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**A BILL TO AMEND THE REAL PROPERTY ACTS
WITH RESPECT TO THOSE PROVISIONS RELATING
TO WRITS OF EXECUTION, BILLS OF
ENCUMBRANCE AND BILLS OF MORTGAGE, AND
CAVEATS**

Working Paper 25

Queensland Law Reform Commission
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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.

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The short citation for this working paper is QLRCWP.25.

LAW REFORM COMMISSION

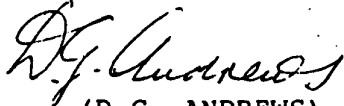
WORKING PAPER ON A BILL TO AMEND THE REAL PROPERTY
ACTS WITH RESPECT TO THOSE PROVISIONS RELATING TO
WRITS OF EXECUTION, BILLS OF ENCUMBRANCE AND BILLS
OF MORTGAGE, AND CAVEATS

The second programme of the Law Reform Commission of Queensland as approved by the Governor in Council includes a revision of the Real Property Acts.

As part of this process of revision, a working paper has been prepared on those provisions of the Real Property Acts relating to Writs of Execution, Bills of Encumbrance and Bills of Mortgage, and Caveats.

The working paper is being circulated to persons and bodies known to be interested in these matters, from whom comment and criticism are invited. It is circulated on a confidential basis, and recipients are reminded that any recommendations for the reform of the law must have the approval of the Governor in Council before being laid before Parliament. No inferences should be drawn as to any Government Policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland, 4000 so as to be received no later than 15th October, 1982.


(D.G. ANDREWS)
Chairman.

THE REAL PROPERTY ACTS AMENDMENT BILL

COMMENTARY

General Introduction

The Queensland Law Reform Commission is currently engaged in the preparation of a working paper on the consolidation and revision of the Real Property Acts. As a consequence of consultations with solicitors as to the areas of the law of real property which are in need of reform, it has become apparent that three matters in particular are causing concern. These are:-

- (a) The provision relating to writs of execution;
- (b) The distinction between bills of mortgage and bills of encumbrance;
- (c) The provisions relating to caveats against dealings.

The consultations with solicitors, and in particular with members of the Conveyancing Committee of the Queensland Law Society, not only served to identify areas which needed priority attention, but also provided an opportunity for suggestions to be made as to ways in which the legislation might be reformed or as to matters which required consideration in amending the legislation.

As the time involved in the preparation of a comprehensive working paper on the Real Property Acts and in the revision of this to take account of criticisms and suggestions from those with particular knowledge and experience is likely to be rather extended, the Commission considered that work on the reform of these three matters should not be delayed while the larger undertaking is being completed. It has accordingly prepared this working paper in which it recommends certain changes which might be made to the existing Real Property Acts.

The recommendations made in this working paper are intended to be of an interim or provisional character, in the sense that they will subsequently be incorporated into the more comprehensive study. At the same time, it is anticipated that the relevant clauses of the Bill to consolidate and reform the Real Property Acts will reproduce without substantial amendment the clauses contained in the draft Bill annexed to this working paper.

WRITS OF EXECUTION

Section 91 of the Real Property Act of 1861 provides:

"No writ of execution issued in pursuance of any judgment notwithstanding any purchaser mortgagee or creditor may have had actual or constructive notice thereof shall bind or affect or be effectual against any land under the provisions of this Act or any estate or interest therein as to purchasers mortgagees or creditors unless and until a memorial of the said writ shall have been entered in the register book and also upon the instrument evidencing title to the estate or interest intended to be charged or taken in execution in case such instrument shall be produced to the Registrar-General.

And upon proof to his satisfaction that any such writ of execution has been discharged or satisfied the Registrar-General may enter in the register book and on the certificate of title or other instrument evidencing title to the estate or interest charged and affected a memorandum to that effect and upon such entry being made the writ of execution to which such entry relates shall be deemed to be discharged or satisfied.

Provided always that no writ of execution although duly entered in the register book as aforesaid shall affect any land under the provisions of this Act or any estate or interest therein as to purchasers mortgagees or creditors unless such writ be executed and put in force within three calendar months from the date of the entering such writ.

From and after the passing of the Real Property Acts Amendment Act of 1952 -

- (a) No judgment shall be capable of registration; and
- (b) The registration of any judgment registered prior thereto shall be deemed to be cancelled.

The first clause in s.91 is negative in its terms, as Griffith C.J. pointed out both in Re Deane's Transfer (1889) 9 Q.L.J. 106 and In Bond v. McClay [1903] S & R Qd. 1. A writ of execution is not to bind land under the Real Property Act unless a memorial is entered in the register book. But nothing in the section specifies what is the effect of a writ of execution in binding land. One possibility is that the effect of a writ is to create a proprietary charge in favour of the execution creditor, so that the entering of a memorial makes the charge a registered charge over the estate or interest against which it is entered. The other possibility is that the writ merely prevents the execution debtor from dealing with the goods, so that entry of a memorial merely nullifies any dealing by the owner during the prescribed period of three months. In Bond v. McClay, the latter view was adopted. According to the judgment of the Full Court, under the Act of 1861 the execution creditor

did not by virtue of the entry on the register book of the writ of execution obtain any right of property in, or any proprietary charge upon, the land itself : [1903] St.R.Qd. at p.8.

The property in the land remains in the judgment debtor. There is Victorian Authority that he can make valid dispositions of it while the land is bound, but any dispositions he may make are defeasible until the writ is withdrawn or satisfied, or the term of three months expires, and will be void as against the Sheriff's sale under the writ. See Bruce v. Woods [1951] V.L.R. 49 at p.53.

The condition precedent to the writ of execution becoming effective to bind the land in the sense laid down in Bond v. McClay is the entry in the register book of a memorial of the writ. In Re Deane's Transfer, it was held that the writ affects the land from the date when the writ is produced to the Registrar. The basis for this opinion is the provision in s.14 of the 1877 Act that all instruments registered shall take effect from the date of production for registration. It was said that as a writ of fi fa is an instrument within the meaning of that term in s.3 of the Real Property Act 1861, it was effectual against land from the date when it was lodged for registration. This decision has been criticised, and in Day v. General Credits Ltd. [1981] Qd.R. 115, Connolly J. indicated some sympathy for the view that the date of the entering of the writ was the date of the entering of a memorial of the writ in the register book, but he was of course bound to follow the decision of the Full Court.

The proviso to s.91 expresses a legislative policy to prevent titles from being affected by the operation beyond a limited time of unexecuted writs of execution, and to reconcile the rights of a judgment creditor with those of a purchaser for value, whether with or without notice. This policy is effected by compelling the creditor to proceed within a limited time to enforce an execution by actual sale of the land affected thereby. See Registrar of Titles v. Paterson (1876) 2 App.Cas. 110 at p.118. There is however no requirement in Queensland, as there is in s.105 of the N.S.W. Real Property Act, that an entry of a memorial of the writ must be made not later than a specified time (six months) after the date of issue of the writ.

If the sheriff sells within the specified time pursuant to the writ, the sale will not affect rights created by the judgment debtor prior to the entry of the writ, and all that the sheriff can sell is the judgment debtor's interest in the land : National Bank of Australasia v. Morrow (1887) 13 V.L.R. 2; Rowe v. Equity Trustees Executors and Agency Co. Ltd. (1895) 21 V.L.R. 762 : Bruce v. Woods [1951] V.L.R. 49. See however s.35 of the Act of 1877.

The effect of s.91 on the position of the judgment debtor is twofold, as Connolly J. pointed out in Day v. General Credits Ltd. First, the power of the judgment debtor to deal with the land is not suspended from the date of entry of judgment, as had been the position under the old common law, or from the date of delivery of the writ of execution to the Sheriff, as under the N.S.W. Act 7 Vic. No. 16, s.21, repeated in s.45 of the Common Law Practice Act 1867, but from the date of entry in the register book of a memorial of the writ. Secondly, it limits the period during which the judgment debtor's power to make valid dispositions will be restricted. If the transfer from the Sheriff is not produced for registration within three months from entry of the writ, it will be postponed to a transfer from the registered proprietor lodged before it : Re Real Property Acts (1891) 4 Q.L.J. 70.

