlawfully held over, however, s. 3(2) of the Act of 1970 refers to the determination of the interest of a tenant "otherwise" than by effluxion of time or notice to quit and so, possibly unwittingly, brought within the scope of the summary ejectment remedy cases of leases determined by forfeiture. In our view this step was neither necessary nor wise. It was not necessary because the kind of tenancy principally within the scope of the Act is short periodic tenancies, which are seldom if ever in the form of written instruments embodying conditions of forfeiture. It was unwise because only the Supreme Court has power to relieve against forfeiture for breach of condition, and the effect of the extension effected by the Act is to oblige a tenant to commence separate proceedings for relief in the Supreme Court, during the pendency of which the ejectment proceedings before the magistrate are necessarily stayed.

We are therefore opposed to an extension of the summary jurisdiction in the respect effected by the Act of 1970 and our present proposals contemplate a reversion to the limitations which in this respect existed under the Act of 1867. We have also thought it preferable to dispense with the use of the description "unlawfully held over" and to provide simply for a procedure, without descriptive epithet, for summary recovery of possession of land held by a tenant whose tenancy has expired or been determined by notice to quit. Apart from this, the alterations proposed for Part II of the Act of 1970 are matters of detail rather than of substance.

141. Summary recovery of possession. As explained above, in expressing this section we have chosen the language of s. 2 of the Act of 1867 in preference to that of s. 3(2) of the 1970 Act, although cl. 141(2) is based upon s. 3(3) of the latter Act. It should be observed that procedures for obtaining summary judgment for recovery of possession of leased land also exist both under the Rules of the Supreme Court and Rule 153 of the District Court Rules.

142. Mode of proceeding. This follows almost verbatim the terms of s. 4 of the 1970 Act.

143. Contents of complaint. This follows s. 5 of the existing Act with the qualification that para. (d) now requires the nature of the tenancy to be stated in the complaint only "if practicable". In its present form, the requirement that the nature of the tenancy be stated tends to give rise to unnecessary practical difficulties because the nature of the tenancy may be unknown (e.g. whether weekly or monthly) although there may be no real question that it has been effectively determined whatever its nature.

144. Summons upon complaint for recovery of land. The only change here, as compared with the existing s. 6, is the addition of a provision for proof on affidavit of the matters alleged to justify an order for substituted service.

145. Hearing and determination. Section 7 of the 1970 Act introduced a procedure whereby a tenant who intended to oppose the complaint is required to give notice thereof at least three days before the hearing date, and if he fails to do so and to appear at the hearing the complainant may prove his case by affidavit. This represents a useful procedure somewhat akin to that for obtaining summary judgment in civil actions, but its disadvantage is that a determined tenant can force the complainant into seeking an adjournment by the simple expedient of not giving notice and then turning up unexpectedly at the hearing to oppose the complaint. The complainant, who has been expecting no opposition, is then obliged to ask for an adjournment in order to call witnesses; his affidavits have proved a waste of time and expense; and the tenant thus secures an unmerited extension of time to remain in possession. This provides a procedure akin to that for obtaining summary judgment in the Supreme Court - which procedure continues to exist independently of provisions for summary ejectment such as the present.

What we propose is that, notwithstanding the appearance at the hearing of a tenant who has not given the requisite notice, the complainant may nevertheless rely on the affidavits as prima facie evidence of the facts they

contain, and the onus will thus pass to the tenant to adduce evidence to the contrary. This will not deprive anyone of the right to present his case by oral evidence, but will ensure that the proceedings are disposed of more expeditiously and with less expense in the form of legal costs than is possible under the present procedure.

146. Warrant for possession. This section is identical with s. 8 of the Termination of Tenancies Act, save that s. 8(7) of that Act at present places no limit on the time for which the issue of the warrant of possession may be postponed. We consider it a mistake to vest so unlimited a discretion in the court and propose that the period for which the warrant may be suspended should be restricted to fifteen days, as was the case under s. 6 of the Act of 1867.

147. Arrears of rent. This provision is identical with existing s. 9.

148. Rehearing where proof made by affidavit. This is in the same form as s. 10 of the Act except for an alteration consequential upon the change recommended in respect of cl. 144 (s. 7).

149. Court's powers in proceedings under this Division. It has been questioned whether in proceedings under the existing Act the court has power to amend the complaint. This is probably covered by s. 11 of the Act, read with s. 48 of The Justices Acts; but, to place the matter beyond doubt, we have included an express reference to the power of amending the complaint. In other respects this clause is in the same form as s. 11 of the Act.

150. Protection of justices.

151. Protection of landlord entitled to possession.

152. Persons lacking the right to possession not protected.

These three clauses follow precisely the terms of ss. 12, 13 and 14 of the existing Act.

Division 6 - Agricultural holdings

153 - 167. Agricultural fixtures and improvements. At common law the rule is that trade fixtures and, to a slightly qualified extent, ornamental fixtures affixed by a tenant are removable by him during the period of the lease: see Woodfall, *op. cit.*, pp. 702-704. By virtue of the decision in Elwes v. Maw (1802) 3 East. 38, fixtures erected by a tenant for agricultural purposes are not so removable, which means that these become at common law once and for all the property of the landlord when affixed to the realty. The decision in Elwes v. Maw, which has been described by Holdsworth as "unfortunate" and appears to be inconsistent with earlier authorities (see History of English Law, vol. 7 at p. 286), has in England been gradually eroded by a line of statutes beginning with the Landlord and Tenant Act 1851: see Woodfall, at p. 705, which refers to the "unjust" rule laid down in that decision. The English legislation has been repealed and replaced on a number of occasions and is now represented by the Agricultural Holdings Act 1948 (11 & 12 Geo. 6, c. 63). There is a similar statute in New South Wales, the Agricultural Holdings Act (No. 55 of 1914), which is based upon earlier State and English legislation, and legislation to similar effect exists in other Australian States.

In general, the approach of this legislation to the problem of agricultural fixtures has been twofold: (1) to confer on the tenant a right to remove fixtures erected by him, provided that this is done during the tenancy or within a reasonable period thereafter (in England, two months), that it is done without causing substantial or avoidable damage, and that the tenant gives notice of his intention to remove, so as to afford to the landlord an opportunity of buying the improvement; and (2) to confer on the tenant a right to compensation for certain specified improvements, including fixtures, made but not removed by him.

In Queensland, for some reason which is not entirely clear, the corresponding local statute The Agricultural Holdings Act of 1905 (5 Edw. 7, No. 11) adopted only the latter alternative, and conferred on the tenant no general right of removal of fixtures erected by him except in the case of fruit trees (s. 15). As regards compensation, the Queensland Act, like the other statutes mentioned, requires notice to be given by the tenant of his intention to make the improvement and provides a procedure for arriving at agreement as to the improvement, its cost, etc., and for arbitration in the event of disagreement (s. 5). Furthermore, written notice of intention to claim compensation must be given by the tenant at least two months prior to determination of the tenancy (s. 8). These provisions are plainly based upon a desire to ensure that a landlord is not "improved out of" his land by an over-zealous tenant and are intended to strike a balance between the interests of both parties as well as to ensure that improved use of agricultural land is not discouraged by the rule in Elwes v. Maw.

In practice, however, it is not uncommon for the requirement of notice to be overlooked by the tenant with the consequence that he loses his statutory right to compensation. The potential harshness of this obligation to give notice has, however, been greatly reduced by the decision in Wylie v. McDermott [1933] St. R. Qd. 1, holding that an express provision in the lease requiring the making of improvements amounted to an implied dispensation under s. 6(i) with the necessity for notice under s. 5; and in Re Brown & Others & Morrisson's Arbitration [1955] St. R. Qd. 223, at p. 233, it was said that, where the parties were sufficiently agreed upon the details of the obliged improvement as to make notice unnecessary, then notice is to be regarded as dispensed with. Nevertheless, we think that the operation of the Act might be further improved if s. 6(i) expressly referred to conduct dispensing with notice: there are in practice many occasions on which both landlord and tenant are sufficiently agreed on the desirability of making an improvement (whether or not it is one required by the lease) as to render express formal notice quite unnecessary. Clause 158(a), which corresponds with s. 6(i) of the Act, has accordingly been drawn with this addition. In this regard, it may be observed that, unlike s. 5, non-compliance with s. 8 (which deals with notice of the intended claim by the tenant and notice of set-off by the landlord) is not necessarily fatal to the claim if there is reasonable ground for such non-compliance.

In the foregoing respect the Act appears to operate reasonably well. On the other hand, the Full Court in Re Brown & Morrisson's Arbitration (*supra*) also held that, unlike the English statute or the New South Wales Act (see s. 35), there is no prohibition against contracting out of the compensation provisions of The Agricultural Holdings Act of 1905 in Queensland. The result is that practically all professionally drawn agricultural tenancy agreements now contain a provision excluding the Act, with the consequence that the tenant is placed in the same position, as regards improvements, as prevails at common law under the rule in Elwes v. Maw. He cannot remove fixtures because of that rule, and he cannot claim the statutory compensation for improvements because the provisions of the Act are excluded by agreement.

We consider this to be an unsatisfactory state of affairs, and one which frustrates one of the principal objects of the Act, which was to encourage the best use of agricultural land. The difficulty is to find some reasonable solution to the problem of balancing the respective interests of landlord and tenant. In New South Wales the solution adopted has been simply to render void any agreement which takes away or which limits the tenant's right to compensation (s. 35). The disadvantage of this course is that a tenant will sometimes be willing to undertake the making of uncompensated improvements in return for a lower rent, but a provision such as s. 35 precludes an agreement in this form. In our opinion there is probably only one feasible solution, and that is to provide that any agreement having the effect of taking away or limiting the tenant's right to compensation for improvements should

be unenforceable except in respect of such improvements as are particularly specified in the tenancy agreement. This will, it may be expected, at least have the effect of curtailing the use of the all-embracing general provisions for exclusion of the right to compensation which are rapidly becoming standard form in leases of this kind. A provision to give effect to this recommendation is contained in cl.153(2).

Another reform which we think should now be undertaken is the inclusion of a provision along the lines of s.13 of the English Act of 1948 and s.21 of the 1941 Act in New South Wales, allowing a tenant to remove fixtures erected by him, subject to the qualifications already mentioned. This will have the effect of placing agricultural tenants on the same footing as other tenants as regards removal of fixtures, although we also consider it legitimate to permit the parties to contract out of such a provision. This is the position both under the present and earlier English legislation (see Woodfall, at p.707, citing Premier Dairies Ltd. v. Garlick [1920] 2 Ch.17), and the objections to such a course are much less cogent than in the case of compensation for improvements, particularly in view of the fact that this again corresponds with the position in the case of non-agricultural tenancies, and that the tenant will (if our recommendation in cl.153(2) is adopted) retain his right to statutory compensation. There are in any event a number of improvements (such as clearing land) which cannot be removed, and, in respect of these, compensation is the only practicable remedy. In this regard, cl.155, which closely follows s.13 of the English Act, contains our proposals on this aspect. The specific provision in s.15 of the Act relating to removal of fruit trees will then become redundant and may be omitted.

In respects other than those mentioned above the provisions of the proposed Division 6 follow the terms of The Agricultural Holdings Act of 1905.

PART IX - POWERS OF ATTORNEY

168. Application of Part. With one exception there are no general statutory provisions governing powers of attorney in Queensland. The sole exception is s.2 of The Mercantile Acts, 1867 to 1896, which is concerned with the effect of revocation of powers of attorney on transactions thereafter entered into with the attorney. For reasons discussed later, we consider that this provision should be repealed and replaced by a better drawn section.

The only other statutory enactments affecting powers of attorney are those contained in s.293 of the Land Act and ss.104, 107 and 108 of The Real Property Acts, 1861 to 1963, and s.13 of The Real Property Act of 1877. The latter prescribe forms of powers of attorney and instruments of revocation and provide for their registration and effect. It might be thought desirable that these provisions should be repealed in favour of the more general provisions proposed here, but there are difficulties in the way of such a course, among them the fact that s.107 of The Real Property Acts is also concerned with registration abstracts and it would be difficult to separate the provisions relating to this topic from those relating to powers of attorney.

It is proposed (sub.-cl.(2) of this clause) that the provisions of this Part should extend to powers of attorney authorising dealings with land under The Real Property Acts and the Land Act. This sub-clause is drawn from s.158 of the Conveyancing Act of New South Wales, where the co-existence of general provisions in the Conveyancing Act with the particular provisions in the Real Property Act of that State does not appear to have been the source of any practical difficulties. It will mean that a choice of provisions, not greatly different in their effect, will be available to a person wishing to execute a power of attorney exercisable in respect of registered land. The expectation is that the more general provisions proposed in this

Bill will prove more popular, leading eventually to the obsolescence of the form of power of attorney prescribed in The Real Property Acts.

It should, however, be pointed out that, although the use of powers of attorney in relation to dealings with land is common enough, such powers are at least as, if not more, frequently taken and exercised in relation to transactions involving personalty and particularly shares. Hence, the need exists for a series of modern and generalised provisions dealing with this subject. In this the Commission has been greatly assisted by the recent Report (No. 30) of the English Law Commission on Powers of Attorney, whose recommendations on this subject have also been adopted by the Working Party on the Reform of Land Law in Northern Ireland.

169. Execution of powers of attorney. Although the point is perhaps not beyond doubt, the prevailing view is that a power of attorney should be under seal. In its recent Report on Powers of Attorney (Law Com. No. 30), the Law Commission for England and Wales has recommended that the requirement of sealing be retained, the reason being that a power of attorney is a grant rather than an agreement and so should be made by deed. That Commission has, however, also recommended that it should be made possible for a power of attorney to be executed by another by direction of the donor, a course which is often necessary, but at present is not possible, where, for example, the donor is physically incapacitated by illness. In this case the recommendation is that an instrument creating the power should be executed in the presence of the donor and two witnesses, by analogy with the execution of a will.

We respectfully agree with and recommend the adoption of the English proposal in question, with the qualification that we consider that it should suffice if, in the ordinary case, the instrument is executed in accordance with clause 45 which regulates the execution of deeds.

Sub-clause (4) preserves the requirement of any other Act as to witnessing of instruments creating powers of attorney. It is not known whether any such requirement exists in any other Act. In particular, it has been held that a power of attorney executed in accordance with The Real Property Acts does not require to be attested in the manner of an instrument under s. 115 of those Acts, although it seems that the Registrar would be likely to deliver a requisition in respect of an instrument creating the power which was executed in this informal manner: see Douglas v. Hodges (1971: unreported. Qld. Sup. Ct.).

170. Form and revocation of power of attorney. The English Law Commission in its Report already referred to recommended the provision of a simple statutory form of power of attorney in the expectation that this would lead to a greater degree of standardisation in the forms of such powers. The Commission considered that this result could best be achieved in conjunction with a statutory provision defining the authority conferred by a power in the prescribed form, which will avoid doubts as to the scope and effect of such a power.

Sub-clause (1) and the related form in the Schedule are taken directly from the English model, in relation to which the Law Commission remarked that "the essential requirement is that the form used should contain a specific reference to the statutory provision." In addition, however, we consider it desirable to prescribe a form of instrument of revocation of a power, whether that power is in the general statutory form or otherwise. This is necessary because of the special registration requirements of cl. 171 and of the provisions and general policy requirement of The Real Property Acts as to conclusiveness of the register in the case of transactions affecting land.

171. Registration of powers and instruments revoking powers. The Law Commission has recommended that the procedure for filing powers of attorney be abolished. However, in England this procedure exists only for the purpose of facilitating proof of such powers. In Queensland the process of registration of powers of attorney serves a different purpose. In so far as dealings with land are concerned, registration of a power of attorney is a necessary part of the scheme of registration of title to land. Section 104 of The Real Property Acts, 1861 to 1963 (providing for registration), s. 108 (providing for revocation of the power), and s. 13 of the Act of 1877 (as to the register of such powers) have previously been referred to. In New South Wales, s. 163 of the Conveyancing Act makes provision for registration of powers of attorney and of instruments revoking such powers. See also s. 293 of the Land Act, which is similar in effect. Section 163(2) provides that a conveyance or other deed, with some exceptions, shall not be of any force or validity unless the instrument creating the power has been registered, but that upon registration such conveyance, deed, etc., shall take effect as if the instrument creating the power has been registered before execution of the conveyance or deed. These provisions apply to dealings with land under the Real Property Act (N. S. W.); see Conveyancing Act, s. 158(2) and Stuckey (*op. cit.*) at p. 314, although the Real Property Act in that State itself contains provisions regulating the form, effect and registration of powers of attorney and instruments of revocation of such powers (ss. 88-89).

In so far as dispositions of land are concerned, it is plainly necessary that powers of attorney executed in accordance with the provisions of this Bill should continue to be registered, and we therefore recommend the adoption of the substance of s. 163(2) of the New South Wales Conveyancing Act. This accords with the present Titles Office practice under which an instrument executed under an unregistered power of attorney may be validly registered upon lodgment and registration of the instrument creating the power: see *Douglas v. Hodges* (1971: unreported. Qld. Sup. Ct.). Section 163 of the Conveyancing Act permits but does not require registration of an instrument revoking the power. In Queensland The Real Property Act of 1861 provides for registration of an instrument of revocation. Section 293 of the Land Act, although requiring registration of powers of attorney, does not at present provide for registration of any instrument of revocation.

172. Execution of instruments etc. by donee of power of attorney. Under the general law the rule is that an instrument executed by an attorney should be executed in the name of the principal: cf. Stuckey, *op. cit.*, at p. 314, citing *Wilks v. Back* (1802) 2 East. 142; *Lawrie v. Lees* (1881) 7 App. Cas. 19.

The present clause is in substance derived from cl. 6 of the Bill drafted by the English Law Commission which is virtually identical with s. 123 of the Law of Property Act. The latter section has its source in s. 46 of the Conveyancing Act 1881, which was copied in s. 159 of the Conveyancing Act of New South Wales.

In England doubts have arisen as to the proper form of execution by a corporation acting under power of attorney, these doubts being prompted by the provisions of s. 74(3) and s. 74(4) of the Law of Property Act relating to execution of deeds by corporations. Because of this the Law Commission recommended the inclusion of sub-cl. (2), which in effect authorises the use of either alternative mode of execution. Since cl. 46 of this Report recommends the adoption of the provisions of cl. 74 relating to execution of deeds by corporations, it appears desirable that sub-cl. (2) also be adopted here in relation to execution of instruments under power of attorney.

173. Powers of attorney given as security. Where a power of attorney is coupled with an interest it is at common law irrevocable. A power is irrevocable if given by way of security, e. g., in the case of an equitable mortgage containing an irrevocable power to sell and transfer the legal title,

or in the case of an obligation, e. g., an underwriting agreement containing an irrevocable power to apply for shares - to cite the two examples given by the English Law Commission in its Report. The effect is to protect the attorney or donee of the power and third parties having dealings with him. The present proposed clause is based on the recommendation contained in cl. 4 of the Report of the Law Commission and simply restates the common law position.

In this connexion it is to be noticed that s. 108 of The Real Property Acts expressly provides for revocation of a power of attorney registered in accordance with those Acts. It is not clear whether the right of revocation so conferred is intended to apply even where the power is coupled with an interest and so irrevocable at common law. There is no authority on the point, but it seems extremely unlikely that s. 108 was intended to alter the common law in this respect merely because the power is registered under those Acts. Accordingly, we consider that the present clause, when adopted, should expressly provide that the statutory power of revocation under s. 108 shall be subject to the provisions here proposed.

174. Protection of donee and third persons where power of attorney is revoked. As is stated in the Report of the Law Commission on Powers of Attorney -

"A power of attorney cannot be effectively granted unless the donor is capable of understanding what he is doing, and the subsequent incapacity of the donor operates to revoke the power."

The rule that subsequent incapacity (e. g., insanity) automatically revokes the power is not in doubt: cf. McLaughlin v. Daily Telegraph Newspaper Co. Ltd. (1904) 1 C. L. R. 243; but this point does not always seem to be fully appreciated for it is not uncommon for a power of attorney to be taken in anticipation of impending mental incapacity. Nevertheless, the donee of a power who acts after revocation of the power in circumstances such as these incurs the risk of personal liability for breach of warranty of authority in relation to persons who deal with him on the faith of his continuing authority, and this is so whether or not the donee of the power is aware of the circumstance giving rise to its revocation. Likewise, revocation of the power deprives any subsequent transaction of validity even though the other party thereto takes for value and without notice. These problems are greatly increased by the practical difficulty in some cases of determining whether the donor has reached a stage of mental incapacity such as will revoke the power.

The above strict rule of the common law has to some extent been modified in Queensland by s. 2 of The Mercantile Acts, 1867 to 1896, in New South Wales by s. 160 of the Conveyancing Act, and in England by s. 124 of the Law of Property Act, 1925. The provisions of the English and New South Wales legislation are taken from s. 14 of the English Conveyancing Act of 1881, which, with s. 2 of the Queensland statute, have a common origin in earlier English legislation. This in effect provides that a power of attorney which is declared to be irrevocable shall continue to be effective until notice of revocation or death of the donor is received by the attorney, and that a declaration of non-revocation made by the attorney at the time of the relevant transaction is, in favour of a bona fide purchaser for valuable consideration without notice, conclusive proof of such non-revocation. There is a somewhat similar provision in s. 293(5) of the Land Act, which creates a presumption of non-revocation of a power of attorney.

The provisions of the Law of Property Act on this subject were recently the subject of review by the Law Commission which described them as "very obscure". The same is true of the provisions of s. 2 of The Mercantile Acts, which, as we have seen, have a common statutory origin with the English enactment. Amongst their recommendations on this point, the Law Commission proposed the repeal of s. 124 of the Law of Property Act and the

enactment of a provision the effect of which is that neither the donee of the power, nor any person dealing with him, will be affected by revocation of the power if such revocation has taken place without his knowledge. The recommendation also proposes that a person dealing with the donee acting under a power which is expressed to be irrevocable and to be given by way of security will be entitled to assume that the power is incapable of revocation. Further, there is to be a conclusive presumption of non-revocation in favour of a purchaser if the transaction in question is completed within 12 months of the date on which the power came into operation, or if, before or within three months after completion of the purchase, the purchaser makes a statutory declaration that he did not know of the revocation of the power.

These recommendations will undoubtedly effect a great improvement in the degree of protection which is at present afforded by statute both to the donee and to a purchaser acting on the faith of a power which has been revoked. It will be seen that the Law Commission's proposals will have the practical effect of making determination of the donee's authority dependent upon actual knowledge of circumstances giving rise to revocation. As a general rule, this seems plainly to be necessary although in Queensland such a general principle requires modification in the case of revocation of instruments affecting registered land. In this instance, we think that the invalidity of the transaction, as well as the personal liability of the donor of the power, should be made to depend not on the state of knowledge of the parties but upon registration of the instrument of revocation. To this extent, the provision proposed in sub-cl. (5)(a) of the Bill diverges from that recommended in England, with the practical consequence that in transactions concerning land, it will be necessary for a person relying upon the power to conduct a search immediately before the transaction is completed. This will serve to maintain the practice which now prevails in the case of powers of attorney registered under s. 104 of The Real Property Acts.

175. Proof of instruments creating power. In England a statutory procedure has hitherto existed for the filing of powers of attorney at the Central Office of the Supreme Court of Judicature. The only practical advantage of doing so is to facilitate proof, and the Law Commission in England has recently recommended the abolition of this procedure and the substitution of a provision for proof of a power of attorney by production of a photo-copy, which is required to be duly certified as true and complete by a solicitor or stock broker so as to avoid the possibility of forgery.

The importance of powers of attorney and their use is more limited in Queensland than in England, where an instrument creating the power may form part of the documents of title. Moreover, in the case of powers of attorney registered under s. 104 of The Real Property Acts, the instrument may be proved by production of a photocopy certified by the Registrar under s. 122 of those Acts. Nevertheless, the use of powers of attorney is not confined to land, or even registered land, and the advantages of the method of proof suggested in England are obvious, particularly because it is often inconvenient and sometimes imprudent for the attorney to part with the original instrument. We therefore recommend adoption of the English proposal contained in cl. 3 of the Report of the Law Commission.

PART X - INCORPOREAL HEREDITAMENTS AND APPURTENANT RIGHTS

176. Prohibition upon creation of rent charges. A rent charge is an annual sum of money issuing and payable out of land. It is in substance a security for the purpose of securing on land or an interest in land a periodical payment: see Helmore: The Law of Real Property (2nd ed.) at p. 181. The distinction between a rent charge and a rent reserved on a lease is explained by Megarry & Wade (op. cit.) at p. 789, as follows:-

"Where the relationship of lord and tenant exists between the parties, any rent payable by virtue of that relationship by the tenant to the lord is a rent service."

In respect of land under The Real Property Acts, the place of rent charges is taken by "incumbrances", defined in s. 3 of those Acts as meaning "any charge on land created for the purpose of securing the payment of an annuity or sum of money other than a loan". Incumbrances are rarely encountered in practice although a bill of incumbrance is sometimes taken in preference to a bill of mortgage in cases where the obligation sought to be secured is other than a loan of money and so may not fall strictly within the terms of the definition of mortgage in s. 3 of the Acts.

If incumbrances of registered land are rare, rent charges are virtually unknown since a rent charge in the true sense can now be created in Queensland only in respect of old system land. Even in England the creation of new rent charges is generally uncommon: the researches of the Law Commission, published in its Working Paper No. 24, show that in certain limited geographical areas of England (principally Manchester, Bath and Bristol) interests of this kind are not infrequently created in the course of residential estate development and sale. Because of the complexities which the existence of rent charges adds to conveyancing, the Law Commission has recommended that the creation of further rent charges in the future be prohibited and that provision be made for the redemption of existing rent charges.

The existence in Queensland of a system of registered conveyancing means that the difficulty mentioned by the Law Commission does not arise in the case of land under The Real Property Acts, with respect to which the presence of an incumbrance can be discovered by search. As to old system land the same problem might exist if such land were plentiful and rent charges were widely used, but this is not the case. Hence there is no pressing need to follow the course suggested in England.

However, as a measure of simplification of real property law, and because of the general inutility of rent charges under modern conditions, we propose that the creation of rent charges should no longer be possible in the future: see sub-cl. (1). Sub-clause (2) will expressly preserve the power to create incumbrances in respect of registered land.

177. Release of part of land from rent charge. The only Queensland legislation dealing specifically with rent charges is s. 40 of The Distress Replevin and Ejectment Act of 1867, which provides that the release from a rent charge of part of the land charged therewith shall not extinguish the whole rent charge. There is similar legislation in England and the Australian States, thus reversing the common law rule on this point.

— It is perhaps doubtful whether s. 40 applies to, or is necessary for, incumbrances registered under The Real Property Acts. The extent of the identity between an incumbrance and a rent charge is by no means clear despite some dicta in Mahoney v. Hosken (1912) 14 C.L.R. 379, 384. Both because of this, and to preserve s. 40 for the benefit of any existing rent charges issuing out of land under the general law, it seems desirable to retain a provision in the form of that in The Distress Replevin and Ejectment Act, which it is proposed will be repealed in toto.

178. No presumption of right to access or use of light or air. In one of the first cases decided by the High Court of Australia it was held that the English law of prescription as to ancient lights had become part of the colonial law of Australia upon its settlement: see Delohery v. Permanent Trustee Co. of New South Wales (1904) 1 C.L.R. 283. This decision was followed by immediate legislative action in New South Wales, Victoria and Queensland, where by The Ancient Lights Declaratory Act 1906 (6 Edw. 7,

No. 3) it was provided that from the commencement of that Act (1st March, 1907) no right to the access or use of light to or for any building should be capable of coming into existence by reason only of the enjoyment of such access or use for any period.

Subsequently both the Victorian and New South Wales legislation was amended to extend the above enactment to air as well as light. This was evidently done in consequence of the later decision of the High Court in Commonwealth v. Registrar of Titles (1918) 24 C.L.R. 348, to the effect that a right to the uninterrupted passage of air to the doors and windows of a building was capable of subsisting as an easement created by express grant. It followed from this that it was also capable of being acquired by long continuous user in accordance with the principle of Delohery's case; cf. Tuckett v. Brice [1917] V.L.R. 36.

The foregoing amendment has never been adopted in Queensland, and the present clause is intended to effect this step. The date from which the proposed clause will operate is 1st March, 1907, the date of commencement of the Act of 1906. Since that enactment did not deal with the acquisition by prescription of a right to air, the clause is open to the objection that, as regards air, it will have a retrospective operation. But in the particular circumstances we do not think that this departure from principle is of any moment since the doctrine of prescription has in any case no application to land under The Real Property Acts: see Miscambles v. Phillips [1936] St. R. Qd. 136.

179. Right to support of land and buildings. At common law an owner has a natural right to have his land supported by his neighbour's land "more accurately described as a right not to have that support removed by his neighbour": Megarry & Wade (op. cit.) at p. 811. This right is however subject to two qualifications. One is that it is confined to land in its natural state, there being no natural right to support for buildings or for the additional burden which they place upon the land. "The owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour's house, if supported by it, to fall in ruins to the ground.": Dalton v. Angus (1880) 6 App. Cas. 740, 804, per Lord Penzance.

The second qualification is that there is no right to support of land by water. Thus, if the effect of drainage on neighbouring lands is to cause settlement of an owner's land with consequent damage to buildings, no right of action appears to exist: see Popplewell v. Hodgkinson (1869) L. R. 4 Exch. 248; Langbrook Properties Ltd. v. Surrey County Council [1970] 1 W. L. R. 161. The Law Commission in its Published Working Paper (No. 36) on Appurtenant Rights has suggested that prior to Popplewell v. Hodgkinson the courts did entertain claims to rights to support by water, and that some doubt has been cast upon the correctness of the decision in Popplewell's case by remarks in later cases. It is clear that an owner may restrain withdrawal of support by water where it is brought about by the intervention of a stranger, i. e. a person such as a local authority, who is not a neighbouring owner: see Perth Corporation v. Halle (1911) 13 C. L. R. 393 and Metropolitan Water Supply & Sewerage Board v. Jackson [1924] St. R. Qd. 82. However, in the latter case the Full Court accepted the correctness of the principle in Popplewell v. Hodgkinson, so that it must be taken that in Queensland there is no liability in a neighbouring owner who causes damage by withdrawal of subsurface water.

Both of the above qualifications on the natural right to support are difficult to justify either in logic or as a matter of policy. As regards the first, Lord Penzance said in Dalton v. Angus that -

"If this matter were *res integræ*, I think it would not be inconsistent with legal principles to hold, that where an owner of land has used his land for an ordinary and reasonable purpose, such as placing a

house upon it, the owner of the adjacent soil could not be allowed so to deal with his own soil by excavation as to bring his neighbour's house to the ground. It would, I think, be no unreasonable application of the principle *sic utere tuo ut alienum non laedas* to hold that the owner of the adjacent soil, if desirous of excavating it, should take reasonable precautions by way of shoring or otherwise to prevent the excavation from disastrously affecting his neighbour. A burden would no doubt be thus cast on one man by the act of another done without his consent. But the advantages of such a rule would be reciprocal, and regard being had to the practicability of shoring up during excavation, the restriction thus placed on excavation would not seriously impair the rights of ownership."

We have little doubt that, with advances in modern engineering techniques, an owner both can and should, and in practice almost invariably does, take precautions against damage to his neighbour's building caused by subsidence arising from excavations on adjoining land, and we share the view of the Law Commission that there should be a legal obligation to avoid damage to buildings as well as to land deriving natural support from such land. We also agree with the Commission's view that a right to continue to have land naturally supported by water should be recognised, as it is in Scotland: see Bald v. Alloa Colliery Co. (1854) Dunl. 870.

The present clause is based substantially upon the Law Commission's recommendations in this behalf, which we may add will also have the incidental practical advantage of avoiding the necessity for attempting to distinguish between support for land and support for the buildings upon it, and between support derived from water and support derived from silt.

180. Imposition of statutory rights of user in respect of land. The Law Commission in its Working Paper No. 36 on Appurtenant Rights (paras. 115-120) has recently recommended that the court (or in England the Lands Tribunal) should be given power to impose land obligations (i. e. rights of user in the nature of easements) upon land ("the servient land") in the interests of improved use or development of other land ("the dominant land"). The example given in para. 116 of the Paper is:-

"Let it be supposed that in a particular case it would be in the public interest that a housing estate should be built on a particular site, and, further, that such development would require the acquisition of drainage rights over neighbouring land. It is always to be hoped that the developer will obtain those rights from his neighbour by agreement; but what if he cannot? The developer's land will not be put to optimum use, unless the development is carried out by some body having compulsory powers."

In Queensland such problems have arisen not so much in the sphere of estate development, where owners can generally be induced by the offer of a substantial consideration to grant the rights required, but in relation to individual residential or commercial properties requiring access to or for utilities and services or to public highways. These problems are accentuated by the titles registration system, which precludes recognition of easements which would ordinarily be implied or imposed at law or in equity. In Pryce v. McGuinness [1966] Qd. R. 591 the court was able to conclude that, notwithstanding the paramountcy provisions of The Real Property Acts, an easement of way of the course of subdivision had been cut off from access to the highway, but was unable to hold that any similar easement could be implied for or in respect of the passage of electricity, sewerage and drainage services. There seems to be no reason why the court should not have power to create such rights in favour of the dominant land and to impose them on the servient land where this is necessary in the interests of effective user of the dominant land. Legislation of this general kind already exists in the form of The Mining on Private Land Act of 1909, which authorises the grant of permits to enter on private land for mining purposes on

terms of payment of compensation to the land owner: see ss. 12 and 17. This legislation has worked well, and there is no reason why it should not be successfully extended in principle to functions and uses in addition to mining. In England there is similar legislation, which has recently been the subject of a decision in Cartwright v. Post Office [1969] 2 Q.B. 62, authorising the carrying of telephone lines across private land.

We propose that the principle of this legislation should be made generally available, so as to avoid difficulties of the kind that arose in Pryce v. McGuinness. It would be necessary to surround the power to impose such statutory rights of user with adequate safeguards, e.g. that the owner of the servient land can be adequately recompensed in money for any disadvantage he may suffer and that he should have unreasonably refused to agree to accept the imposition of such obligation: see sub-cl. (3). These safeguards are based substantially on the recommendations of the Law Commission Paper referred to above, which also proposed that costs should not ordinarily be capable of being awarded against the servient owner, as a deterrent to frivolous and vexatious applications. Provision for extinction and modification of such statutory rights, as well as their registration, is also proposed: see sub-cl. (4).

181. Power to modify or extinguish easements and restrictive covenants. Section 84 of the English Law of Property Act 1925 makes provision for the modification or extinction (on terms of compensation or otherwise) of restrictive covenants in cases where (expressed in general terms) such restrictions impede the reasonable user of the subject land. In New South Wales the corresponding section of the Conveyancing Act (s. 89) extends to the modification or extinction of easements as well as restrictions imposed by covenants, and a similar extension of the English section has recently been recommended in the Law Commission's published Working Paper No. 36 (paras. 114, 115, 121). Decisions on the construction of the English s. 84 have shown up a number of shortcomings. Thus, in relation to the first limb of s. 84(1)(a), the requirement that the restriction should be "obsolete" has been held to mean that its original object should no longer be capable of being achieved at all: see Re Truman, Hanbury Buxton & Co. Ltd.'s Application [1956] 1 Q.B. 261; in relation to the second limb of s. 84(1)(a), the court must be satisfied both that the permitted user is no longer a reasonable one and that the applicant's proposed user is the only reasonable one. Because of the difficulty of satisfying these tests, the Law Commission in its Report on Restrictive Covenants recommended the amendment and extension of the provisions of s. 84 relating to modification and extinction of restrictive covenants, and these recommendations were given legislative effect by s. 28 of the Law of Property Act 1969; 17 & 18 Eliz. 2, c. 59.

In Queensland the use of restrictive covenants to protect the interests of landowners has not been common. This is probably due in the main to the fact that such covenants, which are equitable only, cannot be registered (as they can in New South Wales) in respect of land under The Real Property Acts. Logically, it should be possible to protect such interests by lodgment of a caveat, and this is consistent with the view taken of these interests by the High Court in Pirie v. Registrar-General (1962) 109 C.L.R. 619, particularly per Kitto J. at p. 620; but, apart from the practical difficulties of such a course, some doubt has been expressed as to whether a restrictive covenant confers a caveatable interest: see the discussion in 2 Australian Current Law Review 85 (R. Barber). Because of these problems, restrictive covenants in Queensland are usually only contractual in form and so not binding on successors in title. Even contractual covenants of this kind may, however, require modification or discharge, and problems of obsolescence not infrequently arise in the case of easements. A statutory provision along the lines of the English and New South Wales section is therefore both desirable and necessary in Queensland.

In England the statutory jurisdiction to modify or extinguish covenants is vested in the Lands Tribunal. Both there and in New South Wales it has been held that town planning considerations do not form an element in the decision whether a covenant or (in New South Wales) an easement should be modified or extinguished under the section: see Re Mason and the Conveyancing Act (1960) 78 W.N. (N.S.W.) 925, 929, and English decisions there cited. In England, consequentially upon the recommendation of the Law Commission, the section was amended in 1969 so as to permit account to be taken of the town plan and any ascertainable pattern of decisions of the local authority in granting or refusing approval to use land in the area. This being so, the appropriate tribunal in Queensland, and the one best equipped to decide questions of whether or not a restriction or easement should be modified or extinguished, is the Local Government Court. Accordingly, we propose that the jurisdiction exercisable under the section should be vested in that court, with rights of appeal to the Supreme Court and other procedural matters to be regulated as in the case of civil proceedings in the District Court.

Subject to inclusion of the amendments effected by the English legislation in 1969, the proposed section follows the form of s. 89 of the Conveyancing Act (N.S.W.).

PART XI - ENCROACHMENT AND MISTAKE

182-193. Encroachment of buildings. At common law the owner of land owns not only the land itself but anything permanently affixed thereto and also owns or is prima facie entitled to possession of the airspace above it: cf. Davies v. Bennison (1927) 22 Tas. S.R. 52 (bullet entering airspace above land held to be a trespass to land). Hence, the unauthorised encroachment by an overhanging projection of a building or sign is a trespass which will be restrained by injunction: Kelsen v. Imperial Tobacco Co. Ltd. [1957] 2 Q.B. 334, and the owner of the land is entitled to any encroachment which is affixed to the surface of his land.

Since boundaries are not always perfectly well defined or marked, the common law rule has serious consequences for those who mistakenly or inadvertently exceed the limits of their boundaries in building upon land. The Encroachment of Buildings Act of 1955 (4 Eliz. 2 No. 18) provides a procedure by which the court may, on terms of payment of compensation, make orders for the transfer, etc., of the land encroached upon to the encroaching owner or the removal of the encroachment. The Act which is based on a similar New South Wales statute (the Encroachment of Buildings Act 1922) seems to have worked reasonably well, and few practical problems seem to have arisen in the course of its application and enforcement. For a general account of the principles applicable under these Acts, see Haddens Pty. Ltd. v. Nesbitt [1962] Q.W.N. 44 and Re W. H. Marsh (1942) 42 S.R. (N.S.W.) 21. A possible conflict between the encroachment relief provisions under the Act and the minimum subdivision provisions of local authorities was, in Re Star Mirrors Pty. Ltd. [1967] Q.W.N. 31, resolved in favour of the former, so that subdivisional approval is not necessary for the validity of an order under the Act. As a matter of convenience we consider this to be the correct approach since the number of orders under the Act is so small as not materially to affect any major principle of town planning law, but we think that the decision in the Star Mirrors case should be made explicit by legislation so that the question does not arise again in any future case: see cl. 182 of this Division.

In other respects the provisions of the Act of 1955 are adopted without material alteration and are included in this Bill simply for the sake of completeness and convenience.

194-197. Improvements under mistake of title. The rule that the owner of land becomes the owner of any fixtures permanently attached to it means that a house or other structure or improvement mistakenly built upon the land of another becomes the property of that other without any right of compensation or removal in favour of the builder. The position is otherwise where the owner is aware that the building is being carried out on his land in error, since he may then be estopped from asserting his title: Ramsden v. Dyson (1865) L. R. 1 H. L. 129; but when there is no such acquiescence or inequitable conduct on his part, he is entitled to claim the structure or improvement so affixed free from any claim by the builder: Brand v. Chris Building Society Pty. Ltd. [1957] V. R. 625. But as Sackville and Neave point out (Property Law Cases and Materials, at p. 100) the rigid solution adopted in the Victorian decision is not inevitable and some other legal systems confer on the builder a lien or right to retain possession of the land built upon until the owner pays a reasonable sum in respect of the unjust enrichment of his land: see Fletcher v. Bulawayo Waterworks Co. Ltd. 1915 A. D. 636 (South Africa).

