SOUTH AUSTRALIA

SEVENTY-FIFTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW OF SET-OFF

1983

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19 September 1968. The present members are:

THE HONOURABLE MR JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR JUSTICE WHITE. *Deputy Chairman.*

THE HONOURABLE MR JUSTICE LEGOE, *Deputy Chairman.*

M. R. GRAY, Q.C., S.-G.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

G. F. HISKEY.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SEVENTY-FIFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF SET-OFF

To:

The Honourable C. J. Sumner, M.L.C., Attorney-General for South Australia.

Sir,

In the Fifty-Fifth Report of this Committee dealing with the inherited Imperial Statute Law, we referred to the Statutes of set-off; 2 Geo. II c. 22 (1728), 3 Geo. II c. 27 (1729), and 8 Geo. II c. 24 (1734) which are still the foundation for a right of set-off at law in this State. We said then that the whole topic of set-off needed fuller consideration than could be contained in the short space of the consideration of three Imperial Statutes among many others in a report which related to inherited Imperial law, and recommended that set-off be the subject of a separate study. Your predecessor assigned the matter to us for this purpose and we now report as follows:

The general rules as to set-off, both at common law and under the Statutes of George II, are as set out in *Chitty on Pleading Volume I (7th Edition, 1844) page 595:*

"At *common* law, and independently of the statutes of set-off, a defendant is in general entitled to retain, or claim by way of *deduction,* all just allowances or demands accruing to him, or payments made by him, in respect of the *same* transaction or account, which forms the ground of action. But this cannot be termed a *set-off* in the strict legal sense of the word, because it is not in the nature of a *cross* demand, or *mutual* debt, but rather constitutes a *deduction,* rendering the sum to be recovered by the plaintiff so much less. So, where demands, originally cross, and not arising out of the same transaction have by subsequent *express argument* been stipulated to be deducted, or set off against each other, only the *balance* is the debt and sum recoverable, without any special plea of set-off; though it is *advisable* in most cases, and *necessary* when the action is on a specialty, to plead it; and since Reg. Gen. Hil. T. 4 Will. 4, a special plea claiming such *deduction* would in most cases be requisite. A defendant cannot reduce a plaintiff's demand for goods sold, by producing a debtor and creditor account in the handwriting of the plaintiff's clerk, showing goods to have been sold by the defendant to plaintiff, unless he has pleaded a set-off."

Chitty then deals with the cases in which a deduction as distinct from a set-off may be made and goes on at page 596-7 as follows:

"But before the statutes of set-off, where there were *cross demands unconnected with each other,* a defendant could not in a Court of law defeat the action by establishing that the plaintiff was indebted to him even in a larger sum than that sought to be recovered, and relief could only be obtained in a Court of equity. To remedy this injustice, it was enacted by the 2 Geo. 2, c. 22, s. 13 *(c)* 'that where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as *executor or administrator,* where there are mutual debts between the testator or interstate and either party, one debt may be set against the other; and such matter may be given in evidence upon the *general issue,* or *pleaded in bar,* as the nature of the case shall require, so as

at the time of his pleading the general issue, where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on evidence, *notice* shall be given of the particular sum or debt so intended to be insisted on, and upon what account it became due, or otherwise such matter shall not be allowed in evidence upon such general issue". This clause was made perpetual by 8 Geo. 2, c. 24, s. 4; and it having been doubted whether mutual debts of a *different* nature could be set against each other, it was by the last-mentioned statute further declared, "that by virtue of the said clause *mutual debts* may be set against each other, either by being pleaded in bar or given in evidence under the general issue, in the manner therein mentioned, notwithstanding that such debts are deemed in law to be of a *different nature*, unless in cases where either of the said debts shall accrue by reason of a *penalty* contained in any bond or specialty, and in all cases where either the debts for which the action hath been or shall be brought, or the debt intended to be set against the same hath accrued or shall accrue by reason of any such *penalty*, the debt intended to be set off shall be *pleaded in bar*, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other as aforesaid"."