The comments made to the Commission in relation to s.91 have raised three issues. One relates to the fact that the period of three months prescribed in s.91 cannot be extended. If a writ of execution is not executed and put in force within three months from the date of the entering of the writ, the judgment creditor will not be protected against dealings by the judgment debtor with land held by him. In Re Real Property Acts (1891) 4 Q.L.J. 70 it was held that the words "executed and put in force" signified only the sale of the land by the sheriff within the time specified and did not require that a transfer of the land by the sheriff should be produced for registration within that time. It is suggested that it is unsatisfactory for the protection of the judgment creditor to be continued beyond the three months period because a transfer from the Sheriff is not produced for registration, and also that it is unsatisfactory for that protection to be lost because for reasons not attributable to any default on his part, the process of execution is not carried out to the point of production for registration of a transfer following the Sheriff's sale of the land within the prescribed period.

It is recommended therefore that the proviso to s.91 be amended in two respects. First, the event upon which the binding effect of a writ of execution is made dependent should not be expressed as being whether the writ is "executed and put in force" within the specified period, but rather whether the Sheriff's transfer has been presented for registration within that period. Secondly, the period should, as in the South Australian Real Property Act 1886, s.110, be six months or such extended time as the Court shall order. Delays may be involved in selling land, without default on the part of anyone because of the situation or nature of the land or the unavailability of finance or for other reasons. Accordingly, it is considered appropriate both to extend the time and to authorise the Court to permit further extensions. It is further suggested that in exercising its power to extend time, the Court should be required to have regard to two particular matters. One is whether reasonable efforts have been made to have the writ executed by sale of the land within the six months period. The other is the position of the judgment debtor and of any other person interested in the land.

It is recommended therefore that the proviso to s.91 should be amended to read as follows:-

Provided always that no writ of execution although duly entered in the register book as aforesaid shall affect any land under the provisions of the Act or any estate or interest therein as to purchasers mortgagees and creditors unless a transfer on sale under such writ in accordance with the provisions of section 35 of the Real Property Act of 1877 is lodged with the Registrar within the period of six months from the date of the entering of such writ, or within such extended time as the Court or a Judge shall order.

In exercising its power to extend time, the Court or Judge shall consider -

- (a) Whether good reason has been shown by the judgment creditor why the writ was not executed within the period of six months;
- (b) whether the judgment debtor or any other person will suffer prejudice if an order is made extending the time; and
- (c) such other matters as to the Court or a Judge may seem meet.

See, in this regard, the observations of members of the Full Court in Campbell v. United Pacific Transport Pty. Ltd. [1966] Qd.R. 465.

The second issue has been expressed in these terms:-

"The definition of Writ of Execution (or Warrant of Execution) should be improved specifically to include 'encumbrances' under Section 88(1)(c) of the Property Law Acts 1974-1975 or vice versa; because a mortgagee exercising power of sale should not have any doubts as to whether or not a mortgagee can pay the Judgment Creditor under a Writ of Execution."

Part VII of the Property Law Act, which relates to Mortgages, contains provisions conferring on a mortgagee a power to sell the mortgaged property (s.83), but subject to requirements regulating the exercise of the power of sale (Ss. 84 and 85). A mortgagee exercising the power of sale conferred by the Act has, in the case of land the subject of a bill of mortgage registered in accordance with the Real Property Acts, power to sell and, subject to any prior registered encumbrance, transfer the land mortgaged and all the interest thereof of the mortgagor (s.86(2)). Money arising from the sale which is received by the mortgagee is to be held by him in trust and applied in accordance with the terms of s.88. That section requires an application ... "thirdly, in payment of any subsequent mortgages or encumbrances." A writ of execution does not appear to be within the definition of an encumbrance in s.4 of the Property Law Act and remarks in Hall v. Richards (1961) 108 C.L.R. 84 at p.94 confirm this interpretation. The residue

of the money arising from sale is to be paid to "the person entitled thereto or entitled to give receipts for the proceeds of sale of the mortgaged property".

The point behind this submission appears to be that the mortgagee who exercises a power of sale should be obliged to pay the judgment creditor as if he were an encumbrancee, that is, prior to payment of the residue of the money arising from the sale to the persons entitled thereto. To do this would have the effect of conferring upon judgment creditors rights to which under the general law they are not entitled. In Hall v. Richards (1961) 108 C.L.R. at p.101, Taylor J. said that the Bankruptcy Act "does not regard or treat judgment creditors as secured creditors for the purposes of the Act". As already mentioned, the settled interpretation of s.91 of the Real Property Act 1861 is that a writ of execution does not create a proprietary charge in favour of the execution creditor. To make him an encumbrancee would have that effect.

The only legislation which confers a preferred position on a judgment creditor in the disposition of the proceeds of sale by a mortgagee is the Tasmanian Land Titles Act 1980. This provides in s.78(1) that the purchase-money received by a mortgagee who has exercised the power of sale is to be applied ... thirdly, in payment of subsequent mortgages and encumbrances in the order of their priority; fourthly, in satisfaction of the claims of all persons who have lodged caveats subsisting when the power of sale was exercised, in accordance with their respective rights and priorities; and fifthly, in payment of the residue (if any) to the mortgagor. Section 134 permits a judgment creditor of a person registered as the proprietor of registered land to lodge a caveat.

It has been held in Queensland that the direction in s.88(1) of the Property Law Act 1974 that the mortgagee is to apply money arising from a sale "in payment of any subsequent mortgages or encumbrances" refers to unregistered as well as to registered subsequent mortgages : Ex parte Australian Co-op Development Soc. Ltd. [1978] Qd.R. 395. The mortgagee who exercises the power of sale may pay the moneys into court under s.258 of the Property Law Act and s.102 of the Trusts Act 1973, and he would be justified in doing so if there was difficulty (as there well may be with unregistered mortgages) in ascertaining the subsequent mortgagees or encumbrancees. But if he paid the balance of money into Court rather than to the judgment debtor, because a judgment creditor had lodged a writ of execution against the land, he might be liable to pay the costs of payment out.

The third matter which was suggested as requiring consideration was the question of priority where two writs of fi fa (or warrants of execution) were issued. In Peace v. The Sheriff of Queensland (1890) 4 Q.L.J. 33, it was held that where A first and B subsequently delivered to the Sheriff writs of fi fa against C, but B registered his writ against C's lands before A did so, B was entitled to the proceeds of the sale, as his writ had priority over that of A in respect of the land. The position at common law is that "where a Sheriff has several writs issued

by different creditors against the same debtor, it is his duty to execute that writ first which was delivered to him, and when he has sold sufficient to satisfy that writ, he should sell under the next in order, and so on, as long as there are goods unsold." See Mather on Sheriff and Execution Law, 3rd edition (1935) page 79,80. The decision in Peace v. The Sheriff of Queensland departs from the common law rule, though the reasons for doing so are not clearly expressed. It may however be supported on the grounds referred to in Re Deane's Transfer (1898) 9 Q.L.J. 106 and by reference to s.12 of the Real Property Act of 1877. A different view was taken in Victoria. See Beath v. Anderson (1883) 9 V.L.R. (L)41.