The problem has been tackled by legislation both in the Canadian provinces and in New Zealand and more recently Western Australia. The Canadian statutes apparently have their origin in legislation of certain of the American States and commonly appear in two distinct parts, one conferring on the builder a lien for "lasting improvements" made on land in the mistaken belief that it is his own, and the other providing for relief in respect of encroachments in a manner similar to the Queensland Act of 1955: see, for example, Manitoba Law of Property Act R. S. M. 1954, c. 138, ss. 28 and 29. On the other hand, the Western Australian provision (s. 123 of the Property Law Act 1969), which is based upon s. 129A of the New Zealand Property Law Act 1952, is confined to cases in which a building has been erected on land by a person having an estate or interest in another piece of land which he mistakenly believes is the land built upon. The provision also extends to encroachments caused by mistake as to the boundaries of the land, and in this way it also partly serves the function which in Queensland is performed by The Encroachment of Buildings Act of 1955 and which in this Bill is covered by Division 1 of this Part.

The incidence of building on one allotment in mistake for another is surprisingly large, most practising members of the profession having encountered it on one or more occasions, and such errors are likely to recur as long as there is large-scale development of new residential subdivisions which in their undeveloped condition often make it difficult to identify a particular allotment or to distinguish one from another. Legislation on this topic is, in our opinion, therefore not only justified but necessary. Because of the existing procedure in relation to encroachments under the Act of 1955 (which will be incorporated in and become Division 1 of this Part), we see no need to adopt legislation in the precise form of s. 123(1) of the Western Australian Act, which is somewhat complex in its terms. That provision also suffers from the limitations that it is available only in respect of a building and only where the builder owns other land at the time he erects the building in question, and this restricts its application to an extent which, in our view, is unwarranted. It may, for example, exclude the case of a person on whose behalf a house is being built by a building contractor, or who buys from a builder or other person before the mistake is discovered. We therefore prefer the Canadian form of legislation, which extends to any "lasting improvement" (which has been held to include the clearing of land on an improved farm: Mateychuk v. Kuchernowski [1930] 1 D. L. R. 367; contrast Tuckwell v. Guay (1917) 34 D. L. R. 106, but not to include a concrete footpath: Mohl v. Benft (1956) 6 D. L. R. 2d. 32), and which rests simply upon the existence of a genuine belief that the land belongs to the improver without the additional requirement of ownership of other land. Furthermore, the Canadian provisions have been the subject of a good deal of reported judicial decision which affords the advantage of a useful guide to interpretation of the legislation: in addition to the decisions

mentioned, see, on the Ontario provision (now s. 38 of the Conveyancing and Law of Property Act, R.S.O. 1960 c. 66), the following: Bilecki v. Weber [1942] 2 D.L.R. 210; Derro v. Dube [1948] 2 D.L.R. 296; Cartwright v. Cartwright [1940] S.C.R. 659, mentioned in Laskin: Cases & Notes on Land Law (rev. ed.) at p. 161, and Gay v. Wierzbicki [1967] 2 O.R. 211.

We therefore prefer and recommend the adoption of a general provision modelled on the Canadian legislation on this subject, as to which see cl. 195 of this Division. On the other hand, the Western Australian section is much more explicit and detailed on the subject of the powers of the court and the procedural aspects of the relief which may be granted, and for this reason we have chosen to incorporate sub-sections (2) to (7) of s. 123 of the W.A. Act in the draft provisions constituting Division 2 of this Part of the Bill.

PART XII - EQUITABLE INTERESTS AND THINGS IN ACTION

198. Statutory assignments of things in action. Prior to The Judicature Act of 1876 assignments of choses in action were recognised only in equity, but s. 5(6) of that Act introduced a statutory means by which such assignments could be effective, i. e. in writing under the hand of the assignor and upon giving notice in writing to the assignee. The statutory provision has worked well but its proper place is in legislation dealing with property law and not in a statute concerned primarily with matters of procedure.

This clause therefore simply follows the terms of s. 5(6) of The Judicature Act so that that sub-section will then fall to be repealed.

199. Efficacy in equity of voluntary assignments. The introduction of a statutory means of assigning a chose in action did not impair the efficacy of assignments in equity, as was recognised by the House of Lords in William Brandt's Sons & Co. v. Dunlop Rubber Co. [1905] A.C. 454, 462. On the other hand, the maxim that equity will not assist a volunteer means that equity will not perfect an imperfect gift, and an attempted gift will not be given effect even in equity unless, as Turner L. J. said in Milroy v. Lord (1862) 4 De G.F. & J. 264, 274, the donor has "done everything which... was necessary to be done in order to transfer the property."

This formulation of the test for determining whether a voluntary assignment will or will not be given effect in equity has, since the introduction of the statutory procedure for assignment, given rise to a remarkable divergence of judicial opinion. Of the three judges of the High Court who participated in the decision in Anning v. Anning (1907) 4 C.L.R. 1049:-

- (1) Isaacs J. took the view that if the legal title to the property was assignable at law it must be so assigned or equity would not enforce the gift. This approach (which would recognise completion of the assignment only if the legal requirements of the statute were complied with) is, as Mr. L. Zimes has pointed out in an article in 38 A.L.J. 337, at p. 339, now clearly contrary to the trend of authority, and may be ignored.
- (2) Higgins J. considered that what was required was that everything should be done by the donor which it lay within his power to do in order to transfer the property. On this approach a gift of a chose in action would be regarded as incomplete if the donor had not given to the debtor notice of the assignment, since this was something which it was within his power to do (see 39 A.L.J. at p. 339) even though it might also be done by the assignee himself.
- (3) Griffith C. J., however, considered that the words "necessary to be done" in the formulation of Turner L. J. in Milroy v. Lord should be construed to mean "necessary to be done by the donor".

so that if what remained to be done (such as giving notice to the debtor) could equally well be done by the assignee the gift should be regarded as effective.

Although nearly three quarters of a century have passed since the decision in Anning v. Anning a choice between the views of Griffith C. J. and Higgins J. has not yet been finally or authoritatively made. In Queensland the Full Court in O'Regan v. Commissioner of Stamp Duties [1921] St. R. Qd. 283 has shown a marked preference for the approach adopted by Griffith C. J., and it is also arguable that in Re Rose [1952] Ch. 499 the English Court of Appeal likewise considered that the critical question was whether the donor had done everything which was necessary to be done by him in order to transfer the subject property. More recently, in Norman v. Federal Commissioner of Taxation (1963) 109 C. L. R. 9, Windeyer J. (in a judgment which was described by Dixon C. J. as not containing anything with which he was disposed to disagree) indicated that the view of Griffith C. J. better accorded with general principle.

We think that the time has come for this conflict of authority to be resolved by legislation and that the trend of opinion favours the view adopted by Griffith C. J. in Anning v. Anning. Accordingly, we propose a provision in the form of cl. 199 which will give statutory authority to that view. It does seem necessary expressly to confine the operation of the provision to effecting a transfer in equity so as not to disturb ordinary rules of priority, and sub-cl. (2) will ensure that other methods of disposing of property (e. g. by deed of gift) are not interfered with, as well as that specific statutory provisions (e. g. those requiring a writing in the case of transfers of interests in trusts of land or the requirements of The Real Property Acts) are not affected.

PART XIII - POWERS OF APPOINTMENT

200. Application of Part. This section, following similar legislation in England and elsewhere, simply applies the statutory provisions to existing powers of appointment.

201. Mode of exercise of powers. The general rule is that the exercise of a power must take place strictly in accordance with any formalities prescribed by the instrument creating the power, otherwise the appointment will be void: see Megarry & Wade, op. cit., at p. 473.

In the case of powers exercisable by will, s. 42 of The Succession Acts, 1867 to 1968 provides that no appointment made by will shall be valid unless executed in the manner of a will, i. e., signed by the testator and two witnesses; but, if so executed, it constitutes a valid exercise of the power notwithstanding an express requirement that some other formality is required.

As regards non-testamentary powers, s. 66 of those Acts contains a similar provision permitting such powers to be exercised by deed if attested by two or more witnesses in the manner in which deeds are ordinarily attested and exercised. This section is taken from s. 12 of the English Law of Property Amendment Act 1859 and contains a proviso preserving the effect of any direction which requires the consent of any person or the performance of any act in order to give validity to any appointment where this is not related merely to matters of form.

Both of these sections are designed to prevent the avoidance of an appointment merely because of failure to comply with some additional and unnecessary formality imposed by the instrument creating the power, and provisions similar to s. 66 appear in the Law of Property Act 1925 and the property legislation of the Australian States.

The Succession Acts are not the appropriate place for a provision such as s. 66, which has no reference to testamentary powers of appointment, and we propose that this section should be repealed and placed in the present legislation. The proposed clause is modelled primarily on s. 41(1) of the New South Wales Conveyancing Act, which specifically caters for instruments executed in accordance with the Real Property Act (see Qld. Real Property Acts, s. 115) and in other respects conforms with the relevant English and other provisions. Sub-clauses (2) and (3) are derived from the English legislation.

202. Validation of appointment where objects are excluded or take illusory shares. Apart from statute the rule was that an appointment under a non-exclusive power (i. e., one authorising the donee of a power to prescribe merely the shares or proportions in which the objects of the power might take) was void unless there was an appointment to each object of a share, no matter how trivial. In England invalidity arising from this source was cured by the Illusory Appointments Act 1830 (11 Geo. 4 & 1 Wm. 4, c. 46) which in Queensland appears as ss. 70, 71 and 72 of The Equity Act of 1867. Later English legislation, in the form of the Powers of Appointment Act 1874, was designed to cure a further ground of invalidity arising in particular cases from the death of an appointed object during the lifetime of the testator: see 23 Halsbury's Laws of England (1st ed.) at p. 24.

Both of the foregoing English enactments have now been repealed and replaced by s. 158 of the Law of Property Act and there are corresponding provisions in the Australian States. These provide the model for the present clause, which will enable the repeal of ss. 70-72 of The Equity Act.

203. Protection of purchasers claiming under certain void appointments. An appointment may amount to a fraudulent exercise of power on any of three grounds, namely (1) where made with a corrupt purpose; (2) where made for a purpose foreign to the power; and (3) where made in pursuance of a bargain to benefit a person who is not a proper object of the power: see Megarry & Wade (op. cit.) at pp. 475-476. The effect of fraud in any of the foregoing forms is that, even if the fraud affects only part, the entire appointment is bad unless the fraudulent part is clearly separable from the rest. This has the effect that a purchaser for value, even without notice of the fraud, of an equitable interest in the subject-matter appointed does not acquire title thereto since the appointment is void and his right is subsequent in time to that of the person entitled.

In England, Victoria and Western Australia, legislation now provides that a purchaser for value without notice from an appointee not less than 25 years of age is protected to the extent of the amount to which, at the time of the appointment, the appointee was presumptively entitled in default of appointment. In New South Wales the relevant age is 23 years. The subject clause is identical with the English section.

204. Disclaimer, etc. of powers.—A collateral power (i. e. a power given to a person who has no interest in the property the subject of the power) and a power coupled with an interest cannot be released or disclaimed or otherwise extinguished by the donee of the power: see Stuckey, op. cit., at p. 56.

Sections 155 and 156 of the Law of Property Act, following ss. 52 and 56 of the English Conveyancing Acts of 1881 and 1882 respectively, permit the release or disclaimer of collateral powers and appendant or appurtenant powers. These provisions do not apply to a power coupled with a duty: see Re Mills [1930] 1 Ch. 654, and in New South Wales the corresponding section (s. 28 of the Conveyancing Act) expressly so provides.

There are provisions similar to those in the English Law of Property Act in corresponding legislation in the Australian States, although the latter conveniently reduces them to one instead of two sections. The New South

Wales section contains provision for registration of an instrument of disclaimer or release where it affects land under the Real Property Act, and an appropriate form is prescribed.

The present clause adopts the form of provision found in the Australian State legislation with the addition of the foregoing features of the New South Wales section.

PART XIV - PERPETUITIES AND ACCUMULATIONS

205-221. Perpetuities and accumulations. These clauses represent the provisions of the Perpetuities and Accumulations Bill which was the subject of the Law Reform Commission's Report on this subject (Q. L. R. C. 7), to which reference should be made for detailed comment on these provisions. The only change, which has been made in response to suggestions by the Public Curator and the Life Offices' Association for Australasia, is a clarification of the provision in cl. 219(1)(d) respecting superannuation and associated trust funds.

In company with property legislation in other States, it is thought preferable that the perpetuity and accumulation provisions should be incorporated in this Bill, which embraces all property rights in general.

PART XV - CORPORATIONS

222. Devolution of property of corporation sole. Corporations sole are generally not commonly encountered in Queensland although they may be created expressly by statute or be constituted by letters patent under The Religious Educational and Charitable Institutions Acts, 1861 to 1967 ("the R. E. C. I. Acts"): see Serbian Orthodox Ecclesiastic School Community "Saint Nikolas" Queensland v. Vlislavljevic [1970] Qd. R. 386, for an instance of the latter kind. At common law there are some peculiar rules applicable to corporations sole, one being that a leasehold interest may not be granted to a corporation sole in his corporate capacity but only in his natural capacity, so that a lease granted to a corporation sole passes to his personal representatives and not to his successors: see 8 Halsbury's Laws of England (1st ed.) at p. 371, citing Arundell's Case (1615) 1 Roll. Abr. p. 515, and Fullwood's Case (1591) 4 Co. Rep. 64b.

The present clause follows s. 180(1) of the English Law of Property Act and s. 176 of the Victorian Property Law Act 1958 and is intended to ensure that proprietary interests such as leaseholds pass to the successors of a corporation sole and not to his personal representatives.

223. Vacancy in corporation. Another rule of the common law, applicable both to corporations sole and corporations aggregate, is that during a vacancy of office the corporation is capable of no corporate act: see Co. Litt. 263b; Holdsworth: History of English Law, vol. 3, at p. 486. Hence, a grant or devise of land to a corporation during such vacancy is void; ibid., citing Corpus Christi College Case (1587) 4 Leon. 223; Grant on Corporations (ed. 1850) 123.

Clause 223, which is based on s. 180(2) of the English Act and s. 177 of the Victorian Act of 1958, is designed to displace the above rule.

224. Transactions with corporations sole. This clause, based on s. 178 of the Property Law Act (Vic.), is included for reasons similar to the preceding clause.

225. Corporation incapable of acting. It sometimes happens that, through death, incapacity or otherwise, all the officers and members of a body corporate are incapable of acting, with the consequence that the corporation itself ceases to be capable of acting or of accepting further members, or even of appointing new officers such as directors to manage its affairs. This is a state of affairs which is now happening with recurring frequency, particularly in the case of small proprietary companies of which the only directors and shareholders are husband and wife who are killed in the same

motor accident: see Re Noel Tedman Holdings Pty. Ltd. [1967] Qd. R. 561. In the latter case Wanstall J. was able to solve the problem by directing the holding of a meeting to appoint directors to be attended by the personal representatives of the deceased shareholders; but the case was one in which at least one of the shareholders had appointed an executor and the position is virtually insoluble where none of those deceased has left a will. In such cases (which have in fact occurred in Queensland) there is no means by which the affairs of the corporation can be conducted pending the appointment of an administrator of the estate of the deceased, which may involve delays of many months.

What is needed is some procedure by which the court can, during such a period, appoint a person who can administer the affairs of the corporation. Such a procedure exists under s. 23 of The Building Units Titles Act of 1965, but there is no comparable provision in either the Companies Act 1961-1971 or the R.E.C.I. Acts. We therefore propose a clause, modelled principally on s. 23, which will enable an administrator to be appointed to the affairs of a corporation during any period when it is incapable of acting. This will ensure that it will be possible to preserve the assets of the corporation and to carry on and complete transactions entered into by it until the conduct of its affairs can be returned to normal.

226. Corporate contracts and transactions under seal. At common law the contracts and transactions of a corporation are, in order to be valid, required to be effected under the corporate seal, although an exception is recognised in respect of trivial day-to-day transactions: see Church v. Imperial Gas Light & Coke Co. (1838) 6 Ad. & El. 846. The practical disadvantages of the common law rule are greatly reduced by statutory provisions, such as s. 19 of the Local Government Act 1936-1970 and s. 55 of The Harbour Acts, 1955 to 1964, both of which are modelled on s. 35 of the Companies Act 1961-1971 which places the contracts of companies on the same footing, so far as formalities are concerned, as those of individuals. In Queensland, the legislature, in creating statutory bodies corporate, has been fairly assiduous in reproducing the formula adopted in the Companies Act; but there are one or more such statutes in which this requirement has been overlooked (for a recent example, see the State and Regional Planning, etc. Act 1971), in which event any contract made by the corporation will be unenforceable by either party unless under seal: see Wright & Son Ltd. v. Romford Borough Council [1957] 1 Q.B. 431. Another example which appears to fall within this category is a corporation constituted by letters patent under the R.E.C.I. Acts, which do not contain any statutory provision to displace the common law requirement of the corporate seal as a prerequisite to the validity of all but trivial contracts.

In England the decision last mentioned prompted the passing of the Corporate Bodies' Contract Act 1960 (8 & 9 Eliz. 2, c. 46) which adopted the standard formula from the Companies Act and extended it to all other corporations. Clause 226 is based upon the provisions of the English Act.

PART XVI - VOIDABLE DISPOSITIONS

In England a good deal of legislation has from time to time been directed at dispositions of property by debtors whose aim was to place their property out of the reach of their creditors. Early examples are the statute 50 Edward 3, c. 6 of 1376, which was directed against collusive trusts of land intended to deceive creditors, and which now appears in Queensland as s. 44 of The Mercantile Acts, 1867 to 1896, and the statute 3 Henry 7, c. 4 (1487), which made similar provision with respect to goods and which now stands as s. 45 of those Acts. More famous are the provisions of 13 Elizabeth 1, c. 5 (cf. s. 46 of The Mercantile Acts), passed in 1570, which avoided "feigned, covinous and fraudulent" conveyances with intent to delay, hinder or defraud creditors. This statute was the historical source of a great many of the concepts and provisions of modern bankruptcy law,

including those governing voidable preferences and settlements which are now regulated by ss. 120 and 122 of the Commonwealth Bankruptcy Act 1966-1968. In addition, the statute 27 Elizabeth 1, c. 4 of 1585, which was designed to avoid fraudulent conveyances intended to deceive purchasers of estates, was adopted in Queensland in ss. 48 and 49 of The Mercantile Acts. The same legislation in s. 50 also incorporated s. 4 of the later statute of Elizabeth which provided a protection from the foregoing provisions in favour of bona fide purchasers for good faith.

Each of the above sections is stated in archaic and somewhat unclear language, and it is desirable that in Queensland the step should be taken of expressing the legislation directed at fraudulent dispositions in a simpler and more modern form, as has been done by ss. 172 and 173 of the Law of Property Act in England and similar legislation in the Australian States. This will facilitate repeal of the old English statutes mentioned above as well as ss. 44 to 52 of The Mercantile Acts.

227. Voluntary conveyances to defraud creditors voidable. Clause 227 is essentially a re-statement of the substance of 13 Eliz. c. 5 as it appears in s. 172 of the English Law of Property Act 1925 (cf. s. 46 of The Mercantile Acts). Section 172 of the English Act and the comparable section of their current Victorian Property Act 1928 use the word "conveyance" in place of "disposition" and it was not without some difficulty that in Thompson v. Nicholson [1939] V. L. R. 157 Lowe J. was able to construe this as comprehending personal property as well as real property. The corresponding New South Wales provision (s. 37A of the Conveyancing Act) and s. 172 of the Victorian Act of 1958 use the word "alienation"; and we prefer this term as capable of embracing dispositions of all kinds of property whether real or personal.

To a large extent the field of fraudulent dispositions is now occupied by s. 121 of the Commonwealth Bankruptcy Act, which, however, is confined to dispositions by bankrupts as such. The foregoing sections of the property legislation are not, however, confined to insolvents and so affect dispositions which are not within the scope of the Commonwealth legislation.

Sub-clause (2) contains the common protective provision in favour of bona fide purchasers without notice.

228. Voluntary dispositions of land how far void as against purchasers. This clause corresponds with s. 48 of The Mercantile Acts and is derived ultimately from the statute 27 Eliz. 1 c. 4, which was construed by the courts to the effect that a voluntary conveyance taking place before conveyance to the purchaser was proof of intention to defraud the purchaser. This construction was altered in England by the Voluntary Conveyances Act 1893, which removed the presumption which the courts had read into the statute of Elizabeth, and which is the source of sub-cl. (2) of the present provision.

229. Acquisition of reversions at undervalue. Equity has always looked with sympathy on reversioners and others having expectations of succession on account of their vulnerability to bad bargains. A court of equity would set aside a transaction with respect to such an interest in expectancy unless the transferee discharged the onus of proving that a fair price had been paid. In England the Sales of Reversions Act 1867 (31 & 32 Vict. c. 4) made it no longer a sufficient reason by itself for setting aside a dealing with a reversionary interest that the consideration was inadequate provided that the bargain was made bona fide, but the adequacy of the consideration remains an important factor in determining whether the bargain is unconscionable. The only remotely comparable provision in Queensland is found in s. 11 of the Money Lenders Act 1916-1968, which is, however, confined to transactions with money lenders. Although improvident bargains by expectant heirs now recall a social milieu which is largely past, there will be no harm, and may well be some good, in adopting the provisions of s. 174 of

the Law of Property Act with respect to this subject.

PART XVII - APPORTIONMENT

230. Interpretation of terms.

231. Rents etc. apportionable in respect of time. The general rule at common law is that rent and other payments falling due at periodic intervals are not due and payable until the expiration of the full period in question: Clun's Case (1614) 10 Co. Rep. at p. 18a. Hence, if for some reason the full period is never completed, for example, where a lease determines on a date between two rent days, no part of the rent or payment is recoverable at all in respect of that part of the period which had expired. The rule, (which originated with rent and was later applied to other periodic payments: see Holdsworth: History of English Law, vol. 7 at pp. 267-270) was further complicated in the case of rents due from tenants for life by the principle that there could be no personal action in debt for rent, which could not be reserved on an estate of inheritance, and was partly responsible for statutory extensions of the remedy of distress: see Holdsworth, loc. cit., at p. 263. A somewhat similar difficulty arose in the case of the death of a tenant for life during the currency of a lease granted by him. The latter problems were in part overcome in 1709 by the statute 8 Anne c. 14, s. 4 (which did not however apply to rent-charges) but did not finally become obsolete until the abolition of the real actions by the Common Law Procedure Acts passed in the nineteenth century: see Thomas v. Sylvester (1873) L. R. 8 Q. B. 368, at p. 371. The non-apportionability of other rents and periodical payments was tackled by a series of statutes including s. 15 of the Distress for Rent Act 1737 (11 Geo. 2, c. 19) and 4 & 5 Wm. 4, c. 22, s. 2.

The provisions of the lastmentioned Act, which has been judicially described as "one of the worst drawn, possibly the worst drawn, on the statute book", have been adopted in Queensland and appear in s. 39 of The Distress Replevin and Ejectment Act of 1867. The section appears to have been applied by the Full Court in Re Brodribb [1942] St. R. Qd. 72, although the reasoning in the judgment in that case does not throw light on the meaning or construction of the section.

In England the statute 4 & 5 Wm. 4, c. 22 was repealed and replaced by the Apportionment Act 1870, the provisions of which have been adopted in New South Wales by s. 144 of the Conveyancing Act and by ss. 130 to 134 of the Property Law Act 1969 of Western Australia. The provisions of these statutes represent a substantial improvement over s. 39 of the Queensland Act.

When originally we considered this question in our Report on Leases and Instruments (Q. L. R. C. 1) we recommended the adoption of the English and New South Wales legislation above referred to, which expressly includes, as apportionable sums, dividends payable by companies. However, the principal trustee companies operating in Queensland have made strong representations to the Commission against the adoption of a provision which renders such dividends apportionable. In particular, it said that, with the very considerable variety of dividends declared by different companies, it is often extremely difficult to determine in respect of what period a dividend is declared, whether it is in character final or interim only, and, if interim, what is the proper method of dealing with it as between life tenant and remainderman. Such sums are almost invariably small and the time and cost expended upon making the necessary inquiries and calculations is seldom justified in financial terms and simply results in substantial delays and expense in administering estates.

We are impressed by these arguments and have therefore come to the conclusion that dividends from companies should be excluded from the statutory provision for apportionment, so that the whole of such payments will

be and remain the property of the individual entitled at the time the payment is made.

With this exception we recommend the adoption of an apportionment provision in the form of s. 144 of the N.S.W. Conveyancing Act.

232. Exceptions and application. This provision is self-explanatory.

PART XVIII - UNREGISTERED LAND

Division 1 - Application of Part; Interpretation

233. Application and interpretation. This Part applies only to unregistered land, which, by virtue of the definition in cl. 4, means freehold land not under The Real Property Acts. The definition of "instrument" follows closely that in s. 22 of the Registration of Deeds Act 1843 (7 Vic. No. 16) which corresponds with the definition in s. 3 of the New South Wales Registration of Deeds Act 1897.

Division 2 - Sales and Conveyances

234. No conveyance to have tortious operation. At common law a conveyance of "old system" land by one who is not lawfully seised of the land is said to pass the freehold by wrong, the conveyance in such cases being said to have a tortious operation.

In New South Wales and in Western Australia (Property Law Act 1969, s. 40) this doctrine has been abolished, with the consequence that, as Stuckey says (*op. cit.*) at p. 40, a person can only convey such estate as he is entitled to dispose of.

235. Want of livery of seisin. At common law land could be conveyed only by livery of seisin which was a symbolic investiture of the grantee by the grantor of the land. In New South Wales (and therefore in Queensland before separation) the common law requirement was not always adhered to. Consequently, by s. 25 of the Registration of Deeds Act 1843, replacing an earlier provision of 1842, a deed of feoffment was made equivalent to livery of seisin, and, since doubts had arisen as to the efficacy of such deeds prior to the enactment of the above statutes, feoffments executed without livery of seisin prior to 3rd January, 1842, were retrospectively validated by the Titles to Land Act 1858; 22 Vic. No. 1, s. 19: see Helmore, *op. cit.* at pp. 313-314.

In New South Wales both of the foregoing statutes have been repealed although the relevant provisions are re-enacted elsewhere. In Queensland both the original New South Wales Acts of 1843 and 1858 continue to apply, but their replacement by this Part and consequent repeal is contemplated by this Act. The present clause reproduces s. 19 of the Titles to Land Act 1858, and, although it is perhaps unlikely that any doubt will now arise in Queensland in relation to titles made before 1843, it is preferable to avoid any such possibility by retaining s. 19 in its existing form. This has been done in New South Wales, where s. 19 now appears as s. 31 of the Conveyancing and Law of Property Act 1898. Because of cl. 8 the retention of s. 25 of the Act of 1843 will no longer be necessary.

236. Statutory commencement of title. A purchaser of land under the old system is at common law entitled to insist upon proof of the vendor's title to the subject land for a period extending for sixty years prior to the sale, and for that purpose may require production of the records of past transactions and all deeds and instruments, such as mortgages and probates, which go to make up and prove that title.

In England the common law period of sixty years was first reduced to forty years by the Conveyancing Act 1881 and then to thirty years by s. 41 of the Law of Property Act, 1925. The period has been similarly reduced to thirty years in New South Wales and Victoria, and in England it has very recently been further reduced to fifteen years: see Law of Property Act 1969.

In Queensland the common law requirement of sixty years remains in force, although, for the purpose of bringing land under The Real Property Acts, 1861 to 1963, s. 20 now provides that the Master of Titles may be satisfied with a title by possession of forty years. We consider that the law in Queensland should in this respect be brought into line with that in other States by reducing the requisite period from sixty to thirty years with consequential amendment to s. 20 of The Real Property Acts. The proposed clause is based upon s. 44 of the English Law of Property Act, 1925.

237. Other statutory conditions of sale. This provision is, like the preceding clause, intended to simplify conveyancing of unregistered land by limiting the inquiries which a purchaser may and must make, and the documents of title which he may require to be produced, in order to satisfy himself of the vendor's title. Amongst other matters it entitles and requires him, until the contrary appears, to assume the correctness of recitals in abstracted documents. A provision to similar effect, though limited to the recital of a lease or bargain and sale, at present appears in s. 26 of the Registration of Deeds Act, 1843.

Clause 237 is based on s. 45 of the English Act, of which there are analogues in the Victorian and New South Wales legislation.

238. General words implied in conveyances. Clause 238 is essentially a "word-saving" provision which is designed to imply in a conveyance of unregistered land various words and descriptions of rights and things intended to be conveyed. Its object is to reduce the length and expense of old system conveyances, and it is subject to the expression of any contrary intention in the conveyance itself.

239. All estate clause implied. The object of this clause is to ensure that, unless the parties otherwise provide, the conveyance will pass to the grantee all the estate and interest of the grantor in the property conveyed.

Division 3 - Registration of Deeds

240. Registration of instruments and wills. As mentioned above, the principal enactment providing for registration of deeds affecting old system land, namely the Registration of Deeds Act 1843, continues to apply in Queensland, although repealed in New South Wales where its place is now taken by the Registration of Deeds Act 1897. The substantive provisions of these statutes are similar. The Act of 1843 originally contained provision for the registration or enrolment of a variety of deeds and documents, such as Acts of Parliament, charters of incorporation of public companies, wool and stock liens, and certificates of births, marriages and deaths, all of which were to be registered or enrolled by the Registrar-General: s. 10. Previously this function had been performed by the Registrar of the Supreme Court, but all of his functions as registrar of deeds were, by the New South Wales statute, the Registration of Deeds Act of 1857; 20 Vic. No. 27, transferred to the Registrar-General. In Queensland the duties and powers of the Registrar-General in relation to deeds were, by The Registrar of Titles Act of 1884 (48 Vic. No. 4), transferred to the Registrar of Titles, whose office was created by that Act. Finally, by The Registration of Deeds Act of 1899 (63 Vic. No. 6), any necessity for registering under the Act of 1843 instruments, other than deeds relating to unregistered land, was dispensed with and that Act of 1843 has since continued to be utilised only in relation to old system land.

The practical result now is that registration of deeds affecting old system land continues to be effected under the Act of 1843, and that the function of registration is now performed by the Registrar of Titles. The scheme proposed here is to incorporate in this Division the relevant operative provisions of the Acts of 1843 and 1858 and to repeal those statutes, together with the Registration of Deeds Act, 1857, and The Registration of Deeds Act of 1899, both of which have exhausted their purpose. Apparently, the Deeds Register is still used to register certain instruments (such as assignments of Book debts, not affecting land), and it is necessary to preserve this power to register.

241. Mode of registration. Registration is accomplished by lodging a verified legible copy of the relevant deed in the office of the Registrar, who indorses it with the date of registration, issues his receipt, and records the registration in a book kept for that purpose: see ss. 12, 13 and 14 of the Act of 1843, the provisions of which will be continued by this and the ensuing clauses.

242. Signature on behalf of dead or absent party. Section 13 of the Act of 1843 requires that the registration copy be signed by "some one or more" of the parties to the original instrument. Where such party is dead or absent an application to the Supreme Court is necessary to authorise signature by some other person: see s. 12, and Re Brennan [1902] Q. W. N. 85, for an example of the application of this section. In New South Wales the Registration of Deeds Act, 1897, s. 9, has dispensed with the necessity for application to court for this purpose, and has also conferred on the Registrar a general power to sign on behalf of a party to the original instrument. The present clause adopts the N. S. W. section in preference to the more limited existing section of the Act of 1843.

243. Receipts by Registrar and indorsement. This clause repeats in substance the provisions of s. 14 of the Act of 1843.

244. Mistakes in registration. See s. 17 of the Titles to Land Act, 1858, from which this clause is taken.

245. Deeds to take effect according to priority of registration. The scheme of the deeds registration procedure is to confer priority according to the date and sequence of registration of deeds and instruments affecting the land. Registration does not itself confer title and the efficacy of a transaction is not dependent on registration: see Fuller v. Goodwin (1865) 4 S. C. R. (N. S. W.) 64; but failure to register means, broadly speaking, that a subsequent right, whether legal or equitable (see Darbyshire v. Darbyshire (1905) 2 C. L. R. 787) will, if the instrument giving rise to it is registered, take precedence over rights arising out of the earlier unregistered transaction.

This principle of priority according to date of registration is embodied in s. 11 of the Act of 1843, which is reproduced here with only one alteration, viz., the substitution of "and" for "or" in the phrase "bona fide or for valuable consideration". This amendment simply reflects the construction which has already been placed upon s. 11: see Jones v. Collins (1891) 12 L. R. (N. S. W.) (L) and represents no change in the law.

246. Fraud of conveying party. Priority under s. 11 of the Act of 1843 was, by s. 18 of the Titles to Land Act of 1858, withheld where the party taking under the instrument acted in bad faith, and in this context "bad faith" appears to be equated with notice of an interest sought to be overreached: see Sydney and Suburban Mutual Permanent Building and Land Investment Association Ltd. v. Lyons [1894] A. C. 260, and Helmores (op. cit.) at pp. 332-337 for a discussion of the deeds registration legislation and its effects.

The present clause simply reproduces s. 18.

247. Covenants to produce deeds.

248. Certified copy to be admitted in evidence. The above clauses are self-explanatory and require no comment.

Division 4 - Compulsory registration of title

249. Application of Division and interpretation. As was mentioned in the introductory part of the Commentary to this Bill, there are probably now only a few thousand acres of unregistered freehold land in Queensland, most of it in the non-metropolitan rural areas of south-eastern Queensland. However, because of its comparative rarity the number of legal practitioners capable of handling with facility a conveyance of such land is very limited, and for this reason transactions with respect to such land are attended with considerable delay and cost. It is clear that these factors, together with the doubts which necessarily surround unregistered titles, make such land substantially less easily transferable and marketable, and give rise to a degree of inconvenience and expense which, as time proceeds, will become steadily more severe and intolerable.

In the interests, therefore, both of present and future owners of such land, as well as the community as a whole, we consider that legislative steps should now be taken to compel unregistered land to be brought under The Real Property Acts with as little further delay as is possible. The difficulty, however, is to devise some appropriate means by which such action can be compelled. Merely by legislation to require registration of any existing unregistered land is likely to achieve very little, even though such legislation were to include a financial penalty for failure to comply with its terms, since contravention of such legislation is not, in the nature of things, likely to be readily apparent. A much more direct course would be for the Crown compulsorily to resume all such land, and then to cause fresh deeds of grant to issue to those who could establish the best right to title prior to such resumption; but, attractive and effective though this solution appears to be, it is, we think, somewhat too radical a step in a society which accords a high degree of importance to the sanctity of property rights. Such a scheme might, in any event, possibly give rise to more difficulties than it would cure if in practice the legislation were ignored and transactions with respect to such land continued to take place in ignorance or in defiance of such compulsory resumptions.

In the end, we believe that some less radical solution must be adopted. The critical moment in relation to old system land is the occasion on which such land is dealt with, usually by sale, mortgage, lease or some other such disposition inter vivos. It is at this point of time that old system land is in practice commonly brought under the Acts, and we think that it should be made obligatory at such time to bring land under The Real Property Acts, since it is on the occasion of a disposition of this kind that investigation of title to the land is undertaken, usually by the purchaser or mortgagee. The relevant information and documents necessary under ss. 16 to 22 of the Acts for an application for registration of title are ordinarily collected for the purpose of the conveyance and for registration under the Registration of Deeds Act, and it only remains to compel it then to be used in order to register title. This is the reason and policy underlying similar legislation in England, where registration is made compulsory under s. 123 of the Land Registration Act 1925 upon a conveyance on sale of the fee simple or the assignment on sale or creation of certain leases.

In a similar way we recommend that an application to bring land under The Real Property Acts should be compulsory on any occasion on which it is sought to register an instrument in accordance with the provisions of Division 3 of this Part. Such compulsion by legislation is, however, likely to have little significant effect unless accompanied by some form of sanction, and the sanction which we propose is that the effect of registration of an instrument, and with it the benefits which such registration confers (such as priority and notice), should lapse and cease after 12 months from such registration to have effect unless, within 3 months after such registration or such extended periods as the Registrar may for good reason allow, the party seeking such registration applies to bring the land under The Real

Property Acts. The practical effect of this will be that, faced with the possibility of losing priority in respect of his registered deed, the applicant for registration will be compelled to apply to bring the subject land under The Real Property Acts.

- 250. Bringing land under The Real Property Acts.
- 251. Limited effect of registration.
- 252. Financial assistance.

The first two of the above clauses are designed to give effect to the proposal outlined above. The last clause deserves special mention. It is intended to cater for the cases (which are not likely to be common) in which the applicant is financially or otherwise unable to discharge the burden of bringing the land under The Real Property Acts. In such event the Registrar will have power to authorise payment of the whole or part of the costs and expenses out of the Assurance Fund constituted by the Acts. That Fund is in a notoriously healthy state and can quite justifiably be made to bear, in the exceptional case, the cost of taking a course which in the end will be of advantage to the whole community.

PART XIX - MISCELLANEOUS

253. Protection of solicitors and others adopting this Act. This provision is taken from s. 182 of the English Act of 1925 and s. 176 of the N. S. W. Conveyancing Act, and is self-explanatory.

254. Restriction on constructive notice. The doctrine of notice is concerned with equitable interests, which are protected against a person who acquires the legal estate with notice actual, imputed or constructive, of the existence of that equitable interest. Notice is imputed where the agent of a party has notice, and, as the law now stands, such notice may be imputed where, for example, a party's solicitor acquires knowledge of a fact by reason of his conduct of a previous transaction unconnected with his client's affairs: see *Re Cousins* (1886) 31 Ch. D. 671. Sub-clause (1)(b) is designed to alter this rule and to confine such notice to facts ascertained or ascertainable in the course of the particular transaction in hand. Sub-clause (1)(b) is derived from s. 164(1)(a) of the Conveyancing Act, which differs from the corresponding section 199 of the English Law of Property Act in expressly including searches as to instruments deposited or registered under any Act. This, as Stuckey points out (*op. cit.*) at p. 325 merely gives statutory effect to the decision in *Mills v. Renwick* (1901) 1 S. R. (N. S. W.) Eq. 173, that, although registration under the Registration of Deeds Act is not equivalent to notice in all cases, a purchaser who negligently omits to search the register is in no better position than he would have been if he had searched and so had taken subject to such equities as would have been discovered by search.

The provision is restrictive of the effect of constructive notice: see sub-cl. (3), and has no relevance to land under The Real Property Acts, where the doctrine of notice is abrogated by s. 109 of the Act of 1861.

255. Service of notices. Each of the modern property statutes contains provisions regulating the mode of service of notices prescribed by those Acts. The most detailed of these is s. 135 of the Western Australian Property Law Act 1969.

A defect common to all "notice" sections in this form was recently shown up by the English decision in *Re 88 Berkeley Road N. W. 9* [1971] 2 W. L. R. 307, where a notice of severance of a joint tenancy was held to have been effectively served in accordance with the Act on the plaintiff (who lived together with the deceased in the same house) by the deceased, who caused it to be posted by her solicitors but intercepted it upon delivery to the house so that the plaintiff never in fact received the notice. This kind

of difficulty is probably capable of being solved by the inclusion of a provision to the effect that the statutory mode of service shall not apply where the person serving the notice prevents its receipt by the person for whom it is intended: see sub-cl. (5).

With this amendment, cl. 255 follows the Western Australian provision mentioned above.

256. Payments into and applications to court. This clause regulates payments into court and applications made to court in pursuance of the provisions of the Act.

257. Power to make regulations. This includes a power by regulation to revive any of the provisions of the repealed Acts and which should prove useful in case it should be found that such repeal was based upon an erroneous view of the statute: cf. s. 11 of the New South Wales Imperial Acts Application Act 1969, from which this procedure is borrowed.

-----o0o-----

A Bill to consolidate, amend, and reform the law relating to Conveyancing, Property, and Contract, and to terminate the application of certain Imperial statutes.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title and commencement. (1) This Act may be cited as the Property Law Act 1972 .

(2) This Act shall come into operation on the first day of 197 .

(3) This Act, except where otherwise provided, binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

2. Division of Act. This Act is divided into Parts as follows:-

- PART I - PRELIMINARY, ss.1-6;
 - PART II - GENERAL RULES AFFECTING PROPERTY, ss.7-18;
 - PART III - FREEHOLD ESTATES, ss.19-29;
 - PART IV - FUTURE INTERESTS, ss.30-32;
 - PART V - CONCURRENT INTERESTS : CO-OWNERSHIP,
ss.33-43;
 - PART VI - DEEDS, COVENANTS, INSTRUMENTS AND
CONTRACTS, ss.44-75;
 - PART VII - MORTGAGES, ss.76-101;
 - PART VIII - LEASES AND TENANCIES, ss.102-167;
 - PART IX - POWERS OF ATTORNEY, ss.168-175;
 - PART X - INCORPOREAL HEREDITAMENTS AND
APPURTENANT RIGHTS, ss.176-181;
 - PART XI - ENCROACHMENT AND MISTAKE, ss.182-197;
 - PART XII - EQUITABLE INTERESTS AND THINGS IN ACTION,
ss.198-199;
 - PART XIII - POWERS OF APPOINTMENT, ss.200-204;
 - PART XIV - PERPETUITIES AND ACCUMULATIONS, ss.205-221;
 - PART XV - CORPORATIONS, ss.222-226;
 - PART XVI - VOIDABLE DISPOSITIONS, ss.227-229;
 - PART XVII - APPORTIONMENT, ss.230-232;
 - PART XVIII - UNREGISTERED LAND, ss.233-252;
 - PART XIX - MISCELLANEOUS, ss.253-257;
-
- FIRST SCHEDULE - Forms
 - SECOND SCHEDULE - Short forms of covenants in leases
 - THIRD SCHEDULE - Improvements by tenant
 - FOURTH SCHEDULE - Rules as to arbitration
 - FIFTH SCHEDULE - Acts repealed.

