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**A BILL TO CONSOLIDATE, AMEND AND REFORM
THE SUPREME COURT ACTS AND ANCILLARY
ACTS REGULATING CIVIL PROCEEDINGS IN THE
SUPREME COURT**

Report No 32

Queensland Law Reform Commission
1988

QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON A BILL TO CONSOLIDATE, AMEND
AND REFORM THE SUPREME COURT ACTS

AND

ANCILLARY ACTS REGULATING CIVIL
PROCEEDINGS IN THE SUPREME COURT

Q.L.R.C. 32

QUEENSLAND

A REPORT OF THE LAW REFORM COMMISSION

ON THE REFORM OF THE
SUPREME COURT ACTS

AND

ANCILLARY ACTS REGULATING CIVIL
PROCEEDINGS IN THE SUPREME COURT

Q.L.R.C. 32.

The Honourable S.S. Doumany, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

The second programme of the Law Reform Commission of Queensland as approved by the Governor in Council includes a revision of the rules and procedure regulating civil proceedings in the Supreme Court and elsewhere with a view to expediting such proceedings and with particular reference in the Supreme Court to the consolidation and amendment of certain procedural statutes.

As part of this process of revision, a working paper was prepared which contained a commentary and a proposed Bill to consolidate, amend and reform the Supreme Court Acts and Ancillary Acts regulating civil proceedings in the Supreme Court.

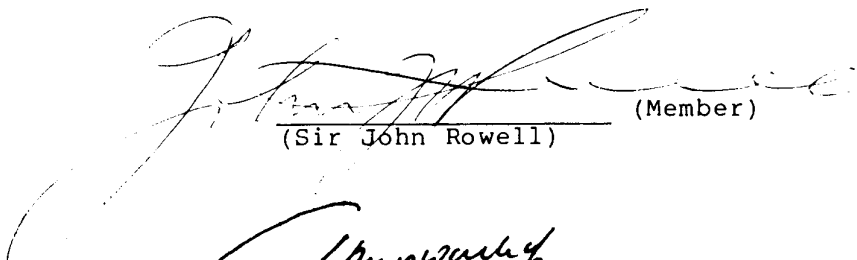
Two members of the Commission, Mr. B.H. McPherson, Q.C. and Mr. G.N. Williams, Q.C., who participated in the preparation of the working paper ceased to be members upon their appointment as Judges of the Supreme Court of Queensland. The remaining members wish to express their gratitude for the valuable contribution they made in the preparation of the working paper.

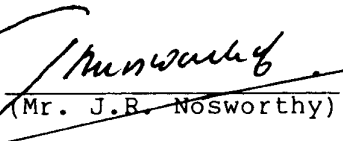
The working paper was circulated to persons and bodies known to be interested in these matters, from whom comment and criticism were invited. In particular, comment was invited on the question of the desirability of establishing a Court of Appeal and Divisions of the Supreme Court. The Commission has recommended the establishment of a Court of Appeal. It is, however, contemplated by the Commission that the Court of Appeal be a division of the Supreme Court of Queensland and not a separate body.


This report has been written after full consideration of the detailed comments received from the judiciary and members of the legal profession, and the original draft Bill has been revised and improved in several respects as a result of their suggestions and criticisms.

Signed:  (Chairman)
(The Hon. D.G. Andrews)

 (Member)
(Prof. K.W. Ryan, Q.C.)

 (Member)
(Sir John Rowell)

 (Member)
(Mr. J.R. Nosworthy)

 (Member)
(Mr. R.E. Cooper)

PREFACE

The Law Reform Commission has been functioning since 1st March, 1969 and has been constituted by the Law Reform Commission Act 1968-1976.

The members are:-

The Honourable Mr. Justice D.G. Andrews, Chairman

Professor K.W. Ryan, Q.C.

Sir John Rowell

Mr. J.R. Nosworthy

Mr. R.E. Cooper

Mr. K.J. Dwyer

The Secretary of the Commission is Mr. D.M. Hensler. The office of the Commission is at 179 North Quay, Brisbane.

The short citation for this working paper is Q.L.R.C.32.

CORRIGENDA

Inadvertently the page numbering is defective. Some pages have been given the same number and some numbers have been omitted. This does not affect the text in any way, which is in its proper sequence.

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THE SUPREME COURT BILL

COMMENTARY

General Introduction

A. The Reference

The Law Reform Commission of Queensland has been charged with a revision of the rules and procedure regulating civil proceedings in the Supreme Court and elsewhere with a view to expediting such proceedings, and with particular reference in the Supreme Court to the consolidation and amendment of certain procedural statutes referred to in this commentary as "the ancillary Acts". These are:-

The Common Law Practice Act, 1867-1981
The Common Law Pleading Act of 1867
The Common Law Process Acts, 1867-1972
The Equity Acts, 1867-1974
The Equity Procedure Act of 1873
The Supreme Court Acts, 1861-1980

The Commission decided to concentrate initially on the consolidation and amendment of the Supreme Court Acts and the ancillary Acts. Any proposals which would change these Acts in substance or in form would clearly require consequential changes to the Rules of Court, but the Commission considered that it was preferable to limit its review in the first place to the Acts rather than to attempt a comprehensive revision of the Acts and Rules of Court.

Though the reference includes revision of civil proceedings not only in the Supreme Court but also in other Courts, the Commission considered that it should direct itself initially to the rules and procedure in the Supreme Court. There were two reasons for doing this. One was that the ancillary Acts were mainly concerned with regulating the procedure of the Supreme Court. The other was that the task of revising the procedure of the Supreme Court would be complicated unnecessarily if attention had to be directed at the same time to matters which concerned Courts other than the Supreme Court. The better course seemed to be to examine what amendments should be proposed to the legislation regulating civil proceedings in the Supreme Court, and to defer to a later stage the examination of any changes which should be suggested in relation to the other Courts in the interest of uniformity or on other grounds.

Even a cursory examination of the Supreme Court Acts and of the ancillary Acts will disclose that they are concerned with matters which are only tenuously connected with the matter of civil proceedings, or which more naturally should be regulated by some Act other than a revised Supreme Court Act. Included among these matters are the following:-

- (a) Actions for death caused wrongfully (see the Common Law Practice Act, ss.12 to 15)

- (b) Admission of legal practitioners (see the Supreme Court Act of 1867, s.40)
- (c) Leave of absence to judges (see the Supreme Court Acts Amendment Act of 1944, s.3)

In each of these cases, it would seem more appropriate to deal with the matter in the context of an Act or Acts relating to civil wrongs or legal practitioners or regulating the salary, superannuation and other entitlements of Supreme Court Judges than as part of a Supreme Court Act.

The exclusion of such matters would leave for consolidation and amendment those provisions which related to (a) the constitution, jurisdiction, functioning and administrative structure of the Supreme Court; and (b) the procedure of the Supreme Court. Though it would be feasible to deal with these two matters by separate Acts, it is probably more convenient to set out the relevant provisions in one Act, as has been done in Queensland in the case of the District Courts and Magistrates Courts. That process has in general been followed in the Supreme Court Acts of the other Australian States, which include matters which are separately regulated in Queensland by the various ancillary Acts.

B. The Supreme Court of Queensland

The Order in Council of 6 June 1859, which conferred its first constitution upon the Colony of Queensland, provided that all the courts of civil and criminal jurisdiction within the Colony would continue to exist until other provision should be made by the Queensland Parliament.

At the time of separation, by an Act of the Parliament of New South Wales entitled "An Act to provide for the better Administration of Justice in the District of Moreton Bay" (20 Vic. No. 25) a Supreme Court had been established at Moreton Bay, and the Judge of that Court had been given all the powers of the Supreme Court of New South Wales. That Act was repealed so far as it related to Queensland by the Supreme Court Constitution Amendment Act of 1861. This established the Supreme Court of Queensland as a court of record with civil and criminal jurisdiction, to be holden at Brisbane. In 1863, a Supreme Court Act (27 Vic. No. 14) declared that the Supreme Court of Queensland had within the limits of the colony all the authorities, powers and jurisdiction of the Supreme Court of New South Wales as they existed at the time when the Order in Council of 6 June 1859 came into operation.

The main foundation for the court system in New South Wales at the time of separation was provided by a British Act of 1823 (4 Geo. IV, C.96), which was largely re-enacted by the Australian Courts Act 1828, and the Charter of Justice of 1823 issued pursuant to the Act of 1823. The Charter of Justice established a Supreme Court, with the jurisdiction of the courts of King's Bench, Common Pleas and Exchequer at Westminster. It was also given the authority conferred by commissions of oyer and terminer and general gaol delivery. Circuit courts could be established which would stand in the same relation to the Supreme Court as the courts of assize, nisi prius, oyer and terminer and general gaol delivery stood to the courts at Westminster.

Equity jurisdiction was conferred on the Supreme Court by a provision which authorised it to do, exercise and perform all such acts, matters and things necessary for the due execution of such equitable jurisdiction as the Lord High Chancellor of Great Britain can or lawfully may in England. The Court was empowered to deal with questions of probate of wills and the administration of intestate estates in accordance with the practices and procedures of the diocese of London. It was given the common law jurisdiction of the Chancellor in respect to the guardianship of infants and the control of their estates. Finally, it was given jurisdiction in matters of insolvency.

As Sir Victor Windeyer has pointed out (48 A.L.J. at p.359) the Supreme Court of New South Wales, brought into existence by the Charter of Justice dated 13th October, 1823, is the Supreme Court of New South Wales that exists today. In Queensland, the Supreme Court Constitution Amendment Act of 1861 did not purport to continue that Court, but established a separate Supreme Court of Queensland which was declared by the Supreme Court Act of 1863 to have the same jurisdiction as the Supreme Court of New South Wales. When the Supreme Court Act of 1867 was enacted, it was declared that the Supreme Court was the same court as had previously been established. The Supreme Court of Queensland is accordingly the Court which was established in 1861, but it is holden under the Act of 1867 and subsequent amendments thereto.

C. The Ancillary Acts

It was inevitable that in the circumstances which existed when the Australian colonies were established, the court system should be fashioned as closely as possible upon the English model. The Australian Courts Act 1828 required that "all laws and statutes in force within England at the time of the passing of the Act shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land so far as the same can be applied within the said Colonies." (Cf. The Supreme Court Act of 1867, s.20). The laws so applied included the procedural as well as the substantive law.

In England, during the course of the nineteenth century, the matter of procedural reform was pursued through the enactment of a number of statutes. This activity culminated with the adoption of the Judicature Act of 1873. This provided a code of civil procedure in the schedule to the Act, which was to regulate the procedure in the High Court and the Court of Appeal, with some exceptions which included criminal proceedings and matrimonial causes. As Holdsworth remarks (History of English Law, Vol. 15, p.130), the code "was not wholly new. In it were gathered up the reforms in procedure which had been made by the Common Law Procedure Acts, the Chancery Procedure Act, and other Acts of this period. But it contained much new matter. Reforms were made with a view to securing uniformity, the elimination of obsolete technicalities, and effectiveness coupled as far as possible, with simplicity."

In Queensland, comparable provisions will be found dealing with matters of procedure in the Common Law Pleading Act 1867, the Common Law Practice Act 1867, the Equity Act 1867, the Equity Procedure Act 1873, the Interdict Act 1867, the Supreme Court Act 1867, and the Supreme Court Act 1874. All of these Acts preceded the enactment in this State of the Judicature Act of 1876.

There are some parts of these Acts which can conveniently be incorporated into a Supreme Court Act, as has been done in some Australian States. However, in many cases, the provisions contained in these Acts have been rendered otiose by the subsequent adoption of Rules of Court covering the same matter, or the procedures have fallen into disuse. A comparison of the terms of those provisions with the present Rules of Court suggests that most of them can be repealed, though some amendments to the present rules may be required. For example, it would seem desirable to replace ss.54 and 55 of the Equity Act, which relate to the power of the Court to obtain the assistance of scientific persons, by rules of court similar to those contained in English Order 40. Similarly, s.77 of the Equity Act could be inserted into the rules of court, as in English 0.29 R.8.

However, there are some provisions in the Equity Act of 1867 which are not susceptible to incorporation in the rules of court. One instance is provided by the provisions relating to jurisdiction in infancy. These reproduce the substance of the English Infants Settlements Act 1855. They deal with a subject matter which should not be included in a Supreme Court Act or rules of court. Similarly, s.78 of the Equity Act reproduces Locke King's Act, but it has been replaced by a provision contained in the Succession Act 1981.

Though it would seem desirable to repeal all the Acts listed above when the new Supreme Court Act is enacted, it will not be possible to do this in the case of the Common Law Practice Act and the Equity Act, though most of the provisions in those Acts may be repealed. Nor will it be possible in the case of the Supreme Court Act of 1867, since as already observed this contains provisions relating to the admission of barristers and the practice of conveyancing, which should not be included in the new Supreme Court Act.

It may be desirable to incorporate the remnants of those Acts which will be substantially repealed in other consolidating legislation. For example, consideration should be given to the inclusion of the provisions in the Supreme Court Act of 1867 relating to the admission of practitioners in a general Act relating to practitioners, and to the insertion of the sections of the Common Law Practice Act relating to actions by and against executors in a Wrongs Act.

PART ONE - PRELIMINARY

A. Binding the Crown

None of the Acts which it is proposed to incorporate into the new Supreme Court Act contains a provision by which the Act would bind the Crown. It was consequently held in DFCT v. Etablissements Lecorche Freres [1954] St.R.Qd. 314 that the process of foreign attachment provided for in s.45 of the Common Law Process Act of 1867 was not applicable to the Queensland Housing Commission.

There is also no such provision in the District Courts Act of 1967, or in the Supreme Court Acts of other Australian States, except New South Wales. In that State, s.3 of the Supreme Court Act of 1970 provides:

- (1) Subject to this and any other Act, the Crown is bound by, and has the benefit of this Act and the rules.

- (2) In subsection one of this section, "Crown" includes not only the Crown in right of New South Wales but also the Crown in all its other capacities.

It has been recognised in Queensland since the enactment of the Claims Against the Government Act of 1866 that a petitioner should be able to sue the nominal defendant appointed where a claim was made against the Government by a process in which "the proceedings and rights of parties therein shall as nearly as possible be the same and judgment and costs shall follow on either side as in an ordinary case between subject and subject at law or in equity". This policy was continued with the enactment of the Crown Proceedings Act 1980. See s.9 of that Act. That Act binds the Crown, and has effect notwithstanding anything in any Act or enactment or rule of law, practice or procedure.

It would be consistent with this to make the provisions of the Supreme Court Act binding upon the Crown, but to ensure that this was done subject to the Crown Proceedings Act.

A suggested formulation is as follows:

"Subject to the express provisions of this Act and of the Crown Proceedings Act 1980, this Act 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."

B. Savings and Transitional

It is necessary to include in the new Supreme Court Act provisions relating to the following matters -

- (a) The effect of the new Act on existing Acts, Rules and the jurisdiction of the Court.
- (b) The confirmation in office and of the appointment of judges, masters, sheriffs, registrars, and officers of the Court.
- (c) The effect of the new Act on pending proceedings.
- (d) The effect of the new Act on statutory references to the Supreme Court in Acts anterior to the new Act.

The only one of these matters on which it is necessary to comment is that of the effect on pending proceedings. The District Courts Act of 1967 contains the following provisions on this matter:

"s.3(2)(f): All proceedings pending and all judgments given, signed, entered, or made at or before the commencement of this Act under or subject to the repealed Acts, shall be treated as if pending, given, signed, entered, or as the case may be, made under this Act, and may be proceeded with, completed, enforced, or otherwise howsoever dealt with under this Act accordingly.

A Court or a Judge may on the application of either party or of its own motion give directions in respect of such a proceeding or judgment which in its or his opinion are necessary or convenient to give effect to this paragraph (f) and any step taken in accordance with such directions shall be deemed to have been taken in accordance with this Act."

A different approach is adopted by s.16 of the N.S.W. Supreme Court Act 1970. This provides that subject to the rules, and unless the Court otherwise orders, that Act does not apply to, and the repeals and amendments made by the Act do not affect, any proceedings commenced in the Court before the commencement of the Act.

The general rule of the common law, as stated by Mellish L.J., in Republic of Costa Rica v. Erlanger (1876) 3 Ch.D. 62 is that "no suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done." In Maxwell v. Murphy (1957) 96 C.L.R. 201 at p.267, Dixon C.J., observed that "changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed." In the same case, Fullagar J. referred (at p.206) to the distinction which must be drawn "between statutes which create or modify or abolish substantive rights or liabilities on the one hand and statutes which deal with the pursuit of remedies on the other hand. In the former class of case there is a presumption against retrospective operation In the latter class of case there is no such presumption : on the contrary, the presumption is that the enactment applies in all proceedings commenced after it became law, and it may be right to construe it as applying even in proceedings commenced before it became law."

The provision in the Districts Courts Acts has been drafted in conformity with these principles. It relates only to the conduct of proceedings and the pursuit of remedies, and applies the Act to proceedings commenced before the law came into operation. It is suggested that the model provided by the District Courts Act should be followed in the case of an Act which is intended mainly to codify the existing practice of the Supreme Court. However, as some substantial changes have been proposed in relation to remedies, it would seem to be appropriate to give a discretion to the Court to refuse to extend them to proceedings commenced before the Act came into operation.

For reasons set out later in this report, the Commission supports the establishment of a Court of Appeal in Queensland. A further clause has therefore been added to the draft Bill annexed to the working paper to cover references in Acts, Rules of Court or Regulations to the Full Court or the Court of Criminal Appeal.

PART II - CONSTITUTION OF THE SUPREME COURT

A. Continuance of the Supreme Court

It is the standard practice in the Australian States when legislation relating to Supreme Courts is enacted to provide that the Court constituted under the Act is the same Court as existed prior to its enactment. A recent example of this is provided by the N.S.W. Supreme Court Act of 1970. Section 22 provides that the Supreme Court of New South Wales as formerly established as the superior court of record in New South Wales is thereby continued. One result which flows from this practice is that all references in Acts and regulations to the Supreme Court will continue to apply. Another is that the jurisdiction and practice of the Court will not be altered except so far as this is done by the express terms of the amending legislation.

It will be seen by a reference to clause 6 of the Bill that express provision is made to ensure the attainment of these consequences of continuing the existence of the Court. It may be open to question whether the terms of clause 6 would suffice to preserve all the jurisdiction of the Supreme Court as constituted under the repealed Acts for example the federal jurisdiction conferred on it, but such doubts should be overcome by a clause providing for a continuance of the Court. The clause is however designed to have more than a mere technical operation. It is intended to express the historical continuity of the Court which, although reorganized, is the same Supreme Court as formerly exercised unlimited civil and criminal jurisdiction in Queensland.

B. Constitution of the Court

Clauses 7 and 8 in the draft Bill reproduce in more modern form the substance of ss.8 and 16 of the Supreme Court Act 1867 and of the Supreme Court Acts Amendment Act of 1903.

The clauses as set out in the draft Bill annexed to this report provide for the Court to include a President of the Court of Appeal and Judges of Appeal. The reasons for proposing the establishment of a permanent Court of Appeal are set out later in this report.

The Supreme Court Acts Amendment Act 1980 provides that the Supreme Court shall have such number of masters, being at least two, as the Governor in Council from time to time thinks fit. The masters are required to exercise such of the powers, jurisdiction and functions of the Supreme Court as may be specified in Rules of Court.

The provisions in the 1980 Act do not expressly make masters part of the Supreme Court itself, as distinct from the Court's officers and administrative machinery. One consequence of this was to throw doubt on the capacity of the Masters to exercise federal jurisdiction. Under s.77(iii) of the Commonwealth Constitution, the Commonwealth Parliament may, with respect to any of the matters mentioned in ss.75 and 76 of the Constitution, make laws investing any court of a State with federal jurisdiction. The High Court had held that the jurisdiction to hear and determine matrimonial causes which was invested in the Supreme Courts of the States by s.23(2) of the Commonwealth Matrimonial Causes Act 1959 could not be exercised by an officer of the Supreme Court of a State who was not a member of the Court. In Kotsis v. Kotsis (1970) 122 C.L.R.69, it was held that an order made by a Deputy Registrar of the Supreme Court of New South Wales on an application for the payment of interim costs in a matrimonial cause was made without jurisdiction. In Knight v. Knight (1971) 122 C.L.R. 114, it was held that the Master of the Supreme Court of South Australia had no jurisdiction to hear an application for maintenance pending the hearing of a suit for dissolution of marriage.

The decision in Knight v. Knight was based on the ground that the Supreme Court Act of South Australia did not make the Master a constituent member of the Supreme Court. It was not enough that under that Act the Master was empowered to exercise a number of judicial functions. The Act provided that the Court "shall be constituted of the following judges, that is to say, the Chief Justice and not more than six puisne judges." A further provision included acting judges appointed to be members of the Court. In relation to Masters, it provided that the Court "shall have a Master and not more than two deputy Masters". The High Court held that this provision did not make the Master a member of the Court.

In the working paper which preceded this report, it was stated that if the view was adopted that the efficient conduct of the business of the Supreme Court required that the Masters should be able to exercise jurisdiction in federal matters, it would be necessary to make them constituent members of the Court. It was noted that this had been done in the case of the Supreme Court Act of Western Australia which provided (in s.7) that the Supreme Court consisted of the Judges, the acting Judges and the Master. In South Australia, the Supreme Court Act was amended to like effect by the Constitution Amendment (Administration of Courts and Tribunals) Act 1981. In Victoria, Masters are constituent members of the Supreme Court by virtue of s.75(2) of the Constitution Act 1975.

In the working paper, it was suggested that the new Supreme Court Act should make the Masters members of the Supreme Court, and thereby comply with what the High Court had determined to be an essential condition to the exercise of federal jurisdiction.

Since the working paper was issued, the High Court has delivered a judgment by which its decisions in Kotsis v. Kotsis (1970) 122 C.L.R. 69 and Knight v. Knight (1971) 122 C.L.R. 114 have been overruled. In Commonwealth v. Hospital Contribution Fund (judgment delivered on 11 May, 1982), the High Court held that the Master was not under the relevant New South Wales legislation a component part of the Court, but that he was properly invested with federal jurisdiction by virtue of s.39(2) of the Judiciary Act (Cwth).

It is clear from this decision that Masters may exercise federal jurisdiction though they are not made members of the Court. As the purpose for proposing that they should be made members of the Court was, as Gibbs C.J. put it, to endeavour to circumvent the effect of the decisions which have now been overruled, it is unnecessary to persist with the proposal. Accordingly, in the draft Bill attached to this report, the formula used in the Supreme Court Act Amendment Act 1980, that "the Supreme Court shall have such number of masters, being at least two, as the Governor in Council from time to time thinks fit" is retained.

C. Judges of the Supreme Court

(a) Appointment of Judges. As a consequence of the recommendation to establish a permanent Court of Appeal, provision is made in the draft Bill for the appointment of Judges of Appeal and additional Judges of Appeal.

(i) Judges of Appeal. The English Court of Appeal was constituted originally by ex officio Judges, ordinary Judges and additional Judges. The ex officio Judges of the Court of Appeal are the Lord Chancellor, any person who has held the office of Lord Chancellor, any Lord of Appeal in Ordinary who at the date of his appointment would have been qualified to be appointed an ordinary Judge of the Court of Appeal, or who at that date was a Judge of that Court, the Lord Chief Justice, the Master of the Rolls and the President of the Family Division and the Vice-Chancellor. There are not more than eighteen ordinary Judges (Lords Justices of the Appeal). The provisions contained in the Supreme Court of Judicature (Consolidation) Act 1925 relating to additional Judges have not been reproduced in the Supreme Court Act 1981.

The pattern of ex officio Judges, ordinary Judges and additional Judges is followed in the constitution of the appeal tribunals in New South Wales and New Zealand. The New South Wales model has been followed in the clauses of the Draft Bill relating to additional Judges of Appeal. The N.S.W. Supreme Court Act provides that additional Judges of Appeal may be appointed during the absence of a Judge of Appeal for a period not exceeding six months, and the Chief Justice may nominate a Judge to act as an additional Judge of Appeal : s.36. In New Zealand, the appointment is during the pleasure of the Governor-General. It is considered preferable that appointments as additional Judges of Appeal should not be for an indeterminate period.

In accordance with the New Zealand and New South Wales models, the draft Bill provides that a Judge of Appeal should be a Judge of the Supreme Court. As such, he will have all the jurisdiction and powers of a Judge, and will be available when this is necessary to assist in the non-appellate work of the Court, just as other Judges may be required to act as additional Judges of Appeal.

It is however necessary to emphasize that the whole concept of a separate Court of Appeal may be undermined if excessive use is made of the power to nominate additional Judges of Appeal, or to require Judges of Appeal to handle trials or deal with chamber applications. It should be only in exceptional circumstances that a Judge of Appeal acts or is required to act in cases other than those which fall within the jurisdiction of the Court of Appeal. For reasons set out later in this report, it may be necessary from time to time to nominate Judges to serve as additional Judges of Appeal in criminal appeals, but this should rarely be necessary in civil appeals.

(ii) Acting Chief Justice. The draft Bill reproduces s.16A of the Supreme Court Act 1867, as amended by the Supreme Court Acts Amendment Act of 1965, except for subsection (6), which has no continuing operation.

(b) Performance of Functions by Judges

The draft Bill contains two sub-clauses in relation to the authority of the Chief Justice to arrange the business of the Supreme Court. The first sub-clause (clause 12(1)) reproduces the effect of s.7 of the Supreme Court Act of 1921, modified to take account of the establishment of a Court of Appeal. The second sub-clause (clause 12(2)) is designed to remove the need for any change in the law calendar to be approved by the Governor in Council. The practice of submitting changes to the Governor in Council arose from the prescription in s.6 of the Supreme Court Act of 1921 that the Governor in Council may by Order in Council "order that sittings of the Supreme Court presided over by a Judge shall be held for the trial of criminal causes and the trial and hearing of civil causes and matters at such time or times, or such date or dates, and at such place within each district as are from time to time prescribed". It is suggested that the Chief Justice should have authority to control the business of the Court without the delay involved in having to submit changes to approval by the Governor in Council.

The duty imposed on the Chief Justice of arranging the business of the Court will necessarily place on him a heavy administrative burden. The Commission believes that any proposal which may be put forward by the Chief Justice for assistance in the discharge of this duty, in particular through the appointment of a Court Administration Officer, should receive favourable consideration.

(c) Qualification of Judges. The relevant legislation presently in force is contained in -

- (1) The Supreme Court Act 1867, s.8 (barristers of England or Ireland, advocates of Scotland, barristers of the Courts of New South Wales, Victoria or Queensland) of not less than five years standing;
- (2) The Legal Practitioners Act 1881 to 1968 (solicitors of five years standing).

In the draft Bill, the provisions have been replaced by one modelled on s.9 of the District Courts Act of 1967. The change made to that formulation is designed to cover the case where a person had been a barrister or solicitor of the Supreme Court of Queensland of not less than five years standing, but at the time of appointment did not hold that qualification. An example would be provided by the case of a person who had been a solicitor for more than five years and was a barrister of less than five years standing at the time of his appointment.

It will be apparent that a District Court Judge will be qualified to be appointed as a Supreme Court Judge, as the qualification for appointment as a District Court Judge specified in s.9 of the District Courts Act is sufficient for appointment as a Supreme Court Judge.

The Bar Association of Queensland has proposed that the period of time following admission prior to which a person is eligible for appointment as a Judge should be increased, and it has been suggested that the period of qualification ought to be not less than ten years as either a barrister or a solicitor.

It is certainly desirable that no person should be appointed as a Judge of the Supreme Court unless he has wide legal experience extending over a period of at least ten years. It is however questionable whether an alteration of the period from five to ten years will have any real effect by way of preventing the appointment of unsuitable persons. It would not, for example, prevent the appointment of a person who had been admitted for more than ten years, but had not been actively involved in legal work for a long period or indeed at any stage in his career.

(d) Number of Judges. There are currently two provisions which limit the authority of the Governor-in-Council to appoint Judges. These are s.2 of the Supreme Court Acts Amendment Act 1975 and s.4(6) of the Supreme Court Act of 1921. The former provides that the number of Judges of the Supreme Court shall not exceed 16, and at any time when the total number in office of the Judges is less than 16, it shall be lawful for the Governor-in-Council by commission to appoint a

duly qualified person to be a Judge. However, provisos to the section declare that the Governor-in-Council is not bound to make an appointment increasing the number in office for the time being, and is required not to make an appointment increasing to more than sixteen the number in office.

Section 4(6) of the Supreme Court Act of 1921 as amended authorises the Governor-in-Council by commission to fill a vacancy in the number of Judges, but limits the power to do this by stating that the number of appointments which may be made must not bring the total number of Judges to more than sixteen.

These two provisions have been amalgamated in Clause 15 of the draft Bill. It seems sufficient to fix the maximum number of Judges who may be appointed, and to authorise (but not require) the Governor-in-Council to fill any vacancy.

The specification of a maximum number of Judges who may be appointed has the consequence that an amendment must be made to the legislation whenever it is considered proper to increase the number of Judges. A submission was made to the Commission that authority should be accorded to the Executive to increase the number. It does not however favour that course, but considers that the matter of the maximum number of Supreme Court Judges is one which should continue to be submitted to the decision of the Parliament.

The number of Judges (20) referred to in the draft Bill extends the number currently authorised (16). This recommendation takes account both of present needs of the Court together with the increase required should a Court of Appeal be established.

(e) Tenure of Judges. The draft Bill combines the provisions to be found in the Judges' Retirement Act of 1921, s.3 and the Supreme Court Act of 1867, s.9, with a variation to make the relevant provision relating to the determination of pending matters consistent with the provision on the same subject which is made in respect to the acting Judges.

The Judges' Retirement Act of 1921 provides for the retirement of Judges from office and for their office becoming vacant but it does not expressly refer to their commissions ceasing to be in force. Compare the Victorian Constitution Act 1975, s.77(4). This has been rectified in the draft.

(f) Acting Judges. The appointment of Acting Judges is currently regulated by three Acts. The Acting Judges Act of 1873 authorises the Governor-in-Council to appoint a person qualified to be a Judge of the Supreme Court to act temporarily in the place of a Judge granted leave of absence. The Supreme Court Act of 1892 authorises the Governor-in-Council to appoint a District Court Judge or any person qualified to be a Judge of the Supreme Court to act as a Judge of the Court for the hearing of any matter or proceeding in the Full Court when a sufficient number of Judges of the Court competent to sit upon the hearing cannot be secured. It also authorises the appointment of a District Court Judge or of any person qualified to be a Judge of the Supreme Court to act as a Judge of the Court when the orderly business of the Court is likely to be interrupted for any reason. As a supplement to this, the Supreme Court Act of 1892 No.2, authorised the appointment of a Judge of the Supreme Court of any of the Australian Colonies to act as a Judge of the Supreme Court of Queensland for the purposes specified in the Act of 1892.

It is convenient to note here also the existence of s.33 of the Supreme Court Act of 1867, which authorises the Governor in Council to issue a special commission to a District Court judge or barrister to discharge the duties of a judge of the Supreme Court at a Circuit Court or at remote places.

The provisions in the Acts of 1892 and in s.33 of the Supreme Court Act reflect conditions at a time when the number of judges of the Supreme Court was small and transport to distant parts of the State was time-consuming and difficult. There seems to be no justification for retaining them in their present form. It is however possible that circumstances may arise where it would be useful to have the power to appoint as an Acting Judge a District Court Judge or other person qualified to be appointed as a Supreme Court Judge, apart from cases where a Judge is on leave. Convenient formulations for this purpose are contained in s.16 of the District Court Act of 1967 and s.81 of the Victorian Constitution Act 1975.

(g) Salaries and Pensions. It has been the practice to specify in the Supreme Court Acts the salary payable to judges. See for example the U.K. Supreme Court of Judicature (Consolidation) Act 1925 s.13 (salaries) and s.14 (pensions); the N.S.W. Supreme Court Act 1970, s.29; the S.A. Supreme Court Act 1935, s.12; of the Vic. Constitution Act 1975 ss.82 and 83 (salaries and pensions) the Commonwealth Judiciary Act 1903, s.47 (salary and travelling allowances). These provisions have in some cases been superseded or supplemented by other legislation (for example, in the U.K. there are such Acts as the Judges' Remuneration Act 1965, the Judicial Pensions Act 1959; the Pensions (Increase) Act 1962 and the Administration of Justice (Pensions) Act 1950.)

In Queensland, provision for payment of the salaries and pensions of Judges of the Supreme Court is made in the Judges' Salaries and Pensions Act 1967 to 1973, and the Judges Pensions Acts 1957 to 1974. The Supreme Court Act of 1867, s.10 provides for the payment of a judge's salary so long as his patent or commission is in force, and s.6 of the Supreme Court Act of 1874 provides for a judge's salary to be charged on the consolidated revenue fund.

It is suggested that the details of the actual salary payable to judges and their pension and superannuation entitlements are more appropriately dealt with in legislation other than a Supreme Court Act. The provisions which may properly be included in such an Act are those which are designed to ensure payment to a Judge of such salary as is fixed by Parliament.

(h) Holding Other Office. Section 12 of the Supreme Court Act of 1867 prohibits judges of the Supreme Court from holding any other office of profit, subject to certain exceptions. Section 4 of the Acting Judges Act 1873 is in similar terms.

A prohibition on the acceptance of any other office, or place of profit or emolument, on pain of avoidance of judicial office, was included in the Charter of Justice of 1823. It appears from a statement by Sir Samuel Griffith (Q.P.D. Vol. 55, pp.417-8) that a provision corresponding to s.12 of the Supreme Court Act of 1867 was adopted in the Supreme Court Acts of all the Australian colonies, though no corresponding provision existed in any English statute. At the present time, a provision in terms similar to s.12 is contained in the Victorian Constitution Act 1975, s.84. The differences are that the Victorian provision omits any reference to an exception in

the case of duties cast upon a Judge by law, and it adds an exception permitting a Judge to perform duties of another office or place to which with his consent he is appointed by the Governor-in-Council or he is appointed with the consent of the Chief Justice and the Governor-in-Council. The other States have not incorporated into their present Supreme Court Acts a provision corresponding to s.12.

A simpler form of the clause will be found in the Judiciary Act (C'th) 1903, s.8: A Justice of the High Court shall not be capable of accepting or holding any other office or any other place of profit within the Commonwealth, except any such judicial office as may be conferred upon him by or under any law of the Commonwealth.

It has been necessary from time to time in Queensland to pass particular Acts to deal with situations which might otherwise involve a breach of s.12. (See, for example, The Honourable Jack Lawrence Kelly Enabling Act 1976, and the Supreme Court (Commonwealth) Payment of Judges Validation Acts 1930 to 1946, which were repealed by the Supreme Court Acts Amendment Act of 1960). The Judges' Validating Act of 1888 was enacted to validate the acts and continue the office of a Judge who had continued after his appointment to hold the office of a member of the Defence Force of Queensland and of a director of a company. It declared however that these offices were offices of profit within the meaning of s.12.

The draft Bill reproduces the substance of s.12 of the Supreme Court Act of 1867, so far as this has continuing application, but adds a provision modelled on s.84 of the Victorian Constitution Act 1975. This is intended to obviate the necessity for passing Acts to deal with individual cases where acceptance by a Judge of another office or place is regarded by him, the Chief Justice and the Government as appropriate, but which may involve the possibility of a breach of the prohibition on holding another office.

PART III - JURISDICTION AND POWERS OF THE COURT

A. Jurisdiction

The Supreme Court Act of 1867 used two procedures to confer jurisdiction on the Supreme Court. In the first place, by s.34 of that Act it was declared that the Supreme Court of Queensland had within the limits of the Colony of Queensland all the authorities powers and jurisdiction of the Supreme Court of New South Wales as they existed when the Order in Council of 6 June, 1859 empowering the Governor of Queensland to provide for the administration of justice in the Colony came into operation. The effect of that provision was to continue within Queensland the jurisdiction conferred on the Supreme Court of New South Wales including its jurisdiction under the Charter of Justice of 1823 and the Australian Courts Act of 1828. At the same time, ss.21 to 24 of the Supreme Court Act of 1867 conferred jurisdiction on the court or a judge thereof by reference to the jurisdiction possessed by courts in England.

Section 21 gave to the Supreme Court or a judge thereof in the administration of the law of Queensland "the same jurisdiction power and authority as the Superior Courts of Common Law and the High Court of Chancery in England or any or either of the last mentioned courts respectively".

Section 22 conferred on the Supreme Court within the colony and its dependencies the equitable jurisdiction possessed by the Lord High Chancellor or other equity judges of England, and also their common law jurisdiction.

By s.23, the Supreme Court was given the ecclesiastical jurisdiction of the Prerogative Court of the Archbishop of Canterbury.

By s.24, the Supreme Court was given the criminal jurisdiction exercisable by the Court of Queen's Bench at Westminster or in the Central Criminal Court in London or by judges of assize or oyer and terminer and general gaol delivery in England.

The definition of the jurisdiction of the Supreme Courts by reference to the jurisdiction possessed by Courts in England was common to the Supreme Court Acts of the other Australian States. See, for example, the Victorian Supreme Court Act of 1958, s.15 (jurisdiction of the Courts of Queen's Bench, Common Pleas and Exchequer at Westminster) and s.16 (equitable jurisdiction possessed by the Lord High Chancellor of England); the N.S.W. Supreme Court and Circuit Courts Act 1900, s.14 (by which the Court was authorised to perform acts required to be performed by the Courts at Westminster); The South Australian Supreme Court Act 1935 s.17 (jurisdiction of the High Court of Chancery, the Courts of Queen's Bench, Common Pleas and Exchequer, and the courts created by commissions of assize), and s.18 (jurisdiction of the English Court of Probate). See also the Western Australian Supreme Court Act 1935, ss.16 and 23.

In England itself, the Supreme Court of Judicature (Consolidation) Act 1925 likewise defined the jurisdiction of the High Court by reference to the jurisdiction which was formerly vested in or capable of being exercised by certain courts. See ss. 18, 20, 21, 22.

There is a notable departure from this practice in the New South Wales Supreme Court Act of 1970. This contains two provisions on jurisdiction:

- S.22 : The Supreme Court of New South Wales as formerly established as the Superior Court of record in New South Wales is hereby continued.
- S.23 : The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

The effect of s.22 is to make it certain that the Supreme Court was not established by the Act of 1970. The existing court was continued, and presumably it remained invested with the jurisdiction already conferred on it by other Acts - Imperial, Commonwealth and State. That section, together with s.23, is modelled on s.16 of the New Zealand Judicature Act 1908, which provides that "the Court shall continue to have all the jurisdiction which it had at the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand".

If the Queensland Supreme Court Acts are repealed and replaced by a new Act, it will clearly be necessary to provide for the continuance of the Supreme Court. A provision corresponding to s.22 of the N.S.W. Supreme Court Act 1970 will therefore be required, and it is incorporated in Clause 6 of the draft Bill. It is however suggested that merely to continue the existence of the Court would be unsatisfactory; the Act should set out its jurisdiction. It is questionable whether a statement of jurisdiction in such general terms as are to be found in s.23 of the N.S.W. Supreme Court Act 1970 or s.16 of the New Zealand Judicature Act 1900 is appropriate. At the same time, it is considered unnecessary to repeat in a modern Act the formulae which were used for conferring jurisdiction in the nineteenth

century. These have a distinct antiquarian flavour, with references to courts which no longer exist. A simpler, yet comprehensive, formulation is to be found in s.85(2) of the Victorian Constitution Act 1975:

"The Court and the Judges of the Court shall have and may exercise such jurisdictions powers and authorities as were had and exercised by any of the superior Courts in England or the judges thereof or by the Lord High Chancellor of England including the jurisdiction powers and authorities in relation to probate and matrimonial causes and administration of assets at or before the commencement of Act No. 502".

(In Queensland, the corresponding reference would be "at or before the commencement of the Supreme Court Act of 1867").

It is suggested that a clause in this form should be substituted for ss.21, 22, 23 and 24 of the Supreme Court Act of 1867. The effect of s.34 of that Act should be preserved by conferring on the Supreme Court the jurisdiction of the Supreme Court of New South Wales as at the date when the Order in Council of 6 June 1859 came into operation.

The jurisdiction of the Supreme Court is not of course limited to that held by the English superior courts in 1867 and the Supreme Court of New South Wales in 1859. A modern Supreme Court Act should contain a statement of the subsequent sources of jurisdiction. This would comprise:

- (a) Jurisdiction vested in or capable of being exercised by the Supreme Court under or by virtue of any Imperial Act (for example, the Colonial Courts of Admiralty Act 1890; the Merchant Shipping Act 1894); or under or by virtue of any Commonwealth Act (for example, the Judiciary Act 1903; the Income Tax Assessment Act 1936).
- (b) Jurisdiction conferred under or by virtue of any State Act, including the new Supreme Court Act.

Section 21 of the Supreme Court Act of 1867, provides that the Supreme Court "shall have cognizance of all civil pleas", and shall have jurisdiction "to hear and determine all actions whatsoever real personal and mixed". By s.24, it has jurisdiction to "inquire and hear and determine ... all treasons felonies misdemeanours and offences of what nature or kind soever and wheresoever committed". These phrases, like s.23 of the New South Wales Supreme Court Act, express the fact that the Supreme Court is a court of unlimited jurisdiction, that is, unlimited as to the value of the subject matter at issue, or as to the amount that may be claimed or recovered, or as to the offences that may be tried, or as to the place within the State where the matter arose. In the Victorian Constitution Act 1975, s.85(1) provides expressly that the Supreme Court is a court with unlimited jurisdiction. It is suggested that this provision should be incorporated into the new Supreme Court Act.

B. Judicature System

In England, the Judicature Acts were enacted to effect change in three respects.

First, they altered the judicial machinery. The Court of Chancery, the Courts of Queen's Bench, Common Pleas and Exchequer, the Court of Admiralty, the Court of Probate, the Divorce Court, and the London Court of Bankruptcy were consolidated and formed into one Supreme Court of Judicature (Holdsworth, History of English Law, Vo.1 p.638.) As the Supreme Court of Queensland had been invested with the jurisdiction of these various English courts, there was no need to recast the Queensland court machinery when the Judicature Act was enacted here in 1876.

Secondly, they changed substantially the rules of pleading and procedure for the newly created Supreme Court of Judicature. These changes were adopted in Queensland. Some of them are referred to in various parts of this report.

Thirdly, provision was made that in cases of conflict between the rules of law and equity the rules of equity should prevail. The Judicature Acts effected a fusion of jurisdiction, procedure and pleading but not of the two systems of rules. There was in fact little conflict between the rules of law and equity. The cases where it existed were specifically regulated, and the clause providing that the rules of equity were to prevail was inserted to deal with any other cases of conflict.

In the English Supreme Court of Judicature (Consolidation) Act 1925 the provisions of the former Judicature Acts relating to the concurrent administration of law and equity were set out in ss.36 to 44. This procedure has been followed in the Supreme Court Acts of the Australian States. See for example the Victorian Act of 1958, s.61; the South Australian Act 1935, ss.20 to 28 the Western Australian Act 1935 to 1979, ss.24 and 25; and the New South Wales Act 1970, ss.57 to 64.

There is an objection to including in a Supreme Court Act the provision to the effect that in all matters where there is any conflict between the rules of equity and common law with reference to the same matter, the rules of equity shall prevail. The objection is that the intention of the English Judicature Act 1873 was "to amend and declare the law to be hereafter administered in England as to certain matters". (See s.25 of the Act of 1873). It was not intended merely to define the law to be applied in the new Supreme Court.

In New South Wales, the substance of the provisions contained in s.4 of the Queensland Judicature Act was reproduced in ss.57 to 63 of the Supreme Court Act 1970. But with respect to the matters contained in s.5 of the Queensland Act, which corresponds to s.5 of the English Act of 1873, only s.5(11) was reproduced, and became s.64 of the N.S.W. Act of 1970. The specific matters were mainly covered by amendments to other Acts by way of changes in the general law, and not merely by altering the rules applicable in the Supreme Court. Subsequent consideration led the New South Wales Law Reform Commission to propose the repeal of s.64 of the 1970 Act, which was not restricted to the statement of a rule to be applied in the Supreme Court. It recommended that a new Act should be enacted, which would reproduce the terms of the former s.64, and that a section should be inserted based upon s.202 of the English Supreme Court of Judicature (Consolidation) Act 1925 requiring inferior courts to give effect to every ground of defence, equitable or legal, as might be done by the Supreme Court. This recommendation was implemented by the Law Reform (Law and Equity) Act 1972.