As a writ of fi fa directs the Sheriff to seize and cause to be sold the real and personal property of the person named in the writ, the decision has the consequence that different priority rules apply to the real property, if it is land under the Torrens system, and to the personal property seized and sold in execution. But the Sheriff is not able to execute a transfer of land under the Real Property Acts unless a writ of execution has been registered, (see s.35 of the Real Property Act of 1877) and the rule that priority should be accorded on the basis of the time when the writs are lodged for registration is not unreasonable. However, it should be mentioned that Rule 315 of the District Courts Rules 1966 provides that when a writ of execution against the lands or goods of a party to an action or other proceedings has been issued out of the Supreme Court, and a warrant of execution against the lands or goods of the same party has been issued out of a District Court, the right to the property seized shall be determined by the priority of the time of the delivery of the writ so issued out of the Supreme Court to the sheriff to be executed, or the time of the application to the Registrar for the issue from the District Court of the warrant of execution, whichever is the earlier.

It seems from the fact that no decision on the question of priority between judgment creditors has been given in any Australian jurisdiction in this century that the issue can hardly be described as one of a pressing and crucial character, but it is perhaps appropriate in a reform of the law relating to writs of execution to settle the question. On balance, it is considered to be more consistent with the Torrens system of registration to make priority depend on the dates at which the writs are produced to the Registrar of Titles for registration. Accordingly, no reform of the existing law is considered to be necessary in this matter.

It is suggested that it would be inappropriate to amend s.88 of the Property Law Act by providing that the judgment creditor who had issued a writ of execution was to be accorded priority in the application of the moneys received by a mortgagee who had exercised a power of sale. A preferable procedure would seem to be to authorise the Court, when money is paid into court by a mortgagee who has exercised the power of sale, to order that payment out should be made to an execution creditor rather than to the judgment debtor.

BILLS OF MORTGAGE AND BILLS OF ENCUMBRANCE

A number of submissions have proposed that the distinction between a bill of mortgage and a bill of encumbrance should be abolished and that provision should be made for one form of security to cover repayments of loans and all other liabilities where security is taken over registered land.

The issue was highlighted by the decision of the High Court in Cambridge Credit Corporation Ltd. v. Lombard Australia Ltd. (1977) 51 A.L.J.R. 586. The appellant had executed a bill of mortgage under the Real Property Act 1861 in favour of the respondent to secure repayment of an advance with interest, and the mortgage was registered. A clause in the mortgage provided that the mortgagor would on demand pay to the mortgagee "all such further and other sums of money interest costs charges and expenses as are now or hereafter shall become due owing or payable by the mortgagor to the mortgagee upon any account whatsoever ...". The respondent maintained that the mortgage extended to security the liabilities of the appellant under guarantees given by the appellant to the respondent prior to the execution of the mortgage. The appellant claimed that the mortgage was ineffective to create a security over the land in respect of these liabilities. The decision of the High Court, affirming the judgment of Lucas J., was that the registration of the bill of mortgage was effective to secure repayment of the liabilities of the appellant as guarantor.

In s.3 of the Real Property Act 1861, a "mortgage" is defined as meaning any charge on land created merely for securing a loan, and a "bill of mortgage" means any instrument in Form F of the Schedule or in such form as under the provisions of the Act may for the like purpose be authorised executed by the intending mortgagor with a view to creating any such mortgage. A "mortgagor" means the borrower of money on the security of any estate or interest in land, and a "mortgagee" means the lender of money upon the security of any estate or interest in land. In the same section, an "encumbrance" is defined as meaning any charge on land created for the purpose of securing the payment of an annuity or sum of money other than a loan, and a "bill of encumbrance" means any instrument in Form G of the Schedule or in such other form as under the provisions of the Act may for the like purpose be authorised executed by any person having estate or interest in land with the view of creating any such encumbrance. An "encumbrancer" means any person not being a mortgagor who shall have charged any estate or interest in land with any annuity or sum of money other than a loan, and an "encumbrancee" means any person not being a mortgagee for whose benefit any estate or interest in land shall have been charged with any annuity or sum of money other than a loan.

The High Court considered that although the Act drew a distinction between mortgages and encumbrances in certain respects, for the most part its provisions applied equally and uniformly to both mortgages and encumbrances. The Court said (at p.590):

"There is no difference between the character of the security created by a mortgage and that created by an encumbrance; both constitute a security only; and the nature of the security is by way of charge in each case (s.60). Moreover the remedies conferred by the Act are the same in each case, even to the extent of giving the encumbrancee, as well as the mortgagee, an entitlement by proceedings in equity to foreclose the right of redemption ... The Act does not in terms prohibit the creation of a mortgage and an encumbrance by the one instrument ... The Act fails to make provision for the case where the security given is given in respect of a loan and some other liability as well. And, apart from the division of securities into the category of mortgage and encumbrance, there is no reason for supposing that it was intended to prohibit the inclusion of a mortgage and an encumbrance in the one instrument. The similarity of the two securities and the rights which they confer do not suggest that there is any overriding or substantial purpose which would be served by an insistence on the execution and registration of separate instruments ... The Act is to be regarded as saying no more than that a Bill of Mortgage in Form F will be executed when security is given for a loan of money only and that a Bill of Encumbrance in Form G will be executed when security is given for an annuity, rent charge or sum of money only, and as allowing the parties to execute a Bill of Mortgage with appropriate modifications when security is given for a liability as well as a loan."

It is difficult to understand why some have apparently taken the view that this decision effectually abolished the distinction between a bill of mortgage and a bill of encumbrance. On the contrary, it recognised the distinction, while pointing to common features in the two securities, and stressed that a bill of mortgage in Form F was required when security was given for a loan of money only, while a bill of encumbrance in Form G was required when security was given only for an annuity or sum of money other than a loan. All that the case determined was that when security was given both for a loan and for payment of a sum of money, it was permissible to execute a Bill of Mortgage with appropriate modifications to include the liability to pay money.

In the Torrens Title legislation of the other States, a distinction is drawn between a mortgage and an encumbrance or charge. There is however considerable variation in terminology and definitions, and in the rights conferred upon a mortgagee, encumbrancee or chargee under the various Acts. These are discussed in Frances: Torrens Title in Australia, Vol.1 at p.296ff, and in Sykes: The Law of Securities, 2nd ed., at p.265ff, and in Queensland differs from the position in other States primarily in two respects. First, it adopts a very narrow definition of a loan. Compare the definition in s.3 of the N.S.W. Real Property Act, which defines a mortgage as any charge on land created merely for securing the payment of a debt. Secondly, Queensland is unique in conferring upon a registered encumbrancee a right to foreclose the right of the encumbrancer to redeem the encumbered land. See s.60 of the 1861 Act.

It has been pointed out in one submission that unpaid purchase money under a contract of sale is not a loan and therefore that a bill of mortgage is not the appropriate instrument to secure such moneys, though the Registrar of Titles has followed the practice of accepting a bill of mortgage in Form F to secure unpaid purchase money. The proper instrument to secure the payment of the balance of purchase money under a contract of sale where the purchaser is to be registered as proprietor would appear to be a bill of encumbrance, or a memorandum of transfer and charge under s.74 of the 1877 Act.

The standard conveyancing practice in Queensland has been to secure unpaid purchase money under a contract of sale by a bill of mortgage. Legislative recognition of this practice was provided by s.5(g) of the Contracts of Sale of Land Act 1933 (repealed by the Property Law Act 1974) which exempted from the provisions of that Act "a sale of land where the owner has sold and conveyed the land by means of a memorandum of transfer in favour of the purchaser, and duly recorded in the Register Book, and has accepted a bill of mortgage duly registered for the balance of the unpaid purchase money". In s.9 of the same Act, vendor was obliged in certain circumstances to "execute a memorandum of transfer and charge in the purchaser's name; or execute a memorandum of transfer in the purchaser's name, and to take from the purchaser a bill of mortgage for the unpaid purchase-money". The Act contained no reference in these circumstances to a bill of encumbrance. The practice was also assumed to be proper in Cohen v. Mason [1961] Qd.R.518, where an agreement providing for payment of the balance of the purchase money to be secured by a bill of mortgage was attacked on several grounds, but neither counsel nor the Court suggested that a bill of mortgage was not the appropriate instrument.