Abbreviations. Abbreviations used in references to other Acts in notes appearing at the beginnings of sections have the following meanings:- Eng. Law of Property Act 1925; Vic. Property Law Act 1958; N.S.W. Conveyancing Act 1919-1969; W.A. Property Law Act 1969; S.A. Law of Property Act 1936-1969; Qld. 1867 - Statute of Frauds and Limitations Act of 1867; Imp. 1677 - Statute of Frauds 1677; Qld. D.R.E. Act - Distress Replevin and Ejectment Act of 1867; Qld. R.P.A. - The Real Property Acts, 1861 to 1963; J.A. 1876 - The Judicature Act of 1876.

3. Repeals. (1) The Imperial Acts and New South Wales Acts mentioned in Parts 1 and 2 of the Fifth Schedule to this Act shall to the extent indicated in the Schedule cease to apply in this State.

(2) The Acts mentioned in Part 3 of the Fifth Schedule to this Act are to the extent indicated in the Schedule repealed.

(3) The cesser of application of any of the Imperial Acts and New South Wales Acts mentioned in the Fifth Schedule shall not be taken to imply that such Act applied or, but for the passing of this Act, would have applied in Queensland.

(4) Notwithstanding subsections (1) and (2) of this section, the provisions of the Statute of Frauds 1677 (29 Car. 2, c. 3) and of The Statute of Frauds and Limitations Act of 1867 (31 Vic. No. 22) shall, unless a different intention appears in this Act, continue to apply to any contract, promise, ratification, assurance or disposition made, or to any interest created, before the commencement of this Act to the same extent as if this Act had not been passed.

4. Interpretation. [cf. N.S.W. s. 7(1)]. In this Act unless the context or subject-matter otherwise indicates or requires -

"assurance" includes a conveyance and a disposition made otherwise than by will; and "assure" has a corresponding meaning;

"backward person" means a backward person within the meaning of The Backward Persons Act of 1938;

"bank" means any bank authorised under Part II of the Commonwealth Banking Act 1959 or under any other Commonwealth Act to carry on banking business in Australia;

"bankruptcy" includes any act or proceeding in law having under any Act or Commonwealth Act effects or results similar to those of bankruptcy, and includes the winding-up of an insolvent company; and "bankrupt" has a meaning corresponding with that of bankruptcy;

"Coal Mining Act" means the Coal Mining Act 1925-1969;

"Commonwealth" means Commonwealth of Australia, and

"Commonwealth Act" (with or without descriptive words) means an Act passed by the Parliament of the Commonwealth and includes any Act amending or substituted for the same;

"conveyance" includes a transfer within the meaning of The Real Property Acts, and any assignment, appointment, lease, settlement, or other assurance in writing of any property; and "convey" has a meaning corresponding with that of conveyance;

"Court" means the Supreme Court or any Judge thereof;

"deed" includes an instrument having under this or any other Act the effect of a deed;

"Department" means the Department of Lands;

"disposition" includes a conveyance, vesting instrument, declaration of trust, nomination of trustees, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will; and "dispose" has a corresponding meaning;

"District Court" means a District Court within the meaning of the District Court Act, 1967-1969, or any judge thereof;

"Imperial Act" means any statute law in force in the realm of England on the 25th day of July, 1828;

"income", when used with reference to land, includes rents and profits;

"incumbrance" includes a mortgage in fee or for a lesser estate or interest, and a trust for securing money, and a lien and a charge of a portion, annuity or other capital or annual sum; and "incumbrancee" has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or satisfaction thereof;

"instrument" includes deed, will, and Act of Parliament;

"land" includes tenements and hereditaments, corporeal and incorporeal, and every estate and interest therein whether vested or contingent, freehold or leasehold, and whether at law or in equity;

"Land Act" means the Land Act 1962-1970;

"land under the provisions of the Land Act", or any equivalent expression, means estates, interests, or any other rights in or in respect of land, granted, leased, or granted in trust or reserved and set aside under that Act, but does not include registered land or unregistered land;

"land under the provisions of The Real Property Acts", or any equivalent expression, means estates or interests registered under those Acts;

"lease" includes demise and tenancy, whether for a term, for a period, or at will;

"lessee" includes tenant, his executors, administrators or assigns;

"lessor" includes landlord, his executors, administrators or assigns;

"local authority" means a local authority constituted under the Local Government Act 1936-1970, and includes the Brisbane City Council constituted under The City of Brisbane Acts, 1924 to 1966;

"The Miners' Homestead Leases Acts" means The Miners' Homestead Leases Acts, 1913 to 1965;

"The Mining Acts" means The Mining Acts, 1898 to 1967;

"mortgage" includes a charge on any property for securing money or money's worth; and "mortgage-money" means money or money's worth secured by a mortgage;

"mortgagee" includes any person from time to time deriving title to the mortgage under the original mortgagee; and "mortgagee in possession" means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property;

"mortgagor" includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property;

"nomination of trustees" means an instrument executed pursuant to section 77 of The Real Property Acts nominating any persons to be trustees of land or any estate or interest therein;

"notice" includes constructive notice;

"order" includes judgment and decree of Court;

"patient" means a patient as defined in the Third Schedule to The Mental Health Acts, 1962 to 1964;

"possession", when used with reference to land, includes the receipt of income therefrom;

"President of the Law Society" means the President for the time being of the Council of Queensland Law Society Incorporated;

"property" includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest;

"Public Curator" means the Public Curator of Queensland constituted by the Public Curator Act 1915-1971;

"purchaser" means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property;

"registered" means the making or recording by proper authority in the appropriate register (if any) or other book, instrument or document of such entries, indorsements, particulars or other information as may be requisite for recording a dealing or other transaction with respect to land;

"registered land" means land under the provisions of The Real Property Acts;

"Registrar" means the Registrar of Titles appointed under The Registrar of Titles Act of 1884;

"rent" includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, the ton, or otherwise; and "fine" includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium or foregift;

"sale" means only a sale properly so called;

"securities" include stocks, funds, and shares;

"The Real Property Acts" mean The Real Property Acts, 1861 to 1963;

"State Housing Act" means the State Housing Act 1945-1971;

"title deed" includes a certificate of title, or deed of grant in respect of, to registered land;

"trustee corporation" means the Public Curator and any corporation authorised by the Trustee Companies Act 1968 to administer the estates of deceased persons and other trust estates;

"valuable consideration" includes marriage but does not include a nominal consideration in money;

"unregistered land" means land alienated by the Crown for an estate of freehold other than registered land and other than land granted in trust under the Land Act;

"will" includes codicil.

5. Application of Act. (1) Except where otherwise provided, this Act shall -

- (a) apply to unregistered land;
- (b) apply to land under the provisions of The Real Property Acts, including any lease of such land, but subject to the provisions of those Acts;
- (c) apply to estates, interest, and any other rights in or in respect of land, granted, created or taking effect under or pursuant to any Act, but subject to the provisions of such Act;
- (d) without limiting the generality of paragraph (c) of this subsection:-
 - (i) subject to the provisions of the Coal Mining Act, apply to land under the provisions of that Act;
 - (ii) subject to the provisions of the Land Act, apply to land under the provisions of that Act;
 - (iii) subject to the provisions of The Miners' Homestead Leases Acts, apply to land under the provisions of those Acts;
 - (iv) subject to the provisions of The Mining Acts, apply to leases, and any other rights in or in respect of land, granted, created or taking effect under or pursuant to the provisions of those Acts.

(2) Where by this Act (including this section) a provision is expressed to apply to land or interests in land under the provisions of a particular Act, such expression shall not, unless a different intention appears, be construed to mean that the provision -

- (a) applies exclusively to such land; or
- (b) does not apply to property other than land.

6. Savings in regard to ss. 10, 11, 12 and 59. [cf. N.S.W. s.23E; Eng. s.55; Vic. s.55] Nothing in sections 10, 11, 12 or 59 of this Act -

- (a) invalidates any disposition by will; or
- (b) affects any interest validly created before the commencement of this Act; or
- (c) affects the right to acquire an interest in land by virtue of taking possession; or
- (d) affects the law relating to part performance; or
- (e) affects a sale by the Court.

PART II - GENERAL RULES AFFECTING PROPERTY

7. Effect of repeal of Statute of Uses [cf. Eng. s. 4(1)]. (1) Interests in land which under the Statute of Uses could before the commencement of this Act have been created as legal interests shall after the commencement of this Act be capable of being created as equitable interests.

(2) Notwithstanding subsection (1) of this section, an equitable interest in land shall, after the commencement of this Act, only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement.

(3) [Eng. s. 60(3); cf. N.S.W. s. 44(1)] In a voluntary conveyance executed after the commencement of this Act a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

8. Lands lie in grant only. [Vic. s. 51; S.A. ss. 9, 10; Eng. s. 51; W.A. s. 32]. (1) All lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale, or by lease and release, and a conveyance of an interest in land may operate to pass the possession or right to possession thereof, without actual entry, but subject to all prior rights thereto.

(2) The use of the word "grant" is not necessary to convey land or to create an interest therein.

9. Reservation of easements, etc., in conveyances of land [cf. N.S.W. s. 45A; Eng. s. 65; Vic. s. 65]. (1) In a conveyance of land a reservation of any easement, right, liberty, or privilege not exceeding in duration the estate conveyed in the land, shall operate without any execution of the conveyance by the grantee of the land out of which the reservation is made, or any regrant by him, so as to create the easement, right, liberty or privilege, and so as to vest the same in possession in the person (whether or not he be the grantor) for whose benefit the reservation was made.

(2) This section applies only to reservations made after the commencement of this Act.

10. Assurances of land to be in writing [cf. Imp. 1677, s. 3; Qld. 1867, s. 4; Eng. s. 52; N.S.W. s. 23B]. (1) No assurance of land shall be valid to pass an interest at law unless made by deed or in writing signed by the person making such assurance.

(2) This section does not apply to -

- (a) a disclaimer made in accordance with any law relating to bankruptcy in force before or after the commencement of this Act, or not required to be evidenced in writing;
- (b) a surrender by operation of law, including a surrender which may, by law, be effective without writing;
- (c) a lease or tenancy or other assurance not required by law to be made in writing;
- (d) a vesting order;

- (e) an assurance taking effect under any Act or Commonwealth Act.

11. Instruments required to be in writing [cf. Imp. 1677, ss. 3, 7, 8, 9; Qld. 1867, s. 4; Eng. s. 53; N.S.W. s. 23C]. (1) Subject to the provisions of this Act with respect to the creation of interests in land by parol -

- (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised, in writing or by will, or by operation of law;
- (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
- (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved by some writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

12. Creation of interests in land by parol. [cf. Imp. 1677, ss. 1, 2; Qld. 1867, ss. 2, 3; Eng. s. 54; N.S.W. s. 23D] (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by his agent thereunto lawfully authorised, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in this Act shall affect the creation by parol of a lease taking effect in possession for a term not exceeding three years, with or without a right for the lessee to extend the term for any period which with the term would not exceed three years.

13. Persons taking who are not parties. [cf. N.S.W. s. 36C; Eng. s. 56(1); Vic. s. 56(1); W.A. s. 11] (1) In respect of an assurance or other instrument executed after this Act, a person may take -

- (a) an immediate or other interest in land; or
- (b) the benefit of any condition, right of entry, covenant or agreement over or respecting land -

notwithstanding that he may not have executed the assurance or other instrument, or may not be named as a party thereto, or may not have been identified or in existence at the date of execution of the assurance or other instrument.

(2) Such person may sue, and shall be entitled to all rights and remedies in respect thereof, as if he had been named as a party to and had executed the assurance or other instrument.

14. Conveyances by a person to himself etc. [cf. Eng. s. 72; Vic. s. 72; N.S.W. s. 24; Qld. The Mercantile Acts, 1867 to 1896, s. 1.] (1) In conveyances and leases made after the 28th day of December, 1867, personal property, including chattels real, may be conveyed or leased by a person to himself jointly with another person by the like means by which it might be conveyed or leased by him to another person.

(2) In conveyances or leases made after the commencement of this Act freehold land, or a thing in action, may be conveyed or leased by a person to himself jointly with another person, by the like means by which it might be conveyed or leased by him to another person; and may, in like manner, be conveyed or leased by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

(3) After the commencement of this Act a person may convey or lease land to or vest land in himself.

(4) Two or more persons (whether or not being trustees or personal representatives) may convey or lease, and shall be deemed always to have been capable of conveying or leasing, any property vested in them to any one or more of themselves in like manner as they could have conveyed or leased such property to a third party:

Provided that if the persons in whose favour the conveyance or lease is made are, by reason of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance or lease shall be liable to be set aside.

(5) For the purpose of subsection (4) of this section, the words "or more of themselves" shall be construed to include all the persons by whom the conveyance or lease is or, as the case may be, has been made.

15. Rights of husband and wife. [Eng. s. 37; cf. N.S.W. No. 45 of 1901, s. 26] A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of the Act, be treated as two persons.

16. Presumption that parties are of full age. [cf. Eng. s. 15] The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed at the date of such conveyance to be of full age or of such other lesser age as to have capacity to give effect to the conveyance.

17. Merger. [cf. Vic. s. 185; Eng. s. 185; N.S.W. s. 10; Qld. J.A. 1876, s. 5(4); W.A. s. 18] An estate does not merge by operation of law only if the beneficial interest therein would not be merged or extinguished in equity.

18. Restrictions on operation of conditions of forfeiture. [N.S.W. s. 29C]
(1) Where there is a person entitled to income (including an annuity or other periodical income) or any other property, subject to a condition of forfeiture on alienation, whether voluntary or involuntary, and whether with or without words of futurity, then -

(a) unless the instrument containing the condition expressly provides to the contrary, no alienation, whether by way of charge or otherwise, of the income or other property, made or occurring before he becomes entitled to receive payment of the income, or to call for a conveyance or delivery of the other property, shall operate to create forfeiture under the condition unless the alienation is in operation at the time he becomes so entitled;

(b) notwithstanding any stipulation to the contrary in the instrument containing the condition no voluntary alienation made by him, with the sanction of the court, shall operate to create forfeiture under the condition.

(2) This section applies where the condition of forfeiture is contained in an instrument executed, made, or coming into operation before or after the commencement of this Act, but only in cases where such person becomes

entitled to receive payment of the income, or to call for an assurance or delivery of the other property, or, where the alienation with the sanction of the court is made, after such commencement.

PART III - FREEHOLD ESTATES

19. Freehold estates capable of creation. After the commencement of this Act the following estates of freehold shall be capable of being created and, subject to the provisions of this Act, of subsisting in land -

- (a) estate in fee simple;
- (b) estate for life or lives.

20. Incidents of tenure on grant in fee simple. [cf. Tenures Abolition Act, 1660, s. 4; 12 Car. 2, c. 24; N.S.W. No. 30 of 1969, s. 37; N.S.W. No. 7 of 1964, s. 9] (1) All tenures created by the Crown upon any grant of an estate in fee simple made after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.

(2) Where any quit rent issues to the Crown out of any land, or the residue of any quit rent issues to the Crown out of any land in respect of which quit rent has been apportioned or redeemed, such land or residue is hereby released therefrom.

(3) In respect of property of any person dying intestate on or after the 16th day of April, 1968 -

- (a) escheat is abolished;
- (b) all such property, whether real or personal, shall, subject to this section, be distributed in the manner and to the person or persons provided by The Succession Acts, 1867 to 1968, but subject to the provisions (including the provisions of Part V) of those Acts.

(4) Subject to the provisions of any other Act, property of any corporation dissolved after the commencement of this Act shall not escheat, but the Crown shall be entitled to and take as bona vacantia all such property, whether real or personal, as would apart from this Act be liable to escheat or pass to the Crown as bona vacantia.

(5) Notwithstanding the provisions of this section, where the Crown, or it is made to appear to the Governor in Council that the Crown, has a right to any property, by escheat or devolution or as bona vacantia, on the death intestate of any person, whether the death occurred before or after the passing of this Act, the Governor in Council, upon application being made for the waiver of that right, may by Order in Council waive such right on such terms (if any), whether for the payment of money or otherwise, in favour of any one or more of the following persons, whether belonging to the same or to different classes:-

- (a) any dependants, whether kindred or not, of the intestate;
- (b) any other persons for whom the intestate might reasonably have been expected to make provision;
- (c) any persons to whom Her Majesty would, if Her Majesty's title had been duly proved by inquisition, have power to grant such property;
- (d) any other persons having in the opinion of the Governor in Council a just claim to the grant of the property; and
- (e) the trustees of any person as aforesaid.

(6) Upon a waiver made under subsection (5) of this section, the right of Her Majesty so waived, subject to subsection (8) of this section, shall vest in the person or persons in favour of whom the waiver is made.

(7) (a) For the purpose of giving effect to any waiver under subsection (5) of this section, the Governor in Council by the Order in Council making the waiver or by a further Order in Council may do all or any of the following things:-

- (i) appoint such person as he considers suitable to be administrator of the property of the person who has died intestate (hereinafter referred to as "the deceased") and the person so appointed may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and such letters of administration may be granted accordingly.

For the purposes of the grant of the letters of administration and the administration thereunder, the property in respect of which the right of Her Majesty has been waived shall be deemed to form part of the estate of the deceased to be administered in accordance with the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made;

- (ii) appoint a person to execute any conveyance or transfer or other document for the purpose of conveying or transferring in accordance with the terms of the waiver to the person or persons in whose favour the waiver is made the right of Her Majesty so waived; and
- (iii) give all such directions as he may consider necessary or desirable to give effect to the waiver (including the terms thereof), and such directions shall have the force of law.

(b) For the purpose of giving effect to any waiver made under subsection (5) of this section, the Governor in Council, at any time may grant the land or other property whatsoever the subject of the waiver or any part thereof, and in the case of land in fee simple or for any less estate, to the administrator appointed under this section or to any person or persons in favour of whom the waiver is made.

(8) The provisions of this section shall be subject to the provisions of the Sixth Schedule to this Act and all proceedings by way of writ of inquisition or otherwise may be had in accordance with the provisions of that Schedule.

(9) In this section "intestate" has the same meaning as in section 29 of The Succession Acts, 1867 to 1968.

21. Alienation in fee simple. [N.S.W. No. 30 of 1969, s. 36; cf. 18 Edw. 1, St. 1 (Quia Emptores).] Land held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect.

22. Abolition of estates tail. [cf. N.S.W. ss. 19, 19A; Vic. s. 249, W.A. s. 23] (1) In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been enacted, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable as the case may be) in such land in favour of such person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.

(2) (a) Where at or after the commencement of this Act any person is entitled, or would, but for subsection (1) of this section, be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, such person, save as is hereinafter mentioned, shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in such land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.

(b) Where any such person is an infant and such land for any estate or interest would pass to any other person in the event of the death of the infant before attaining full age and without issue, then in such case the infant shall be deemed to take an estate in fee simple with an executory limitation over of such estate or interest on the happening of such event in favour of such other person.

(3) In this section the expression "estate tail" includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.

(4) The Registrar is hereby authorised, on application in Form 1 of the First Schedule to this Act, to make all such entries in the register book as may be necessary to give effect to this section.

23. Abolition of quasi-entails. In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been passed, would have created in favour of any person a quasi-entail (legal or equitable) in respect of any estate for life or lives of another or others shall be deemed to create in favour of that person an estate (legal or equitable as the case may be) for the life or lives of that other.

24. Liability of life tenant for voluntary waste. [Statute of Marlborough 1267; 52 Hen. 3, c. 23; cf. N.S.W. No. 31 of 1969, s. 32] (1) A tenant for life or lives shall not commit voluntary waste.

(2) Nothing in subsection (1) of this section applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.

(3) A tenant who infringes subsection (1) of this section is liable in damages to his remainderman or reversioner, but this section imposes no criminal liability.

25. Equitable waste. [Qld. J.A. 1876, s. 5(3)] An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

26. Recovery of property on determination of a life or lives. [The Cestui que Vie Act, 1666; 18 & 19 Car. 2, c. 11; The Cestui que Vie Act, 1707; 6 Anne, c. 72 (or c. 18); cf. Qld. R.P.A., s. 90; N.S.W. No. 31 of 1969, s. 38]

(1) Every person having any estate or interest in any property determinable upon a life or lives who, after the determination of such life or lives without the express consent of the person next immediately entitled upon or

after such determination, holds over or continues in possession of such property estate or interest, or of the rents, profits or income thereof, shall be liable in damages or to an account for such rents and profits, or both, to the person entitled to such property, estate, interest, rents, profits or income after the determination of such life or lives.

(2) Where a reversion, remainder, or other estate or interest in any property is expectant upon the determination of a life or lives, the reversioner, remainderman, or other person entitled to such reversion, remainder, or estate or interest may in any proceeding claiming relief on the basis that such life or lives has or have determined, adduce evidence of belief that such life or lives has or have been determined and of the grounds of such belief, and thereupon the court may in its discretion order that, unless the person or persons on whose life or lives such reversion, remainder, or other estate or interest is expectant is or are produced in court or is or are otherwise shown to be living, such person or persons shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.

(3) If in such proceedings the lastmentioned person is shown to have remained beyond Australia, or otherwise absented himself from the place in which if in Australia he might be expected to be found, for the space of seven years or upwards, such person, if not proved to be living, shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.

(4) If in any such proceedings judgment has been given against the plaintiff, and afterwards such plaintiff brings subsequent proceedings upon the basis that such life has determined, the court may make an order staying such proceedings permanently or until further order or for such time as may be thought fit.

(5) If in consequence of the judgment given in any such proceedings, any person having any estate or interest in any property determinable on such life or lives has been evicted from or deprived of any property or any estate or interest therein, and afterwards it appears that such person or persons on whose life or lives such estate or interest depends is or are living or was or were living at the time of such eviction or deprivation, the court may give such relief as is appropriate in the circumstances.

27. Penalty for holding over by life tenant. [Landlord and Tenant Act, 1730; (4 Geo. 2, c. 28), s. 1; cf. Vic. No. 6285, s. 9] Where any tenant for life or lives or person who is or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after -

(a) termination of the tenancy; and

(b) after demand has been made and notice in writing given for the delivery of possession thereof by the person to whom the remainder or reversion of such land belongs or his agent thereunto lawfully authorised -

then the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of double the yearly value of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.

28. Abolition of the Rule in Shelley's Case. [Vic. s. 130; cf. N.S.W. s. 17; Eng. s. 131; W.A. s. 27] Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class

of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the Rule in Shelley's Case, and independently of section 22 of this Act, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person shall take as would in the case of freehold land have answered that description under the general law formerly in force.

29. Words of limitation. [cf. Eng. s. 60; Vic. s. 60; N.S.W. s. 47; W.A. s. 37] (1) A disposition of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the donee the fee simple or other the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.

(2) A disposition of freehold land to a corporation sole by his corporate designation without the word "successors" shall pass to the corporation the fee simple or other the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.

(3) This section applies to dispositions effected after the commencement of this Act.

PART IV - FUTURE INTERESTS

30. Creation of future interests in land. [cf. Eng. s. 4(1)] (1) A future interest in land validly created after the commencement of this Act shall take effect as an equitable and not a legal interest.

(2) Notwithstanding the provisions of section 36 of The Real Property Acts, no entry in the register-book of the name of any person as remainderman, and no indorsement upon the certificate of title of a memorandum setting forth that such person has been entered in the register-book as such remainderman, shall be made in respect of a future interest created after the commencement of this Act.

(3) This section shall not apply to any future interest -

(a) created before the commencement of this Act whether that interest arose or arises before or after the commencement of this Act; or

(b) created or arising by virtue of section 22 of this Act.

(4) In this section "future interest" means -

(a) a legal contingent remainder; and

(b) a legal executory interest.

31. Power to dispose of all rights and interests in land. [cf. Vic. s. 19; Eng. s. 4(2); S.A. s. 10; N.S.W. s. 50(1)] (1) All rights and interests in land may be disposed of including -

(a) a contingent, executory or future interest in any land or a possibility coupled with an interest in any land, whether or not the gift or limitation of such interest or possibility be ascertained;

(b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent.

(2) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under him, but, in regard to an estate in fee simple (not being a rentcharge held for a legal estate) only within the period authorised by the rule relating to perpetuities.

32. Restriction on executory limitations. [cf. Eng. s.134; N.S.W. s.29B; Vic. s.132] (1) Where there is a person entitled to -

- (a) land, or an equitable interest in land, for an estate in fee simple or for any less estate or interest, or
- (b) any other property, or an interest in any other property,

with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue who has attained the age of twenty-one years of the class on default or failure whereof the limitation over was to take effect.

(2) This section applies where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

PART V - CONCURRENT INTERESTS : CO-OWNERSHIP

Division 1 - General Rules

33. Forms of co-ownership. (1) Any property and any interest, whether legal or equitable, in any property may be held by two or more persons:-

- (a) as joint tenants; or -
- (b) as tenants in common.

(2) Any two or more persons acquiring land after the commencement of this Act in circumstances in which, but for the passing of this Act, they would have acquired the land as coparceners shall acquire such land as tenants in common and not as coparceners.

34. Power for corporations to hold property as joint tenants. [Eng. 62 & 63 Vict., c.20; N.S.W. s.25; Vic. s.28] (1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or two or more bodies corporate become entitled to any property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants:

Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

(2) Where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

(3) This section shall apply in all cases of the acquisition or holding of property after the commencement of this Act.

35. Construction of dispositions of property to two or more persons together. [cf. N.S.W. s.26] (1) A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for two or more persons together beneficially shall be construed as made to or for them as tenants in common, and not as joint tenants.

(2) This section does not apply:-

(a) to persons who by the terms or by the tenor of the disposition are executors, administrators, trustees, or mortgagees, nor in any case where the disposition provides that persons are to take as joint tenants or tenants by entireties; and -

(b) to a disposition for partnership purposes in favour of persons carrying on business in partnership.

(3) Subject to the provisions of The Partnership Acts, 1891 to 1965, a disposition for partnership purposes of an interest in any property in favour of persons carrying on business in partnership shall, unless a contrary intention appears, be construed as:-

(a) a disposition (if any) of the legal interest to those persons as joint tenants;

(b) a disposition (if any) of the beneficial interest to those persons as tenants in common.

(4) This section applies to any disposition made after the commencement of this Act.

(5) In this section "disposition" includes a disposition which is wholly or partly oral.

36. Tenants in common of equitable estate acquiring the legal estate. [N.S.W. s.27] Where two or more persons entitled beneficially as tenants in common to an equitable estate in any property are or become entitled in their own right, whether as joint tenants or tenants in common, to the legal estate in such property equal to and co-extensive with such equitable estate both the legal and equitable estates shall be held by them as tenants in common unless such persons otherwise agree.

Division 2 - Statutory trusts, sale and division

37. Interpretation. [N.S.W. s.66F] In this Division -

(1) "Co-ownership" means ownership whether at law or in equity in possession by two or more persons as joint tenants or as tenants in common; and "co-owner" has a corresponding meaning and includes an incumbrancee of the interest of a joint tenant or tenant in common.

(2) [cf. Eng. 1925, s.35] Property held upon the "statutory trust for sale" shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners.

(3) Property held upon the "statutory trust for partition" shall be held upon trust -

- (a) with the consent of the incumbrancee of the entirety (if any) to partition the property and to provide (by way of mortgage or otherwise) for the payment of any equality money; and
- (b) upon such partition being made to give effect thereto by assuring the property so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

38. Statutory trusts for sale or partition of property held in co-ownership.
[N.S.W. s. 66G] (1) Where any property (other than chattels personal) is held in co-ownership the Court may, on the application of any one or more of the co-owners, and notwithstanding the provisions of any other Act, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

(2) Where the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives shall, unless the Court otherwise determines, be appointed trustees on either of such statutory trusts, but subject, in the case of personal representatives, to their rights and powers for the purposes of administration.

(3) (a) Where the entirety of the property is vested at law in co-owners the Court may appoint a trustee corporation either alone or with one or two individuals (whether or not being co-owners), or two or more individuals, not exceeding four (whether or not including one or more of the co-owners), to be trustees of the property on either of such statutory trusts.

(b) On such appointment the property shall, subject to the provisions of section 90 of the Trusts Act 1972, vest in the trustees.

(4) If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the Court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the Court may, with the consent of the incumbrancee of the entirety (if any), appoint trustees of the property on the statutory trust for partition, or as to part of the property on the statutory trust for sale, and as to part on the statutory trust for partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

(5) (a) When such trustees for partition have prepared a scheme of partition they shall serve notice in writing thereof on all the co-owners of full age, and any of such co-owners dissatisfied with the scheme may, within one month after service upon him of such notice, apply to the Court for a variation of the same.

(b) Where any of the co-owners is a backward person, a mentally ill person, or a patient, such notice shall be served on the person charged by law with the management and care of the property of that backward person, mentally ill person or patient, or, if there is no person so charged, on the Public Curator

(c) Where any of the co-owners is an infant or a person who cannot be found or ascertained, or as to whom it is uncertain whether he is living or dead, the trustees may act on behalf of the infant or person, and retain land or other property to represent his share.

(6) In relation to the sale or partition of property held in co-ownership, the Court may alter such statutory trusts, and the trust so altered shall be deemed to be the statutory trust in relation to that property.

(7) Where property becomes subject to such statutory trust for sale -

- (a) in the case of joint tenancy, a sale under the trust shall not of itself effect a severance of that tenancy;
- (b) in any case land shall be deemed to be converted upon the appointment of trustees for sale unless the Court otherwise directs.

(8) This section applies to property held in co-ownership at the commencement of this Act and to property which becomes so held after such commencement.

(9) [cf. Eng. 15 Geo. V, c. 18, s. 75(10)] This section does not apply to property in respect of which a subsisting contract for sale (whether made under an order in a suit for partition, or by or on behalf of all the co-owners) is in force at the commencement of this Act, if the contract is completed in due course, nor to land in respect of which a suit for partition is pending at such commencement if a decree for a partition or sale is subsequently made in such suit.

39. Trustee on statutory trusts for sale or partition to consult persons interested. [N.S.W. s. 66H; cf. Eng. 1925, s. 26(3); Eng. 16 & 17 Geo. V., c. 11. Schedule] So far as practicable trustees on the statutory trust for sale, or on the statutory trust for partition, shall consult the persons of full age and not subject to disability for the time being beneficially entitled to the income of the property until sale or partition, and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this section have been complied with.

40. Right of co-owners to bid at sale under statutory power of sale. [N.S.W. s. 66I] (1) On any sale under a statutory trust for sale the Court may allow any of the co-owners of the property to purchase whether at auction or otherwise on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters as to the Court seems reasonable.

(2) A co-owner, with a right to purchase shall not, without the leave of the Court, be entitled to act as trustee in connection with the sale.

41. Sale or division of chattels. [cf. 1 Eliz. 2, No. 42, s. 13; Eng. 1925, s. 188; N.S.W. s. 36A; Vic. s. 187; W.A. s. 129] (1) Where any chattel or chattels belong to two or more persons jointly or in undivided shares any such person or persons may apply to the Court for an order under this section.

(2) On any application under this section the Court may:-

- (a) order that the chattels in respect of which the application is made, or any one or more of them, be sold and the proceeds of sale distributed among the persons entitled thereto in accordance with their interests in the chattel or chattels; or
- (b) order that the chattels or some of them in respect of which the application is made be divided among the persons entitled thereto; or

- (c) order that one or more of such chattels be sold and the others be divided as aforesaid; and
- (d) make such other orders and give any consequential directions as it thinks fit.

(3) In this section "Court" means the Supreme Court or where the value of the chattel, or, if more than one, the aggregate value of the chattels the subject of the application does not exceed six thousand dollars, the District Court.

42. Powers of the Court. In proceedings under section 38 or section 41 the Court may on the application of any party to the proceedings or of its own motion:-

- (a) determine any question of fact arising (including questions of title) in the proceedings or give directions as to how such question shall be determined; and -
- (b) where the Court is the Supreme Court, direct that such inquiries be made and such accounts be taken as may in the circumstances be necessary for the purpose of ascertaining and adjusting the rights of the parties.

43. Liability of co-owner to account. [cf. 4 & 5 Anne, c. 3, s. 27] (1) A co-owner shall, in respect of the receipt by him of more than his just or proportionate share according to his interest in the property, be liable to account to any other co-owner of the property.

(2) In this section, "co-owner" means a joint tenant, whether in law or in equity, or a tenant in common, whether at law or in equity, of any property.

PART VI - DEEDS, COVENANTS, INSTRUMENTS AND CONTRACTS

Division 1 - Deeds and Covenants

44. Description and form of deeds. [Eng. ss. 57, 56(2); Vic. ss. 57, 56(2); W.A. s. 12.] (1) A deed between parties, to effect its objects, has the effect of an indenture although not indented or expressed to be indented.

(2) Any deed, whether or not being an indenture, may be described (at the commencement thereof or otherwise) as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

45. Formalities of deeds executed by individuals. [cf. N.S.W. s. 38; Eng. s. 73; Vic. s. 73; W.A. s. 9] (1) Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone shall not be sufficient.

(2) An instrument expressed:-

- (a) to be an indenture or a deed, or
- (b) to be sealed

shall, if it is signed and attested by at least one witness not being a party thereto, be deemed to be sealed and, subject to section 47, to have been duly executed.

(3) No particular form of words shall be requisite for the attestation.

(4) [cf. The Evidence and Discovery Acts, s. 26A] A deed executed and attested in accordance with this section may in any proceedings be proved in the manner in which it might be proved if no attesting witness were alive.

(5) Nothing in this section shall affect -

- (a) the execution of deeds by corporations; or
- (b) the requirements as to attestation of instruments provided in section 115 of The Real Property Acts; or
- (c) the provisions of section 20 of the Bills of Sale and Other Instruments Act 1955-1971; or
- (d) any deed executed before the commencement of this Act.

46. Execution of instruments by or on behalf of corporations. [N.S.W. s. 51A; Eng. s. 74; Vic. s. 74; W.A. s. 10] (1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall, subject to section 47, be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.

(3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness, and in the case of a deed by executing the same in accordance with section 45 of this Act, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.

(4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose, either generally or in the particular instance, by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.

(5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.

(6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

(7) Nothing in this section shall affect the requirements as to attestation of instruments provided in section 115 of The Real Property Acts.

47. Delivery of deeds. (1) After the commencement of this Act, execution of a document -

(a) in the form of a deed, or

(b) in the form provided in section 45 or section 46 -

shall not of itself import delivery, nor shall delivery be presumed from the fact of such execution only, unless it appears that execution of the document was intended to constitute delivery thereof.

(2) Subject to subsection (1) of this section, delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.

(3) In this section "delivery" means the intention to be legally bound either immediately or subject to fulfilment of a condition.

48. Construction of expressions used in deeds and other instruments. [cf. Eng. s. 61; Vic. s. 61; N.S.W. s. 181; W.A. s. 8] (1) In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires -

(a) "month" means calendar month;

(b) "person" includes a corporation;

(c) the singular includes the plural and vice versa;

(d) the masculine includes the feminine and vice versa.

(2) [cf. N.S.W. s. 76; Eng. s. 83; Vic. s. 83; W.A. s. 46] A covenant, power or other provision implied in a deed or other instrument by virtue of this or any other Act shall be construed in accordance with subsection (1) of this section.

49. Implied covenants may be negated. [cf. N.S.W. s. 74] (1) Subject to this Act a covenant, power or other provision implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the instrument wherein it is implied.

(2) Any such covenant or power may, unless otherwise provided in this or such other Act, be negated, varied, or extended by -

(a) an express declaration in the instrument wherein it is implied; or

(b) another instrument.

(3) Any such covenant or power so varied or extended shall, so far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were implied under the Act.

50. Covenants and agreements entered into by a person with himself and another or others. [Eng. 1925, s. 82; Vic. s. 82; N.S.W. s. 72; W.A. s. 52]

(1) Any covenant, whether express or implied, or agreement entered into by a person with himself and one or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.

(2) This section applies to covenants or agreements entered into before or after the commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to himself and one or more other persons, but without prejudice to any order of the Court made before such commencement.

51. Receipt in instrument sufficient. [cf. Eng. s. 67; Vic. s. 67; N.S.W. s. 39; W.A. s. 14] (1) A receipt for consideration money or securities in the body of a deed or other instrument shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being indorsed on the deed or instrument.

(2) This section applies only to deeds or instruments executed after the commencement of this Act.

52. Receipt in instrument or indorsed evidence. [cf. Eng. s. 68; Vic. s. 68; N.S.W. s. 40; W.A. s. 15] (1) A receipt for consideration money or other consideration in the body of a deed or instrument or indorsed thereon shall in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part be sufficient evidence of the payment or giving of the whole amount thereof.

(2) This section applies to deeds or instruments executed or indorsements made before or after the commencement of this Act.

53. Benefit and burden of covenants relating to land. [Eng. ss. 78, 79; Vic. ss. 78, 79; N.S.W. ss. 70, 70A; W.A. ss. 47, 48] (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

(2) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself, his successors in title and the persons deriving title under him or them, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed.

This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

(3) For the purposes of this section in connexion with covenants restrictive of the user of land "successors in title" shall be deemed to include the owners and occupiers for the time being of such land.

(4) This section applies only to covenants made after the commencement of this Act, but shall take effect subject, in the case of registered land, to the provisions of The Real Property Acts.

Division 2 - General rules affecting contracts

54. Effect of joint contracts and liabilities. [cf. Eng. s. 81; Vic. s. 81]

(1) Subject to this and to any other Act -

(a) a promise made by two or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally by each of those persons;

(b) a liability which is joint shall not be discharged, nor shall a cause of action with respect thereto be extinguished, by reason of any fact, event, or matter except to the extent that the same would by reason thereof be discharged or extinguished if the liability were joint and several and not joint.

(2) In this section "promise" includes a promise under seal, a covenant, whether express or implied under this Act, and a bond or other obligation under seal.

(3) This section applies only to a promise, liability or cause of action coming into existence after the commencement of this Act.

55. Contracts for the benefit of third parties. (1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

(2) Prior to acceptance the promisor and promisee may without the consent of the beneficiary vary or discharge the terms of the promise and any duty arising therefrom.

(3) Upon acceptance -

(a) the beneficiary shall be entitled in his own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor; and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer;

(b) the beneficiary shall be bound by the promise and subject to a duty enforceable against him in his own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of him;

(c) the promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary;

(d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor, the promisee, and the beneficiary.

(4) Subject to subsection (1) of this section, any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.

(5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall be capable of being created and of subsisting in land under the provisions of any Act but subject to the provisions of that Act.

(6) In this section -

(a) "acceptance" means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on his behalf, in the manner and within the time specified in the promise or, if none is specified, within a reasonable time of the promise coming to the notice of the beneficiary;

(b) "beneficiary" means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given;

(c) "promise" means a promise which is or appears to be intended -

(i) to be legally binding; and

(ii) to create a duty enforceable by a beneficiary -

and includes a promise whether made by deed, or in writing, or orally, or partly in writing and partly orally;

(d) "promisee" means a person to whom a promise is made or given;

(e) "promisor" means a person by whom a promise is made or given.

(7) Nothing in this section affects any right or remedy which exists or is available apart from this section.

(8) This section applies only to promises made after the commencement of this Act.

56. Guarantees to be in writing. [cf. 1677, s. 4; Qld. 1867, s. 5] (1) No action may be brought upon any promise to guarantee any liability of another unless the promise upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorised.

(2) A promise, or memorandum or note thereof, in writing shall not be treated as insufficient for the purpose of this section by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

57. Recovery of sums paid under discharged contract.

OMITTED.

58. Effect of provisions as to conclusiveness of certificates, etc. (1)
Subject to any other Act, a provision in a contract or instrument to the effect that a certificate, statement or opinion of any person shall be or be received as conclusive evidence of any fact therein contained shall be construed to mean only that such certificate, statement or opinion shall be or be received as prima facie evidence of that fact.

(2) This section shall not apply to -

- (a) a certificate, statement or opinion of a person who, in making the certificate or statement or in forming the opinion, is bound to act judicially or quasi-judicially or as aribtrator or quasi-arbitrator;
- (b) a provision agreed to after a dispute has arisen as to the relevant fact.

(3) This section applies to a contract made or instrument executed after but not before the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

(4) In this section "fact" includes any matter, thing, event, circumstance or state of affairs.