In Queensland, s.2 of the Judicature Act 1876 provides that the several rules of law enacted and declared by the Act shall be in force and receive effect in all courts whatsoever in Queensland so far as the matters to which such rules relate shall be respectively cognizable by such court. Section 4 sets out rules to be administered by the Supreme Court, while s.5 declares the law to be administered in Queensland (not only by the Supreme Court).

There is no problem about incorporating into a Supreme Court Act the provisions of s.4 of the Judicature Act, apart from the issue of how they can best be reformulated. It would be possible to leave the Judicature Act unrepealed as a whole, while transferring to the Supreme Court Act those provisions which relate only to the Supreme Court. This would seem to leave only s.2 and part of s.5 as operative provisions of the Judicature Act. It would also be possible to follow the New South Wales model and incorporate these provisions in a separate Act. It is suggested however that the preferable course is to repeal the whole of the Judicature Act and to transfer all its operative provisions which have not been already incorporated into other Acts to the Supreme Court Act. This would involve the insertion of some material which related to other courts as well as the Supreme Court, but this seems to be a better procedure than to leave in existence only the remnants of an Act or to enact special legislation to overcome a quite minor difficulty.

An examination of the terms of s.5 of the Judicature Act shows that most of its eleven sub-clauses can simply be repealed. The position in respect of the various sub-clauses is as follows:

- Sub-Clause 1: Covered by s.57 of the Succession Act 1981 and s.438 of the Companies Act 1981.
- Sub-Clause 2: Covered by s.27 of the Limitation of Actions Act 1974.
- Sub-Clause 3: Covered by s.25 of the Property Law Act 1974.
- Sub-Clause 4: Covered by s.17 of the Property Law Act 1974.
- Sub-Clause 5: Covered by s.81 of the Property Law Act 1974.
- Sub-Clause 6: Covered by s.199 of the Property Law Act 1974.
- Sub-Clause 7: Covered by s.62 of the Property Law Act 1974.
- Sub-Clause 8: This relates only to the jurisdiction and powers of the Supreme Court and should be reproduced in the new Supreme Court Act.

One commentator on the working paper suggested that a provision be inserted to remove any doubts about the power of the Court to grant an injunction for a threatened or apprehended breach of contract or other wrongful act, and reference was made in this regard to Astor Electronics Pty. Ltd. v. Jason Electron Optics Laboratory Co. Ltd. [1966] 2 N.S.W.R. 419. This power is accorded to the N.S.W. Supreme Court by s.66(1) of the N.S.W. Supreme Court Act, which is based on provisions corresponding to ss. 52 to 55 of the Queensland Interdict Act of 1867. It is considered that this suggestion merits adoption, and clause 30 of the draft Bill has been amended accordingly.

Sub-Clause 9: Covered by ss.295 to 261 of the Commonwealth Navigation Act 1912 so far as that Act extends (see s.2). It extends only to matters which fall within constitutional heads of power of the Commonwealth. The provisions in the Navigation Act follow those in the Maritime Conventions Act 1911 (U.K.). The Law Reform (Contributory Negligence) Act 1945 (U.K.) provides that the Act does not apply to a claim to which s.1 of the Maritime Conventions Act 1911 (which corresponds to s.259 of the Navigation Act) applies, and the Maritime Conventions Act has effect as if the Act of 1945 had not been passed.

The effect of this is that claims in respect of damage or loss caused to one or more vessels, or to their cargo or freight or property on board, by the fault of two or more vessels, are dealt with under the Maritime Conventions Act and not under the Law Reform (Contributory Negligence) Act.

In Queensland, claims which fall within the ambit of the Commonwealth Navigation Act will be dealt with under its provisions. In respect of other claims, the Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act of 1952 provides for the apportionment of liability in case of contributory negligence. There is no statute in Queensland which reproduces the terms of the Maritime Conventions Act 1911 (U.K.) so far as non-Commonwealth matters are concerned, and in particular in respect to acts occurring within the inland waters of the State. The question therefore arises whether the liability in respect to damage to a vessel or its cargo in cases of contributory negligence is to be determined by the rules adopted by the Admiralty Court, or whether it is covered by the provisions of the Law Reform Act of 1952. It is however unnecessary to consider this question under the existing law since there is a substantial reason why the issue should be settled by a new legislative provision. It is suggested that the matter should be dealt with, as it has in several other states (see, for example, the Victorian Supreme Court Act 1958, ss.64 to 66; South Australian Supreme Court Act 1935-1975, ss.111-113; Western Australian Supreme Court Act 1935-1979, ss.26-30), by the enactment of provisions which follow the terms of the Commonwealth Navigation Act and apply where that Act does not apply. It is unsatisfactory to have different rules applying according as to whether or not a ship is engaged in overseas or inter-state trade, or is on the high seas or in territorial waters or inland waters, or is in waters which are used by ships engaged in overseas or inter-state trade.

Accordingly, the draft Bill includes provisions in Division 3 of Part III which follow the terms of ss.259 to 261 of the Commonwealth Navigation Act 1912.

Sub-Clause 10: Partly covered by Part IX of the Children's Services Act 1965 to 1978. It is suggested that this provision should be reproduced in the new Supreme Court Act.

Sub-Clause 11: This should be reproduced in the new Supreme Court Act.

As was previously mentioned the New South Wales Law Reform (Law and Equity) Act 1972 requires every inferior court in every proceeding before it, to give effect to every ground of defence, equitable or legal, in as full and ample a manner as might and ought to be done in the like case by the Supreme Court. It is considered unnecessary to insert such a provision in the Supreme Court Act or in a separate Act. In Queensland, the power of the inferior courts to give effect to equitable claims and to permit a defendant to rely on equitable defences is defined in the District Court Act ss.68 and 69 and Rules 94 and 95, and in the Magistrates Courts Act s.4(1)(c) and Rules 80 and 85. It would only create confusion to remove those provisions from the respective Acts and rules and put them into a special Act.

Division 3 - MISCELLANEOUS RULES AND POWERS OF THE COURT

A. Miscellaneous Rules.

The draft Bill reproduces in this Division the substance of the Judicature Act 1876, s.5(10) and (11), and s.5(8), which have subsisting application, and clauses based upon ss.259 to 261 of the Commonwealth Navigation Act 1912. The reasons for including these provisions here are explained in the commentary on Division 2 of this Part.

B. Declaratory Orders.

Order 4 Rule 11 provides that no action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby; and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

This order is in the same terms as 0.15.r16 (United Kingdom), which is itself based on the former 0.25r.5 introduced in 1883. Provision for declaratory judgment is made by Rules in Tasmania (0.28.r5) and in the Rules of the High Court of Australia (0.26.r19). It is made by statute in New South Wales (Supreme Court Act 1970, s.75) in Victoria (Supreme Court Act 1958, s.62); and in South Australia (Supreme Court Act 1935, s.31).

The Queensland Equity Act 1867-1964 s.73 provides that no suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby and it shall be lawful for the Court to make binding declarations of right without granting consequential relief. This provision ante-dates the Judicature Act, and it should be either simply repealed or replaced by a provision in the terms of 0.4.r11. It is unnecessary to repeat in the new Supreme Court Act the language of 0.4.r11, and it is clear from the preceding paragraph that there is diversity in expressing the provision in legislation or in rules of court. It is suggested that s.73 of the Equity Act should be repealed and that the matter should be regulated by 0.4.r11.

C. Damages in Lieu of or in Substitution for Equitable Remedies.

The Court of Chancery in England originally had no power to award damages. Accordingly, if it refused specific performance of a contract, it could not award damages for breach of the contract, and the plaintiff was obliged to commence another action in a common law court to recover damages. Similarly, the Court of Chancery could not award damages in lieu of an injunction. However, the Chancery Amendment Act 1858 (Lord Cairns' Act) authorised the Court, in all cases in which it had jurisdiction to grant an injunction or to order specific performance, to award damages to the injured party, either in addition to or in substitution for the other relief.

In England, Lord Cairns' Act was repealed by the Statute Law Revision and Civil Procedure Act 1883, but that Act contained words preserving the jurisdiction of the Court notwithstanding the repeal. It provided that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the Act should not be affected by the repeal. Accordingly in Sayers v. Collyer (1884) 28 Ch.D. 103, the Court of Appeal decided that the jurisdiction of the Court had been preserved notwithstanding the repeal. It added however that since the Judicature Acts each Division of the Court had full power, apart from Lord Cairns' Act, to give either an injunction or damages. It was therefore clear that the Chancery Division could give damages as alternative relief, without having recourse to Lord Cairns' Act.

The legislative history in Queensland has followed that in England, as Philp J. explained in Conroy v. Lowndes [1958] St.R.Qd. 375 at p.383. In Queensland, s.62 of the Equity Act of 1867 enacted Lord Cairns' Act. This section was abrogated by the Repealing Rules of 1900 and repealed by the Statute Law Revision Act of 1908. Both the Repealing Rules and the Statute Law Revision Act have saving clauses similar to that of the English Act 46 and 47 Vic. cap. 49 which repealed Lord Cairns' Act, so that the Queensland Law and the English law as to the survival of the principles following from Lord Cairns' Act are the same.

In the Supreme Court Acts of the other States, a specific provision based upon Lord Cairns' Act has been inserted. See for example N.S.W. Supreme Court Act 1970, s.68; Vic. Supreme Court Act 1958, s.62(3); S.A. Supreme Court Act 1935, s.30. The suggested formulation in Clause 34 and the draft Bill follows that in the South Australian Act.

It was proposed by one commentator on the working paper that the words "wrongful act" in clause 34 should be defined to include "breach of an equitable obligation". It was said that the Court should be recognised as having a clear power to award damages in matters falling within its exclusive equitable jurisdiction, and it was pointed out that the equitable right which had generated most controversy in relation to this jurisdictional issue was the right of confidentiality.

It is however not a sufficient answer to the problems raised by breach of confidence to clarify the right of the court to grant damages in lieu of an injunction. To do so would not, for example, assist in a case where disclosure had already taken place, so that an injunction could not be granted. See Malene v. Metropolitan Police Commission [1979] Ch. 344 at p.360. The English Law Commission has recently issued a report on Breach of Confidence (Law Com. No. 110, October 1981), and it seems preferable to consider the subject fully in the light of that report rather than to adopt the proposed amendment.

PART IV - DISTRIBUTION OF BUSINESS OF THE COURT

Division 1 - General

A. The Court in Banc and Single Judges.

It is intended in this section to give first an outline of the present situation in relation to the distribution of the business of the Court. This is followed by sections on the exercise of the Court's civil and criminal jurisdiction, which take account of the recommendation to create a permanent Court of Appeal.

The Supreme Court Act of 1867 was enacted prior to the great reform in England which resulted in the disappearance of the three great historic common law courts - the Queen's Bench, the Common Pleas, and the Exchequer - and their replacement by a Supreme Court of Judicature, divided into the High Court of Justice and the Court of Appeal. These earlier Courts sat in banc, and were usually courts of four judges. The English Judicature Act 1873 provided that the jurisdiction of the High Court, as a general rule, could be exercised by a single Judge of the Court, but certain matters were to come before a Divisional Court, which was generally composed of two Judges of the High Court. Included among these were matters formerly heard by any of the common law courts in banc. The Court of Appeal was constituted to hear appeals on all civil matters from the divisions into which the High Court was divided. Except in interlocutory matters or by consent of the parties or in vacations the Court of Appeal was to consist of at least three members.

The influence of this history is apparent in the Supreme Court Acts of 1867, 1874 and 1892 and the Judicature Act 1876. There were several sections which defined the jurisdiction which could be exercised by a single Judge of the Court. See for example the Supreme Court Act of 1867, s.15 (power of a Judge in vacation to make orders which under ordinary circumstances could only be made by the Court); s.21 (the Court or a judge to have the jurisdiction of the Courts of Common Law and Chancery); s.25 (indictments to be preferred before one or more judges of the Supreme Court); s.38 (a decree or order of a judge exercising sole jurisdiction in equity or matrimonial causes was to be as effectual as if it had been pronounced by the full court); the Supreme Court Act of 1874 s.12 (single Judge empowered to dispose of ex parte and certain other motions); the Judicature Act 1876 s.6 (any Judge of the Court empowered to exercise in Court or in Chambers the Court's jurisdiction in any matters which might have been heard in Court or Chambers by a single Judge before the commencement of the Act or which might be directed or authorised to be so heard by Rules of Court). Subject to this, the jurisdiction of the Court was exercisable by the Full Court. This included jurisdiction to hear appeals from orders made by a Judge in Court or Chambers (Judicature Act, s.10). On such appeals, the Supreme Court was to consist of not less than three Judges; otherwise it was to consist of not less than two Judges (Supreme Court Act of 1892, ss.5 and 6). In broad terms, it could be said that the Full Court in Queensland was given the jurisdiction which in England was exercisable by a Divisional Court and the Court of Appeal. It will be apparent that although the Full Court was made a court of appeal, it was by no means simply a court of appeal. In particular it exercised original jurisdiction in relation to applications for the issue of a writ of mandamus, prohibition, certiorari or habeas corpus. See R v. Kerr, ex parte Groves [1973] Qd.R.314, where it was pointed out that a decision of the Full Court sitting in banc was equivalent to a decision of all the Judges.

The Supreme Court Act of 1867 provided (s.2) that the "Supreme Court shall continue to be holden at Brisbane", though provision was made (s.30) for Circuit Courts to be held in the Colony. The notion that the common law courts should be held at a fixed place is as old as Magna Carta, which required that the Court of Common Pleas (the jurisdiction of which was exercised by the Supreme Court or a Judge thereof: s.21 of the 1867 Act) should be held at a fixed place.

The same notion presumably is responsible for the definition given to the term "Full Court" in The Supreme Court Act of 1892, s.2, namely that it means the Supreme Court sitting at Brisbane. In Queensland Dairy Products Stabilisation Board v. Munro [1937] St.R.Qd. 347 at p.363, Webb J. said that in that section "the Full Court does not mean the Supreme Court of Queensland, but the Supreme Court sitting at Brisbane."

While the Full Court must sit at Brisbane, there is no express provision in The Criminal Code that the Court of Criminal Appeal must sit at Brisbane. Section 668A of the Code provides that the Supreme Court shall be the Court of Criminal Appeal, and that the Court shall be duly constituted if it consists of not less than three judges and of an uneven number of judges. However, s.5 of the Supreme Court Act of 1921 provides that the Full Court and the Court of Criminal Appeal shall continue to be held in Brisbane.

The Court of Criminal Appeal is not a court distinct from the Supreme Court; the Supreme Court is the Court of Criminal Appeal. See Ex Parte Williams (1934) 51.C.L.R.545. In Western Australia, the Court of Criminal Appeal is the Full Court (Criminal Code, s.687), but the Full Court when sitting as the Court of Criminal Appeal must be constituted by an uneven number of judges. In Queensland, legislative practice distinguishes between the Court of Criminal Appeal, which is the Court constituted as required by s.668A of The Criminal Code, and the Full Court constituted as required by the Supreme Court Act of 1892. See the Supreme Court Act of 1921, s.5; and the Supreme Court Acts Amendment Act of 1958 (No. 2), s.4.

B. The Exercise of the Court's Civil Jurisdiction

The civil jurisdiction vested in the Court is presently exercisable either by the Full Court or a single Judge.

It has already been mentioned that the original conception was that the Court sat as a bench of all Judges of the Court. Even a trial at nisi prius was regarded as a trial by the full Bench. As Holdsworth states (History of English Law, Vol. 1, p.281), "a trial at nisi prius was in all respects equivalent to a trial before the full Bench ... the judges at nisi prius act in all points touching the trial and its incidents as and for the court from which the record comes." A single Judge was in effect regarded as a delegate of the full Bench. It would be more in accord with modern practice to provide, as in s.42 of the Victorian Supreme Court Act 1958, that any single Judge sitting in Court may, subject to appeal to the Court of Appeal, hear and determine all motions, causes, actions, matters and proceedings not required under any Act or Rules of Court to be heard and determined by the Full Court. This is based upon an earlier provision which is equivalent to the Judicature Act 1876, s.6 (Qld), but it removes the limitation which refers to the matters determinable by a single judge before the Judicature Act.

The draft Bill contains four sub-clauses on the exercise of the Court's jurisdiction. First, it provides that the jurisdiction may be exercised either by the Court of Appeal or by a single Judge.

This is made subject to the Rules of Court and to any enactment. This would include the provision in the draft Bill which reproduces s.39A(11)(a) of the Supreme Court Act of 1867, which provides that the Masters are to exercise such of the powers, jurisdiction and functions of the Supreme Court as may be prescribed in Rules of Court made from time to time in that regard. Secondly, it authorizes a single Judge to hear and determine all causes and matters within the Court's jurisdiction which are not required to be heard and determined by the Court of Appeal. As a corollary of this provision, the matters to be heard and determined by the Court of Appeal are set out in subsequent clauses of the draft Bill. Thirdly, it states the cases in which the jurisdiction of the Court may be exercised by a Judge in chambers. Finally, it empowers a single Judge to exercise all the jurisdiction of the Court.

This formulation preserves the distinction between court and chambers. This was abolished in New South Wales by the Supreme Court Act 1970, s.11 (1). The reason assigned for this in the Report of the N.S.W. Law Reform Commission on Supreme Court Practice was that "it would simplify matters by eliminating the various difficulties that have been held to exist under the present system". However, these differences do not appear to have given rise to any substantial difficulties in Queensland, and there seems to be no good reason why the existing practice should be disturbed. A simplification of procedure may be effected notwithstanding that some applications are still to be heard in camera.

Section 15 of the Supreme Court Act of 1892 imposes a limitation on the power of a Judge to hear a case in chambers. This is reproduced in Clause 36 of the draft Bill.

Some submissions received in response to the working paper proposed that clause 36 should be amended. One suggestion was that unless the public interest compelled a contrary view, all contested matters should be heard in public and that there should be no option to permit a contested matter to be heard in Chambers unless the Judge for good cause so ordered. Another supported the abolition of the distinction between Court and Chambers. A third was that the law should reflect the current practice, which was that unless one of the parties requested a matter to be adjourned into open Court, it was assumed that all consented to it being heard in Chambers.

The Commission considers that the existing law should be maintained. The English practice permits a Judge in Chambers to direct that any summons, application or appeal shall be heard in court or shall be adjourned into court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard. See 0.32,R.13. In the Chancery Division, the hearing of any application in Chambers may be adjourned from Chambers into court and subsequently from court into chambers : 0.32,R.18. In Queensland, 0.65,R.16 permits any application to be adjourned from Chambers into Court. This must be read subject to s.15 of the Supreme Court Act of 1892. The result is that a Judge always had a discretion to order that any chamber matter shall be adjourned into court, and he must do so if the matter is contested unless all the parties consent to the matter being heard in chambers. This seems to the Commission to be a satisfactory situation.

Section 15 of the Supreme Court Act of 1867 confers jurisdiction on a vacation Judge to exercise the powers of the Full Court. See R v. The Queensland Trotting Board, ex parte McLean [1972] QWN9. The purpose of this provision is presumably to enable a vacation judge to deal immediately with an application which he considers should be promptly heard and to prevent possible injury or injustice occurring because an

application cannot be made immediately to the Full Court. Any such order made by the vacation judge may be set aside on application made to the Full Court within the first four days of the next ensuing term.

In England, s.69 of the Supreme Court of Judicature (Consolidation) Act 1925 authorizes a single Judge of the Court of Appeal at any time during vacation to make an interim order to prevent prejudice to the claims of any parties pending an appeal, as he may think fit. Such an order may be discharged or varied by the Court of Appeal. It also authorizes a single Judge of the Court of Appeal to give, in any cause or matter pending before the Court of Appeal, any direction incidental thereto not involving the decision of the appeal. This section has been adopted mutatis mutandis, by s.61 of the Western Australia Supreme Court Act 1935. It is recommended that it should replace the present s.15 of the Supreme Court Act of 1867.

C. The Exercise of the Court's Criminal Jurisdiction

The Supreme Court Act of 1867 includes a number of provisions which are grouped under the heading "Criminal Jurisdiction". The provisions which are still in effect are ss.24, 25, 26 and 28.

Section 24 confers criminal jurisdiction on the Supreme Court. Its substance is reproduced in Clause 20 of the draft Bill.

Section 25 provides that "all indictments in which such treasons, felonies, misdemeanours and offences are charged as may be preferred before any one or more Judges of the said Supreme Court sitting in open court in Brisbane and all issues of law joined on every such indictment shall be determined by any one or more Judge or Judges of the said Court and all issues of fact joined on every such indictment shall be tried by and before any one or more such judge or judges and a jury of twelve men to be summonsed, impanelled and sworn according to law.

This provision relates to proceedings on indictment before the Supreme Court in Brisbane. It is supplemented by s.30, which relates to circuit courts. Such courts are to be held by one or more judge or judges of the Supreme Court, and have the same jurisdiction to hear and determine all treasons, felonies, misdemeanours and offences as courts of assize, oyer and terminer and general goal delivery in England possess.

Section 25 contemplates that criminal trials may be held before a single Judge or before the Court sitting in banc. Order VII of the Criminal Practice Rules of 1900 provides that a trial before the Court sitting in banc (a trial at bar) shall not be held except by order of the Full Court. It is questionable whether there is any good reason for preserving trials at bar in criminal matters. Apparently the last trial at bar in England was the trial of Casement for treason in 1917. See R v. Casement [1917] 1K.B.98. However, provision is made in Clause 42 of the draft Bill for trials at bar to be held before the Court of Appeal and this would extend to trials at bar in criminal matters if the Court of Appeal saw fit to order such a trial.

It is considered unnecessary to incorporate a provision corresponding to s.25 of the Supreme Court Act of 1867. Clause 35 of the draft Bill empowers a single Judge to hear and determine all "causes and matters" which are not required to be heard and determined by the Court of Appeal, and the definition of "cause" extends to any criminal proceeding by the Crown. So far as s.25 relates to procedure, it is rendered unnecessary by the provisions of The Criminal Code and the Jury Acts 1929 to 1978.

For reasons set out later in this working paper, it is recommended that s.26 of the Supreme Court Act of 1867 should be repealed. There remains s.28. Under that section, in order that persons committed to gaol to await their trial on indictable offences are not detained in prison unduly, the Attorney-General may issue a warrant directing the sheriff or gaoler having custody of such person to discharge him from imprisonment.

Section 590(1) of The Criminal Code was amended in 1975 to provide that a person who has been committed for trial may apply to be brought to trial. Subsection 3 provides that if he is not brought to trial by the last day of the sittings next following the sittings during which the application was made, he is entitled to be discharged.

Section 28 of the Supreme Court Act of 1867 and s.590 of The Criminal Code differ in that under the former, the Attorney-General acts to secure the prisoner's discharge and in the latter the person committed is required to make application. This difference is important, particularly in the case of a person in custody who may lack the skill, confidence or knowledge necessary for making the application.

In view of this difference, it is recommended that s.28 be retained. It would seem more appropriate that it should be transferred to the Criminal Code rather than be incorporated in a Supreme Court Act. As it is proposed that the Supreme Court Act of 1867 should not be wholly repealed, s.28 may be left as one of the sections of that Act which remain in force.

DIVISION 2: THE COURT OF APPEAL

A. The Constitution of the Court of Appeal

In New South Wales, the Supreme Court is divided into a Court of Appeal, and six Divisions. The powers of the Court of Appeal are exercisable by any three or more Judges of Appeal who are commissioned as such.

This arrangement for a separately constituted Court of Appeal is modelled on that which was set up in England when the Court of Appeal was established by the Judicature Acts 1873-75. It has not been followed by the other Australian States.

In the working paper, it was stated:

"There have been suggestions that a Court of Appeal constituted by certain ex officio members (for example, the Chief Justice and the President of the Court of Appeal) and by separately commissioned Judges of Appeal should be established in Queensland. The main argument adduced to justify such a change is that this would enable Judges of Appeal to concentrate exclusively on appellate work and free other Judges from such work, with consequential benefit to the conduct of work in both the original and appellate jurisdiction of the Court.

As against this, it can be argued that such specialization of functions is not desirable, and that the number of Judges in Queensland and the volume of business before the Full Court do not warrant the establishment at this time of a Court of Appeal manned by Judges of Appeal.

The Commission is anxious to obtain views from the persons and bodies to whom this working paper is circulated on the desirability of establishing a Court of Appeal in Queensland and on the way in which this should be effected if it is considered desirable. The draft Bill does not contain provisions relating to these matters, but they will be considered fully by the Commission in the light of the comments made to it on this working paper."

The Commission received submissions on the question whether a Court of Appeal should be established in Queensland, from the Judges, from the Bar Association of Queensland, and from the Queensland Law Society, as well as some individual submissions. The general view of the Judges was in opposition to the proposal for the establishment of a separate Court of Appeal. The Bar Association supported the proposal. The Queensland Law Society expressed its opinion as being that "on balance, the Council considered that an Appeal Court should be useful but queried whether the time was right to have one in view of the present number of Judges appointed. The Council agreed that the main reasons for having such a Court were that it increased the quality of law that was produced by a Court, allowed the development of specialist areas of law and allowed the hearing of urgent appeals."

The case made by the Bar Association for the establishment of a Court of Appeal repeated and added to the submission made to that effect to the Attorney-General in July 1980. It stressed four matters. These were:

- (a) The State appellate court is the final court for the vast majority of cases and accordingly its judgments must be of the highest quality. In this regard, reference was made to the fact that the cases in which an appeal lies as of right to the High Court had been considerably reduced, and the opinion was ventured that in the future there would be either no appeals as of right to the High Court, or else there would be a reduced proportion of cases where there was an appeal as of right.
- (b) The quality of the work produced by a permanent Court of Appeal was likely to be much higher, since its members would be able to devote their time exclusively to hearing appeals. The opinion was expressed that "they should get to the essence of appeals quickly, and their judgments were much more likely to be consistent in relation to important matters, such as the level of sentences and the quantum of awards (an aspect which in fact reduced the number of appeals)."
- (c) There was ample work available to occupy a permanent Court of Appeal. It was pointed out that at present the Full Court and Court of Criminal Appeal were sitting three weeks out of every four.
- (d) A permanent Court of Appeal would be more flexible than the existing appellate tribunals. As it would have a continuous list, and could hear appeals every working day of the year, it was likely that the time between the institution and hearing of an appeal would be reduced, and it could deal with

urgent cases quickly. It was stated that the prospect of an early hearing of appeals was likely to induce more appeals, and that it was to the public advantage that criminal and civil appeals, and other matters which would fall within the jurisdiction of the Court of Appeal should be heard quickly.

The case made against the establishment of a permanent Court of Appeal strongly challenged the argument that a permanent Court of Appeal would function better than a Full Court.

It was stated that no deficiency had been shown in the work of the Victorian Full Court, which functions like the Queensland Full Court, on a comparison with the work of the New South Wales Court of Appeal. It was said that if the proposed Court of Appeal dealt with criminal appeals, it would be imperfectly manned if it did not comprise a group of judges with continuing experience in trial work in the criminal jurisdiction. The judges considered that appellate work in the criminal jurisdiction could only be performed satisfactorily by a group of judges with such experience in conducting criminal trials and in sentencing. It was also said that the Court in banc, which is what the present Full Court approximates to, is best qualified to hear appeals in civil cases in which the trial has been a jury trial; and jury trials of civil cases remain an important part of the work of the Supreme Court. In relation to the assertion that judgments of a Court of Appeal were more likely to be consistent in relation to sentences and awards of damages, it was stated that particular sentences and particular awards of damages could not be forced into any absolute consistency with other sentences and awards since the differences in the facts for each case must be accommodated.

The superiority of a Full Court in dealing with appeals against decisions given at trials was emphasized in an address by Mr. Justice Connolly which is referred to in the paper by the Judges. His Honour said:

" True it is that the Court in banc exercises the pure functions of a Court of Appeal. It is however also and above all the Court which sets aside decisions and where appropriate orders new trials on the ground not that some substantive principle of the law has not been applied or that there is not evidence to support the verdict, but on the ground that the trial has for some reason been unsatisfactory and has miscarried. Now, no Court can perform this latter function as satisfactorily as a group of trial Judges."

The need for establishing a permanent Court of Appeal to handle appeals more expeditiously was answered by the Judges as follows:

" There is presently no need to increase sitting days in appeal work as there is no backlog of cases requiring it. If a permanent Court of Appeal were created, then the time of Judges in that Court, if not there utilized, would be wasted. Appeal judgments in Queensland under the present system are in general delivered with reasonable despatch.

Appeals which are urgent can presently be accommodated if an approach is made by the parties to the presiding Judge ... the important point is that there is no real backlog of appeals to be dealt with.

It was also said that a permanent Court of Appeal would reduce flexibility of the total judicial strength. According to the paper by the Judges, it was difficult to escape the conclusion that the constitution of a Court of Appeal would necessitate the appointment of a considerable number of Judges who, if separately commissioned as Judges of Appeal would not be available to assist or, (perhaps) would not be amenable to a direction by the Chief Justice that they should assist, with trial and chamber work when circumstances require that the system should be flexible. This would be most unsatisfactory."

It is suggested that the first question to be resolved is whether the quantity of appellate work would justify the creation of a permanent Court of Appeal, assuming that it was desirable in principle to establish it. The answer to that question depends on whether the Court of Appeal would handle only appeals in civil matters, as in New South Wales and originally in England, or would have jurisdiction also in criminal matters. It is the view of the Law Reform Commission that justification would exist for the creation of a permanent Court of Appeal only if it were to be invested with the jurisdiction which is presently exercised by the Full Court and the Court of Criminal Appeal. However, on the assumption that it was invested with such jurisdiction, there seems no reason to believe that the Court would not have its time fully occupied.

The crucial question is whether the establishment of a permanent Court of Appeal is desirable in principle as a means for improving the administration of Justice in Queensland. The reason for asserting that it is desirable is that the best performance of any appellate tribunal can only be secured if judges appointed because of their outstanding capacity for appellate work are associated together on a continuous basis in the determination of appeals. It needs no demonstration that some judges who are able to carry out their duties with distinction at first instance may be less adapted than some other judges to appellate work. The importance of permanent association of members of an appellate tribunal has been emphasized in particular by Lord Evershed M.R. He stated (see 25 A.L.J. at p.388):

" If the real purpose of an appellate court is to be achieved, it is essential so to do by getting what I may call a combined judicial operation. Two heads it is said are better than one, but only if they work truly together. Otherwise the individual opinion of each of three appellate judges may have no obvious primacy over the view of the trial judge. If, therefore, the members of the appellate court are constantly having to change ... then these judges constituting the court would not sit often enough together to acquire the faculty of working not individually but in co-operation with their brethren."

The main attack on the principle of a permanent Court of Appeal is based on the perceived dangers of a system in which members of the judiciary who decided appeals would do so without sufficient and current involvement in the conduct of trial work. It is suggested that the problem is more likely to be serious in criminal than in civil matters. It is highly improbable that any Court of Appeal established in Queensland would not consist predominantly of members who had had long, extensive and varied experience in civil trial as members of the judiciary and/or as

counsel. But the danger that a Court of Appeal might be composed of members with limited experience in criminal trials cannot be dismissed as unreal. The persistence in New South Wales of a Court of Criminal Appeal alongside the Court of Appeal, and the constitution in England of a civil division and a criminal division of the Court of Appeal, attest to the need to ensure that an appellate court includes members with extensive experience in the criminal jurisdiction. This need may however be met by providing a discretion to the Chief Justice to appoint a Judge as an additional Judge of Appeal. It is anticipated that this discretion would be exercised mainly in constituting a court for criminal appeals, in cases where he considered that the members of a particular Court of Appeal could be assisted by the addition of a Judge highly experienced in the criminal jurisdiction.

An affirmative answer to the question of principle does not by itself determine the issue under consideration. It is also necessary to consider the cost involved in the establishment of a Court of Appeal. The justification for increasing the number of Judges and for removing some of them from the work of presiding over trials and dealing with chamber matters must be substantial where the standard of justice presently being administered by the Court is high and where the appellate work of the Court is despatched without undue delay. If the constitution of a Court of Appeal were to involve a considerable increase in the number of Judges, this would be a serious consideration. It is however suggested that the creation of a Court of Appeal would involve only one extra judicial appointment. At present at least three Judges are assigned at any time to appellate work.

On balance, the conclusion of the Law Reform Commission is that it is appropriate to recommend the establishment in Queensland of a permanent Court of Appeal. It recommends also that the following provisions should be inserted in the draft Bill in relation to the Court of Appeal:

1. Establishment and Jurisdiction of the Court of Appeal.

The Supreme Court of Judicature (Consolidation) Act of 1925 provided that the Supreme Court of Judicature in England was to consist of the High Court of Justice and the Court of Appeal, with such jurisdiction as was conferred on those courts respectively by that Act. The jurisdiction vested in the High Court was defined in ss.18 to 25 of that Act, while the jurisdiction vested in the Court of Appeal was defined in ss.26 to 31. In Re Carroll [1931] 1 K.B. 104, the Court of Appeal decided that it had no original jurisdiction to entertain an application for the issue of a writ of habeas corpus. Scrutton, L.J. stated (at p.107):

" The Supreme Court of Judicature is composed of the High Court and the Court of Appeal, and the members of the Court of Appeal can only sit as judges of the High court when certain formalities have been complied with which have not been complied with in this case. We are not members of the High Court to the Judges of which repeated applications for the issue of a writ of habeas corpus can be made ... the Court of Appeal was a statutory Court created by the Judicature Act, 1873, and could only do such things as that statute expressly allowed ... the Court of Appeal has no original jurisdiction in habeas corpus, and is not a member of the High Court of Justice."

The jurisdiction vested in the Court of Appeal by the Judicature Act 1873 and subsequently by the Supreme Court of Judicature (Consolidation) Act 1925 was confined to civil matters. However, the Criminal Appeal Act 1966 abolished the Court of Criminal Appeal and combined it and the Court of Appeal into a single court with a civil division and a criminal division.

The present position in England as established by the Supreme Court Act 1981 is that the Supreme Court consists of the Court of Appeal, the High Court of Justice and the Crown Court, and that there are two divisions of the Court of Appeal, namely the criminal division and the civil division. The model provided by the English Judicature Act of 1873 was followed in the Judicature Act 1908 of New Zealand.

The position in New South Wales is very different. The strict separation in jurisdiction made in England and New Zealand between the Court of Appeal and the High Court (or Supreme Court in New Zealand) is avoided. Section 38 of the New South Wales Supreme Court Act 1970 provides that for the more convenient despatch of business, the Supreme Court shall be divided into (a) the Court of Appeal, and (b) seven Divisions. All proceedings in any Division are to be heard and disposed of before a Judge, who constitutes the Court: s.40(1). The Court of Appeal may, in proceedings before it, exercise every power, jurisdiction or authority of the Court: s.44. Part III of the Act, which is headed "Distribution of business", provides in Division 1 for this distribution of business between the Court of Appeal and Divisions, and in Division 11 for the distribution of business amongst Divisions. The Act sets out in s.48 the powers which may be exercised only by the Court of Appeal. The powers which may be exercised either by the Court of Appeal or by the Court in a Division are specified in s.49. Provision is made by s.51 for the removal of proceedings into the Court of Appeal where they were wrongly commenced in a Division, and for the remission of proceedings to a Division where they were wrongly commenced in the Court of Appeal. The removal or remission takes place only if an order is made; otherwise proceedings may be continued and disposed of where they were commenced.

Separate provision is made in New South Wales for a Court of Criminal Appeal. The Criminal Appeal Act 1912 provides (s.3) that the Supreme Court shall be the Court of Criminal Appeal, and the court shall be constituted by such three or more Judges of the Supreme Court as the Chief Justice may direct. It appears from the New South Wales law reports that Judges of Appeal are frequently assigned as members of the Court of Criminal Appeal.

It is suggested that the New South Wales model should be followed in fitting the Court of Appeal as closely as possible into the fabric of the Supreme Court. There is however no justification for creating, as in England, a separate division of the Court of Appeal for criminal matters, and as stated above, it would not be justifiable to create a permanent Court of Appeal in Queensland unless it was invested with appellate jurisdiction in criminal as well as in civil matters.

The jurisdiction to be vested in the Court of Appeal may be expressed in a simple formula, namely, that the Court of Appeal shall hear and determine all causes and matters which at the time when the Court is established are required by an Act, Regulation or Rule of Court to be heard and determined by the Full Court or by the Court of Criminal Appeal and all matters required thereafter to be heard and determined by the Court of Appeal. This will include jurisdiction which is not appellate, but it would seem undesirable to have any Supreme Court business handled by a Court in banc which is not the Court of Appeal. Adoption of the proposed formula would mean that the jurisdiction of the Supreme Court would be exercised by the Court of Appeal or by a single judge.

2. Membership of the Court of Appeal. The Court of Appeal should consist of -

- (a) the Chief Justice, ex officio;
- (b) the President of the Court of Appeal; and
- (c) three other Judges of Appeal.

Provision should also be made for the appointment or nomination of additional Judges of Appeal. See clause 13 of the draft Bill, and this report at p.29.

B. Constitution of the Court of Appeal. The constitution of the Full Court is currently regulated by the Supreme Court Act of 1892, ss. 4, 5, 6 and 7. Section 4 prohibits a Judge from sitting upon the hearing of an appeal from a judgment or order made by himself, or from sitting in the Full Court upon the hearing of any motion or application for judgment or for a new trial, or to set aside a verdict, finding or judgment, or for any other relief in any cause or matter before himself. Sections 5 and 6 refer to the number of judges required to hear an appeal from a Judge of the Supreme Court and to constitute the Full Court. Section 7 states how questions are to be decided when the Judges are divided in opinion in the Full Court.

A further provision relating to the constitution of the Full Court is contained in s.5 of the Supreme Court Act of 1921. This states that unless in any particular case the Governor in Council on the recommendation of the Chief Justice otherwise directs, not more than three Judges shall sit in the Full Court. The Judges who from time to time constitute the Full Court are selected by the Chief Justice.

The general rule expressed in s.7 of the Supreme Court Act of 1892 is that questions before the Full Court are to be decided according to the opinion of the majority; if the Judges are equally divided, the opinion of the senior Judge present prevails. This is also the rule adopted by the N.S.W. Supreme Court Act of 1970, s.45. In the working paper it was suggested that a preferable rule was that in the case where the Judges are equally divided, a judgment appealed from is affirmed, if it is a judgment of a single Judge of the Court; otherwise the opinion of the senior Judge present prevails (cf. Federal Court of Australia Act 1976, s.10).

In the case of the Court of Criminal Appeal, provision is made in s.668A of The Criminal Code that it is to be duly constituted if it consists of not less than three judges and of an uneven number of judges; that the determination of any question before the Court shall be according to the opinion of the majority of the members of the court hearing the case; and that the judge of the court of trial shall not be one of such judges.

It is undesirable to have different provisions for the constitution and method of making decisions of a Court of Appeal which exercises appellate jurisdiction in both civil and criminal matters, depending upon which jurisdiction it is exercising at any time, particularly as that question may itself be sometimes a matter of controversy. Accordingly, the draft Bill now provides that the Court of Appeal shall be duly constituted for the purpose of exercising any of its jurisdiction if it consists of an uneven number of judges not less than three. This is the provision contained in the U.K. Supreme Court Act 1981, ss.34 and 55. In that case, it is enough to provide that questions shall be decided in accordance with the opinion of the majority of the Judges.

It is however necessary to provide for the constitution of the Court of Appeal when one member is unable to continue. This is done in clause 50, which follows s.4 of the Supreme Court Acts Amendment Act of 1958 (No.2).

Clause 43 of the draft Bill repeats the provision presently contained in s.5 of the Supreme Court Act of 1921 that the Full Court and Court of Criminal Appeal are to be held in Brisbane. Some submissions have suggested that the appeal tribunal should be authorised to sit in such other places in the State as the Court might decide. The Full Court and the Court of Criminal Appeal, unlike the High Court of Australia, have never been peripatetic, and in the opinion of the Commission it would involve expense and inconvenience disproportionate to any benefit which might accrue if the present practice were to be changed.

DIVISION 3: MATTERS TO BE DETERMINED BY THE COURT OF APPEAL

Clause 35 of the draft Bill provides that, subject to any enactment and to the Rules of Court, a single Judge of the Court may hear and determine all causes and matters within the jurisdiction of the Court which are not required under any Act or Rules of Court to be heard and determined by the Court of Appeal.

The matters to be heard and determined by the Court of Appeal are (1) Appeals; (2) motions for new trials; (3) certain special cases; (4) certain motions for judgment; (5) trials at bar; (6) other matters which are required to be determined by the Court of Appeal, including those which are set out comprehensively in Chapter LXVII of the Criminal Code.

(1) APPEALS

Section 38 of the Supreme Court Act 1867 contained a proviso that the decrees and orders of a Judge in cases mentioned in that section were subject to appeal to the Full Court. That section did not by any means cover all matters which could be heard and determined by a single Judge. However, the Judicature Act of 1876 provided that an appeal lay to the Full Court from every order made by a Judge in Court or in Chambers (s.10) except that no order made by any Judge by the consent of parties or as to costs only which by law were left to the discretion of the Judge were to be subject to any appeal except by leave of the Judge making such order (s.9).

Section 10 of the Judicature Act is a general enactment, and subject to later special and particular enactments which limit the right of appeal : White v. White (No. 2) [1923] St.R.Qd.69 at p.76 (per Lukin J.) : Schwartz v. Strutt [1948] St.R.Qd.129; cf. Hermit Park Bus Service v. Ross [1952] and see Exton v. White [1976] Qd.R.126. It has been held that s.10 applies to orders made by a Judge in a criminal cause or matter : R. v. Foster [1937] St.R.Qd.67.

The new Supreme Court Act should provide that the Court of Appeal shall hear and determine all appeals from a single Judge whether sitting in court or in chambers.

It will of course be necessary to provide for exceptions to this rule, but these can conveniently be stated in a separate clause. Order 39 R 52 provides for the assessment of damages by a District Court Judge a Master or Registrar where judgment is given in the Supreme Court for damages to be assessed, and no provision is made by the judgment as to how they are to be assessed. It is suggested that an appeal should lie to the Full Court from such an assessment in the same way as it would if the assessment had been made by a Judge of the Supreme Court. In addition provision should be made to cover the cases where the Court of Appeal is authorised under other Acts to hear appeals. Instances of this are provided by the District Courts Act of 1967, s.92; the Elections Acts 1915 to 1962, s.118; the Land Acts 1962 to 1965, ss.45 to 48. It would be feasible to list such cases, as has been done in s.48(3) of the New South Wales Supreme Court Act 1970, but it is suggested that this is unnecessary and that a general formula would be preferable, as it would not require amendment consequential upon any change to the other Acts regulating appeals. This might be in the form that the Court of Appeal shall hear and determine all appeals which are required by the provisions of any Act or by Rules of Court to be heard and determined by the Court of Appeal.

In the U.K. Supreme Court of Judicature (Consolidation) Act 1925, s.31 a number of restrictions on appeals were set out. This model has been followed in the Supreme Court Acts of the other States. The list of cases where no appeal is to lie varies in the different Acts. It is suggested that no appeal should lie in the following cases:

- (a) Without the leave of the court or judge making the order from an order of the court or any judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the court.

This reproduces s.9 of the Judicature Act 1876. It corresponds with s.31(1)(b) of the Supreme Court of Judicature (Consolidation) Act 1925; See new s.18(1)(f) of the Supreme Court Act 1981 cf. s.39 of the Victoria Supreme Court Act of 1958.