It is questionable whether the decision in Cambridge Credit v. Lombard requires any change in conveyancing practice or will create any practical difficulties; it seems more likely to resolve difficulties by sanctioning the combination in a bill of mortgage of claims providing both for repayments of a loan and discharge of another liability. Moreover, if a mortgagee under a bill of mortgage has had his security registered, it is probable that any attack made on the basis that a bill of encumbrance should have been executed will fail. Registration even of a void instrument confers an indefeasible title on the registered proprietor, including a registered mortgagee. See Breskvar v. Wall (1971) 126 C.L.R. 376, and the definition of "proprietor" in s.3 of the Real Property Act of 1877; and no order would be made by a Court requiring the mortgagee to release his security because of a personal equity arising out of the circumstances simply because there was a formal defect in the instrument. See Palais Parking Station v. Shea (1980) 24 S.A.S.R. 425.

Nevertheless, it seems that some practitioners are concerned about the effect of the decision and have taken measures to ensure that bills of mortgage are so drafted as not to be subject to attack on the ground that they are not charges created merely for securing a loan. It appears that some use the device of including a small loan component in the consideration in addition to the obligation to repay the debt, while others insist upon the execution of both a bill of mortgage and a bill of encumbrance to secure unpaid purchase money.

It is undesirable that this uncertainty should persist. It may be removed either by abolishing the distinction between bills of mortgage and bills of encumbrance, and by providing for registration of one form of security irrespective of the nature of the consideration, or by defining the term "mortgage" so as to be less restrictive than the present definition.

In the New Zealand Land Transfer Act 1952, the term "mortgage" is defined in s.2 in an extensive way to mean "any charge on land created under the provisions of this Act for securing -

- (a) The repayment of a loan or satisfaction of an existing debt;
- (b) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;
- (c) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of that charge;
- (d) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rent-charge, or sum of money other than a debt."

This definition in Clause (b) appears to be wide enough to cover not only existing obligations under which the borrower may or will become subject to a present liability upon the happening of some future event or at some future date (See National Bank of Australasia Ltd. v. Mason (1975) 133 C.L.R. 191) but also contingent obligations, that is obligations which arise only upon the happening of some future event.

Section 10(1) which has the sidenote "forms of mortgage", provides:

"Whenever any estate or interest under this Act is intended to be charged with or made security for payment of any money, the registered proprietor shall execute a memorandum in Form C or Form D in the Second Schedule to this Act as may be applicable to the case, and every such instrument shall contain a precise statement of the estate or interest intended to be charged ..."

Form C, headed "memorandum of mortgage", is in terms similar to Queensland Form F, except that it refers to the circumstances of indebtedness, present or future, in respect of which the security is intended to be given, while Form F refers to a sum lent to the mortgagor by the mortgagee. Form D, headed "memorandum of encumbrance for security a sum of money", is in terms identical with those in Queensland Form G.

It will be seen that while the New Zealand legislation contains a definition of a mortgage as a charge on land to secure repayment of present or future debts or periodical payments, it furnishes distinct forms to cover an instrument to secure payment of a debt and an instrument to secure periodical payments. This recognises the fact that while under the Torrens Title legislation, both a mortgage and a rent charge take effect as a charge and not as a transfer of the land (see s.60 of the Queensland 1861 Act) they are sufficiently different in purpose as to require the provision of separate forms for their regulation.

The treatment of this matter in New Zealand may be contrasted with that in New South Wales. This distinguishes between a charge, which is defined as "any charge on land created for the purpose of securing the payment of an annuity, rent-charge or sum of money other than a debt", and a mortgage, which is defined as "any charge on land created merely for securing the payment of a debt". Distinct forms are prescribed in respect of mortgages and charges.

It may be suggested that one reason for defining a mortgage and a charge separately under the New South Wales legislation and together under the New Zealand legislation is that the remedy of foreclosure is available in the case of a mortgage but not in the case of a charge in New South Wales whereas in New Zealand foreclosure is apparently not available in either case. In Queensland, it is available in both cases - though the notion of foreclosure by a rent-chargee seems bizarre.

It is appropriate to observe here that the term "mortgage" is defined in a more extensive way in s.4 of the Property Law Act than in s.3 of the Real Property Act. The definition in the Property Law Act follows that in the New South Wales Conveyancing Act 1919, s.7, which is based on the definition in the English Law of Property Act 1925, s.205. The Property Law Act defines a mortgage as including a charge on any property for security money or money's worth. This definition would include both a mortgage and an encumbrance as defined in s.3 of the Real Property Act. In one submission, reference is made to the fact that under s.75 of the Property Law Act, a purchaser under an instalment contract may be entitled to serve upon the vendor a notice to convey the land conditionally upon the purchaser executing a mortgage to secure payments of moneys which would have become payable by the purchaser pursuant to the instalment contract. The submission contains a comment that "s.75 appears to be in conflict with the definition of a mortgage contained in the Real Property Acts and also is not in conformity with the High Court decision" in Cambridge Credit v. Lombard. This seems to be based upon a misconception. The Property Law Act does not preclude the use of a bill of encumbrance if that is the proper instrument to secure unpaid purchase moneys under the Real Property Acts, since a bill of encumbrance is a mortgage in the sense of s.4 of the Property Law Act. It is suggested therefore that no amendment is required to s.75 of the Property Law Act whether or not any amendment is made to the Real Property Acts.

If the New Zealand model were to be followed, it would be necessary to amend the Real Property Acts extensively so as to remove all references to encumbrances and to ensure that no distinction between mortgages and encumbrances remained. Adoption of the New South Wales model would on the contrary involve only slight amendments to the existing legislation to settle the problems caused or apprehensions aroused by the Cambridge Credit case. However, the definition of a mortgagee in the New South Wales Act is itself too narrow. In particular it is questionable whether it comes covers contingent liabilities.

It is suggested that the most appropriate course to follow is to replace the existing definitions of "mortgage" "mortgagor" and "mortgagee" in s.3 of the Real Property Act 1861 by definitions based on those in the New Zealand Land Transfer Act 1952, while leaving the definitions and provisions relating to encumbrances unchanged. This will have the effect that there will probably be no situation where it will be necessary to use bill of encumbrance and the provisions on encumbrances may be left to wither on the vine. In the general review of the Torrens system legislation, the opportunity will occur to make the amendments consequential upon the introduction of a single instrument.

It is recommended therefore:

That the definition of mortgage, mortgagor and mortgagee in s.3 of the Real Property Act 1861 be amended as follows:

"Mortgage" shall mean any charge on land created for securing -

- (a) The repayment of a loan or satisfaction of an existing debt;
- (b) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;
- (c) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of that charge;
- (d) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rent, charge, or sum of money other than a debt."

"Mortgagor" shall mean the proprietor of an estate or interest charged with a mortgage.

"Mortgagee" shall mean the proprietor of a mortgage.

Note: In the statutory forms to the Victorian Transfer of Land Act and the South Australian Real Property Act, which contain no definition of the term "mortgage", the consideration for giving the security is stated to be a "sum this day lent to me", as in the existing Queensland Form F. It may be that the distinction between "securing a debt" and "securing a loan" would be ignored by a Court in circumstances in which the unpaid purchase money owing by the mortgagor to the mortgagee could have been converted to a loan by a simple exchange of cheques. In Larocque v. Beauchemin [1897] A.C. 35F, the Privy Council quoted with approval the words of Mellish L.J. in Spargo's Case (1873) L.R. 8 Ch. 407 that "it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties met together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards".

CAVEATS AGAINST DEALINGS

The Queensland Torrens System legislation employs the caveat procedure in relation to the bringing of land under the system, dealings with land under the system, and the acquisition of title by possession. It is only in relation to the operation of the rules relating to caveats against dealings that submissions have been made to the Commission, and in this Working Paper consideration is directed solely at the question of reform of the law relating to such caveats.