Division 3 - Sales of land

59. Contracts for sale, etc. of land to be in writing. [cf. Imp. 1677, s. 4; Qld. 1867, s. 5; 1925, s. 40] No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract

upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged, or by some person thereunto by him lawfully authorised.

60. Sales of land by auction. [N. S. W. s. 65; Eng. 30 & 31 Vict. ss. 4-6]

(1) In the case of a sale of land by auction -

- (a) where the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor, he shall not be entitled to bid himself or to employ any person to bid at the sale, nor shall the auctioneer be entitled to take any bid from the vendor or any such person; any sale contravening this rule may be treated as fraudulent by the purchaser;
- (b) a sale may be notified in the conditions of sale to be subject to a reserved or upset price, and a right to bid may also be therein expressly reserved by or on behalf of the vendor;
- (c) where a right to bid is expressly reserved, but not otherwise, the vendor or any one person on his behalf may bid at the auction.

(2) This section applies to sales effected after the commencement of this Act.

61.

62. Conditions of sale of land. [cf. N. S. W. s. 57] (1) Under a contract for the sale of registered land the purchaser shall be entitled at the cost of the vendor -

- (a) to receive from the vendor sufficient particulars of title to enable him to prepare the appropriate instrument to give effect to the contract; and
- (b) to receive from the vendor an abstract of any instrument, forming part of the vendor's title, in respect of which a caveat is entered upon the register; and
- (c) to have the relevant certificate of title or other document of title lodged by the vendor at the office of the Registrar to enable the instrument to be registered; and
- (d) to have any objection to the registration of the instrument removed by the vendor: Provided that, as to any such objection which the purchaser ought to have raised on the particulars or abstract, or upon the investigation of the title, or which arises from his own act, default, or omission, he shall not be entitled to have the same removed except at his own cost.

(2) Under any contract for the sale of any land there shall be implied a term that -

- (a) payment or tender of any moneys payable pursuant to the contract may be made by cheque drawn by any bank;
- (b) an obligation on the part of the vendor to execute and deliver a conveyance of the subject land free of incumbrances shall be satisfied if the vendor will, upon completion of the contract, be able to and does in fact discharge any existing incumbrance out of the purchase moneys payable under the contract by the purchaser;
- (c) unless otherwise agreed by the parties, their solicitors or conveyancers, settlement of the contract shall take place -
 - (i) in the case of registered land, at the Office of the Registrar of Titles or Deputy Registrar of Titles at which the land is registered;
 - (ii) in the case of land under the Land Act, at the Office of the Lands Administration Commission;
 - (iii) in the case of land under the Miners' Homestead Leases Act, at the warden's office.

(3) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract, and to the provisions therein contained.

62. Stipulations not of the essence of the contract. [Qld. J.A. 1876, s. 5(7)]
Stipulations in contracts, as to time or otherwise, which according to rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law in accordance with rules of equity.

63. Application of insurance money on completion of a sale or exchange.
[Eng. s. 47; Vic. s. 47] (1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of the purchaser and paid by the vendor to the purchaser on completion of the sale or exchange, or so soon thereafter as the same shall be received by the vendor.

(2) For the purpose of this section, cover provided by such a policy maintained by the vendor extends until the date of completion, and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.

(3) This section shall apply only to contracts made after the commencement of this Act, and shall have effect subject to -

- (a) any stipulation to the contrary contained in the contract;
- (b) the payment by the purchaser of the proportionate part of the premium from the date of the contract.

(4) This section shall apply to a sale or exchange by an order of Court, as if -

- (a) for references to the "vendor" there were substituted references to the "person bound by the order";
- (b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court;
- (c) for reference to the date of the contract there were substituted a reference to the time when the contract became binding.

64. Rights of purchaser as to execution. [Eng. s. 75(1); Vic. s. 75(1); N.S.W. s. 59] (1) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2) This section applies only to sales made after the commencement of this Act.

65. Receipt in instrument or indorsed authority for payment. [cf. Vic. s. 69; Eng. s. 69(1)] (1) Where a banker, a solicitor, or a conveyancer, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the instrument being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, or produces a duly executed instrument in respect of

registered land, the instrument shall be a sufficient authority to the person liable to pay or give the same for his paying or giving the same to the banker or solicitor, without the banker, solicitor or conveyancer producing any separate or other direction or authority in that behalf from the person who executed or signed the receipt or instrument.

(2) In this section -

- (a) "instrument" includes a discharge of mortgage; and
- (b) "banker" means a person acting in his official capacity as general manager or manager of a bank.

66. Restriction on vendor's right to rescind on purchaser's objection. [N. S. W. s. 56] (1) In any contract the vendor shall not be entitled to exercise any right to rescind the contract, whether given by the contract expressly or otherwise, on the ground of any requisition or objection made by the purchaser unless and until he has given the purchaser seven days notice of his intention to rescind so as to enable the purchaser to withdraw or waive the requisition or objection.

(2) This section applies only to contracts made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

67. Damages for breach of contract to sell land. (1) A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser in such sum as at the time the contract was made was reasonably foreseeable as the loss liable to result, and which does in fact result, from the failure of the vendor to perform the contract; and, unless the contract otherwise provides, the vendor shall not be relieved, wholly or in part, of liability for damages measured in accordance with this section by reason only of his inability to make title to the land the subject of the contract of sale, whether or not such inability was occasioned by his own default.

(2) This section shall not affect any right, power or remedy which, apart from this section, may be available to a purchaser in respect of the failure of a vendor to show or make good title or otherwise to perform a contract for the sale of land.

(3) This section shall not apply to contracts for the sale of unregistered land and shall apply only to contracts entered into after the commencement of this Act.

68. Rights of purchaser where vendor's title defective. [cf. N. S. W. s. 55(1) & (2)] (1) Where specific performance of a contract would not be enforced against the purchaser by the court by reason of a defect in or doubt as to the vendor's title, but such defect or doubt does not entitle the purchaser to rescind the contract, the purchaser shall nevertheless be entitled to recover his deposit and any instalments under the contract whether at law or in equity, unless the contract discloses such defect or doubt and contains a stipulation precluding the purchaser from objecting thereto.

(2) If the defect or doubt not disclosed by the contract is one which is known or ought to have been known to the vendor at the date of the contract the purchaser shall in addition be entitled to recover his expenses of investigating the title.

(3) This section applies -

- (a) to a contract for the sale or exchange of land or any interest in land;

- (b) to a contract made after the commencement of this Act;
- (c) notwithstanding any provision to the contrary contained in the contract.

69. Applications to court by vendor and purchaser. [Eng. s. 49(1); Vic. s. 49(1)] A vendor or purchaser of land, or their respective representatives, may apply in a summary way to the Court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with a contract (not being a question affecting the existence or validity of the contract), and the Court may make such order upon the application as to the Court may appear just, and may order how and when and by whom all or any of the costs of and incident to the application are to be borne and paid.

Division 4 - Instalment sales of land

70. Application of Division. [cf. Qld. The Contracts of Sale of Land Act of 1933; Vic. Sale of Land Act 1962 (as amended)] (1) This Division shall not bind the Crown.

(2) In this Division -

(a) "deposit" means a sum -

- (i) not exceeding ten per centum of the purchase price payable under an instalment contract;
- (ii) paid or payable in one or more amounts; and
- (iii) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser;

(b) "instalment contract" means an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange therefor;

(c) "mortgage" includes any incumbrance or charge other than a charge attaching by the operation of any statutory enactment;

(d) "purchaser" includes any person from time to time deriving an interest under an instalment contract from the original purchaser under the contract;

(e) "sale" includes an agreement for sale and an enforceable option for sale;

(f) "vendor" includes any person to whom the rights of a vendor under an instalment contract have been assigned.

(3) Where a contract for the sale of land may, at the election of the purchaser, be performed in a manner which would constitute it an instalment contract, it shall, unless and until the purchaser elects to perform it in some other manner, be presumed to be an instalment contract within the meaning of this section.

(4) This Division applies -

- (a) to an instalment contract entered into after the commencement of this Act; and

(b) notwithstanding anything to the contrary contained in any contract.

71. Restriction on vendor's right to rescind. [cf. Qld. The Contracts of Sale of Land Act of 1933, s.13(1), (2), (3)] (1) An instalment contract shall not be determinable or determined by reason of default on the part of the purchaser in payment of any instalment or instalments due and payable under the contract until the expiration of a period of thirty days after service upon the purchaser of a notice in Form 2 of the First Schedule or to like effect.

(2) A purchaser upon whom a notice in the form of the Schedule or to like effect has been served may within the period mentioned in subsection (1) of this section pay or tender to the vendor or his agent such instalment or instalments as would have been due and payable under the contract at the date of such payment or tender but for such default (including any instalment in respect of which the default was made).

(3) Upon payment or tender in accordance with subsection (2) of this section any right or power of the vendor to determine the contract by reason of the default specified in the notice shall cease and the purchaser shall be deemed not to be in default under the contract.

(4) A notice shall be deemed to be to the like effect of that in Form 2 of the First Schedule if it is reasonably sufficient fully and fairly to apprise the purchaser of his default and of the effect of his failure to remedy the default within the time specified in this section.

72. Land not to be mortgaged by vendor. [cf. Vic. Sale of Land Act 1962, s.7; Qld. The Contracts of Sale of Land Act of 1933, ss.18(4), 26] (1) A vendor under an instalment contract shall not without the consent of the purchaser sell or mortgage the land the subject of the contract.

(2) Where land is mortgaged in contravention of this section -

- (a) the instalment contract shall be voidable by the purchaser at any time before completion of the contract;
- (b) the vendor shall be guilty of an offence against this Act and liable to a penalty not exceeding five hundred dollars.

(3) Nothing in this section affects -

- (a) the rights of any bona fide purchaser from the vendor for value and without notice of the instalment contract; or
- (b) the provisions of The Real Property Acts.

73. Right of purchaser to lodge caveat. [cf. Qld. The Contracts of Sale of Land Act of 1933, s.9(c)] (1) A purchaser under an instalment contract for the sale of land under the provisions of The Real Property Acts may by caveat in accordance with those Acts forbid the registration of any instrument affecting the land the subject of the contract until completion of the instalment contract, and such caveat shall, within the meaning of section 39 of The Real Property Act of 1877, be deemed to be and to have been lodged with the written consent of the vendor as registered proprietor of the land.

(2) A caveat lodged pursuant to this section may on the application of any person interested be removed upon proof to the satisfaction of the Registrar or of the Court -

- (a) that the purchaser has consented to removal of the caveat; or
- (b) that the instalment contract has been rescinded or determined or discharged by performance or otherwise; or
- (c) of any other ground which justifies removal of a caveat.

(3) Nothing in this section affects the powers of the Registrar under section 102 of The Real Property Acts.

74. Right to require conveyance. [cf. Vic. Sale of Land Act 1962, s.4, 7; Qld. The Contracts of Sale of Land Act of 1933, s.9(b)] (1) A purchaser who is not in default under an instalment contract may at any time after an amount equal to one third of the purchase price has been paid serve upon the vendor a notice in writing requiring the vendor, at the expense of the purchaser, to convey the land to the purchaser conditionally upon the purchaser at the same time executing a mortgage in favour of the vendor or such other person as the vendor may specify to secure payment of all moneys which would thereafter but for the execution of such mortgage have become payable by the purchaser pursuant to the instalment contract.

(2) A vendor who is not in default under an instalment contract may at any time after an amount equal to one third of the purchase price has been paid serve upon a purchaser a notice in writing requiring the purchaser to accept a conveyance of the land from the vendor conditionally upon the purchaser at the same time executing a mortgage or mortgages in favour of the vendor or such other person or persons as the vendor may specify to secure payment of all moneys which would thereafter but for the execution of such mortgage or mortgages have become payable by the purchaser pursuant to the instalment contract.

(3) A vendor who requires a purchaser to accept a conveyance pursuant to the provisions of the last preceding subsection shall be obliged to advance to the purchaser -

- (a) an amount equal to the duty (if any) payable by the purchaser pursuant to the provisions of the Stamp Act 1894-1970 on the conveyance; and
- (b) an amount equal to legal costs of preparation, execution and registration of transfer of the land to the purchaser -

but such obligation shall be conditional upon the purchaser agreeing to the amount so advanced being added to the principal sum secured by the mortgage or by such one of the mortgages as is specified by the vendor.

(4) A mortgage executed pursuant to this section shall -

- (a) contain all such terms and all such powers and covenants on the part of the mortgagor as may be agreed by the vendor and the purchaser and shall accord with and provide for observance of all obligations of the purchaser pursuant to the instalment contract; and
- (b) in the case of subsection (1) of this section, but subject to subsection (6), be prepared and registered at the expense of the purchaser.

(5) In the event of the vendor and the purchaser failing to agree upon the terms, covenants and powers, or any of them, to be contained in the mortgage, the mortgage and any such term, covenant or power to be contained therein shall be settled by an independent practising solicitor ^{conveyancer} or/ appointed by the President of the Law Society on the application thereto of the vendor and the purchaser or either of them, and the mortgage so settled shall be deemed to have been agreed upon by both the vendor and the purchaser.

(6) The reasonable costs of settling a mortgage in accordance with subsection (5) of this section shall be borne by the vendor and the purchaser in such proportions (if any) as in the circumstances the President of the Law Society thinks fit; and such costs shall be recoverable by the solicitor ^{or conveyancer} in those proportions (if any) from the vendor and the purchaser in any court of competent jurisdiction.

(7) A person liable for costs by virtue of subsection (6) of this section shall be entitled to require those costs to be taxed in accordance with the Costs Act of 1867.

(8) Where a notice in writing under this section has been served upon a vendor by a purchaser or upon a purchaser by a vendor, and such vendor or, as the case may be, purchaser without lawful excuse fails to convey or to accept a conveyance of the land or to execute any instrument requisite for giving effect to this section, such vendor or purchaser -

(a) shall be deemed to have broken a condition of the contract, and the purchaser or, as the case may be, vendor shall be entitled to all civil remedies accordingly; and

(b) the party so failing shall be guilty of an offence under this Act and liable to a penalty not exceeding five hundred dollars.

(8) In any contract entered into after the commencement of this Act, a reference to section 9 of The Contracts of Sale of Land Act of 1933 shall be construed as a reference to this section.

75. Deposit of title deed and conveyance. (1) A purchaser who is not in default under an instalment contract may at any time after the contract has been entered into direct the vendor at the cost of the purchaser to deposit with a prescribed authority -

(a) the title deed or deeds relating to the land the subject of the contract; and

(b) a duly executed conveyance or instrument of transfer of the land in favour of the purchaser, which shall be deemed to be delivered by the vendor in escrow pending discharge of the contract by performance or otherwise.

(2) A vendor who fails to comply with a direction given in accordance with subsection (1) of this section shall be deemed to have broken a condition of the contract, and the purchaser shall be entitled to all civil remedies accordingly.

(3) The title deed or deeds and the conveyance or ^{instrument of} transfer referred to in subsection (1) of this section shall be held in trust by the prescribed authority who shall not, except for the purpose of safe-keeping, deliver the same to any person (other than another prescribed authority, to be held by him in accordance with the provisions of this section) until -

(a) the time for performance of the contract arrives; or

(b) the contract is discharged by performance or otherwise; or

(c) the Court otherwise orders on the application of the prescribed authority or of the vendor or the purchaser or some interested person.

(4) In this section, "prescribed authority" means any of the following -

(a) any person, firm or corporation who at the commencement of this Act is a prescribed authority for the purposes of section 5(i) of The Contracts of Sale of Land Act of 1933;

(b) any bank carrying on business in the State;

(c) a trustee corporation;

- (d) a solicitor or conveyancer or firm of solicitors or conveyancers approved by the Minister upon the recommendation of the President of the Law Society.

(5) Nothing in this section applies to an instalment contract where at the time such contract is made the land is subject to an existing mortgage.

PART VII - MORTGAGES

76. Application of Part and interpretation of terms. (1) Except where the context or subject-matter otherwise indicates or provides, the provisions of this Part -

- (a) apply to unregistered land and to any mortgage of such land;
- (b) apply to land and any mortgage of land which is subject to the provisions of -
 - (i) The Real Property Acts;
 - (ii) the Land Act;
 - (iii) The Miners' Homestead Leases Acts;
 - (iv) The Mining Acts, or the Regulations made under those Acts;
 - (v) The State Housing Acts;
 - (vi) any other Act, and any repealed Act the provisions of which continue to apply to mortgages made before that Act was repealed;
- (c) subject to the provisions of any other Act, apply to any other mortgage whether of land or any other property.

(2) In the interpretation of this Part, unless the context or subject-matter otherwise indicates or requires -

- (a) "instrument of mortgage" includes -
 - (i) a bill of mortgage and a bill of encumbrance within the meaning of The Real Property Acts;
 - (ii) a memorandum of mortgage under the Land Act, The Miners' Homestead Leases Acts, or The Mining Acts and the Regulations made under those Acts;
- (b) "mortgagee" includes an encumbrancee under a registered bill of encumbrance;
- (c) "mortgagor" includes an encumbrancer under a registered bill of encumbrance;
- (d) "principal money" includes any annuity, rentcharge or principal money secured or charged by a bill of encumbrance registered under The Real Property Acts.

[cf. Qld. R. P. A. s. 69; N. S. W. s. 80(1)]

77. Implied obligations in mortgages. / (1) In every instrument of mortgage there shall be implied on the part of the mortgagor the following obligations -

- (a) that he will pay the principal money and interest thereby secured according to the rate and at the times therein mentioned without any deduction whatever;

- (b) that he will keep all buildings and other improvements erected and made upon the land in as good and substantial repair as the same were in at the date of the mortgage, and that he will permit the mortgagee at all convenient times, until such mortgage is redeemed, with or without agents, to enter into and upon such land to view and inspect the state of repair of such buildings and improvements.

(2) An obligation implied by virtue of this section shall, if the mortgage is by deed, take effect as a covenant on the part of the mortgagor.

(3) This section applies only if and as far as a contrary intention is not expressed in the instrument of mortgage, and shall have effect subject to the terms of the instrument, and to the provisions therein contained.

(4) Subject to subsection (3) of this section, an obligation implied by this section shall have effect as if it were in terms contained in the instrument of mortgage.

78. Variation or postponement of mortgage. [cf. N.S.W. s.91]

(1) A mortgage of land may be varied by memorandum of variation, which may -

- (a) increase or reduce the rate of interest payable in respect of the mortgage debt;
- (b) increase or reduce the amount secured by the mortgage;
- (c) shorten, extend or renew the term or currency of the mortgage;
- (d) vary any condition, covenant or other provision of the mortgage; or
- (e) provide for any one or more of the foregoing.

(2) A mortgage of land may, with consent of the person or persons adversely affected thereby, by memorandum of postponement be postponed wholly or in part in priority to any other mortgage of the same land or partly of the same land.

(3) A memorandum of variation or a memorandum of postponement shall be -

- (a) in the form, or to the effect of one or more of Forms 3, 4, 5, 5A or 5B of the First Schedule, with such variations or additions as circumstances may require;

- (b) signed by the persons to be bound thereby;
- (c) attested by at least one witness;
- (d) indorsed upon or annexed to the instrument of mortgage; and
- (e) registered.

(4) The power of and procedure for variation or postponement conferred by this section shall be in addition to any other such power or procedure existing at law.

79. Inspection and production of instruments. [cf. N.S.W. s.96; Eng. s.96; Vic. ss.95, 97] (1) A mortgagor, as long as his right to redeem subsists, shall by virtue of this Act, be entitled from time to time at reasonable times, on his request and at his own cost and on payment or tender of the mortgagee's proper costs and expenses in that behalf, by himself or his solicitor or conveyancer, to inspect and to make or be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the possession, custody or power of the mortgagee.

(2) In the case of a mortgage of land the mortgagor shall, at his own cost and upon payment or tender of the mortgagee's proper costs and expenses in that behalf, be entitled to have the relevant certificate of title or instrument of lease or other documents of title lodged at the office of the Registrar or in the Department or in the warden's office, as the case may be -

- (a) to permit of the registration of any authorised dealing by the mortgagor with the land; or
- (b) to permit of registration of a second or subsequent mortgage.

(3) A certificate of title, instrument of lease, or other document of title lodged in terms of subsection (2) of this section:-

- (a) shall, when the dealing or mortgage referred to in that subsection has been registered, be re-delivered to the mortgagee or other person authorised by the mortgagee to take delivery thereof;
- (b) shall not, whilst so lodged, be used or available for the purpose of registering any instrument, dealing, or mortgage other than those referred to in subsection (2) of this section.

(4) A mortgagee, whose mortgage is surrendered, discharged or otherwise extinguished, shall not be liable on account of delivering documents of title in his possession to the person not having the best right thereto, unless he has notice of the right or claim of a person having a better right, whether by virtue of a right to require a surrender, discharge or re-conveyance or otherwise.

(5) This section shall apply to mortgages made after but not before the commencement of this Act and shall have effect notwithstanding any stipulation to the contrary.

80. Actions for possession by mortgagors. [cf. Eng. s.98; Vic. s.98; N.S.W. s.11; S.A. s.14; Qld. J.A. of 1876, s.5(5)] (1) A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of his intention to take possession or to enter into the receipt of the rents and profits thereof, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.

(2) This section does not prejudice the power of a mortgagor independently of this section to take proceedings in his own name only, either in right of any legal estate vested in him or otherwise.

(3) This section applies whether the mortgage was made before or after the commencement of this Act.

81. Tacking and further advances. [cf. Eng. s.94; Vic. s.94] (1) After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable) -

- (a) if an arrangement has been made to that effect with the subsequent mortgagees; or
- (b) if he had no notice of such subsequent mortgages at the time when the further advance was made by him; or
- (c) whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.

(2) Nothing in subsection (1) hereof affects the right of a prior mortgagee to rank in priority to subsequent mortgagees in respect of expenses properly incurred in preserving the mortgaged property.

(3) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered under an Act providing for registration of mortgages or deeds, if it was not so registered at the date of the original advance or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.

This subsection applies only where the prior mortgage was made expressly for securing a current account or other further advances.

(4) Save in regard to the making of further advances as aforesaid, the right to tack is hereby abolished:

Provided that nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with the subsequent incumbrances.

(5) This section applies to mortgages of land made whether before or after the commencement of this Act.

82. Powers incident to estate or interest of mortgagee. [cf. Vic. s.101; S.A. s.47; W.A. s.57; Eng. s.101; N.S.W. ss.109, 110] (1) A mortgagee, where the mortgage is made by instrument, shall, by virtue of this Act, have the following powers, to the like extent as if they had in terms been conferred by and were contained in the instrument of mortgage, but not further, namely:-

- (a) a power to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, in subdivision or otherwise, by public auction or by private contract, and for a sum payable either in one sum or by instalments, subject to such conditions respecting title, or evidence of title, or other matters as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances may require and he thinks fit; and
- (b) a power, at any time after the date of the instrument of mortgage, to insure and keep insured against loss or damage by fire ^{and by storm and tempest} any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest wherein is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and
- (c) a power to appoint a receiver of the income of the mortgaged property, or any part thereof; or, if the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof; and
- (d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract; and
- (e) a power to sell any easement, right or privilege of any kind over or in relation to the mortgaged property.

(2) The power of sale aforesaid includes the following powers as incident thereto, namely:-

- (a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part thereof, or on the purchaser and any property sold, any restriction or

reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing;

(b) a power to sell the mortgaged property, or any part thereof, or all or any mines and minerals apart from the surface:-

(i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part thereof, or to any property sold; and

(ii) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements and rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part thereof, or to any property sold; and

(iii) with or without covenants by the purchaser to expend money on the land sold.

(3) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any other section regulating the exercise of those powers, may, except where otherwise provided, be varied or extended by the instrument of mortgage.

(4) This section applies only -

(a) to an instrument of mortgage of land executed whether before or after the commencement of this Act;

(b) if and so far as a contrary intention is not expressed in the instrument of mortgage and has effect subject to the terms of the instrument and to the provisions therein expressed.

(5) The provisions of this Act relating to the foregoing powers comprised in this section, or in any other section regulating the exercise of those powers, apply to mortgages of land under the provisions of -

(a) the Land Act;

(b) The Miners' Homestead Leases Acts; and

(c) The Mining Acts, and the Regulations made under those Acts;

but subject to and to the extent only that the provisions of this Act are consistent with those provisions.

83. Regulation of exercise of power of sale. [cf. Qld. R.P.A. ss.57, 59; N.S.W. s.111(2); Eng. s.103; Vic. s.103; W.A. s.59; S.A. s.48] (1) A mortgagee shall not exercise the power of sale conferred by this Act or otherwise unless and until -

(a) default has been made in payment of the principal money or interest or any part thereof secured by the instrument of mortgage, and notice requiring payment of the amount the failure to pay which constituted the default under such instrument of mortgage has been served on the mortgagor or one of the mortgagors, and such default has continued for a space of 30 days from service of the notice; or

- (b) default has been made in the observance or fulfilment of some provision contained in the instrument of mortgage or implied by this or any other Act and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed and performed, and notice requiring the default to be remedied has been served on the mortgagor or one of the mortgagors, and such default has continued for the space of 30 days from service of the notice.

(2) A notice under this section may be in Form 6 of the First Schedule or to like effect.

(3) The provisions of this section apply, notwithstanding any stipulation to the contrary and notwithstanding the provisions of section 49 of this Act, to mortgages made whether before or after the commencement of this Act; but only to the exercise of a power of sale arising upon or in consequence of a default occurring after the commencement of this Act.

(4) Nothing in this section applies to the exercise by a mortgagee of the power of sale conferred on a mortgagee by the Land Act, or by The Miners' Homestead Leases Acts, or by the Regulations made under The Mining Acts.

84. Duty of mortgagee as to sale price. (1) It is the duty of a mortgagee, in the exercise after the commencement of this Act of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.

(2) Within twenty-eight days from completion of the sale, the mortgagee shall give to the mortgagor notice in Form 7 of the First Schedule.

(3) The title of the purchaser is not impeachable on the ground that the mortgagee has committed a breach of any duty imposed by this section; but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.

(4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) shall be guilty of an offence and liable to a penalty not exceeding \$100.

(5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee from the duty imposed by this section.

(6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.

(7) This section applies to mortgages whether made before or after the commencement of this Act but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this Act.

85. Effect of conveyance on sale. [cf. W.A. s. 60(1); Eng. s. 104(1); Vic. s. 104(1); N.S.W. s. 112; S.A. s. 49(1); Qld. R.P.A. s. 57] (1) A mortgagee exercising the power of sale conferred by this Act has, in the case of unregistered land, power by deed or instrument in writing to convey to and vest in the purchaser the property sold for all the estate (including the legal estate) and interest therein which the original mortgagor had power to dispose of freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage.

(2) A mortgagee exercising the power of sale conferred by this Act has, in the case of land the subject of a bill of mortgage registered in accordance

with The Real Property Acts, power to sell and transfer the land mortgaged and all the estate or interest therein of the mortgagor.

(3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.

(4) This section shall not apply to a transfer in the exercise of the power of sale conferred on a mortgagee by:-

- (a) the Land Act 1962-1970; or
- (b) The Miners' Homestead Leases Acts, 1913 to 1965; or
- (c) The Mining Acts and Regulations made thereunder.

86. Protection of purchasers. [cf. Eng. s.104(2); Vic. s.104(2); W.A. s.60(2); S.A. s.49(2); N.S.W. s.112(3); Qld. R.P.A. s.57] (1) Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground -

- (a) that no case had arisen to authorise the sale; or
- (b) that due notice was not given; or
- (c) that leave of the Court, when so required, was not obtained; or
- (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;

and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have his remedy in damages against the person exercising the power.

(2) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.

(3) The preceding provisions of this section shall not apply to a transfer made in exercise of the power of sale conferred upon a mortgagee by -

- (a) the Land Act 1962-1970; or
- (b) The Miners' Homestead Leases Acts, 1913 to 1965; or
- (c) The Mining Acts and Regulations made thereunder -

save that where, after the commencement of this Act, a transfer is so made the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, and the purchaser is not, either before or on conveyance, concerned to see whether a case has arisen to authorise the sale; but any person damnified by an unauthorised exercise of such power of sale shall have his remedy in damages against the person exercising the power.

87. Application of proceeds of sale. [cf. Eng. s.105; Vic. s.105; N.S.W. s.112(4); W.A. s.61; S.A. s.50; Qld. R.P.A. s.57] (1) Subject to this section, the money arising from sale, and which is in fact received by the

mortgagee, shall, after discharge of prior incumbrances to which the sale is not made subject, if any, be held by him in trust to be applied by him -

- (a) firstly, in payment of all costs, charges and expenses properly incurred by him as incident to the sale, or any attempted sale, or otherwise; and
- (b) secondly, in discharge of the mortgage money, interest and costs, and other money, if any, due under the mortgage; and
- (c) thirdly, in payment of any subsequent mortgages or incumbrances;

and the residue, if any, of the money so received shall be paid to the person entitled thereto or entitled to give receipts for the proceeds of sale of the mortgaged property.

(2) The money which is in fact received by a mortgagee arising from sale in the exercise of the power conferred by -

- (a) The Miners' Homestead Leases Acts; or
- (b) The Mining Acts and Regulations made thereunder -

shall, subject to paragraphs (a) and (b) of subsection (1) of this section, be dealt with as provided in those Acts or Regulations.

(3) The proceeds of sale arising from a sale by a mortgagee in the exercise of the power conferred by the Land Act shall be disposed of as provided in that Act.

88. Provisions as to exercise of power of sale. [cf. Eng. s.106; Vic.s.106 N.S.W. s.112(7); W.A. s.62; S.A. s.51; Qld. R.P.A. s.57] (1) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(2) The power of sale conferred by this Act does not affect the right of foreclosure.

(3) Subject to section 84, the mortgagee shall not be answerable for any voluntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected therewith, or of any power or provision contained in the instrument of mortgage.

(4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, ^{then,} or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

89. Mortgagee's receipts, discharges, etc. [cf. Eng. s.107; Vic. s.107; N.S.W. s.113; W.A. s.63; S.A. s.52; Qld. R.P.A. s.57] (1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage or to see to the application of the money or securities so paid or transferred.

(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this Act directed respecting money received by him arising from a sale under the power of sale conferred by this Act, but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

90. Amount and application of insurance moneys. [Eng. s.108; Vic. s.108; N.S.W. s.114; W.A. s.64] (1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed such amount as is specified in the mortgage, or, if no amount is therein specified, the full insurable value of the buildings upon the mortgaged land or the amount owing to the mortgagee in respect of the mortgage.

(2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases, namely:-

- (i) where there is a declaration in the instrument of mortgage that no insurance is required;
- (ii) where an insurance is kept up by or on behalf of the mortgagor in accordance with the instrument of mortgage;
- (iii) where the instrument of mortgage contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Act authorised to insure.

(3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, be applied in or towards the discharge of the mortgage money.

91. Appointment, powers, remuneration and duties of receiver. [cf. Eng. s.109; Vic. s.109; N.S.W. s.115; W.A. s.65; S.A. s.53] (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this or any other Act, but may then appoint such person as he thinks fit to be receiver:

Provided that in the case of a mortgage registered under -

- (a) the Land Act;
- (b) The Miners' Homestead Leases Acts; or
- (c) The Mining Acts and Regulations made thereunder -

a mortgagee entitled as aforesaid may appoint a receiver at any time after he has become entitled to enter upon and take possession of the land subject to the mortgage.

(2) A receiver appointed under the powers conferred by this Act, or any enactment replaced by this Act, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the instrument of mortgage otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:-

- (a) in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and
- (b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and
- (c) in payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the instrument of mortgage or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- (d) in payment of the interest accruing due in respect of any principal money due under the mortgage; and
- (e) in or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The appointment of a receiver or of a new receiver under this section shall be -

- (a) made by the mortgagee by writing in Form 8 of the First Schedule; and
- (b) registered, in the case of a mortgage -
 - (i) of registered land, by the Registrar;
 - (ii) of land under the provisions of the Land Act, in the Department;
 - (iii) of land under the provisions of The Miners' Homestead Leases Acts, or of The Mining Acts and Regulations made thereunder, in the warden's office.

92. Effect of advance on joint account. [Eng. s.111; Vic. s.112; N.S.W. s.99; W.A. s.67; Qld. R.P.A.1877, s.21] (1) Where -

- (a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account; or
- (b) a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly,

the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.

(2) This section applies if and so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and has effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions therein contained.

(3) Where the Act, if any, under which the mortgage is registered provides for registration of a record of death, this section shall have effect only upon such registration as is provided by that Act.

(4) This section applies only to mortgages made or obligations created after the commencement of this Act.

93. Obligation to transfer instead of discharging mortgage. [cf. N.S.W. ss.94, 95; Eng. s.95; Vic. s.95; S.A. s.45] (1) Where a mortgagor is entitled to redeem he shall by virtue of this Act have power to require the mortgagee, instead of discharging, and on the terms on which he would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.

(2) The right of the mortgagor conferred by this section shall belong to and be capable of being enforced by each incumbrancee, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancee shall prevail over a requisition of the mortgagor, and as between incumbrancees a requisition of a prior incumbrancee shall prevail over a requisition of a subsequent incumbrancee.

(3) This section shall not apply in the case of a mortgagee being or having been in possession.

(4) This section applies to mortgages whether made before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

94. Relief against provision for acceleration of payment. [cf. Ontario Mortgages Act, 1960, s. 20; Eng. s. 146] (1) Where default has taken place -

(a) in payment of any instalment due of principal or interest under a mortgage; or

(b) in the observance of any covenant or obligation in a mortgage -

and under the terms of the mortgage an accelerated sum may or has, by reason of such default or of the exercise upon such default of any option or election conferred by the mortgage, become due and payable, the mortgagor shall be entitled to relief in accordance with this section.

(2) A mortgagor who, at any time before sale by the mortgagee or before the commencement of proceedings to enforce the rights of the mortgagee -

(a) performs any such covenant or obligation; and

(b) tenders to the mortgagee, who accepts payment of, the amount of such instalment and any reasonable expenses incurred by the mortgagee -

is thereupon relieved from the consequences of such default.

(3) Where tender of payment or performance referred to in subsection (2) of this section is not accepted by the mortgagee, the mortgagor, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor himself, may -

(a) upon undertaking to the Court to perform any such covenant; and

(b) upon tender or payment into Court of such instalment -

apply to the Court for relief from the consequences of such default; and the Court may grant or refuse relief (whether by staying proceedings brought by the mortgagee or otherwise) as the Court, having regard to the conduct of the parties and to all other circumstances, thinks fit; and in the case of relief may grant it on such terms, if any, as to payment of any reasonable expenses of the mortgagee and as to the costs or otherwise as the Court in the circumstances thinks fit.

(4) Where in granting relief under subsection (3) of this section the Court stays proceedings for the enforcement of the rights of the mortgagee, the Court may on application thereto remove the stay if default again takes place.

(5) This section applies to mortgages of any property whether made before or after the commencement of this Act, but only to a default occurring after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

(6) In this section "accelerated sum" means the whole or part of principal or interest secured by the mortgage other than the instalment referred to in paragraph (a) of subsection (1) of this section.

95. Mortgagee accepting interest on overdue mortgage not to call up without notice. [cf. N.S.W. s.92; N.Z. (1908) No.152, s.68] (1) Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the said sum for any period (not being less than three months) after default has been so made, then so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to compel payment of the said sum, or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor three months' notice of his intention so to do.

(2) No purchaser from the mortgagee exercising his power of sale shall be concerned to inquire whether the mortgagee has accepted interest as aforesaid after such default.

(3) This section applies to mortgages whether made before or after the commencement of this Act, but only where the default has occurred after such commencement, and shall have effect notwithstanding any stipulation to the contrary.

96. Period of notice for redemption after default. (1) Where a mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, the mortgagor may -

- (a) at the expiration of three months after giving to the mortgagee notice of his intention in that behalf; or
- (b) upon paying to the mortgagee three months interest on the principal sum in lieu of such notice; and
- (c) upon paying to the mortgagee the principal sum and any other moneys due under the mortgage -

redeem the mortgaged property.

(2) This section does not affect any other right of a mortgagor to redeem the mortgaged property at any time whether with or without notice and whether with or without payment of interest.

(3) This section applies to mortgages whether made before or after the commencement of this Act, but only where the default has occurred after such commencement, and shall have effect notwithstanding any stipulation to the contrary.

97. Right to redeem before time fixed for redemption. [cf. N.S.W. s.93; N.Z. (1908) No.152, s.70(2)] (1) Subject to any other Act, a mortgagor is entitled to redeem the mortgaged property although the time appointed for redemption has not arrived; but in such case he shall, subject to the provisions of the mortgage and of any other Act, pay to the mortgagee, in addition to any other moneys then owing under the mortgage, interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage:

Provided that redemption under this subsection shall not prejudice the right of the mortgagee to any collateral benefit, or to enforce any burden or restriction to the extent to which he would be entitled under the mortgage or otherwise if the mortgage were paid off at the due date.

(2) For the purposes of this section "moneys owing under a mortgage" includes all costs, charges, and expenses reasonably and properly incurred by the mortgagee -

(a) for the protection and preservation of the mortgaged land or the title thereto, or otherwise in accordance with the provisions of the mortgage; and

(b) with a view to the realisation of his security;

and in either case includes interest on the sums so expended after the rate expressed in the mortgage.

(3) This section applies to mortgages whether made before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

98. Abolition of consolidation of mortgages. [cf. W.A. s. 56; N.S.W. s. 97; Eng. s. 93; Vic. s. 93] (1) A mortgagor seeking to redeem any one mortgage is entitled to do so without paying any money due under any separate mortgage made by him, or by any person through whom he claims, solely on property other than that comprised in the mortgage which he seeks to redeem

(2) This section has effect notwithstanding any stipulation to the contrary.

(3) This section applies only where the mortgages are or one of them is made after the commencement of this Act.

99. Sale of mortgaged property in action for redemption or foreclosure. [cf. Eng. s. 91; Vic. s. 91; N.S.W. s. 103; W.A. s. 55; S.A. s. 44; Qld. Equity Act 1867, s. 74] (1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative.

(2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the Court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding that -

(a) any other person dissents; or

(b) the mortgagee or any person so interested does not appear in the action;

and without allowing any time for redemption or for payment of any mortgaged money, may direct a sale of the mortgaged property, on such terms subject to subsection (3), as it thinks fit, including the deposit in court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

(3) In an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancees.

(5) This section applies to actions brought whether before or after the commencement of this Act.

(6) In this section "mortgaged property" includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.

(7) For the purposes of this section the Court may, in favour of a purchaser, make a vesting order conveying the mortgaged property, or appoint a person to do so, subject or not to any incumbrance, as the Court may think fit; or, in the case of an equitable mortgage, may create and vest a legal estate in the mortgagee to enable him to carry out the sale as if the mortgage had been made by deed or instrument by way of legal mortgage.

100. Realisation of equitable charges by the Court. [cf. Eng. s. 90; Vic. s. 90; W.A. s. 54; S.A. s. 43] (1) Where an order for sale is made by the Court in reference to an equitable mortgage of land the Court may, in favour of a purchaser, make a vesting order conveying the land or may appoint a person to convey the land or create and vest in the mortgagee a legal estate in the land to enable him to carry out the sale, as the case may require, in like manner as if the mortgage had been created by instrument or deed by way of legal mortgage, but without prejudice to any incumbrance having priority to the equitable mortgage unless the incumbrancee consents to the sale.

(2) This section applies to equitable mortgages whether made or arising before or after the commencement of this Act.

101. Facilitation of redemption in case of absent or unknown mortgagees. [cf. N.S.W. s. 98] (1) When any person entitled to receive payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown, or it is uncertain who is so entitled, the Court, upon the application of the person entitled to redeem the mortgaged premises, may order the amount of such debt to be ascertained in such manner as the Court thinks fit, and direct the amount so ascertained and not paid (if any) to be paid into court.

(2) A certificate of the Registrar of the Court that such payment was directed and has been made, shall operate to discharge the mortgage debt; but, as between the mortgagor and the person so entitled to receive payment as aforesaid, any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount so paid shall continue to be a debt due under the mortgage.

(3) The Court shall order the amount so paid into court to be paid to the person entitled, upon the application of such person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection therewith, have been delivered up to the person by whom the amount was so paid into court, or his executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.

(4) The certificate referred to in subsection (2) of this section -

(a) shall, in the case of a mortgage of unregistered land, upon registration of the certificate under this Act operate in favour of a purchaser of the land as a discharge of the land as from the date of the certificate and as a re-conveyance of the estate and interest of the mortgagee of and in the mortgaged property to the person who at the date of the certificate is entitled to the equity of redemption thereof according to his interest therein,

(b) shall, in the case of a mortgage of registered land, be registrable in the manner of an indorsement of discharge under section 63 of The Real Property Acts, and upon registration shall have effect

as a discharge in accordance with the provisions of that section;

- (c) shall, in the case of a mortgage registered under the Land Act, be registered in the manner of a discharge of mortgage under that Act and upon registration shall have effect accordingly;
- (d) shall, in the case of a mortgage registered under The Miners' Homestead Leases Acts, be registered in the manner in which the memorandum of mortgage was registered and upon registration shall operate as a discharge of the land from the mortgage;
- (e) shall, in the case of a mortgage registered under the Regulations made under The Mining Acts, be delivered as required by and have effect as a certificate of cancellation under those Regulations.