A submission by the Bar Association of Queensland suggested that the procedure of obtaining leave from the Judge at first instance to appeal against an order for costs was pointless, and it was suggested that a better course would be to provide that there should be no appeal from such an order other than by leave of the Court of Appeal.

It is considered that this suggestion should not be followed. The provision does not apply where the appeal covers matters other than costs. If an order relates only to costs which are within the discretion of the trial Judge, an appeal will lie without leave if the circumstances are such that the trial Judge did not in truth exercise his discretion at all. See Jones v. McKie and Mersey Docks [1964] 2 All E.R. 842. It seems not unreasonable to limit an appeal against a discretionary order as to costs to cases where the trial Judge grants leave, unless the Court of Appeal is persuaded that he did not in fact exercise the discretion vested in him. Under the present law, which is reproduced in the draft Bill, a final decision by the trial Judge on costs which are left to his discretion is made by him, unless he grants leave to appeal or unless there is no basis connected with the case for his order. The effect of the proposed amendment would be to make all orders for costs subject to appeal by leave of the Court of Appeal.

- (b) From an order of a Judge allowing an extension of time for appealing from a judgment or order;
- (c) From a decision of a Judge where it is provided by any Act that such decision is to be final.

These Clauses are based on s.31(1)(b) and (d) of The Supreme Court of Judicature (Consolidation) Act 1925. See new s.18(1)(b) and (c) of the Supreme Court Act 1981.

A further provision which is included as Clause 46(2) in the draft Bill is one providing that an application for leave to appeal may be made ex parte, unless the Judge or the Court of Appeal otherwise directs. This is based on s.40(4) of the Victorian Supreme Court Act 1958. It has been reproduced in the South Australian Supreme Court Act 1935, s.51, and in the Western Australian Supreme Court Act 1935-1976, s.60(3).

The U.K. Supreme Court of Judicature (Consolidation) Act 1925, s.31 (i) provides that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge, except in certain specified cases. This is repeated in s.18(1)(f) of the Supreme Court Act 1981. The N.S.W. Supreme Court Act 1970 forbids an appeal except by leave of the Court of Appeal from an interlocutory judgment or order in proceedings in the Court, and contains no exceptions to the rule that appeals from interlocutory judgments or orders require leave. In the corresponding legislation in South Australia, Victoria and Western Australia, leave may be granted not only by the Full Court, but also by the Judge who delivered the judgment or made the order, while the list of exceptions to the rule requiring leave is longer than under the English legislation.

The question whether an order is final or interlocutory is fraught with uncertainty, as has been frequently recognised by the Courts. See for example, Salter Rex & Co. v. Ghosh [1971] 2 Q.B. 597 at p.601; Tampian v. Anderson (1973) 3 A.L.R. 414; Becker v. Marion Corporation [1976] 2 W.L.R. 728. In view of this, it is considered undesirable to include in the draft Bill any provision modelled on s.31(i) of the U.K. Supreme Court of Judicature (Consolidation) Act.

(2) NEW TRIALS

The Supreme Court Act of 1874 s.13 provides that a new trial shall not be granted in any action at common law on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court some substantial wrong or miscarriage has been thereby occasioned in the trial of the action, and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy the Court may give final judgment as to part thereof and direct a new trial as to the other part only.

The Judicature Act s.8 provides that every motion for a new trial of any cause or matter on which a verdict has been found by a jury or by a judge without a jury shall be heard before the Court of Appeal.

An application for a new trial where there has been a trial by a Judge without a jury is made by appeal to the Full Court : 0.70, r.20. An application for a new trial where a verdict has been found by a jury is made to the Full Court by motion upon notice : 0.70, r.21. The jurisdiction of the Court of Appeal to hear appeals from a Judge has been preserved (see the preceding section of this report). This should be supplemented by a provision that the Court of Appeal shall hear and determine all applications for new trials (cf. Victorian Supreme Court Act 1958, s.34(1)(a); South Australian Supreme Court Act 1934 s.48). This would replace s.8 of the Judicature Act. A further provision should reproduce s.13 of the Supreme Court Act of 1874, with the deletion of the words "in any action at common law", which refer to the pre-Judicature Act system.

The Victorian and South Australian Acts refer simply to "motions for new trials". The corresponding English provision speaks of "every motion for a new trial, or to set aside a verdict, finding or judgment in any cause or matter in the High Court in which there has been a trial thereof or of any issue therein with a jury". The provision in Western Australia is even wider. It refers to "applications for a new trial or re-hearing of any cause or matter, or to set aside or vary any verdict, finding or judgment found given or made in any cause or matter tried or heard by a Judge or before a Judge and jury." The formulation proposed is "all applications for a new trial or to set aside the verdict or finding of a jury". This is consistent with the present Rules of Court. See in particular 0.70. r.26.

(3) SPECIAL CASES

The proviso to s.6 of the Judicature Act states that every issue of law and every special case stated by consent of parties shall be heard and determined by a single judge in the first instance unless either party shall require that the same be heard and determined by the Full Court in the first instance in which case the same shall be so heard and determined accordingly. Section 7 of that Act provides that subject to any Rule of Court any judge sitting in the exercise of his jurisdiction otherwise than in the Full Court may reserve any case or any point in a case for the consideration of the Full Court or may direct any case or point in a case to be argued before the Full Court.

The substance of these provisions has been reproduced in Clause 45 of the draft Bill.

(4) MOTIONS FOR JUDGMENT.

Section 9 of the Judicature Act provided that every motion for judgment other than a motion for judgment on default in delivering a defence or demurrer and every motion to reduce damages was to be heard before the Full Court. However, the Supreme Court Act of 1892, s.9, required motions for judgment in any cause or matter in the Court in which there had been a trial of the cause or matter, or of any issue therein, with or without a jury to be heard and determined in the first instance by the Judge before whom the trial took place, unless it was impracticable or inconvenient that such a Judge should act, in which case the motion was to be heard and determined by some other Judge.

It is suggested that the substance of s.9 of the Supreme Court Act of 1892 should be reproduced. A convenient place would be in Part VI - Procedure.

(5) TRIALS AT BAR.

A trial at bar is a trial before a court in banc. In Dixon v. Farrer (1886) 1 Q.B.D. 43 at p.49, Lord Esher M.R. said that after the Judicature Acts a trial at bar would be a trial before a Divisional Court. In Queensland, it would by virtue of s.6 of the Supreme Court Act of 1892 be a trial before not less than two judges.

Provision is made in the Supreme Court Acts of several of the States for the Full Court to have jurisdiction to hear and determine trials at bar. Though trials at bar are almost obsolete, it is probably desirable to preserve the procedure of trial at bar in case some extraordinary situation may make such a trial desirable, and, more importantly, to avoid any contention that the Court of Appeal cannot act as a trial court.

(6) OTHER MATTERS REQUIRED TO BE DETERMINED BY THE COURT OF APPEAL.

The Victorian Supreme Court Act of 1958 s.34 and the Supreme Court Acts of some other states contain a provision that the Full Court shall have jurisdiction to hear and determine all causes and matters which are required by the rules of court, or by the express provision of any other Act, to be heard or determined by the Court of Appeal.

This provision should be incorporated into the new Supreme Court Act. So should a further provision of those Acts conferring jurisdiction on the Court of Appeal to hear and determine all rules and orders to show cause returnable before the Court of Appeal.

The provision that the Court of Appeal is to hear and determine all causes and matters required by the express provisions of any other Act to be heard and determined by the Court of Appeal, when combined with Clause 5(2) by which references in any Act to the Full Court or Court of Criminal Appeal are to be construed as a reference to the Court of Appeal will ensure that the Court of Appeal will be able to hear and determine all appeals which lie under the present legislation to the Full Court or Court of Criminal Appeal.

The Supreme Court as a Court of Error

The Supreme Court Act of 1874, s.10 provides that the Supreme Court is for all purposes to be the Court of Error for Queensland. For reasons set out below, it is recommended that this provision should be repealed.

Holdsworth (History of English Law, Vol.1 at p.214) states that "the common law knew nothing of an appeal by a rehearing of the case. It only knew a procedure in error in which only errors which appeared on the record could be alleged." The procedure involved the removal of the record into the higher court. Then came the assignment of errors by the plaintiff in error, the summoning of the defendant in error by writ of Scire Facias to hear the errors assigned, and the joinder of issue on the question whether the errors so assigned were really errors.

In criminal cases, the record stated the commission of the judges, the presentment of the grand jury, the indictment, the plea, the fact that the accused placed himself on his country, the summons of the jury, the verdict, and the judgment. It did not state either the evidence or the direction given by the judge to the jury. As these were the matters in which error was most likely to occur, the writ of error was ineffective to remedy the most substantial errors.

In 1907, the English Parliament passed the Criminal Appeal Act. This abolished writs of error in criminal cases, and established the Court of Criminal Appeal. That Court might refuse to quash a conviction even if there was some defect in the proceedings of the court if it thought that no miscarriage of justice had taken place. It had no power to order a new trial, but it could order a venire de novo where there had been such a mis-trial as rendered the trial a nullity from the outset : R v. Neal [1949] 2 K.B. 590.

In Queensland, the Court of Criminal Appeal may order a new trial : Criminal Code s.669. In R v. Smith [1954] Q.W.N. 49, the Court of Criminal Appeal ordered a new trial where the original trial was a nullity. The question, said Philp J., was whether the power to order a new trial was confined to cases where there had merely been a mistrial or extended to a case in which the trial had been so fundamentally defective as to result

in a nullity, in which case a court of error would have directed not a new trial but a venire de novo as of right. He answered it by holding the words "new trial" in s.669 were wide enough to give the Court the power to order a new trial in such circumstances as a court of error would grant a venire de novo.

This might lead to an inference that the fact that the Supreme Court is a Court of Error adds nothing to the powers which can be exercised by the Court of Criminal Appeal, and that it is simply superfluous. It is certainly difficult to imagine any situation in which an appellant would use the procedure of a writ of error. That might be a sufficient reason for repealing it in relation to criminal cases. But the real justification for a repeal is that the persistence in Queensland of the provision making the Supreme Court a Court of Error has substantive effects which are attributable to a procedure which is defective and inadequate.

This point was brought home vividly in a recent case before the Queensland Court of Criminal Appeal : R. v. Hart, Cuzzo & Smith [1980] Qd.R. 259. Cuzzo and Hart were convicted after a joint trial on a charge of conspiracy. Hart appealed successfully to the Court of Criminal Appeal, which quashed his conviction and sentence and ordered that there be no new trial. It was held that this implied acquittal of Hart involved the acquittal of Cuzzo also. The Court of Criminal Appeal followed a decision of the Privy Council in reaching this conclusion, although that decision was disapproved by the House of Lords in D.P.P. v. Shannon [1975] A.C. 717. Very recently the High Court has expressed its approval for the House of Lords decision: see R v. John Edward Darby (unreported). It is unnecessary here to canvass the issues involved in the case, beyond pointing to the effect of the old procedure. In D.P.P. v. Shannon, Lord Morris stated (at p.749):

"In days when any review of convictions in criminal cases involved bringing the record before the court it was assumed that if there was an apparent inconsistency on the face of the record then that must have been the reflection or the consequence of some error. The error could then be corrected. I say apparent inconsistency because if the charge was that A and B (and no others) conspired together and if the record showed that one was found guilty and the other not guilty it need not logically have been inferred that there necessarily was inconsistency. The case against A might have been proved while the case against B had not. On the other hand, when only the record was available and when the apparent inconsistency very probably or possibly reflected a real inconsistency, the fair course was to decide that there was error which called for correction."

It is suggested that it is unsatisfactory at the present time that the Court should be required to quash a conviction which results in error or inconsistency, real or apparent on the record. The jurisdiction of the Court of Criminal Appeal should not be affected by the presence or absence of such errors, and this would be the position if s.10 of the Act of 1874 was abolished.

In civil cases, the writ of error was defective, as Holdsworth points out (op cit., at p.223), in that it was both too wide and too narrow. It was too wide because any error on the record, however trifling, was ground for a writ; and it was too narrow, because it lay only for errors on the record (or on a bill of exceptions). The civil jurisdiction in error at the Supreme Court is now obsolete. One effect of the Judicature Act 1876 was to abolish the common law procedure in error in civil cases and to replace it by the chancery system of appeal by way of rehearing the case. See R. v. Smith [1954] Q.W.N. 49, and 0.70, r.l.

Jurisdiction of the Supreme Court in error has apparently been abolished in the other States, as it has in England. It is suggested that it should also be abolished in Queensland.

DIVISION 4 - INCAPACITY OF A JUDGE

The Supreme Court Acts Amendment Act of 1958 (No. 2) contains provisions relating to two matters which may be affected when a Judge dies or becomes incapable of continuing to act. One is the constitution of the Full Court or Court of Criminal Appeal. The other is the conduct of a trial. As these provisions are comprehensive and relatively modern, they have been incorporated without any substantial change into the draft Bill.

DIVISION 5 - DISTRICTS AND CIRCUITS

The Supreme Court Act of 1867, s.30, authorised the Governor in Council to define the limits of districts within and the number of times at which circuit courts were to be held in Queensland, and to direct that circuit courts were to be held at such places within those limits as he thought fit to appoint. The same section also defined the civil and criminal jurisdiction of the circuit courts. The dates for the holding of the circuit courts were to be fixed by the Judges of the Supreme Court, and every circuit court was to be opened by a judge or judges of assize at the time and place proclaimed (s.31), subject to the proviso in s.31 and to s.5 of the Supreme Court Act of 1893 (which removed the necessity for a judge to attend when the Sheriff certified that there was no business at a circuit court).

The Supreme Court Act of 1874 s.15 provided that one of the judges of the Supreme Court was to reside at Bowen and was to be called the Northern Judge. Within the district assigned by the Governor in Council he was to have all the powers and jurisdiction of the Supreme Court, with the proviso that all his decisions in matters which would in Brisbane properly belong to the Full Court were to be subject to appeal to the Full Court. In 1889, this was amended to provide that two of the judges of the Court were to be styled Northern Judges, who were to sit together in all matters which would in Brisbane be proper to be heard and determined by the Court of Appeal. The Northern Court was to sit at Townsville.

A further change was made by the Supreme Court Act of 1895. This provided for sittings of the Supreme Court to be held within the Central District and the Northern District respectively, at Rockhampton and Townsville.

Finally, the Supreme Court Act of 1921, which had repealed the District Court Acts of 1891 and 1897, authorised the Governor in Council from time to time to

- (i) constitute Supreme Court districts, each of which was to consist of a petty sessions district or two or more contiguous petty sessions districts, and order that sittings of the Supreme Court presided over by a Judge were to be held for trial of criminal causes and for the trial and hearing of civil causes and matters at such times, dates, and place within each district as were from time to time prescribed.
- (ii) constitute at each such place for such district a Supreme Court registry;
- (iii) make such changes in the boundaries of any district or in the place at which sittings were to be held and the registry was to be situated as he thought fit.

Until otherwise prescribed, all existing districts and District Court registries constituted under the repealed Acts were to be deemed to have been constituted for all purposes under the Supreme Court Act of 1921.

The 1921 Act provided further that sittings of the Supreme Court held in a district under that Act were to be a Circuit Court.

The draft Bill incorporates a number of suggested changes to the existing provisions. The main amendments are as follows:

- (a) The promulgation of a calendar appointing sittings of the Court is made a matter for the Chief Justice. Compare s.6 of the Supreme Court Act of 1921.
- (b) The definitions of central and northern districts are complemented by a definition of the southern district.
- (c) Provisions is made authorising the Governor in Council to appoint a further Judge or Judges to reside in the Northern District or the Central District.
- (d) Certain towns are listed as circuit towns, and provision is made for other towns to be so declared by the Governor in Council.
- (e) Provision is made for personal actions only to be commenced and heard in a Circuit Court when exercising civil jurisdiction.

DIVISIONS AND COMMERCIAL CAUSES

Divisions of the Court: In New South Wales, the Supreme Court is divided into (a) the Court of Appeal; and (b) seven divisions: the Common Law Division, the Equity Division, the Admiralty Division, the Family Law Division, the Protective Division, the Probate Division and the Administrative Law Division. See Supreme Court Act of 1970, s.38. All proceedings in any Division and all business arising out of proceedings in a Division are to be heard by a single Judge, who shall constitute the Court (s.40). The jurisdiction of the Court is exercised in the Divisions by Judges specially appointed and by Judges nominated by the Chief Justice to act in a Division, but a Judge appointed or nominated to act in a Division may exercise the Court's jurisdiction in any other Division (s.41). There is assigned to each Division all work which is required by any Act to be so assigned or which would have been commenced in the corresponding former jurisdiction. Subject to this, certain specified proceedings are assigned to the Equity Division, and there is assigned to the Common Law Division all proceedings not assigned to another Division (s.53).

Section 56 of the N.S.W. Supreme Court Act of 1970 provides that a commercial list is to be kept in the registry of the Common Law Division. Where proceedings in the Common Law Division arise out of the ordinary transactions of merchants and traders, or relate to the constitution of mercantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency, or mercantile usages, the Court may, on application by any party, order that the proceedings be entered in the commercial list. Thereupon the Court may give such directions as it thinks fit for the speedy determination of the real questions between the parties.

These provisions are modelled on those which apply to the English High Court of Justice. The High Court was originally divided into five divisions, but now is divided into the Chancery Division, the Queen's Bench Division and the Family Division. All causes and matters in the High Court are distributed among the divisions as directed by statute and rules of court. As part of the Queen's Bench Division there are constituted an Admiralty Court, a Patents Court and a Commercial Court. In relation to the Commercial Court, the Administration of Justice Act 1970 provides (s.3) that there shall be constituted as part of the Queen's Bench Division of the High Court, a Commercial Court to take such causes and matters as may in accordance with the rules of court be entered in the commercial list (see new s.62 of the Supreme Court Act 1981). The judges of the Commercial Court are to be such of the puisne judges of the High Court as the Lord Chancellor may from time to time nominate to be Commercial Judges. By s.4 of that Act, a judge of the Commercial Court may accept appointment as sole arbitrator or as umpire under an arbitration agreement, where the dispute appears to him to be of a commercial character.

The practice of sitting in divisions has been adopted in the case of the Federal Court of Australia. See the Federal Court of Australia Act 1976, s.13 (Industrial Division and General Division). It has not however been followed in the case of the Supreme Courts of the other States. Section 47 of the S.A. Supreme Court Act 1935-1975 provides that any two or more of the judges may sit at the same time, as separate courts or divisions of the court, for the despatch of its business, either in the same jurisdiction or in different jurisdictions, and, in particular, the Full Court may sit in two

divisions. This provision seems to be designed to meet any objection that the court being unitary cannot dispose of its business through the exercise of its jurisdiction by courts or judges sitting separately at the same time. It does not operate to set up separate divisions of the Court as has been done in England or New South Wales.

In the working paper which was issued by the Commission, it was stated:

"Where a court is composed of a large number of judges, as in England and to a lesser extent in New South Wales, and where legal work has traditionally been handled in different divisions of the court by judges and legal practitioners who have specialized in the jurisdiction of a particular division, there are good reasons based on administrative efficiency and expertise for continuing to despatch business through its allocation to divisions of the Court. But where the number of judges is relatively small, as in Queensland, it is a matter for consideration whether the assignment of judges to particular divisions would improve or prejudice the efficient conduct of the Court's business. It is arguable that the prompt discharge of the work of the Supreme Court of Queensland requires that all judges must be available to handle any criminal or civil matters which may come before the Court. On this view, while this may involve some loss of the advantages which accrue from specialization in a particular branch of law, this would be compensated by the greater flexibility which would exist for the allocation of the work of the Court among all the judges. An alternative view would emphasize the quality and predictability of decisions made by judges who are able to devote themselves mainly if not exclusively to a particular jurisdiction. The Commission seeks comments from those to whom this working paper is circulated on the questions (a) whether provision should be made for the establishment of divisions of the Supreme Court; (b) what divisions should be established; and (c) how the assignment of judges to the divisions should be made. In the light of these comments, the Commission will consider whether provisions should be inserted in the draft Bill relating to divisions of the Court."

Consideration of the comments received in response to this invitation has led the Commission to the conclusion that the proposed new Supreme Court Act should not include any provision for the establishment of divisions of the Supreme Court.

A submission by the Bar Association of Queensland dated July 1980 proposed the establishment of an Equity Division, a Common Law Division, a Criminal Law Division, and an Administrative Law Division. Its submission in response to the Working Paper varied this by deleting the proposal for a Criminal Division separate from the Common Law Division. At the same time, it accepted that a system of Divisions could be implemented by way of statute or by discretion of the Chief Justice.

The case against the establishment of separate divisions by statute seems, at least given the present numbers of the Court, to be unanswerable. The most prejudicial consequence of introducing divisions would be that the degree of flexibility which is necessary for the despatch of the Court's business would be lost through the assignment of Judges to particular divisions, and the resulting inability or difficulty in using a Judge to dispose of matters outside the area of the division to which a particular Judge was assigned.

With a relatively small number of Judges, it would be impossible in view of fluctuations in the kinds of matters which come before the Court to ensure that work was so allocated that each Judge was fully occupied with matters falling within his particular area, and that delays did not occur as a result of unforeseen heavy caseloads in certain divisions.

It is not necessary in a report on the statutory provisions which should be included in a new Supreme Court Act to examine the question whether or not it would be advantageous to introduce a de facto system of divisions, and the Commission expresses no opinion on that question. It is enough to draw attention to the authority which is accorded to the Chief Justice in Clause 12 of the draft Bill.

One suggestion which was made in some comments was that consideration should be given to the establishment of a "Crown Court" to handle criminal trials. In England, the Crown Court is part of the Supreme Court, and it might be thought appropriate that if a decision were taken to establish such a court, the relevant legislation should be incorporated into a Supreme Court Act. However, the question whether such a Court should be established raises important issues as to the administration of criminal justice which go beyond the matters which were canvassed in the Commission's Working Paper, and it is thought preferable that the desirability of establishing such a court should be considered as a separate issue. So should the related question of the desirability of establishing an office of Director of Public Prosecutions.

Commercial Causes.

In the Supreme Court Practice (the White Book), the commentary on O.72 relating to commercial actions states:

The institution of the Commercial List (often referred to as the Commercial Court) was largely due to Mathew L.J. (then Mr. Justice Mathew). The object was to create a simplified procedure, more suited to the needs of the mercantile community, with briefer pleadings, more expeditious trials before Judges of special experience in such cases, and reduced expense.

In Queensland, the Commercial Causes Act of 1910 provided for a list of commercial causes, as defined in s.2, to be kept by the Registrar, and required that all proceedings in the causes on this list were to be in accordance with the provisions of the Act. The establishment of the commercial causes list did not involve the creation of a separate division of the Supreme Court. Its effect was rather to permit expeditious procedures to be applied to hear and determine commercial disputes.

In 1972, the Commercial Causes Act of 1910 was amended in several particulars following the submission of a Joint Report of Sub-Committees of the Bar Association of Queensland and the Queensland Law Society.

As the provisions relating to commercial causes are concerned with matters of procedure, it might seem more appropriate that they should be expressed as rules of court rather than in an Act. This has been done in England (see O.72) and Victoria (O.14 of the Rules of Procedure in Miscellaneous Civil Proceedings). In New South Wales, the matter was originally dealt with by legislation - the Commercial Causes Act 1903 - but it is now covered mainly by rules of court (Part 14 of the Supreme Court Rules 1970).

It is recommended that the Commercial Causes Act 1910 to 1972 should be repealed, and that its provisions should be incorporated into the Rules of Court. The only amendment which it is suggested might be made to the present provisions is one dealing with the removal of actions from the Commercial Cause List (Compare Vic. O.14, R6 of the Rules of Procedure in Miscellaneous Civil Proceedings). Pending that incorporation, it is recommended that the Commercial Causes Act remain in its present form.

Two comments were made on the proposals contained in the Working Paper. One was that the definition of commercial causes in the Commercial Causes Act should be amended by substituting the word "means" for "includes", so as to make the determination of whether or not a case was one to be entered on the Commercial Causes list independent of the exercise of discretion by the Commercial Causes Judge. This seems a desirable measure, as litigants should be able readily to determine whether or not a particular matter will be entered in the list. The Commission therefore supports the suggestion that this amendment should be made prior to the incorporation of the provisions of the Act into the Rules of Court, if that latter step is likely to involve delay.

The other comment was that provision should be made that where proceedings are entered in the commercial causes list, issues of fact are to be tried without a jury, or alternatively, if a party in a commercial cause seeks to have a jury, then the matter should be removed from the Commercial Causes List. It is suggested that this is a matter which should be regulated by Rules of Court or by an amendment to the Commercial Causes Act, rather than by qualifying the right to trial by Jury as set out in Clause 74 of the draft Bill.

PART V - OFFICERS, REGISTRIES AND SEALS

A. OFFICERS OF THE COURT

It is proposed that all legislation relating to officers of the Court should be included in the new Supreme Court Act. At the moment legislation affecting the various officers is to be found in:

- (1) the Supreme Court Act of 1867
- (2) the Supreme Court Act of 1895
- (3) the Supreme Court Act of 1921
- (4) the Costs Act of 1867
- (5) The Criminal Code
- (6) the Sheriff's Act of 1875

MASTERS

The creation of the office of "master" was effected in 1980 by the Supreme Court Act Amendment Act 1980. By virtue of this amending legislation a section 39A was inserted into the Supreme Court Act of 1867. A new Order 86 was introduced into the Rules of Court and some minor alterations were made to existing orders to define the jurisdiction and functions of the office. The draft Bill incorporates the substance of the Supreme Court Act Amendment Act 1980. The qualification for appointment as master has been expressed in the same terms as that for appointment as a Judge.

As the qualification for appointment of a District Court Judge is that he must be a barrister or solicitor of the Supreme Court of Queensland of not less than five years standing (District Courts Act of 1967, s.9), it is unnecessary to refer specifically to District Court Judges as being qualified for appointment as masters. The power to make Rules of Court relating to the function of masters, appeals from decisions of masters, and the stating of a special case by a master has been included in the clause conferring power to make Rules of Court.

For reasons set out earlier in this report, it is recommended that the present position be maintained. Accordingly, the provisions of the Supreme Court Act Amendment Act 1980 are reproduced in clause 61 of the draft Bill.

REGISTRARS AND OTHER OFFICERS

Section 39 of the Supreme Court Act 1867 states, inter alia:

"(t)he said Court shall have a master in equity and the said Court shall also have a prothonotary and registrar and such and so many other officers as to the judge or judges for the time being of the said Court shall appear to be necessary for the administration of justice and the due execution of all the powers and authorities of the said court..."

The Legislature took cognizance of the fact that circumstances might not warrant the creation of three offices occupied by different incumbents by providing:

"... that, until such appointments be made respectively, the registrar and other officers of the Supreme Court as constituted before the passing of this Act shall exercise the like powers and authorities as were by them severally and respectively exercise and discharged in the said Court up to the time of the passing of this Act."

The offices of master in equity and prothonotary are a legacy of history and stem from the time when law and equity were administered in separate courts. In Queensland the traditional functions of these officers, together with that of the registrar, has invariably been exercised by the registrar. With the creation of masters in Queensland OIR1 has been amended and now reads:

"Whenever by any statute any power or duty is conferred or imposed upon an officer of the Court by the name of the Master in Equity or Prothonotary, such power or duty shall and may be exercised and performed by a master or by the registrar respectively."

By section 9 of the Supreme Court Act of 1895 provision was made for the Governor in Council to appoint such and so many duly qualified persons as may be requisite to perform the duties of sheriff, prothonotary, registrar, together with such other officers as may be necessary for the purposes of the Central and Northern Courts. Section 6(1) of the Supreme Court Act of 1921 gave the Governor in Council the power to create Supreme Court districts and registries for the more convenient administration of justice. Section 6(1A) of the Act of 1921 also permits the Governor in Council to appoint a registrar, deputy sheriff and such and so many other officers as are necessary in and for every Supreme Court District constituted under the Act.

Section 39 of the Supreme Court Act of 1867 provides inter alia, that "all persons who may be appointed to any other office in the said court than those hereinbefore particularly enumerated (viz. master in equity, prothonotary, and registrar) shall be so appointed by the Governor of the said colony with the advice aforesaid and no new office shall be created in the said court unless the judge or judges thereof shall certify by writing under his or their hand or hands to the said Governor that such new office is necessary."

In the case of Byrnes v. James (1889) 3 Q.L.J. 165 the Full Court held that a taxing officer appointed to relieve the registrar of the court from the duty of taxing bills of costs was irregularly and illegally appointed. The executive had created the office and filled the same without a certificate in writing from a judge or judges to the Governor as required by s.39. In consequence of this decision section 5 of the Supreme Court Act of 1889 was enacted. That section has no continuing operation and should be repealed.

Lilly CJ said in Byrnes' case (at p.168):-

"Under the Supreme Court Act there might have been appointed a master - not a master in equity, as equity has ceased to be separate; there might have been a prothonotary, who might have been called a registrar; and there might have been a second registrar, and a third registrar, as the growing importance of the business of the Court might demand. Or one of them might have been called a taxing officer; but he would be a new officer, and would hold a new office."

Presumably the office of "master" could have been created merely by executive fiat after due compliance with s.39. It was, however, created by means of legislation (The Supreme Court Acts Amendment Act 1980). In New South Wales, Western Australia and South Australia there is an unfettered right to appoint officers of court vested in the executive. In Victoria no new office shall be created in the court unless the Chief Justice certifies that a majority of the judges are of the opinion that a new office should be created.: s180(2) of the Supreme Court Act of 1958-1977. The office referred to, however, is that of "Master" only. (In Victoria the offices of Senior Master, Master, Listing Master and Taxing Master are expressly created by legislation: s180(1)).

In Tasmania the 19th Century Imperial Charter of Justice still governs the appointment of officers. The situation is there reversed with the Chief Justice having to recommend and the Governor having to signify his approbation in writing.

It is recommended that the part of s.39 requiring judicial certification before a new office is created in the Court should be retained, but such certification should be by the Chief Justice.

The Costs Act of 1867 provides that on the application of the party chargeable by a bill of costs that party may, within one month, seek to have the bill taxed as of course and without order of a judge, "from the master in equity in case the whole of the business contained in such bill shall have been transacted in the Supreme Court in its equitable jurisdiction or in any matter of lunacy or shall relate to conveyancing business; from the judge in insolvency in case of the whole of such business contained in such bill shall have been transacted in the Supreme Court in its insolvency jurisdiction; and from the prothonotary of the Supreme Court in every other case including criminal business and though the business or part of the business contained in such bill shall not have been transacted in the Supreme Court.": s.24.

This section never found application as the offices of master in equity and prothonotary were rendered obsolete by practice, the Rules (see O1, R1) and the fusion of law and equity by the Judicature Act.

It is recommended that registrars and the variants thereof (e.g. deputies, assistants, etc.) be expressly charged with the duties of taxing officer. This would accord with what already is the practice. In Victoria alone a Supreme Court master is exclusively made Taxing Officer: see Supreme Court Act 1958-1977, S180(1). In Tasmania the Master, the Registrar, any Deputy Master or Registrar, and the District Registrars are all appointed taxing officers of the Court: Supreme Court Act 1959, S10. The Supreme Court Act 1970-1979 of New South Wales is silent on the point but provision is made for the appointment of registrars and other officers and it would seem that one or some of these "other officers" may be appointed a taxing officer - see s.121 and RSC part 83, Div. 6, rule 4, and note that under the rules the Chief Justice may appoint as many officers of court as he thinks fit to be taxing officers. Western Australian legislation makes the Registrars the taxing officers: s.155 Supreme Court Act 1935-1979. In South Australia the legislation does not specifically nominate any officer of Court to be the taxing officer. The matter is dealt with in the Rules, however - see RSC. O65, Rr 6 & 19. By Rule 6 the court or a judge may refer the question of costs to the "Master or to another officer of the court for inquiry and report" if it or he thinks that costs have been incurred "improperly or without reasonable cause."

At present the Masters of the Supreme Court of Queensland are precluded from reviewing the taxation of costs - O86, R1(a)(iii). O70, R33 provides for an appeal, generally, from a registrar's decision to a Judge in Chambers.

If the recommendation regarding taxing officers is accepted then O95, R10 may be deleted. This rule vests power to tax in district registrars and this is covered by the suggested legislation.

Section 28 of the Costs Act of 1867 is now irrelevant and can be repealed. It states:

"In all cases in which such bill shall have been referred to be taxed and settled by the prothonotary of the Supreme Court such officer shall be at liberty to request the master in equity to assist him in taxing and settling any bill or any part of such bill

"and such officer so requested shall thereupon proceed to tax and settle the same and shall have the same powers in respect thereof as upon a reference to him and shall return the same with his opinion thereon to the prothonotary."

Section 39 of the Supreme Court Act of 1867 contains a broad definition of the duties and functions of the officers of the court. The relevant part reads:

".... and such master (in equity) prothonotary and registrar and other officers shall respectively draw up, prepare and settle all such and the like orders rules decrees reports and proceedings as are usually drawn up prepared and settled by persons holding similar office in the superior courts of law and equity in Westminster or in such other manner as may have been provided for by any legislative enactment in force in the said colony without any charge whatsoever."

This formulation is clearly outmoded and should not be reproduced.

The Registrar of the Supreme Court is also the registrar of the Court of Criminal Appeal: S668A of the Criminal Code Act 1899. If the office of "registrar" is structured as suggested in the provisions of the draft Bill, then this section of the code should be amended so that "Registrar of the Supreme Court" reads "Principal Registrar of the Supreme Court".

Section 63 of the Common Law Practice Act 1867-1978 provides:

"In actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation it shall not be necessary to issue a writ of inquiry but the court or judge may direct that the amount for which final judgment is to be signed shall be ascertained by the prothonotary of the said court

and the attendance of witnesses and the production of documents before such prothonotary may be compelled by subpoena in the same manner as before a jury upon a writ of inquiry

and it shall be lawful for such prothonotary to receive affidavits and depositions as evidence upon the inquiry and to adjourn the inquiry from time to time as occasion may require

and the prothonotary shall endorse upon the rule or order for referring the amount of damages to him the amount found by him and shall deliver the rule or order with such indorsement to the plaintiff and such and the like proceedings may thereupon be had as to taxation of costs signing judgment and otherwise as upon the finding of a jury upon a writ of inquiry."

Its provisions are now covered by the Rules of Court - see Order 39, Rules 51-54. The section can be repealed.

Section 2 of the Supreme Court Act of 1899 prescribes that:

"Whenever, by reason of illness or absence, or other inability, the Central Judge or the Northern Judge, as the case may be, is unable to hear and determine -

- (i) Any unopposed motion or application or any ex parte application intended to be made to the Court or a Judge thereof in any matter depending in the Court in its insolvency jurisdiction;
- (ii) Any application for the issue of a writ of *capias ad respondendum*;
- (iii) Any application under section seventeen of "The Bills of Sale Act of 1891":⁽¹⁾

and no other Judge is present at Rockhampton or Townsville respectively, the Registrar of the Central Court or of the Northern Court, as the case may be, shall have power to hear and determine such motion or application, and for such purpose may exercise all the jurisdiction, powers, and authorities of the Court which may be exercised by a Judge sitting alone:

Provided that such Registrar may if he thinks fit adjourn any such motion or application in order that the same may be heard or determined by a Judge."

It is suggested that this section be repealed. It was enacted at a time when communication and travel were slow and onerous, and it was conceivable that access to a Supreme Court Judge could be denied for a considerable period.

This suggestion was opposed by one practitioner from the Northern District, on the ground that such matters should not be dealt with in Brisbane. It is however not implied that this should happen. The implication is rather that it is unnecessary now to confer judicial authority upon administrative officials in the Central and Northern Districts, since Judges may be sent without delay from Brisbane to deal with matters when no Judge is present at Rockhampton or Townsville.

The proposal was on the contrary supported by the Law Society after eliciting the views of the country practitioners.

Section 6(3) of the Supreme Court Act 1921 confers on District Registrars all the powers, jurisdiction and authorities of Supreme Court Registrars so far as proceedings in their respective registries are concerned.

It is questionable whether in all cases District Registrars would have the experience needed for the exercise of such powers, and it may therefore be appropriate to limit their powers through Rule of Court.

SHERIFFS

The appointment of sheriffs and their deputies is covered by sections 43, 44 and 45 of the Supreme Court Act 1867 and section 6(1A) of the Supreme Court Act of 1921. The Sheriff's Act of 1875 makes provision for the appointment of "high bailiffs or bailiffs" - Section 2, and "special bailiffs" - see section 6.

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(1) Now see Section 16 of Bills of Sale and Other Instruments Act 1955-1971.

Section 9 of the Supreme Court Act of 1895 provides that the Governor in Council may from time to time appoint, for the purposes of the Central Court and the Northern Court respectively, persons to perform within these Districts the duties of Sheriff.

It provides further that the provisions of s.8 of the Sheriff's Act of 1875 with respect to the power, duties and liabilities of the Northern Sheriff appointed under the Supreme Court Act of 1874 shall apply to the Central Sheriff and to the Northern Sheriff.

Section 6(1A) of the Supreme Court Act of 1921 authorizes the Governor in Council to appoint a deputy sheriff for every Supreme Court District constituted under that Act.

The effect of these provisions has been substantially reproduced in Clause 63 of the draft Bill.

Section 46 of the Supreme Court Act 1867 provides that -

"(t)he said sheriff and each of such deputy sheriffs respectively shall give security to Her Majesty her heirs and successors by bond or recognizance of himself and two responsible sureties or otherwise in such reasonable amount as may be fixed by the Governor in Council conditioned for the due performance by such sheriff and deputy sheriffs respectively of the duties of their offices and for the payment by him and them as he and they may be respectively directed of all moneys which shall come to his or their hands respectively."

Sheriffs are public servants and there is no good reason why they should be subjected (or liable to be subjected) to any "special" incentive for the due execution of their duties other than the provisions of the Public Service Act. It is, therefore, recommended that this section be abrogated. Moreover, as an officer of the court the sheriff is subject to supervision of the court which may set aside the acts of its officers: See Owen v. Daly (1955) VLR p.442 and the authorities cited therein.

The duties of the sheriff are detailed in s.43 of the Supreme Court Act 1867. This has been reformulated as in s.8 of the South Australia Sheriff's Act, 1928.

Section 48 of the Supreme Court Act of 1867 makes it lawful for the sheriff or his deputy to sell property by auction without having taken out an auctioneer's licence. This provision has been reformulated in similar terms to s.15 of the South Australia Sheriff's Act, 1978.

Section 49 of the Supreme Court Act of 1867 permits a sheriff to act as a Justice of the Peace. It is in these terms:

"It shall be lawful for the sheriff of Queensland to act as a Justice of the Peace any law or custom to the contrary notwithstanding."

A prohibition placed on sheriffs acting as Justices can be traced back to as early as 1194 and the reign of Richard I. Clause 24 of the Magna Carta of 1215 signed by King John continued the restriction and clause 17 of the Magna Carta as ratified by Henry III in 1255 was in terms similar to that of the earlier Clause 24. It read that "no sheriff, constable, escheator, coroner, nor any other bailiffs, shall hold pleas of our Crown."

The statute 1 Mary Sess 2 C8 of 1553 was entitled "An Act that Sheriffs shall not be Justices of the Peace during that office" and was enacted to overcome the effect of 1Edw. 6C7 of 1547 which permitted the concurrent holding of both the offices of sheriff and Justice of the Peace. This Act of 1553 remained in force until 1887 when it was effectively repealed by the Sheriff's Act of 1887. Section 17 of this latter Act continues the prohibition in England. At the present time, there seems no good reason why the sheriff should be prohibited from acting as a Justice of the Peace and the present position in Queensland is presented in the draft Bill.

The liability of sheriffs for improperly or negligently performing their duties is prescribed by sections 4, 6, 7 and 9 of the Sheriffs Act of 1875. These have been replaced in the draft Bill by a clause which is in the terms of s.12 of the South Australia Sheriff's Act 1978.

It is provided in s.51 of the Supreme Court Act of 1867 that the sheriff may require the payment of a deposit to cover the necessary expenses associated with the execution of any writ or other process. If any dispute arises as to the amount to be deposited, the matter is to be referred to the Registrar for decision. It seems more appropriate, as is provided in the Western Australia Supreme Court Act, that the amount should be fixed by rules of court.

The Equity Act 1867-1974 contains provisions relating to contempt: ss. 120-135. Section 120 requires the sheriff to "keep a register of the names of all persons committed by the Supreme Court in equity for contempts." This section can be repealed. The rules deal with committal for contempt - see R.S.C. O.53, rr.6-8; O.84. Sections 32-34 of the Interdict Act 1867 are concerned with interpleading by the sheriff. This matter is now covered by R.S.C. O.59, rr.15-17.

The "marshal" is an officer of the Court in its admiralty jurisdiction. He performs a function in this jurisdiction similar to that of the sheriff. In practice the one person occupies the offices of sheriff and marshal. There is no express reference to the office of "marshal" in any of the Acts dealing with the Supreme Court. The term is defined in the Rules of Court viz. "The term 'marshal' means the marshal of the court in its admiralty jurisdiction, and includes a deputy marshal or assistant marshal.": O.1, r.1.

The authority for the creation of this office is to be found in section 39 of the Supreme Court Act of 1867 where it is said, inter alia, ".... and the said court shall also have so many other officers as to the judge or judges for the time being of the said court shall appear to be necessary for the administration of justice and the due execution of all the powers and authorities of the said court."

Provision is made in Clause 68 of the draft Bill giving statutory authority for the appointment of marshals (and other officers who may be or may subsequently be seen to be necessary or desirable).

REGISTRIES

The division of the State into a Northern, Central and Southern District and the establishment of a Northern Court and a Central Court had the consequence that provision had to be made for the transfer of causes from one Court to another and for the place where process was returnable. Section 10 of the Supreme Court Act of 1895 provides that all matters depending in the Supreme Court at Brisbane, or in the Central Court, or in the Northern Court may be transferred to any other one of the said Courts in such manner as may be prescribed by Rules of Court. Section 12 of the same Act made any process issued out of the Office of one of the Courts returnable in that office, but affirmed any process was to have full force and effect and might be enforced at any place within the State.

The Supreme Court Act of 1921, by s.6(1), empowered the Governor in Council to constitute Supreme Court districts and to constitute for such district a Supreme Court registry. Section 8 of that Act required every civil cause or matter commenced in the Supreme Court to be commenced in the prescribed registry, and such cause or matter was to be tried or heard in the District for which such registry had been constituted. Provision was however made for matters to be removed to another registry. The matters to be commenced in a district registry and the district in which an action is to be commenced are prescribed by Order 95.

Clauses 52 (on transfer of causes) and 53 (on Supreme Court Districts) reproduce the terms of s.10 of the Supreme Court Act of 1895 and s.6(1) of the Supreme Court Act of 1921. These should be supplemented by clauses which cover the matters dealt with by s.12 of the Supreme Court Act of 1895 and s.8 of the Supreme Court Act of 1921, except matters which are more appropriately dealt with by rules of court.

It is recommended that the registry at Brisbane should be designated as the Principal Registry and the registries at Rockhampton and Townsville respectively should be designated as the Central and Northern Registries.

SEALS

Sections 3 to 7 of the Supreme Court Act of 1867 deal with the matter of the Court's seals and Judges' stamps. See also Order 87. It is proposed to reproduce these provisions except for sections 5 to 7 which should more appropriately be dealt with by rules of court.

PART VI - PROCEDURE

Division 1 - General

The legislation which was introduced in England over the half century preceding the enactment of the Judicature Act in 1873 to effect procedural reforms in both the common law courts and in the Court of Chancery was copied in Queensland in such Acts as the Common Law Pleading Act 1867, the Common Law Practice Act 1867, the Common Law Process Act 1867, the Equity Act 1867, the Equity Procedure Act 1873, the Interdict Act 1867, and the Supreme Court Acts of 1867 and 1874. Those Acts (referred to in this working paper as the ancillary Acts) remain on the Queensland Statute book in some cases as substantial pieces of legislation, in others as mere remnants of the original Acts.