The maintenance of an effective system of caveats against dealings is essential to the operation of the Torrens system. Means must be provided to protect unregistered interests. This is achieved under the caveat system by warning persons who are minded to deal with the registered land of the existence of interests asserted by the caveator, and by ensuring that the caveator is notified of any dealings lodged for registration which are inconsistent with the interest he claims.

The submissions made in relation to caveats dealt with three matters:-

- (a) Non-lapse of Caveats when proceedings have not resulted in Trial.

Section 98 of the Real Property Act 1861 provides that any person claiming an estate or interest in any land may by a caveat in Form K of the Schedule forbid the registration of any instrument affecting such land estate or interest. If the person by whom or on whose behalf the caveat was lodged takes proceedings within three months from the date of lodgment in any court of competent jurisdiction to establish his title to the estate or interest specified in the caveat and gives written notice to the Registrar-General, the caveat will not lapse : s.39 of Real Property Act 1877.

It has been pointed out that in several instances caveats have been lodged and actions taken in the appropriate court, but that these actions have not resulted in a trial for various reasons. The caveator may not be willing to sign a request to remove the caveat, or it may not be possible to trace him or he may have died, or he may take no steps to proceed with the action he has instituted. In these circumstances the authority given to the Registrar by s.102 of the Real Property Act 1861 to cancel a caveat may not be exercisable, because it will not be possible to prove to his satisfaction that the caveator's estate interest or claim has ceased, been abandoned or withdrawn, or that the rights of the persons on whose behalf the caveat was lodged are satisfied or arranged.

The caveatee will be able in these circumstances to apply to the Court for an order for removal of the caveat under s.99 of the 1861 Act. It has however been proposed that provision should be made whereby a certificate by the Registrar of the appropriate Court that the action has been finalised or discontinued or no step in the action has been taken for upwards of one year shall be deemed sufficient evidence to satisfy the Registrar-General as required under s.102, and thus enable him to remove a caveat at the request of the registered proprietor.

It seems that the problem arises in Queensland because of the different procedure adopted here in relation to the lapse of caveats from that adopted in other States. In New South Wales, caveats (other than those lodged by a settlor, or by or on behalf of a beneficiary under a will or settlement or by the Registrar-General) lapse upon the expiration of fourteen days after notice is given to the caveator that application has been made for registration of a dealing, unless an order to the contrary is made by the Supreme Court: Real Property Act 1900, s.73. It will be observed that in Queensland the caveat will lapse after the specified period unless the caveator takes proceedings, whereas in New South Wales it will lapse fourteen days after notice to the caveator of an application for registration unless the caveator obtains a court order within that period.

In Victoria, caveats other than those lodged by the Registrar, lapse as to any land affected by any transfer or other dealing, with certain specified exceptions, upon the expiration of thirty days after notice given by the Registrar to the caveator that a transfer or dealing has been lodged for registration. Section 90(2) of the Transfer of Land Act 1958 provides:-

"If before the expiration of the said period of thirty days or such further period as is specified in any order made under this sub-section the caveator or his agent appears before the Court and gives such undertaking or security or lodges such sum as the Court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed, the Court may order the Registrar to delay registering any dealing with the land for a further period specified in the order or may make such other order (and in either case such order as to costs) as is just."

It appears from a note in Butterworth's Annotations to the New South Wales Statutes that a Practice Note was issued by Street C.J. in 1975 which requires any party (apart from the Crown suing by the Attorney-General) obtaining the benefit of an order under s.73 of the Real Property Act which has the effect of extending a caveat to give to the Court an undertaking as to damages.

The effect of the procedure laid down in the N.S.W. and Victorian Acts is that the caveat will lapse at the end of the specified time unless the caveator applies for an order extending the time; and any such order may be made on terms of an undertaking as to damages. It is suggested that this is preferable to the Queensland procedure, under which the caveat will not lapse if the caveator takes proceedings within the period to establish his title. The Queensland system provides an opportunity for dilatoriness by a caveator which is not available to him in the other States. The proper function of a caveat is, as Kitto J. remarked in Lamshed v. Lamshed (1967) 109 C.L.R. 440 at p.451, to act as 'a statutory injunction which continues in force until the caveat is removed or lapses'. In J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales (1973) 135 C.L.R. 546 at p.552, Barwick C.J. said, in relation to the New South Wales Act, that the purpose of a caveat "is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealings for registration." A caveat is "nothing more than a statutory injunction to keep the property in status quo until the Court has an opportunity of discovering what are the rights of the parties", as Owen J. observed in Re Hitchcock (1900) 17 W.N. N.S.W. 62, at p.63. If a caveat is to act as a statutory injunction, it should be continued only on the terms which are imposed when injunctions are issued.

The caveatee has under the Queensland Act and under the other Acts mentioned a right to apply to the Court to have the caveat removed. For example, the N.S.W. Real Property Act s.97 provides that a person who claims an estate or interest in land described in a caveat may apply to the Supreme Court for an order that the caveat be withdrawn. The Court may make an order for the caveat to be withdrawn within a specified time, and may make such other or further order as it thinks fit. It has been held that the Court has no power, on an application to remove a caveat against dealings, to determine the rights of the parties : Ex parte Muston (1903) 3 S.R. N.S.W. 663. In that case, the order made was that the caveat be removed unless within one calendar month the caveator served upon the applicants a statement of claim, with leave to the applicants to apply if the caveator did not prosecute such suit.

It has recently been held that on an application to remove a caveat s.99 of the Real Property Act of 1861 authorises a requirement that a caveator give an undertaking as to damages as a condition of the continuance of a caveat. In South Brisbane Motors Pty. Ltd.'s Caveat [1981] Qd.R. 416, Dunn J. ordered that a caveat be removed unless the caveator filed an undertaking as to damages before a specified date, and that if the undertaking was filed, the caveat was not to be removed until the determination of litigation commenced by the caveator.

It follows from this decision that if a caveatee acts under s.99 for removal of a caveat, an order may be made requiring an undertaking in damages from the caveator. The Court will also be able to certify the action by the caveator for speedy trial and to order the parties thereto to take all necessary steps in the action as speedily as is reasonably practicable, as was done in Re South Brisbane Motors Pty. Ltd.'s Caveat. However, it does not appear possible in Queensland, as it is in the other States, for such orders to be made unless the caveatee summons the caveator to show cause why the caveat should not be removed.

It is suggested that this is an unsatisfactory position. The caveator who has acted to forbid registration of an instrument should be required as a condition for an extension of the non-lapsing period to give an undertaking in damages and to proceed expeditiously with his action to establish his title. It should not be necessary for the caveatee to be put to the trouble and expense of taking proceedings for removal of the caveat to enable such orders to be made.

An amendment to s.39 of the Real Property Act of 1877 along the lines of the corresponding legislation in the other States would remove the problem referred to in the submissions. The proposal for removal by the Registrar of Titles upon certification by the Registrar of the appropriate Court would still permit a caveator to prolong the proceedings unduly and thereby hold up the registration of instruments relating to the land, with the consequential possibility of considerable loss to the caveatee. The provision in s.103 of the Real Property Act 1861 whereby compensation may be recoverable for lodging a caveat without reasonable cause is not a sufficient substitute for an undertaking by the caveator to pay damages sustained by the caveatee.

It is suggested that the problem has arisen basically because in Queensland the provisions relating to the lapse of caveats against dealings have been modelled on those relating to the lapse of caveats against bringing land under the Act, though they serve rather different purposes in the two cases. In the latter case, the function of a caveat is to set a period within which proceedings to establish the caveator's claim must be commenced; it enables him to assert a claim which otherwise would be extinguished when a certificate of title is issued upon bringing land under the Act (unless it is maintained by the indefeasibility provisions of the Act), but restricts the time within which the claim must be pursued. In the former case, its function is to enable the caveator to establish an interest he has claimed which would be defeated if dealings were lodged for registration which were inconsistent with his interest.