(5) Nothing in this section affects the provisions of section 56 of the Public Curator Act 1915-1971.

PART VIII - LEASES AND TENANCIES

Division 1 - Rights, powers and obligations

102. Abolition of interesse termini as to reversionary leases and leases for lives. [Eng. s.149; N.S.W. s.120A] (1) The doctrine of interesse termini is hereby abolished.

(2) As from the commencement of this Act all terms of years absolute shall, whether the interest is created before or after such commencement, be capable of taking effect at law or in equity, according to the estate interest or powers of the grantor, from the date fixed for commencement of the term, without actual entry.

(3) A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void; but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes.

(4) Nothing in subsections (1) and (2) of this section prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the commencement of this Act, operates to vary any statutory or other obligations imposed in respect of such terms or interests.

(5) Nothing in this Act affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term, which rule is hereby confirmed.

(6) In this section "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.

103. Abolition of distress for rent and rates. (1) As from the commencement of this Act, distress for rent (whether rent-service or rent-seck), distress pursuant to subsections (9) and (14) of section 27 of the Local Government Act, 1936-1970, distress pursuant to sections 60, 61A, 135 and 136 of The Real Property Acts, and distress pursuant to subsection (3) of

section 100 of The Metropolitan Water Supply and Sewerage Acts, 1909 to 1962, is abolished.

(2) This section does not apply to any distress which has been put in force but not completed before the commencement of this Act.

104. Voluntary waste. [cf. 52 Hen. 3, c. 23 (Statute of Marlborough, 1267); N.S.W. 30, 1969, s. 32] (1) A lessee shall not commit voluntary waste.

(2) Nothing in subsection (1) of this section applies to any lease without impeachment of waste, or affects any licence or other right to commit waste.

(3) A lessee who infringes subsection (1) of this section is liable in damages to the reversioner but this section imposes no criminal liability.

(4) This section does not affect the operation of any event which may determine a tenancy at will.

105. Obligations of lessees. [cf. N.S.W. s. 84] (1) Subject to this Act, in every lease of land made after the commencement of this Act there shall, unless otherwise agreed, be implied the following obligations by the lessee, for himself, his executors, administrators, and assigns, with the lessor, his executors, administrators, and assigns:-

- (a) To pay rent - that he or they will pay the rent thereby reserved at the time therein mentioned:

Provided, however, that in case the demised premises or any part thereof shall at any time during the continuance of the lease be destroyed or damaged by fire, flood, lightning, storm, or tempest so, in any such event as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent thereby reserved, or a proportionate part thereof, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee;

- (b) To keep in repair - that he or they will, at all times during the continuance of the said lease, keep and, at the termination thereof, yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, damage from fire, flood, lightning, storm and tempest, and reasonable wear and tear excepted; but this obligation is not implied in the case of a lease for a term of three years or for any lesser period.

(2) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.

106. Fitness of premises for human habitation. [cf. Eng. 5 & 6, Eliz. 2, c. 56, s. 6; Ont. c. 236, s. 96 (1970)] (1) In a lease of premises or any part thereof for the purpose or principally for the purpose of human habitation for a term of three years or for any lesser period there is an obligation -

- (a) on the part of the lessor to provide and, during the lease, maintain the premises, or such part as is let for such purpose, in a good state of repair and reasonably fit for human habitation; and

- (b) on the part of the lessee -

- (i) to care for the premises in the manner of a reasonable tenant; and
- (ii) to repair damage caused by him or by persons coming on the premises with his permission.

(2) This section applies -

- (a) to leases made after the commencement of this Act;
- (b) notwithstanding any other provision of this Act or any agreement to the contrary.

107. Powers in lessor. [cf. N.S.W. s.85] Unless otherwise agreed, in every lease of land made after the commencement of this Act there shall be implied the following powers in the lessor, his executors, administrators, or assigns:-

(1) To enter and view - that he or they may, by himself or themselves, or his or their agents, twice in every year during the term at a reasonable time of the day upon giving to the lessee two days' previous notice, enter upon the demised premises and view the state of repair thereof, and may serve upon the lessee, his executors, administrators, or assigns, or leave at his or their last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring him or them, within a reasonable time, to repair same in accordance with any covenant or obligation expressed or implied in the lease.

(2) To enter and repair - that in default of the lessee his executors administrators or assigns repairing any defect according to notice, he or they may from time to time enter the premises and execute the required repairs.

(3) To enter and carry out requirements of public authority, and repair under the lease - that he or they may, by himself or themselves, or his or their agents, at all reasonable times during the term, with workmen and others and all necessary materials and appliances, enter upon the demised premises or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting the said premises, and of any notices served upon the lessor or lessee by the licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of any repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound, may neglect to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease: Provided that such destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.

(4) To re-enter and take possession - that, in case the rent or any part thereof is in arrear for the space of one month (although no formal demand therefor has been made), or in case default is made in the fulfilment of any covenant, obligation, condition, or stipulation, whether expressed or implied in the lease, and on the part of the lessee to be performed or observed, and such default is continued for the space of two months, or in case the repairs required by such notice as aforesaid are not completed within the time therein specified, he or they may re-enter upon the demised premises (or any part thereof in the name of the whole) and thereby determine the estate of the lessee, his executors, administrators, or assigns, therein, but without releasing him or them from liability in respect of the breach or non-observance of any such covenant, condition, or stipulation.

108. Recovery of possession where half-year's rent is due. [Qld. D.R.E. Act, ss.130, 131, 132; District Courts Act 1967-1969, s.90] (1) In addition to any other powers, a lessor -

- (a) to whom half a year's rent is due and in arrear, and
- (b) who has no power to re-enter for nonpayment of rent -

may, without any formal demand or re-entry, commence proceedings in any court of competent jurisdiction for recovery of the land the subject of the lease, and upon proof to the satisfaction of the court -

- (c) that half a year's rent was due before the writ, or as the case may be, plaint was served, and
- (d) if the title of the plaintiff has accrued since the letting of the land, of the title of the plaintiff -

judgment may, subject to the provisions of this section, be given in favour of the lessor as if the rent in arrear had been duly demanded and a re-entry made.

(2) If at any time before judgment is given in such proceedings the lessee pays into court or tenders to the lessor or his solicitor all rent and arrears and the costs of such proceedings, the proceedings shall be stayed, and thereupon the lessee shall continue to hold and enjoy the land leased according to the terms of the lease without necessity for any new lease.

(3) If in any such proceedings judgment is given in favour of the lessor for recovery of possession of the land leased, the lessor shall hold the land discharged from the lease.

(4) Rule 169 of the "District Court Rules, 1968" is hereby repealed, but this section shall take effect subject, in the case of proceedings in the District Court, to the provisions of section 90 of the District Courts Act 1967-1969.

109. Short forms of covenants and obligations of lessees. [cf. N.S.W. s. 86] (1) Whenever in any lease which expressly refers to the Second Schedule to this Act there is used the form of words contained in the first column of the Second Schedule to this Act and distinguished by a number therein, such form of words shall imply an obligation by the lessee or the lessor for himself, his executors, administrators, and assigns, with the lessor or the lessee, his executors, administrators, and assigns, in the terms contained in the second column of the said Schedule, and distinguished by the corresponding number.

(2) There may be introduced into or annexed to any form in the first column any addition to, exception from, or qualification of the same; or any words in such column may be struck out or omitted; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission, shall be taken to be added to the corresponding form in the second column.

(3) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.

(4) This section applies only to leases made after the commencement of this Act.

110. Cases in which statutory obligations or powers not implied. [cf. N.S.W. s. 87] Where on the face of any lease it appears that any of the short forms of words contained in the first column of the Second Schedule to this Act has been struck out, the covenant, obligation or proviso represented by such short form of words shall not be implied in the lease by sections 105 and 109 of this Act.

111. Lessee to give notice of ejectment to the lessor. [cf. Eng. s. 145; Qld. D.R.E. Act, 1867, s. 129; District Court Rules 1968, r. 170; Ont. c. 236 (1970), s. 29] Every lessee to whom there is delivered any writ or plaint for recovery or for delivery of land leased to or held by him, or to whose knowledge any such writ or plaint comes, shall forthwith give notice thereof to his lessor or his agent, and, if he fails to do so, he shall be liable to the person of whom he holds the land for any damages sustained by that person by reason thereof, to be recovered by action in any court of competent jurisdiction.

112. Provisions as to covenants to repair. [N.S.W. s. 133A; Eng. Landlord and Tenant Act, 1927, s. 18] (1) Damages for a breach of a covenant, obligation or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant, obligation or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant, obligation, or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant, obligation, or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant, obligation, or agreement.

(2) A right of re-entry or forfeiture for a breach of any such covenant, obligation, or agreement as aforesaid shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section 124 of this Act had been served on the lessee was known either -

- (a) to the lessee; or
- (b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
- (c) to the person who last paid the rent due under the lease either on his own behalf or as agent for the lessee or under-lessee;

and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.

Where a notice has been sent by post in a registered letter addressed to a person at his last known place of abode in or out of the State, and that letter is not returned through the post office undelivered, then, for the purposes of this subsection, that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

(3) This section applies whether the lease was created before or after the commencement of this Act.

Division 2 - Surrenders, assignments and waiver

113. Head leases may be renewed without surrendering under-leases. [cf. 4 Geo. II, c. 28, s. 6; Eng. s. 150; N.S.W. s. 121] (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the head landlord, such new lease shall without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease.

(2) Every person in whom any estate for life, or lives, or for years, is from time to time vested by virtue of such new lease and his executors and administrators shall be entitled to the rents, covenants, obligations, and duties, and have like remedy for the recovery thereof, and the under-lessees shall hold and enjoy the lands in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued.

(3) The head landlord shall be entitled to the same remedy by entry in and upon the lands comprised in any such under-lease for the rents and duties reserved by such new lease (so far as the same do not exceed the rents and duties reserved in the lease out of which such under-lease was derived) as he would have had in case such former lease had been still continued or as he would have had in case the respective under-leases had been renewed under such new principal lease.

114. Provision as to attornments by tenants. [cf. Eng. s. 151(1); 4 Anne, c. 16 (c. 3), ss. 9, 10; N.S.W. s. 125(1)] (1) Where land is subject to a lease -

- (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
- (b) the creation or conveyance of a rentcharge to issue or issuing out of the land;

shall be valid without any attornment of the lessee:

Nothing in this subsection -

- (i) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to him by the person entitled thereunder; or
- (ii) renders the lessee liable for any breach of covenant to pay rent, on account of his failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.

(2) [cf. Eng. s. 151(2); 11 Geo. 2, c. 19, s. 11; Qld. D.R.E. Act, 1867, s. 128] An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, shall be void.

This subsection does not apply to an attornment -

- (a) made pursuant to a judgment of a court of competent jurisdiction; or
- (b) to a mortgagee, by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or
- (c) to any person rightfully deriving title under the lessor.

115. When reversion on a lease is surrendered, &c., the next estate to be deemed the reversion. [cf. Eng. s.139; N.S.W. s.122] When the reversion expectant on a lease of land made either before or after the commencement of this Act is surrendered or merges after the commencement of this Act, the estate which for the time being confers as against the lessee under the lease the next vested right to the land, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the lease.

116. Apportionment of conditions on severance. [Eng. s.140; N.S.W. s.119; cf. Qld. D.R.E. Act, 1867, s.126] (1) Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) In this section "right of re-entry" includes a right to determine the lease by notice to quit or otherwise; but where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter notice expiring at the same time as the original notice.

(3) This section applies to -

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act where the reversionary estate in the lands comprised therein is severed or there is an avoidance or cesser of the term as above mentioned after the commencement of this Act.

117. Rent and benefit of lessee's covenants to run with the reversion. [cf. Grantees of Reversions Act, 1540 (32 Hen. 8, c. 34); Eng. s.141; N.S.W. s.117] (1) Rent reserved by a lease, and the benefit of every covenant, obligation, or provision therein contained, touching and concerning the land, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

(2) Any such rent, covenant, obligation, or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant, obligation, or provision may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable,

but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled as aforesaid.

(4) This section applies to -

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, obligation or provision contained in the lease.

118. Obligation of lessor's covenants to run with reversion. [cf. Grantees of Reversions Act, 1540 (32 Hen. 8, c. 34); Eng. s. 142; N.S.W. s. 118] (1) The obligation under a condition or of a covenant or other obligation entered into by a lessor touching and concerning the land shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies to -

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act so far only as relates to breaches of covenant committed after the commencement of this Act.

(3) This section takes effect without prejudice to any liability affecting a covenantor or his estate.

119. Waiver of a covenant in a lease. [cf. Eng. s. 148; N.S.W. s. 120; Qld. D.R.E. Act, 1867, s. 127] (1) Where any actual waiver by a lessor or the persons deriving title under him of the benefit of any covenant, obligation, or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant, obligation, or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant, obligation, or condition.

(2) Unless a contrary intention appears this section applies and extends to waivers effected after the twenty-eighth day of December, 1867.

120. Effect of licences granted to lessees. [Eng. s. 143; cf. N.S.W. ss. 123, 124; Qld. D.R.E. Act, 1867, ss. 124, 125] (1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only -

- (a) to the permission actually given; or
- (b) to the specific breach of any provision or covenant referred to; or
- (c) to any other matter thereby specifically authorised to be done; and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

(2) Notwithstanding any such licence -

- (a) all rights under covenants, obligations, and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, obligation, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and
- (b) the condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.

(3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted -

- (a) to any one of two or more lessees to do any act, or to deal with his equitable share or interest; or
- (b) to any lessee, or to any one of two or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property,

the licence does not operate to extinguish the right of entry in case of any breach of covenant, obligation, or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be), in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence.

(4) This section applies to licences granted after the 28th day of December, 1867.

121. Provisions as to covenants not to assign &c., without licence or consent. [cf. N.S.W. ss.132, 133B; Eng. s.144; Eng. Landlord and Tenant Act, 1927, s.19(1)] (1) In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part thereof, without licence or consent, such covenant, condition, or agreement shall -

- (a) notwithstanding any express provision to the contrary, be deemed to be subject -
 - (i) to a proviso to the effect that licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent; and
 - (ii) (if the lease is for more than forty years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition, or alteration of buildings) to a proviso to the effect that in the case of any assignment, underletting, charging, or parting with the possession (whether by the holders of the lease or any under-lessee whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.

- (b) unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent.

(2) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the making of improvements, without licence or consent, such covenant, condition, or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to the proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor, and of any legal or other expenses properly incurred in connection with such licence or consent nor in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.

(3) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the alteration of the user of the leased premises, without licence or consent, such covenant, condition, or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent.

(4) Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the lessor shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

122. Involuntary assignment no breach of covenant. [cf. N.S.W. s.133] Neither the assignment nor the underletting of any lease by the trustee of a bankrupt, or by the liquidator on behalf of a company (other than a liquidator in a voluntary winding up of a solvent company), nor the sale of any lease under an execution, nor the bequest of a lease, shall be deemed to be a breach of a covenant, condition, or agreement against the assigning, underletting, parting with the possession, or disposing of the land leased.

Division 3 - Relief from forfeiture

123. Interpretation. (1) The provisions of this Part apply to under-leases of land under the provisions of the Coal Mining Act, the Land Acts, The Miners' Homestead Leases Acts, The Mining Acts and the State Housing Act, but not to leases of such land, other than leases of land under Part XII of the Land Acts.

(2) [cf. Eng. s.146(5); N.S.W. s.128] For the purposes of this Division -

"lease" includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an

agreement for a lease where the lessee has become entitled to have his lease granted;

"lessee" includes an original or derivative under-lessee, a grantee under such a grant as aforesaid, his executors, administrators, and assigns, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of a lessee;

"lessor" includes an original or derivative under-lessor, a grantor as aforesaid, a person bound to grant a lease under an agreement as aforesaid, and the executors, administrators, and assigns of a lessor;

"proceedings" include an application commenced by originating summons;

"under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted;

"under-lessee" includes any person deriving title through or from an under-lessee.

124. Restriction on and relief against forfeiture. [Eng. s.146; N.S.W. s.129; cf. Qld. D.R.E. Act, 1867, ss.118-123; Equity Act, 1867, ss.63-68] (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice -

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same,

and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay reasonable compensation to the satisfaction of the lessor for the breach.

(2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action, if any, or in proceedings instituted by himself, apply to the Court for relief; and the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, may grant or refuse relief, as it thinks fit; and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit.

(3) The making of an application under this section shall not of itself be construed as an admission on the part of the lessee -

- (a) that any such notice as is mentioned in subsection (1) hereof has been served by the lessor; or
- (b) that any such breach as is mentioned in subsection (1) hereof has occurred or that any right of or cause for re-entry or forfeiture has accrued or arisen,

and the Court may, if it thinks fit, grant relief as aforesaid without making

a finding that, or arriving at a final determination whether, any such notice has been served, or any such breach has occurred, or that any such right has accrued or cause arisen.

(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant or obligation shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6) This section does not extend -

- (a) to any lease or tenancy for a term of one year or less; or
- (b) to a covenant, condition, or agreement against the assigning, under-letting, parting with the possession or disposing of the land leased where the breach occurred before the commencement of this Act; or
- (c) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease of -
 - (i) agricultural or pastoral land;
 - (ii) mines or minerals;
 - (iii) a house used or intended to be used as licensed premises under the Liquor Act 1912-1970;
 - (iv) a house let as a dwelling-house;
 - (v) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under him;
- (d) in case of a mining lease to a covenant, condition, or agreement for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines, or other things, or to enter or inspect the mine or the workings thereof;
- (e) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease (other than a lease mentioned in paragraph (c) of this subsection) after the expiration of one year from the date of taking in execution, provided the lessee's interest be not sold within such one year: But if the lessee's interest be sold within such one year this section shall extend and be applicable to such condition for forfeiture.

(7) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(8) The notice mentioned in this section shall be in Form 9 of the First Schedule to this Act or to a similar effect.

(9) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

125. Power of court to protect under-lessee on forfeiture of superior leases. [Eng. s.146(4); N.S.W. s.130] (1) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, under any covenant, proviso, or stipulation in a lease made either before or after the commencement of this Act or for non-payment of rent, the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, or any part thereof, make an order staying any such action or other proceeding on such terms as to the Court may seem just, and vesting, for the whole term of the lease, or any less term, the property comprised in the lease or any part thereof, in any person entitled as under-lessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of proper and reasonable rent, costs, expenses, damages, compensation, giving security, or otherwise as the Court in the circumstances of each case, and having regard to the consent or otherwise of the lessor to the creation of the estate or interest claimed by the under-lessee, thinks fit; but in no case shall any such under-lessee be entitled to require a lease to be granted to him for a larger area of land or for any longer term than he had under his original under-lease.

(2) Any such order may be made in proceedings brought for the purpose by the person claiming as under-lessee or, where the lessor is proceeding by action or otherwise in the Court, may be made in such proceeding.

126. Costs and expenses. [Eng. s.146(3); N.S.W. s.131] A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.

The lessor shall be so entitled to recover whether the lessee has or has not rendered forfeiture unenforceable against him under subsection (2) of section 124 of this Act.

127. Relief against notice to effect decorative repairs. [Eng. s.147] (1) After a notice is served on a lessee relating to the internal decorative repairs to a house or other building, he may apply to the Court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the Court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.

(2) This section does not apply:-

- (a) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;
- (b) to any matter necessary or proper -
 - (i) for putting or keeping the property in a sanitary condition; or
 - (ii) for the maintenance or preservation of the structure;

- (c) to any statutory liability to keep a house in all respects reasonably fit for human habitation;
- (d) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.

(3) This section applies whether the notice is served before or after the commencement of this Act, and has effect notwithstanding any stipulation to the contrary.

128. Relief against loss of lessee's option. [N.S.W. ss.133C-133G] (1)
In this section -

- (a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor -
 - (i) to sell, or offer to sell, to the lessee the reversion expectant on the lease; or
 - (ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part thereof,

whether the right is conferred by the lease or by an agreement collateral to the lease; and

- (b) a reference to a breach by a lessee of his obligations under a lease containing an option is a reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of this Act in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.

(2) This section applies to and in respect of leases granted before or after the commencement of this Act and options contained therein, and has effect notwithstanding any stipulation to the contrary.

(3) In this section "prescribed notice" means a notice in writing that -

- (a) specifies an act or omission; and
- (b) states that, subject to any order of the court under subsection (5) of this section, a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.

(4) Where an act or omission that constituted a breach by a lessee of his obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of fourteen days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and -

- (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of one month next succeeding service of the notice; or
- (b) where such relief is so sought -
 - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief; or
 - (ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the court for the purpose.

(5) Relief referred to in subsection (3) of this section may be sought -

- (a) in proceedings instituted in the court for the purpose; or
- (b) in proceedings in the court in which -
 - (i) the existence of an alleged breach by the lessee of his obligations under the lease; or
 - (ii) the effect of the breach from which relief is sought, is in issue.

(6) The court may, in proceedings in which relief referred to in subsection (3) of this section is sought -

- (a) make such orders (including orders affecting an assignee of the reversion) as it thinks fit for the purpose of granting the relief sought; or
- (b) refuse to grant the relief sought.

(7) The court may, in proceedings referred to in subsection (6) of this section, take into consideration -

- (a) the nature of the breach complained of;
- (b) the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach;
- (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice;
- (d) the rights of persons other than the lessor and the lessee;
- (e) the operation of subsection (9) of this section; and
- (f) any other circumstances considered by the court to be relevant.

(8) The court -

- (a) may make an order under subsection (6) of this section on such terms as to costs, damages, compensation or penalty, or on such other terms, as the court thinks fit; and
- (b) may make any consequential or ancillary order it considers necessary to give effect to an order made under that subsection.

(9) Subject to any order of the court and to this section -

(a) where -

- (i) an option is contained in a lease;
- (ii) the lessee exercises, or purports to exercise, the option; and
- (iii) the lease would, but for this paragraph, expire within the period of fourteen days after the exercise, or purported exercise, of the option,

the lease shall be deemed to continue in force until the expiration of that period;

(b) where -

- (i) a prescribed notice is duly served on a lessee; and
- (ii) the lease in respect of which the notice is served would, but for this paragraph, expire within the period of one month referred to in paragraph (a) of subsection (4) of this section,

the lease shall be deemed to continue in force until the expiration of that period; and

(c) where, in relation to a lease continued in force under paragraph (b) of this subsection, relief referred to in subsection (3) of this section is sought by a lessee, the lease shall, subject to subsections (10) and (11) of this section, be deemed to continue in force until -

(i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting the relief; or

(ii) effect is given to orders made by the court in granting that relief in so far as they affect the lessor or relate to an assurance to the lessee.

(10) Paragraph (c) of subsection (9) of this section -

(a) does not apply to or in respect of a lease that, but for that paragraph, would continue in force for a period longer than the period for which it is, by the operation of that paragraph, continued in force; and

(b) does not, where a lessee fails to comply with terms imposed upon him pursuant to paragraph (a) of subsection (8) of this section, operate to continue the lease in force beyond the time of that failure by the lessee.

(11) Where, under subsection (9) of this section, a lease continues in force after the day on which, but for that subsection, it would expire -

(a) the lease so continues in force subject to the provisions, stipulations, covenants, conditions and agreements in the lease (other than those relating to the term and the option contained in the lease) but without prejudice to any rights or remedies of the lessor or lessee in relation to the lease; and

(b) the lessee, if the lease is of registered land and the lessee is in possession of the leased premises, has the protection of section 44 of The Real Property Acts and, so far as applicable, section 11 of The Real Property Act of 1877 as if the lease were a tenancy referred to in that paragraph.

(12) Subject to subsection (13) of this section, where, pursuant to an option contained in a lease continued in force under subsection (9) of this section, the lease is renewed or a new lease is granted, the period during which the lease was so continued in force shall be deemed to be part of the term for which the lease was renewed or the new lease granted, and any lease granted pursuant to an exercise of the option shall be expressed to have commenced when the lease containing the option would, but for subsection (9) of this section, have expired.

(13) Subsection (12) of this section does not apply to or in respect of a lease that stipulates for the commencement of any lease granted pursuant to an exercise of the option contained therein on a day that is later than the day on which the lease so granted would, but for this subsection, commence under subsection (12) of this section.

Division 4 - Termination of Tenancies

129. Abolition of yearly tenancies arising by implication of law. [N.S.W. s. 67] (1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time.

(2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act, and, in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by six months' notice in writing expiring on the day of 197 , or any date thereafter.

130. Notice of termination of tenancy. [cf. Ont. 1970 R.S.O., c. 236, s. 98] (1) Subject to the other provisions of this Division, a weekly, monthly, yearly, or other periodic tenancy may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon, the notice -

- (a) shall satisfy the requirements of section 131;
- (b) shall be given in the manner prescribed by section 132;
- (c) shall be given in sufficient time to provide the period of notice required by section 134, 135 or 136 as the case may be.

(2) Subject to section 129, any other kind of tenancy determinable on notice may, unless otherwise expressly agreed upon, be terminated as provided by section 131 and section 132.

(3) In this section "yearly tenancy" means a tenancy from year to year other than a tenancy from year to year arising by implication before the commencement of this Act.

131. Form and contents of notice. [cf. Ont. 1970 R.S.O., c.236, s.99]
(1) A landlord or a tenant may give notice to terminate either orally or in writing, but a notice by a landlord to a tenant shall not be enforceable under Division 5 of this Part unless it is in writing.

(2) A notice in writing -

- (a) shall be signed by the person giving the notice or by his agent;
- (b) shall identify the land or premises in respect of which the notice is given; and
- (c) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice.

(3) A notice may state both -

- (a) the date on which the tenancy is to terminate; and
- (b) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice,

and if it does state both, and the date on which the tenancy is to terminate is incorrectly stated, the notice shall nevertheless be effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

(4) A notice need not be in any particular form, but a notice by a landlord to a tenant may be in Form 10 of the First Schedule with such variations or additions (if any) as may be requisite by reason of section 137; and a notice by tenant to landlord may be in Form 11 of the First Schedule.

132. Manner of giving notice. [cf. Ont. 1970 R.S.O., c.236, s.100; Qld. No.12 of 1970, s.20] (1) Notice to terminate shall be sufficiently given if delivered personally to the tenant or, as the case may be, to the landlord or his agent.

(2) Where the tenant is absent from the land or premises, or is evading service, the notice may be given to the tenant -

- (a) by delivering it to some person apparently over the age of eighteen years and apparently residing on or in occupation of the land or premises; or
- (b) by delivering it to the person by whom the rent is usually paid, if such person is apparently over the age of eighteen years; or
- (c) by posting it up in a conspicuous place upon some part of the land or premises; or
- (d) by sending it by registered post to the tenant at his usual or last known place of abode or business.

(3) (a) Where a tenant has died and probate or letters of administration of his estate have not been granted, any notice to terminate which might have been given to the legal personal representative of the deceased tenant had probate or letters of administration of his estate been granted shall be sufficiently given if -

- (i) where any person is or persons are apparently residing on or in occupation of the land, it is delivered to any of such persons apparently over the age of eighteen years;

(ii) in any other case, it is advertised twice in a daily newspaper circulating in the district in which the land is situated.

(b) Where a proceeding for the recovery of the possession of land is taken in reliance on a notice to terminate given in a manner provided in subparagraph (i) of paragraph (a) of this subsection, any occupier of the land or other person claiming an interest in the land shall be entitled to be heard in the proceeding and the contesting of the proceeding shall not of itself be regarded as an act of administration or as intermeddling in the estate of the deceased tenant or as constituting the person so contesting the proceeding an executor de son tort of the deceased tenant.

(4) Nothing in this section shall affect the right of a landlord to give notice to terminate otherwise than as provided in this section.

133. Notice to terminate weekly tenancy. [cf. Ont. 1970 R.S.O. c. 236, s. 101] (1) A notice to terminate a weekly tenancy shall be given on or before the last day of one week of the tenancy to be effective on the last day of the following week of the tenancy.

(2) For the purposes of this section, "week of the tenancy" means the weekly period on which the tenancy is based and not necessarily a calendar week, and, unless otherwise expressly agreed upon, the week shall be deemed to begin on the day on which the rent is payable.

134. Notice to terminate monthly tenancy. [cf. Ont. 1970 R.S.O. c. 236, s. 102] (1) A notice to terminate a monthly tenancy shall be given on or before the last day of one month of the tenancy to be effective on the last day of the following month of the tenancy.

(2) For the purposes of this section, "month of the tenancy" means the monthly period on which the tenancy is based and not necessarily a calendar month, and, unless otherwise expressly agreed upon, the month shall be deemed to begin on the day on which the rent is payable.

135. Notice to terminate yearly tenancy. [cf. Ont. 1970 R.S.O. c. 236, s. 103.] (1) A notice to terminate a yearly tenancy shall be given on or before the first day of the period of six months ending with the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.

(2) For the purposes of this section, "year of the tenancy" means the yearly period on which the tenancy is based and not necessarily a calendar year, and, unless otherwise expressly agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

136. Notice to terminate other periodic tenancy. (1) A notice to terminate a periodic tenancy other than a weekly, monthly, or yearly tenancy shall be given on or before the last day of any period of the tenancy to be effective on the last day of the following period of the tenancy.

(2) For the purposes of this section, "period of the tenancy" means the period on which the tenancy is based, and, unless otherwise expressly agreed upon, such period shall be deemed to begin on the day on which the rent is payable.

137. Termination of tenancy of dwelling-house. [cf. Qld. No.12 of 1970, s.18] (1) Subject to this section, a notice to terminate a tenancy shall not, if given by a landlord, be effective to terminate a tenancy of a dwelling-house unless it is given in writing on one or more of the following grounds -

- (a) that the tenant has failed to pay the rent in respect of a period of not less than fourteen days; or
- (b) that the tenant has failed to perform or observe some other term or condition of the tenancy and the performance or observance of that other term or condition has not been waived or excused by the landlord; or
- (c) that the tenant has failed to take reasonable care of the premises, or of any goods let therewith, or has committed waste; or
- (d) that the tenant has been guilty of conduct which is a nuisance or annoyance to adjoining or neighbouring occupiers; or
- (e) that the tenant himself or any other person has been convicted during the currency of the tenancy of any offence arising out of the use of the premises for any illegal purpose or a court of competent jurisdiction has found or declared that the premises have, during the currency of the tenancy, been used for an illegal purpose; or
- (f) that the tenant has sublet the premises or some part thereof without the consent or approval of the landlord; or
- (g) that the tenant without just cause or excuse has parted with possession of the premises without the consent or approval of the landlord; or
- (h) that the tenant without just cause or excuse, not having parted with possession of the premises, has, without the consent or approval of the landlord ceased for a period exceeding three months to be a bona fide occupant of the premises; or
- (i) that the premises are reasonably required by the landlord for occupation by himself or by his spouse, a parent, child, brother or sister; or
- (j) that the landlord has agreed to sell the premises by an agreement which requires the purchaser to pay not less than one-fourth of the whole purchase price within twelve months from the date thereof and which requires the landlord to deliver vacant possession of the premises;
- (k) that the premises have been condemned by or on behalf of the local authority having jurisdiction in respect of them;
- (l) that the premises are reasonably required by the lessor for reconstruction, demolition or removal.

In a proceeding before any court, where it is material to conclude whether a tenancy of a dwelling-house has been terminated by a notice to terminate, the notice shall not be held to be ineffective for that purpose by reason only of the fact that it was given on a ground that is not prescribed by this subsection if the court finds that the ground is a proper and sufficient ground on which to terminate the tenancy and is established on the evidence.

(2) This section applies only in respect of a tenancy of a dwelling-house other than a tenancy for a fixed term and applies subject to any agreement to the contrary / notwithstanding any agreement to the contrary.

(3) In this section "dwelling-house" means premises let principally for the purpose of residence: The term includes any land and appurtenances let with any premises that are a dwelling-house within the foregoing provisions

of this definition: The term does not include -

- (a) licensed premises within the meaning of the Liquor Act 1912-1970;
- (b) the premises of a club that holds a registered club licence under the Liquor Act 1912-1970;
- (c) premises which are ordinarily leased for holiday purposes;
- (d) premises of which the tenant is mortgagor under a mortgage in favour of, or purchaser under a contract for the sale by, the landlord in terms of which the mortgagor or purchaser agrees or is required to attorn tenant to the landlord.

138. Tenants and other persons holding over to pay double the yearly value. [cf. Landlord and Tenant Act 1730, s. 1 (4 Geo. II, c. 28); Vict. No. 6285, s. 9] Where any tenant for life or lives or for years, including a tenant from year to year or other person who is or comes into possession of any land by from or under or by collusion with such tenant, wilfully holds over any land after -

- (a) determination of the lease or term; and
- (b) after demand made and notice in writing has been given for the delivery of possession thereof by the lessor or landlord or the person to whom the remainder or reversion of such land belongs or his agent thereunto lawfully authorised -

then the person so holding over shall, for and during the time he so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the land shall have been so detained, to be recovered by action in any court of competent jurisdiction.

139. Tenant holding over after giving notice to be liable for double rent. [cf. Distress for Rent Act 1737, s. 18 (11 Geo. II, c. 19); Vict. No. 6285, s. 10; cf. Qld. D.R.E. Act 1867, s. 38] Where a lessee who has given notice of his intention to quit the land held by him at a time specified in such notice does not accordingly deliver up possession at the time so specified, then he shall thereafter be liable to the lessor for double the rent or sum which would have been payable to the lessor before such notice was given. Such lessee shall continue to be liable for such double rent or sum during the time he continues in possession as aforesaid, to be recovered by action in any court of competent jurisdiction.

Division 5 - Summary recovery of possession

140. Interpretation. [cf. Qld. No. 12 of 1970, s. 3] In this Division unless the context or subject-matter otherwise indicates or requires -

"agent" means -

- (a) a person usually employed by the landlord in the letting of the land or in the collection of the rents thereof;
- (b) a person specially authorised to act in the particular matter by writing under the hand of the landlord;
- (c) a solicitor authorised to act on behalf of the landlord;

"court" means a Magistrates Court;

"defendant" means the person alleged in a complaint laid pursuant to this Act to be a person who fails to deliver up possession of land;

"justice" means a justice of the peace for Queensland;

"Magistrates Court" means a Magistrates Court constituted under The Justices Acts 1886 to 1968;

"Magistrates Court District" means a district for the purposes of Magistrates Courts appointed under The Justices Acts 1886 to 1968 or, pursuant to The Decentralization of Magistrates Courts Act of 1965, deemed to be such a district.

141. Summary proceedings for recovery of possession. [cf. Qld. S. E. Act 1867, s. 2] (1) When the term or interest of the tenant of any land held by him as tenant for any term of years or for any lesser estate or interest whether with or without being liable for payment of rent -

- (a) has expired by effluxion of time; or
- (b) has been determined by notice to terminate or demand of possession -

and the tenant or any person claiming under him and in actual occupation of the land or any part thereof fails to deliver up possession of such land or part, the landlord may by complaint in accordance with this Division proceed to recover possession of that land or part thereof.

(2) The power to recover possession of any land or part thereof conferred by this Division shall be in addition to, and not, except where otherwise provided, in derogation from, any other power, right, or remedy of the landlord.

142. Mode of proceeding. [Qld. No. 12 of 1970, s. 4] (1) Subject to this Act proceedings under this Division for the recovery of possession of any land referred to in section 141 may be heard and determined by a Magistrates Court in a summary way under The Justices Acts 1886 to 1968, upon the complaint in writing of the landlord or his agent.

(2) The complaint shall be heard and determined at a place where it could be heard and determined were it a complaint of a breach of duty committed in the Magistrates Courts District within which the land concerned is situated or, where the land concerned is situated in more than one such district, in any of those districts.

143. Contents of complaint. [Qld. No. 12 of 1970, s. 5] A complaint under this Division for the recovery of the possession of land shall state -

- (a) the description in brief of the land or premises or such other particulars as are sufficient to identify the land;
- (b) where the land is situated;
- (c) the landlord of whom the land was held;
- (d) that the land was held under a tenancy and (if practicable) the nature of the tenancy under which the land was so held;
- (e) the date on which the tenancy expired by effluxion of time or, as the case may be, was determined by a notice to terminate;
- (f) that the defendant fails to deliver up possession of the land.

A complaint may be in or to the effect of the form of complaint set out in Form 12 of the First Schedule to this Act.

144. Summons upon complaint for recovery of possession of land. [Qld. No. 12 of 1970, s. 6] (1) Upon complaint in accordance with section 143 of this Act signed by the complainant or his agent a justice may issue his summons directed to the defendant requiring him to appear on the day and at the time stated in the summons at the Magistrates Court at the place stated

in the summons to answer the complaint and to show cause why a warrant to eject him from the land should not be issued.

Such summons may be in or to the effect of the form of summons set out in Form 13 of the First Schedule to this Act.

(2) Every summons shall be indorsed on its face with a notice directed to the defendant that unless the defendant, not less than three days before the day on which he is required by the summons to appear, gives written notice to the clerk of the court whereat he is summoned to appear that he wishes to appear to answer the complaint, the complaint may be heard and determined in his absence and evidence by affidavit on behalf of the complainant may be admitted.

(3) The summons shall be served within a reasonable time before the time appointed for the defendant to appear and in the manner provided by The Justices Acts 1886 to 1968, provided that, where it is made to appear by evidence or affidavit (including affidavit founded upon information and belief and stating the sources of such information and grounds of belief) to the court before which the defendant is required by the summons to appear that for any cause the service of a summons issued and complaint made pursuant to this Division cannot be effected in the manner provided by those Acts, the court may -

- (a) make such order for substituted or other service as it thinks proper, in which case the summons and complaint served in the manner provided by such order shall be deemed to have been duly served on the defendant; or
- (b) upon being satisfied that the summons and complaint have by any means come to the knowledge of the defendant, order that the defendant be deemed to have been duly served therewith and on the making of such order may deal with the complaint as if such complaint and summons had been duly served pursuant to The Justices Acts 1886 to 1968.

145. Hearing and determination. [cf. Qld. No.12 of 1970, s.7] (1) At the hearing and upon proof of -

- (a) the tenancy;
- (b) the expiry or determination, by notice to terminate or demand of possession, of the tenancy;
- (c) the lawful right of the landlord as against the defendant to possession;
- (d) the failure of the defendant to deliver up possession; and
- (e) (where the defendant does not appear in person or by counsel or solicitor) due service of the summons upon the defendant a reasonable time (being in no case less than seven days) before the time appointed for his appearance,

it shall be lawful for the court, unless the defendant appears and shows to its satisfaction reasonable cause why such a warrant should not be issued, or the court is otherwise satisfied that there is such cause, to order that a warrant be issued against the defendant requiring and authorising any person to whom it is addressed to take and give possession of the land the subject of the complaint to the landlord or, where the complaint was made by an agent, such agent.

(2) Where a defendant does not, at least three days before the day on which he is required by the summons to appear, give written notice to the clerk of the court whereat he is summoned to appear, that he wishes to appear to answer the complaint, and proof is made to the court upon oath,

or by deposition made in manner prescribed by The Justices Acts 1886 to 1968, or by admission of the defendant, of due service of the summons upon the defendant a reasonable time (being in no case less than seven days) before the time appointed for his appearance, then -

- (a) an affidavit or affidavits, made by some person or persons having personal knowledge of the facts therein deposed to and deposing to all or any of the matters prescribed in subsection (1) of this section, shall, until the contrary is shown, be accepted by the court as prima facie evidence of all or, as the case may be, each of such matters; and
- (b) the court shall hear and determine the matter of the complaint upon all the evidence properly adduced at the hearing or any adjourned hearing of the complaint, including any evidence adduced by or on behalf of the defendant, and any further evidence (which the complainant shall be at liberty to adduce) in rebuttal or in support of the complaint.

146. Warrant for possession. [cf. Qld. No.12 of 1970, s.8] (1) The warrant issued by order of the court shall be in the form set out in Form 14 of the First Schedule to this Act, or in a form to the like effect, may be issued by the court (or, after the case has been heard and determined, by the clerk of the court), and shall require and authorise any person to whom it is addressed, within the period therein specified (not being more than three months from the date of the order), to enter (by force if necessary) into and upon the land therein specified and to eject therefrom the defendant and all persons claiming under or through him together with his or their goods and effects, and to give possession of the same to the landlord or, as the case requires, his agent.