An analysis of the provisions of those Acts discloses that they are of three kinds. First, there are a number of provisions which deal with substantive questions of law which are not directly related to the jurisdiction, powers or functioning of the Supreme Court. These should be preserved, or at least not affected by the enactment of a new Supreme Court Act. Secondly, there are provisions which have not been superseded by rules of court, but which have been supplemented by rules which assume their continuing application. Thirdly, there are those provisions which, though still in force, regulate procedures which have fallen out of use or in respect to which rules of court have set out procedures which are not based upon the statutory enactments.

The following matters seem to be of this third kind:-

- (a) Common Law Pleading Act : Payment into Court in replevin (s.46).
- (b) Common Law Practice Act : Description of parties (s.23); co-partnerships (s.25); refusal to make an affidavit (s.40); writ of view (s.62); writs of trial (s.66); summoning of a jury (s.70); examination without subpoena (s.74); failure of witnesses to attend (s.75); trial without jury (s.78); amendments (s.80); warrants of attorney and cognovit actionem (s.84).
- (c) Equity Act : substituted service (s.15); joinder of parties (s.18); objection for want of parties (s.22); examination of defendants (s.48); issue of a subpoena (s.51); evidence out of jurisdiction (s.53); scientific assistance (s.54); taking accounts (s.75); power to order sale of real estate (s.76); contempt (s.120); discharge of insolvents (s.140); plea of privilege (s.142).
- (d) Equity Procedure Act : Investment of funds in Court : (s.94).
- (e) Interdict Act : Interpleader (s.22)
- (f) Supreme Court Act 1861 : Examination on Interrogatories : (s.49).
- (g) Supreme Court Act 1867 : change of venue (s.60) : feigned issues (s.61).
- (h) Supreme Court Act 1874 : Amendments (s.11).

It is recommended that most of these provisions of the third kind should be repealed. The danger in doing this is naturally that such repeal may have unexpected consequences by removing the statutory basis for some procedure which should be preserved. To obviate this problem, the Supreme Court of Judicature (Consolidation) Act 1925, s.103 provided:

- (1) Save as is otherwise provided by this Act or by rules of court, all forms and methods of procedure which, under or by virtue of any law, custom, general order or rules whatsoever, were formerly in force in any of the courts, the jurisdiction of which is vested in the High Court or the Court of Appeal respectively, and which are not inconsistent with this Act or rules of court, may continue to be held in the High Court and the Court of Appeal respectively in the like cases and for the like purposes as those in and for which they would have been applicable in the former respective courts.

- (2) Subject to rules of court, the practice and procedure in all criminal causes and matters whatsoever in the High Court shall be the same as the practice and procedure in force at the commencement of this Act in relation to similar causes and matters.

It is recommended that a clause modelled on this should be incorporated into the new Supreme Court Act, in order to preserve existing procedures except so far as they are incompatible with the new Act. At the same time, it would be useful to carry out a review of the rules of court which relate to matters affected by the repealed Acts, in order to determine whether any changes should be made to them to ensure that they were not affected by the repeals and that they operated independently of the provisions in the repealed Acts. Such a review would necessarily involve close consultation with the Judges, whose concurrence is required before rules of court are made or altered.

The second relates to juries. It contains five sub-sections. The first and fifth set out the position in relation to the right to trial by jury. The second and third reproduce the existing provisions in s.15 of the Judicature Act 1876. The fourth provides for questions submitted to a jury. The draft follows the provision in this regard in the Supreme Court of Judicature (Consolidation) Act 1925.

The right to trial by jury is in Queensland a creation of statute law, for the reasons set out by Kneipp J. in Matthews v. General Accident Fire and Life Insurance Corporation Ltd. [1970] Q.W.N. 37. The right to trial by jury in criminal cases in the Supreme Court is accorded by s.604 of the Criminal Code. In relation to civil actions, O.39 R7 provides that subject to such right as existed at the commencement of the Judicature Act to have particular cases submitted to the verdict of a jury, and subject to the like right under any later statute, the Court or Judge may at any time direct the trial of any question or issues of fact, or partly of fact and partly of law, arising in any cause or matter to be tried without a jury, either by a Judge or by a Judge with assessors, or may refer the same for inquiry and report to a special referee.

The right to have certain kinds of case submitted to the verdict of a jury has been restricted since the enactment of the Judicature Act. See for example, the Motor Vehicles Insurance Act 1936-1979, s.12, and the Railways Act 1914-1928, s.12(1). There does not appear to be any later statute which has accorded such a right. Prior to the Judicature Act, the right to trial by jury of all actions at law and all civil issues of fact in the Supreme Court was accorded by the N.S.W. Act 11 Victoria No. 20 s.20, referred to in the judgment of Kneipp J., which was in force in Queensland when the Judicature Act 1876 was enacted. In certain kinds of equitable actions, right to trial by jury was given by ss. 75 and 76 of the Equity Procedure Act 1873 which were also in force in 1876 : See Queensland Investment and Land Mortgage Co. Ltd. v. Hart (1894) 6 Q.L.R. 180.

In England, trial by jury in civil matters is in the discretion of the Court. However in an action to be tried in the Queen's Bench Division, if the Court is satisfied that a charge of fraud against a party, or a claim in respect of libel, slander, malicious prosecution or false imprisonment is in issue, the action must be tried with a jury if a party so requires, unless

the Court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury. See Administration of Justice (Miscellaneous Provisions) Act 1933, s.6(1).

In New South Wales, the general rule is that proceedings are to be tried without a jury, unless the Court otherwise orders. However, in proceedings on a common law claim, issues of fact are to be tried with a jury if a party so requires and pays the prescribed fee. To this there is an exception in the case of running down cases. In the case of common law claims for fraud, defamation etc., issues of fact are to be tried by a jury, but the Court may order that issues of fact be tried without a jury not only in cases involving prolonged examination of documents or investigations, but also where the proceedings are entered in the commercial list or where all parties consent to the order.

In the working paper it was suggested that the rule for Queensland should be formulated as follows:

"Subject to the provisions of any Act and to the Rules of Court, in proceedings on a common law claim, issues of fact shall be tried with a jury if any party to the action applies for trial with a jury.

Provided that the Court or a Judge may order that all or any issues of fact in such proceedings shall be tried without a jury where any prolonged examination of documents or accounts or scientific or local investigation is required and cannot conveniently be made with a jury."

The question was raised in one submission whether under this formulation it would be necessary for a party to make a formal application to have issues of fact tried with a jury. This would not seem to be necessary. The relevant Rule of Court, O.39, R.4, permits a request for trial by jury to be made in the statement of claim, defence or answer, and the provision is made subject to the Rules of Court. However, to avoid any difficulty, it might be preferable to refer to a party requiring trial with a jury rather than applying for trial with a jury, and the draft Bill has been amended accordingly.

The right to a jury in civil actions under this formulation will be more extensive than in England but less extensive than in New South Wales. It does not, as in England, limit the right to a limited category of common law actions. It does not, as in New South Wales, require certain actions to be tried with a jury. It preserves the existing position in this State in relation to the right to trial by jury in common law actions, and makes an order directing trial by jury dependent on a request by a party (as under Queensland O.39 R.5) and gives the Court a discretion as in England and New South Wales to refuse such a request in certain circumstances where trial by jury would be inconvenient. This discretion is presently conferred by O.39, R.8, in slightly different terms, but it is considered convenient to include the clause conferring it in a statement of the general rule relating to the right to trial by jury.

It is appropriate to point out that many provisions of the ancillary Acts were repealed by the Statute Law Revision Act of 1908 and for that reason do not appear in the 1962 reprint of the Queensland Statutes. However, some of these repealed provisions continue to apply by virtue of s.2 of that Act, which provides that the Act shall not affect any principle rule of law or equity or established jurisdiction, form or course of pleading, practice or procedure... notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived by, in or from any enactment hereby repealed. One example of a repealed provision which thus continues to apply is s.62 of the Equity Act (Lord Cairns' Act). This has been incorporated expressly into the draft Bill - See Clause 34. Another example is s.45 of the Common Law Practice Act. Its effect is preserved by O48 R1 of the Rules of Court and Clause 88 of the draft Bill reproduces its effect.

In order to ensure that any repealed provisions which continued to apply by virtue of s.2 of the Statute Law Revision Act of 1908 should be included in this draft Bill, the Commission asked interested persons to advise it of any repealed provisions still relied on in practice of which they were aware. It appears that there are no such provisions other than s.62 of the Equity Act and s.45 of the Common Law Practice Act.

Section 103 of the Supreme Court of Judicature (Consolidation) Act 1925 operates to save the former procedure except where it is inconsistent with the Act and rules of court. However, reference to former practice is only permissible, by virtue of s.32 of that Act, where no special provision is contained in the Act or in rules of court with reference thereto. Section 32 provides as follows:

"The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act by rules of court, and where no special provision is contained in this Act or in rules of Court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained"

A clause based on this should also be incorporated into the new Supreme Court Act.

There are a few further matters which may conveniently be dealt with at this point. The first relates to the award of costs. The clause in the draft Bill is based on s.50 of the U.K. Supreme Court of Judicature (Consolidation) Act 1925. It is substantially the same term as the first sentence of O91, R1 which refers to the "provisions of the Judicature Act". There seems to be no relevant provisions remaining in that Act. Similar provisions are contained in the N.S.W. Supreme Court Act 1970, s.76 and the S.A. Supreme Court Act 1935, s.40.

Another matter is that of the right of appearance in Supreme Court proceedings. The draft reproduces s.38A of the Supreme Court Act of 1867, which was inserted by the Supreme Court Act Amendment Act 1973. Other matters are change of venue, motions for judgment, registration of deeds, failure of witnesses to attend, and dating and listing of proceedings. In these cases, the existing provisions are simply reproduced so far as they are presently applicable.

In one submission it was suggested that a specific power should be included in the clause relating to the failure of witnesses to attend whereby a non-attending witness might be ordered to pay costs thrown away. This has been done by including a provision modelled on O.40, R.19.

There remain for consideration matters of the second kind referred to above. They are discussed in the succeeding sections of this working paper.

DIVISION 2 - MESNE PROCESS

A. Arrest on Mesne Process

Section 10 of the N.S.W. Supreme Court Act 1970 provides that no person shall be arrested under the jurisdiction of the Court formerly exercised by writ of *capias ad respondendum* or by writ of *ne exeat*, or otherwise on mesne process.

In the other Australian States a closely circumscribed power of arrest on mesne process still survives.

In the United Kingdom, arrest on mesne process has been abolished, but s.6 of the Debtors Act 1869 provides that where the plaintiff in any action in the High Court in which if brought before 9th August, 1869, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a Judge of the Court, that the plaintiff has good cause of action against the defendant to the amount of 50 pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he is apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, the Judge may in the prescribed manner order the defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the order, that he will not go out of England without the leave of the court.

In Queensland s.47 of the Common Law Process Acts 1867 to 1972 prohibits arrest upon mesne process in any civil action in any court within the State except in the cases and in the manner provided by that Act. Section 48 authorises a Judge of the Supreme Court on the conditions set out in that section to direct that a defendant about to remove himself from the jurisdiction of the Court or to abscond to remote parts within the State shall be held to bail for an amount set by the Judge not exceeding the amount of the debt or damages. The plaintiff may then sue out a writ of *capias ad respondendum* against the defendant, whereupon the sheriff is required to arrest the defendant and retain him in custody until he has given a bail bond of the sum endorsed on the writ of *capias*.

Arrest upon mesne process was available only in respect to legal claims. For an equitable debt or demand the remedy of the plaintiff was to apply for the issue of a writ *ne exeat colonia* (as to which see the judgment of Dixon J. in - Glover v. Walters (1950) 80 C.L.R. 172). This was an adaptation of the writ *ne exeat regno*. It appears from the judgment of Megarry J. in Felton v. Callis [1969] 1 Q.B. 200 that this writ is still extant, but by analogy will issue only if the conditions set out in s.48 of the Common Law Process Act (or s.6 of the U.K. Debtors Act 1869 in the case of the United Kingdom) are satisfied.

In relation to the issue of the writ of capias ad respondendum, the following matters should be noted:

- (a) The issue of an order under s.48 is discretionary:
Hasluck v. Lehman (1890) 6 T.L.R. 376
- (b) The writ of capias by which the defendant is arrested is no longer, as it was originally, a means of commencing an action. It may be obtained at any time after the commencement of the action : s.48. See Warringah Transport Co. Pty. Ltd. v. Krapral (1957) 74 W.N. (N.S.W.) 349 at p.355).

The United Kingdom Committee on the Enforcement of Judgment Debts (the "Payne Committee") recommended in 1969 (para. 1259) that s.6 of the Debtors Act 1869 should be repealed and a new procedure made available. Under this, an order enforceable by committal of the debtor for contempt could be made, if the debtor should take any steps showing that he intended imminently to leave the country and to take with him or otherwise dispose of the assets. It suggested that the order should only be made after the writ of summons had been issued, or alternatively on terms that the writ of summons should be issued on the next day on which the court office was open.

If it is thought appropriate that an order for arrest may be made before commencement of the action, the procedure for issuing a writ of ca.re. should be replaced by one providing for an order for arrest (as orders for mandamus and injunction replace writs of mandamus and injunction). A convenient formulation will be found in the English O.29.R1(3) relating to applications for injunctions before issue of the writ or originating summons.

(c) The writ is not a form of execution. This is made clear by s.50 of the Common Law Process Act, by which the special order may be made and the defendant arrested only before final judgment has been obtained in the action.

(d) Under the English Debtors Act 1869, the plaintiff must establish that the absence of the defendant from England "will materially prejudice the plaintiff in the prosecution of his action". This will often not be capable of proof. More often, as James L.J. observed in Drover v. Beyer 49 L.J. Ch.37, the defendant's absence from England will facilitate the plaintiff's action, because judgment will go by default. It is necessary for the plaintiff to establish that the presence of the defendant within the jurisdiction is required for the prosecution of his action, because, for example, his case cannot be proved without examining the defendant, or because the defendant is in possession of documents material to his case and discovery is necessary (per Lopes J. in Comedy Opera Company v. Carte [1879] W.N. 210).

In Queensland, the plaintiff must prove that his action will be defeated unless the defendant is forthwith apprehended. This seems prima facie to make the plaintiff's task even more difficult than under the English provision, but it appears that the interpretation given to this provision avoids that result. (See below)

Under the English provision, it has been said that it is irrelevant that the plaintiff's chances of recovery on any judgment he may obtain will be prejudiced by the defendant's absence. In Felton v. Callis [1969] 1 Q.B. 200, Megarry J. remarked (at p.214):

"In the present case I have no evidence whatever before me to show that the defendant's absence from England would materially prejudice the plaintiffs in obtaining the fruits of their action; but that is not the test. I can also see how unsatisfactory it is if a man who owes a substantial sum of money and does not pay it can fully remove himself from the jurisdiction with all his assets, leaving his creditors unpaid. I would be ready indeed to use any powers that existed to prevent a debtor evading his just obligations in this way. But Parliament has curtailed the powers of the courts; and where, as here, the creditor has yet to obtain judgment, and the debtor's presence is not required for this purpose ..."

the court cannot restrain the departure of the defendant.

There are however expressions in a number of Australian cases which indicate that an action will be defeated if the plaintiff will not be able eventually to obtain satisfaction of his debt. For example, in O'Connor v. Pitcairn 27 V.L.R. 2 at p.6, Hood J. said that "the case the Act refers to are cases where a man has realised his assets and is about to leave the country with the proceeds of such realisation. That is to prevent a man rendering fruitless an action which would otherwise have been fruitful." See also Lundgren v. O'Brien [1921] V.L.R. 200; but compare the remark by Philp J. in Waugh v. Morris [1947] Q.W.N. 14 that "it must obviously be difficult if not impossible in many cases to show that the action would be defeated" by movement from one State to another.

(e) It must be stressed that the function of an order under s.48 of the Common Law Process Act is to ensure that the defendant remains within the jurisdiction until final judgment is signed. It does not prevent him from removing his assets from the jurisdiction prior to judgment, though that result may be secured by a Mareva injunction.

In recent years the courts in England have shown themselves willing to grant an injunction restraining the removal from the jurisdiction of assets where the plaintiff establishes that such removal will result in him being deprived of the fruits of the judgment he is seeking. Until 1975, the position in England as settled by Lister v. Stubbs (1890) 45 Ch.D. 1 was that "the court will not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would be open to any claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets": Barclay-Johnson v. Yuill [1980] 3 All E.R. 190 at p.193 (per Megarry V.C.). But since 1975 a qualification has been made to this rule, under which a "Mareva injunction" may be issued where there is a risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action. See the article on "The Rise of the Mareva Injunction" by Professor Gareth Jones, Downing Professor of the Laws of England, Cambridge, in 11 U.Q.L.J. 134.

(f) A defendant arrested under a writ of ca.re may give bail to the sheriff; he may deposit with him the sum indorsed on the writ, together with \$20 costs; or he may remain in custody. If he remains in custody he is entitled to be released if he subsequently procures special bail : s.49. See Avis Rent-A-Car System Pty. Ltd. v. Jolly [1961] Q.W.N.1. An order discharging the defendant from the custody of the Sheriff may be made at any time after arrest : s.51. See Valttila v. Saarenpaa [1956] Q.W.N.12.

In England any money paid by the defendant into court must be paid out to him once judgment is signed : Hands v. Hands [1881] 43L.T. 750. If a bond is given with sureties, the liability of the obligor ceases upon the defendant submitting to judgment; and if the defendant remains under arrest instead of giving a bond, he must be discharged once the plaintiff signs final judgment. See Yorkshire Engine Co. Ltd. v. Wright (1872) W.N.15. The position is different in Queensland : See 0.78, rr.7, 14 and 55; and Avis Rent-A-Car System Pty. Ltd. v. Jolly [1961] Q.W.N.1.

These differences between the English and Queensland processes reflect the fact that the object of the English provision is merely to secure the presence of the defendant in England, where this is necessary to enable the plaintiff to prosecute his action, whereas the object of the Queensland provision is to ensure that any judgment which may ultimately be obtained against the defendant will not be rendered unenforceable against him because he has left the jurisdiction.

The limited utility of the procedure for an order under s.6 of the U.K. Debtors Act of 1869 and the difficulty in satisfying the Court that an order should be made have led to its virtual disappearance in England. This is evidenced by the fact that the Rules of Court regulating the procedure to be followed on an order to arrest under s.6 of the Debtors Act have been repealed. In the Final Report of the Committee on Supreme Court Practice and Procedure (1954, Cmnd. 8878), the view was expressed that the writ ne exeat regno (the issue of which is subject to the requirements of s.6 of the Debtors Act) was "useless in its present application", and the recommendation was made that the writ should not be available to a plaintiff before judgment, but that it should be available if a judgment creditor satisfied the Court that there was reasonable cause to believe that the judgment debtor intended to leave the jurisdiction for the purpose of avoiding payment of his debts. This recommendation was not implemented. If it had been, it would have completely altered the character of the proceedings, which would have ceased to be a form of mesne process.

The question whether arrest upon mesne process should be retained is one of considerable difficulty. The recommendation of the Payne Committee has already been mentioned. In the United States, a study on civil arrest prepared for the California Law Revision Commission in 1972 concluded:

"Practically every commentator on the history and law of civil arrest has argued its repeal. The Californian Constitution Revision Commission has recommended that the prohibition against imprisonment for debt be made absolute. In the words of Charles Evans Hughes (later Chief Justice) uttered at the beginning of this century : 'Provision of such slight utility at the best and so commonly perverted should be repealed without delay.'"

The utility of the process of civil arrest has declined with improvements in communications (as to the relevance of which see Waugh v. Morris [1947] Q.W.N.14), with the enactment of the Commonwealth Service and Execution of Process Act 1901, and most recently with the development of the Mareva injunction. The scope of the Mareva injunction is however still uncertain : See Pivovarov v. Chirnabaeff (1978) 16 S.A. S.R.239; Re Hunt [1979] 2 N.S.W.L.R. 406, and The Sistina [1977] 3 All E.R. 803. In particular, it is not certain whether a Mareva injunction will restrain a defendant resident within the jurisdiction from disposing of his assets so as to defeat a plaintiff's claim before judgment. See Third Chandris Shipping v. Unimarine [1979] 2 All E.R. 972 at p.983. In addition the process may be the only way in which an effective order may be made against an absconding debtor who has removed his assets from the jurisdiction or who has assets outside the jurisdiction. In particular, it may be the only process which is realistically available against a defendant from overseas who incurs a debt or liability in Queensland and seeks to avoid payment by departing from Australia immediately, though he has assets abroad to satisfy any claim which may be established against him.

There is a danger that the process may be employed to harass with threats of imprisonment overseas tourists who enter into transactions in this State or are involved in accidents here. One way in which this possibility may be greatly limited is by raising considerably the amount which must be in issue before a writ of ca.re. may issue.

The Second Report of the N.S.W. Law Reform Commission on Supreme Court Procedure justified its earlier recommendation to abolish arrest on mesne process on the ground that as the object of arrest on mesne process was to ensure that the body of the defendant might ultimately be accessible to the plaintiff's execution, the process ought not to be preserved unless arrest in execution ought itself to be preserved. As it concluded that arrest in execution could not be justified, it considered that arrest on mesne process in its existing form should be abandoned, but it saw merit in the alternative scheme proposed by the Payne Committee.

Reasons are given later in this report for retaining in some circumstances arrest in execution. It is recommended that arrest in mesne process should also be retained and the draft Bill incorporates clauses to this effect. In relation to these clauses, the following observations may be made:-

- (a) Section 48 of the Common Law Process Act refers to an action in which the defendant is now (that is in 1867) liable to arrest whether upon the order of a Judge or without such order. At that time, a person could be arrested for a debt, without the order of a judge, or in an action of trespass if sanctioned by the order of a judge. The suggested formulation, which refers to personal actions, is based on s.66 of the District Courts Act of 1967.
- (b) The amount of \$2500 is the present maximum amount of the jurisdiction of Magistrates Courts in personal actions. The maximum amount of the jurisdiction of Small Debts Courts was sixty dollars under the Small Debts Act of 1867, which is an enactment of the same year as the Common Law Process Act.
- (c) There seems to be no justification now for preserving the reference to absconding to remote parts within Queensland.

In the submission by the Law Society it was suggested that the terms of the process for arrest on mesne process should follow more closely those in s.78 of the Bankruptcy Act 1966. In the part of the Working Paper which dealt with the writ of capias ad satisfaciendum, reference was made to that provision. Section 78 applies in part in relation to a debtor whether or not he has become a bankrupt, and it might therefore be thought to provide a proper model for recasting the process for arrest on mesne process. That section applies to a debtor against whom a bankruptcy notice has been issued or a petition presented, and it is designed to prevent the bankrupt from taking action which could defeat any order subsequently made. It is however suggested that at the stage when proceedings are initiated against a debtor, it will usually be necessary to act quickly against a debtor who is on the point of removing himself from the jurisdiction, and it will often be difficult or impossible to establish at that time an intention or action of the kind specified in s.78.

Since the Working Paper was issued, the scope of the "Mareva injunction" has been considered by the English Court of Appeal in Z Ltd. v. A-Z and AA-LL [1982] 2 W.L.R. 288. It has also been given a statutory formulation in s.37(3) of the English Supreme Court Act 1981.

It is recommended that this provision should be included in the new Supreme Court Act. An appropriate place would be in clause 30, which has been amended accordingly.

B. Foreign Attachment

In England, the process of foreign attachment was regulated by the custom of the Lord Mayor's Court in the City of London and by custom in local courts in some other great commercial centres. That custom is discussed in the Mayor etc. of London v. London Joint Stock Bank (1881) 6 App.Cas. 393, where it was held that the process against a garnishee to enforce obedience to the jurisdiction of the Lord Mayor's Court in foreign attachment was personal, and could not be applied to a corporation aggregate.

As a consequence of that decision, the process of foreign attachments, though still valid, has fallen into disuse in the Lord Mayor's Court. Halsbury, 3rd ed., Vol. 25, p.572. In the Australian States, however, the process is made available through Supreme Court proceedings and it is still at least occasionally used. It is regulated in Victoria by the Supreme Court Act of 1958, ss.142 to 159; in New South Wales, by the Common Law Procedure Acts 1899 to 1957 (now repealed); and in Queensland by the Common Law Process Acts.

In Rasu Maritima S.A. v. Pertamina [1971] 3 W.L.R. 518 at pp. 524-526, Lord Denning M.R. made the following remarks about the process of foreign attachment:

"In former times (this procedure of seizure of assets before trial or judgment) was much used in the City of London by a process called foreign attachment. It was originally used so as to compel the defendant to appear and to give bail to attend but it was extended to all cases when he was not within the jurisdiction. Under it, if the defendant was not to be found within the jurisdiction of the court, the plaintiff was enabled instantly, as soon as the plaint was issued, to attach any effects of the defendant, whether money or goods, to be found

within the jurisdiction of the court When our citizens of London and Bristol went out to the United States of America and settled there they took with them this process of foreign attachment

It was adopted throughout as a remedy for settling debts due from non-resident or absconding debtors the same process was available in most maritime towns in the continent of Europe. There it has survived most vigorously and is in force everywhere today. It is called in France 'saisie conservatoire'. It is applied universally on the continent. It enables the seizure of assets so as to preserve them for the benefit of the creditor. Very often the debtor lodges security and gets the assets released."

The rise of the Mareva injunction will probably make recourse to the process of foreign attachment even rarer than in the past. However, in Cretanor Maritime Co. Ltd. v. Irish Maritime Management Ltd. [1978] 1 W.L.R.966, the Court of Appeal pointed out that a Mareva injunction gave relief in personam, by restraining the owner from dealing with an asset in certain ways, but did not effect the seizure of the asset. As a consequence, it did not make the person who had obtained such an injunction a secured creditor. There may therefore be cases where a plaintiff would be advised to seek foreign attachment rather than an injunction. Moreover, the prevalence of the process indicates that there is good reason to suppose that it should not be abandoned lightly. The procedure of foreign attachment as laid down in the Common Law Process Acts is extremely complex. It is suggested that a simpler process should be available which would be a counterpart to the *capias ad respondendum* process. In that case, the procedure enables an effective order to be made against a defendant who is present in the jurisdiction, but is about to leave it, and who may have assets outside the jurisdiction. In the instant case, the process lies against a defendant who is absent from the jurisdiction but who has assets within it.

It is recommended that the Court should be empowered to make an order attaching property within the jurisdiction in which the absent defendant has an interest and directing the garnishee not to dispose of it without leave of the Court. However, such an order should be dissolved if the defendant gives sufficient security to meet the plaintiff's claim and costs.

The process of foreign attachment lies at present only where the defendant does not reside within the jurisdiction. An analogous process of attachment is provided in s.46 of the Common Law Process Act 1867 to 1972 against absconding resident defendants. The plaintiff must show to the satisfaction of a Judge of the Supreme Court three things:

- (a) that the plaintiff has a cause of action against the defendant to the amount of \$20 or upwards or has sustained damage to that amount;
- (b) that the defendant is about to remove or is making preparations to remove or has absconded out of the jurisdiction of the court or to remote parts within the State; and
- (c) that his action will be defeated thereby.

The Judge may thereupon order, upon such terms as to giving security or otherwise as he may deem fit to direct, that the plaintiff have leave to issue a writ of attachment and seizure. The sheriff is then obliged to seize the defendant's goods and chattels, but they are to be released if bail is given.

One submission suggested that the process of foreign attachment should not be restricted to actions on or arising out of contract, and that it should be extended to cases where the defendant was about to abscond from the jurisdiction of the Court. The first point has been accepted, and the draft Bill now makes it applicable to personal actions. It is however considered that the case of an absconding defendant is adequately met by the provisions on arrest on mesne process and by the existence of the Mareva injunction.

It might appear as a logical consequence of the recommendation to retain the process of foreign attachment against absent defendants that the process of attachment and seizure should be retained against absconding resident defendants. However, in their case the process of ca.re. is also available, and as attachment is limited to the defendant's goods and chattels it seems to be of little utility. It is difficult to envisage circumstances in which a plaintiff would not be advised to seek the arrest of the defendant under a writ of ca.re. or the issue of a Mareva injunction in the circumstances where s.46 of the Common Law Process Act would apply. Moreover, if the absconding defendant had chattels of any considerable value, he would most probably take them to some other part of Australia, and it is probable that a Judge would be slow to exercise the discretion conferred on him under s.46 in view of the existence of the Commonwealth Service and Execution of Process Act 1901.

It is suggested therefore that s.46 of the Common Law Process Act 1967 to 1972 should simply be repealed.

DIVISION 3 - REFEREES AND ASSESSORS

A. Referees and Assessors

Section 11 of the Judicature Act provides:

"Subject to any Rules of Court and to such right as may now exist to have particular cases submitted to the verdict of a jury any question arising in any cause or matter before the Court may be referred by the Court or Judge before whom such cause or matter may be pending for inquiry and report to a special referee and the report of any such referee may be adopted wholly or partially by the Court and may (if so adopted) be enforced as a judgment by the Court. The Court or Judge may also in any such cause or matter as aforesaid in which it may think it expedient so to do call in the aid of one or more assessors specially qualified and try and hear such cause or matter wholly or partially with the assistance of such assessors. The remuneration if any to be paid to such special referee or assessors shall be determined by the Court or Judge."

A reference under s.11 (which corresponds to the former s.56 of the English Judicature Act 1873) is for inquiry and report to the Court or Judge, which may adopt or partially adopt, or reject the report of the referee as it thinks right. Such a reference is very different from one under s.12 of the Judicature Act (or the former s.57 of the English Judicature Act), where the report has the effect as the verdict of a jury, and can only be set aside in the same way and on the same grounds as a verdict of a jury can be set aside. See Baroness Wenlock v. River Dee Co. (1887) 19 Q.B.D. 153 at p.158. Section 12 provides:

"In any cause or matter before the said Court in which all parties interested who are under no disability consent thereto and also without such consent in any such cause or matter requiring any prolonged examination of documents or accounts or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers, the Court or a Judge may at any time on such terms as may be thought proper order any question or issue of fact or any question of account arising therein to be tried before a special referee to be appointed by the Court or Judge. All such trials before referees shall be conducted in such manner as may be prescribed by Rules of Court and subject thereto in such manner as the Court or Judge ordering the same shall direct."

This is supplemented by s.13, which provides:

"In all cases of reference to or trial by referees under this Act the referees shall be deemed to be officers of the Court and shall have such authority for the purpose of such reference or trial as shall be prescribed by Rules of Court or (subject to such Rules) by the Court or Judge ordering such reference or trial. And the report of any referee upon any question of fact on any such trial shall (unless set aside by the Court), be equivalent to the verdict of a jury."

In England, referees are now regulated by Rules made under powers conferred by s.150 of the Administration of Justice Act, 1956. O.36, R.1 confers power on the Court to order that a cause or matter, or any question or issue of fact arising thereon, shall be tried before an official referee. O.36 R.2 authorises the Court to refer to an official referee for inquiry and report any question or issue of fact arising in a cause or matter. An order under O.36 R.1 may, with the consent of the parties, order that the trial be before a special referee instead of an official referee. A reference under O.36 R.2 may be made to a special referee instead of an official referee.

Though the English rule speaks of "official referees", s.25 of the Courts Act 1971 provides that no further appointments are to be made to the office of official referee, but the functions conferred on official referees are to be discharged by such of the Circuit Judges as the Lord Chancellor may from time to time determine.

O.36 R.9 provides that an order under O.36 R.1 may, with the consent of the parties to the cause or matter, order a trial before a master instead of an official referee.

The most modern treatment of the matter of inquiries and trials by referees in the legislation of any of the Australian States is to be found in ss.50 to 55 of the W.A. Supreme Court Act. This has varied slightly the corresponding provisions in the S.A. Supreme Court Act, ss.65 to 70. The draft Bill is based on these provisions and on O.36 of the English Rules.

It has been pointed out in the submission by the Bar Association that in Peter Slip Pty. Ltd. v. Commonwealth of Australia [1979] Qd.R. 123, the Full Court said that in exercising his discretion to direct trial of an issue with assessors or to refer it to a referee, the attitude of the parties was to be taken into account; and in Silk v. Eberhardt (1959) Q.W.N. 29, Philp J. observed that if one party objected to a reference (in that case to arbitration), the Court should not make an order where high additional costs would be involved. See also Honeywell Pty. Ltd. v. Austral Motors Holdings Ltd. [1980] Qd. R. 355. It was then suggested that trial by referee or trial with assessors should not be ordered where both parties agreed that such course not be followed. It is however considered that it would not be desirable to impose such a restriction. The decisions mentioned provide guidance for the exercise by Judges of their discretion, and it is considered preferable to leave the matter in the discretion of the Judges, having regard to all the circumstances of a particular case, including the nature and complexity of the facts, the attitude of the parties and the extra costs of trial by referees or with assessors.

It was further suggested that the relevant clause should provide that, if either party wished the trial to proceed either with a referee or assessors, he should be obliged to apply for directions at an early stage. This is a useful suggestion, but it is thought preferable that it should be dealt with by a rule of court rather than by a clause of the Bill.

B. Commissioners

1. Affidavits:

Section 1 of the Writs of Dedimus Act of 1871 provides that "commissions for taking affidavits in the Supreme Court may be issued as has been the practice heretofore and may be executed within and without the colony and all such commissions heretofore issued and all things done thereunder are hereby declared valid."

Section 50 of the Equity Act 1867-1974 provides for the issuing by the Chief Justice of a commission or commissions under the seal of the court to "the warden keeper or other chief officer of any prison within the colony and their deputies" for the purpose of taking and receiving affidavits and answers as any person within prison is desirous or willing to make. These commissioners are entitled to receive a fee of ten cents for taking any affidavit.

The latter provision has been rendered superfluous by section 3 of the Oaths Act Amendment Act 1891-1974. That section was substituted by section 2 of the Oaths Act Amendment Act 1974 and reads:

"An affidavit may hereafter be sworn before a Justice of the Peace, or a barrister or solicitor of the Supreme Court, and all such persons are hereby authorized and empowered to take affidavits without a commission being issued for that purpose."

This is concerned only with the taking of affidavits within the State. The taking of affidavits (and of evidence) outside of Queensland, both in other States of Australia and other countries, was originally covered by s.53 of the Equity Act 1867-1974. Section 24 of the Common Law Process Act 1867-1972 allowed for the taking of affidavits in connection with proceedings as against absent defendants as provided for in the Act. So far as the taking of affidavits overseas is concerned, this is now provided for in The Australian Consular Officers' Notarial Powers and Evidence Acts, 1946-1963. The taking of evidence in other States and overseas is now regulated by sections 25-34 of the Evidence Act 1977-1979.

It is recommended that the Writs of Dedimus Act of 1871 be repealed together with s.53 of the Equity Act 1867-1974, and section 24 of the Common Law Process Act 1867-1972. If this is done there will be a deficiency in as much as there would then appear to be no provisions in existence for the taking of affidavits in other States of Australia. To obviate this difficulty it is suggested that section 3 of the Oaths Act Amendment Act 1891-1974 be further amended by making the present provision subsection 1 and adding a sub-section 2 as follows:

"(2) An affidavit may hereafter be sworn in any other State of Australia or in any Territory of Australia before any person having authority to administer an oath in that other State or Territory."

Sections 40 and 41 of the Common Law Practice Act 1867-1974 provide:

"40. Any party to any civil proceeding or motion for a criminal information in the Supreme Court requiring the affidavit of a person who refuses to make an affidavit may apply by summons for an order to such person to appear and be examined upon oath before a judge or any commissioner for taking affidavits to whom it may be most convenient to refer such examination as to the matters concerning which he has refused to make an affidavit and a judge may if he think fit make such order for the attendance of such person before the person therein appointed to take such examination for the purpose of being examined as aforesaid and for the production of any writings or documents to be mentioned in such order and may therein impose such terms as to such examination and costs of the application and proceedings thereon as he shall think fit.

41. Such order shall be proceeded upon in like manner as an order for a commission made under The Rules of the Supreme Court for the time being and the examination thereon shall be conducted and the depositions taken down and returned as nearly as may be in the mode used on viva voce examinations under such a commission."

The matters dealt with therein are now covered by the Rules of Court. It is, therefore, recommended that Sections 40 and 41 of the Common Law Practice Act be repealed.

The effect of the recommendations would be to leave no practical reason for the retention of Commissioners for Affidavits. Notwithstanding this, it is recommended that the office of Commissioner for Affidavits not be abolished since it is referred to in many instruments, and it exists in other Australian jurisdictions, e.g. N.S.W.: s.27(2), Oaths Act 1900 (as amended); Vic.: s.118, Evidence Act 1958 (as amended); W.A.: s.175, Supreme Court Act 1935-1979; Tas.: s.193, Supreme Court Civil Procedure Act 1932; S.A.: s.281(1) Oaths Act 1936-1969; s.2(1) Evidence (Affidavits) Act 1928-1974.

It is suggested that the following be added as a sub-section 3 to the previously suggested sub-section 2 (see above) of the Oaths Act Amendment Act 1891-1974:-

"(3) Commissions for taking affidavits in the Supreme Court may be issued as has been the practice heretofore and may be executed within and without the State and all commissions heretofore issued and all things done thereunder are hereby declared valid."

This substantially reproduces the relevant part of the Writs of Dedimus Act.

2. Writs of Summons, Writs of Subpoena and Writs of Capias ad Respondendum.

The Chief Justice may, by commission under his hand and seal of the court, appoint any fit person residing at or within four kilometres of Maryborough, Gladstone, Rockhampton, Bowen, Warwick, Mackay and Townsville respectively to be a commissioner with the power to issue writs of summons at the instance of any plaintiff : s.64 Common Law Process Act 1867-1972; s.1, Common Law Process Act of 1867 Amendment Act 1870-1972.

These commissioners are also authorized to receive any praecipe for and to issue a writ of summons for the Supreme Court at Brisbane, and also to issue any writ of subpoena to give evidence in any civil or criminal case : s.73, Common Law Process Act 1867-1972; s.1, Common Law Process Act Amendment Act 1870-1972.

The commissioners mentioned above are also invested with the power to issue writs of capias ad respondendum : s.64, Common Law Process Act 1867-1972; s.1, Common Law Process Act Amendment Act 1870-1972.

There is no practical reason at the present time for retaining these special commissioners with the powers elaborated above. The relevant provisions should simply be repealed.

3. Examination of Witnesses and the Taking of Evidence:

Section 51 of the Equity Act 1867-1974 provides that any party in any cause or matter pending in the Court may by a writ of subpoena ad testificandum or duces tecum require the attendance of any witness before the master in equity [now registrar] or before a commissioner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any motion, petition, or other proceeding before the court

in like manner as such witness would be bound to attend and be examined with a view to hearing of a cause. Any party having made an affidavit to be used or which shall be used on any motion, petition, or other proceeding before the court shall be bound on being served with a subpoena to attend before the court, master in equity [i.e. registrar], or a commissioner for the purpose of being cross-examined.

The examination of witnesses and the taking of evidence is now dealt with in order 40, rules 1 and 8; and order 41, rule 1. There seems no reason to retain s.51 of the Equity Act.

4. Writs of Dedimus Potestatem:

The Writs of Dedimus Act of 1871 also authorizes the issuing of writs of dedimus potestatem. Such a writ enables the person to whom it is addressed to do some act appertaining to a judge or a court. The writ was intended to expedite the doing of the particular act, and in England it was most commonly granted upon a suggestion that the party who was to do something before a judge, or in a court was so weak that he could not travel.

There are other historical uses for the writ. On renewing the commission of the peace a writ of dedimus potestatem was issued out of Chancery, empowering the persons to whom it was directed to administer the oath of allegiance and a judicial oath to a person who had been newly appointed a Justice of the Peace. The writ was also used in early England to appoint special commissioners to take a conusance of a fine or to swear an answer to a bill in equity. In still earlier times it was required when a person wished to appoint an attorney to represent him in court, because the law required the parties to appear in court personally. See The Dictionary of English Law by Earl Jowitt, Sweet & Maxwell Limited, 1959. (p.591).

Writs of dedimus potestatem appear no longer to be of any practical use and need not be retained.

The result of this survey in relation to Commissioners is to suggest that certain amendments should be made to the Oaths Act Amendment Act 1891-1974, but no provisions need to be inserted in the new Supreme Court Act.

PART VII - EXECUTION OF JUDGMENTS AND ORDERS

A. The Writ of Fieri Facias. In England this is an order to the sheriff of the county in which the execution is to take place, directing him to seize the judgment debtor's goods and leaseholds and sell them. In Queensland, the writ has a wider ambit. The direction to the sheriff extends to the lands, tenements, goods, chattels, choses in action and other property of the defendant within the State of Queensland. See R.S.C., Form No. 221 and 0.48; the New South Wales (Debts) Act 1813 s.4; and the Common Law Process Acts 1867 to 1972, ss.56, 57, 61.

A judgment or order for the payment of money to any person, whether by way of debt, damages, costs or otherwise, may be enforced by writ of fieri facias : 0.48 r.3. The Supreme Court Act of 1867 s.51 provides that on any writ or other process being left with the sheriff for execution by him the person leaving it shall if required deposit

with the sheriff a sufficient sum for payment of the expenses of execution. The sheriff is empowered to seize the defendant's money and pay it to the execution creditor, and to sue for the recovery of sums secured by bills of exchange and other securities belonging to the judgment debtor : Common Law Process Act 1867-1972, s.56. He may seize and cause to be sold the debtor's property within the State : ibid, s.57. Sales of land by the sheriff must follow the procedure laid down in s.59 of the Common Law Process Act and 0.48 r.12. The sale is to be by public auction unless the Court sanctions a private sale : 0.48, r.6.

There is no provision in Queensland, as there was in South Australia, that execution be levied upon goods in the first instance and only upon a failure to satisfy the judgment debt out of the personalty of the debtor was recourse to the realty permitted. The proposal contained in the Report of the Law Reform Committee of South Australia relating to the Reform of the Law on Execution of Civil judgments (1974), that execution be leviable against the realty of the judgment debtor without the need for the personalty to have proved inadequate, is therefore unnecessary so far as Queensland law is concerned. Its further proposal that the procedure of suing out a writ of execution be replaced by a more informal procedure is examined later in this working paper.

The Final Report of the Committee on Supreme Court Practice and Procedure (1954, Cmnd. 8878) and the Report of the Committee on the Enforcement of Judgments Debts (1969, Cmnd. 3909) both concluded that execution upon goods together with a power of sale should be retained. But they also expressed criticisms of the present form of such execution, as the South Australian Law Reform Committee has also done. The main criticisms are as follows:

- (a) **Overlapping of Process.** Both English Committees were concerned by the fact that there was great disparity in the costs and expenses of execution as between the High Court and the county courts even where the judgments were for the same sum of money. The Payne Committee considered that it was "not defensible that in the administration of justice a plaintiff should be able to enjoy advantages, or impose on a defendant disadvantages, simply by choosing a different court in which to conduct his litigation" (para. 649). It recommended that actions within the jurisdiction of the county court should not be commenced in the High Court except with leave, which had the consequence that execution in the High Court would not operate in respect of judgment debts under \$1,000. The significance of this is apparent from the fact that nearly 90 per cent of writs of *fi fa* issued out of the High Court at that time were for amounts up to \$1,000. It considered also that procedure for execution upon goods should be governed by the amount of the debt, and not by the Court in which the judgment was obtained.

It is suggested that the institution of a system under which execution would be carried out in accordance with the procedure in the District Courts or Magistrates Courts (that is on the basis of a warrant of execution issued by the Registrar and directed to a bailiff) where the amount recoverable under a Supreme Court judgment was less than a specified amount would not be justified in the absence of clear evidence that:-

- (i) there was a widespread use of the Supreme Court processes to recover sums within the jurisdiction of the other Courts; and
- (ii) there was no other feasible way in which the use of the Supreme Court processes could be prevented or discouraged.