The lodging of a caveat may be destructive of any possibility which the registered proprietor may have of dealing with his land. Nothing operates as effectively as the presence of a caveat in warning off prospective purchasers. The inference might be drawn from this that to allow a caveat to continue, as in New South Wales and Victoria, until a dealing is lodged may be prejudicial to the registered proprietor. It is true that

the registered proprietor can act to procure the removal of the caveat under s.99 of the 1861 Act without delay, or he can seek its cancellation by the Registrar of Titles under s.102 of that Act. It is questionable whether that affords sufficient protection to the registered proprietor. It is suggested that a caveator should not be able to lodge a caveat which will remain, in the absence of action to have it removed or cancelled until dealings are lodged which are inconsistent with it. Instead, the caveator should be required to obtain an order from the Court extending the caveat after a short period, unless the caveat is lodged with the consent of the registered proprietor. This is in effect the system applied under the South Australian legislation.

(b) The discretion given to the Registrar of Titles to refuse to register an instrument while a caveat remains in force though the caveat expressly states that its registration is not forbidden.

Section 101 of the 1861 Act provides that so long as any caveat remains in force the Registrar of Titles is not to register any instrument purporting to transfer or otherwise deal with or affect any land estate or interest to which the caveat relates, unless -

- (a) in the case of an instrument lodged in the office of the Registrar prior to the date of lodgment of that caveat, that caveat expressly states that registration of that instrument is not forbidden; or
- (b) in the case of an instrument lodged either prior or subsequent to the date of lodgment of that caveat, the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; or
- (c) in the case of an instrument executed by a mortgagee or encumbrancee whose bill of mortgage or bill of encumbrance has been registered prior to the date of lodgment of that caveat, the caveat has been lodged by person claiming an estate or interest in the land as security for the payment of a loan an annuity or sum of money.

To this there is however a proviso, under which, notwithstanding sub-paragraphs (a), (b) and (c), the Registrar may in his discretion refuse to register any instrument referred to in any of those sub-paragraphs so long as that caveat remains in force.

The main objection which has been expressed to the terms of this section is that the existence of the discretion given to the Registrar has the effect that no-one is able to say with certainty whether any instrument to which a caveat relates will be registered if lodged for registration, although the caveat expressly states that its registration is not forbidden. It is said that this has the consequence that dealings which are not within the scope of the caveat will be impeded, since there can be no assurance that the Registrar will register them. A caveator may not wish to impede transactions which will not

affect his interests, but the lodgment of the caveat will necessarily have that effect since parties to such transactions will not be prepared to hand over money in exchange for an instrument which the Registrar may in his discretion refuse to register.

In considering this objection, certain matters must be borne in mind.

In the first place, the effect of a caveat in Form K lodged under s.98 of the 1861 Act is to forbid the registration of an instrument affecting the land. In this respect, strong contrast is provided by the terms of s.30A of the 1877 Act, where the caveat is against a dealing with the land except subject to the equitable mortgage. See Bell v. Custom Credit Corporation Ltd. 1976 Qd.R. 57. A caveat lodged under s.30A does not prevent the registration of any instrument, and reciprocally a caveat lodged under s.98 does not merely operate as an encumbrance notified upon the register.

Secondly, the terms of a caveat in Form K as set out in the Schedule are to forbid the registration of any memorandum of sale or other instrument affecting "the land" described in the caveat (except instruments the registration of which is not forbidden by the caveat). The terms of s.98 are different. What is forbidden is the registration of any instrument affecting "such land, estate or interest". The caveat must state the nature of the estate or interest claimed, and the grounds on which the claim is founded. If the caveat fails to state these matters accurately it is defective and may be removed: In re Powells' Caveat 1966 Q.W.N. 9. In Queensland Estates Pty. Ltd. v. Co-Ownership Land Development Pty. Ltd. 1969 Qd.R. 150 at p.155, the Full Court stated that "a person is given a right to caveat to protect his interest in the land, and the registered proprietor is to be left to deal freely with the remaining interest in the land". On this interpretation, the prohibitory effect of a caveat is limited to instruments which affect the estate or interest claimed by the caveator. This is clearly the position under the N.S.W. provision (s.72(1) of the Real Property Act) which forbids the recording in the register of any dealing affecting the estate or interest specified in the caveat. It is suggested that in any amendment to the provisions relating to the caveat system the opportunity should be taken to make the terms of the Schedule correspond with these in s.98, and to make both of them reflect the intention of the legislation as expressed by the Full Court.

Thirdly, the prohibitory effect of a caveat extends in Queensland to instruments lodged before as well as after the lodgment of the caveat. In this respect, the position in Queensland differs radically from that in the other States. See for example the Victorian Transfer of Land Act 1958 s.91(2) : no instrument lodged for registration shall be in any way affected by any caveat lodged at a time later than the lodgment of such instrument : N.S.W. Real Property Act s.74(2) : The provision prohibiting the recording of dealings while a caveat is in force shall not operate to prevent the recording of a dealing which, when the caveat was lodged, had previously been

so lodged in registrable form : S.A. Real Property Act 1886-1975, s.191(3) : Notwithstanding the receipt of a caveat the Registrar-General shall proceed with and complete the registration of any instrument affecting the said land, which instrument is produced for registration before the receipt of the caveat by the Registrar-General.

In Queensland, where an instrument is lodged prior to the date of lodgment of the caveat, the Registrar must not register it if it purports to deal with or affects an estate or interest to which the caveat relates, unless the caveat expressly states that registration of that instrument is not forbidden, or the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; and in those cases where the Registrar is not prohibited from registering the instrument, he is given a discretion to refuse to do so.

Before discussing the issue raised by the submission, it is necessary to refer to the more fundamental question as to whether a caveat should have effect in relation to instruments lodged prior to the lodgment of the caveat. The great defect of a system which permits registration to be held up through the lodging of a caveat after the instrument of transfer in registrable form is lodged is that a purchaser who has made payment at the time when the instrument of transfer is handed to him, will find himself in a position where registration of his interest is delayed, and where he may not be able to recover his purchase money from the transferor. It is suggested that it should be the position here, as it is in other States, that if a purchaser makes proper search, receives in exchange for the purchase money an instrument in registrable form and lodges it for registration without delay, he should not be affected by caveats lodged thereafter.

In the form in which it stood prior to 1952, s.98 permitted a person claiming an estate or interest in any land by a caveat in Form K to forbid the registration of any instrument affecting such land estate or interest either absolutely or until after notice of intention to register the interest had or until after notice of intention to register had been served. In 1952, s.98 was amended by excepting an instrument the registration of which was stated in the caveat to be thereby not forbidden. At the same time, s.101 was amended by excluding from the prohibition on entering in the register book any instrument purporting to deal with or affect the land estate or interest in respect of which a caveat had been lodged, an instrument the registration of which the caveat expressly stated was thereby not forbidden, but conferring a discretion on the Registrar to refuse to register that instrument so long as the caveat remained in force. In 1973, the exception in s.98 of an instrument where registration was stated in the caveat to be not forbidden was limited to such an instrument which had been lodged in the office of the Registrar of Titles prior to the caveat, and a new s.101 was inserted. This prohibited registration while a caveat remained in force, with two exceptions: first, in the case of an instrument lodged prior to the date of lodgment of the caveat, the caveat expressly stated that registration of the instrument was not forbidden; or in the case of an instrument lodged prior or subsequent to the date of lodgment of the caveat, the caveator lodged his consent to the registration of the instrument. However, in both these cases, the Registrar was given a discretion to refuse to

register an instrument so long as the caveat remained in force. In 1974 s.98 and Form K were amended by omitting the words "either absolutely or until notice of intention to register the instrument had been served". Finally, s.101 was amended in 1979 by adding a third exception, and extending to it the Registrar's discretion to refuse to register an instrument so long as the caveat remained in force.