(2) Such warrant shall be sufficient authority to any person to whom it is addressed to enter (by force if necessary) into and upon the land therein specified, with such assistants as he deems necessary, to eject therefrom the defendant and all persons claiming under or through him together with his or their goods and effects, and to give possession to the landlord or, as the case requires, his agent accordingly.

(3) Such warrant may be executed not only against the defendant but also against every person claiming under or through him who is in actual occupation of the land therein specified or any part thereof and for this purpose a person whose occupation is referable to a tenancy held of the defendant (whether the tenancy was created before or after the commencement of the proceeding out of which the warrant was issued) shall be deemed to claim under the defendant notwithstanding that such tenancy has expired by effluxion of time, has been determined by a notice to terminate, or has been otherwise terminated.

(4) Such a warrant issued in relation to a building, or a unit or part of a multiple house or other building, shall be sufficient authority to any person to whom it is addressed to pass (by force if necessary), with such assistants as he thinks necessary, through, along, across, over or under any land (including in the case of any such unit or part, any other part of the multiple house or other building in which it is comprised) ordinarily used as a means of access to such building, or unit or part.

(5) No entry upon such a warrant shall be made on a Sunday, Good Friday, Christmas Day or Anzac Day, or at any time except between the hours of nine o'clock in the morning and four o'clock in the afternoon.

(6) Where the complaint has been heard and determined ex parte such a warrant shall not be issued within seven days after the determination.

(7) Where the circumstances of the case make it appear to the court proper so to do, the court may, upon making an order that such a warrant be issued, further order that the issue of the warrant be postponed for such time (not exceeding fifteen clear days from the date of the adjudication) and on such conditions (if any) as appear to it just and are specified in the order, whereupon the warrant shall not be issued within such time while such conditions are complied with.

Notwithstanding a postponement of the issue of a warrant pursuant to this subsection the maximum period within which the warrant, when issued, may be executed shall not exceed three months from the date on which was made the order that the warrant be issued.

147. Arrears of rent, etc. [cf. Qld. No. 12 of 1970, s. 9] (1) In a complaint under this Division for the recovery of the possession of land, it may be joined as a further matter of complaint that the defendant is indebted to the landlord for rent or mesne profits, or both, in respect of the land the subject of the complaint.

Such further matter of complaint shall be set out in a separate paragraph in the complaint.

(2) In respect of such further matter of complaint the same particulars of the complainant's claim for rent or mesne profits, or both, shall be supplied and served as would be required if the said claim were being made by way of a plaint filed in a Magistrates Court exercising jurisdiction under The Magistrates Courts Acts 1921 to 1964.

(3) In any case where the court orders that the further matter of complaint be heard separately it may, by the same or any subsequent order, give directions for the conduct of the proceedings in relation thereto or may order that the said proceedings be carried on in the same manner as if the said claim were being made by way of a plaint filed in a Magistrates Court exercising jurisdiction under The Magistrates Courts Acts 1921 to 1964.

(4) Where the matters of complaint are heard together, if, pursuant to subsection (2) of section 145 of this Act, the matters prescribed by subsection (1) of that section may be proved by affidavit, the amount of indebtedness the subject of the further matter of complaint may also be proved by affidavit.

(5) In respect of the further matter of complaint, the court shall order the defendant to pay to the landlord such amount, if any, (but not exceeding one thousand two hundred dollars) as it determines to be payable and unpaid in respect of the indebtedness the subject thereof when it makes the determination.

An order made by a court pursuant to this subsection shall, for the purposes of the enforcement thereof, be deemed to have been made by a Magistrates Court in the exercise of its jurisdiction under The Magistrates Courts Acts 1921 to 1964, and shall be enforceable accordingly, and not otherwise:

Provided however that where the matters of complaints are heard and determined together ex parte action to enforce the order made in respect of the further matter of complaint shall not be taken within seven days after the determination.

(6) A postponement of the issue of a warrant pursuant to subsection (7) of section 146 of this Act shall not affect any order for payment made pursuant to this section.

148. Rehearing where proof made by affidavit. [cf. Qld. No.12 of 1970, s10] (1) Where, in default of appearance of the defendant at the time and place appointed by the summons for hearing and determining the complaint, or at any time or place to which the hearing is adjourned, the court has, upon proof by affidavit of the matters required by subsection (1) of section 145 of this Act to be proved, ordered that the warrant mentioned in that subsection be issued, a Magistrates Court at the place where the order was made may, upon application in that behalf made by the defendant or by his counsel or solicitor, within seven days after the date on which the order was made, if in its opinion there is a proper reason for so doing, grant a re-hearing of the complaint upon which the order was made on such terms and subject to the payment of such costs as it thinks fit.

(2) Upon and by virtue of the grant of a re-hearing -

- (a) subject to subsection (4) of this section, the order for the issue of a warrant made upon the first hearing and any warrant issued thereunder shall cease to have effect;
- (b) the court may, with the consent of the complainant, proceed with the re-hearing forthwith or it may and, if the complainant does not consent to the court proceeding with the re-hearing forthwith, shall set down the re-hearing for a later date;
- (c) on the re-hearing, the complaint shall be re-heard and re-determined as if the re-hearing were the original hearing and determination.

(3) Upon the re-hearing proof shall not be made by affidavit of any of the matters required by subsection (1) of section 145 of this Act to be proved.

(4) If the defendant when called does not appear at the time and place appointed for the re-hearing, the court, if it thinks fit, may without re-hearing the complaint order that the original order (and where applicable warrant) be restored and such order (and, where applicable, warrant) shall be restored to effect accordingly and shall be deemed to have had force and effect on and from the date when the order was first made or, in the case of such warrant, it was first issued:

Provided however that in the case of such a warrant the time thereby limited for its execution shall begin to run on and from the date of the order restoring it to effect.

(5) (a) Where in the case of a complaint containing a further matter of complaint pursuant to section 147 of this Act, the matters of complaint have been heard together, then upon and by virtue of the grant of a re-hearing of the complaint the order, if any, made against the defendant in respect of such further matter of complaint shall, subject to paragraph (b) of this subsection, cease to have effect and upon the re-hearing such further matter of complaint shall be re-heard and re-determined as if the re-hearing were the original hearing and determination thereof.

(b) If, pursuant to subsection (4) of this section, the court orders the original order for the issue of a warrant made upon the complaint to be restored the order, if any, made against the defendant in respect of the further matter of complaint shall, without any order of the court be also restored to effect:

Provided that the court, upon the application of the complainant and upon proof, which may be by affidavit, of the amount payable and unpaid at the date it restores the order for the issue of a warrant made upon the original complaint, may vary the order made in respect of the further

matter of complaint so as to require thereby the payment of such amount.

149. Court's powers in proceeding under this Division. [cf. Qld. No. 12 of 1970, s. 11] The powers conferred on a court by this Division are in addition to the powers (including any power of amending a complaint) of the court under The Justices Acts 1886 to 1968.

In respect of a proceeding under this Division upon a complaint that includes a claim for the recovery of land the court shall have and may exercise all or any of its powers as if the proceeding were upon a complaint for a breach of duty.

In respect of a claim for rent or mesne profits made before it by way of complaint pursuant to this Division the court shall have and may exercise all or any of the powers conferred by The Magistrates Courts Acts 1921 to 1964 on a Magistrates Court constituted by the person or persons who constitute the court in the proceeding in which the claim is made.

An order made in a proceeding under this Division for the payment of money (including by way of costs) shall, for the purposes of the enforcement thereof, be deemed to have been made by a Magistrates Court in the exercise of its jurisdiction under The Magistrates Courts Acts 1921 to 1964 and shall be enforced accordingly and not otherwise.

150. Protection of justices, etc. [cf. Qld. No. 12 of 1970, s. 12] An action or prosecution shall not be brought against -

- (a) a justice who constituted a court which issued a warrant pursuant to this Division;
- (b) a clerk of the court who issued a warrant pursuant to an order of a court made under this Division;
- (c) a person by whom any such warrant was executed,

on account of the issue or execution of the warrant by reason that the landlord by or on whose behalf the warrant was obtained had no lawful right to possession of the land for the recovery of which the warrant was issued.

151. Protection of landlord entitled to possession. [cf. Qld. No. 12 of 1970, s. 13] In all cases where at the time of the execution of a warrant issued pursuant to this Division the landlord by or on whose behalf the warrant was obtained, had as against the person in possession of the land lawful right to the possession thereof, then neither such landlord, nor his agent nor any other person acting on his behalf, shall be a trespasser by reason merely of any irregularity or informality in the manner of obtaining possession under the authority of this Division but the party aggrieved may, if he thinks fit, bring an action for any such irregularity or informality.

152. Persons lacking right to possession not protected. [cf. Qld. No. 12 of 1970, s. 14] (1) Neither a provision of this Division nor a warrant to take and give possession of land issued pursuant to this Division shall be construed to protect a landlord by whom or on whose behalf the warrant was obtained from action brought against him on account of entry upon or taking possession of the land or any part thereof by virtue of the warrant where the landlord, at the time the warrant was executed, had not lawful right to possession of the land or part as against the person in possession thereof at that time.

(2) Without prejudice to the rights to which any person may be entitled as out-going tenant, where the landlord had not such right to possession he shall be liable in respect of the entry and taking possession as if the same were made or effected by him or at his direction without the authority of the warrant.

Division 6 - Agricultural holdings

153. Application. [cf. Qld. 5 Ed. 7, No. 11, s. 3] (1) Except where otherwise provided, this Division -

- (a) applies to any contract of tenancy entered into after the commencement of this Act;
- (b) does not apply to any lease or licence from the Crown under any law in force for the time being relating to the leasing and occupying of Crown land.

(2) [cf. N.S.W. No. 55 of 1941, s. 35] A provision in a contract of tenancy, or in any other agreement made at the time the contract of tenancy is entered into, is unenforceable in so far as it purports to take away or limit the right of a tenant to compensation in respect of any improvement, unless the contract of tenancy or such other agreement -

- (a) specifies the particular improvement or improvements;
- (b) provides that, or to the effect that, the tenant is required to make such improvement or improvements; and
- (c) specifies what compensation (if any) shall be payable in respect thereof.

(3) The provisions of this Division are in addition to any other right, power or privilege of a tenant, whether arising by agreement or otherwise.

154. Interpretation. [cf. Qld. 5 Ed. 7, No. 11, s. 2; Eng. 46 & 47 Vic. c. 61, s. 61] In this Division, unless the context otherwise indicates, the following terms have the meanings respectively set against them, that is to say -

"compensation" - compensation payable under this Division, or compensation payable under any agreement which by this Division is deemed to be substituted for compensation under this Division;

"contract of tenancy" - a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after the 1st day of January, 1905;

"determination of tenancy" - the cesser of a tenancy by effluxion of time or from any other cause;

"holding" - any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than five acres held by a tenant under a landlord;

"landlord" - the person for the time being entitled to possession of a holding, as the absolute owner thereof, subject to a contract of tenancy; the expression "absolute owner" means the owner or person capable of disposing by appointment or otherwise of the fee simple or whole interest in a holding, although the land or his interest therein is mortgaged or encumbered or charged;

"tenant" - the person in possession of a holding under a contract of tenancy.

The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under or in pursuance of this Division.

155. Tenant's property in fixtures. [cf. Eng. 11 & 12 Geo. 6, c. 63, s. 13; N.S.W. No. 55 of 1941, s. 21] (1) Subject to the provisions of this section -

- (a) any engine, machinery, fencing or other fixture affixed to a holding by the tenant thereof; and
- (b) any building (other than one in respect of which the tenant is entitled to compensation under this Act or otherwise) erected by him on the holding,

not being a fixture affixed or, as the case may be, a building erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, as the case may be, shall be removable by the tenant at any time during the continuance of the tenancy or before the expiration of two months from the termination of the tenancy, and shall remain his property so long as he may remove it by virtue of this subsection.

(2) The right conferred by the foregoing subsection shall not be exercisable in relation to a fixture or building unless the tenant -

- (a) has paid all rent owing by him and has performed or satisfied all his other obligations to the landlord in respect of the holding; and
- (b) has, at least one month before both the exercise of the right and the termination of the tenancy, given to the landlord notice in writing of his intention to remove the fixture or building.

(3) If, before the expiration of the notice aforesaid, the landlord gives to the tenant a counter-notice in writing electing to purchase a fixture or building comprised in the notice, subsection (1) of this section shall cease to apply to that fixture or building, but the landlord shall be liable to pay to the tenant the fair value thereof to an incoming tenant of the holding.

(4) In the removal of a fixture or building by virtue of subsection (1) of this section, the tenant shall not do to any other building or other part of the holding any avoidable damage, and immediately after the removal shall make good all damage so done that is occasioned by the removal.

(5) This section applies -

- (a) to a contract of tenancy entered into after the commencement of this Act;
- (b) subject to any agreement to the contrary contained in the contract of tenancy.

156. Tenant's right to compensation. [cf. Qld. 5 Ed. 7, No. 11, s. 4; Eng. 63 & 64 Vic. c. 50, s. 1; S.A. No. 521, s. 6] When a tenant makes on his holding any of the improvements mentioned in the first or second part of the Third Schedule to this Act, he shall be entitled, on quitting his holding at the determination of his tenancy, to obtain from the landlord compensation for such of those improvements as are not removed by him pursuant to section 155 or otherwise.

157. Intended improvements. [cf. Qld. 5 Ed. 7, No. 11, s. 4; Eng. 46 & 47 Vic. c. 61, s. 4; S.A. No. 521, ss. 7, 9, 10; Third Schedule] (1) Notwithstanding the provisions of the last preceding section, compensation shall not be payable in respect of any improvement mentioned in the first part of the Third Schedule to this Act, unless the tenant has, not more than three months nor less than two months before beginning to make such improvement, given to the landlord, or to his agent duly authorised in that behalf, notice in writing of his intention to make the improvement and of the manner in which he proposes to do the intended work.

(2) The landlord may within one month from the giving of such notice serve upon the tenant a dissent in writing to such intended improvement and require the matter in difference to be referred to arbitration, and thereupon a reference may be had in manner provided by this Division.

If the arbitrator is satisfied that any improvement specified in the tenant's notice will increase the value of the holding to an incoming tenant and will be a suitable and desirable improvement, he shall make an award accordingly, and the tenant shall be entitled to compensation for every improvement which he makes in accordance with such award.

If the arbitrator is satisfied that such improvement will not increase the value of the holding to an incoming tenant, and will be an unsuitable and undesirable improvement, the tenant shall not, if he executes such improvement, be entitled to any compensation in respect thereof.

(3) If no agreement is entered into as hereinafter provided within one month after such notice has been given, or if there is a reference to arbitration, then within one month after the award has been made the landlord may, unless the notice of the tenant is previously withdrawn, undertake to make the improvement himself, and may make the same accordingly in any reasonable and proper manner he thinks fit, and may charge the tenant interest at the rate of five dollars per centum per annum on the outlay incurred in making the improvement.

Such interest shall be payable and recoverable as rent in the same manner and at the same time as the rent in respect of the holding is payable and recoverable.

(4) In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with his undertaking within a reasonable time, the tenant may make the improvement himself, and shall in that case be entitled to compensation in respect thereof.

158. Agreements, etc. [cf. Qld. 5 Ed. 7, No. 11, s. 6; Eng. 46 & 47 Vic. c. 61, s. 4] The landlord and tenant may at any time -

- (a) dispense (whether expressly, by conduct, or otherwise) with any notice required by this Division to be given by either party to the other;
- (b) subject to section 153(2), enter into an agreement between themselves as to the party by whom and the mode in which any improvement is to be made, or as to the amount and mode and time of payment of compensation or other moneys to be paid to the tenant or to the landlord under this Division.

Any compensation payable under such agreement shall be deemed to be substituted for compensation under this Division.

159. Arbitration. [cf. Qld. 5 Ed. 7, No. 11, s. 7; Fourth Schedule] (1) In the absence of an agreement between the parties, every matter or question arising under this Division shall be determined by arbitration in accordance with the provisions set out in the Fourth Schedule to this Act.

(2) An arbitration shall, unless the parties otherwise agree, be before a single arbitrator.

160. Notice of intended claim. [cf. Qld. 5 Ed. 7, No. 11, s. 8] A tenant shall not be entitled to compensation, unless two months at least before the determination of his tenancy he gives notice in writing to the landlord claiming compensation.

When a tenant gives such a notice, the landlord may, within one month thereafter, give a notice in writing to the tenant claiming any set off.

Every notice under this section shall state as far as reasonably may be the particulars and amount of the intended claim:

Provided that non-compliance by either party with any of the provisions of this section shall not deprive such party of any rights under this Division if the arbitrator is of opinion that there was reasonable excuse for such non-compliance.

161. Rules for ascertaining amount of compensation. [cf. Qld. 5 Ed. 7, No 11, s. 9; Eng. 63 & 64 Vic. c. 60, ss. 1, 2] (1) In ascertaining the amount of compensation payable to the tenant in respect of any improvements made by him, the arbitrator shall be guided by the following rules.

(2) The amount to be awarded shall be such sum as fairly represents the value of the improvements to an incoming tenant.

(3) There shall not be taken into account as part of such improvements what is justly due to the inherent capabilities of the soil.

(4) There shall be taken into account by way of set off against such improvements -

- (a) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant making the improvements;
- (b) any sum due to the landlord from the tenant for rent or otherwise;
- (c) compensation to the landlord by way of damages for any waste, or for any breach of covenant, contract, or agreement connected with the tenancy committed or permitted by the tenant, but the landlord shall not be entitled to have taken into account any waste or breach by the tenant in relation to a matter of husbandry or cultivation committed or permitted more than two years before the determination of the tenancy; and
- (d) any rates, taxes, or assessments due in respect of the holding to which the tenant is liable as between himself and the landlord.

162. Recovery of compensation. [cf. Qld. 5 Ed. 7, No. 11, s. 10; Eng. 46 & 47 Vic. c. 61, s. 24] Where any money agreed to be paid for compensation, costs, or otherwise is not paid within fourteen days after the time when it is agreed to be paid, it shall be recoverable upon an order made by a judge of a District Court as money ordered to be paid by a District Court in its ordinary jurisdiction is recoverable.

Where any money awarded to be paid for compensation, costs, or otherwise is not paid in accordance with such order, a copy of such award may be filed in the office of the registrar of the nearest District Court, and thereupon such order may be enforced in all respects as if it were judgment of such District Court for the amount due, together with the costs of and incidental to enforcing the same.

163. Landlord who is a trustee. [cf. Qld. 5 Ed. 7 No. 11, s. 11; Eng. 46 & 47 Vic. c. 61, s. 31] (1) Where the landlord is a person entitled to receive the rents and profits of any holding as a trustee or otherwise than for his own benefit, the amount due from such landlord in respect of compensation, costs, or otherwise shall not be recoverable personally against him, nor shall he be under any personal liability to pay such amount, but the same shall be a charge on and recoverable against the holding.

If such landlord has not paid to the tenant the amount due to him within fourteen days after the time when such amount was agreed or awarded to be paid, then the tenant shall be entitled to obtain from the court or a Judge thereof an order in favour of himself, his executors, administrators, and assigns charging the holding to the amount due to him together with all costs properly incurred in obtaining the charge.

(2) Such landlord shall, either before or after payment to the tenant of the amount due to him, be entitled to obtain from the Court or a Judge there of an order charging the holding to the amount to be paid or paid, as the case may be, to the tenant, together with all costs properly incurred in obtaining the charge.

(3) Such Court or Judge may, by such order or by any subsequent order, give all directions necessary for securing full legal effect to any such charge, and every such order shall be obeyed.

164. Compensation to tenants, when mortgagee in possession. [cf. Qld. 5 Ed. 7, No. 11, s. 12; Eng. 53 & 54 Vic. c. 57, s. 2] (1) Where a tenant holds land under a contract of tenancy with the mortgagor, and such land is mortgaged at the time when such contract was made, or is subsequently mortgaged, and the mortgagee enters into possession of the holding, then the tenant shall, as against such mortgagee in possession, be entitled to any compensation which is or would be due to the tenant from the mortgagor.

(2) Before such mortgagee deprives the tenant of possession of the holding otherwise than in accordance with such contract, he shall give to the tenant six months' notice in writing of his intention so to deprive him.

(3) In ascertaining the amount of such compensation payable by the mortgagee the arbitrator shall have regard to the same rules as are here-inbefore provided for the ascertainment of compensation payable by a landlord, with this addition - that compensation shall be paid to the tenant for his crops, and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy, in so far as any improvement resulting therefrom is not exhausted at the time of his being deprived of possession.

(4) Save as aforesaid, such compensation shall be determined and recovered in like manner as compensation under this Act, and for all such purposes the expression "landlord", wherever used in this Act, shall be deemed to include such mortgagee in possession.

165. Incoming tenant's claim for compensation reserved. [cf. Qld. 5 Ed. 7, No. 11, s. 13; Eng. 46 & 47 Vic. c. 61, s. 56] Where an incoming tenant has, with the consent in writing of his landlord, paid to an outgoing tenant any compensation in respect of the whole or part of any improvement, such incoming tenant shall be entitled, on quitting the holding, to obtain compensation in respect of such improvement or part in like manner (if at all) as the outgoing tenant would have been entitled if he had remained tenant of the holding, and had quitted the holding at the time when the incoming tenant quits the same.

166. Change of tenancy not to affect right to compensation. [cf. Qld. 5 Ed. 7 No. 11, s. 14; Eng. 46 & 47 Vic. c. 61, s. 58] A tenant who has remained on his holding during a change or changes of tenancy shall not thereafter, on quitting his holding at the determination of a tenancy, be deprived of his right to compensation in respect of improvements by reason only that such improvements were made by him during a former tenancy or tenancies, and not during the tenancy at the determination of which he is quitting.

167. Power of entry. [cf. Qld. 5 Ed. 7, No. 11, s. 17; Eng. 63 & 64 Vic. c. 50 s. 5] The landlord of a holding, or any person authorised by him, may at all reasonable times enter on the holding, or any part of it, for the purpose of viewing the state of the holding.

PART IX - POWERS OF ATTORNEY

168. Application of Part. [cf. N.S.W. s.158] (1) Except where otherwise provided the provisions of this Part apply only to powers of attorney created after the commencement of this Act.

(2) This Part shall extend to powers of attorney authorising, whether expressly or in general terms, dealings with land under the provisions of The Real Property Acts and with land under the provisions of the Land Act.

169. Execution of powers of attorney. [cf. Law Com No. 30, cl.1] (1) An instrument creating a power of attorney shall be signed and sealed by, or by direction and in the presence of, the donor of the power.

(2) Subject to subsection (3) of this section such an instrument shall be deemed to be signed and sealed if it is executed by the donor in accordance with section 45 of this Act.

(4) This section is without prejudice to any requirement in or having effect under any other Act as to witnessing of instruments creating powers of attorney and does not affect the rules relating to the execution of instruments by bodies corporate.

170. Form and revocation of power of attorney. [cf. Law Com. No. 30, cl. 9] (1) A general power of attorney in Form 15 of the First Schedule, or in a form to the like effect, shall operate to confer -

- (a) on the donee of the power; or
- (b) if there is more than one donee, on the donees acting jointly or acting jointly or severally, as the case may be,

authority to do on behalf of the donor anything which he can lawfully do by an attorney.

(2) A general or other power of attorney may, if that power is or becomes revocable, be revoked by instrument in Form 16 of the First Schedule, or in a form to the like effect, executed in like manner to the instrument creating the power.

171. Registration of powers and instruments revoking powers. [cf. N.S.W. s.163] (1) An instrument creating a power of attorney may be registered.

(2) Any dealing with land purporting to take effect pursuant to the exercise of a power of attorney shall have no force or validity unless the instrument creating the power is registered; but upon registration any such disposition shall take effect as if the instrument creating the power had been registered before the instrument purporting to give effect to such dealing.

(3) An instrument revoking a power of attorney may be registered.

(4) Subject to any other Act, where an instrument creating a power of attorney has been registered, it shall not, unless a different intention appears from the instrument, cease to confer on the donee of the power any authority to deal with such land on behalf of the donor of the power until an instrument revoking that power has been registered.

172. Execution of instruments etc. by donee of power of attorney. [cf. Law Com. No. 30, cl.6; Eng. s.123] (1) The donee of a power of attorney may, if he thinks fit -

- (a) execute any instrument with his own signature and, where sealing is required or employed, with his own seal; and

(b) do any other thing in his own name,

by the authority of the donor of the power; and any instrument executed or thing done in that manner shall be as effective as if executed or done by the donee with the signature and seal, or, as the case may be, in the name of, the donee of the power.

(2) An instrument to which subsection (3) or (4) of section 46 of this Act applies may be executed either as provided in those subsections or as provided in this section.

(3) This section applies to a power of attorney whether created before or after the commencement of this Act.

173. Powers of attorney given as security. [cf. Law Com. No. 30, cl. 4]

(1) Where a power of attorney is expressed to be irrevocable and is granted to secure -

- (a) a proprietary interest of the donee of the power; or
- (b) the performance of an obligation owed to the donee -

then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked -

- (i) by the donor without the consent of the donee; or
- (ii) by the death of incapacity or bankruptcy of the donor, or, if the donor is a body corporate, by its winding up or dissolution.

(2) A power of attorney given to secure a proprietary interest may be given to the person entitled to the interest and the persons deriving title under him to that interest, and those persons shall be duly constituted donees of the power for all purposes of the power but without prejudice to any right to appoint substitutes given by the power.

(3) The power of a registered proprietor under section 108 of The Real Property Acts to revoke a power of attorney in accordance with that section shall be subject to the provisions of this section.

174. Protection of donee and third persons where power of attorney is revoked. [cf. Law Com. No. 30, cl. 5; cf. Qld. Mercantile Acts, 1867 to 1896, s. 2] (1) A donee of a power of attorney who acts in pursuance of the power at a time when it has been revoked shall not, by reason of the revocation, incur any liability (either to the donor or to any other person) if at that time he did not know that the power had been revoked.

(2) Where a power of attorney has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them shall, in favour of that person, be as valid as if the power had then been in existence.

(3) Where the power is expressed in the instrument creating it to be irrevocable and to be given by way of security then, unless the person dealing with the donee knows that it was not in fact given by way of security, he shall be entitled to assume that the power is incapable of revocation except by the donor acting with the consent of the donee and shall accordingly be treated for the purposes of subsection (2) of this section as having knowledge of the revocation only if he knows that it has been revoked in that manner.

(4) Where the interest of a purchaser depends on whether a transaction between the donee of a power of attorney and another person was valid by virtue of subsection (2) of this section, it shall, subject to paragraph (a) of subsection (5) of this section, be conclusively presumed in favour of the purchaser that that person did not at the material time know of the revocation of the power if -

- (a) the transaction between that person and the donee was completed within twelve months of the date on which the power came into operation; or
- (b) that person makes a statutory declaration, before or within three months after the completion of the purchase, that he did not at the material time know of the revocation of the power.

(5) For the purpose of this section -

- (a) the donee of the power of attorney, and any person dealing with him, shall, in relation to any dealing with land purporting to take effect in pursuance of the exercise of a power of attorney registered in accordance with section 171, be deemed to have knowledge of revocation of that power from the time at which an instrument of revocation of the power is registered;
- (b) without prejudice to subsection (3) of this section, knowledge of the revocation of a power of attorney includes knowledge of the occurrence of any event (such as the death of the donor) which has the effect of revoking the power.

175. Proof of instruments creating powers. (1) The contents of an instrument creating a power of attorney may be proved by means of a copy which -

- (a) is a reproduction of the original made with a photographic or other device for reproducing documents in facsimile; and
- (b) contains the following certificate or certificates signed by the donor of the power or by a solicitor, a conveyancer or stock broker, that is to say -
 - (i) a certificate at the end to the effect that the copy is a true and complete copy of the original; and
 - (ii) if the original consists of two or more pages, a certificate at the end of each page of the copy to the effect that it is a true and complete copy of the corresponding page of the original.

(2) Where a copy of an instrument creating a power of attorney has been made which complies with subsection (1) of this section, the contents of the instrument may also be proved by means of a copy of that copy if the further copy itself complies with that subsection, taking references in it to the original as references to the copy from which the further copy is made.

(3) In this section "stock broker" means a stock broker as defined in the Securities Industries Act, 1971.

(4) This section is in addition and without prejudice to section 122 of The Real Property Acts, and to any other method of proof authorised by law.

PART X - INCORPOREAL HEREDITAMENTS AND APPURTENANT RIGHTS

176. Prohibition upon creation of rent charges. (1) No rent charge shall be created after the commencement of this Act, and any rent charge so created shall be void and of no effect.

(2) Nothing in this section applies to the creation, in respect of registered land, of an encumbrance within the meaning of The Real Property Acts, 1861 to 1963.

177. Release of part of land subject to rent charge. [cf. N.S.W. s.18; Eng. s.70; Vic. s.70; Qld. D.R.E. Act, s.40] The release from a rent charge of part of the land charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the land released without prejudice nevertheless to the rights of all persons interested in the land remaining unreleased and not concurring in or confirming the release.

178. No presumption of right to access or use of light or air. [cf. N.S.W. s.179; Vic. ss.196, 197; Qld. Ancient Lights Declaratory Act, 1906] From and after the 1st day of March, 1907, no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence, by reason only of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment.

179. Right to support of land and buildings. For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do thereon anything which will withdraw support from any other land or from any building, structure, or erection which has been placed upon it.

180. Imposition of statutory rights of user in respect of land. (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (herein referred to as "the dominant land") that such land, or the owner for the time being of such land, should in respect of any other land (herein referred to as "the servient land") have a statutory right of user in respect of that other land, the Court may, on the application of the owner of the dominant land but subject to the succeeding provisions of this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.

(2) A statutory right of user imposed under subsection (1) of this section may take the form of an easement, licence or otherwise, and may be declared to be exercisable -

- (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
- (b) on one or more occasions; or
- (c) until a date certain; or
- (d) in perpetuity or for some fixed period -

as may be specified in the order.

(3) An order of the kind referred to in subsection (1) of this section shall not be made unless the Court is satisfied that -

- (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
- (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which he may suffer from the imposition of the obligation; and either
- (c) the owner of the servient land has refused to agree to accept the imposition of such obligation and his refusal is in all the circumstances unreasonable; or

- (d) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

(4) An order under this section (including an order under this subsection) -

- (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the Court to be just;
- (b) may include such other terms and conditions as may be just;
- (c) shall, unless the Court otherwise orders, be registered as provided in this section;
- (d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the Court where it is satisfied that -
 - (i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or
 - (ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made;
- (e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.

(5) Where by this section an order is required to be registered, then in the case of -

- (a) registered land, the Registrar shall make such amendments of and entries in the register book and elsewhere as may be necessary for giving effect to such order in respect of all deeds of grant, certificates of title, and other instruments affected thereby, if or when available;
- (b) other land, a memorandum of such order shall be indorsed in such manner and on such instruments of title and elsewhere as the Court may direct.

(6) In any proceedings under this section the Court shall not, except in special circumstances, make an order for costs against the servient owner.

(7) In this section -

- (a) "owner" includes any person interested whether presently, contingently or otherwise in land;
- (b) "statutory right of user" includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land;
- (c) "utility" includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental thereto.

181. Power to modify or extinguish easements and restrictive covenants.
[N.S.W. s. 89; Eng. s. 84; 17 & 18 Eliz. 2, c. 59, s. 28; Vic. ss. 84, 85] (1)
Where land is subject to an easement or to a restriction arising under
covenant or otherwise as to the user thereof, the court may from time to
time, on the application of any person interested in the land, by order
modify or wholly or partially extinguish the easement or restriction upon
being satisfied -

- (a) that by reason of change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances of the case which the court may deem material, the easement or restriction ought to be deemed obsolete; or
- (b) that the continued existence of the easement or restriction would impede some reasonable user of the land subject to the easement or restriction, or that the easement or restriction, in impeding that user, either -
 - (i) does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; or
 - (ii) is contrary to the public interest;and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the extinguishment or modification;
- (c) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part or waived the benefit of the restriction wholly or in part; or
- (d) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction.

(2) In determining whether a case is one falling within paragraph (a) or (b) of subsection (1) of this section, and in determining whether (in such case or otherwise) an easement or restriction ought to be extinguished or modified, the court shall take into account the town plan and any declared or ascertainable pattern of the local authority for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area, as well as the period at which and context in which the easement or restriction was created or imposed, and any other material circumstance.

(3) The power conferred by subsection (1) of this section to extinguish or modify an easement or restriction includes a power to add such further provisions restricting the user or the building on the land as appear to the court to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the court may accordingly refuse to modify an easement or restriction without such addition.

(4) An order extinguishing or modifying an easement or restriction under subsection (1) of this section may direct the applicant to pay to any person entitled to the benefit of the easement or restriction such sum by way of consideration as the court may think it just to award under one, but not both,

of the following heads. that is to say, either -

- (a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the extinguishment or modification; or
- (b) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(5) Where any proceedings by action or otherwise are instituted to enforce an easement or restriction, or to enforce any rights arising out of a breach of any restriction, any person against whom the proceedings are instituted may in such proceedings apply to the court for an order under this section; and such application shall, unless the court otherwise orders, operate to stay such proceedings until determination of the application made under this section.

(6) The court may in any proceedings under this section on the application of any person interested make an order declaring whether or not in any particular case any land is or would in any given event be affected by an easement or restriction, and the nature and extent thereof, and whether the same is or would in any given event be enforceable, and if so by whom.

(7) Notice of any application made under this section shall, if the court so directs, be given to the local authority in whose area the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the court, either generally or in a particular instance, may order.

(8) An order under this section shall, when registered, entered or indorsed as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement, or interested in enforcing the restriction and whether such persons are parties to the proceedings or have been served with notice or not.

(9) In the case of

- (a) registered land, the Registrar shall make such amendments of and entries in the register book and elsewhere as may be necessary for giving effect to such order in respect of all deeds of grant, certificates of title, and other instruments affected thereby, if or when available;
- (b) other land, a memorandum of such order shall be indorsed in such manner and on such instrument of title and elsewhere as the court may direct.

(10) In this section "court" means the Local Government Court constituted under the City of Brisbane Town Planning Act 1964-1970.

(11) The court may -

- (a) give such directions for the conduct of proceedings;
- (b) make such orders in respect of costs of proceedings;
- (c) direct that any instrument of title or other document relating to the land be produced to any person specified by the court -

under this section as in its discretion it may think fit.

(12) Subject to this section, the powers and procedure of the court, the enforcement of any order made by the court, and any appeal therefrom, shall in all respects be regulated by the provisions of the District Courts Act 1967-1969 and the District Court Rules 1968 in relation to original proceedings in the civil jurisdiction of that Court.

PART XI - ENCROACHMENT AND MISTAKE

Division 1 - Encroachment of Buildings

182. Application of Division. The provisions of this Division apply notwithstanding the provisions of any other Act.

183. Definitions. [cf. Qld. 4 Eliz. 2, No. 18, s. 2] In this Division, unless the context or subject-matter otherwise indicates or requires, the following terms shall have the meanings respectively assigned to them, that is to say-

"adjacent owner" - the owner of land over which an encroachment extends;

"boundary" - the boundary line between contiguous parcels of land;

"building" - a substantial building of a permanent character: the term includes a wall;

"encroaching owner" - the owner of land contiguous to the boundary beyond which an encroachment extends;

"owner" - any person entitled to an estate of freehold in possession -

(a) whether in fee simple or for life or otherwise;

(b) whether at law or in equity;

(c) whether absolutely or by way of mortgage, and includes a mortgagee under a registered mortgage of a freehold estate in possession in land under The Real Property Acts;

"subject land" - that part of the land over which an encroachment extends.

184. Application for relief in respect of encroachments. [cf. Qld. 4 Eliz. 2, No. 18, s. 3] (1) Either an adjacent owner or an encroaching owner may apply to the Court for relief under this Act in respect of any encroachment.

(2) On the application the Court may make such order as it may deem just with respect to -

(a) the payment of compensation to the adjacent owner;

(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to him of any estate or interest therein or of any easement, right, or privilege in relation thereto;

(c) the removal of the encroachment.

(3) The Court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters -

(a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be;

(b) the situation and value of the subject land, and the nature and extent of the encroachment;

(c) the character of the encroaching building, and the purposes for which it may be used;

(d) the loss and damage which has been or will be incurred by the adjacent owner;

(e) the loss and damage which would be incurred by the encroaching owner if he were required to remove the encroachment;

(f) the circumstances in which the encroachment was made.

(4) This section applies to encroachments made either before or after the commencement of this Act.

185. Compensation. [cf. Qld. 4 Eliz. 2, No. 18, s. 4] (1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant as aforesaid to the encroaching owner shall, if the encroaching owner satisfies the Court that the encroachment was not intentional and did not arise from negligence, be the unimproved capital value of the subject land, and in any other case three times such unimproved capital value.

(2) In determining whether the compensation shall exceed the minimum, and if so by what amount, the Court shall have regard to -

- (a) the value, whether improved or unimproved, of the subject land to the adjacent owner;
- (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner;
- (c) the circumstances in which the encroachment was made.

186. Charge on land. [cf. Qld. 4 Eliz. 2, No. 18, s. 5] (1) The order for payment of compensation may be registered in the office of the Registrar in such manner as the Registrar determines and shall, except so far as the Court otherwise directs, upon registration operate as a charge upon the land of the encroaching owner, and shall have priority to any charge created by him or his predecessor in title.

(2) In this section the land of the encroaching owner means the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part thereof as the Court may specify in the order.

187. Encroaching owner - compensation and conveyance. [cf. Qld. 4 Eliz. 2, No. 18, s. 6] Wherever the Court sees fit, and in particular where the encroaching owner is not an owner beneficially entitled to the fee-simple free from encumbrances, the Court may determine -

- (a) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately;
- (b) to whom, for whose benefit and upon what limitations the conveyance, transfer, or lease of the subject land or grant as aforesaid in respect thereof is to be made.

188. Adjacent owner: compensation and conveyance. [cf. Qld. 4 Eliz. 2, No. 18, s. 7] Wherever the Court sees fit, and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the Court may determine -

- (a) to whom, for whose benefit, and in what proportions the compensation is to be paid or applied; and
- (b) by whom the conveyance, transfer, or lease of the subject land or grant in respect thereof is to be made.

189. Vesting order. [cf. Qld. 4 Eliz. 2, No. 18, s. 8] Wherever the Court may make or has made an order under this Division with respect to the subject land, the Court may make such vesting order as it may deem proper in lieu thereof or in addition thereto, or in default of compliance therewith.

190. Boundaries. [cf. Qld. 4 Eliz. 2, No. 18, s. 9] (1) Where any question arises as to whether an existing building encroaches or a proposed building will encroach beyond the boundary, either of the owners of the

contiguous parcels of land may apply to the Court for the determination under this Division of the true boundary.

(2) On the application the Court may make such orders as it may deem proper for determining, marking, and recording the true boundary.

(3) This section applies to buildings erected either before or after the commencement of this Act.

191. Suit, action or other proceeding. [cf. Qld. 4 Eliz. 2, No. 18, s. 10]

(1) In any suit or proceeding before the Court, however originated, the Court may, if it sees fit, exercise any of the powers conferred by this Division, and may stay the suit or proceeding on such terms as it may deem proper.

(2) Where any action or proceeding is taken or is about to be taken at law by any person, and the Court is of opinion that the matter could more conveniently be dealt with by an application under this Division, the Court may grant an injunction, on such terms as it may deem proper, restraining the person from taking or continuing the action or proceedings at law.

(3) In any action at law a Judge may, if he is of opinion that the matter could more conveniently be dealt with by an application under this Division, stay the action or proceeding on such terms as he may deem proper.

192. Persons interested. [cf. Qld. 4 Eliz. 2, No. 18, s. 12] In any application under this Division the Court may require -

- (a) that notice of the application shall be given to any person interested;
- (b) that any person who is or appears to be interested shall be made a party to the application.

193. Costs. [cf. Qld. 4 Eliz. 2, No. 18, s. 13] In any application under this Division the Court may make such order as to payment of costs (to be taxed as between solicitor and client or otherwise), charges, and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

Division 2 - Improvements under mistake of title

194. Application of Division. The provisions of this Division apply notwithstanding the provisions of any other Act.

195. Relief in case of improvements made by mistake. [cf. Ont. R. S. O. 1960, c. 66, s. 38] Where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that -

- (a) such land is his property; or
- (b) such land is the property of a person on whose behalf the improvement is made or intended to be made -

application may be made to the Court for relief under this Division.