However, procedure already exists by which actions commenced in the Supreme Court may be transferred to a Magistrates Court (O.96, r.2) or to a District Court (District Courts Act of 1967, s.77). A further useful provision is contained in the English RSC, O.47, r.4, namely that where a judgment or order is for less than \$700 and does not entitle the plaintiff to costs against the person against whom the writ of fieri facias to enforce the judgment or order is issued, the writ may not authorise the sheriff to whom it is directed to levy any fees, poundage or other costs of execution. This rule stems from the Common Law Procedure Act 1852, s.123. In Queensland, O.47, r.15 authorises the party entitled to execution to levy the taxed costs of the writ of execution, and the poundage, fees, and expenses of execution, over and above the sum recovered no matter what that sum may be. It is suggested that the English rule may be usefully adopted herein, with an amount of \$2500 instead of \$700.

- (b) Lack of an integrated system of enforcement. A distinct issue which is suggested by the preceding discussion of the use of the different procedures in the various Courts is whether those procedures should be integrated. That may be a goal to be pursued eventually, but it seems preferable initially to seek a measure of standardisation of the procedures rather than their fusion.

The Payne Committee recommended a major change in the enforcement processes in all the courts. It proposed that:

- (1) A new Enforcement Office should be established with local officers attached to the county courts in each district.
- (2) All money judgments from all courts should be channelled or enforced through the Enforcement Office.
- (3) A new integrated system of enforcement should be introduced in which all modes of enforcement should be available on one application and should, if necessary, be pursued concurrently instead of, as at present, separately.
- (4) Full information about the means, property, assets and circumstances of a defendant should be ascertained before the appropriate modes of enforcement are selected.
- (5) All moneys recovered from the debtor or elsewhere under enforcement should be distributed rateably amongst the creditors.
- (6) On a distribution of moneys received into the Enforcement Office the same priority should be recognised between the different classes of judgment creditors as exist in bankruptcy.
- (7) Orders for execution against goods should be issued by the Enforcement Office and carried out by its bailiffs. This would involve the abolition of execution in the High Court by writ of fieri facias enforced by the Under Sheriff and his officers.

The Judgements (Enforcement) Act Northern Ireland 1969 established an Enforcement of Judgement Office by or through which all judgments to which the Act applied were to be enforced, but no legislation has been introduced in England along the lines recommended by the Payne Committee. The Law Reform Commission of New South Wales issued in 1975 a Draft Proposal relating to the Enforcement of Money Judgments which was strongly influenced by the recommendations of the Payne Committee.

These proposals obviously go well beyond a mere integration of the procedures presently available in the Supreme Court and in the other Courts. The question whether they should be adopted raises issues which transcend the matter with which this working paper is concerned, namely the examination of the existing modes of enforcement of judgments and the restatement and improvement of the relevant rules. It is a question which deserves full consideration, but it is not practical to deal with it in the context of a general review of the law of civil procedure applicable in the Supreme Court.

- (c) Undue Formalism. The Thirtieth Report of the Law Reform Committee of South Australia has recommended that the present procedures should be replaced by procedures "under which the plaintiff would simply file with the Master of the Court a declaration that as at the date of filing the document the defendant in execution is liable to the plaintiff in execution for the sum of x dollars under the judgment plus y dollars for interest computed up to that time and continuing interest at the percentage allowed by the Rules of Court until the completion of the execution, and z dollars for costs of execution. He should also have to file an affidavit setting out what he knows of the assets of the defendant and requesting the Master to require the Sheriff to seize those assets into his hands and by any of the known forms of execution to realize them and account to the plaintiff for what is owed to him. Alternatively the plaintiff may first seek an order ... requiring the debtor to appear and be examined as to his assets and then after the examination, proceeding as before to direct the sheriff to take into his hands the assets discovered by the examination and satisfy the claim of the plaintiff in execution." It was recognized that this reform would require a consequential amendment of the law as to priority of execution. It recommended that creditors should have priority in order of the time at which their request to execute was filed in the office of the Master, and property in the goods of the debtor should be bound from the date of filing of the request. It recommended further that "the writs of fieri facias, levam facias, venditioni exponas, distringas, delivery and sequestration should be abolished and in lieu it should simply be enacted that a direction by the Court (which we would envisage would be ordinarily a Master's direction) to the sheriff to execute should be a sufficient authority for him to complete the execution subject to such directions as he might from time to time receive from the Court unless the plaintiff in execution shall by notice in writing to the sheriff withdraw or postpone the execution".

This recommendation resulted in the repeal in 1978 in South Australia of the provisions in the Supreme Court Act (ss. 115 and 116) relating to writs of fieri facias. At the same time, the Enforcement of Judgments Act 1978 was enacted. This did not implement exactly the recommendations of the Law Reform Commission. It retained the system of enforcing judgments

through the issue of writs (named writs of sale, possession and attachment - as in the New Zealand Code of Civil Procedure). It also provided that where the Court had given a judgment for the payment of a sum of money, it might upon the application of the judgment creditor examine the judgment debtor as to his income, assets and liabilities, and thereupon order him to pay the judgment debt forthwith or within a period set by the Court or to pay it by instalments.

Provision is made in Queensland by 0.47 r.33 for the examination of a Judgment debtor as to debts owing to him. If it is thought appropriate to authorise the payment of a judgment debt by instalments, this can be done by an amendment to that rule or the insertion of a special rule (compare Magistrates Courts Rule 198). The question whether writs of execution should be replaced by a direction or order for execution does not appear to have received a positive answer in any Australian State or in England. In New South Wales, where the proceedings by way of writs have been greatly restricted, writs of execution and writs in aid of writs of execution have not been affected : Supreme Court Act 1970, s.69. It is suggested that the considerations which have led in some jurisdictions to the substitution of orders for writs are not pertinent in the case of proceedings for execution. In particular, the issuing of such writs is not a complex matter, they are generally issued as of course, and the determination of the appropriate writ of execution is seldom a matter of difficulty. In these regards, the writs of execution stand in sharp contrast to the prerogative writs.

The first clause of the draft Bill in relation to writs of fieri facias reproduces the substance of s.57 of the Common Law Process Act. The proviso is not contained in the Common Law Process Act. It follows the language of the District Courts Rule 1966, R.292. The amount of \$200 should probably be increased in the light of changes in the value of money and a figure of \$1000 is suggested. An alternative recommended by the Payne Committee is that a list of exempted articles should be prescribed. See para. 675. In South Australia, the court is given a discretion to exempt property from execution where it is of the opinion that the seizure and sale of the property would cause extreme hardship to the judgment debtor. See Enforcement of Judgments Act 1978 s.9(2).

The second clause reproduces s.56 of the Common Law Process Act. The reference in the last clause of that section to warrants or precepts in the nature of writs of fi fa sued out of an inferior court has been dropped, as the District Courts Rules 293 and Magistrates Courts Rule 243 regulate the procedure to be followed in relation to securities seized by the bailiff when executing a warrant of execution.

The third clause reproduces s.59 of the Common Law Process Act. The manner of advertisement is prescribed by 0.248, R.12.

One submission expressed the opinion that the advertising provisions were grossly inadequate and could cause unnecessary loss to both the creditor and the debtor. This is however a matter which relates to the Rules of Court rather than the Act, and should be considered in the context of a revision of the Rules.

The fourth clause contains three sub-clauses. The first of three is based on s.45 of the Common Law Practice Act. This was one of the sections which were repealed by the Statute Law Revision Act of 1908 but which continued to apply by virtue of s.2 of that Act. It would only apply to unregistered (old system) land, since s.91 of the Real Property Act 1861-1980 deals with the entry of writs and their effect on lands under that Act. The provisions of the Real Property Act 1861-1980 relating to execution against Torrens title land are preserved by Clause 7. The other two clauses are based on ss.58 and 60 of the Common Law Process Act, which lay down a procedure for sale on non-Torrens system land. In the case of land under the Real Property Acts, the conditions for a valid transfer by the sheriff are set out in s.35 of the Real Property Act of 1877.

The fifth clause reproduces s.61 of the Common Law Process Act with the deletion of a provision relating to the manner of sale. In Anderson v. Liddell and Others [1967] Qd.R.410, Lucas J. expressed doubt as to whether s.61 had an application to a mortgagor's interest in land under the Real Property Acts, though he acknowledged that a different conclusion was reached in Coleman v. de Lissen (1885) 6 N.S.W.L.R. (Eq) 104. The reason for this was, as Lucas J. pointed out, that the concept of an equity of redemption was inapt to be applied to land under the Real Property Acts. In addition, it seems clear that the proviso to s.61 refers only to real estate not under the Real Property Acts, and this has been made explicit in the draft. It is however doubtful whether the section as a whole is inapplicable to land under the Real Property Acts, since it authorises sales under fi fa of equitable interests, which clearly may exist in land held under those Acts. See s.51 of the Real Property Act 1877.

The final clause provides that nothing in this part of the Act is to affect the provisions of the Real Property Act relating to execution against land under the provisions of that Act. This is not meant to imply that those provisions are regarded as fully satisfactory. In particular, s.91 of the Real Property Act may require consideration. In Day v. General Credits Ltd. [1981] Qd.R. 115, Connolly J. felt constrained by the decision of the Full Court in Re Deane's Transfer (1898) 9 Q.L.J. 106 to hold that the date of the entering of the writ within the meaning of that expression in the proviso to s.91 was the date upon which the writ was produced for registration rather than the date of the entering of a memorial of the writ in the register book. He held also that the effect of s.91 was to limit to three months from such date the period during which the judgment debtor may not create interests which will take priority over the judgment creditor. It may be that this period is unsatisfactory. However there are issues which should be considered in the context of any review of the Real Property Acts, rather than in a revision of the Supreme Court Acts. A review of the Real Property Acts is presently being conducted by the Law Reform Commission.

B. The Writ of Elegit. In England, elegit was the usual method of execution against land under a judgment or order for the recovery or payment of a sum of money. The writ directed the sheriff to ascertain by a jury of what land the judgment debtor was possessed in the county to satisfy the judgment and to deliver it to the judgment creditor to hold until the judgment

debt was paid. In Queensland the direction is to deliver to the plaintiff the defendant's goods and the lands in Queensland to hold until the sum to be executed has been received. See R.S.C., Form No. 227. In England, the Committee on Supreme Court Practice and Procedure recommended that the writ of *elegit* should be abolished. This recommendation was implemented by the Administration of Justice Act 1956. This gives power to the Court for the purpose of enforcing a judgment or order for the payment of money to any person, to impose by order a charge on any such land or interest in land of the debtor as may be specified in the order for securing the payment of moneys due or to become due under the judgment or order.

There is even less justification for the retention of the writ of *elegit* in Queensland, since execution against freehold land may be levied under a writ of *fieri facias*. It is suggested that it should be abolished here, and the scope of the present law relating to charging orders enlarged as has been done in England.

C. Writ of Capias ad Satisfaciendum. This is a writ directed to the Sheriff by which he is commanded to take the debtor and him safely keep so that he may have him in court immediately after the execution of the writ to satisfy the execution creditor the amount of moneys recovered by the judgment together with interest. See R.S.C., Form No.229.

In England, no person can be arrested or imprisoned for making default in payment of a sum of money except default in payment in one of the six cases provided for in the Debtors Act 1869. According to Halsbury (Vol. 16, para. 98) the writ of *capias ad satisfaciendum* is still theoretically available in three of the cases, but it has completely fallen out of use.

The position is different in Queensland, where the writ is still occasionally though rarely issued. The relevant provisions will be found in the Common Law Process Act 1867, ss.52 to 55 and in R.S.C. 0.47 rr3;18; and 0.78, r.23.

In New South Wales, the Supreme Court Act of 1970 s.98 (as amended by the Supreme Court Amendment Act 1972) provides that:

(1) A judgment or order of the Court for the payment of money shall not be enforceable -

- (a) by process of the Court for attachment of the person or for committal; or
- (b) by the issue of a writ of *capias ad satisfaciendum*

(2) This section does not affect the power of the Court to punish for contempt.

The report of the N.S.W. Law Reform Commission on which this provision was based stated laconically that "imprisonment for debt is the survival of an archaic procedure and we think that it has no place in a modern system." Previously, Part IV of the Judgment Creditors' Remedies Act 1901 - 1970 had contained provisions similar to those in the Queensland Common Law Process Act.

In the second report of the N.S.W. Law Reform Commission on Supreme Court Procedure, the reasons for recommending abolition of the procedure of *capias ad satisfaciendum* were set out in considerable detail. The report states:

"Para 30: Arrest in execution is a barbarous process. It is not designed to reach property which may be applied in satisfaction of the judgment; it is designed merely to coerce the judgment debtor (or his friends and relations) to pay the judgment debt. Such at least was the purpose of the process as it stood in its most developed form in the first decade of the nineteenth century. This purpose is manifest in section 20 of the Judgment Creditors' Remedies Act, 1901.

Para 31. But there is another policy evident in section 21 of the Judgment Creditors' Remedies Act 1901, by which the prohibition in section 19 of arrest in execution is made not to apply to a writ of *capias ad satisfaciendum* in an action for breach of promise of marriage, libel, slander, seduction, or any malicious injury. Section 21 is penal in character. Punishment is out of place in a Court of civil jurisdiction, except in cases of contempt. Further, it is quite wrong on present day ideas, that a judgment creditor should have it in his power, without any judicial supervision, to put his judgment debtor in gaol."

These strictures on the process are justified. There is no place in a modern system of law for a system of imprisonment for debt merely as a means to force a judgment debtor to pay the judgment debt. There is no reason why imprisonment should be ordered by a court in civil proceedings simply because the subject matter of the action may involve malice. There should be no possibility of a judgment debtor being imprisoned without judicial supervision. The provisions set out in the draft Bill are based on acceptance of all these points. The report admits that it might be possible, if it were necessary, to frame a new code for the arrest of a judgment debtor who concealed his property or who was about to abscond, but concludes that this was made unnecessary by the Commonwealth Bankruptcy Act. The question whether this is so is discussed below.

In Victoria, the relevant law is presently to be found in the Imprisonment of Fraudulent Debtors Act 1958. In relation to that Act, Walsh J. made the following comments in Commissioner for Motor Transport (N.S.W.) V. Train (1972) 46 A.L.J.R. 691 at pp. 695 - 696:

"Section 3 provides that no person shall be arrested or imprisoned or detained in prison upon any writ of *capias ad satisfaciendum* issued out of the Supreme Court. Provisions of a similar kind are made with respect to the other courts. But the prohibitions against imprisonment of debtors are not absolute. Under certain conditions orders may be made for the committal of a debtor to prison. But the conditions are of such a character, so it has been held, that imprisonment when it is ordered is a means of punishing a debtor who is deserving of punishment, because some fraud or dishonesty has been involved in the contracting of the debt or in divesting himself of property in fraud of his creditors or because he has acted in

defiance of the orders of the Court. The view that an order made under the Imprisonment of Fraudulent Debtors Act 1915 is of a punitive character and is not to be regarded as a process of execution is explained fully in the judgments of Madden C.J. and Cussen J. in R. v. Wallace; Ex parte O'Keefe [1918] V.L.R. 285. The latter judgment contains an elaborate historical survey of legislation relating to the imprisonment of debtors and to the discharge from custody of insolvent debtors. In Newmarch v. Atkinson (1918), 25 C.L.R. 381, the decision in Wallace's case was approved by this Court. It was held that the effect of the Victorian Act of 1915 was that coercion of the body of a judgment debtor, by way of execution in order to obtain payment of a debt, is entirely and absolutely abolished, but where there is a judgment against a debtor, then for certain cases of dishonest or unjust conduct in relation to that debt, expressed in the statute, punishment by imprisonment is provided. The Court was of opinion that the imprisonment was not intended as a means of execution for debt, but as a deterrent against reprehensible conduct in relation to the debt: See (1918), 25 C.L.R., at pp. 285-387."

It is incorrect and misleading to regard the process laid down under either the Victorian Imprisonment of Fraudulent Debtors Act or the Queensland Common Law Process Act as imprisonment for debt. It is not a procedure by which unfortunate or inadequate debtors can be imprisoned because they have failed to discharge their liabilities. Rather it is a procedure to prevent reprehensible conduct by a judgment debtor. In Queensland, the writ of ca.sa. may issue in two circumstances: If a Supreme Court Judge is satisfied that the defendant is fraudulently concealing money, goods or valuable securities from his judgment creditor; or if he is satisfied that the defendant is about to leave the State without satisfying the judgment. The first of these two cases has an analogy with s.78(1)(b) and (d) of the Commonwealth Bankruptcy Act 1966, and the second with s.78(1)(a) of that Act. Compare also the offences referred to in s.263 and s.272(b) of that Act. In the Victorian legislation, as under the Bankruptcy Act, the emphasis is laid upon the criminal element in the debtor's conduct as justifying imprisonment, and consistently with this the process by which a determination is made that a judgment debtor should be committed to prison for a term is detailed in a way compatible with the proper administration of justice in circumstances involving the liberty of the subject. On the other hand, the Queensland legislation is directed not so much at the punishment of the offending debtor as at ensuring that the creditor's rights are not defeated by his conduct. Both of these attitudes are understandable, and in both the Victorian and Queensland legislation the elements of punishment and coercion are present. As Cussen J. said of the Victorian Act, it assists little to ask - Is the imprisonment punitive or is it coercive - since it may be both. See R. v. Wallace, ex parte O'Keefe [1918] V.L.R. 285 at p.337.

The Bankruptcy Act 1966 provides in s.40(1)(g) that a debtor commits an act of bankruptcy if a creditor who has obtained against the debtor a final judgment, has served on him a bankruptcy notice, and the debtor does not comply with the requirements of the notice within the specified time or satisfy the Court as to certain matters. The Court may issue a warrant

for the arrest of a debtor against whom a bankruptcy notice has been issued if he has absconded, or is about to abscond, with a view to avoiding payment of his debts: s.78(1)(a), or if he has concealed or removed any of his property with a view to preventing or delaying possession of it being taken in the event of his becoming a bankrupt: s.78(1)(b).

A creditor's petition may not be presented against a debtor unless the debt owing by the debtor amounts to \$1000 : s.44. A debtor may petition for his own bankruptcy without any limit on the amount of the debt: s.55. The court may, at any time after the presentation of a petition, upon such conditions as it thinks fit, discharge an order made against the property or person of the debtor under any law relating to the imprisonment of fraudulent debtors and stay any action, execution or civil legal process against the property or person of the debtor and discharge him out of custody : s.60(1). The provisions under ss.52 to 56 of the Common Law Process Act are a law relating to the imprisonment of fraudulent debtors : See Commissioner for Motor Transport (N.S.W.) v. Train (1972) 45 A.L.J.R. at p.696.

The provisions of the Bankruptcy Act will be those to which a judgment creditor will normally have recourse if he fears that the judgment debtor will abscond. But a judgment creditor may not wish to use that procedure, and there seems to be no good reason why he should be obliged to do so. The ability of the Supreme Court to issue a writ of ca.sa should be expressed in terms similar to those used in s.78 of the Bankruptcy Act, but should not be denied because an alternative procedure is available by taking steps to have the debtor commit an act of bankruptcy. An order made for the arrest of a judgment debtor under a writ of ca.sa may be discharged under s.60 of the Bankruptcy Act only after presentation of a petition, whereas the draft Bill would permit this at any time. The fact that the debt must amount to \$1000 to found a creditor's petition is of little consequence, as it is unlikely that proceedings for arrest on ca.sa would be taken for a lesser sum or that they would be successful if instituted, or that an order for discharge would not be made if security for payment of the amount or other satisfactory arrangement was made. As the power of the Supreme Court under the draft Bill is as extensive as that of the Court under s.78 of the Bankruptcy Act, the fear expressed by the N.S.W. Law Reform Commission that an arrest may have the effect of coercing a judgment debtor into petitioning for his own bankruptcy seems to be without substance.

It is recommended that the provisions relating to the issue of writs of ca.sa should be retained, but in an amended form.

Clause 1 reproduces the first Clause in s.52 of the Common Law Process Act.

The formulation in Clause 2 is based partly on s.52 of the Common Law Process Act and partly on Rule 296 of the District Courts Rules 1966. It changes s.52 in two respects. First, the issue of a writ of ca.sa is not made mandatory. Secondly, it replaces the ground "that the defendant is about to leave the colony without satisfying the judgment" by two grounds, one relating to removal of property and the other to absconding, and it requires in each case that this must be done with intent to evade payment of the judgment debt.

Clause 3 is based on s.10 of the Victorian Imprisonment of Fraudulent Debtors Act 1958, while Clause 4 is based on Rule 297 of the District Courts Rules. Clause 5 reproduces the effect of s.23 of the Common Law Process Acts. Clause 6 is designed, as is s.98 of the N.S.W. Supreme Court Act 1970, to preserve the power of the Court to punish for contempt of Court.

The draft Bill omits any provision corresponding to the proviso to s.52 of the Common Law Process Act relating to malicious injuries for the reason stated above. It also omits any provision for writs of ca.sa to fix bail. The relevant section (s.53 of the Common Law Process Act) is obscure and the practice under it is considered undesirable. See in this regard paragraphs 32 to 36 of the Second Report of the N.S.W. Law Reform Commission on Supreme Court Procedures.

D. Attachment of Debts. Attachment of debts is a process by means of which a judgment creditor is enabled to reach money due to the judgment debtor which is in the hands of a third party.

In most Australian States, including Queensland, the subject of attachment of debts is dealt with by rules of court, though the Western Australian Supreme Court Act (ss.126) regulates it in considerable detail.

The Common Law Practice Act 1867-1978, s.59, provides that in proceedings to obtain an attachment of debts under that Act, the judge may in his discretion refuse to interfere where from the smallness of the amount to be recovered or of the debt sought to be attached or otherwise the remedy sought would be worthless or vexatious. There would seem to be no need to retain this provision, since in Queensland O.49 r.1 gives the Court or Judge or registrar a discretion as to the making of an order nisi for a garnishee order and he could refuse if the remedy would be worthless or vexatious. There does not appear to be any corresponding provision in the relevant rules of court in England or the other Australian States.

In England, s.38(1) of the Administration of Justice Act 1956 provides that a sum standing to the credit of a person in a deposit account in a bank shall, for the purposes of the jurisdiction of the Supreme Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, be deemed to be a sum due or accruing to that person and, subject to rules of court, shall be attachable accordingly, notwithstanding that certain specified conditions are applicable to the account in relation to the withdrawal of money. This provision has been substantially reproduced in the New South Wales rules (Part 46). In effect it makes savings as well as current accounts liable to attachment. For the present position see, Music Masters Pty. Ltd. v. Minette [1968] Qd.R. 326 and Re ANZ Savings Bank Ltd.; Mellas v. Evriniadis [1972] V.R. 690.

It is a matter for consideration whether a similar provision should be made in relation to deposits with building societies and credit unions. In relation to building societies, a report by the English Law Commission in 1976 (cmd. 6412) advised that stock of a building society should not be subject to a charging order but it observed (paragraph 84).

"Although the making of a deposit with a Building Society may make the depositor a shareholder, he realises his asset, not through any dealing with his shares as such, but simply by withdrawing his deposit. We therefore feel that if it is desired to make this asset more readily amenable to execution process (a point on which we express no view), it might be better to do so by bringing the account within the scope of a garnishee order (even though the relationship between the Building Society and its depositor-member may not strictly be one of debtor and creditor)."

It is suggested that deposits with building societies and credit unions should be treated in the same way as deposits with banks so far as process of execution is concerned. There seems to be no good reason why the availability to a judgment creditor of a process to garnishee a sum standing to the credit of a judgment debtor should depend upon the question whether he has deposited the sum in a deposit account in a bank or in a building society or a credit union. Any other solution would make an unnecessary and undesirable discrimination between these three kinds of deposits.

It is recommended therefore that the new Act should incorporate provisions modelled on s.38(1) of the U.K. Administration of Justice Act 1956 and the N.S.W. rules, but that these should be extended so as to apply to sums deposited with a building society or credit union.

E. Charging Orders. In England, prior to the enactment of the Charging Orders Act 1979, charging orders could be made to enforce a judgment debt for a sum of money on three kinds of assets. These were - (a) land and an interest in land : 0.50, r.1; (b) government stock and company shares : 0.50, r.2; and (c) money in court : 0.50, r.8. The procedure was available also for partnership interests : the Partnership Act, s.23 (corresponding to s.26 of the Queensland Partnership Acts 1891 to 1965), and to secure a solicitor's costs : the Solicitors Act 1974, s.73.

The rationale behind this restricted list of assets in respect to which a charging order might be made appears to be threefold. First, in England the kinds of execution available to judgment creditors vary according to the judgment debtor's assets. For particular assets, particular forms of execution are appropriate. For example, the writ of fieri facias is available in the case of chattels and leasehold land. The writ of elegit was formerly available in the case of freehold land. For choses in action and equitable interests in land and chattels, appointment of a receiver was the appropriate procedure. Debts owing to a judgment debtor could be attached by garnishee proceedings. For stocks and shares and money in court, a charging order could be made. Secondly, a charging order was appropriate rather than a writ of fieri facias where the latter procedure would be too cumbersome or would prejudice other persons. Hence its use as a procedure against partnership property by a judgment creditor of a partner. See Brown Janson & Co. v. Hutchinson & Co. [1895] 1 Q.B. 737. Thirdly, the assets capable of being charged by a charging order were restricted to those in relation to which the charge could ensure that a purchaser from the debtor would have notice of the charge.

It is impossible to give a similar rationalisation for the cases where charging orders may be made under the legislation of the Australian States. The complicating factor here is the wide ambit which has been accorded to the writ of fieri facias. Probably the only asset referred to in the preceding paragraph which it would not cover is money in court. Nevertheless, charging orders may be made in respect of certain assets which may be seized and sold under a fi fa. It is by no means clear that in all these cases the justification can be given that the alternative procedure is required because of defects in the fi fa procedure.

The antithesis of the English approach which carefully delimits the assets in respect of which a charging order may be made is provided by s.34(1) of the South Australian Enforcement of Judgments Act 1978, under which the Court may charge any property of a judgment debtor with a judgment debt. A charging order is in effect an alternative to a writ of fi fa. (or "writ of sale" to use the South Australian expression), the differences being that issue of a writ of fieri facias is mandatory while the making of a charging order is discretionary, and that under the writ of fieri facias the sale is to be made by the sheriff as prescribed by the Act, while under a charging order the Court may make orders prohibiting or restricting dealings with the property subject to the charge or providing for the sale of the property.

The other Australian States have followed two rather different courses in relation to property which may be charged by a charging order. Under the N.S.W. Judgment Creditors' Remedies Act 1901, s.27, which is in substantially the same terms as s.49 of the Queensland Common Law Practice Act 1867, a charging order may be made where a judgment debtor (a) has any stock or shares of or in any public company (whether incorporated or not) or any deposit in any bank of New South Wales, standing in his name in his own right, or in the name of any person in trust for him; or (b) has or is entitled to any equity of redemption or other equitable interest. On the other hand, the Victorian Supreme Court Act 1958, s.174 and the Western Australian Supreme Court Act 1935 to 1979, s.127, refer to a person who has any Government stock funds or annuities or any stock or shares of or in any public company in Victoria, Western Australia (whether incorporated or not) standing in his name in his own right or in the name of any person in trust for him. It should be noted that the Queensland provision refers obscurely to "any annuities funds stock or shares in companies and bank deposits."

It is suggested that it is unwise to provide a multiplicity of alternative procedures to enforce judgment debts. Given the scope of the writ of fi fa, other procedures should be made available to a judgment creditor only in cases where enforcement cannot be obtained by fi fa or where there is a substantial reason for permitting an alternative procedure. Apart from the cases of money in court and partnership property, these seem to be limited to:-

- (a) Interests in land. Though land may be sold under a fi fa, judgment creditors in Australia have always had available to them the alternative procedure of elegit. It is recommended that this alternative should be preserved through a provision empowering the Court to make a charging order in respect to land. This can also be justified on the basis that it may be more advantageous to both the judgment creditor and debtor to impose a charge on the land rather than to require it to be sold under a fi fa.

- (b) Securities. It seems that a judgment debtor's property in company shares may be taken in execution under a fi fa. See Daly v. Cooper (1888) 3 Q.L.J. 104. However, the use of the charging order procedure may be justified partly on historical grounds, and partly because the process of seizure and sale by the sheriff may not always be apt to meet the special circumstances of this kind of property.

There seems to be no good reason why the securities should be limited to company stock or Government stock. In England, the list now comprises the following securities:-

- (i) Government stock.
- (ii) Stock of any body (other than a building society) incorporated within England and Wales.
- (iii) Stock of a body incorporated outside England and Wales or of any State or Territory outside the United Kingdom, being stock registered in a register kept at any place within England and Wales.
- (iv) Units of any unit trust in respect of which a register of the unit holding is kept at any place within England and Wales.

It is recommended that this list should be used mutatis mutandis in defining the securities which may be charged.

- (c) Beneficial interests in trust assets other than land. The English Law Commission recommended that the ability to make a charging order should not be restricted to beneficial interests in trust assets falling within the defined list of securities, but should be extended to permit the Court to make a charging order in respect of any beneficial interest of a judgment debtor under a trust. This recommendation was implemented by the Charging Orders Act 1979. In these cases, the chargee is able to protect his interest by notice to the trustee.

This leaves out of consideration two cases where charging orders may at present be made under the Common Law Practice Act. One is deposits in banks. It is difficult to understand why this species of property is made subject to a charging order. The appropriate procedure would seem to be attachment by garnishee proceedings, which would be facilitated if provisions equivalent to s.35(1) of the U.K. Administration of Justice Act 1956 were enacted in Queensland.

It is for the same reason that in England stock of a building stock is excluded from the list of assets which may be subjected to a charge under a charging order.

The second is an equity of redemption or other equitable interest. These may be sold under a fi fa (see s.61 of the Common Law Process Act 1867), or execution will be available by the appointment of a receiver if the suggestions set out later in this working paper are adopted. It seems to be unnecessary to make them specifically subject to a charging order, though the provision for a charging order on beneficial interests under a trust will cover most equitable interests.

The provisions in the draft Bill have been modelled on those contained in the U.K. Charging Orders Act 1979. This is based upon the recommendation made by the English Law Commission in its report on charging orders, and the following comments are derived in large measure from that report.

The first clause gives the Court jurisdiction to make charging orders to enforce money judgments or orders.

In England, this clause is followed by one which makes clear the discretionary nature of the jurisdiction, and refers to particular matters which the Court must consider in exercising its discretion, in view of the fact that a charging order will make a judgment creditor a secured creditor with priority over unsecured creditors in the event of the debtor becoming bankrupt or being wound up.

In Re Overseas Aviation Engineering (G.B.) Ltd. [1963] Ch.24, it was decided that a charging order on land did not operate to give the judgment creditor any preference in the event of the bankruptcy or winding up of the judgment debtor. He would be entitled to priority only if he had completed the execution before the bankruptcy or winding up, and an execution against land was not completed by the making of a charging order. The English Law Commission recommended that the charging order should constitute execution for the purposes of the Bankruptcy Act 1914, s.40 (which is expressed in significantly different terms from the corresponding provision in the Commonwealth Bankruptcy Act 1966, s.118, although it is identical with s.92 of the former Commonwealth Bankruptcy Act 1924) and the Companies Act 1948, s.325 (which is in the same terms as the Queensland Companies Act 1961, s.298). This recommendation was adopted : See s.4 of the Charging Orders Act 1979.

It is not feasible in the context of a general review of legislation relating to the Supreme Court to pursue the question whether this recommendation should be adopted here. It would involve issues relating to both Commonwealth legislation and uniform State legislation. It is moreover a problem which can be met by a judgment creditor proceeding to obtain the appointment of a receiver after he applies for a charging order. In England, the Rules of Court have been amended to permit the application for a charging order to be accompanied by a simultaneous application for the appointment of a receiver : O.50, R.9.

Clauses 2 and 3 define the property capable of being charged by a charging order. The U.K. Administration of Justice Act 1935 had provided (in s.35) that a charging order might be made in respect of any such land or interest in land of the debtor as might be specified in the order. In Irani Finance Ltd. v. Singh [1971] Ch.59, it was held that the beneficial interest of a beneficiary under a trust for sale of land could not be made the subject of a charging order, since such an interest was not an interest in land; it was instead an interest in the proceeds of the sale of land. The English Law Commission recommended that the availability of charging orders should be extended to cover cases in which the interest sought to be charged was a beneficial interest in the proceeds of sale of land, and, more generally, that the making of charging orders should be permitted on all beneficial interests under trusts of land. It recommended also that the court should have power to make a charging order in respect of a legal estate (or lesser interest) in land vested in trustees if -

- (a) the judgment was against the trustees in their representative capacity; or
- (b) there being only one beneficiary absolutely entitled under the trust, that beneficiary was the debtor; or
- (c) there being two or more beneficiaries together absolutely entitled under the trust, all the beneficiaries were debtors in respect of a single debt.

To be absolutely entitled for this purpose, a beneficiary must hold the whole of his beneficial interest unencumbered and for his own benefit.

In relation to securities, the Commission recommended that a charging order should be available when they were in the debtor's own name and he was the sole beneficial owner of them. Where there was a trust, a charging order should be available in the same circumstances as those in which it should be available in respect of the legal estate in land held upon trust.

These recommendations have been followed in the draft Bill.

The list of securities in respect of which a charging order may be made is based on that set out in the Charging Orders Act 1979. It was not possible to reproduce the English provision which includes units of a unit trust in respect of which a register of unit holders is kept at any place within Queensland, since there is no Queensland Act corresponding to the English Prevention of Frauds (Investments) Act 1958 which refers to unit trust schemes. The Queensland provisions which regulate unit trusts are contained in Division 6 of Part IV of the Companies Act 1981 relating to prescribed interests.

It would be possible to include a corresponding provision, perhaps in the form that charging orders may be made in respect of prescribed interests as defined in s.5 of the Companies Act 1981, where a register of the holders of interests is kept at any place within Queensland. However, it is suggested that it would be preferable to include a general clause, comparable to s.3(7) of the Charging Orders Act, by which power is given to add assets to the list by Rules of Court.

Clause 4 permits the Court, when a charge is imposed upon an asset in the list, to extend it to interest or dividends payable in respect of that asset.

In the South Australian Enforcement of Judgments Act 1978, it is provided that where the Court has made an order charging property of a judgment debtor, it may make consequential or ancillary orders (a) requiring registration of the charge; (b) prohibiting or restricting dealings with the property subject to the charge; (c) providing for the sale or conversion into money of the property; or (d) relating to any other matters. The English legislation is more detailed. It contains provisions on the following matters:-

- (a) The terms of a charging order. Section 3 of the English Act provides that a charging order may be made either absolutely or subject to conditions as to notifying the debtor as to the time when the charge is to become enforceable, or as to other matters. This has been reproduced in Clause 5 of the draft.

- (b) Registration of the order imposing the charge. In England, the Land Charges Act 1972 and the Land Registration Act 1925 apply in relation to charging orders affecting any land as they apply in relation to other writs or orders affecting land issued or made for the purpose of enforcing judgments.

Section 91 of the Real Property Acts 1861 to 1900 prohibits the registration of judgments. That section is in any case unsatisfactory as a means to protect a chargee because of the requirement for execution within three months from the date of entry of the writ of execution.

In the working paper, it was stated:

"It is suggested that a chargee should be able to protect his interest by a caveat, as may be done by certain equitable mortgagees. See s.30A of the Real Property Act 1877 to 1980. Clause 6 of the draft is modelled on that provision. It may be preferable to deal with this matter by an amendment to the Real Property Act 1877 to 1979, in which case this clause could be deleted from the draft Bill."

In a comment on the working paper the Registrar of Titles expressed the opinion that it would be preferable that an amendment be made to the Real Property Act. The Commission agrees with this opinion, and accordingly has deleted sub-clause 6 from the draft Bill.

- (c) Effect of a charging order. Section 3(3) of the English Charging Orders Act states that subject to the provisions of that Act, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand. The remedy in the case of an equitable charge under hand is sale, but the Court may also appoint a receiver.

Clause 7 of the draft is modelled on this provision.

- (d) The discharge of charging orders. Clause 8 of the draft is modelled on s.3(5) and (6) of the Charging Orders Act.
- (e) Stop Orders and Notices. In England a creditor who has a charging order on stock which is not in court may serve a "stop notice" which ensures that he has warning of any intended disposition of the stock. Halsbury, Vol. 16, p.102 (3rd ed.) states that "when the stocks or shares charged are not in court, it may be advisable, in order to obtain complete protection for the execution creditor, to issue and serve a notice in lieu of distringas, which will prevent transfers of the stocks or shares and the payment of dividends or interest thereof without notice to the applicant. Such a notice may be issued by any person claiming to be interested in any stock standing in the books of the company."

It is not necessary that he should first apply for a charging order. A notice in lieu of distringas is usually given by a person claiming to be beneficially entitled to an interest in the stock to prevent unauthorised or fraudulent dealings with it by the person in whose name it is standing. But by English O.50, r.15, replacing s.4 of the Court of Chancery Act 1841, the Bank of England or any other company registered under any general Act of Parliament might be restrained from permitting the transfer of stock or paying any dividend thereof or interest thereon.

The Charging Orders Act authorized the making of rules of court to make a stop order by which the Court could prohibit the taking of any step for (a) the registration of any transfer of the securities specified in the order; (b) in the case of funds in court, the transfer, sale, delivery out, payment or other dealing with the funds, or of the income therein; (c) the making of any payment by way of dividend, interest or otherwise in respect of the securities; and (d) in the case of a unit trust, any acquisition of or other dealing with the units by any person or body exercising functions under the trust.

In Queensland the general effect of s.4 of the Court of Chancery Act 1841 is reproduced in s.50 of the Common Law Practice Act of 1867. There are however significant differences between the Queensland and English provisions. In particular, in England a restraining order may be made independently of the making of a charging order; in Queensland, it is a concomitant of a charging order.

It is recommended that, as in England, the matter of stop orders and notices should be dealt with by Rules of Court rather than in the Act.

Clause 92 is a definition clause. The only comment which needs to be made refers to the definition of stock. The standard expression in the relevant Australian Acts (including s.49 of the Common Law Practice Act) is "stock or shares of or in any public company (whether incorporated or not)". This expression "public company" occurs in legislation which antedates the modern joint stock company legislation. It does not mean a "public company" in contrast to a "private company" as defined in the Companies Act 1981. See Dalston Development Pty. Ltd. v. Dean [1967] W.A.R. 176. In English O.50, R.2 the expression was "company registered under any general Act of Parliament." The Charging Orders Act uses the wider expression "shares, debentures and other securities of the body concerned", since it includes in the securities on which a charge may be imposed stock of any body (other than a building society). This would include stock other than company stock, such as stock issued by a local authority.

In Sellar v. Charles Bright & Co. Ltd. [1904] 2K.B.446, it was held that debentures were not "stock or shares" within the meaning of the Judgment Act 1838, and therefore could not be made the subject of a charging order. The draft includes shares, debentures and other securities of the body concerned.

- (F) The Appointment of a Receiver. In Queensland, execution by appointment of a receiver is regulated by R.S.C., 0.47, RR. 36 and 37. These are expressed in terms which correspond with those in the Rules of Court in England and the other Australian states, and no amendment to them is suggested.

The Judicature Act 1876 in s.5(8) provides that a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made. However, in Morgan v. Hart [1914] 2K.B. 183 the Court of Appeal affirmed earlier decisions to the effect that the Court had no jurisdiction to appoint a receiver by way of equitable execution in aid of a judgment at law except in cases in which execution could not be levied in the ordinary way, by reason of the nature of the property. Buckley L.J. quoted with approval a statement that what the person who obtains an order appointing a receiver gets is not execution but equitable relief, which is granted on the ground that there is no remedy by execution at law. He summarised the effect of the authorities as being that s.5 of the Judicature Act does not give to the Courts either of Law or Equity any wider jurisdiction than existed before, but enabled such orders as could be made before to be made in any proceedings, without commencing special proceedings in the Court of Chancery such as were necessary before the Act.

In England, the power to appoint a receiver by way of equitable execution has been extended by s.36 of the Administration of Justice Act 1956 so as to operate in relation to all legal estates and interests in land. This extension was made at the same time as the writ of elegit was abolished and power was given to the High Court to impose charges on land or interests in land of the judgment debtor, but s.36(2) provides that the power may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on the land for the purpose of enforcing a judgment or order.

It is suggested that whether or not Queensland follows England in abolishing writs of elegit and introducing charges on land to enforce a judgment or order for the payment of money, the Supreme Court should be given power to appoint a receiver by way of equitable execution in relation to all estates and interests in land. In England, when the legal estate in land was vested in the judgment debtor, the property could be reached by an elegit, and as it was subject to execution at law, appointment of a receiver by way of equitable execution was not permissible. It was different when the judgment debtor's interest was an equity of redemption, since this could not be reached by an elegit. In Queensland, however, an equity of redemption or other equitable interest of the judgment debtor may be sold under a writ of fi fa : s.61 of the Common Law Process Act 1867 to 1972. It would appear therefore that in Queensland the appointment of a receiver by way of equitable execution would not be justified (as it would in England) where the debtor's interest in land was equitable, since equitable interests may be taken in execution. It is suggested therefore that the Queensland legislation should refer to "all estates and interests in land", and not, as in England, to all legal estates and interests in land.

The South Australian Law Reform Commission recommended in its thirtieth report (1974) that the amendments made in England by s.36 of the Administration of Justice Act 1956 should be adopted.

The clauses relating to appointment of receivers by way of equitable execution have been modelled on those in the Administration of Justice Act 1956 and the South Australian Enforcement of Judgments Act 1978.

- (G) Writs for Recovery of Property. The forms of execution thus far considered are available for enforcing judgments or orders for the payment of money to any person. 0.47 R.3 provides that such an order may be enforced by writ of fieri facias or writ of elegit, or, in cases in which that writ is by law allowed, by writ of capias ad satisfaciendum, or, in the cases thereafter mentioned, by the appointment of a receiver of any moneys payable to the person against whom the judgment is given. 0.49 R.1 provides for an order for attachment of debts where any person has obtained a judgment or order for the payment of money by any other person, and 0.40 R.1 is concerned with applications for charging orders by a person who has obtained a judgment or order for the payment of money by any other person. The preceding sections of this working paper have set out proposals for legislation in respect of these forms of execution to replace existing legislation on the matter.

Where a judgment or order is made for the recovery of land, or for the delivery of the possession of land, it may be enforced by writ of possession : 0.47, R.4. The procedure is regulated by 0.51. Where a judgment or order is made for the recovery of any property other than money or land, it may be enforced by writ of delivery or writ of sequestration, or by attachment : 0.47, R.5. The procedure is regulated by Orders 48, 52, and 53.

There seems to be no reason to regulate by statute matters which at present are adequately covered by Rules of Court. However statutory provisions relating to the specific delivery of chattels will be found in ss.16 and 17 of the Common Law Practice Act 1867 - 1981. Section 17 of that Act, which was based on s.78 of the English Common Law Procedure Act of 1854, is reproduced in 0.52, and may be repealed. Section 16 was copied from a New South Wales provision which subsequently became s.136 of the Common Law Procedure Act 1899. That Act has been repealed by the N.S.W. Supreme Court Act 1970, which contains in s.93 a provision based on s.78 of the English Common Law Practice Act of 1857. It is suggested that s.16 should also be repealed.

The result of this would be that the matter of orders which may be made in proceedings for the detention of goods would be regulated wholly by rules of court, as it is in England and in Victoria. The forms of judgment which may be made in an action for detinue under the former English 0.48, which corresponds to Queensland 0.52, are explained fully in the judgment of Diplock L.J. in General and Finance Facilities Ltd. v. Cook's Cars (Ramford) Ltd. [1963] 2 All E.R. 314 at p.319.

(H) Miscellaneous Issues relating to Execution.

1. Execution on Decrees and Orders

Section 19 of the Common Law Practice Act 1867 to 1978 provides that all remedies thereby given to judgment creditors are likewise given to any persons to whom any moneys or costs charges or expenses are by any decree or order in equity or any rule or order at common law by the Supreme Court or any decree rule or order of the said court in its ecclesiastical or matrimonial jurisdiction respectively directed to be paid.