This record of amendments indicates a progressive refinement of the circumstances in which the Registrar is permitted to register instruments despite the subsistence of a caveat, but discloses at the same time an intention that the Registrar should have a discretion to refuse registration. In so far as other States do not prohibit the registration of instruments which are lodged for registration before the lodging of a caveat, there is naturally no corresponding discretion accorded to the Registrar. However, in relation to instruments lodged after the caveat, no discretion is accorded in other States to the Registrar. In South Australia, the Registrar is not to register any dealing with the land in respect of which a caveat has been lodged contrary to the requirements of the caveat, but the caveat may forbid registration "either absolutely or unless such dealing shall be expressed to be subject to the claim of the caveator or to any conditions conformable to the law expressed therein." In New South Wales, the Registrar is not to record in the Register any dealing the recording of which is prohibited by the caveat, except with the written consent of a person entitled to withdraw the caveat. In Victoria, the Registrar is not to enter in the Register Book any dealing purporting to affect the estate or interest in respect of which the caveat is lodged, except in accordance with some provision of the caveat or with the consent in writing of the caveator.

It is difficult to see any justification for according a discretion to the Registrar to refuse registration where the caveat allows it or the caveator consents to it. The whole point behind a caveat system is to give interim protection to the caveator to prevent his rights being prejudiced by the registration of an instrument until he has been able to invoke the aid of the Court. It seems pointless to give the Registrar an authority in effect to extend that protection beyond the limits required by the caveator himself.

Under the present legislation, if a caveator lodges a caveat, but excepts from it dealings which are not opposed to his interest, there can be no certainty that such dealings will be registered while the caveat remains in force. Moreover, such an exception may be made only in the case of an instrument lodged in the office of the Registrar prior to the date of lodgment of the caveat. It is suggested that, even if Queensland continues to extend the prohibitory effect of a caveat to instruments lodged before the lodging of the caveat, there is no good reason why it should limit the power of a caveator to except dealings to the situation where the instrument has been lodged prior to the date of lodgment of the caveat, or why it should accord to the Registrar any discretion to refuse to register such an instrument while the caveat remains in force.

(c) Establishment of a Caveatable Interest.

It has been stated that it is the practice of some purchasers to lodge a caveat although they have no caveatable interest. Where a contract is made subject to finance or to local government approval, the purchaser may have no caveatable interest until the condition of the contract is fulfilled. See, for example, Re Bosca Land Pty. Ltd.'s Caveat 1976 Qd.R. 119; but compare Gasuinas v. Meinhold (1964) 6 F.L.R. 182. It is further stated that the purpose for which a caveat is lodged by a person without a caveatable interest may be to prevent the vendor from forfeiting the deposit paid under the contract and to operate as a means for obtaining repayment of the deposit or most of it to the caveator. It is then proposed that the caveator should be required to file with the caveat a copy of the contract and other evidence to establish that the conditions of the contract have been fulfilled or to establish the interest which the caveator has in the land.

It is enough under the terms of s.98 of the 1861 Act for the caveator to claim an estate or interest in the land; he does not have to establish that claim. However s.102 authorises the Registrar to cancel a caveat in case he and the Master of Titles shall be satisfied that the nature of the estate interest or claim of the person by whom or on whose behalf the caveat is lodged is not such as to entitle him to prohibit the sale or mortgage or other dealing with the land estate or interest referred to in such caveat. At least seven days before cancelling the caveat, the Registrar must serve notice on the caveator.

The effect of the proposal would be to require the Registrar to make a judgment in every case where a caveat was lodged upon the basis of the supporting documentation as to whether the caveator had a sufficient caveatable interest to support the lodging of the caveat. This would impose a much heavier burden on him than under the present provision. The caveatee may take proceedings under s.99 of the 1861 Act for removal of the caveat. However the Court will not in such summary proceedings decide questions of title to the land or determine the rights of the parties, but it may order removal of the caveat unless the caveator takes action to establish his claim. See Re Oil Tool Sales Pty. Ltd: Classified Pre-Mixed Concrete Pty. Ltd. Caveator 1966 Q.W.N. 11. It is not appropriate to invest the Registrar of Titles with power to cancel a caveat except in a case where there is no doubt that the caveator has no right to maintain it.

If a caveator lodges a caveat without reasonable cause, he becomes liable to an action under s.103 of the 1861 Act. If the caveat is not defective on its face, or otherwise plainly insupportable, it is suggested that the caveator's claim should be determined in proceedings to remove the caveat or in proceedings to establish the caveator's title, and that it should not be determined by the Registrar.

It is appropriate in this regard to refer to s.89A of the Victorian Transfer of Land Act, inserted by the Transfer of Land (Removal of Caveats) Act 1965. This provides:

- "(1) Any person interested in land affected by a caveat not being a caveat lodged by the Registrar may make application in writing to the Registrar to cancel the memorandum of such caveat ...

- (2) Every such application shall be accompanied by a certificate signed by a person for the time being practising as a barrister or a solicitor, or as a barrister and solicitor, of the Supreme Court of Victoria referring to the caveat and stating his opinion that the caveator never had an enforceable right to the estate or interest claimed in the caveat or that the estate or interest so claimed has ceased to exist.
- (3) Upon receiving any such application and certificate the Registrar shall forthwith give notice to the caveator requiring that the caveat be withdrawn or that proceedings be commenced in the court to substantiate the claim of the caveator.
- (4) If within thirty days after the date of the notice given by the Registrar under the last preceding sub-section the caveat has not been withdrawn or notice in writing has not been given to the Registrar that proceedings have been commenced in the court as aforesaid, the Registrar shall cancel the said memorandum."

This is a preferable procedure in some respects to that proposed in the submission or contained in s.102 of the Queensland Act. It relieves the Registrar of the burden of checking the relevant documentation whenever a caveat is lodged, and does not confer upon him any authority to decide whether or not a caveator has the estate or interest claimed. It may, however, be a costly procedure for the caveatee to follow. This is an important consideration in deciding on a summary procedure to be followed where what is in issue essentially is the cancellation of caveats which lack any justification.

Section 73A of the N.S.W. Real Property Act 1900-1979 provide that where it appears to the Registrar-General that the estate or interest claimed by any caveator does not exist he may, on the application of any person interested in the land, estate or interest in respect to which the caveat is lodged, serve notice on the caveator requiring him within fourteen days from the date of service of the notice to show cause to the Registrar-General why the caveat should not be removed.

Unless within that time the caveator so shows cause to the satisfaction of the Registrar-General, the caveat shall be deemed to have lapsed.

This is similar to s.102 of the Queensland Real Property Act of 1861, though the latter gives a wider power to the Registrar to cancel a caveat.

A different procedure is contained in s.191 (v), (vi) and (vii) of the South Australian Real Property Act. Except where the caveat is lodged by a settlor, or by a beneficiary under a will or settlement or by the Registrar, the caveatee may apply in writing to the Registrar to remove the caveat. The Registrar is thereupon required to give 21 days notice in writing to the caveator, requiring the caveat to be withdrawn. The Registrar is required to remove the caveat after the lapse of 21 days, or such extended time as may be ordered by the Court. Under this procedure, a caveat (with the three exceptions mentioned) will lapse within a short period if the caveatee

applies for its removal, unless the Court extends the time. In addition, the caveatee may apply to the Court at any time to have the caveat removed, and the Court may make such order as shall seem just: s.191(iv). The South Australian System ensures removal of the caveat within a short period on the application of the caveatee unless the caveator obtains an extension from the Court, and permits its removal without delay if the court so orders on the application of the caveatee.

In New South Wales and Victoria, a caveat lapses after specified time after notice has been served on the caveator that a dealing prohibited by the caveat has been lodged for registration, unless the Court makes an order to the contrary. The caveat may be removed by order of the Court, or it may be removed by the Registrar in New South Wales in the circumstances set out in s.73A, or cancelled by the Registrar in the circumstances set out in Vic. s.89A. In South Australia, the caveat does not lapse but it may be removed after the expiration of 21 days whether or not any dealings have been lodged for registration, unless the court extends the time. The proposals made here for amendment of s.39 of the Real Property Act of 1877 are modelled on those in the South Australian Act.