196. Nature of relief. [cf. W.A. s. 123] (1) If in the opinion of the Court it is just and equitable that relief should be granted to the applicant or to any other person, the Court may if it thinks fit make any one or more of the following orders, that is to say -

- (a) vesting in any person or persons specified in the order the whole or any part of the land on which the improvement or any part thereof has been made either with or without any surrounding or contiguous or other land;

- (b) ordering that any person or persons specified in the order shall or may remove the improvement or any part thereof from the land or any part of it;
 - (c) ordering that any person or persons specified in the order pay compensation to any other person in respect of -
 - (i) any land or part thereof;
 - (ii) any improvement or part thereof;
 - (iii) any damage or diminution in value caused or likely to be caused by or to result from any improvement or order made under this Division;
 - (d) ordering that any person or persons specified in the order have or give possession of the land or improvement or part thereof for such period and upon such terms and conditions as the Court may specify.
- (2) An order under this Division, and any provision of the order, may -
- (a) include or be made upon and subject to such terms and conditions as the Court thinks fit, whether as to payment by any person of any sum or sums of money including costs (to be taxed as between solicitor and client or otherwise), or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise;
 - (b) declare that any estate or interest on the land or any part thereof on which the improvement has been made to be free of any mortgage, lease, easement or other incumbrance, or may vary, to such extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part thereof.

197. Right to apply or be served. [cf. W.A. s.123] (1) Application for relief under this Division may be made by -

- (a) any person who made or who is for the time being in possession of any improvement referred to in section 195;
 - (b) any person having any estate or interest in the land or any part thereof upon which such improvement has been made;
 - (c) any person claiming to be a party to or to be entitled to any benefit under any lease, easement, contract or other instrument relating to such land or improvement;
 - (d) the successor in title to any person upon whose land the improvement or any part thereof was intended to be made; and
 - (e) the local authority within whose area the land or improvement or any part thereof is situated.
- (2) In any application under this Division the Court may require -
- (a) that notice of the application be given to any of the persons referred to in subsection (1) of this section and to any other person who is or appears to be interested in or likely to be affected by an order made under this Division;
 - (b) that any such person be made a party to the application.

PART XII - EQUITABLE INTERESTS AND THINGS IN ACTION

198. Statutory assignments of things in action. [Qld. Judicature Act 1876, s. 5(6)] (1) Any absolute assignment by writing under the hand of the

assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice -

- (a) the legal right to such debt or thing in action;
- (b) all legal and other remedies for the same; and
- (c) the power to give a good discharge for the same without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice -

- (a) that the assignment is disputed by the assignor or any person claiming under him; or
- (b) of any other opposing or conflicting claims to such debt or thing in action,

he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

199. Efficacy in equity of voluntary assignments. (1) A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by him that is necessary in order to transfer the property to the assignee -

- (a) notwithstanding that anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and
- (b) provided that anything so remaining to be done is such as may thereafter be done without intervention of or assistance from the assignor.

(2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act.

PART XIII - POWERS OF APPOINTMENT

200. Application of Part. [cf. Eng. s.160; Vic. s.160; W.A. s.98] This Part applies to powers created or arising either before or after the commencement of this Act.

201. Mode of exercise of powers. [cf. N.S.W. s.41; Eng. s.159; Vic. s.159; W.A. s.97; S.A. s.58; cf. Qld. Succession Act, s.66] (1) Where a power of appointment by an instrument other than a will is exercised by deed, executed and attested in accordance with this Act, or, in the case of an instrument under The Real Property Acts, in accordance with those Acts, such deed or instrument shall, so far as respects the execution and attestation thereof, be a valid exercise of the power, notwithstanding that by the instrument creating the power some additional or other form of execution or attestation or solemnity is required.

(2) This section does not operate to defeat any direction in the instrument creating the power that -

- (a) the consent of any particular person is to be necessary to a valid execution;
- (b) in order to give validity to any appointment, any act is to be performed having no relation to the mode of executing and attesting the instrument.

(3) This section does not prevent the donee of a power from executing it in accordance with the power by writing, or otherwise than by an instrument executed and attested as a deed; and where a power is so executed this section does not apply.

(4) This section applies to the exercise after the commencement of this Act of any such power created by an instrument coming into operation before or after the commencement of this Act.

202. Validation of appointments where objects are excluded or take illusory shares. [cf. Eng. s.158; Vic. s.158; W.A. s.96; S.A. s.57a; N.S.W.s.29; Qld. Equity Act, ss.70, 71, 72] (1) No appointment made in exercise of any power to appoint any property among two or more objects shall be invalid on the ground that -

- (a) an unsubstantial, illusory, or nominal share only is appointed to or left unappointed to devolve upon any one or more of the objects of the power; or
- (b) any object of the power is thereby altogether excluded,

but every such appointment shall be valid notwithstanding that any one or more of the objects is not thereby, or in default of appointment, to take any share in the property.

(2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.

(3) This section applies to appointments made before or after the commencement of this Act.

203. Protection of purchasers claiming under certain void appointments. [cf. Eng. s.157; Vic. s.157; W.A. s.95; N.S.W. s.29A] (1) An instrument purporting to exercise a power of appointment over property, which, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not (save as hereinafter provided) be void on the ground of fraud on the power as against a purchaser in good faith:

Provided that, if the interest appointed exceeds, in amount or value, the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in his favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.

(2) In this section "a purchaser in good faith" means a person dealing with an appointee of the age of not less than twenty-five years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

(3) Persons deriving title under any purchaser entitled to the benefit of this section shall be entitled to the like benefit.

(4) This section applies only to dealings effected after the commencement of this Act.

204. Disclaimer, etc. of powers. [Vic. ss.155, 156; W.A. ss.93, 94; S.A. s.57; Eng. ss.155, 156(1); N.S.W. s.28] (1) A person to whom any power, whether or not coupled with an interest, is given may by deed disclaim, release or contract not to exercise the power, and after such disclaimer, release or contract shall not be capable of exercising or joining in the exercise of the power.

(2) On such disclaimer, release, or contract the power may be exercised by the other person or persons or the survivor or survivors of the other persons to whom the power is given unless the contrary is expressed in the instrument creating the power.

(3) Where such power is exercisable by any instrument which may or is required to be registered under any Act, the power may be released or disclaimed by a memorandum in Form 17 of the First Schedule or to like effect, which may be registered.

(4) This section -

- (a) does not apply to a power coupled with a duty;
- (b) applies to a power created by an instrument coming into operation whether before or after the commencement of this Act.

XIV - PERPETUITIES AND ACCUMULATIONS

205. Interpretation. [cf. Vic. s.2; W.A. s.4; U.K. s.15; N.Z. s.2] (1) In this Part unless inconsistent with the context or subject-matter terms shall have the meanings assigned to them in section 4 of this Act save that -

"disposition" includes the conferring or exercise of a power of appointment or any other power or authority to dispose of an interest in or a right over property and any other disposition of an interest in or right over property; and references to the interest disposed of shall be construed accordingly;

"instrument" includes a will, and also includes an instrument, testamentary or otherwise, exercising a power of appointment whether general or special but does not include an Act of Parliament;

"power of appointment" includes any discretionary power to transfer or grant or create a beneficial interest in property without the furnishing of valuable consideration.

(2) For the purposes of this Part a disposition contained in a will shall be deemed to be made at the death of the testator.

(3) For the purposes of this Part a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and shall be treated as a potential member if in his case only one or some of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

206. Application. [cf. Vic. s.3; W.A. s.3; U.K. s.15; N.Z. s.4] (1) Save as otherwise provided in this Part, this Part shall apply only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument whereby a special power of appointment is exercised shall apply only where the instrument creating the power takes effect after that commencement: Provided that section 207 of this Act shall apply in all cases for construing the reference in this subsection to a special power of appointment.

Abbreviations used in references to other Acts in notes appearing at the beginning of sections 205-221 have the following meanings:- U.K. Perpetuities and Accumulations Act 1964 (United Kingdom); Vic. Perpetuities and Accumulations Act 1968 (Victoria); W.A. Law Reform (Property, Perpetuities, and Succession) Act 1962 (Western Australia); N.Z. Perpetuities Act 1964 (New Zealand).

(2) This Part shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

207. Powers of appointment. [cf. Vic. s. 4; W.A. s. 16; U.K. s. 7; N.Z. s. 5] For the purposes of the rule against perpetuities a power of appointment shall be treated as a special power unless -

- (a) in the instrument creating the power it is expressed to be exercisable by one person only; and
- (b) it could at all times during its currency when that person is of full age and capacity be exercised by him so as immediately to transfer to or otherwise vest in himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

208. Power to specify perpetuity period. [cf. Vic. s. 5; W.A. s. 5; U.K. s. 1; N.Z. s. 6] (1) Save as in this Part otherwise provided where the instrument by which any disposition is made so provides the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration shall be such number of years not exceeding eighty as is specified in the instrument as the perpetuity period applicable to the disposition.

(2) Subsection (1) of this section shall not have effect where the disposition is made in exercise of a special power of appointment but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.

(3) If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purposes of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

209. "Wait and see" rule. [cf. Vic. s. 6; W.A. s. 7; U.K. s. 3; N.Z. s. 8]

(1) Where apart from the provisions of this section and of section 212 of this Act a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

(2) Where apart from the provisions of this section and of section 212 of this Act a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period as if the disposition were not subject to the rule against perpetuities.

(3) Where apart from the provisions of this section and of section 212 of this Act a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and subject to the said provisions shall be treated as void for remoteness only if and so far as the right is not fully exercised within that period.

(4) Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted:

Provided however that in the case of a disposition to a class of persons or to one or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

210. Power to apply to court for declaration as to validity. [cf. Vic. s. 7; W.A. s. 8; N.Z. s. 22] (1) A trustee of any property, or any person interested under or on the invalidity of, a disposition of property may at any time apply to the Court for a declaration as to the validity, in respect to the rule against perpetuities, of a disposition of that property.

(2) The Court may, on an application under subsection (1) of this section, make a declaration on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is made; but the Court shall not make a declaration in respect of any disposition the validity of which cannot be determined at the time at which the Court is asked to make the declaration.

211. Presumptions and evidence as to future parenthood. [cf. Vic. s. 8; W.A. s. 6; U.K. s. 2; N.Z. s. 6] (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time, then -

- (a) it shall be presumed, subject to paragraph (b) of this subsection, that a male can have a child at the age of twelve years or over but not under that age and that a female can have a child at the age of twelve years or over but not under that age or over the age of fifty-five years; but
- (b) in the case of a living person evidence may be given to show that he or she will or will not be capable of having a child at the time in question.

(2) Where any such question is decided by treating a person as incapable of having a child at a particular time and he or she does so, the Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.

(3) Subject to subsection (2) of this section, where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child; but those provisions (except paragraph (b) of subsection (1) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her capacity at that time to beget or give birth to a child.

212. Reduction of age and exclusion of class members to avoid remoteness. [cf. Vic. s.9; W.A. s.9; U.K. s.4; N.Z. s.9] (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twenty-one years and it is apparent at the time the disposition is made or becomes apparent at a subsequent time -

- (a) that the disposition would apart from this section be void for remoteness; but
- (b) that it would not be so void if the specified age had been twenty-one years,

the disposition shall be treated for all purposes as if instead of being limited by reference to the age in fact specified it had been limited by reference to the age nearest to that age which would if specified instead, have prevented the disposition from being so void.

(2) Where in the case of any disposition different ages exceeding twenty-one years are specified in relation to different persons -

- (a) the reference in paragraph (b) of subsection (1) of this section to the specified age shall be construed as a reference to all the specified ages; and
- (b) that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

(3) Where the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class prevents the preceding provisions of this section from operating to save a disposition from being void for remoteness those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class and the said provisions shall thereupon have effect accordingly.

(4) Where in the case of a disposition to which subsection (3) of this section does not apply it is apparent at the time the disposition is made or becomes apparent at a subsequent time that apart from this subsection the inclusion of any persons, being potential members of a class or unborn persons who at birth could become members or potential members of the class would cause the disposition to be treated as void for remoteness those persons shall unless their exclusion would exhaust the class thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

(5) Where this section has effect in relation to a disposition to which section 209 of this Act applies the operation of this section shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

213. Unborn husband or wife. [cf. Vic. s.10; W.A. s.12; N.Z. s.13; U.K. s.5] The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities shall be deemed to be a life in being for the purpose of -

- (a) a disposition in favour of that widow or widower; and

- (b) a disposition in favour of a charity which attains or of a person who attains or of a class the members of which attain according to the terms of the disposition a vested interest on or after the death of the survivor of the said person who is a life in being and that widow or widower, or on or after the death of that widow or widower or on or after the happening of any contingency during her or his lifetime.

214. Dependent dispositions. [cf. Vic. s.11; W.A. s.13; U.K. s.6; N.Z. s.14] A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

215. Abolition of the rule against double possibilities. [cf. Eng. L.P.A. s.161] (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished.

(2) This section applies only to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

216. Restrictions on the perpetuity rule. [cf. Vic. s.13] (1) For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied -

- (a) to any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or
- (b) to any rentcharge created only as an indemnity against another rentcharge, although the indemnity rentcharge may arise or become payable only on breach of a condition or stipulation; or
- (c) to any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge; or
- (d) to any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of -
 - (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals;
 - (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;
 - (iii) executing repairs, alterations or additions to any adjoining land, or the buildings and erections thereon;
 - (iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

(2) This section shall apply to instruments coming into operation before or after the commencement of this Act.

(3) In this section "instrument" includes a statute creating a settlement.

217. Options. [cf. Vic. s.15; W.A. s.14; U.K. ss.9,10; N.Z. s.17] (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the terms of a lease if -

- (a) the option is exercisable only by the lessee or his successors in title; and
- (b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

This subsection shall apply in relation to an agreement for a lease as it applies in relation to a lease, and "lessee" shall be construed accordingly.

(2) An option to acquire an interest in land (not being an option to which subsection (1) of this section refers) or a right of pre-emption in respect of land, which according to its terms is or may be exercisable at a date more than twenty-one years from the date of its grant shall after the expiration of twenty-one years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect, but -

- (a) this subsection shall not apply to an option or right of pre-emption conferred by will; and
- (b) nothing in this subsection shall affect an option for renewal or right of pre-emption contained in a lease or an agreement for a lease.

218. Determinable interests. [cf. Vic. s.16; W.A. s.15; U.K. s.12; N.Z. s.18] (1) The rule against perpetuities shall apply -

- (a) to a possibility of reverter in land on the determination of a determinable fee simple; in which case if the fee simple does not determine within the perpetuity period it shall thereafter continue as a fee simple absolute;
- (b) to a possibility of a resulting trust on the determination of any other determinable interest in property; in which case if the first interest created by the trust does not determine within the perpetuity period the interest it creates shall thereafter continue as an absolute interest;
- (c) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent and to an equivalent right in the case of property other than land; in which case if the right of entry or other right is not exercised within the perpetuity period the fee simple shall thereafter continue as an absolute interest and any such other interest in property shall thereafter continue free from the condition.

(2) This section shall apply whether or not the determinable or conditional disposition is charitable except that the rule against perpetuities shall not apply to a gift over from one charity to another.

(3) Where a disposition is subject to any provision that causes an interest to which paragraph (a) or paragraph (b) of subsection (1) of this section applies to be determinable, or to any condition subsequent giving rise on breach thereof to a right of re-entry or an equivalent right in the case of property other than land, or to any exception or reservation the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising by virtue of the provision conditional subsequent exception or reservation.

219. Trustee powers and superannuation funds. [cf. Vic. s.17 and No. 6401 of 1958 (Victoria) s.73, 61 Vic. No.10, s.59] (1) The rule of law known as the rule against perpetuities does not apply and shall be deemed never to have applied so as to render void -

- (a) a trust or power to sell property, where a trust of the proceeds of sale is valid;
- (b) a trust or power to lease or exchange property, where the lease or exchange directed or authorised by the trust or power is ancillary to the carrying out of a valid trust;
- (c) any other power which is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property;
- (d) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for persons who are or have been -
 - (i) employees;
 - (ii) self-employed persons;
 - (iii) employees and self-employed persons;
 - (iv) the spouse, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or
 - (v) persons selected or nominated by an employee or a self-employed person pursuant to the provisions of such trust or fund;
- (e) any provision for the remuneration of trustees.

(2) This section does not -

- (a) render any trustee liable for any acts done prior to the commencement of this Act for which that trustee would not have been liable had this section not been enacted; or
- (b) enable any person to recover any money distributed or paid under any trust, if he could not have recovered that money had this section not been enacted.

(3) In this section -

- (a) "employee" includes directors, servants, officers or employees of any employer or employers;
- (b) "self-employed persons" includes persons engaged in any lawful profession, trade, occupation or calling.

220. Non-charitable purpose trusts. [cf. Vic. s.18; U.K. s.15; N.Z. s.20] (1) Except as provided in subsection (2) of this section nothing in this Act shall affect the operation of the rule of law rendering non-charitable trusts and trusts for the benefit of corporations which are not charities void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.

(2) If any such trust is not otherwise void the provisions of sections 208 and 209 of this Act shall apply to it and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period but not thereafter.

221. Accumulation of income. [cf. Vic. s.19; W.A. s.17; U.K. ss.13, 14; N.Z. s.21] (1) Where property is settled or disposed of in such manner that the income thereof may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise.

(2) Nothing in this section shall affect the power of any person or persons to terminate an accumulation that is for his or her benefit and any jurisdiction or power of the Court to maintain or advance out of accumulations or any power of a trustee under the Trusts Act or under any other Act or law or under any instrument creating a trust or making a disposition.

PART XV - CORPORATIONS

222. Devolution of property of corporation sole. [cf. Eng. s.180(1); Vic. s.176] Where either before or after the commencement of this Act any property or interest therein is or has been vested in a corporation sole (including the Crown), the same shall, unless and until disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to and vested in the successors from time to time of such corporation.

223. Vacancy in corporation. [cf. Eng. s.180(2); Vic. s.177] Where either before or after the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall notwithstanding such vacancy vest and be deemed to have vested in the successor to such office on his appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

224. Transactions with corporation sole. [cf. Eng. s.180(3); Vic. s.178] Any contract or other transaction expressed or purporting to be made with a corporation sole, or any appointment of a corporation sole as trustee, at a time when there was a vacancy in the office and no administrator acting, shall on the vacancy being filled take effect and be deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect, and on the appointment of a successor shall be capable of being enforced, accepted, disclaimed or renounced by him.

225. Corporation incapable of acting. [cf. Qld. Building Unit Titles Act 1965, s.23] (1) Where, by reason of the death or incapacity (whether before or after the commencement of this Act) of any one or more of the officers or members of a corporation or for any other reason, the corporation ceases to be capable of acting -

- (a) either generally or in respect of a particular transaction or transactions; and
- (b) either temporarily or for an indefinite or any lesser period -

the Court may, on the application of any officer or member of the corporation or the personal representative of such member or of any creditor or person having or appearing to have any claim against the corporation, appoint an administrator.

(2) The Court may in its discretion appoint any administrator for an indefinite period or for a fixed period or until the happening of any specified event and on such terms and conditions as to remuneration out of the assets of the corporation and otherwise as it thinks fit.

(3) Unless the Court otherwise directs, the administrator shall, to the exclusion of the corporation and any officer or member thereof, have authority to and may exercise all the powers of the corporation subject to such

terms and conditions (if any) as the Court sees fit to impose.

(4) Unless the Court otherwise directs, the administrator may delegate any of the powers exercisable by him.

(5) The Court may in its discretion on the application of the administrator or of any person referred to in subsection (1) hereof -

(a) give to the administrator directions -

(i) as to the exercise of any of the powers exercisable by him, and

(ii) as to any question or matter arising in or with respect to the affairs of the corporation;

(b) remove or replace the administrator.

(6) On any application under this section the Court may make such order for the payment of costs as it thinks fit.

(7) This section applies to any corporation, whether a corporation aggregate or corporation sole, constituted under or pursuant to -

(a) The Religious Charitable and Educational Institutions Acts, 1861 to 1967;

(b) the Companies Act 1961-1971; or

(c) any other Act.

(8) Where an order is made under this section for the appointment, removal or replacement of an administrator in relation to a company constituted under the Companies Act 1961-1971, the order shall not take effect until the lodgment within seven days of the making of the order, or such longer period as the Court may allow, of an office copy of the order with the Registrar of Companies.

226. Corporate contracts and transactions not under seal. [cf. Eng. 8 & 9 Eliz. 2, c. 46] (1) Contracts and other transactions may be made or effected by any body corporate, wherever incorporated, as follows -

(a) a contract or other transaction which if made or effected by or between individuals would by law be required to be in writing, signed by the party to be charged therewith or effecting the same, may be made by the corporation in writing signed by any person under its authority, express or implied; and

(b) a contract or other transaction, which if made or effected by or between individuals would by law be valid although made by parol only, and not reduced to writing, may be made by parol by the corporation by any person acting under its authority, express or implied.

(2) A contract or other transaction made or effected in accordance with this section shall be effective in law, and shall bind the corporation and its or his successors and all other parties thereto.

(3) A contract or other transaction made or effected in accordance with this section may be varied or discharged in the same manner in which it is by this section authorised to be made or effected.

(4) Nothing in this section shall be taken to prevent a contract or other transaction from being made or effected under the seal of the corporation.

(5) This section -

- (a) applies to the making, effecting, variation or discharge of a contract or transaction after the commencement of this Act, whether the corporation gave its authority before or after the commencement of this Act;
- (b) does not apply to contracts made by any company incorporated under the Companies Act 1961-1971, or any repealed Act to like effect, or by any corporation incorporated under or pursuant to any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.

PART XVI - VOIDABLE DISPOSITIONS

227. Voluntary conveyances to defraud creditors voidable. [cf. Eng. s.172; N.S.W. s.37A; Qld. Mercantile Act of 1867, ss.46, 50; 13 Eliz.1, c.5]

(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

228. Voluntary disposition of land how far voidable as against purchasers. [cf. Eng. s.173; N.S.W. s.37B; Qld. Mercantile Act of 1867, ss.48, 50]

(1) Every voluntary alienation of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.

(2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud by reason only that a subsequent conveyance for valuable consideration was made, if such subsequent conveyance is made after the commencement of this Act.

229. Acquisitions of reversions at an under value. [cf. Eng. s.174; N.S.W. s.37C] (1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.

In this subsection "reversionary interest" includes an expectancy or possibility.

(2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

PART XVII - APPORTIONMENT

230. Interpretation of terms. For the purposes of this Part -

"annuities" include salaries and pensions;

"dividends" include (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of any company or other body corporate incorporated under any statute, divisible between all, or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise;

"rents" include rent-service, rent-charge, and rent-seck, and all periodical payments or renderings in lieu of or in the nature of rent.

231. Rents, &c., apportionable in respect of time. [cf. W.A. s.131; N.S.W. s.144; Eng. Apportionment Act 1870; Qld. D.R.E. Act 1867, s.39]

(1) All rents, annuities, and other periodical payments (other than dividends) in the nature of income whether reserved or made payable under an instrument in writing or otherwise shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

(2) The apportioned part of any such rent, annuity, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part forms part becomes due and payable, and not before; and in the case of a rent annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.

(3) All persons and their respective executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies, at law and in equity, for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively.

(4) Notwithstanding the provisions of subsection (3) of this section, where any person is liable to pay rent reserved out of or charged on lands, that person and the said lands shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this section or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such lastmentioned person by the executors, administrators, or other parties thereto entitled under this section by action or suit.

232. Exceptions and application. (1) Nothing in this Part renders apportionable any annual sums payable under policies of assurance of any description.

(2) This Part does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

XVIII - UNREGISTERED LAND

Division 1 - Application of Part; Interpretation

233. Application and interpretation. (1) Subject to section 240, the provisions of this Part apply only to unregistered land and any estate or interest therein.

(2) [cf. 7 Vic. No.16, s.22] In this Part the term "instrument" includes not only conveyances and other deeds, but also all instruments in writing whatsoever, whereby real or leasehold estate is affected or is intended so to be, including:-

- (a) a certificate under section 101 of this Act; and
- (b) a power of attorney registered under section 171 of this Act.

Division 2 - Sales and Conveyances

234. No conveyance to have tortious operation. [cf. W.A. s. 40; N.S.W. s. 22] No conveyance of any land made or purporting to be made after the commencement of this Act shall have a tortious operation.

235. Want of livery of seisin. [cf. 22 Vic. No. 1, s. 19] Livery of seisin shall not be deemed to have been necessary to give effect to any feoffment executed before the 3rd day of January, 1842, but every such feoffment shall be taken to have operated in the same manner as the same would have done in case there had been livery of seisin in the most valid form.

Provided that nothing in this section shall make any such feoffment operate as a tortious conveyance or shall prejudice or affect the title of any person now in possession of land the subject of any such feoffment and claimed adversely to the feoffee his heirs or assigns.

236. Statutory commencements of title. [cf. Eng. s. 14; N.S.W. s. 53]

- (1) After the commencement of this Act thirty years shall be substituted for sixty years as the period of commencement of title which a purchaser of land may require; nevertheless earlier title than thirty years may be required in cases similar to those in which earlier title than sixty years might immediately before the commencement of this Act be required.
- (2) Under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign shall not be entitled to call for the title to the freehold.
- (3) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.
- (4) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.
- (5) Where by reason of any of the three last preceding subsections, an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, he shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice.
- (6) A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he had investigated the title or made enquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or enquiries.
- (7) Where a lease whether made before or after the commencement of this Act, is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.
- (8) This section, save where otherwise expressly provided, applies to contracts for sale whether made before or after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts

for sale, save that it applies only to contracts for exchange made after such commencement.

(9) This section applies only if and so far as a contrary intention is not expressed in the contract.

237. Other statutory conditions of sale. [cf. Eng. s.45; Vic. s.45; N.S.W. s.54] (1) A purchaser of any property shall not -

- (a) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; or
- (b) require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or noticed;

and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise:

Provided that this subsection shall not deprive a purchaser of the right to require the production, or an abstract or copy of -

- (i) any power of attorney under which any abstracted document is executed; or
- (ii) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document; or
- (iii) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document.

(2) Where land sold is held by lease (other than an under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(3) Where land is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

(4) On a sale of any property, the following expenses shall be borne by the purchaser where he requires them to be incurred for the purpose of verifying the abstract or any other purpose, that is to say -

- (a) the expenses of the production and inspection of all records, proceedings of courts, deeds, wills, probates, letters of administration, and other documents, not in the possession of the vendor or his mortgagee or trustee, and the expenses of all journeys incidental to such production or inspection; and
- (b) the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the possession of the vendor or his mortgagee or trustee, and all attested, stamped, office, or other copies or abstracts of, or extracts from, other documents aforesaid, not in the possession of the vendor or his mortgagee or trustee;

and where the vendor or his mortgagee or trustee retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

(5) On a sale of any property in parcels, a purchaser of two or more ^{parcels} held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(6) Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.

(7) The inability of a vendor to furnish a purchaser with an acknowledgment of his right to production and delivery of copies of documents of title or with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

(8) Such acknowledgments of the right of production or covenants for production and such undertakings or covenants for safe custody of documents as the purchaser can and does require shall be furnished or made at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser.

(9) A vendor shall be entitled to retain documents of title where -

- (a) he retains any part of the land to which the documents relate; or
- (b) the document consists of a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust.

(10) This section applies to contracts for sale made after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts for sale.

(11) This section shall apply subject to any stipulation or contrary intention expressed in the contract.

(12) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court.

238. General words implied in conveyances. [cf. Eng. s. 62; N.S.W. s. 67; Vic. s. 62] (1) A conveyance of land after the commencement of this Act shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, ~~or~~ at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

(2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

(3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

239. All estate clause implied. [cf. Eng. s. 63; Vic. s. 63; N.S.W. s. 68] (1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained.

(3) This section applies to conveyances made after the commencement of this Act.

Division 3 - Registration of Deeds

240. Registration of instruments and wills. [cf. 7 Vic. No. 16, ss. 8, 9, 10; N.S.W. No. 22 of 1897, s. 6] (1) After the commencement of this Act -

- (a) any agreement in writing, deed, conveyance or other instrument (except a lease for less than three years) affecting any estate in land may; and
- (b) any will or devise affecting any estate in land may; and
- (c) any other instrument, record or document which, prior to the passing of this Act, might have been registered under The Registration of Deeds Act of 1843 may; and
- (d) every Act of Parliament shall -

in accordance with the provisions of this Division, be registered, enrolled or, as the case may be, recorded in the office of the Registrar.

(2) A reference in any Act or instrument to, or to registration of an instrument under, the Registration of Deeds Act 1843 or the Titles to Land Act 1858 shall be construed as a reference to this Division.

241. Mode of registration. [cf. 7 Vic. No. 16, s. 13; N.S.W. No. 22 of 1897, s. 7] (1) Registration in accordance with the provisions of this Division shall be effected by lodging in the office of the Registrar at Brisbane a full copy of the instrument signed by some one or more of the parties to the original instrument, or will, certified in accordance with this section.

(2) The copy referred to in subsection (1) of this section -

- (a) shall be legibly and neatly written or printed upon paper of such form, size and quality as the Registrar may from time to time direct;
- (b) shall be certified to be a true copy by the oath of a credible person, such oath to be taken before any of the persons referred to in section 115 of The Real Property Acts, to whom the original such instrument or will shall be produced at the time of certification.

(3) Any erasure or interlineation on the copy referred to in subsection (1) of this section shall be indorsed in the margin opposite thereto with the signature or initials of the person certifying the same to be a true copy.

242. Signature on behalf of dead or absent party. [cf. 7 Vic. No. 16, s. 12; N.S.W. No. 22 of 1897, s. 9] When any party to any instrument is dead or absent at the time when registration of the instrument is required -

- (a) the executor or administrator of that person; or
- (b) the attorney constituted under a power of attorney of the absent party; or
- (c) if the Registrar is satisfied that the signature of a party cannot for any other reason be obtained, the Registrar -

may, in place of a party referred to in the preceding section, sign the copy instrument, and such signature shall be valid to all intents and purposes as if such copy had been signed by the original party to the instrument.

243. Receipts by Registrar and indorsement. [cf. 7 Vic. No. 16, s. 14; N.S.W. No. 22 of 1897, s. 10] (1) Upon the lodging in the office of the Registrar of any such certified copy as aforesaid and the verification of the same, the Registrar or his deputy shall grant and sign a receipt for such copy, specifying the day and hour on which it was lodged, and the name and place of abode of the witnesses attesting or verifying the same, and the number of such verified copy according as the same shall be numbered in such office, and such receipt shall be indorsed upon the original instrument to which such certified copy relates, and shall also be entered on such certified copy.

(2) The time so indorsed shall be taken to be the time of registration of every such instrument of which the certified copy has been made as aforesaid.

(3) Every such certified copy so lodged in the said office shall be numbered successively according to the order of time in which the same has been lodged, and shall immediately be registered according to such number and order of time in a book or books to be provided and kept for such purpose in the said office, and every such book shall be open at all convenient times to the inspection of persons desirous of searching the same.

(4) The Registrar or his deputy shall make and keep proper indexes to all registrations so that, as far as may be, information may readily be obtained by parties interested therein as to all incumbrances, liens or instruments affecting any land.

244. Mistakes in registration. [cf. 22 Vic. No. 1, s. 17; N.S.W. No. 22 of 1897, s. 13] No registration of any instrument under any Act now or heretofore in force for the registration of deeds or intended to be in pursuance of any such Act shall be defeated or made ineffectual by reason of any omission misdescription or error in any case where the identity of the instrument in evidence with the one alleged to have been registered is established and the substantial requirements of the Act have been complied with.

245. Deeds to take effect according to priority of registration. [cf. 7 Vic. No. 16, s. 11; N.S.W. No. 22 of 1897, s. 12] All deeds and other instruments (wills excepted) affecting land or any interest therein which shall be executed or made bona fide and for valuable consideration and which shall be duly registered in accordance with the provisions of this Division shall have and take priority not according to their respective dates but according to the priority of the registration thereof only.

246. Fraud of conveying party. [cf. 22 Vic. No. 1, s. 18; N.S.W. No. 22 of 1897, s. 18] No instrument hereafter executed and registered in accordance with the provisions of this Division shall lose any priority to which it would be entitled by virtue of such regis-

tration by reason only of bad faith in the conveying party if the party beneficially taking under such instrument acted bona fide and there was a valuable consideration for the same paid or given.

247. Covenants to produce deeds. [cf. 7 Vic. No.16, s.25] A covenant or undertaking whether now or hereafter entered into to produce to any purchaser lessee or mortgagee of land or his assigns any deed of or relating to such land shall be satisfied by a deposit of the deed permanently in the office of the Registrar who shall give a receipt for and keep in his office a list of all deeds so deposited and shall permit any person on payment of the proper fees to inspect and obtain copies of every such deed.

248. Certified copy as evidence. [cf. 7 Vic. No.16, s.30] (1) In all proceedings before any court of justice a copy of any instrument, will or copy thereof registered, deposited or lodged in accordance with the provisions of this Division shall, if such copy be signed by the Registrar and sealed with his seal, be received in evidence as prima facie proof of the instrument or will and of all matters contained or recited in or indorsed on the original instrument.

(2) In any case where the production of a certified copy or of any indorsement or memorial is required for the purpose of evidence under this Act the same may be produced by the Registrar or his deputy or any clerk in the office of the Registrar appointed by him for that purpose.

(3) In this section "copy" includes "photostatic copy".

Division 4 - Compulsory registration of title

249. Application of Division and interpretation. (1) The provisions of this Division apply, notwithstanding any of the provisions of Division 3 of this Part, to any application for registration of an instrument hereafter made by lodging the same in the office of the Registrar in accordance with the provisions of Division 3.

(2) In this Division the expression "applicant for registration" means a person who lodges, or (if that person is a solicitor or conveyancer or some person employed by a solicitor or conveyancer acting on behalf of another) on whose behalf there is lodged, an instrument for registration under the provisions of Division 3 of this Part.

250. Bringing land under The Real Property Acts. Any applicant for registration after the commencement of this Act shall upon registration of an instrument in accordance with the provisions of Division 3 of this Part make and prosecute an application in accordance with the provisions of The Real Property Acts to bring under those Acts the land to which the instrument so registered relates.

(2) This section shall not apply to -

- (a) any land in respect of which, at the time of such registration, there is in existence an application for bringing the land under The Real Property Acts;
- (b) any person from whom the Registrar is by reason of section 16 of The Real Property Acts precluded from receiving an application to bring land under those Acts, other than a person mentioned in paragraph (c) hereof; or

- (c) any person from whom the Registrar is by reason of section 16 of The Real Property Acts precluded from receiving an application to bring land under those Acts except with the consent of any other person, and the Registrar is satisfied that reasonable steps have been taken to obtain such consent but without success;
- (d) any person who is not competent under section 16 of The Real Property Acts to apply to bring such land under the Acts.

(3) The Registrar may for good reason extend, for such period not exceeding three months from the date of the registration referred to in subsection (1) of this section as he thinks fit, the time for making the application referred to in that subsection.

251. Limited effect of registration. (1) Registration in accordance with the provisions of Division 3 of this Part of any instrument executed whether before or after the commencement of this Act shall, subject to this section, be effective only for the period of twelve months next following the date of such registration.

(2) The Registrar may for good reason extend the period referred to in subsection (1) of this section for such one or more further periods of twelve months as he may think fit.

(3) Upon the expiration of the period of twelve months referred to in subsection (1) of this section and of such further period or periods (if any) as the Registrar may under subsection (2) of this section allow, registration in accordance with the provisions of Division 3 of this Part shall lapse and cease to be effective -

- (a) for the purpose of according priority to such registered instrument;
- (b) for the purpose at any time of constituting notice to any person of the execution or existence or registration of such instrument; and
- (c) for any other purpose of Division 3 of this Part.

(4) In any case in which, in the exercise of the powers conferred by this section, the Registrar extends the period during which a registered instrument shall have effect, he shall, in addition to any other indorsement required to be made by the provisions of this Part -

- (a) indorse upon the copy instrument referred to in section 243(1), and
- (b) enter in the book or books referred to in section 243(3) -

a memorial of such extension, including particulars of the day and hour on which it was granted and the day and hour on which such extension will expire.

(5) Unless the Registrar otherwise directs, an instrument which has, by virtue of subsection (3) of this section, lapsed and ceased to be effective shall not on any subsequent occasion be registered in accordance with the provisions of Division 3 of this Part.

(6) This section shall not apply to any application in respect of land referred to in subsection (2) of section 250, or to any application by a person referred to in that subsection, or to any application by any person who is not competent under section 16 of The Real Property Acts to apply to bring land under the provisions of those Acts.

(7) Any person aggrieved by a decision of the Registrar may within twenty-one days after such decision apply to a Judge for a direction that the Registrar reverse or modify his decision, and the Registrar shall thereafter act in accordance with the direction, if any, which may be given on such application.

252. Financial assistance. (1) Where the Registrar is satisfied that, by reason of financial or other circumstances, the making and prosecution of an application to bring land under the provisions of The Real Property Acts will cause hardship to an applicant for registration, the Registrar may by writing under his hand and seal certify that fact and may further certify that the whole or any specified proportion of the costs and expenses of bringing the land under the provisions of The Real Property Acts be paid out of the Assurance Fund constituted under sections 42 and 43 of those Acts.

(2) The Treasurer shall upon receipt of a certificate in accordance with subsection (1) of this section pay to the solicitor or conveyancer for the applicant for registration or, if the applicant for registration has no solicitor or conveyancer acting on his behalf, to the applicant for registration, the whole or such proportion of the costs and expenses as are certified by the Registrar to be the reasonable costs and expenses of bringing the land under the provisions of The Real Property Acts, and shall charge the same to the Assurance Fund.

PART XIX - MISCELLANEOUS

253. Protection of solicitors and others adopting this Act. [cf. Eng. s.182; N.S.W. s.176] (1) The powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed to be included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction, and a solicitor, counsel or conveyancer shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so.

(2) Nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3) Where the solicitor, counsel or conveyancer is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4) Where such persons are acting without a solicitor, counsel or conveyancer, they shall also be protected in like manner.

254. Restriction on constructive notice. [cf. N.S.W. s.164; Eng. s.199]

(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless -

- (a) it is within his own knowledge, or would have come to his knowledge, if such searches as to instruments registered or deposited under any Act, inquiries, and inspections had been made as ought reasonably to have been made by him; or

- (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4) This section applies to purchases made either before or after the commencement of this Act, save that where an action is pending at the commencement of this Act the rights of the parties shall not be affected by this section.

255. Service of notices. [cf. W.A. s.135; Eng. s.196; N.S.W. s.135]

- (1) (a) A notice required or authorised by this Act to be served on any person or any notice served on any person under any instrument or agreement that relates to property may be served on that person -

- (i) by delivering the notice to him personally;
- (ii) by leaving it for him at his usual or last known place of abode, or, if he is in business as a principal, at his usual or last known place of business;
- (iii) by posting it to him/as a letter addressed to him at his usual or last known place of abode, or, if he is in business as a principal, at his usual or last known place of business; or
- (v) in the case of a corporation by leaving it or by posting it as a letter addressed in either case to the corporation at its registered office or principal place of business in the State.

- (b) A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.

- (2) (a) If the person is absent from the State, the notice may be delivered as provided in subsection (1) of this section to his agent in the State.

- (b) If he is deceased, the notice may be so delivered to his personal representative.

(3) If the person is not known, or is absent from the State and has no known agent in the State or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the Court.

(4) Notwithstanding anything in the foregoing provisions of this section, the Court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery thereof.

(5) This section does not apply to notices served in proceedings in the Court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served.

(6) This section applies unless a contrary method of service of a notice is provided in the instrument or agreement or by this Act.

256. Payments into and applications to Court. [cf. N.S.W. s.171; Eng. s.203] (1) Payment of money into court under the provisions of this or any other Act shall effectually exonerate therefrom the person making the payment.

(2) Every application to the Court shall be by summons at chambers, except where it is otherwise provided in this Act (expressly or by implication) or in regulations made under this Act.

(3) On an application by a purchaser, notice shall be served in the first instance on the vendor unless the Court dispenses with such service.

(4) On an application by a vendor, notice shall be served in the first instance on the purchaser unless the Court dispenses with such service.

(5) On any application, notice shall be served on such persons (if any) as the Court thinks fit.

(6) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

257. Power to make regulations, etc. The Governor in Council may by notice published in the Gazette -

- (a) make regulations not inconsistent with this Act for the purpose of carrying out or giving effect to any of the provisions of this Act;
 - (b) make regulations prescribing the fees to be paid and taken, and the Registrar or other person by whom such fees are to be taken, for any matter or thing to be done under this Act;
 - (c) prescribe additional forms or omit vary or modify any form provided for use in connexion with this Act;
 - (d) make regulations reviving any Act or any Imperial Act or New South Wales Act or any provision of such Act which by virtue of this Act is repealed or ceases to apply.
-

THE FIRST SCHEDULE

Form 1

Application by tenant in tail for entry of title in fee simple

The Real Property Acts, 1861 to 1963
Property Law Act 197 , section 22

To the Registrar of Titles:

I, _____, being the registered proprietor for an estate
in tail by virtue of Certificate of Title _____ Volume _____ Folio _____
in the lands therein described do hereby apply to you to note on such
Certificate of Title that in pursuance of section 22 of the Property Law Act
I am entitled to such land for an estate in fee simple and I hereby certify
that this application is correct for the purposes of The Real Property Acts,
1861 to 1963.