Section 59 of the Supreme Court Act of 1867 provides similarly that all decrees and orders of the Supreme Court in equity and all rules and orders of the said court at common law or in its ecclesiastical or matrimonial jurisdiction whereby any sum of money or any costs charges or expenses shall be payable to any person shall have the effect of judgment at law and such person shall or lawfully may have execution thereon for the moneys so payable and the judges of the said court may from time to time cause writs of execution to be framed accordingly and to issue as they think fit, and all such writs shall be enforced in the same manner as writs of execution are in ordinary cases.

The origin of these provisions is to be found in the English Judgments Act 1838. Section 17 of that Act provided that judgment debts were to carry interest at the rate of 4 per cent per annum from the time of entering up the judgment, and that such interest may be levied under a writ of execution on such judgment. Section 18 provides that all decrees and orders of courts of equity, and all rules of courts of common law whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such moneys or costs, charges or expenses shall be payable shall be deemed judgment creditors within the meaning of that Act. It further provides that all remedies thereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid. Section 20 authorised new or altered writs to be sued out of the Courts of Law, Equity and Bankruptcy as the Courts deemed necessary or expedient for giving effect to the provisions of the Act, and provided for the execution of such writs to be enforced in the same manner as the execution of writs of execution.

The effect of the Judgments Act is that any order etc. which comes within the scope of s.18 has the effect of a judgment of a Superior Court of Common Law, with the consequence that the debt carries interest at 4% and that the remedies available to judgment debtors are available to the person in whose favour such an order is made. The orders in question must be for money, or costs, or charges or expenses, and they must order payment to some person. Accordingly, an order for payment into Court does not fall within the section; but a decree for specific performance ordering the defendant to pay the purchase-money and costs does fall within it. See Taylor v. Rose [1894] 1 Ch.413

at p.417. In Sundell v. Queensland Housing Commission (No.5) [1955] St.R.Qd.162 at p.173, Townley J. referred to s.18 of the Judgments Act in relation to the inherent jurisdiction of the court to order payment of moneys found due by an award. It has been held that the Act applies only where the direction to pay money appears on the face of a judgment, decree or order, and does not extend to cases where something is necessary to be done to give a party a title to the money.

In Victoria, s.160 of the Supreme Court Act of 1958 is in terms corresponding to s.59 of the Queensland Supreme Court Act of 1867. In New South Wales, s.3 of the Judgment Creditors' Remedies Act 1901 had been in similar terms, but it has been replaced by s.96 of the Supreme Court Act of 1970 which provides:

- (1) Any judgment or order of the Court for the payment of money shall have the effect of a judgment at law.
- (2) Subject to ss.98 and 99 of this Act (these relate to attachment of the person, committal and attachment of wages) and subject to the rules, a person to whom money is payable under a judgment or order of the Court -
 - (a) may have execution on the judgment or order; and
 - (b) shall be entitled to the remedies given to a judgment creditor by the Judgment Creditors' Remedies Act, 1901.

It is recommended that a provision be inserted in the new Act modelled on s.96 of the N.S.W. Supreme Court Act of 1970.

2. Interest up to Judgment and on Judgment Debts.

It has been the practice in Australia for provisions to be included in the Supreme Court Acts relating to the power of the Court to make orders for payment of interest up to judgment and on judgment debts. See N.S.W. Supreme Court Act 1970, ss.94 and 95; Victoria Supreme Court Act 1958, s.161; W.A. Supreme Court Act 1935, s.30c.

In Queensland, this matter is regulated by ss.72 and 73 of the Common Law Practice Act 1867 - 1981. These sections are not confined in their operation to proceedings in the Supreme Court. Section 72 applies to proceedings in respect of a cause of action that arises in a court of record for the recovery of money, and section 73 applies where judgment is given or an order is made by a court of record for the payment of money.

As the provisions have a wider application than to Supreme Court proceedings, and as it will not be feasible to incorporate all the provisions of the Common Law Practice Act into the new Supreme Court Act, it is suggested that no provision should be included in that Act relating to the power of the Supreme Court to make orders for payment of interest up to judgment and on judgment debts. These matters will continue to be regulated by the Common Law Practice Act.

One submission pointed out that the rate of interest prescribed by the Common Law Practice Act was inconsistent with current commercial rates, and the suggestion was made that the rate specified in the Common Law Practice Act should be linked to some official standard, such as the bond rate, or that the Court should be given a discretion to determine the rate. As the draft Bill does not refer to this matter, for the reason set out in the preceding paragraph, these suggestions are simply noted here for separate consideration.

3. Foreign Judgments

In the Victorian Supreme Court Act of 1958, there was included a division on Reciprocity in the Enforcement of Judgments. That division was repealed when the Foreign Judgment Act 1962 was enacted. That Act is in the same terms as the Queensland Reciprocal Enforcement of Judgments Act of 1959.

There are provisions in the Reciprocal Enforcement of Judgments Act which relate to courts other than the Supreme Court. See in particular s.9; s.10 (1), (3); s.11(2); s.13. For this reason, and because of the special nature of the legislation, it is suggested that it should not be incorporated into the new Supreme Court Act.

There would not appear to be any justification for the retention of the system of execution of foreign judgments which is set out in ss.20 to 22 of the Common Law Practice Act 1867. It has been superseded in the case of judgments obtained elsewhere in the Commonwealth by the Service and Execution of Process Act 1901, and in the case of New Zealand judgments by the Reciprocal Enforcement of Judgments Act of 1959. The provisions in the Common Law Practice Act should simply be repealed.

4. Appointment to Execute Instruments.

The N.S.W. Supreme Court Act 1970, s.100 provides:

"Where any person does not comply with a judgment or order directing him to execute any conveyance, contract or other document, or to indorse any negotiable instrument, the court may on terms order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it."

This is in substantially the same terms as s.47 of the English Supreme Court of Judicature (Consolidation) Act, 1925. This provision is additional to 0.48 R.8 which corresponds to Queensland 0.47, R.29. These rules are derived respectively from the English Common Law Process Act 1854, s.74, and the Queensland Interdict Act of 1867, s.50. These rules authorise the Court where a mandamus, injunction or judgment for specific performance of a

contract is not complied with to direct that the act required to be done may be done so far as practicable by the party by whom the judgment or order has been obtained, or by some other person appointed by the Court or Judge for the purpose.

The provision is also additional to those contained in the U.K. Trustee Act 1925 relating to vesting orders, which are reproduced in the Queensland Trusts Act 1973. See in particular s.92 of the Trusts Act 1973.

It is recommended that s.50 of the Interdict Act should be repealed since its effect is preserved by 0.47 R.29. It is also recommended that a provision in the terms of s.100 of the N.S.W. Supreme Court Act 1970 should be included in the new Act, since both 0.47 R.29 and s.92 of the Trusts Act are of limited scope.

PART VIII - PREROGATIVE PROCEEDINGS

There has been a considerable change in some jurisdictions in the procedures by which the remedies made available through the prerogative writs may be sought. It is convenient to consider separately developments which have occurred in England, in the Australian States and in the Commonwealth, before referring to the position in Queensland.

A. England.

The Administration of Justice (Miscellaneous Provisions) Act 1938 s.7 provided that the prerogative writs of mandamus, prohibition and certiorari should no longer be issued by the High Court, but that in any case where the High Court would formerly have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the High Court or any division thereof for any purpose, the Court may make an order requiring the act to be done, or prohibiting the removing of the proceedings or matter, as the case may be.

The effect of this provision was to abolish the prerogative writs of certiorari, mandamus and prohibition. These were writs issued from the Court of Queen's Bench. They were issued only upon cause shown, as distinguished from the original or judicial writs which commenced suits between party and party and which issued as of course. The earlier procedure was one which usually involved an application for an order nisi and a subsequent judgment that the order nisi be discharged or made absolute. If the defendant failed to do what the writ directed, the writ actually was issued after a further application to the Court. Under the newer procedure, set out in 0.53, an application for an order of mandamus, prohibition or certiorari was made to a Divisional Court by leave. Application for such leave was made ex parte to a Divisional Court of the Queen's Bench Division, except in vacation when it might be made to a Judge in Chambers.

The Act of 1938 by s.9 also abolished informations in the nature of quo warranto which were replaced by injunctions. It provided that in any case where any person acted in an office in which he was not entitled to act, and such an information would have lain against him, the High Court might grant an injunction restraining him from so acting and might declare the office to be vacant, provided that the proceedings were brought by a person who would have been entitled to apply for such information.

The writ of habeas corpus was not abolished and replaced by a prerogative order, and applications for writs of habeas corpus were regulated by special rules in 0.53 different from those applicable to the other orders.

In 1977, 0.53 was recast so as to regulate applications for judicial review. This change was made in consequence of recommendations made by the Law Commission (1976, Cmnd. 6407). Its report states (para. 43):

"Our basic recommendation is that there should be a form of procedure to be entitled an 'application for judicial review'. Under cover of the application for judicial review a litigant should be able to obtain any of the prerogative orders, or in appropriate circumstances a declaration or an injunction. Broadly speaking, the circumstances when it would be appropriate for a litigant to ask for a declaration or an injunction under cover of an application for judicial review would be when the case involved an issue comparable to those in respect of which an application may be made for a prerogative order - i.e., when an issue of public law is involved."

The Law Commission had recommended that the changes should be made by statute, but in fact they were made by amendments to the Rules of Court.

B. New South Wales and Victoria.

The influence of the changes made in England by the Administration of Justice (Miscellaneous Provision) Act 1938 is apparent in the terms of ss. 69 and 70 of the N.S.W. Supreme Court Act 1970. Section 69 goes beyond the position in England. The only writs preserved are the writ of habeas corpus ad subjiciendum, and writs of execution and writs in aid of writs of execution. The prerogative writs of mandamus, certiorari and prohibition are no longer to issue (nor are writs of summons), but the Court is empowered to grant the relief and remedy by way of judgment or order. In relation to quo warranto, s.12 states that informations in the nature of quo warranto are abolished, but s.70 provides that where any person acts in an office in which he is not entitled to act and an information in the nature of quo warranto would, but for s.12, lie against him, the Court may grant an injunction restraining him from so acting and may (if the case so requires) declare the office to be vacant.

In the report of the N.S.W. Law Reform Commission on Appeals in Administration (L.R.C. 16, 1973), proposals were made for the appointment of an ombudsman and for the establishment of a Public Administration Tribunal which would have power to set aside the official action of a public authority where that action was beyond power or was harsh, discriminatory or otherwise unjust. It stated that these proposals would have no effect on judicial review, except

that the jurisdiction of the Tribunal would overlap that of the Supreme Court on judicial review. In some cases an aggrieved person could choose to go to the Tribunal where in the like case today he would have no redress except by judicial review in the Supreme Court. In para 166 of the report, it said:

"Our proposals do not affect the law relating to judicial review. We decided against proposing a Bill to amend that law because, in 1970, its procedural aspects were usefully reformed and the substantive law, though still complex and technical, is rapidly changing and developing. It is not, in our view, an opportune time to modify restate or codify the substantive law."

In Victoria, the relevant practice of the Supreme Court is regulated by R.S.C. 0.53 and 0.3.r1A. 0.53.r1(1) provides that an application for a writ of certiorari, mandamus, prohibiton, or habeas corpus (other than for the production of a person in confinement for the purpose of examination or trial), or for leave to exhibit an information of quo warranto, or for relief of like nature to mandamus or quo warranto may be made ex parte to the Court or a Judge. It will be apparent from this that in Victoria, unlike England or New South Wales, the prerogative writs may still issue.

It appears from the judgment of Smith J. in Mudge v. A.G. (Vic.) [1960] V.R. 43 that the action for a statutory mandamus which was introduced in Victoria by the Common Law Procedure Act 1865 s.229-34 (which corresponds to ss.68-73 of the English Common Law Procedure Act 1854, and ss.44 to 51 of the Queensland Interdict Act of 1867) was not taken away by the Supreme Court Act 1890, despite the repeal of the relevant sections of the 1865 Act. In 1966, 0.3,r1A was inserted, apparently to regulate the procedure relating to a statutory mandamus, though it extends to any form of relief which can be sought upon order to show cause under 0.53r.1.

In 1978, the Administrative Law Act was passed by the Victorian Parliament. This enables any person affected by a decision of a tribunal (not being a court of law or one constituted or presided over by a Judge of the Supreme Court) to make an application for review to the Supreme Court for an order calling on the tribunal or the members thereof and also any party interested in maintaining the decision to show cause why it should not be reviewed. Upon the return of the order to review, the Court may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in an action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain its implementation. Section 11 provides that any person affected by the decision of a tribunal or inferior court shall have sufficient standing to maintain proceedings for certiorari, prohibition, mandamus, a declaration of invalidity or an injunction in relation to the decision, but nothing in that section shall take away or impair any right to relief otherwise existing or the discretion to refuse any such relief.

It will be seen that this Act does not qualify the jurisdiction of the Supreme Court to issue the prerogative writs, though it does affect the issue of the standing required to apply for a prerogative writ. The Act provides in effect an alternative process to application for the prerogative writs in certain circumstances.

C. The Commonwealth of Australia.

Section 33 of the Judiciary Act 1903 provides:

- (1) The High Court may make orders or direct the issue of writs -
- (a) commanding the performance by any court invested with federal jurisdiction of any duty relating to the exercise of its federal jurisdiction; or
 - (b) requiring any court to abstain from the exercise of any federal jurisdiction which it does not possess; or
 - (c) commanding the performance of any duty by any person holding office under the Commonwealth; or
 - (d) removing from office any person wrongfully claiming to hold any office under the Commonwealth; or
 - (e) of mandamus; or
 - (f) of habeas corpus.

(2) This section shall not be taken to limit by implication the power of the High Court to make any order or direct the issue of any writ.

The procedure relating to applications for the prerogative writs is regulated by 0.55 of the High Court Rules.

By virtue of s.75(V) of the Commonwealth Constitution the High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

The question whether the procedures of the High Court in relation to the prerogative writs should be revised was considered by a Committee of Review of Prerogative Writ Procedures. Its report (1973 - Parliamentary Paper 56, para.47) states:

"This committee recommends acceptance of the approach of the Kerr Committee, that is, that judicial review of Commonwealth administrative action should be vested primarily in a Commonwealth Superior Court, with the High Court exercising an appellate and stated case jurisdiction in relation to the decisions of that Court. It would not be possible by statute to prevent the issue of the prerogative writs of the High Court due to the Constitution. These procedures would still be available for those who wished to make use of them. If this approach is adopted, revision of the High Court procedures is undesirable. For the reasons set out by the Kerr Committee, it is desirable that the work of supervisory review of the Commonwealth Administrative action should be channelled away from the High Court. Revision of procedures in the High Court at this stage would tend to attract work to that Court and the revised procedure would, of course, remain even after the Commonwealth Superior Court had been established. This committee takes the view that there should be no revision of High Court procedures, at least at this stage."

Subsequently the Commonwealth introduced legislation providing for the review of administrative action : the Administrative Appeals Tribunal Act 1975 and the Administrative Decision (Judicial Review) Act 1977.

The Act of 1975 established the Administrative Appeals Tribunal which was authorised to hear appeals on the merits from certain administrative decisions. The constitutional division of powers in the Commonwealth dictated the need for an administrative body to review administrative decisions on the merits; it was a function which could not be entrusted to Commonwealth courts, even if it was thought desirable that a court should be given it. The decisions which may be reviewed are those set out in the schedule to the Act, and those which under another enactment may be subject to review. The Administrative Decisions (Judicial Review) Act 1977 provides for a person aggrieved by a decision of an administrative character to apply to the Federal Court of Australia for an order of review in respect of the decision on one or more of the grounds set out in the Act. On such an application, the Court may make orders quashing or setting aside the decision, or referring it back to the person who made the decision for further consideration, or declaring the rights of the parties, or directing the parties to do or refrain from doing any act or thing, or deputing the making of a decision.

It is not appropriate in this context to consider the general question of review of administrative action. It has been referred to only in the context of an examination of the provisions relating to the jurisdiction of the superior courts to issue or direct the issue of the prerogative writs. It is suggested that two relevant facts emerge from this examination. One is that in England and in New South Wales the legislature has acted to replace prerogative writs by prerogative orders and injunctions, except in the case of the writ of habeas corpus. The second is that steps have been taken in various jurisdictions to improve the procedure for making such orders.

This latter is an important matter. The deficiencies in the present procedure are many and serious. A report by the Victorian Statute Law Revision Committee on judicial review and the prerogative writs stated:

"There is general agreement that the system surrounding the writs is immersed in technical procedural snares which delay, and in some instances prevent, proper review by the courts. It is not uncommon that, after lengthy legal arguments, the court will hold that a particular writ is not available, and because the boundaries of each remedy are undefined (and perhaps undefinable) there are many cases which never proceed further. The historical restriction on the issue of certiorari and prohibition to bodies held to be acting in a judicial capacity may involve extensive argument in determining whether a particular body does in fact have a judicial function. Time may be consumed considering some doubt as to whether certain defects in the exercise of discretionary powers go to jurisdiction, and hence are amenable to certiorari."

A further and different listing of deficiencies in the present system of remedies is given in para 31 of the report of the English Law Commission (1976, Cmnd. 6407).

While the comments of the Victorian Committee were directed to deficiencies which suggested the need for a supplementary system of review, those of the English Committee were concerned to remedy defects in the system of review through prerogative procedures.

D. Queensland

In Queensland, the jurisdiction of the Supreme Court to issue the prerogative writs is derived from s.21 of the Supreme Court Act of 1867. The Interdict Act of 1867 contains a number of provisions related respectively to the prerogative writ of mandamus (ss. 36 to 43) the action for mandamus (ss.44 to 51) writs of injunction (ss.52 to 56), quo warranto (ss. 58 and 59), and prohibiton (s.60). The procedure for application for writs of certiorari, mandamus or prohibiton, or for leave to exhibit informations of quo warranto, is regulated by 0.81. The procedure on actions for mandamus and injunction is regulated by 0.57.

There appear to be at least two different ways in which provision may be made in the new Supreme Court Act in relation to prerogative proceedings.

One would consist in following the English model, namely replacing the prerogative writs by prerogative orders, and introducing the procedure of an application for judicial review as regulated in the present U.K. 0.53. The other would be based upon the approach adopted in Victoria, where the existing law is left undisturbed but an alternative procedure is provided by which decisions of tribunals may be reviewed. This is also the position adopted in the Commonwealth Administrative Decisions (Judicial Review) Act 1977. Section 10(1)(a) of that Act provides that the rights conferred on a person to make an application to the Court are in addition to, and not in derogation of, any other rights that the person has to seek a review. This approach is appropriate where the procedure laid down is not intended to cover the whole field of administrative action, but it may also be supported as enabling litigants to elect to proceed either in the traditional way or in the new form. If the new procedure proves satisfactory, it should supersede the other procedures and make it possible for these to be repealed without adverse consequences. Moreover, the abolition of the other procedures would entail the amendment of other Acts which refer to them; see, for example, the District Courts Act of 1967, ss.28 and 30. Such amendment would not be required if the other procedures were retained, though in due course it should be effected.

The draft Bill therefore does not, as in England, abolish the prerogative writs, but provides that the Court may make orders of mandamus, prohibition or certiorari. There does not however appear to be any reason why informations in the nature of quo warranto should not be replaced by injunctions. Accordingly, Clause 1 follows the terms of s.7 of the U.K. Administration of Justice (Miscellaneous Provisions) Act 1938, except for the deletion of the first subsection by which it is provided that the prerogative writs of mandamus, prohibition and certiorari are no longer to be issued by the High Court. Clause 2 is in the same terms as s.9 of the U.K. Act of 1938.

Clause 98 provides for the introduction of the procedure by way of an application for judicial review. It is modelled on the draft Bill annexed to the report of the English Law Commission on Remedies in Administrative Law and U.K. Order 52.

The English Law Commission, in considering the scope of the application for judicial review, considered that it would be inappropriate to limit the procedure of review by way of declarations and injunctions to the exercise or refusal to exercise a statutory power, since judicial review in England is not limited to bodies exercising statutory powers. It thought it would also not be

satisfactory to define the circumstances in which a declaration or an injunction might be obtained under cover of an application for judicial review simply by reference to the public character of the person or body against whom the declaration or injunction was sought. The formula it favoured is reproduced in Clause 98(3). See paragraph 45 of its report (Cmnd. 6407, 1976). In all applications for judicial review, including applications for declarations and injunctions made in these proceedings, the applicant is required by Clause 98(2) to have sufficient interest in the subject matter of his application.

Clause 98(5) permits the joinder of a claim for damages with an application for judicial review. The reason for including it is explained by the English Law Commission (Cmnd. 6407, paras. 21 and 54) as being to overcome the difficulty that an application for a prerogative order could not be made in conjunction with an application for any other remedy. It referred to the case where a public authority pursuant to alleged powers which it did not in fact possess seized a person's land. In that situation, the applicant could not join an action for damages in respect of the trespass to the application for certiorari to quash the decision. The commission thought that "there may be cases where the Court, having decided in exercise of its review jurisdiction that illegality has occurred, and being satisfied that the claim for damages is one recognized by the law, may find that there is no remaining dispute that the damage resulted from the illegality or as to the fact or extent of damage or as to the quantum of damages. In such a case we recommend that the Court should, on an application for judicial review, have power to make an award of the damages."

Clause 98(6) confers on the Court a discretionary power, in lieu of quashing a decision, to remit a case to the tribunal or authority which made the decision to reconsider it in the light of the Court's findings. This would avoid in an appropriate case the necessity for the whole case to be heard again.

Nothing has been done to change the existing law and procedure relating to writs of habeas corpus except to repeal s.63 of the Supreme Court Act 1861, which confers special powers on the Police Magistrate of Brisbane to admit to bail on an application made to him for a writ of habeas corpus.

The Council of the Law Society considered the question whether the old prerogative procedures should continue to be available after the new procedures were introduced and whether there should be a dual system for a period. Its opinion was that there would be no objection to a dual system for a period, provided that there was a strict time limit on this after the expiry of which only one system would be in operation. It pointed out that there was a danger, when a dual system existed, that two different results might be obtained, on a similar application, by using two different procedures.

In accordance with this view, it is suggested that it would be appropriate after a period of, say, five years, for the Law Reform Commission to review the question whether there was any need to retain the old procedure. The possibility of divergent results arising from the existence of a dual system cannot be entirely discounted, but it will be noted that the jurisdiction given to the Supreme Court to make orders of mandamus, prohibition and certiorari is limited to cases where it has jurisdiction to order the issue of the corresponding writs.

PART IX - RULES OF COURT

The power to make rules of court is conferred by several Statutes. These include the following, which are printed under the title "Supreme Court and Practice" in the 1962 Reprint of the Queensland Statutes":-

- (a) The Common Law Pleading Act of 1867, s.62
- (b) The Common Law Practice Act 1867-1981, s.94
- (c) The Common Law Process Act 1867-1972, ss.74 to 76
- (d) The Equity Act of 1867-1974, s.156
- (e) The Interdict Act of 1867, ss.62,63
- (f) The Supreme Court Act of 1899, s.3
- (g) The Supreme Court Act of 1921, s.11
- (h) The Supreme Court Funds Acts 1895 to 1958, s.20F
- (i) The Commercial Causes Act 1910-1972, ss.6 and 7.

The rules of court, being made under powers given by statute, have the force of statute. See Donald Campbell & Co. v. Pollak [1927] A.C.732 at p.804. At the same time, they are intended to regulate matters of procedure only, and not to confer any new jurisdiction or to create or alter substantive rights. In British South Africa Co. v. Companhia de Mocambique [1893] A.C.602, Lord Herschell L.C. stated (at p.628) that "it has been held more than once that the rules under the Judicature Acts are rules of procedure only, and were not intended to affect, and did not affect, the rights of parties."

The Queensland Acts listed above confer the rule-making power in different forms. The most comprehensive provision is to be found in s.11 of the Supreme Court Act of 1921. This confers power in s.11(1) in general and wide terms, and then without limiting the generality of that provision, it confers power in s.11(2) to make provision in respect of a large number of specific matters. This is the same model as is used in most other Australian States. See for example the N.S.W. Supreme Court Act of 1970, ss.123-4; Victorian Supreme Court Act of 1958, s.25; S.A. Supreme Court Act of 1935, s.72, the W.A. Supreme Court Act of 1935, ss.167-168 (this does not include a general provision).

The Supreme Court Act of 1921 confers the power to make rules on the Governor in Council, with the concurrence of any two or more of the Judges. In New South Wales, rules are made by a Rule Committee, as they are in England. In Victoria, the power to make and alter rules is conferred on the Judges of the Court: this power is exercised by a majority of the Judges at a meeting for that purpose. The draft Bill reproduces the present position in Queensland. Support was expressed by the Council of the Law Society for the introduction here of a rule making committee, but it is suggested that the formal power to make and alter rules should remain with the Judges. This does not of course imply that there should not be close consultation with the legal profession in the amendment of rules of court.

Clause 99 is based on s.11(2) of the Supreme Court Act of 1921. Amendments have been made to Section 11(2)(ix), consequential upon the establishment of District Courts. Section 11(2)(x) has been deleted, since writs of inquiry have been abolished: 039,R.51. The power conferred by s.11 of the Supreme Court Acts Amendment Act 1980, and by ss.6 and 7 of the Commercial Causes Act 1910-1972 have been added to the list.

Though the list of specific matters in respect of which power to make rules is conferred is extensive, comparison with the corresponding list in other States reveals several matters which are not included in the Queensland list. As s.11(2) does not limit the generality of s.11(1), it is probably unnecessary to include these, but the same could be said of most if not all matters mentioned in s.11(2). Accordingly, the Queensland list has been expanded to cover the matters mentioned in Clause 2, xx to xxiii.

The clause providing for Rules of Court to be laid before the Legislative Assembly and to be judicially noticed is based upon s.108 of the District Courts Act of 1967, which is in similar terms to s.28A of the Acts Interpretation Acts 1954 to 1977. However, the clause goes beyond these provisions by putting the validity of the rules beyond challenge.

In 1928, the Supreme Court Acts Amendment (Rules Ratification) Act of 1928 was enacted, in consequence of the indications in judgments in Newton v. Newton [1928] St.R.Qd. 192 that the Court was not precluded from considering whether certain rules were outside the rule making power. That Act specifically declared that the rules challenged in that case were valid and binding. It declared further that all existing rules made under the Judicature Act or the Supreme Court Act of 1921 were valid and binding, and that those rules and any rules subsequently made under the powers conferred by the Supreme Court Act of 1921 would have the same effect as if they formed part of that Act.

The South Australian Supreme Court Act 1935-1975 by s.72(4) likewise provides that all Rules of Court made in pursuance of the rule-making power are to have the force of law and to be conclusively deemed to be valid. The South Australian provision is followed in the clause set out in the draft Bill.

THE SCHEDULES

It will be necessary to set out in schedules to the new Supreme Court Act the definitions of the "Central District" and "Northern District" as contained in the First Schedule and the Second Schedule to the Supreme Court Act of 1895.

It will also be necessary to include a schedule of repealed provisions. In order to determine what action should be taken in respect to the various provisions in the State Acts included under the title "Supreme Court" in the Queensland Statutes (1962 Reprint), an analysis has been made of those provisions and of subsequent Acts relating to the Supreme Court set out as an annex to this working paper.

ANNEX

<u>ACT</u>	<u>ACTION RECOMMENDED</u>	<u>REASON FOR ACTION</u>
The Commercial Causes Act 1910-1972	No action	The Act should in due course be repealed and its provisions included in the Rules of Court. Until this is done, it should be retained in its present form.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
The Common Law Pleading Act of 1867, ss.43,44	Repeal	The Property Law Act 1974-1978 has repealed the Act 405 Anne. C.16, ss.12 and 13, which is the source of these provisions. They were repealed in England by the Statute Law Revision Act, 1948. According to Halsbury, 3rd Edition, Vol.3 at p.344, s.12 of that Act was no longer required because the equitable rule relating to relief against payment of a penalty prevailed over the common law rule and s.13 was superseded by a rule of court which in Queensland is O.26, Rr1-3.
ss.46,47	Repeal	Replevin was normally associated with distress for rent. Distress for rent was abolished by s.103 of the Property Law Act 1974-1978. It may be advisable to amend O.26, R.1 which is limited to "any action for a debt or damages", so as to make it applicable to payment into court in replevin. The effect of s.47, namely that acceptance of a sum paid into Court does not work a forfeiture of the security given by the replevisor, could be included as an additional subrule to O.28, R.1.
s.62	Repeal	This is included in the power to make rules, included in the draft Bill as Clause 99.
Common Law Practice Act 1867-1981, ss.1-2	Repeal	Included in definition clause in draft Bill.
s.3	No action	This section by which wager of law is abolished may remain in an Act which is to be only partially repealed.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
ss.8,11-15D	No action	These have no special relevance to the Supreme Court, but are rules of law of general application. Sections 8,11 and 15D have been repealed by the Succession Act 1981.
ss.16,17	Repeal	The effect of these sections is covered by 0.52.
s.19	Repeal	The effect of this provision is incorporated in the draft Bill, Clause 94.
ss.20-22	Repeal	Superseded by provisions in the Service and Execution of Process Act 1901 (Cwth.) and Reciprocal Enforcement of Judgement Act 1959.
s.23	Repeal	The provision could be included in 0.3, but it is probably unnecessary. See <u>Golding v. Eyre-Kenny</u> (1905) 8 N.Z. Gaz. L.R.361.
s.24	Repeal	Covered by 0.32, R.1.
ss.25 & 26	Repeal	Covered by 0.54.
ss.40,41	Repeal	These matters should be covered by an amendment to 0.40, RR.8-28.
s.46	Repeal	Incorporated in draft Bill, Clause 47.
ss.48 to 50	Repeal	New provisions for charging orders and execution by way of fieri facias are included in the draft Bill.
s.59	Repeal	Covered by 0.49.
s.62	Repeal	Covered by 0.58.
ss.63,64,66,69	Repeal	Covered by 0.39 and 0.86.
s.70	Repeal	Covered by Jury Acts 1929 to 1978, s.29.
ss.72,73,74	No action	These apply to all courts of record.
s.75	Repeal	Incorporated in draft Bill, Clause 79.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
ss.78,79	Repeal	Covered by 0.39, Rr.5 & 7.
ss.80 to 83	Repeal	Covered by 0.32.
ss.84 to 93	Repeal	The use of warrants of attorney and cognovits is obsolete in Queensland. In practice they have been superseded by the making of consent orders.
s.94	Repeal	This is included in the power to make rules in Clause 99 of the draft Bill.
The Common Law Process Act 1867-1972, s.23	Repeal	Incorporated in draft Bill Clauses 81 and 90.
s.24	Repeal	This is rendered superfluous by the Australian Consular Officers' Notarial Powers and Evidence Act, 1946-1963, and the Evidence Act 1977-1979, ss.25-34.
ss.27 to 45	Repeal	These provisions are to be replaced by those contained in Clause 82 of the draft Bill.
s.46	Repeal	No longer useful. See the commentary.
ss.47 to 55	Repeal	These provisions are to be repealed by those contained in Clauses 81 and 90 of the draft Bill.
ss.56 to 61	Repeal	These provisions are to be replaced by those contained in Clause 88 of the draft Bill.
ss. 64 to 73	Repeal	No longer required in present circumstances.
ss.74 to 76	Repeal	Included in power to make rules as expressed in Clause 99 of the draft Bill.
The Common Law Process Act of 1867 Amendment Act 1870-1972	Repeal	No longer required in present circumstances.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
Equity Act 1867-1974 ss. 15-17	Repeal	Covered by O.10 and O.11.
ss. 18 to 20	Repeal	Covered by O.3.
s.22	Repeal	Covered by O.3.
s.48	Repeal	Covered by s.7 of the Evidence Act 1977-1979.
s.50	Repeal	Rendered superfluous by s.2 of the Oaths Act Amendment Act 1891-1974.
s.51	Repeal	Covered by O.40.
s.53	Repeal	Rendered superfluous by the Australian Consular Officers' Notarial Powers and Evidence Act 1946-1963 and the Evidence Act 1977-1979, ss.25-34.
ss.54,55	Repeal	This should be included in the Rules of Court. Compare the English O.40.
s.73	Repeal	Covered by O.4, R.11.
s.75	Repeal	Covered by O.67, R.19.
s.76	Nil	Repealed by the Succession Act 1981.
s.77	Repeal	This should be included in Rules of Court.
s.78	Repeal	This is repealed by the Succession Act 1981.
ss.120-135	Repeal	So far as these provisions have continuing relevance, they are covered by O.84 and by Clause 95 of the draft Bill relating to execution of instruments.
s.140	Repeal	Covered by the Bankruptcy Act 1966, s.60.
s.142	Repeal	Sequestration is no longer used to compel appearance.
s.146	Repeal	Covered by the Oaths Act 1867-1960.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
ss.148-150	Repeal	Covered by Children's Services Act 1965-1979, s.93.
ss.151-155	No action	These sections relate to matters covered in England by the Infants Settlements Act 1855. They should not be included in the new Supreme Court Act.
s.156	Repeal	Covered by the power to make rules of court in Clause 99 of the draft Bill.
Equity Procedure Act of 1873	No action	Provisions relating to investment of funds should not be included in the new Supreme Court Act.
The Escheat Acts 1891 to 1962	No action	These provisions should not be included in the new Supreme Court Act.
Interdict Act of 1867, ss.2 to 21	No action	Repealed by Arbitration Act 1973.
ss.22 to 35	Repeal	Interpleader proceedings should be regulated exclusively by rules of court. In England, it is stated in the White Book that "the statutory provisions have now been repealed, and their place has been taken by the wider provisions of the present Order (Order 17), which constitutes a code of the procedure by interpleader.
ss.36-57,60,61.	No action	Though the draft Bill includes a provision for a new procedure of judicial review of administrative decisions, it is recommended that the existing statutory provisions relating to prerogative writs and actions should not be repealed. See the commentary.
ss.58,59	Repeal	Replace by proceedings for an injunction, as provided in Clause 30 of the draft Bill.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
ss.62,63	Repeal	Covered by power to make rules conferred in Clause 99 of the draft Bill.
The Judicature Act	Repeal	Included in definition clause in draft Bill.
s.1	Repeal	Covered by Clause 29 of draft Bill.
s.2	Repeal	Covered by Clause 29 of draft Bill.
s.3	Repeal	Covered by Clause 71 of draft Bill.
s.4	Repeal	Covered by Clauses 21 to 28 of draft Bill.
s.5	Repeal	Covered by Clauses 29 to 33 of draft Bill.
s.6	Repeal	Covered by Clause 35 of draft Bill.
s.7	Repeal	Covered by Clause 45 of draft Bill.
s.8	Repeal	Covered by Clause 45 of draft Bill.
s.9	Repeal	Covered by Clause 46 of draft Bill.
s.10	Repeal	Covered by Clause 45 of draft Bill.
s.11	Repeal	Covered by Clause 83 of draft Bill.
s.12	Repeal	Covered by Clause 84 of draft Bill.
s.13	Repeal	Covered by Clause 85 of draft Bill.
s.14	Repeal	Covered by Clause 85 of draft Bill.
s.15	Repeal	Covered by Clause 74 of draft Bill.
s.24	Repeal	No longer required.
s.26	Repeal	No longer required.
The Law Reform (Limitation of Actions) Act of 1956	No action	This Act so far as it was not repealed by the Limitation of Actions Act 1974 applies to provisions in the Common Law Practice Acts which are not affected by the draft Bill.
Reciprocal Enforcement of Judgments Act of 1959	No action	This Act relates to judgments other than those of the Supreme Court, as well as Supreme Court judgments. See Commentary.
The Writs of Dedimus Act of 1871	Repeal	No longer required. See the Commentary.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
The Barristers Act of 1848	No action	Admission to practise as barristers or solicitors should be regulated in legislation other than the Supreme Court Act.
The Barristers Act of 1956 Repeal Act of 1960	No action	See preceding note.
The Legal Practitioners Act 1881-1968	No action	See preceding note.
The Judges' Pensions Acts, 1957-1967	No action	Provisions relating to the salary and entitlements of Judges should not be included in the Supreme Court Act. See commentary.
The Judges' Salaries and Pension Act 1967-1971	No action	Provisions relating to the salary and entitlements of Judges should not be included in the Supreme Court Act. See commentary.
The Judges' Retirement Act of 1921	Repeal	Incorporated into draft Bill, Clause 16.
The Queensland Law Society Act 1952-1971	No action	This relates to matters which fall outside the scope of a Supreme Court Act.
The Supreme Court Constitution Amendment Act of 1861		
s.32	Repeal	Incorporated into draft Bill, Clause 78.
s.49	Repeal	Examination of witnesses on interrogatorie is now regulated by R.S.C, O.40, Rr8-38.
s.63	Repeal	Inappropriate in present conditions. See the commentary.
Supreme Court Act 1867, ss.1,2	Repeal	Incorporated into draft Bill, Clause 6.
ss.3-7	Repeal	Incorporated into draft Bill, Clause 70.
s.8	Repeal	Incorporated into draft Bill, Clauses 7 and 4.
s.9	Repeal	Incorporated into draft Bill, Clause 16.
s.10	Repeal	Incorporated into draft Bill, Clause 18.
s.12	Repeal	Incorporated into draft Bill, Clause 19.
s.15	Repeal	Incorporated into draft Bill, Clause 37.
s.16	Repeal	Incorporated into draft Bill, Clause 7.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
s.16A	Repeal	Incorporated into draft Bill, Clause 13.
s.17	Repeal	Incorporated into draft Bill, Clause 80.
s.18	Repeal	Incorporated into draft Bill, Clauses, 7 & 8.
s.20	No action	This provision applies in the Administration of Justice in all Courts of Queensland.
ss.21-25	Repeal	Incorporated into draft Bill, Clause 20.
s.26	Repeal	The procedure of error should be abolished. See the commentary.
s.28	No action	See the commentary.
ss.30-32	Repeal	Incorporated into draft Bill, Clause 53.
s.33	Repeal	Inappropriate in present condition.
ss.34-36	Repeal	Incorporated into draft Bill, Clauses, 6,20.
s.37	Repeal	Unnecessary. See Acts Interpretation Act 1954-1977.
s.38	Repeal	Incorporated into draft Bill, Clause 35.
s.39	Repeal	Incorporated into draft Bill, Clause 62.
ss.40-42	No action	Those provisions relate to admission of legal practitioners and the practice of conveyancing.
ss.43-51	Repeal	Incorporated into draft Bill, Clauses 63 to 66.
ss.56,57	Repeal	Incorporated into draft Bill, Clauses 67,68.
s.58	Repeal	Incorporated into draft Bill, Clause 73.
s.59	Repeal	Incorporated into draft Bill, Clause 94.
s.60	Repeal	Incorporated into draft Bill, Clause 76.
ss.61,62	Repeal	The procedure of deciding questions of fact arising in the course of an action by directing the trial of a feigned issue has been superseded by that governed by R.S.C., O.38, R.12.
The Acting Judges Act of 1873	Repeal	Incorporated into draft Bill, Clause 17.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
The Supreme Court Act of 1874, s.6	Repeal	Incorporated into draft Bill, Clause 18.
s.10	Repeal	The procedure of error should be abolished.
s.11	Repeal	Covered by Rules of Court, O.32.
s.12	Repeal	Covered by Rules of Court, Clause 35.
s.13	Repeal	Covered by Rules of Court, Clause 45.
The Sheriff's Act of 1875	Repeal	Incorporated into draft Bill, Clauses 63-66.
The Judges' Validating Act of 1888	Repeal	No continuing operation.
The Supreme Court Act of 1889	Repeal	Certification by Chief Justice recommended. See the commentary.
The Supreme Court Act of 1892, s.4	Repeal	Incorporated into draft Bill, Clause 41.
ss.5-7	Repeal	Incorporated into draft Bill, Clauses 39,40, 42.
s.9	Repeal	Incorporated into draft Bill, Clause 77.
ss.11,12,13	Repeal	No longer needed in present circumstances.
s.14	Repeal	Incorporated into draft Bill, Clause 20.
s.15	Repeal	Incorporated into draft Bill, Clause 36.
The Supreme Court Act of 1892, No. 2	Repeal	No longer needed in present circumstances.
The Supreme Court Act of 1893, ss.5-7	Repeal	Incorporated into draft Bill, Clause 60.
s.8	Repeal	Incorporated into draft Bill, Clause 41.
The Supreme Court Act of 1895, ss.4-9	Repeal	Incorporated into draft Bill, Clauses 53 to 55.
s.10	Repeal	Incorporated into draft Bill, Clause 56.
s.11	Repeal	No longer required.
s.12	Repeal	Incorporated into draft Bill, Clause 69.
ss.13	Repeal	Superseded by District Courts Act 1967, s.92.
s.17	Repeal	Incorporated into draft Bill, Clause 69.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
First Schedule	Repeal	Annexed as a schedule to the draft Bill.
Second Schedule	Repeal	Annexed as a schedule to the draft Bill.
The Supreme Court Act of 1899, s.2	Repeal	No longer needed in present circumstances.
s.3	Repeal	Incorporated into draft Bill, Clause 99.
The Supreme Court Acts Amendment Act of 1903 s.2	Repeal	Incorporated into draft Bill, Clause 8.
s.3	Repeal	Incorporated into draft Bill, Clause 15.
The Supreme Court Act of 1921, s.3	Repeal	Has no continuing operation.
s.4	Repeal	Subsections (1) to (3) have been rendered obsolete by s.7 of the Industrial Conciliation and Arbitration Act 1961-1977. Subsection (4) refers to the "Board of Trade and Arbitration", which was abolished in 1929. Subsection (5) has no continuing operation. Subsection (6) is incorporated into the draft Bill, Clause 15.
s.5	Repeal	The first sentence in this section is no longer appropriate. See the commentary. The second sentence is incorporated into the draft Bill, Clause 39. The third sentence is incorporated into the draft Bill, Clause 43.
ss.6,7	Repeal	Incorporated into draft Bill, Clause 57-60.
ss.8,9	Repeal	Incorporated into draft Bill, Clause 69.
ss.10,10A	No action	These relate to the admission of legal practitioners.
s.11	Repeal	Incorporated into draft Bill, Clause 99.
s.13	Repeal	Unnecessary to repeal in the new Supreme Court Act.

ANNEX

ACT	ACTION RECOMMENDED	REASON FOR ACTION
The Supreme Court Acts Amendment Act of 1944	No action	This relates to terms of service of Judges and should not be incorporated into the new Supreme Court Act.
The Supreme Court Acts Amendment Acts of 1946, 1949, 1952, 1955 (No.2) 1961,1975	Repeal	Incorporated into draft Bill, Clause 15.
The Supreme Court Acts Amendment Act of 1958 (No.2)	Repeal	Incorporated into draft Bill, Clauses 50 to 52.
The Supreme Court Acts Amendment Act of 1975	Repeal	Included in draft Bill, Clause 15.
Supreme Court Acts Amendment Act of 1980	Repeal	Incorporated into Clauses 61 and 99 of the draft Bill.

A Bill to consolidate, amend, and reform the law relating to the Supreme Court.

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, Commencement and Application

- (1) This Act may be cited as the Supreme Court Act 1982.
- (2) This Act shall commence on a date fixed by Proclamation.
- (3) Subject to the express provisions of this Act and the Crown Proceedings Act 1980, this Act 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. Arrangement of Act. This Act is arranged as follows:-

PART I PRELIMINARY, ss. 1-5

PART II - CONSTITUTION OF THE SUPREME COURT, ss. 6-19

PART III - JURISDICTION AND POWERS OF THE COURT, ss. 20 - 34.

Division 1 - Jurisdiction, s.20
Division 2 - Judicature System, ss.21-28
Division 3 - Miscellaneous Rules and Powers of the Court, ss.29-34.

PART IV - DISTRIBUTION OF BUSINESS OF THE COURT, ss. 35-60.