It is suggested that the authority accorded to the Registrar of Titles is valuable as a means to enable stale caveats to be cancelled, as well as caveats where there is no doubt that no valid ground existed for the lodging of a caveat or where the caveator's interest has ceased or been satisfied. It is in effect a summary jurisdiction to be exercised only in a clear case, which otherwise might require the caveatee to go to the trouble and expense of proceedings for removal of the caveat. In its present form, s.102 of the 1861 Act seems satisfactory, and no recommendation is made for its amendment. It is however anticipated that if the amendment which it is suggested should be made to s.39 of the Real Property Act of 1877 is implemented, little use will be made of s.102 of the 1861 Act.

Recommendations:

It is recommended that -

- (a) Section 98 of the Real Property Acts 1861 to 1981 be amended to provide:

Any person claiming an estate or interest in any land under the provisions of this Act may by a caveat in the Form K of the Schedule hereto or as near thereto as circumstances will permit forbid the registration of any instrument affecting such estate or interest specified in such caveat.

- (b) Section 101 of the Real Property Acts 1861 to 1981 be amended to provide:

- (1) So long as any caveat shall remain in force prohibiting the transfer or other dealing with land the Registrar of Titles shall not enter in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged unless -

- (i) the caveat expressly states that registration of that instrument is not forbidden;
 - (ii) the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; or
 - (iii) in the case of an instrument executed by a mortgagee or encumbrancee whose bill of mortgage or bill of encumbrance has been registered prior to the date of lodgment of that caveat, the caveat has been lodged by a person claiming an estate or interest in the land as security for the payment of a debt, an annuity or sum of money.
- (2) Notwithstanding anything contained in subsection 1 of this section, no instrument lodged for registration shall be in any way affected by any caveat lodged at a time later than the lodgment of such instrument.
- (c) Section 39 of the Real Property Act of 1877 be repealed and replaced by the following:
- (1) When a caveat is lodged with the Registrar of Titles under the ninety-eighth section of the Principal Act, the caveatee may request the Registrar of Titles in writing to notify the person by whom or on whose behalf the caveat was lodged that unless the caveat is withdrawn within thirty days from the date of the notice the caveat will at the expiration of that time be cancelled by the Registrar of Titles.
 - (2) The Registrar of Titles shall thereupon, unless the caveat has been lodged with the written consent of the registered proprietor of the land affected thereby, give such notice in writing to the person by whom or on whose behalf the caveat was lodged and shall cancel the caveat at the expiration of the aforesaid period unless the Court otherwise orders pursuant to subsection 3 of this section.
 - (3) If before the expiration of the said period of thirty days or such further period as is specified in any order made under this sub-section the person by whom or on whose behalf the caveat was lodged appears before the Court and gives such undertaking or security or lodges such sum as the Court considers sufficient to indemnify every person against any damages that may be sustained by reason of any disposition of the property being delayed, the Court may direct the Registrar not to cancel the caveat and to delay registering any dealing with the land for a further period specified in the order, or may make such other order (and in either case such order as to costs) as is just.

A Bill to amend the Real Property Act 1861-1981 and the Real Property Act 1877-1979, each in certain particulars.

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

1. Short title and citation. (1) This Act may be cited as the Real Property Act Amendment Act 1982.

(2) In this Act, the Real Property Act of 1861 as heretofore amended is referred to as the Principal Act.

(3) The Principal Act as amended by this Act may be cited as the Real Property Act 1861-1982.

2. Commencement of Act. This Act shall commence on a date fixed by Proclamation.

3. Amendment of s.3. Section 3 of the Principal Act is amended -

(a) by substituting the following for the meaning assigned to the word "mortgage" namely

"Mortgage" shall mean any charge on land created under the provisions of this Act for securing -

(a) The repayment of a loan or satisfaction of an existing debt;

(b) The repayment of future advances, or payment or satisfaction of any future or unascertained debt or liability, contingent or otherwise;

(c) The payment to the holders for the time being of any bonds, debentures, promissory notes, or other securities, negotiable or otherwise, made or issued by the mortgagor before or after the creation of that charge;

(d) The payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rent-charge, or sum of money other than a debt.

(b) by substituting the following for the meaning assigned to the word "mortgagor", namely

"Mortgagor" shall mean the proprietor of any estate or interest charged with a mortgage:

(c) by substituting the following for the meaning assigned to the word "mortgagee", namely

"Mortgagee" shall mean the proprietor of a mortgage.

4. Amendment of s.91. Section 91 of the Principal Act is amended by omitting the proviso to that section and substituting the following proviso:

"Provided always that no writ of execution although duly entered in the register book as aforesaid shall affect any land under the provisions of the Act or any estate or interest therein as to purchasers mortgagees and creditors unless a transfer on sale under such writ in accordance with the provisions of section 35 of the Real Property Act of 1877 is lodged with the Registrar within the period of six months from the date of the entering of such writ, or within such extended time as the Court shall order.

In exercising its power to extend time, the Court shall consider -

- (a) Whether good reason has been shown by the judgment creditor why the writ was not executed within the period of six months;
- (b) whether the judgment debtor or any other person will suffer prejudice if an order is made extending the time; and
- (c) such other matters as to the Court may seem meet."

5. Repeal of and new s.98. The Principal Act is amended by repealing s.98 and substituting the following section:

"Any person claiming an estate or interest in any land under the provisions of this Act may by a caveat in the Form K of the Schedule hereto or as near thereto as circumstances will permit forbid the registration of any instrument affecting such estate or interest specified in such caveat."

6. Repeal of and new s.101. The Principal Act is amended by repealing s.101 and substituting the following section:

"(1) So long as any caveat shall remain in force prohibiting the transfer or other dealing with land the Registrar of Titles shall not enter in the register book any memorandum of transfer or other instrument purporting to transfer or otherwise deal with or affect the estate or interest in respect to which such caveat may be lodged unless -

- (a) the caveat expressly states that registration of that instrument is not forbidden;
- (b) the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; or
- (c) in the case of an instrument executed by a mortgagee or encumbrancee whose bill of mortgage or bill of encumbrance has been registered prior to the date of lodgment of that caveat, the caveat has been lodged by a person claiming an estate or interest in the land as security for the payment of a debt an annuity or sum of money.

- (2) Notwithstanding anything contained in subsection 1 of this section, no instrument lodged for registration shall be in any way affected by any caveat lodged at a time later than the lodgment of such instrument."

7. Repeal of and new s.39 of the Real Property Act of 1877.
The Real Property Act of 1877 is amended by repealing s.39 and substituting the following section:

- (1) When a caveat is lodged with the Registrar of Titles under the ninety-eighth section of the Principal Act, the caveatee may request the Registrar of Titles in writing to notify the person by whom or on whose behalf the caveat was lodged that unless the caveat is withdrawn within thirty days from the date of the notice the caveat will at the expiration of that time be cancelled by the Registrar of Titles.
- (2) The Registrar of Titles shall thereupon, unless the caveat has been lodged with the written consent of the registered proprietor of the land affected thereby, give such notice in writing to the person by whom or on whose behalf the caveat was lodged and shall cancel the caveat at the expiration of the aforesaid period unless the Court otherwise orders pursuant to subsection 3 of this section.
- (3) If before the expiration of the said period of thirty days or such further period as is specified in any order made under this sub-section the person by whom or on whose behalf the caveat was lodged appears before the Court and gives such undertaking or security or lodges such sum as the Court considers sufficient to indemnify every person against any damages that may be sustained by reason of any disposition of the property being delayed, the Court may direct the Registrar not to cancel the caveat and to delay registering any dealing with the land for a further period specified in the order, or may make such other order (and in either case such order as to costs) as is just.