DATED this _____ day of _____ 19____

Signed in my presence by the said
who is personally known to me.

Form 2

Notice of default under instalment contract

Property Law Act 197 , section 71

Take notice that you are in breach of a contract dated _____
for the sale of land described as _____ in that you defaulted
in payment of the instalment(s) due and payable thereunder on the
day(s) of _____ 19____.

And further take notice that, unless within the period of 30 days of
service of this notice, you pay or tender to [insert name of vendor or his
agent] the sum of \$ _____, being the amount of the said instalment(s),
the contract will be determined without further notice.

DATED this _____ day of _____ 19____

TO: [Insert name of purchaser]

SIGNED.....
Vendor [or Agent for the Vendor]

Memorandum of Variation of Mortgage

Form 3

Increase or reduction of interest rate

Property Law Act 197 , section 78

Mortgage No.

The rate of interest payable under the mortgage above referred to is hereby increased [or reduced] to _____ per centum per annum [subject to reduction to _____ per centum per annum within _____ days of the dates provided for payment of interest by such mortgage] and we hereby certify that this instrument is correct for the purpose of the Real Property Acts, 1861 to 1963 [or the Land Act 1962-1970, (or as the case may be)].

DATED this _____ day of _____ 19

Signed.....
[Signature of attesting witness]

Signed.....(Mortgagor)

Signed.....(Mortgagee)

[NOTE: This instrument must be signed by all parties to be bound thereby, and be lodged in duplicate with the relative mortgage.]

Form 4

Increase or reduction of mortgage debt

Property Law Act 197 , section 78

Mortgage No.

The principal sum intended to be secured by the mortgage above referred to is hereby increased [or reduced] to \$ _____, and we hereby certify that this instrument is correct for the purpose of the Real Property Acts, 1861 to 1963 [or the Land Act 1962-1970, (or as the case may be)].

DATED this _____ day of _____ 19

Signed.....
[Signature of attesting witness]

Signed.....(Mortgagor)

Signed.....(Mortgagee)

[NOTE: This instrument must be signed by all parties to be bound thereby, and be lodged in duplicate with the relative mortgage.]

Form 5

Shortening, renewal, or extension of mortgage term
Property Law Act, 197 , section 78

Mortgage No.

The term or currency of the mortgage above referred to is hereby shortened [or extended] to the _____ day of _____ 19 , and we hereby certify that this instrument is correct for the purposes of the Real Property Acts, 1861 to 1963, [or the Land Act 1962-1970, [or as the case may be)].

DATED this _____ day of _____ 19

Signed.....
[Signature of attesting witness]

Signed.....(Mortgagor)

Signed.....(Mortgagee)

[NOTE: This instrument must be signed by all parties bound thereby, and be lodged in duplicate with the relative mortgage.]

Form 6

Notice of exercise of power of sale
Property Law Act, 197 section 83

Take notice that default has been made under mortgage *[registered
no. D _____] in respect of land described as _____ in that:-

* (a) principal in an amount of \$ _____ [and interest in an
amount of \$ _____] then due and owing was not paid on
the _____ day of _____ 19 ;

* (b) the provisions of clause _____ of the mortgage [or of section
of the _____ Act, 19] have not been
observed or performed

And further take notice that, unless within 30 days of service upon you of this notice the said default is remedied, the undermentioned mortgagee may proceed to sell the land and exercise all or any of the other powers conferred by the mortgage and by the Property Law Act 19 .

DATED this _____ day of _____ 19

TO: [Here insert name and address
of mortgagor]

Signed.....
[To be signed by the mortgagee
or his agent]

* Omit if inapplicable.

-113/1-

Form 5A

Variation of condition, covenant or other provision of mortgage

Property Law Act, 197 , section 78

Mortgage No.

The mortgage above referred to is hereby varied by:-

- (a) omitting clause [7] of the said mortgage;
- (b) inserting in lieu thereof the following -
" ;
- (c) omitting from clause [8] the words "
and inserting in lieu thereof the words -
" "

DATED this day of 19

Signed.....
[Signature of attesting witness]

Signed.....(Mortgagor)
Signed.....(Mortgagee)

[NOTE: This instrument must be signed by all parties bound thereby, and
be lodged in duplicate with the relative mortgage.]

Form 5B

Postponement in priority of mortgage

Property Law Act, 197 , section 78

Mortgage No.

The mortgage above referred to is [as to \$] hereby
postponed in priority to mortgage no. and as
mortgagee under the mortgage above referred to hereby consents to such
postponement.

DATED this day of 19

Signed.....
[Signature of attesting witness]

Signed.....
(Mortgagee under Mortgage
No. above referred to)

Form 7

Notice of completion of sale
Property Law Act 197 , section 84

Take notice that property described as [here insert description]
comprising the whole [or part] of the property the subject of mortgage no.
dated was on the day of 19 sold
by public auction [or private contract] to [here insert name of purchaser]
of [here insert address of purchaser] for a price of \$ and that
such sale was completed on the day of 19 .

DATED this day of 19

TO: [Here insert name and address of
mortgagor]

Signed.....

[To be signed by the mortgagee
or his agent]

[NOTE: This form may, if desired, include details of the manner in which
the proceeds of sale have been disposed of, and of the balance (if any)
remaining due and owing by the mortgagor to the mortgagee or payable by
the mortgagee to the mortgagor.]

Form 8

Notice of appointment of receiver
Property Law Act 197 , section 90

.....[state name] of [state address], the mortgagee under
instrument of mortgage dated , registered no. given by
to , being entitled to appoint a receiver under the
power conferred by the abovementioned Act, and having become entitled to
exercise the power of sale conferred by that Act, hereby in exercise of the
foregoing power appoints [state names] of [state residence and occupa-
tion], to be receiver of the rents, profits and income of [if the appoint-
ment is to be in respect of part of the rents, profits, and income only, the
form should be altered accordingly and the part described], the property
comprised in the mortgage the particulars of which are set out in the
Schedule hereto.

The rate of commission which the receiver is entitled to retain is
.....[here fill in rate not to exceed five] per centum on the gross
amount of all money received by the receiver.

The receiver is hereby directed to insure and keep insured against
loss or damage by fire any buildings, effects, or property of an insurable
nature comprised in the mortgage, whether affixed to the freehold or not.

The said receiver accepts this appointment.

DATED this day of 19

Signed by [insert name of mortgagee] :

Signed by [insert name of receiver] :

The Schedule

[Insert particulars of mortgaged property]

[NOTE: This appointment must (except in the case of unregistered land) be
registered before the person appointed may exercise the powers
conferred by section .]

-115-
Form 9

Notice to remedy breach of covenant
Property Law Act 197 , section 124

To

The lessee of [here describe premises with reasonable
certainty as for instance, "No. 800 George Street, Brisbane"]

With reference to the lease of the abovementioned premises,
dated the day of , 19 from A.B.
to C.D., and the covenant by the lessee therein contained [here state
concisely the nature of the covenant or covenants breach of which is
complained of, as for instance, "to repair"], and the breach by you of that
covenant I hereby give you notice and require you to remedy that breach by
[here set out the remedy as, for instance, "by putting the said premises in
repair by doing and executing the repairs in and upon the said premises
which are specified in the Schedule hereto annexed." [Add if compensation
is claimed]. And I further require you to pay to me the sum of
as compensation for the breach already committed.

DATED this

day of

19

[Lessor]

[NOTE: The lessor will be entitled to re-enter or forfeit the lease in the
event of the lessee failing to comply with this notice within a reasonable
time - see section 124 of the Property Law Act 197 .]

Form 10

Notice to tenant
Property Law Act 197 , section 131

To [name of tenant]

I hereby give you notice to deliver up possession of the premises

..... [identify the premises]

which you hold of me as tenant, on the day of
next, or on the last day of the period of your tenancy next following the
giving of this notice.

DATED this

day of

19

[Landlord]

Notice to landlord
Property Law Act 197 , section 131

To [name of landlord]

I hereby give you notice that I am giving up possession of the
premises [identify the premises]

which I hold of you as tenant, on the day of
next, or on the last day of the period of my tenancy next following the giving
of this notice.

DATED this day of 19

[Tenant]

.....
Form 12

Complaint for recovery of possession
Property Law Act 197 , section 143

Queensland
[Brisbane] to wit

The complaint of of in the said
State, made this day of 19 , before the
undersigned, one of Her Majesty's Justices of the Peace for the said State
who says that of in the said State fails
to quit and deliver up possession of [shortly describe land held over]
situated at which was held of the said complainant [or, if
the complainant is not the landlord, here state name and address of the
landlord] under a tenancy [state nature of tenancy if
practicable] which expired by effluxion of time [or was determined by notice
to quit] on the day of 19 , whereupon
the said prays that I the said justice will proceed in the
premises according to law.

Made before me the day and year first abovementioned at
in the said State.

A.B., J.P.

.....

Form 13

Summons for complaint
Property Law Act 197 , section 144

To _____ of _____, in the State of
Queensland.

Whereas the above complaint [or, if the summons is not on the
complaint, a complaint] has this day been made before the undersigned, one
of Her Majesty's Justices of the Peace for the said State [if the summons is
not on the complaint here state shortly the matter of the complaint]:

You are hereby commanded, in Her Majesty's name, to appear at the
Magistrates Court at _____, in the said State, on the _____ day
of _____, 19____, at _____ o'clock in the _____ noon, to answer the
said complaint and to show cause why a warrant to eject you from the said
land should not be issued.

Given under my hand at _____, in the said State, this
day of _____, 19____.

A.B., J.P.

Indorsement on Summons

To the abovenamed defendant.

Take notice that unless not less than three days before the day on
which you are required by this summons to appear you give written notice to
the clerk of the Magistrates Court whereat you are now summoned to appear
that you wish to appear and answer the complaint referred to in this
summons, the said complaint may be heard and determined in your absence
and evidence by affidavit on behalf of the complainant may be admitted.
.....

Form 14

Warrant for possession
Property Law Act 197 , section 146

Warrant to member of the Police Force to Take and Give Possession
To the Principal Police Officer at _____, in the State of
Queensland, and to all other members of the Police Force in the said State.

Whereas the Magistrates Court at _____, in the State of Queens-
land, in pursuance of the Property Law Act 197 and The Justices
Acts 1886 to 1968, did on this [the] _____ day of _____, 19____,
upon hearing the matter of a complaint made by A.B. [or C.D. the agent of
A.B.] against E.F. adjudge that the said A.B. is entitled to the possession
of [here describe the land as in the complaint] and also ordered that a
warrant should issue in accordance with the provisions of the said Act for
putting the said A.B. into possession of the said land within [as in Order]
clear days from the date hereof:

Now, therefore, I/we the undersigned, being Her Majesty's justice
(justices) of the peace constituting the said Court [or, being the Clerk of the
said Court] do authorise and command you on any day within [as in Order]
clear days from the date hereof except on Sunday, [Christmas Day, Good
Friday and Anzac Day, or any of those days, to be added if necessary] between
the hours of nine in the forenoon and four in the afternoon to enter by force if
necessary and with or without the aid of [the landlord or agent of the landlord
as the case may be] or any other person or persons you deem necessary to
call to your assistance into and upon the said land and to eject therefrom the
said E.F. and all persons claiming under or through him together with his or
their goods and effects and to give possession of the same to the said A.B.
[or C.D. as such agent as aforesaid on behalf of the said A.B.]

Given under our hands (or my hand) this _____ day of _____

19____

J.P. [or Clerk of the Court, as the case may be]
J.P. [where court constituted by more justices than one]
.....

Form 15

Form of general power of attorney
Property Law Act 197, section 170(1)

This general power of attorney is made this day of
19 by A.B. of

I appoint C.D. of [or C.D. of and E.F. of
 jointly or jointly and severally] to be my attorney[s] in
accordance with section 170(1) of the Property Law Act 19 .

In witness.....etc.

Form 16

Form of instrument revoking power of attorney
Property Law Act 197 , section 170(2)

Take notice that I hereby revoke as from the day of
19 the power of attorney dated the day of
19 whereby I appointed C.D. of [or C.D. of
 and E.F. of jointly or jointly and severally] to be
my attorney[s] in accordance with section 170(1) of the Property Law Act
19 .

In witness.....etc.

Form 17

Release or disclaimer of power
Property Law Act 197 , section 204

To: The Registrar of Titles [or as the case may be]

I, [insert names], of [insert address and description], being the
person entitled to exercise a power in respect of the land described as [insert
description] comprised in Certificate of Title Volume Folio
do hereby, in pursuance of the abovementioned section, release [or disclaim]
such power.

[If it is desired to limit the release or disclaimer to part only of the land,
proceed as follows:-]

so far as concerns that part of the land which is comprised in the
following description, viz.:-

And I hereby certify that this instrument is correct for the purposes
of The Real Property Acts, 1861 to 1963.

DATED this day of 19

(Signature)

Signed in my presence by
the said
who is personally known to me.

.....(Signature)

THE SECOND SCHEDULE

Short Forms of Covenants in Leases

Property Law Act 197 , section 109

Direction as to the forms in this Schedule

1. Parties who use any of the forms in the first column in this Schedule may substitute for the words "lessee" or "lessor",. any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.
2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.
3. Such parties may fill up the blank spaces left in the forms in the first column of this Schedule so employed by them with any words or figures and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
4. Such parties may introduce into or annex to any form in the first column any addition to, exception from, or qualification of the same, or may strike out or omit any words of or from such column; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in the second column.
5. The covenants in the second column shall be taken to be made with and apply to the lessor or lessee or mortgagor or mortgagee as the case may be, his executors, administrators, and assigns, unless otherwise stated.

Leases

Column one.	Column two.
1. That the lessee covenants with the lessor to pay rent.	1. And the said lessee hereby for himself, his heirs, executors, administrators, and assigns, covenants with and promises to the said lessor that he the said lessee, his executors, administrators, or assigns, will, during the said term, pay unto the said lessor, his executors, administrators, or assigns the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever, other than any deduction which the lessee is by any Act of Parliament entitled to make.
2. Provided that in the event of damage by fire, lightning, flood, or tempest, rent shall abate until the premises are restored.	2. Provided that in case the demised premises, or any part thereof, shall at any time during the continuance of the lease be destroyed or damaged by fire, flood, lightning, storm, or tempest, so, in any such event as to render the same unfit for the occupation and use of the lessee, then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee.

Column one.	Column two.
<p>3. And to pay taxes, except for local improvements.</p>	<p>3. And also that the lessee will pay all taxes, rates and assessments whatsoever, whether municipal, local government, parliamentary, or otherwise which are at any time during the term charged upon the demised premises, or upon the lessor, on account thereof, except taxes for local improvements or works assessed upon the property benefited thereby.</p>
<p>4. And to maintain and leave the premises in good repair (having regard to their condition at the commencement of the lease), reasonable wear and tear, and damage by fire, lightning, flood and tempest excepted.</p>	<p>4. And also that the lessee will during the term, when, where, and so often as the need shall be, but having regard to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear, and damage by fire, lightning, flood and tempest occurring within the term -</p> <p>(a) well and sufficiently maintain, amend, and keep; and</p> <p>(b) at the expiration or sooner determination of the term peaceably surrender and yield up unto the lessor,</p> <p>in good and substantial repair the leased premises, including all appurtenances, buildings, erections and fixtures belonging to the leased premises, or at any time within the term lawfully made or erected by the lessor upon or within the leased premises.</p>
<p>5. And that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.</p>	<p>5. That the lessor, his executors, administrators and assigns, may, by himself or themselves, or his or their agents, twice in every year during the term at a reasonable time of the day upon giving to the lessee two days previous notice, enter upon the demised premises and view the state of repair thereof, and may serve upon the lessee, his executors, administrators, or assigns, or leave at his or their last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring him or them, within a reasonable time, to repair same in accordance with any covenant expressed or implied in the lease, and that in default of his or their so doing it shall be lawful for the lessor, his executors, administrators, or assigns from time to time to enter and execute the required repairs.</p>
<p>6. And that the lessor may enter and carry out requirements of public authorities, and repair under the lease.</p>	<p>6. That the lessor, his executors, administrators and assigns, may, by himself or themselves, or his or their agents, at all reasonable times during the term, with workmen and others, and all necessary materials and appliances, enter upon the demised premises, or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting</p>

Column one.	Column two.
<p>And that the lessor may enter and carry out requirements of public authorities, and repair under the lease - <u>continued</u>.</p>	<p>the said premises, and of any notices served upon the lessor or lessee by licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of any repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease; provided that such destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.</p>
<p>7. And to insure from fire in the joint names of the lessor and the lessee.</p>	<p>7. And also that the lessee will forthwith insure the demised premises to the full insurable value thereof in some insurance office approved by the lessor in the joint names of the lessor and the lessee, and keep the same so insured during the continuance of the lease, and will upon the request of the lessor show to him the receipt for the last premium paid for such insurance, and as often as the demised premises shall be destroyed or damaged by fire all and every the sum or sums of money which shall be recovered or received for or in respect of such insurance, shall be laid out and expended in building or repairing the demised premises or such parts thereof as shall be destroyed or damaged by fire as aforesaid.</p>
<p>8. And to paint outside every [] year.</p>	<p>8. And also that the lessee will, in every year during the continuance of the lease, paint all the outside woodwork and ironwork belonging to the demised premises now or usually painted with two coats of proper oil colours, in a workmanlike manner.</p>
<p>9. And to paint and paper inside every [] year.</p>	<p>9. And also that the lessee will, in every year, paint the inside wood, iron and other works now or usually painted, with two coats of proper oil colours, in a workmanlike manner, and also will repaper with paper of a quality as at present such parts of the premises as are now papered, and also wash, stop, whiten, or colour such parts of the demised premises as are now plastered.</p>
<p>10. And to fence.</p>	<p>10. And also that the lessee will, during the continuance of the lease, erect and put up on the boundaries of the demised land or upon such boundaries upon which no substantial fence now exists a good and substantial fence.</p>
<p>11. And to keep up fences.</p>	<p>11. And also will, from time to time, during the continuance of the lease, keep up the fences and walls of or belonging to the demised premises, and make anew any parts thereof that may require to be new-made in a good and husband-like manner and at proper seasons of the year.</p>

Column one.	Column two.
12. And to cultivate.	12. And also that the lessee will at all times during the continuance of the lease cultivate, use, and manage all such parts of the land as are or shall be broken up or converted into tillage in a proper and husband-like manner, and will not impoverish or waste the same.
13. That the lessee will not cut timber.	13. And also that the lessee will not cut down, fell, injure, or destroy any growing or living timber or timber-like trees standing and being upon the demised land, without the consent in writing of the lessor.
14. That the lessee will not without consent use premises otherwise than as a private dwelling-house.	14. And also that the lessee or any sub-tenant will not convert, use, or occupy the demised premises or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the lessor.
15. And will not assign or sublet without leave; no fine to be taken.	15. And also that the lessee or any sub-tenant will not, during the continuance of the lease, assign, transfer, demise, sublet, or part with the possession or by any act or deed, procure the demised premises, or any part thereof, to be assigned, transferred, demised, sublet unto or put into the possession of any person or persons, without the consent in writing of the lessor, but such consent shall not be refused in the case of a proposed respectable and responsible assign, tenant or occupier: Provided further, that no fine or sum of money in the nature of a fine shall be payable for or in respect of such license or consent, but this proviso shall not preclude the right of the lessor to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such license or consent.
16. That the lessee will not carry on any offensive trade.	16. That the lessee or any sub-tenant will not at any time during the continuance of the lease use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the demised premises or any part thereof, any noxious, noisome, or offensive art, trade, business, occupation, or calling, and no act, matter, or thing whatsoever shall, at any time during the continuance of the lease, be done in or upon the said premises or any part thereof which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of any neighbouring premises.

Column one.	Column two.
17. That the lessee will carry on the business of a hotel-keeper and conduct the same in an orderly manner.	17. And also that the lessee, or the sub-tenant for the time being, will at all times during the continuance of the lease, use, exercise, and carry on, in and upon the demised premises, the trade or business of a licensed victualler or hotelkeeper, and keep open and use the buildings upon the demised land as and for a hotel, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed any act, matter, or thing whatsoever whereby or by means whereof any license shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner howsoever; and will comply in all respects with the requirements of the Liquor Act for the time being in force.
18. And will apply for renewal of license.	18. And also that the lessee, or the sub-tenant for the time being, will from time to time, during the continuance of the lease at the proper times for that purpose, apply for and endeavour to obtain at his own expense all such licenses as are or may be necessary for carrying on the said trade or business of a licensed victualler or hotelkeeper in and upon the demised premises, and keeping the buildings open as and for a hotel.
19. And will facilitate the transfer of license.	19. And also that the lessee, or the sub-tenant for the time being, will at the expiration or other sooner determination of the lease sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any license as may be required by law to be affixed to the demised premises, to be thereto affixed and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things as shall be necessary to enable the lessor, or any person authorised by him, to obtain the renewal of any license or any new license, or the transfer of any license then existing and in force.
20. The said (lessor) covenants with the said (lessee) for quiet enjoyment.	20. And the lessor hereby covenants with the lessee that he paying the rent hereby reserved, and performing the covenants hereinbefore on his part contained, shall and may peaceably possess and enjoy the demised premises for the term hereby granted, without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from, or under him.
21. And that the lessee may remove his fixtures.	21. And also that the lessee may at or prior to the expiration of the lease take, remove, and carry away from the demised premises all fixtures, fittings, plant, machinery, utensils,

Column one.	Column two.
And that the lessee may remove his fixtures - <u>continued.</u>	shelving, counters, safes, or other articles upon the demised premises in the nature of trade or tenants' fixtures brought upon the demised premises by the lessee, but the lessee shall in such removal do no damage to the demised premises, or shall forthwith make good any damage which he may occasion thereto.

THE THIRD SCHEDULE

Improvements by tenant

Property Law Act 197 , section 157

PART I

1. Drainage of land.
2. Erection or enlargement of buildings.
3. Making of fences.
4. Formation of silos.
5. Making of water meadows or works of irrigation.
6. Making of dams for the conservation of water, or wells.
7. Clearing of land.

PART II

8. Liming of land.
 9. Manuring of land with purchased artificial or other purchased manures.
 10. Laying down pasture with clover, grass, lucerne, sainfoin, or other seeds sown more than two years prior to the determination of the tenancy.
 11. Making of plantations of bananas or pineapples.
 12. Planting of sugar-cane.
 13. Planting of orchards with fruit trees permanently set out.
-

-126-
THE FOURTH SCHEDULE

Rules as to arbitration

Property Law Act 197 , section 159

PART I - Arbitration before a single arbitrator

Appointment of arbitrator

1. A person agreed upon between the parties, or in default of agreement between the parties within 14 days of the date of the giving of notice by one party to the other party requiring appointment of an arbitrator, nominated by the Secretary of the Department of Primary Industries, herein called the Minister, on the application in writing of either of the parties, shall be appointed arbitrator.

2. If a person appointed arbitrator dies, or is incapable of acting, or for seven days after notice from either party requiring him to act fails to act, a new arbitrator may be appointed as if no arbitrator had been appointed.

3. Neither party shall have power to revoke the appointment of the arbitrator without the consent of the other party.

4. Every appointment, notice, revocation, and consent under this Part of these rules must be in writing.

Time for award

5. The arbitrator shall make and sign his award within twenty-eight days of his appointment or within such longer period as the Minister may (whether the time for making the award has expired or not) direct.

Removal of arbitrator

6. Where an arbitrator has misconducted himself the Court or a Judge thereof may remove him.

Evidence

7. The parties to the arbitration, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator all samples, books, deeds, papers, accounts, writings, and documents, within their possession or power respectively which may be required or called for, and do all other things which during the proceedings the arbitrator may require.

8. The arbitrator shall have power to administer oaths, and to take the affirmation of parties and witnesses appearing, and witnesses shall, if the arbitrator thinks fit, be examined on oath or affirmation.

Statement of case

9. The arbitrator may at any stage of the proceedings, and shall, if so directed by a judge of the Court (which direction may be given on the application of either party), state in the form of a special case for the opinion of that court any question of law arising in the course of the arbitration.

Award

10. The arbitrator shall on the application of either party specify the amount awarded in respect of any particular improvement or improvements, and the award shall fix a day not sooner than one month nor later than two months after the delivery of the award for the payment of the money awarded for compensation, costs, or otherwise, and shall be in such form as may be prescribed by the Minister.

11. The award to be made by the arbitrator shall be final and binding on the parties and the persons claiming under them respectively.

12. The arbitrator may correct in an award any clerical mistake or error arising from any accidental slip or omission.

13. When an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the Court or a Judge thereof may set the award aside.

Costs

14. The costs of and incidental to the arbitration and award shall be in the discretion of the arbitrator, who may direct to and by whom and in what manner these costs or any part thereof are to be paid, and the costs shall be subject to taxation by the proper officer of the Court on the application of either party.

15. The arbitrator shall, in awarding costs, take into consideration the reasonableness or unreasonableness of the claim of either party, either in respect of amount or otherwise, and any unreasonable demand for particulars or refusal to supply particulars, and generally all the circumstances of the case, and may disallow the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily.

Forms

16. Any forms for proceedings in arbitrations under this Act which may be prescribed by the Minister shall, if used, be sufficient.

PART II - Arbitration before two arbitrators or an umpire

Appointment of arbitrators and umpire

1. If the parties agree in writing that there be not a single arbitrator, each of them shall appoint an arbitrator.

2. If before award an arbitrator dies or is incapable of acting, or for seven days after notice from either party requiring him to act fails to act, the party appointing him shall appoint another arbitrator.

3. Notice of every appointment of an arbitrator by either party shall be given to the other party.

4. If for fourteen days after notice by one party to the other to appoint an arbitrator, or another arbitrator, the other party fails to do so, then, on the application of the party giving notice, the Minister shall appoint a person to be an arbitrator.

5. Where two arbitrators are appointed, then (subject to the provisions of these rules) they shall, before they enter on the arbitration, appoint an umpire.

6. If before award an umpire dies or is incapable of acting, or for seven days after notice from either party requiring him to act fails to act, the arbitrators may appoint another umpire.

7. If for seven days after request from either party, the arbitrators fail to appoint an umpire, or another umpire, then, on the application of either party, the Minister shall appoint a person to be the umpire.

8. Neither party shall have power to revoke an appointment of an arbitrator without the consent of the other.

9. Every appointment, notice, request, revocation, and consent under this Part of these rules shall be in writing.

Time for an award

10. The arbitrators shall make and sign their award in writing within twenty-eight days after the appointment of the last appointed of them, or on or before any later day to which the arbitrators, by any writing signed by them, may enlarge the time for making the award, not being more than forty-nine days from the appointment of the last appointed of them.

11. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to either party or to the umpire a notice in writing stating that they cannot agree, the umpire may forthwith enter on the arbitration in lieu of the arbitrators.

12. The umpire shall make and sign his award within one month after the original or extended time appointed for making the award of the arbitrators has expired.

13. The time for making an award may from time to time be extended by the Minister, whether the time for making the award has expired or not.

Removal of arbitrator, evidence, statement of case,
award, costs, forms

14. The provisions of Part I of these rules as to the removal of an arbitrator, the evidence, the statement of a case, the award, costs, and forms shall apply to an arbitration in accordance with this Part as if the expression "arbitrator" whenever used in those provisions included two arbitrators or an umpire, as the case may require.

THE FIFTH SCHEDULE
Acts repealed
Property Law Act 197 , section 3
PART 1 - Imperial Acts

Year and Number	Short Title (if any) or Subject-matter	Extent of Repeal
1266 51 Hen. 3, St. 4	Distress for rent	The whole
1267 52 Hen. 3, c. 23	Statute of Marlborough (waste)	The whole
1275 3 Edw. 1, c. 16	Distress for rent	The whole
1285 13 Edw. 1, St. 1, c. 1	De Donis Conditionalibus	The whole
1285 13 Edw. 1, St. 1, c. 2	Vexatious Replevins	The whole
1285 13 Edw. 1, St. 1, c. 22	Waste	The whole
1285 13 Edw. 1, St. 1, c. 37	Distress	The whole
1290 18 Edw. 1, St. 1	Quia Emptores	The whole
1324 17 Edw. 2, St. 1, c. 6	De Prerogativa Regis	The whole
1327 1 Edw. 3, St. 2, c. 12	Fines on Alienation	The whole
1327 1 Edw. 3, St. 2, c. 13	Tenants in Capite	The whole
1361 34 Edw. 3, c. 15	Confirmation of Grants	The whole
1361 34 Edw. 3, c. 16	Statute of Non-claim	The whole
1376 50 Edw. 3, c. 6	Fraudulent assurances	The whole
1483 1 Ric. 3, c. 7	Statute of Fines	The whole
1487 3 Hen. 7, c. 4	Deeds of gift of chattels	The whole
1487 4 Hen. 7, c. 24	Statute of Fines	The whole
1535 27 Hen. 8, c. 10	Statute of Uses	The whole
1539 31 Hen. 8, c. 1	Statute of Partition	The whole
1540 32 Hen. 8, c. 9	Pretenced Titles	The whole
1540 32 Hen. 8, c. 28	Validation of leases	The whole
1540 32 Hen. 8, c. 31	Recoveries	The whole
1540 32 Hen. 8, c. 32	Statute of Partition	The whole
1540 32 Hen. 8, c. 34	Grantees of Reversions	The whole
1540 32 Hen. 8, c. 36	Statute of Fines	The whole
1540 32 Hen. 8, c. 37	Executors to recover arrears of	The whole
1554 1 & 2 Phill. & Mary, c. 12	Impounding of distress [rent	The whole
1570 13 Eliz. 1, c. 5	Fraudulent conveyances	The whole
1572 14 Eliz. 1, c. 8	Recoveries	The whole
1585 27 Eliz. 1, c. 4	Fraudulent conveyances	The whole
1660 12 Car. 2, c. 24	Tenures Abolition Act	The whole
1665 17 Car. 2, c. 7	Distress for Rents	The whole
1666 18 & 19 Car. 2, c. 11	Cestui que Vie Act, 1666	The whole
1677 20 Car. 2, c. 2	Statute of Frauds, 1677	The whole
1689 2 Wm. & Mary, Sess. 1, c. 5	Distress for Rent Act, 1689	The whole
1705 4 & 5 Anne, c. 16 (or c. 3)	Administration of Justice Act	The whole
1707 6 Anne, c. 72 (or c. 18)	Cestui que Vie Act, 1707	The whole
1709 8 Anne, c. 18 (or c. 14)	Landlord and Tenant Act, 1709	The whole
1730 4 Geo. 2, c. 28	Landlord and Tenant Act, 1730	The whole
1737 11 Geo. 2, c. 19	Distress for Rent Act, 1737	The whole
1800 39 & 40 Geo. 3, c. 98	Accumulations Act, 1800	The whole
1814 54 Geo. 3, c. 145	Corruption of the Blood Act, 1814	The whole
1816 56 Geo. 3, c. 16	Receiver of Crown Rents Act	The whole
1817 57 Geo. 3, c. 93	Distress (Costs) Act, 1817	The whole
1820 1 Geo. 4, c. 87	Recovery of possession by landlords	The whole
1827 7 & 8 Geo. 4, c. 17	Distress (Costs) Act, 1827	The whole
1828 9 Geo. 4, c. 14	Statute of Frauds Amendment	The whole
	- Act, 1828	The whole

PART 2 - New South Wales Acts

1843 7 Vic. No. 16	Registration of Deeds Act, 1843	The whole
1847 11 Vic. No. 28	Leases Act 1847	The whole
1857 20 Vic. No. 27	Registration of Deeds Act, 1857	The whole
1858 22 Vic. No. 1	Titles to Land Act, 1858	The whole

Year and Number	Short Title (if any) or Subject-matter	Extent of Repeal
<u>PART 3 - Queensland Acts</u>		
1861 25 Vic. No. 14	<u>The Real Property Acts, 1861 to 1963</u>	Sections 15A, 61, 61A, 69, 70, 71, 82, 90, 135, 136
1867 31 Vic. No. 16	<u>The Distress Replevin and Ejectment Act of 1867</u>	The whole
1867 31 Vic. No. 17	<u>Common Law Practice Act 1867-1970</u>	Sections 6, 7, 9, 10
1867 31 Vic. No. 18	<u>The Equity Act of 1867</u>	Sections 63 to 68 (inclusive); sections 70 to 72 (inclusive)
1867 31 Vic. No. 22	<u>The Statute of Frauds and Limitations of 1867</u>	The whole
1867 31 Vic. No. 24	<u>The Succession Acts, 1867 to 1968</u>	Sections 24, 25, 26, 66
1867 31 Vic. No. 36	<u>The Mercantile Acts, 1867 to 1896</u>	Sections 1, 2, 46 to 50 (inclusive)
1876 40 Vic. No. 6	<u>The Judicature Act of 1876</u>	Sections 5(2), 5(3), 5(4), 5(5), 5(6), 5(7)
1877 41 Vic. No. 18	<u>The Real Property Act of 1877</u>	Section 31
1891 55 Vic. No. 12	<u>The Escheat (Procedure and Amend- ment) Act of 1891</u>	The whole
1896 60 Vic. No. 6	<u>The Sale of Goods Act of 1896</u>	Section 7
1899 63 Vic. No. 6	<u>The Registration of Deeds Act of 1899</u>	The whole
1905 5 Edw. 7, No. 12	<u>The Agricultural Holdings Act of 1905</u>	The whole
1906 6 Edw. 7, No. 3	<u>The Ancient Lights Declaratory Act of 1906</u>	The whole
1909 9 Edw. 7, No. 12	<u>The Metropolitan Water Supply and Sewerage Acts, 1909 to 1962</u>	Section 100(3)
1911 2 Geo. 5, No. 18	<u>The Partition Act of 1911</u>	The whole
1913 4 Geo. 5, No. 5	<u>The Partition Act Amendment Act of 1913</u>	The whole
1931 22 Geo. 5, No. 28	<u>The Lessees' Relief Acts, 1931 to 1932</u>	The whole
1933 24 Geo. 5, No. 26	<u>The Contracts of Sale of Land Act of 1933</u>	The whole
1934 25 Geo. 5, No. 33	<u>The Law of Distress and Other Acts Amendment Act of 1934</u>	The whole
1936 1 Geo. 6, No. 1	<u>Local Government Act 1936-1970</u>	Section 27(9)
1952 1 Eliz. 2, No. 42	<u>The Law Reform (Joint Tortfeasors Contributory Negligence and Division of Chattels) Act of 1952</u>	Part IV
1955 4 Eliz. 2, No. 18	<u>The Encroachment of Buildings Act of 1955</u>	The whole
1962 No. 16 of 1962	<u>The Escheat Amendment Act of 1962</u>	The whole
1968 No. 12 of 1970	<u>District Court Rules, 1968</u>	Rules 169, 170
1970 No. 12 of 1970	<u>Termination of Tenancies Act, 1970</u>	The whole
1972 No. 9 of 1972	<u>Perpetuities and Accumulations Act 1972</u>	The whole
1972 No. 12 of 1972	<u>Statute of Frauds 1972</u>	The whole

THE SIXTH SCHEDULE

Procedure in Cases of Bona Vacantia

1. Procedure in cases of escheat or other like cases. [cf. Qld. 55 Vic. No. 12] When any question arises as to the title of Her Majesty in right of the Crown to any land or interest in land in any case of escheat or alleged escheat or of bona vacantia or alleged bona vacantia, or in the case of a grant to an alleged alien; or as to the title of Her Majesty in right of the Crown in any other case in which, prior to the passing of The Escheat (Procedure and Amendment) Act, 1891, an inquest of office might have been held, the truth of the matter shall be ascertained in the manner prescribed in this Schedule.
2. Writ of inquisition. In any such case a writ called a writ of inquisition shall be issued from the Supreme Court on the fiat of a Crown Law Officer, which writ shall be addressed to a District Court Judge, or a Commissioner of the Supreme Court for taking affidavits, and shall command him to make diligent inquiry into the matter and to certify under his hand and seal such facts respecting the failure of the heirs or next-of-kin of an intestate, or the alienage of a grantee, or such other facts, as may be necessary to establish the title of Her Majesty in right of the Crown or otherwise.
3. Return of writ. The writ of inquisition with the certificate shall be forthwith returned into the Office of the Supreme Court at Brisbane or Townsville, as the case may be, and any person aggrieved by the certificate shall be entitled to traverse or object to it, in such manner and within such time as may be directed by Rules of Court, and in the absence of any such Rules within one month after the return of the writ.
4. Writ to be returned before new grant made. No grant shall be made of any land alleged to be escheated until after the writ of inquisition and the certificate finding the title thereto has been returned into the Office of the Supreme Court, and the time for traversing the same has expired.
5. Effect of certificate. Except as herein or by Rules of Court otherwise provided, the certificate shall be conclusive evidence of the facts stated therein.
6. Saving. The proceedings upon a writ of inquisition shall not prejudice any rights which at the time of the death of the person that led to the issue of the writ were vested in some other person.
7. Procedure where waiver by the Crown. [cf. Qld. No. 16 of 1962, s. 3A(4)] If at any time not later than two months after the making of an Order in Council under section 20 of this Act waiving the title of Her Majesty to any property, any person claiming any estate or interest in or to the said property requests that a writ of inquisition in respect of Her Majesty's title thereto be issued, and gives security to the satisfaction of a Crown Law Officer for the costs of the issue and execution of such writ, such writ may issue under the provisions of this Schedule and the Order in Council waiving the right of Her Majesty shall cease to have effect from the date when it was made.

If the title of Her Majesty to the property is established by a certificate returned under this Schedule then at any time after the time for traversing such certificate has expired a further Order in Council (which may or may not differ from the previous Order in Council) waiving the right of Her Majesty may be made under subsection (5) of section 20 of this Act, but no further request may be made under this section of the Schedule.

If an Order in Council is made waiving the right of Her Majesty to any land or interest in land the provisions of section 1 of this Schedule shall be read subject to this section save that a writ of inquisition at the instance of the Crown may issue at any time.

8. Power to regulate procedure with respect to escheats to the Crown. The Judges of the Supreme Court or a majority of them, of whom the Chief Justice shall be one, may from time to time make rules for the procedure on and incidental to writs of inquisition and consequential on the holding of inquiries under such writs.

The Rules of Court may prescribe that any questions of fact arising upon any such inquiry shall be determined by a jury, and may prescribe the number of jurors, and may direct that any provisions of the laws relating to juries shall apply to such juries and jurors.

All Rules of Court made under this section shall be laid before Parliament within fourteen days after they are made, if Parliament is then sitting, and if Parliament is not then sitting, then within fourteen days after the beginning of the next session of Parliament, and shall be judicially noticed and shall have effect as if enacted by this Act.

9. The provisions of Order 83 of The Rules of the Supreme Court shall until amended or until other provision is made in that behalf apply to proceedings in respect of any interest in land in any case of escheat or alleged escheat and in any case of bona vacantia or alleged bona vacantia arising after the commencement of this Act as if a reference in the provisions of that Order to The Escheat (Procedure and Amendment) Act, 1891 was a reference to this Schedule.

10. In this Schedule the term "a Crown Law Officer" means and includes the Attorney-General, the Solicitor General and the Minister for Justice.

An Act to Amend The Real Property Acts, 1861 to 1963 in certain particulars.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

1. Short title and citation. (1) This Act may be cited as the Real Property Act 197 .

(2) The Real Property Acts, 1861 to 1963, are in this Act referred to as the Principal Act.

(3) The Principal Act as amended by this Act may be cited as the Real Property Act 1861-197 .

2. Amendment of Principal Act. The Principal Act is amended by omitting section 57 and inserting in its stead the following section:-

"57. Remedy when mortgagor or encumbrancer is in default. Power to sell. The mortgagee or encumbrancee shall have and may exercise the power to sell conferred by the Property Law Act 197 ."

3. Amendment of s. 68. Section 68 of the Principal Act is amended by inserting after the words "or by this Act" where they appear in the second paragraph of section 68 the words "or by the Property Law Act 197 ."

4. Application. This Act applies to a mortgagee or encumbrancee exercising power to sell whether the mortgage was made before or after the commencement of this Act.

-----oOo-----

CIRCULATION LIST

Copies of the Working Paper on this topic were sent to:

Ministers of the Crown
Judges of the Supreme and District Courts
Law Reform Agencies
Members of the Bar Association and Law Society
Government Instrumentalities
Various other interested bodies

Comments were received from the following:

Australian Finance Conference Ltd.
Dean of the Law Faculty, University of Queensland
Hargreaves & Palmer, Solicitors, Ipswich
Ipswich and District Law Association
J. P. Kelly & Co., Solicitors, Brisbane
W. N. Lees, Solicitor, Brisbane
Life Offices' Association of Australasia
Milliner & Garde, Solicitors, Brisbane
Payne Grose & Redhead, Solicitors, Bundaberg
C. W. Pincus, Barrister, Brisbane
Queensland Law Society Incorporated
Solicitor-General
Treasury Department

-----o0o-----