- Division 1 - General, ss. 35-37
- Division 2 - The Court of Appeal, ss. 38-44
- Division 3 - Matters to be determined by the Court
of Appeal, ss. 45-48
- Division 4 - Incapacity of a Judge, ss. 49-52
- Division 5 - Districts and Circuits, ss. 53-60

PART V - OFFICERS, REGISTRIES AND SEALS, ss. 61-70

PART VI - PROCEDURE, ss. 71-87

- Division 1 - General, ss. 71-80
- Division 2 - Mesne Process, ss. 81-82
- Division 3 - Referees and Assessors, ss. 83-87

PART VII - EXECUTION OF JUDGEMENTS AND ORDERS, ss. 88-95

PART VIII - PREROGATIVE PROCEEDINGS, ss. 96-98

PART IX - RULES OF COURT, ss. 99-100

SCHEDULES

Abbreviations

Abbreviations used in references to other Acts in notes appearing at the beginning of sections have the following meanings:-

AJ - Acting Judges Act of 1873; CC - Commercial Causes Act 1910-1972; C.L. Pl. - Common Law Pleading Act of 1867; Common Law Practice Act 1867-1981; C.L. Proc. - Common Law Process Acts 1867-1972; Eq. - Equity Act 1867-1974; Dist. Ct. - District Courts Act 1967; Int. - Interdict Act of 1867; Judic. - Judicature Act 1876; Qld. 1861 - Supreme Court Constitution Amendment Act of 1861; Qld. 1867 - Supreme Court Act of 1867; Qld. 1874 - Supreme Court Act of 1874; Qld. 1892 - Supreme Court Act of 1892; Qld. 1893 - Supreme Court Act of 1893; Qld. 1895 - Supreme Court Act of 1895; Qld. 1899 - Supreme Court Act of 1899; Qld. 1903 - Supreme Court Acts Amendment Act of 1903; Qld. 1921 - Supreme Court Act of 1921; Qld. 1958 - Supreme Court Acts Amendment Act of 1958 (No. 2); Qld. 1980 - Supreme Court Acts Amendment Act 1980; N.S.W. - Supreme Court Act 1970 (N.S.W.); S.A. - Supreme Court Act 1935-1975 (S.A.); Tas. - Supreme Court Civil Procedure Act 1932 (Tas.); Vic. - Supreme Court Act 1958 (Vic.); W.A. - Supreme Court Act 1935-1979 (W.A.); F.C.A. - Federal Court of Australia Act 1976 (Cwth.); ADJR - Administrative Decisions (Judicial Review) Act 1977 (Cwth.); S.C. of J (Consolidation) - Supreme Court of Judicature (Consolidation) Act 1925 (U.K.); A of J (MP.) - Administration of Justice (Miscellaneous Provisions) Act 1938 (U.K.); A of J - Administration of Justices Act 1956 (U.K.); S.C.A. (U.K.) - Supreme Court Act 1981 (U.K.).

3. Repeals [W.A. s.3; Vic. s.2]

The Acts set forth in the First Schedule are repealed as and to the extent therein specified.

4. Savings and Transitional [cf Dist. Ct. s.3; W.A. s.3]

- (1) Save as is otherwise provided, nothing in this Act
 - (a) shall be construed to take away, lessen or impair any jurisdiction, power or authority which is now vested in or capable of being exercised by the Supreme Court, or any one or more of the Judges thereof;
 - (b) shall affect the operation of any Rules of Court in force at the commencement of this Act or, subject to the Rules of Court, any practice or procedure of the Court, or any practice or usage of or connected with any of the offices of the Court, or the officers thereof in force at the commencement of this Act.
- (2) Every Proclamation or Order in Council made under any provision of the repealed Acts and in force at the time of the repeal thereof shall, subject to this Act, continue in force as if it had been made under the corresponding provisions of this Act.
- (3)
 - (a) The Judges of the Supreme Court and Masters of the Supreme Court in office at the time of the repeal of the repealed Acts shall, subject to this Act, continue to hold such offices pursuant to their appointments thereto respectively under the repealed Acts; and the persons who at that time were appointed as Chief Justice of Queensland and Senior Puisne Judge respectively shall continue to hold those appointments.
 - (b) All persons who at the time of the repeal of the repealed Acts are in office as Sheriffs or as Registrars or other officers of the Supreme Court (and whether by appointment or by virtue of the provisions of the repealed Acts) shall, subject to this Act, continue to hold such offices respectively pursuant to their appointments or, as the case may be, the provisions of this Act corresponding to those of the repealed Acts by virtue of which they held these offices.
- (4)
 - (a) Unless the Court or a Judge otherwise orders, on the application of either party, or of its or his own motion, all proceedings pending and all judgments given, signed, entered or made at or before the commencement of this Act under or subject to the repealed Acts, shall be treated as if pending, given, signed, entered or made under this Act and may be proceeded with, completed, enforced or otherwise howsoever dealt with under this Act accordingly.
 - (b) The Court or a Judge may give directions in respect of such a proceeding or judgment which in its or his opinion are necessary or convenient to give effect to paragraph (a) of this sub-section, and any step taken in accordance with such directions shall be deemed to have been taken in accordance with this Act.

- (5)
- (a) A reference in any Act, Rules of Court or Regulation to the Supreme Court shall be construed as a reference to the Supreme Court as continued in existence by this Act, and in the case of an Act, Rule of Court or Regulation passed or made before the commencement of this Act, shall be so construed notwithstanding that the reference is expressed to relate to the Supreme Court within the meaning of an Act other than this Act or to an Act which has been repealed by this Act.
 - (b) A reference in any Act, Rules of Court or Regulations to the Full Court or to the Court as a court consisting of two or more Judges or to the Court of Criminal Appeal shall be construed as a reference to the Court of Appeal as established by this Act.

5. Interpretation [cf CC. s.2; Dist.Ct s4; Judic. s.1; Qld. -- 92,s.3; Qld. 1893, s.2; Qld. 1895, s.2; Qld. 1921, s.2; N.S.W. s.19; W.A. s.4.]

In this Act, unless the contrary intention appears -

"action " means a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court, but does not include any criminal proceeding by the Crown.

"appeal from a Judge" includes a motion or application for judgment or for a new trial in a cause or matter which has been heard before a Judge, with or without a jury and a motion or application to set aside or vary any order made or judgment pronounced by a Judge.

"cause" includes any suit, action or other original proceeding between a plaintiff and a defendant; and any criminal proceeding by the Crown.

"Central District" means the part of the State comprised within the boundaries described in the Second Schedule to this Act.

"Circuit Town" means a town or city appointed as a place for the holding of a Circuit Court.

"Chief Justice" means the Chief Justice of Queensland or the Acting Chief Justice of Queensland.

"Commercial causes" means causes arising out of the ordinary transactions of merchants and traders; amongst others those relating to the construction of mercantile documents, export or import of merchandise, carriage of goods, sale of goods, building contracts, engineering contracts, insurance, banking, money lending, mercantile agency and mercantile usages.

- "Court" means the Supreme Court of Queensland.
- "Defendant" includes every person served with any writ of summons or process or served with notice of or entitled to attend any proceedings.
- "District Registry" means a registry constituted for a District.
- "Existing" means existing at the date fixed for the commencement of this Act.
- "Formerly" means immediately before the commencement of this Act.
- "Judge" means a Judge of the Supreme Court of Queensland and includes an Acting Judge.
- "Judgment" includes a judgment, decree, order or other decision or determination of a Judge.
- "Jurisdiction" includes all powers and authorities incident to the exercise of jurisdiction.
- "Master" means a Master of the Supreme Court of Queensland.
- "Matter" includes every proceeding in the Court not in a cause.
- "Northern District" means the part of the State comprised within the boundaries described in the Third Schedule to this Act.
- "Order" includes rule.
- "Party" includes every person served with notice of or attending any proceeding although not named on the record.
- "Petitioner" includes every person making any application to the Court either by petition, motion or summons otherwise than as against any defendant.
- "Plaintiff" includes every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding whether by action, suit, petition, motion, summons or otherwise.
- "Pleading" includes any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto and of the answer of the plaintiff to any set-off or counter-claim of a defendant.
- "Prescribed" means prescribed by Rules of Court.
- "Registrar" includes the Principal Registrar of the Supreme Court, a Registrar or a Deputy Registrar.
- "Rule of Court" includes forms and schedules to the Rules.

- "Sheriff" in the case of Circuit Courts within the Central District or the Northern District means the Central Sheriff or the Northern Sheriff, as the case may be.
- "Southern District" means the part of the State not included in either the second or third schedule to this Act.
- "Suit" includes action.
- "The Central Court" means the Court held within the Central District as provided by this Act.
- "The Northern Court" means the Court held within the Northern District as provided by this Act.
- "The Southern Court" means the Court held with the Southern District as provided by this Act.
- "This Act" means this Act and all Orders in Council and Rules of Court made thereunder.

PART II - CONSTITUTION OF THE SUPREME COURT

6. Continuance of the Supreme Court. [cf. Qld. 1867, s.34; N.S.W. s.22,; S.A. s.6; W.A. s.6].

The Supreme Court of Queensland as by law established as the superior court of record in Queensland is hereby continued, and it is hereby declared that the Supreme Court of Queensland heretofore and now held and henceforth to be held is and shall be deemed and taken to be the same Court.

7. Constitution of the Court. [cf. Qld. 1867, s.8; S.A. s.7; Vic. s.7; W.A. s.7]

The Court shall be comprised of -

- (a) a Chief Justice and such Puisne Judges as the Governor in Council shall appoint by commission in Her Majesty's name; and
- (b) such acting Judges, if any, as for the time being hold office pursuant to an appointment made under section 17 of this Act.

8. Judges of the Court. [S.A. s.7(2) Qld. 1867, s.16, Qld. 1903]

(1) Subject to any express provision in this or any other Act, all the Judges shall have, in all respects, equal power, authority and jurisdiction.

(2) The Chief Justice shall be the person appointed to that office by the Governor in Council.

(3) The Governor in Council may appoint a Judge of Appeal to be President of the Court of Appeal. A Judge of Appeal may be appointed to be President of the Court of Appeal at the time of his appointment as a Judge of Appeal or at any time afterwards.

(4) The Governor in Council may appoint one of the Judges of the Supreme Court (not being the Chief Justice) to be the Senior Puisne Judge of the Court. The Judge so appointed shall for all purposes whatsoever be deemed to be Senior Judge of the Court, next after the Chief Justice.

(5) The Chief Justice of the Supreme Court shall be styled "The Chief Justice of Queensland". The Senior Puisne Judge of the Supreme Court shall be styled "The Senior Puisne Judge of the Supreme Court of Queensland". The President of the Court of Appeal shall be styled by that name, and Judges of Appeal shall be styled "Judges of Appeal of the Supreme Court of Queensland". The Puisne Judges shall be styled "Judges of the Supreme Court of Queensland".

9. Judges of Appeal. [N.S.W. s.36]

(1) The Governor in Council may by Commission in Her Majesty's name appoint any Judge of the Supreme Court to be a Judge of Appeal.

(2) A Judge may be appointed to be a Judge of Appeal either at the time of his appointment as a Judge or at any time thereafter.

(3) A Judge of Appeal shall continue to be a Judge of the Supreme Court and may from time to time sit as or exercise any of the powers of a Judge of the Supreme Court.

(4) A Judge of Appeal shall hold office as a Judge of Appeal so long as he holds office as a Judge of the Supreme Court.

(5) With the approval of the Governor in Council, a Judge of Appeal may resign his office as Judge of Appeal without resigning his office as a Judge of the Supreme Court.

10. Additional Judges of Appeal. [N.S.W. s.36]

(1) At any time during the illness or absence of any Judge of Appeal (other than the Chief Justice) the Governor in Council may by commission appoint any Judge of the Supreme Court to act as an additional Judge of Appeal during such period not exceeding six months as may be specified in the commission.

(2) Whenever the Chief Justice directs that in any proceedings before the Court of Appeal it is expedient that a Judge nominated by him should act as an additional Judge of Appeal, the Judge so nominated may act as an additional Judge of Appeal for the purposes of that proceeding without the issuing of any further commission.

(3) Every additional Judge of Appeal appointed or nominated pursuant to this section shall be deemed while so acting to be a Judge of Appeal.

(4) The fact that any Judge acts as an additional Judge of Appeal shall be sufficient evidence of his authority to do so and no judgment or order of the Court of Appeal while he so acts shall be questioned on the ground that the occasion for his so acting had not arisen or had ceased to exist.

(5) Every Judge who, pursuant to this section, has acted as an additional Judge of Appeal may attend the sittings of the Court of Appeal for the purpose of giving judgment in, or otherwise completing, any proceedings which have been heard by the Court while he so acted notwithstanding that he is no longer an additional Judge of Appeal.

11. Seniority of Judges

[The Commission does not propose any provision on this matter, which it considers should be settled as a matter of policy by the Government.]

12. Performance of Functions by Judges. [Qld. 1921, s.7]

(1) As and when directed by the Chief Justice in cases where in his opinion such direction becomes necessary, a Judge of the Supreme Court shall act as a Judge of the Court of Appeal or at any sittings of the Supreme Court (including a Circuit Court) whether in the Southern, Central or Northern District.

(2) In the month of December in each year, the Chief Justice shall cause to be published in the Gazette a law calendar for the ensuing year in which he shall appoint sittings of the Court of Appeal, the Supreme Court in each District and Circuit Courts, and he shall assign Judges to such sittings, provided always that as the conduct of the business of the Court requires, the Chief Justice may, by direction, alter the date or duration of any such sittings, appoint additional sittings or assign a different Judge to any sitting.

13. Acting Chief Justice. [Qld. 1867, s.16A]

(1) The Governor in Council may, if at any time the office of The Chief Justice of Queensland is vacant, or the said The Chief Justice is incapable or absent from the State or is administering the Government of the State, appoint by commission in Her Majesty's name the Senior Judge for the time being of Queensland then residing therein and not being under incapacity to act as the Chief Justice of Queensland under the style of "The Acting Chief Justice of Queensland" until the office of the Chief Justice of Queensland is filled, or the said The Chief Justice ceases to be incapable or returns to the State, or, as the case may be, ceases to administer the Government of the State.

(2) Any such Acting Chief Justice shall, during the period of his appointment, rank in seniority next to The Chief Justice of Queensland.

(3) Any such Acting Chief Justice of Queensland is hereby authorised to perform all the duties and exercise all the powers and authorities of The Chief Justice of Queensland while he so acts during the vacancy in the office of the Chief Justice of Queensland, or while the said The Chief Justice is incapable or absent from the State, or during the period the said The Chief Justice administers the Government of the State.

(4) An Acting Chief Justice of Queensland shall be paid, in respect of any and every period during which he so acts, salary at the rate for the time being applicable to the office of The Chief Justice of Queensland in lieu of the salary at the rate payable to him as a Puisne Judge of the Supreme Court of Queensland.

(5) The office of The Acting Chief Justice of Queensland shall be an office cast upon that Judge by law within the meaning of section 16 of this Act and the provisions of that section shall be read subject in all respects to the provisions of this section.

14. Qualification of Judges. [Qld. 1867, s.8; Legal Practitioners Act 1881-1968, s.2; Dist. Ct. s.9]

(1) Subject to section 12 of this Act, the Governor in Council may, by commission in Her Majesty's name, appoint any qualified person to be Chief Justice or a Judge of the Supreme Court.

(2) At the time of his appointment, a person so appointed shall be or shall have been a barrister or solicitor of the Supreme Court of Queensland of not less than five years standing.

15. Number of Judges. [cf. Qld. 1975, s.2; Qld. 1921, s.4(6)]

(1) The number of the Judges of the Supreme Court of Queensland shall not exceed twenty.

(2) At any time when the total number in office of the Judges is less than twenty, it shall be lawful for the Governor in Council by commission in Her Majesty's name to appoint a qualified person to be a Judge, but the Governor in Council shall not make any appointment or appointments increasing to more than twenty the number in office for the time being of the Judges.

16. Tenure of Judges. [Judges' Retirement Act of 1921, s.3; Qld. 1867, s.9]

(1) The commissions of the Judges of the Court shall, subject to subsections (2) and (3) of this section, continue and remain in full force during his or their good behaviour notwithstanding the demise of Her Majesty or of her heirs and successors, any law, usage or practice in any wise notwithstanding.

(2) Notwithstanding anything in subsection (1) or in any other Act, when any Judge of the Court attains the age of seventy years, thereupon his commission shall cease to be in force and his office shall become vacant, save for the purpose of disposing of any causes or matters partly heard or standing for judgment by or before the Court as provided in subsection (3), and such office may, notwithstanding the pendency of any such causes or matters, be filled by the appointment of any qualified person.

(3) If when the office of any Judge of the Supreme Court becomes vacant as aforesaid there shall be any causes or matters partly heard or standing for judgment by or before the Court on which he has entered as Judge, his commission shall continue and he shall continue in office for the purpose only of deciding such causes or matters until judgment shall have been delivered therein.

17. Acting Judges. [Dist. Ct., s.16; Vic. Const. 1975, s.81]

(1) The Governor in Council may appoint (by commission in Her Majesty's name) a person qualified to be appointed a Judge of the Supreme Court to be an Acting Judge -

- (a) if a Judge is absent on leave, granted by the Governor in Council - during the period of that absence on leave;
- (b) if a Judge is absent from any other cause or for any reason is incompetent or unable for the time being to perform fully the duties of his office - for a period not exceeding that during which such judge is absent, incompetent or unable to perform fully the duties of his office;
- (c) if the Chief Justice or the Acting Chief Justice certifies that it is desirable for an acting Judge to be appointed temporarily to assist in disposing of the business of the Court - for a period not exceeding six months as is specified by the Chief Justice or the Acting Chief Justice in his certificate.

(2) The power to appoint an Acting Judge under subsection (1) of this section shall not be limited by the provisions of section 12 of this Act.

(3) An Acting Judge shall hold office for the period for which he is appointed as a Judge of the Court for all purposes whatsoever and shall during that period have all the powers, jurisdiction and privileges and shall perform the duties of a Judge of the Court.

(4) An acting Judge shall during the period for which he is so appointed or for which his commission remains in force pursuant to subsection (6) hereof be subject to the provisions of subsections (1) and (2) of Section 16 of this Act.

(5) If any member of the Legislative Assembly shall accept a commission as an acting judge of the Court, his seat in the Legislative Assembly shall thereby become vacant and he shall be incapable of being nominated and elected to the Legislative Assembly until the expiration of six months from the date of expiry of his commission.

(6) If at the determination by effluxion of time of the commission of an acting Judge of the Court there shall be any causes or matters partly heard or standing for judgment by or before the Court on which he has entered as Judge his commission shall for the purpose only of deciding such causes or matters remain in force until judgment shall have been delivered therein.

18. Salaries. [Qld. 1867, s.10; Qld. 1874, s.6; F.C.A. s.10]

(1) The salaries payable to Judges of the Court by Act of Parliament or otherwise shall be payable to every such Judge so long as his commission remains in force.

(2) Such salaries shall be charged on and paid out of the Consolidated Revenue Fund of Queensland, which is appropriated to the extent necessary therefor.

(3) The salary to which a Judge is entitled shall accrue from day to day, but shall be payable monthly or at such other period as the Governor in Council from time to time may decide.

19. Holding Other Office. [Qld. 1867, s.12; Vic. Const. 1975, S.84, Acting Judges Act 1873, s.4]

(1) A Judge or Acting Judge of the Court shall not be capable of accepting taking or performing the duties of any office or other place of profit within the State of Queensland, excepting such as are granted to him by this or any other Act or which are cast upon him or deemed to be cast upon him by law.

(2) It is hereby declared that for the purpose of subsection 1 of this section, the following offices shall be deemed to be cast upon a Judge by law -

(a) in the case of a Judge of the District Court who is appointed to act as a Judge of the Court or to discharge the duties of a Judge of the Court, the office of a Judge of the District Court;

(b) an office to which a Judge is appointed by the Governor in Council pursuant to the provisions of an Act which authorises the appointment of a Judge of the Court to that office;

(c) an office to which a Judge is appointed with his consent and the consent of the Chief Justice, and by or with the consent of the Governor in Council.

(3) Any acceptance taking or performance of the duties of any such other office shall be deemed in law an avoidance of his office of Judge, and his office and commission shall be thereby superseded and his salary shall thereupon cease.

(4) A Judge shall not receive and shall not be entitled to any remuneration or emolument for or in respect of performing the duties of any other office or place granted to him or cast or deemed to be cast upon him pursuant to subsections 1 and 2 of this section apart from reasonable travelling expenses.

PART III - JURISDICTION AND POWERS OF THE COURT

Division I - Jurisdiction

20. Jurisdiction of the Court. [cf. Vic. Constit. 1975, s.85; Qld. 1867, ss. 21 to 24, s.34; SC. of J. (Consol), s.18]

(1) Subject to the express provisions of this Act or of any other Act or Commonwealth Act or Imperial Act, the Court shall have jurisdiction in or in relation to Queensland and its dependencies in all cases whatsoever, and shall be the superior Court of Queensland with unlimited jurisdiction.

(2) The Court and the Judges of the Court shall have and may exercise such jurisdiction powers and authorities as were vested in or capable of being exercised by -

- (a) any of the superior Courts in England or the judges thereof or the Central Criminal Court in London or by judges of assize or oyer and terminer and general goal delivery in England or by the Lord High Chancellor of Great Britain, including the jurisdiction powers and authorities in relation to probate and matrimonial causes and administration of assets, at or before the commencement of the Supreme Court Act of 1867;
- (b) the Supreme Court of New South Wales as at the sixth day of June 1859;
- (c) the Supreme Court of Queensland immediately before the commencement of this Act.

(3) The Court and the Judges of the Court shall have and may exercise such further or other jurisdiction (whether original or appellate) as is vested in or capable of being exercised by the Supreme Court of Queensland or the Judges thereof under or by virtue of any Imperial Act or Act of the Commonwealth of Australia or Act of the State of Queensland (including this Act).

(4) The jurisdiction vested in the Court shall, subject as otherwise provided in this Act, include the jurisdiction which was formerly vested in, or capable of being exercised by, all or any one or more of the Judges of the Court aforesaid respectively sitting in Court or Chambers or elsewhere, when acting as Judges or a Judge, in pursuance of any statute, law or custom, and all powers given to any such court or to any such judges or judge by any statute, and also all ministerial powers, duties and authorities incident to any and every part of the jurisdiction so vested.

Division 2 - Judicature System

21. Law and Equity to be Administered. [Judic. s.4]

In every civil cause or matter commenced in the Court, law and equity shall be administered by the Court according to the provisions of the seven sections of this Act next following.

22. Equity of Plaintiff. [Judic. s.4(1)]

If a plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument or contract, or against any right, title or claim asserted by any defendant or respondent in the cause or matter, or to any relief founded upon a legal right which formerly could only have been given by the Court in its equitable jurisdiction, the Court shall give to the plaintiff or petitioner the same relief as ought formerly to have been given by the Court in its equitable jurisdiction in a suit or proceeding properly instituted for the same or the like purpose.

23. Equitable Defences. [Judic. s.4(2)]

If a defendant claims to be entitled to any equitable estate or right or to relief upon any equitable ground against any deed, instrument or contract, or against any right title or claim asserted by any plaintiff or petitioner in the cause or matter, or alleges any ground of equitable defence to any such claim of the plaintiff or petitioner, the Court shall give to every equitable estate, right or ground of relief so claimed, and to every equitable defence so alleged the same effect by way of defence against the claim of the plaintiff or petitioner as the Court in its equitable jurisdiction ought formerly to have given if the same or the like matters had been relied on by way of defence in a suit or proceeding instituted in that Court for the like purpose.

24. Counter-Claims and Third Parties. [Judic. s.4(3)]

(1) The Court shall have power to grant to any defendant, in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him -

- (a) all such relief against any plaintiff or petitioner as the defendant has properly claimed by his pleading, and as the Court or Judge might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and
- (b) all such relief relating to or connected with the original subject of the cause of matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who has been duly served with notice in writing of such claim, pursuant to any rules of court, as might properly have been granted against that person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.

(2) Every person served with any such notice shall thenceforth be deemed a party to the cause or matter with the same rights in respect of his defence against the claim, as if he had been duly sued in the ordinary way by the defendant.

25. Equities appearing Incidentally. [Judic. s.4(4)]

The Court shall recognise and take notice of all equitable estates, titles, and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter pending before it, in the same manner in which the said Court in its equitable jurisdiction would formerly have recognised and taken notice of the same in any suit or proceeding duly instituted therein.

26. Defence or Stay instead of Injunction or Prohibition.
[Judic. ss.4(5) and (6)]

No cause or proceeding at any time pending in the Court shall be restrained by prohibition or injunction, but every matter of equity on which an unconditional injunction against the prosecution of any such cause or proceeding might formerly have been obtained may be relied on by way of defence thereto.

Provided that -

- (a) nothing in this Act shall disable the Court, if it thinks fit, from directing a stay of proceedings in any cause or matter pending before it; and
- (b) any person, whether a party or not to any such cause or matter, who would formerly have been entitled to apply to the Court, in any of its jurisdictions, to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise any judgment, decree, rule, or order, in contravention of which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the Court, in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purpose of justice, and the Court shall thereupon make such order as is just.

27. Recognition of all Legal Claims. [Judic. s.4(7)]

Subject to the provisions of this Act for giving effect to equitable rights and other matters of equity, the Court shall recognise and give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilities existing by the common law, or by any custom, or created by any statute, in the same manner as those matters would formerly have been recognised and given effect to by the Court in any branch of its jurisdiction.

28. Determination of Matter Completely and Finally.
[Judic. s.4(8)]

The Court in every cause or matter pending before it shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as it deems just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of every legal or equitable claim properly brought forward by them respectively, in such cause or matter, so that as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

Division 3 - Miscellaneous Rules and Powers of the Court

29. Rules of Equity to Prevail in all Courts. [Judic. s.2, s.5(10) and (11)]

Subject to the express provisions of any other Act in questions relating to the custody and education of infants, and generally in all matters not particularly mentioned in this Act, in which there was formerly any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail in all courts of the State, so far as the matters to which these rules relate are cognizable by those courts.

30. Mandamus, Injunction and Appointment of Receiver.
[Judic. s.5(8); S.C.A. (U.K.) s.37(3)]

(1) The Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the Court to be just or convenient to do so.

(2) Any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just.

(3) The Court may, at any stage of proceedings, by interlocutory or other injunction, restrain any threatened or apprehended breach of contract or other wrongful act.

(4) If an application is made (whether before, or at, or after the hearing of any cause or matter for an injunction) to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the Court thinks fit, whether the person against whom the order is sought is or is not in possession under any claim of title or otherwise, or (if not of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or either of the parties are legal or equitable.

(5) The power of the Court under sub-section (1) to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident, or present within that jurisdiction.

31. Rules as to Division of Loss. [Cwth. Nav. s.259; Vic. s.64]

(1) Where by fault of two or more vessels damage or loss is caused to one or more vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was at fault:

Provided that, if having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section shall operate so as to render any vessel liable for any loss or damage to which its fault has not contributed.

(3) Nothing in this section shall affect the liability of any person under a contract of carriage or any contract, or shall be construed as imposing any liability upon any person from which he is exempted by any contract or by any provision of law or as affecting the right of any person to limit his liability in manner provided by law.

(4) For the purpose of this section, the expression "freight" includes passage money and hire, and references to damage or loss caused by the fault of a vessel shall be construed as including references to any salvage or other expenses consequent upon that fault, recoverable at law by way of damages.

32. Damages for Personal Injuries. [Cwth. Nav. s.260; Vic. s.65]

(1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several.

(2) Nothing in this section shall be construed as depriving any person of any right of defence on which, independently of this section, he might have relied in an action brought against him by the person injured or any person or persons entitled to sue in respect of such loss of life, or shall affect the right of any person to limit his liability in cases to which this section relates in the matter provided by law.

33. Right of Contribution. [Cwth. Nav. s.261; Vic. St. s.66]

(1) Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel, and any other vessel or vessels, and a proportion of the damages is recovered against the owner of one of the vessels which exceeds the proportion in which it was in fault, he may recover by way of contribution the amount of the excess from the owners of the other vessels to the extent to which those vessels were respectively in fault:

Provided that no amount shall be so recovered which could not, by reason of any statutory or contractual limitation of, or exemption from, liability, or which could not for any other reasons have been recovered in the first instance as damages by the persons entitled to sue therefor.

(2) In addition to any other remedy provided by law, the persons entitled to any contribution as provided by subsection (1) of this section shall, for the purpose of recovering the contribution, have, subject to the provisions of this Act, the same rights and powers as the persons entitled to sue for damages in the first instance.

34. Damages in Relation to or in Substitution for Injunction or Specific Performance. [Eq. s.62; S.A. s.30]

In any action arising out of the breach of any covenant, contract or agreement or instituted to prevent the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement, the Court shall have power to award damages to the party injured either in addition to or in substitution for the injunction or specific performance and those damages may be assessed by the Court or in such manner as it directs.

PART IV - DISTRIBUTION OF BUSINESS OF THE COURT

Division I - General

35. Exercise of the Court's Jurisdiction. [cf. W.A. s.41]

Subject to this Act and any other Act and to the Rules of Court,

(a) the jurisdiction of the Court may be exercised either by the Court of Appeal or by a single Judge of the Court;

(b) any single Judge of the Court may hear and determine all causes and matters within the jurisdiction of the Court which are not required under any Act or Rules of Court to be heard and determined by the Court of Appeal;

(c) the jurisdiction of the Court may be exercised by a Judge in Chambers in all such causes or matters and in all such proceedings in any cause or matter, as are authorized by any Act or by the rules or practice of the Court;

(d) a single Judge of the Court, whether sitting in court or in chambers, shall have and may exercise, with respect to any cause or matter properly brought before him, all the jurisdiction, powers and authorities of the Court, as the circumstances may require.

36. Restriction on Hearing Cases in Chambers. [Qld. 1892, s.15]

(1) When, upon an opposed application coming on to be heard before a Judge in Chambers, either party appears by counsel or solicitor the matter shall be adjourned into Court, without any costs of the adjournment and shall be heard in open Court, unless all the parties consent to its being heard in chambers.

(2) When a matter is so adjourned into Court, the same persons shall be entitled to audience that would have been so entitled if it had not been so adjourned.

(3) All existing forms and methods of procedure in relation to any proceeding in Chambers may continue to be used and practised in relation to such proceeding when adjourned into Court, in such and the like cases, and for such and the like purposes as those to which they would have been applicable in relation to such proceedings in Chambers.

37. Power of Single Judge. [S.C. of J. (Consol) 1925, s.69; W.A. 1935, s.61; cf. Qld. 1867, s.15]

(1) In any cause or matter pending before the Court of Appeal any direction incidental thereto not involving the decision of the appeal may be given by a single Judge and a single Judge may at any time during vacation make any interim order to prevent prejudice to the claims of any party pending an appeal, if he thinks fit.

(2) Every order made by a Judge in pursuance of this section may be discharged or varied by the Court of Appeal.

Division 2 - Court of Appeal

38. Establishment of the Court of Appeal. [N.S.W. s.38]

For the more convenient despatch of the business of the Supreme Court of Queensland, a Court of Appeal of the said Supreme Court is established with the composition and jurisdiction set out in this Act.

39. Composition of the Court of Appeal. [N.S.W. s.42]

(1) The Court of Appeal shall consist of -

(a) the Chief Justice of Queensland who shall by virtue of his office be a Judge of Appeal and the senior member of the Court of Appeal;

(b) the President of the Court of Appeal; and

(c) three other judges of Appeal.

(2) The jurisdiction of the Court of Appeal shall not be affected by any vacancy in the office of Chief Justice or President of the Court of Appeal.

40. Constitution of the Court of Appeal. [Qld. S.C. 1892 ss. 5-6; Qld. Criminal Code, s.668A]

Subject to section 50 of this Act, the Court of Appeal shall be duly constituted if it consists of not less than three Judges and of an uneven number of Judges.

41. Membership of the Court of Appeal.
[Qld. 1892, s.4; Qld. 1893, s.8; Qld. 1921, s.5.]

(1) The Chief Justice or Acting Chief Justice shall select the Judges who from time to time constitute the Court of Appeal.

(2) No Judge shall sit upon the hearing of an appeal from a judgment or order made by himself, and no Judge shall sit in the Court of Appeal upon the hearing of a motion or application for judgment or for a new trial, or to set aside a finding or judgment, or for other relief in any cause or matter in which there has been a trial of the cause or matter, or of any issue therein, before himself with or without a jury, or on an appeal against or conviction before himself or court of which he was a member, or a sentence passed by himself or such a court.

(3) When any proceeding, after being fully heard before the Court of Appeal, is ordered to stand for judgment, it shall not be necessary that all the Judges before whom it was heard shall be present together in Court for the purposes of declaring their opinions thereon, but the opinion of any such Judge may be reduced to writing and may be read by any other Judge at any subsequent sitting of the Court of Appeal at which judgment is appointed to be delivered, and in any such case the question shall be decided in the same manner, and the decision or judgment of the Court shall have the same force and effect, as if the Judge whose opinion is so read had been present in Court and had declared his opinion in person.

42. Decision in Case of Difference of Opinion.
cf. Qld. 1892, s.7]

Subject to s.50 of this Act, if the Judges constituting a Court of Appeal are divided in opinion as to the decision to be given on any question, such question shall be decided according to the opinion of the majority of the Judges.

43. Place Where the Court of Appeal is to be Held. [Qld. 1867, s.2; Qld. 1892, s.2; Qld. 1921, s.5.]

The Court of Appeal shall be held in Brisbane.

44. Sittings of the Court of Appeal. [N.S.W. s.43]

(1) At a sitting of the Court of Appeal at which the Chief Justice is present he shall preside.

(2) In the absence of the Chief Justice, the President of the Court of Appeal shall preside.

(3) In the absence of both the Chief Justice and the President, the senior Judge of Appeal present shall preside.

Division 3 - Matters to be Determined by the Court of Appeal

45. Jurisdiction of the Court of Appeal. [Qld. 1867, s.38; Judic. ss. 8 & 10; Qld. 1874, s.13; S.A. s.48; Vic. s.34; Qld. Crim. Code.

(1) Subject to any Act and to the Rules of Court, the Court of Appeal shall hear and determine -

- (a) all appeals from any judgment, order or direction made by a single Judge whether sitting in Court or in chambers;

- (b) all appeals from an assessment of damages by a District Court Judge or Master or Registrar where judgment is given by the Court or a Judge for damages to be assessed;
- (c) all appeals which are required by the provision of any Act or by Rules of Court to be heard and determined by the Court of Appeal;
- (d) all applications for a new trial or to set aside the verdict or finding of a jury;
- (e) all special cases stated by consent of parties which either party requires to be heard and determined by the Court of Appeal in the first instance;
- (f) all special cases and points and questions of law referred to or reserved for the consideration of or directed to be argued before the Court of Appeal by a Judge of the Court;
- (g) all trials at bar;
- (h) all causes and matters which are required by the Rules of Court or by the express provisions of any other Act, to be heard and determined by the Court of Appeal;
- (i) all rules and orders to show cause returnable before the Court of Appeal.

(2) The Court of Appeal shall have and shall exercise the power and jurisdiction which by virtue of any Act, Regulation or Rule of Court was vested in and exercisable by the Court of Criminal Appeal.

(3) The Court of Appeal may, in proceedings before it, exercise every power, jurisdiction or authority of the Court, whether at law or in equity or under any Act, Imperial Act or Commonwealth Act.

46. Restrictions on Appeal to Court of Appeal. [Judic. s.9; S.C. of J. (Consol), s.31; S.A., s.50; Vic. ss.39, 40]

- (1) No appeal shall be to the Court of Appeal -
 - (a) without the leave of the Court or the Judge making the order from an order of the Court or any Judge thereof made with the consent of the parties or as to costs only which by law are left to the discretion of the Court;
 - (b) from an order of a Judge allowing an extension of time for appealing from a judgment or order;
 - (c) from a decision of a Judge where it is provided by any Act that such decision is to be final.
- (2) An application for leave to appeal may be made ex parte, unless the Judge or the Court of Appeal otherwise directs.

47. New Trials. [Qld. 1874, s.13 CL. Prac. s.45]

(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned in the trial of the action, and if it appears to such Court that such wrong or miscarriage affects part only of the matter in controversy the Court may grant final judgment as to part thereof and direct a new trial as to the other part only.

(2) No new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient or that the document does not require a stamp.

48. Special Cases. [Judic. ss. 6 & 7; S.A. s.49; Vic. s.44]

(1) Every special case stated by consent of parties shall be heard and determined by a single Judge in the first instance unless either party shall require that the same be heard and determined by the Court of Appeal in the first instance, in which case the same shall be so heard and determined accordingly.

(2) Subject to any Act and to the Rules of Court, any Judge of the Court sitting in the exercise of its jurisdiction may reserve any case or any point in a case for the consideration of the Court of Appeal, or may direct any case or point in a case to be argued before the Court of Appeal, and the Court of Appeal may hear and determine any such case or point so reserved or so directed to be argued.

Division 4 - Incapacity of a Judge

49. Application of Division. [Qld. 1958, s.3]

This Division shall apply so as not to limit or affect the operation and effect of section 77 of this Act, or of Sections 627, 660, 661 and 671F of The Criminal Code.

50. Constitution of the Court of Appeal when one Judge is unable to continue. [Qld. 1958, s.4]

(1) When after the commencement of the hearing of any cause or matter, including any appeal before the Court of Appeal, but before judgment in the cause or matter has been given, one of the Judges by and before whom the Court is or was constituted dies or becomes incapable of continuing to sit or, in the case of a cause or matter which has been heard but judgment wherein has not been given, of giving his judgment, the remaining Judges by and before whom the Court is or was holden, may, if they think fit, on the application of any party to the cause or matter give (subject to subsection two or, as the case requires, subsection three of this section) judgment in the cause or matter and, if necessary for the purpose of so doing, complete the hearing.

(2) Where the remaining Judges number two and are agreed in opinion as to the decision to be given, they shall give judgment in accordance with that opinion, and may make such order as to costs and otherwise as could be made by the Court in the cause or matter, and such judgment and order shall be deemed and shall have full force and effect as the judgment of the Court in the cause or matter.

(3) Where the remaining Judges number more than two, and three or a majority (whichever is the greater in number) of them are agreed in opinion as to the decision to be given, judgment shall be given in accordance with that opinion, and the remaining Judges, or the aforesaid number of them, may make such order as to costs and otherwise as could be made by the Court in the cause or matter, and such judgment and order shall be deemed and shall have full force and effect as the judgment of the Court in the cause or matter.

(4) Where the remaining Judges refuse the application of a party to give judgment pursuant to this section, or they are divided in opinion so as to be unable to give judgment pursuant to this section, the remaining Judges -

(a) (if this section is applicable in the cause or matter by reason of the temporary incapacity of a Judge) may, according as they deem fit, either adjourn the cause or matter as they deem necessary in order to enable all of the Judges to give judgment and, if necessary for that purpose, the hearing to be completed, or order the cause or matter to be heard and determined de novo; and

(b) In any other case shall order the cause or matter to be heard and determined de novo.

(5) When a cause or matter is heard and determined de novo by the Court of Appeal, -

(a) The Court of Appeal may make such order as to the costs of the first hearing as the Court shall think fit; and

(b) The first hearing shall for all purposes, other than that set out in paragraph (a) of this subsection, be deemed a nullity.

51. Hearing de novo when trial Judge unable to continue.
[Qld. 1958, s.5]

(1) When after the commencement of the hearing of any cause or matter, civil or criminal, including any appeal before a Judge, but before judgment in the cause or matter has been given, the Judge dies or becomes incapable of continuing to sit or, in the case of a cause or matter which has been heard but judgment wherein has not been given, of giving his judgment, any party to the cause or matter may, upon giving seven days' notice to the other party or parties, apply to a Judge for an order that the cause or matter be heard and determined de novo.

(2) On an application under this section to a Judge, that
Judge -

(a) (If this section is applicable in the cause or matter by reason of the temporary incapacity of a Judge) may, according as he deems fit, either adjourn the cause or matter as he deems necessary in order to enable the Judge before whom the hearing thereof was commenced to give judgment and, if necessary for that purpose, to complete the hearing, or order the cause or matter to be heard and determined de novo; and

- (b) In any other case shall order the cause or matter to be heard and determined de novo.
- (3) When, pursuant to this section, a cause or matter is heard and determined de novo-
 - (a) The Judge so hearing and determining the same may make such order as to the costs of the first hearing as he shall think fit; and
 - (b) The first hearing shall for all purposes, other than that set out in paragraph (a) of this subsection, be deemed a nullity.

52. Proof of incapacity of Judge. [Qld. 1958, s.6]

When proof of the temporary or permanent incapacity of a Judge is necessary for a purpose of this Act, the certificate of the Chief Justice or in his absence that of the next senior Judge that such Judge is incapable as specified in the certificate shall be prima facie evidence of that fact.

Division 5 - Districts and Circuit

53. Central and Northern Districts [Qld. 1895, ss.4,5]

- (1) Sittings of the Supreme Court shall be held within the Southern District, Central District and Northern District respectively.
- (2) Without prejudice to the jurisdiction, powers and authority exercisable in any Circuit Court, the Southern District, the Central Court and the Northern Court shall be held at Brisbane, Rockhampton and Townsville respectively.
- (3) The Judges sitting for the time being in the Southern Court, Central Court and Northern Court shall respectively have and exercise all the jurisdiction, power and authorities of the Court which may be exercised by a Judge sitting alone.

54. Central and Northern Judges. [Qld. 1895, ss.6,7]

(1) One of the Judges of the Court shall be styled "the Central Judge" and shall be designated as such in any Commission given to him. The Judge appointed by the style or designation of the Central Judge shall be the Central Judge. The Central Judge shall reside in the Central District.

(2) One of the Judges of the Court shall be styled "the Northern Judge", and shall be designated as such in any Commission given to him. The Judge appointed by the style or designation of the Northern Judge shall be the Northern Judge. The Northern Judge shall reside in the Northern District.

(3) The Governor in Council may at any time appoint a further Judge or Judges to reside in the Northern District or the Central District.

(4) The appointment of a Judge to either the Central or the Northern District shall be made with that Judge's consent, and a Judge so appointed may at any time, with his consent, be appointed to a different district.

55. General Jurisdiction of Judges.

Every Judge of the Court shall have and may exercise in any part of Queensland at which the Supreme Court is appointed to sit all the jurisdiction, powers and authorities of a Judge of the Court.

56. Transfer of Causes and Matters.

All causes and matters depending in the Southern Court or in the Central Court or in the Northern Court may be transferred to any other one of the said Courts in such manner as may be prescribed by the Rules of Court.

57. Circuit Courts

(1) For the more convenient administration of justice, the criminal jurisdiction of the Supreme Court and the civil jurisdiction of the Supreme Court as hereinafter defined shall be exercised by sittings in Circuit Towns.

(2) The following shall be Circuit Towns; Toowoomba, Roma, Maryborough, Bundaberg, Longreach, Mackay, Cairns and Mount Isa; and such other towns as may from time to time be so declared by the Governor in Council.

(3) Sittings of the Supreme Court held in a Circuit Town shall constitute a Circuit Court.

(4) Every such Circuit Court shall be held by a judge of the Supreme Court and shall be a superior court to punish for contempt.

(5) It shall not be necessary to issue any special commission to a judge for the purpose of holding a Circuit Court.

58. Circuit Court Registries

(1) There shall be established in each Circuit Town a Registry for Supreme Court business which shall be designated the Circuit Court Registry.

(2) Each Circuit Court Registry shall have a proper court seal or stamp.

(3) The Governor in Council shall by Order in Council published in the Gazette define the boundaries of each Circuit Court.

(4) Until otherwise proclaimed the districts constituted at the time of the passing of this Act shall delineate the boundaries of Circuit Courts for the purposes of this Act, and the registries constituted at the time of the passing of this Act shall be the registries for the purpose of this Act.

59. Jurisdiction of Circuit Courts

(1) A judge sitting in a Circuit Court shall have and may exercise all of the jurisdiction, powers and authorities that may be exercised by a Judge of the Supreme Court in respect of criminal matters.

(2) Personal actions, including any claim for equitable relief relating to or connected with the subject matter of such action, and all applications and other proceedings in such action, may be commenced in a Circuit Court Registry and may be heard in a Circuit Court, but no other Civil cause or matter shall be so commenced or so heard. A judge hearing such action shall have and may exercise all of the jurisdiction powers and authorities of a Judge of the Supreme Court sitting alone.

60. Conduct of Circuit Courts

(1) Every Circuit Court shall be opened at the time appointed by the Judge who according to the law calendar published by the Chief Justice is the Judge to preside at the Circuit Court in question; provided that if such Judge shall not arrive at the place where the Circuit Court is to be held in time to open it on the day appointed, the said Judge or some other Judge of the Supreme Court may open and hold it on any day or days following the day upon which it should have been opened and held, and the proceedings of the Circuit Court shall be as valid as if it had been duly opened and held at the appointed time.

(2) Where by reason of the absence of the Judge who is to preside at the Circuit Court it cannot be held at the time appointed, the sheriff or his deputy or in the event of the absence of both the bailiff shall adjourn the Court to such date as that Judge shall direct and shall publish notice of the day to which the Court is adjourned in such manner as that Judge directs.

(3) If the sheriff certifies to the Judge who is to preside at a Circuit Court that there are no criminal charges to be tried at the Circuit Court named in the certificate and if the Registrar also certifies to such Judge that there are no civil matters to be tried at the same Circuit Court respectively, it shall not be necessary for such Judge to attend at the place appointed for holding the Court or to open it and if the Judge does not attend, the sheriff or his deputy shall discharge the jurors, if any, who are there present from further attendance.

(4) Such certificates shall be sent to the Judge who is to preside at a Circuit Court not earlier than two days before the day on which the Circuit Court is appointed to be opened.

(5) In any case in which such certificates have been given, the sheriff shall give notice to the jurors, if any, who have been summoned to attend at the Circuit Court, that their attendance will not be required. Any juror who, after receiving such notice at a reasonable time before the time appointed for holding the Court nevertheless attends at the Court shall not be entitled to any expenses or allowance for such attendance.

(6) For the purposes of subsections (3) and (5) of this section, it shall not be necessary for the sheriff to certify where the arrangements in force for the despatch of business provide that only civil sittings will be held at a Circuit Court, nor shall it be necessary for the registrar to certify where those arrangements provide that only criminal sittings shall be held.

PART FIVE - OFFICERS, REGISTRIES AND SEALS

61. Masters. [Qld. 1980]

(1) The Supreme Court shall have such numbers of masters, being at least two as the Governor in Council from time to time thinks fit.

(2) Masters shall be appointed by the Governor in Council by commissions in Her Majesty's name from persons qualified for appointment in accordance with subsection (3) of this section.

(3) Persons qualified for appointment as masters are -

persons who are or have been barristers or solicitors of the Supreme Court of not less than 5 years standing.

(4) (a) A master shall have seniority according to the date on which his appointment as master takes effect.

(b) Where the appointments of two or more masters take effect on the same date, their order of seniority shall be such as is assigned to them by the Governor in Council.

(5) (a) The Governor in Council, by commission in Her Majesty's name, may appoint a person qualified for appointment as a master to be an acting master if circumstances occur that in his opinion make it necessary or desirable to do so.

(b) An acting master so appointed during the time for which he is appointed, shall have the powers, jurisdiction and functions and perform the duties of a master.

(6) (a) The provisions of the law applicable to a District Court Judge with respect to salary, allowances by way of travelling expenses and leave of absence are applicable to a master or an acting master as though he were a District Court Judge.

(b) Salary payable to a master or an acting master shall be a charge upon and paid out of Consolidated Revenue which is hereby appropriated accordingly.

- (7) The provisions of the law applicable to a District Court Judge with respect to retirement and pensions (and, in the case of pensions, applicable to the widow or any child of a District Court Judge) are applicable to a master (and, in the case of pensions, to the widow or any child of a master) as though the master were a District Court Judge.
- (8) A master or an acting master shall not practise as a barrister, solicitor or notary or be directly or indirectly concerned or interested in the practice of a barrister, solicitor or notary; and he shall not be capable of being summoned or being chosen as a member of the Legislative Assembly.
- (9) (a) The Governor in Council may remove a master or an acting master for incapacity or misbehaviour:

Provided that, 21 days at the least before removal, the master or acting master shall receive notice of the intention to remove him, and he shall thereafter and before removal have the opportunity of being heard before the Governor in Council in his defence.

(b) The proviso to paragraph (a) shall not apply in the case of an acting master where the Governor in Council determines, because of the proximity of the expiration of the time for which he was appointed acting master, that the proviso should not apply and notifies such determination in the Gazette.

- (10) (a) If a District Court Judge is appointed master or acting master, his service as a District Court Judge shall be taken into account in computing length of service as a master or an acting master for the purpose of determining any matter relating to leave of absence, pension or any other entitlement.
- (b) If a master or an acting master is appointed a District Court Judge, his service as a master or an acting master shall be taken into account in computing length of service as a District Court Judge for the purpose of determining any matter relating to leave of absence, pension or any other entitlement.
- (11) The masters shall exercise such of the powers, jurisdiction and functions of the Supreme Court as may be prescribed in Rules of Court made from time to time in that regard.

62. Registrars. [Qld. 1867, s.39; Qld. 1895, s.9; Qld. 1921, s.6(1A); N.S.W. s.120; W.A. s.155]

(1) The Court shall have a Principal Registrar who shall be appointed by the Governor in Council under and subject to the Public Service Act 1922-1978.

(2) The Governor in Council may, under and subject to the Public Service Act 1922-1978 -

- (a) appoint a registrar for the Central Court, and a registrar for the Northern Court, such officers to be styled the Registrar of the Central Court and the Registrar of the Northern Court respectively;
- (b) appoint a registrar in and for every Circuit Court, such officers to be styled Circuit Court Registrars;
- (c) appoint persons to be deputies or assistants to the Principal Registrar, Registrar of the Central Court and the Registrar of the Northern Court, or to act temporarily in any of those offices.

(3) The Principal Registrar, Registrars, their Deputies and Assistants, and Acting Registrars, shall be the taxing officers of the Court and shall also exercise such of the powers, jurisdiction and functions of the Supreme Court, and perform such duties as may be conferred upon them by or under this or any other Act or by Rules of Court.

(4) Subject to the Rules of Court, Circuit Court Registrars shall, in relation to proceedings in their respective registries, have all the powers, jurisdictions and authorities of registrars.

63. The Sheriff. [Qld. 1867, ss.43, 44, 45; Qld. 1921, s.6(1A); Qld. Sheriff's Act 1875, s.5; S.A. Sheriff's Act 1978]

(1) The Governor in Council may, under and subject to the Public Service Act 1922-1978, appoint -

- (a) The Sheriff, who shall have jurisdiction and authority throughout the whole State and who shall be styled The Sheriff of Queensland;
- (b) The Northern Sheriff, who shall be a deputy of the Sheriff for the purpose of executing the process of the Court within the Northern District;
- (c) The Central Sheriff, who shall be a deputy of the Sheriff for the purpose of executing the process of the Court within the Central District;
- (d) A deputy Sheriff for the purpose of executing the process of the Court for any Circuit Court constituted under this Act.
- (e) Such Sheriff's officers as he thinks necessary to assist the Sheriff or a deputy sheriff in the performance of their duties.

(2) Where the Sheriff or a Deputy Sheriff is unable, for any reason, to carry out any of his duties, or it is for any other reason expedient to exercise the powers conferred by this subsection, the Court or a Judge may appoint a fit and proper person to execute any process, or to carry out the duties of the Sheriff or a deputy Sheriff in relation to any matter.

(3) Where any process is directed against the Sheriff, or a deputy Sheriff, or it is otherwise improper for the Sheriff or a deputy Sheriff to execute any process, the Court or a Judge may appoint a fit and proper person to execute the process.

(4) A person appointed pursuant to subsection (2) or subsection (3) of this section has, in relation to any matter within the scope of his appointment, the powers, duties and immunities of the Sheriff or a Deputy Sheriff.

64. Duties of the Sheriff. [Qld. 1867, ss.43, 48; Sheriff's Act, s.8; S.A. Sheriff's Act 1978, ss.8]

(1) The Sheriff shall -

- (a) execute or cause to be executed all process directed to him by the Court;
- (b) perform all other duties imposed upon him by law or under this or any other Act or Rules of Court;
- (c) observe and carry out any direction of the Court or a Judge.

(2) All process of the Court wherever it is to be executed shall be directed to the Sheriff.

(3) No licence or other authority is required under any Act by a Sheriff, a Deputy Sheriff, or a Sheriff's officer for the purpose of selling real or personal property (by auction or otherwise) in pursuance of the process of the Court.

65. Sheriff may act as Justice of the Peace. [Qld. 1867, s.49]

It shall be lawful for the Sheriff to act as a Justice of the Peace, any law or custom to the contrary notwithstanding.

66. Liability of Sheriff. (Sheriff's Act 1875, ss.4, 6, 7, 9; S.A. Sheriff's Act 1978, s.12]

(1) Subject to this section, civil liability for any wrongful or negligent act or omission of the Sheriff, a Deputy Sheriff or a Sheriff's officer in the course of carrying out duties assigned to him by law or under this or any other Act shall be determined in accordance with the law of torts.

(2) The Sheriff, Deputy Sheriff, or Sheriff's officer incurs no personal liability in tort for any act or omission in the course of carrying out those duties.

(3) Any action or claim to which the Sheriff, Deputy Sheriff, or Sheriff's officer would, but for subsection (2) of this section, be liable lies against the Crown.

67. Sheriff's Fees and Poundage. [Qld. 1867, s.56; W.A. 1935, s.163]

(1) The Sheriff, Deputy Sheriff, or any officer concerned in the execution of any process directed to the Sheriff or a deputy Sheriff may demand, take and receive such fees and poundage as may be fixed by rules of court.

(2) On a writ or other process being left with the Sheriff or deputy Sheriff for execution by him, the person leaving such writ or other process shall, if required, deposit with the Sheriff or deputy Sheriff a sum not exceeding the prescribed fees for the execution thereof.

68. Other Officers. [Qld. 1867, s.39,56; S.A. 1935, s.109]

(1) The Court shall have such other officers as are necessary for the administration of justice therein, and for the due execution of the judgments, decrees, orders and processes thereof.

(2) Such officers shall be appointed by the Governor in Council under and subject to the Public Service Act 1922-1978. No new office shall be created in the Court unless the Chief Justice shall certify by writing under his hand to the Governor that such new office is necessary.

(3) All fees, poundage, perquisites or costs of whatever nature received or receivable by any officer of the court shall be paid to the Crown and shall be applied in such manner as may be from time to time directed by any Act.

69. Registries. [cf. Qld. 1895, s.12; Qld. 1921, s.2]

(1) The registry of the Southern Court at Brisbane shall be styled the Principal Registry, the registry at Rockhampton shall be styled the Central Registry, and the registry at Townsville shall be styled the Northern Registry.

(2) Any writ or other process issued out of the Principal Registry shall be returnable in the Principal Registry, any writ or other process issued out of the Central Registry shall be returnable in the Central Registry, and any writ or other process issued out of the Northern Registry shall be returnable in the Northern Registry.

(3) Every writ or other process shall have full force and effect, and may be enforced at any place within the State.

(4) Subject to sub-section (5) of this section, the civil actions which may be commenced in a Circuit Court Registry shall be commenced in the Registry prescribed by the rules of court.

(5) Any party may apply to a Judge or registrar including a Circuit Court registrar, to have an action or application removed from a Circuit Court Registry to another Registry and if it is made to appear to such Judge or registrar that such cause or matter could be tried or heard more expeditiously, cheaply, conveniently, or advantageously, in the place for which such other registry is constituted such Judge or registrar may remove the same to such other registry and thereupon the action or application shall be tried or heard in the Court appointed to sit at such place.

70. Seals. [Qld. 1867, ss.3 to 7]

(1) The Supreme Court shall have and use as occasion may require a seal having inscribed on a label thereon the words "The Seal of the Supreme Court of Queensland", and such other seals as may be required for the business of the Court and the offices thereof.

(2) Such seal or seals shall be in the keeping of the Chief Justice or in case of a vacancy of such office then in the keeping of the Acting Chief Justice.

(3) A Judge of the Supreme Court may have a stamp for impressing his name on summonses issued from and orders made in his chambers and such impression on any such summons or order otherwise duly sealed shall have the force and effect of the Judge's signature, and the Court or a Judge may take judicial notice of such impression on any such summons or order otherwise duly sealed. Such impression may be impressed by the Judge's associate or clerk.

(4) A Judge of the Supreme Court may have a chamber seal and such seal on any such summons or order or on any document used at chambers shall have the force and effect of a seal of a Supreme Court registry.

PART VI - PROCEDURE

Division 1 - General

71. Saving Former Procedure. [S.C. of J. (Consol.) Act 1925, s.103; S.A. s.64; W.A. s.22]

Save as is otherwise provided by this or any other Act or by the Rules of Court, all forms and methods of procedure, which, under or by virtue of a law, custom, general order or rules whatsoever, were in force in the Court prior to the enactment of this Act, and which are not inconsistent with this Act or the Rules of Court, may continue to be used in the Court in the like cases and for the like purposes as those in and for which they would have been applicable, prior to the enactment of this Act.

72. Exercise of Jurisdiction. [S.C. of J. (Consol) Act 1925, s.32; W.A. s.21]

Subject to the provisions of any Act, Commonwealth Act or Imperial Act by which jurisdiction is conferred on or vested in the Court, the jurisdiction conferred on or vested in the Court shall, so far as regards procedure and practice, be exercised in the manner provided by this Act and by the Rules of Court; or if no provision, or no appropriate provision, as to the exercise of any such jurisdiction is contained in this Act or in the Rules of court then such jurisdiction shall be exercised in such form, mode and manner as the Court or Judge may from time to time direct.

73. Costs. [Qld. 1867, s.58; S.C. of J. (Consol) Act 1925, s.50; N.S.W. s.76; S.A. s.40]

(1) Subject to the provisions of the Act and to the Rules of Court and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Court, including the administration of estates and trials, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the Costs are to be paid.

(2) Nothing in this section shall alter the practice in any criminal cause or matter.

74. Trial by Jury. [Judic. s.15; N.S.W. s.90; S.C. of J. (consol.) s.102; W.A. s.172]

- (1) Subject to the provisions of any Act and to the Rules of Court, in proceedings on a common law claim, issues of fact shall be tried with a jury if any party to the action requires trial with a jury.

Provided that the Court or a Judge may order that all or any issues of fact in such proceedings shall be tried without a jury where any prolonged examination of documents or accounts or scientific or local investigation is required and cannot conveniently be made with a jury.

- (2) It shall be the duty of a jury to answer any question of fact that may be left to them by the presiding Judge at the trial.
- (3) Nothing in this Act or in any Rule of Court shall take away or prejudice the right of any party to any action to have the questions submitted and left by the Judge to the jury with a proper and complete direction to the jury upon the law and as to the evidence applicable to such questions.
- (4) Where for the purpose of disposing of any action or other matter which is being tried in the Supreme Court by a Judge with a jury it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by a Judge.
- (5) In this section, a common law claim means a claim for damages or other money, or for possession of land, or for delivery of goods.

75. Right of Appearance before the Court. [Qld. 1867, s.38A]

(1) In all matters and proceedings in the Supreme Court a party may appear in person or by a barrister or solicitor or by any person allowed by special leave of the Judge in any case.

(2) A person who is not a barrister or solicitor of the Supreme Court shall not be entitled to claim or recover or receive directly or indirectly a sum of money or other remuneration for appearing or acting on behalf of another person in the Supreme Court.

(3) In this section "party" includes a person served with notice of or attending a matter or proceeding although not named in the record.

76. Change of Venue [Qld. 1867, s.60]

The Court may at any stage of any proceedings, civil or criminal depending therein, or in any Circuit Court, whether the venue be by law local or not, order that the venue be changed and direct that the trial thereof be had in Brisbane, Rockhampton, Townsville or a Circuit Court in such cases and for such reasons as the justice of the case may require and subject to such conditions as the Court may in its discretion impose.

77. Motions for Judgment. [Qld. 1892, s.9]

Every motion for judgment in any cause or matter in the Court in which there has been a trial of the cause or matter, or of any issue therein, with or without a jury, shall, subject to appeal to the Court of Appeal, be heard and determined in the first instance by the Judge before whom the trial took place, unless it is impracticable or inconvenient that such Judge should act, in which case the motion shall, subject to such appeal as aforesaid, be heard and determined by some other Judge.

78. Registration of Deeds. [Qld. 1861, s.32]

All instruments of which the registration is not otherwise provided for by law which are required to be registered may be registered in the Principal Registry of the Court or at the Registries at Rockhampton or Townsville.

79. Witnesses Failing to Attend. [Qld. C.L. Pract., s.75]

(1) Where, in any proceeding in or before the Court or a Judge, whether in civil or criminal jurisdiction, a person fails to attend as a witness, or to produce any books, deeds, papers or writings, in accordance with a recognizance or subpoena thereunto binding or requiring him, the Court or Judge may issue its or his warrant to bring and have that person at the time and place therein specified before the Court or Judge therein named and may order the person in default to pay any costs occasioned by his default.

(2) So far as relates to securing the attendance and punishing the non-attendance of witnesses and to rights and remedies had by parties against witnesses for failure to attend, this section applies in aid of and not in derogation from the jurisdiction had by a Court or Judge otherwise than under this section, and so that a warrant under this section shall not prejudice or affect in any way any such other jurisdiction or the aforesaid rights and remedies.

80. Proceedings to be Dated and How Tested. [Qld. 1867, s.17]

Every writ process or other like proceeding and every commission issuing out of the Supreme Court shall in all cases bear the date of the day on which the same shall be issued and shall be tested in the name of the Chief Justice or in case of a vacancy of such office then in the name of the Acting Chief Justice.

DIVISION 2 - MESNE PROCESS

81. Capias ad Respondendum. [Qld. C.L. Proc, ss.47-51]

(1) No person shall be arrested upon mesne process in any civil action in any court within the State except in the cases and in the manner provided in this section.

(2) Where a plaintiff in an action in the Supreme Court proves at any time after commencement of the action and before final judgment to the satisfaction of a Judge of the Supreme Court

- (a) that the action is a personal action where the amount, value or damage sought to be recovered against the defendant or defendants is not less than two thousand five hundred dollars;
- (b) that the defendant or any one or more of the defendants is about to remove or is making preparations to remove out of the jurisdiction of the Court; and
- (c) that the action will be defeated unless the defendant or defendants are forthwith apprehended,

the Judge may by a special order direct that the defendant or defendants so about to remove shall be held to bail for such sum as the Judge shall think fit not exceeding the amount of the claim.

(3) The plaintiff may thereupon within the time expressed in such order but not afterwards sue out a writ in the form prescribed by Rules of Court against any such defendant or defendants so directed to be held to bail.

(4) The Sheriff or other officer to whom any such writ shall be directed shall before the return of the writ but not afterwards proceed to arrest the defendant thereon, and the defendant, when arrested, shall remain in custody until he shall have given a bail bond to the sheriff or other officer or shall have made deposit of the sum indorsed on the writ together with two hundred dollars costs.

(5) All subsequent proceedings as to putting in and perfecting special bail shall be subject to the Rules of Court.

(6) Any person arrested upon any such writ may apply at any time after such arrest to a Judge of the Supreme Court for an order or rule on the plaintiff to show cause why he should not be discharged out of custody and such Judge may make absolute or discharge such order or rule and direct the costs of the application to be paid by either party or make such order therein as he may think fit.

(7) Any such order made by a Judge may be discharged or varied by the Court of Appeal on application by either party dissatisfied with such order.

(8) Any writ of capias ad respondendum issued out of the Supreme Court may be lawfully executed upon a Sunday.

82. Foreign Attachment. [Cf. Qld. C.L. Proc, ss.27 to 45;
Vic. ss.142 to 159]

(1) In any personal action commenced in the Supreme Court, where it appears to the Court -

- (a) that the cause of action arose within the State of Queensland;
- (b) that the defendant is absent from the jurisdiction of the Court; and
- (c) that the defendant is possessed of or entitled to or otherwise beneficially interested in any property in the custody or under the control of any person in the State (hereinafter called the garnishee) or that any such person is indebted to the defendant,

the Court may make an order attaching such property and directing the garnishee not to sell or otherwise dispose of or part with any such property, or pay over any such debt or part thereof, except to or to the use of the plaintiff, without the leave of the Court.

(2) The Court may at any time after making such order -

- (a) vary or extend the order;
- (b) discharge the order in whole or in part.

(3) If at any time before final judgment is obtained in the action, the defendant enters into a bond with two sufficient sureties to be approved by the Court, acknowledging himself and themselves to be bound to the plaintiff in such sum as the Court thinks fit to order, conditioned to pay the plaintiff the amount and costs he may thereafter recover in such action, the Court shall discharge the order.

(4) In this section, a defendant shall be deemed to be absent from the jurisdiction of the Court if he is not to be found within the jurisdiction, whether he has ever been within the jurisdiction or not.

DIVISION 3 - REFEREES AND ASSESSORS.

83. References for Inquiry and Report. [Cf. Judic. s.11; W.A. s.30]

(1) Subject to the Rules of Court, and to any right to have particular cases tried with a jury, the Court or a Judge may refer to a Master or officer of the Court or to a special referee for inquiry and report any question or issue of fact arising in any cause or matter, other than a criminal proceeding by the Crown.

(2) On receipt of the report, the Court or a Judge may -

- (a) adopt the report in whole or in part;
- (b) vary the report;

- (c) remit the whole or any part of any question or issue originally referred for further consideration by the person to whom it was referred or to another Master, officer of the Court or special referee; or
- (d) decide the question or issue originally referred on the evidence taken before the person to whom it was referred, either with or without additional evidence.

(3) A report of a Master, officer of the Court or special referee adopted or varied by the Court or a Judge may be enforced as a judgment or order to the same effect.

84. Reference for Trial. [Cf. Judic. s.12; W.A. s.51]

Subject to any Rules of Court, in any cause or matter, other than a criminal proceeding by the Crown, -

- (a) if all the parties interested who are not under disability consent; or
- (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the Court or a Judge conveniently be made before a jury or conducted by the Court; or
- (c) if the question in dispute consists wholly or in part of matters of account

the Court or a Judge may at any time order that the cause or matter, or any question or issue of fact arising therein, shall be tried before a Master or an officer of the Court, or before a special referee or before an arbitrator agreed on by the parties.

85. Powers of Referees. [Cf. Judic. ss.13 and 14; W.A. s.52]

(1) In all cases of reference to a Master, an officer of the Court, or a special referee or arbitrator, the Master, officer of the Court, or special referee or arbitrator shall, subject to Rules of Court, have such authority, and conduct the reference in such manner as the Court or a Judge may direct, and the special referee or arbitrator shall be deemed an officer of the court.

(2) The report or award of the Master, officer of the Court, or special referee or arbitrator of any reference shall, unless set aside by the Court or a Judge, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to a special referee or arbitrator to whom any matter is referred under an order of the Court or a Judge shall be determined by the Court or a Judge.

(4) The Court or a Judge shall, in relation to references have all such powers as are conferred by the Arbitration Act 1973 on the Court or a Judge in relation to references by consent out of Court.

(5) A Master, officer of the Court, special referee or arbitrator may, at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

86. Power of Court to Impose Terms. [S.C. of J. (Consol) s.95; W.A. s.55]

An order made under the provisions of this Part of this Act relating to inquiries and trials by referees may be made on such terms as to cost or otherwise as the Court or a Judge thinks fit.

87. Assessors. [S.C. of J. (Consol) s.98; W.A. s.56]

(1) In any cause or matter before the Supreme Court, other than a criminal proceeding by the Crown, the Court, may, if it thinks it expedient so to do, call in the aid of one or more assessors specially qualified, to try and hear the cause or matter wholly or partially with their assistance.

(2) The remuneration, if any, to be paid to an assessor shall be determined by the Court.

PART VII - EXECUTION OF JUDGMENTS AND ORDERS

88. Writs of Fieri Facias. [C.L. Proc. ss.56 to 61]

(1) By virtue of any writ of fieri facias sued out of the Supreme Court, the Sheriff may seize and take and cause to be sold the real and personal property within the State of Queensland which the person named in the writ is or may be seized or possessed of or entitled to or which he can either at law or in equity assign or dispose of.

Provided that the wearing apparel, bedding, tools and implements of trade of such person and his family, to the value of one thousand dollars in the whole, shall be protected from seizure.

- (2) (a) The sheriff shall pay or deliver to the party suing out such writ any money or bank notes so seized, or a sufficient part thereof, and shall hold any cheques, bills of exchange, promissory notes, bonds, or other securities for money as a security for the amount directed to be levied, or so much thereof as has not been otherwise levied and raised, and may sue in his own name for the sum or sums secured thereby if and when the time for payment thereof has arrived.
- (b) The payment to the sheriff by the party liable on any such cheque, bill, promissory note, bond or other security, with or without action, or the receiving and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, or other security.

- (c) The sheriff shall pay over to the party suing out the writ of fieri facias the money so to be recovered, or such part thereof as is sufficient to discharge the amount directed to be levied by such writ, and if, after satisfaction of the amount so to be levied, together with the sheriff's poundage and the fees and expenses of such execution, any surplus remains in the hands of the sheriff, the same shall be paid to the party against whom the writ is issued.
- (d) No sheriff shall be bound to sue any person liable upon any such cheque, bill of exchange, promissory note, bond, or other security, unless the party suing out the writ of fieri facias enters into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any moneys to be recovered in such action.

(3) It shall not be necessary for the sheriff to make a seizure of land under any writ in order to authorise its sale, but instead of such seizure he shall cause notice of the writ and of the intended day and place of sale and the particulars of the property to be published in such manner as is prescribed by Rules of Court. The publication of such notice shall be equivalent to an actual levy by him on the land indicated by the notice.

- (4) (a) No judgment shall bind or affect any lands but a writ of execution against any lands not under the provisions of the Real Property Acts 1861 - 1980 of the person against whom a judgment shall be obtained shall affect and bind such lands from the time of delivery of the writ of execution or the judgment to the sheriff.
- (b) In the case of any sale by the sheriff of the right title and interest of any person of to or in any lands not under the provisions of the Real Property Acts 1861 to 1980, the sheriff shall execute a proper deed of transfer of the right title and interest of such person to the purchaser.
- (c) Every such deed of transfer executed by any sheriff of the land of a judgment debtor or of the right title and interest of such debtor to and in any land shall be prima facie evidence of the existence of a valid judgment and writ to support a levy by the sheriff on the land and of the fact of a levy having been duly made on such land if stated in the deed or of the notice referred to in sub-paragraph 3 hereof having been duly published if that fact is so stated, and no such deed shall be invalid by reason only of non-registration within one calendar month.

(5) The sheriff to whom any writ of fieri facias issued out of the Supreme Court shall be directed may take in execution and cause to be put up for sale and to be sold under such writ any equity of redemption or other equitable interest of or belonging to the defendant therein named, and every such sale shall be as valid and effectual to pass all such defendant's rights and title to and interest in such equity or equitable interest as if the same had been conveyed or assigned to the purchaser by such defendant himself.

Provided that where any such equity or equitable interest shall relate to real estate not under the provisions of the Real Property Acts 1861 to 1980 a deed of transfer thereof or of such defendant's right and title to an interest therein shall be executed by the sheriff to the purchaser and shall be duly registered by him within one calendar month after sale.

(6) In the five last preceding sub-sections the term "sheriff" includes any officer charged with the execution of any writ of execution.

(7) Nothing in this section shall affect the provisions of the Real Property Acts 1861 - 1980 relating to execution against land under the provisions of that Act.

89. Abolition of Writs of Elegit. [A of J. Act 1956, s.35]

No writ of elegit shall be issued after the coming into operation of this Act.

90. Writ of Capias ad Satisfaciendum. [Qld. C.L. Proc, ss.25-52]

(1) Except as hereinafter provided no person shall be arrested on any writ of capias ad satisfaciendum issuing out of the Supreme Court.

(2) When any sum of money payable under a judgment or order of the Supreme Court remains unsatisfied in whole or in part, and a Judge of the Supreme Court is satisfied by affidavit that the judgment debtor -

- (a) fraudulently conceals money, goods or valuable securities from his judgment creditor; or
- (b) has removed or is about to remove or is making preparations to remove any of his property from Queensland with intent to evade payment of the judgment debt; or
- (c) is about to leave or is making preparations to leave Queensland with intent to evade payment of the judgment debt

the said Judge may order such writ to issue, and the defendant may be arrested on the writ.

(3) A Judge of the Supreme Court may at any time and on such conditions as he thinks fit direct that any person arrested or imprisoned under a writ of capias ad satisfaciendum shall be discharged, and such person shall be discharged accordingly. Such discharge shall not operate as a satisfaction or discharge of the amount due on any judgment.

- (4) (a) A person arrested or imprisoned under a writ of *capias ad satisfaciendum* shall be entitled to his discharge upon the payment of the amount named in the writ as due on the judgment, and the costs of obtaining and executing the writ, or upon his estate being sequestered.
- (b) The sheriff, or keeper of the prison in whose custody the judgment debtor may be is hereby empowered and required to receive the amount so paid and to transmit it to a Registrar of the Supreme Court.

(5) Any writ of *capias ad satisfaciendum* issued out of the Supreme Court may be lawfully executed upon a Sunday.

(6) This section does not affect the power of the Court to commit for contempt of court.

91. Attachment of Debts. [Cf. U.K. A of J. Act 1925, s.38(1)]

(1) For the purpose of the jurisdiction of the Supreme Court to attach debts for the purpose of satisfying judgments or orders for the payment of money, and subject to Rules of Court,

- (a) a sum standing to the credit of a judgment debtor in an account in a bank or a building society or credit union shall be deemed to be a sum due or accruing to the judgment debtor, notwithstanding that any condition relating to demand of payment is unsatisfied;
- (b) a sum standing to the credit of a judgment debtor in a deposit account in a bank or a building society or credit union shall be deemed to be a sum due or accruing to the judgment debtor, notwithstanding that any of the following conditions applicable to the account has not been fulfilled -
- (i) a condition that notice is required before any money is withdrawn;
- (ii) a condition that a personal application must be made before money is withdrawn;
- (iii) a condition that a deposit book must be produced before any money is withdrawn;
- (iv) a condition that a receipt for money deposited in the account must be produced before money is withdrawn;
- (v) any other condition prescribed by Rules of Court.

(2) In this section, a "building society" means a society constituted under the Building Societies Acts 1886 to 1976, and a credit union means a credit union formed under the Co-operative and Other Societies Act 1967 to 1978.

92. Charging Orders. [U.K. Charging Orders Act 1979; cf. Qld. C.L. Proc, ss.49, 50]

(1) Where, under a judgment or order of the Court, a judgment debtor is required to pay a sum of money to another person (a judgment creditor) then for the purpose of enforcing that judgment or order, the Court may make an order (a charging order) in accordance with the provisions of this section imposing on any such property of the judgment debtor as may be specified in the order a charge for securing the payment of any money due or to become due under the judgment or order.

(2) A charge may be imposed by a charging order only on -

- (a) any interest held by the debtor beneficially -
 - (i) in any asset of a kind mentioned in subsection (3) of this section; or
 - (ii) under any trust; or
- (b) any interest held by a person as trustee of a trust if the interest is in such an asset or is an interest under another trust and -
 - (i) the judgment or order in respect of which a charge is to be imposed was made against that person as trustee of the trust; or
 - (ii) the whole beneficial interest under the trust is held by the debtor unencumbered and for his own benefit; or
 - (iii) in a case where there are two or more debtors all of whom are liable to the creditor for the same debt, they together hold the whole beneficial interest under the trust unencumbered and for their own benefit.
- (3) The assets referred to in subsection (2) of this section are -
 - (a) land;
 - (b) securities of any of the following kinds -
 - (i) stock of any government which is registered in a register kept at any place within Queensland;
 - (ii) stock of any body (other than a building society) incorporated within Queensland;
 - (iii) stock of any body incorporated outside Queensland which is registered in a register kept at any place within Queensland;
 - (c) funds in court; or
 - (d) any asset of a kind which by a Rule of Court is declared to be an asset on which a charge may be imposed by a charging order.

- (4) In any case where a charge is imposed by a charging order on any interest in an asset of a kind mentioned in paragraph (b), (c) or (d) of subsection (3) of this section, the Court may provide for the charge to extend to any interest or dividend payable in respect of the asset.
- (5) A charging order may be made either absolutely or subject to conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to other matters.
- (6) Subject to the provisions of this section, a charge imposed by a charging order shall have the like effect and shall be enforceable as an equitable charge created by the debtor by writing under his hand.
- (7) The Court may at any time, on the application of the judgment debtor or of any person interested in any property to which the order relates, make an order discharging or varying the charging order or directing that any caveat lodged when a charge has been imposed by a charging order shall be removed.
- (8) In this section - "building society" has the same meaning as in the Building Societies Acts 1886 to 1976;
"stock of any government" includes any funds of, or annuity granted by that government;
"stock" includes shares, debentures and any securities of the body concerned, whether or not constituting a charge on the assets of that body.

93. Receiver by Way of Equitable Execution. [Cf. U.K. Adm. of J., s.36; S.A. Enforcement of Judgments Act 1978, s.35]

- (1) The Court may, for the purpose of enforcing a judgment or order appoint a receiver by way of equitable execution.
- (2) The power of the Court to appoint a receiver by way of equitable execution shall be extended so as to operate in relation to all estates and interests in land.
- (3) The said power may be exercised in relation to an estate or interest in land whether or not a charge has been imposed on that land under section 92 of this Act for the purpose of enforcing a judgment or order of the Court for the payment of money to a person, and it shall be in addition to and not in derogation of any power of the Court to appoint a receiver in proceedings for enforcing such a charge.
- (4) A receiver may be appointed under sub-section (1) of this section notwithstanding that all remedies of execution at law have not been exhausted.

(5) Where a receiver is appointed under this section, the Court may make consequential or ancillary orders -

- (a) conferring on the receiver any powers that may be necessary or expedient for the purposes of the receivership;
- (b) providing for accounts to be rendered by the receiver; or
- (c) relating to any other matter.

94. Execution on Decrees and Orders. [N.S.W. s.96; Qld. 1867, s.59; Qld. C.L. Pract. 1867, s.19]

(1) Any judgment or order of the Court for the payment of money to any person shall have the effect of a judgment at law.

(2) Subject to the other provisions of this Act and the Rules, a person to whom money is payable under a judgment or order of the Court -

- (a) may have execution on the judgment or order; and
- (b) shall be entitled to the remedies given by this Act and the Rules to a judgment creditor.

95. Appointment to Execute Instrument. [Qld. Interdict Act 1867, s.50; N.S.W. s.100; S.C. of J. (Consol) s.47]

Where any person does not comply with a judgment or order directing him to execute any conveyance, contract or other document, or to indorse any negotiable instrument, the Court may on such terms as it thinks fit order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

PART VIII - PREROGATIVE PROCEEDINGS

96. Orders of Mandamus, Prohibition and Certiorari. [U.K. A of J. (M.P.) Act 1938, s.7]

(1) In any case where the Supreme Court has jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorari removing any proceedings or matter into the Supreme Court for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.

(2) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.

(3) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom.

97. Abolition of Informations in the nature of Quo Warranto. [U.K. Adm. of J. (M.P.) Act 1938, s.9]

(1) Informations in the nature of quo warranto are hereby abolished.

(2) In any case where any person acts in an office in which he is not entitled to act and an information in the nature of quo warranto would, but for the provisions of sub-section (1) of this section, have lain against him, the Court may grant an injunction restraining him from so acting and may (if the case so requires) declare the office to be vacant.

(3) No proceedings for an injunction under this section shall be taken by a person who would not immediately before the commencement of this Act have been entitled to apply for an information in the nature of quo warranto.

98. Application for Judicial Review. [Cf. U.K. Order 52]

(1) An application for relief by way of -

- (a) an order of mandamus, prohibition or certiorari;
- (b) an injunction under s.97 of this Act; or
- (c) a declaration or injunction under sub-section (3) of this section

shall be made by way of an application for judicial review, in accordance with the Rules of Court relating to that procedure.

(2) The Court shall not grant any relief sought on an application for judicial review unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(3) A declaration may be made or an injunction granted under this section in any case where an application for judicial review, seeking that relief, has been made and the Court considers that, having regard to -

- (a) the nature of the matters in respect of which relief may be granted by way of orders of mandamus, prohibition or certiorari;
- (b) the nature of the persons and bodies against whom relief may be granted by way of such orders; and
- (c) all circumstances of the case

it would be just and convenient for the declaration to be made or, as the case may be, injunction granted, under this section.

(4) On an application for judicial review the Court may grant such interim relief as it considers appropriate pending final determination of the application.

(5) In proceedings on an application for judicial review, the Court may award damages to the applicant, if -

- (a) he has, in accordance with Rules of Court, joined with his application a claim for damages arising from any matter to which the application relates; and

- (b) the Court is satisfied that, if his claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.

(6) On an application for judicial review where -

- (a) the relief sought is an order of certiorari; and
- (b) the Court is satisfied that there are grounds for quashing the decision in issue

the Court may, instead of quashing the decision, remit the matter to the tribunal or authority concerned, with a direction that they reconsider it and reach a decision in accordance with the finding of the Court.

PART IX - RULES OF COURT.

99. Power to make Rules of Court. [Cf. Qld. 1921, s.11]

(1) The Governor in Council, with the concurrence of any two or more of the Judges, may from time to time, by Order in Council published in the Gazette make all such Rules of Court as may be deemed necessary or convenient for regulating the procedure and practice of the Supreme Court for the purpose of giving full effect to this Act or any amendment thereof and any other Act conferring jurisdiction, power or authority on the Court, including its civil criminal admiralty, ecclesiastical, matrimonial, insolvency and appellate jurisdiction, and may from time to time revoke, alter, add to, or re-enact any Rules previously made.

(2) With the object of simplifying procedure and saving expense and expediting business, but without in any way limiting the generality of the foregoing provisions, such Rules of Court may make provision for all or any of the following matters -

- (i) The effectual execution of this Act or any amendment thereof and the Acts aforesaid, and of the intention and objects thereof.
- (ii) The doing of anything prescribed or authorised to be done by this Act or any amendment thereof or any of the Acts aforesaid.
- (iii) The government and conduct of the registrars, officers, and servants of the Court; the duties of such registrars, officers and servants; conferring on registrars, either generally or in any particular case and under such circumstances and on such conditions as may be prescribed, the jurisdiction, powers, and authorities wholly or in part of a Judge in Chambers, and providing for an appeal from such registrars in the exercise of any such jurisdiction, power or authority;

- (iv) Authorising and providing for the service within and beyond the jurisdiction of the Court of any writ, summons, or other proceeding in any cause or matter within the cognizance of the Court, or of notice of any proceeding or of notice of any judgment or order pronounced or made in any such cause or matter;
- (v) Providing for the admission of barristers, solicitors, and conveyancers on such terms and conditions as may be prescribed and prescribing any qualification or condition precedent notwithstanding the provisions of any Act, rule, or practice;
- (vi) Prescribing and regulating the costs to be allowed by the Court and paid to barristers and solicitors in any cause or matter; and empowering the Court in giving judgment or making any order to fix a sum or sums as the costs in full of all costs of a cause or matter, or any proceeding therein;

Prescribing either generally or with respect to certain classes of causes or matters a scale of costs proportionate to the amount involved in the cause or matter;

For the taxation of solicitors' bills of costs as between party and party or as between attorney and client, specifying the several items to be allowed and the amount that is to be allowed on taxation for each item;
- (vii) Fixing the amount of fees and percentages to be taken in respect of all causes and matters pending in the Court to and by the officers and servants thereof;
- (viii) Regulating the forms of process and mode of pleading in the Court, and the practice of the Court in all its various departments; dispensing with pleadings;
- (ix) Empowering the Court to direct -
 - (a) That any cause or matter in the Supreme Court which a District Court or a Magistrates Court has jurisdiction to try shall be transferred to and heard and determined in such District Court or Magistrates Court;
 - (b) That any action or proceeding commenced in a District Court or a Magistrates Court shall be transferred to and heard and determined in the Supreme Court;
 - (c) As to the costs in or in connection with any cause, matter, action or proceeding so transferred, and generally as to the procedure for or in respect of any such direction;

- (x) The exercise by a master of the powers, jurisdiction and functions of the Supreme Court; relating to appeals from or in respect of any decision, judgment or order of a master; and for, in connection with and consequent upon the stating of a special case by a master for the opinion of the Full Court of the Supreme Court on any question of law;
- (xi) Empowering the Court or any Judge, either generally or in any particular cases, to order that any cause or matter, with or without any other matter, within the jurisdiction of the Court shall be referred to arbitration in such manner and on such terms as may be prescribed, and conferring power and authority on the arbitrator, arbitrators, or umpire to make an award, and making provision for all matters incident to or consequent upon such order; enforcing such awards;
- (xii) Dispensing with technical rules of evidence for proving any matter which is not bona fide in dispute, also with such rules as might cause expense and delay arising from commissions to take evidence and otherwise; dispensing with the proof of -
 - Handwriting,
 - Documents,
 - Identity of parties or parcels,
 - Authority;
- (xiii) Requiring particulars of the cause of action, of the grounds of defence, or of any other facts or circumstances connected with the cause or matter to be served within a specified time by any party;
- (xiv) Mutual discoveries and inspections;
- (xv) Requiring either party to make admissions with respect to any question of fact involved in the cause or matter;
- (xvi) Settling the issues for trial;
- (xvii) Expediting the trial;
- (xviii) Directing that notes of the evidence at the trial or hearing of the cause or matter shall be taken in shorthand;
- (xix) For the carrying into full effect of "The Supreme Court Funds Act of 1895"; regulating the deposit, payment, delivery, and transfer in, into, or out of Court of money and securities belonging to suitors or which are otherwise capable of being deposited in or paid or transferred into Court or in or into the bank which transacts the banking business

of the Treasurer under the said Act with the privity of the Treasurer, or which are under the custody of the Court and the evidence of such deposit, payment, delivery, or transfer; and the investment of and other dealing with money and securities in Court in pursuance of the orders of the Court, and the execution of the orders of the Court and the powers and duties of the Treasurer with reference to such money and securities.

- (xx) Prescribing the causes in which security may be required, and the form of such security, and the manner in which, and the person to whom, it is to be given.
- (xxi) Regulating the sittings of the Court to try commercial causes, and regulating the pleading, practice and procedure in such causes and the costs of proceedings therein.
- (xxii) Prescribing means for, and the practice and procedure to be followed in, the enforcement and execution of judgments and orders.
- (xxiii) Regulating and prescribing the practice and procedure to be followed in connection with the institution of an appeal to the Court.
- (xxiv) Regulating the sittings and order of business of the Court, and regulating the vacations and holidays to be observed by the Court and in the offices of the Court and for the hearing of proceedings during vacation.

(3) Where any provisions in respect of the practice or procedure of the Court are contained in any Act of Parliament, Rules of Court may be made for modifying such provisions to any extent that may be deemed necessary.

100. Orders and Rules to be laid before Legislative Assembly.
[Dist. Ct., s.108; Cf. Qld. 1921, s.11(4)]

(1) Every Order in Council and Rule of Court made or purporting to be made in pursuance of this Act shall -

- (a) be published in the Gazette;
- (b) be laid before the Legislative Assembly within fourteen sitting days after publication in the Gazette if the Legislative Assembly is in session, but if not then within fourteen sitting days after the commencement of its next session.
- (c) Subject to the power of disallowance provided in subsection (2) of this section, have the force of law, be judicially noticed and conclusively presumed to be valid from the date of publication in the Gazette or from such later date as is specified in the Order in Council or Rules of Court.

(2) If the Legislative Assembly passes a resolution of which notice has been given at any time within fourteen sitting days after any such Order in Council or Rule of Court has been laid before it disallowing the same or part thereof, that Order in Council, Rule of Court or part thereof shall thereupon cease to have any effect, but without prejudice to the validity of anything done in the meantime or to the making of a further Order in Council or Rule of Court.