These statutes were in Britain supported by another statute relating to set-offs in bankruptcy: 5 Geo. II c.30 (1731). It may however be that set-off existed in bankruptcy at common law prior to the statute of 5 Geo. II: see the discussion in *Halsbury's Laws of England (3rd Edition) Volume 34 page 396 paragraph 673 and note (m)*. However we do not in this report deal with the question of set-off in bankruptcy. That today is regulated by the Commonwealth Bankruptcy Act 1966, which in our opinion covers the field, and leaves no room for any State law on the subject.

However, it may not be entirely accurate to say that there was no way of setting off known to the common law prior to the statutes of set-off. The history of account both at common law and by early statutes is a long one and it is possible that some forms of set-off did exist prior to the statutes of George II, notwithstanding what is usually said in the textbooks.

The question of account is first dealt with in the Statute of Marlborough, 52 Hen. III c.17 (1267), where a right of account was given as against a guardian in socage. Coke says that this action for an account lay at common law and that the statute was merely in affirmance of the common law: *Co. Litt. 89.*

By the Statute of Westminster II (1285) 13 Edw. I c.11, account was extended to all manner of servants, bailiffs, chamberlains and receivers, and it was provided that auditors be assigned to take the account. These auditors were originally, as appears by the Statute, the nominees of the master, or person seeking the account. Later, however, they became judges of record: *see 2 Coke's Institutes 380.* The existence of the action before auditors is one of the reasons why it is so difficult to say whether any rights of set-off applied at common law. It is obvious from *Brooke's abridgement (1576)* s.v. Accompt that practically all these issues went to auditors and therefore did not appear in the reported cases. *Viner: A General Abridgment of Law and Equity (2nd Edition 1791)* s.v. Account shows that a matter might be a good discharge before auditors which would not be a good plea in bar and citing a case in 12 Hen. IV pl.18, at page 153 note 7 and again at page 165. In addition, as is shown by

Jacob: A New Law Dictionary (1739) s.v. Accompt, an action would lie where there were diverse other dealings where an account had been taken in which case action could be taken on the account. As Jacob says:

> "If A sells his Horse to B for 10 and there being divers other dealings between them, they come to an Accompt upon the Whole, and B is found in arrear 5 A must bring his Insimul Computasset for it and not an Indebitatus assumpsit."

That position would still seem to be so today. *Halsbury 4th Edition Volume 16: Equity page 989 paragraph 1465* asays:

> "Where the nature of dealings between two parties necessitates the keeping of an account, consisting of receipts and payments, debts and credits, on either side, no question of set-off arises. It is only by taking the account and ascertaining the balance that the amount due from one party to the other can be ascertained, and it is this balance only that can be recovered."

The right to an account was extended by 13 Edw. I c.23 (1285) to executors, by 25 Edw. III st.5 c.5 (1351) to executors of executors, and by 31 Edw. III c.11 (1357) to administrators. By 4 Anne c.16 s.27 (1705) actions of account could be brought against executors and administrators of guardians, bailiffs and receivers; by one joint tenant, tenant-in-common, his or their executors, administrators as against the other as the other as bailiff for receiving more than his share; and against the executors and administrators of a deceased joint tenant or tenant-in-common.

However, as is not unexpected, it seems probable that some form of set-off was also available in relation to the law merchant. It could hardly have been otherwise when much merchandise was bartered or exchanged between merchants in different countries and money changed hands only in relation to the balance in favour of one or the other of them. *Bacon's Abridgment of the Law Volume 1 (7th Edition 1932) page 36* says that account lay "by one in favour of trade and commerce, naming himself merchant, against another, naming him merchant, and for the executors of a merchant; for between these there was such a privity that the law presumed them conusant of each other's disbursements, receipts and acquittances." So, too, *Bridgman's Equity Digest Volume 1 (3rd Edition 1822)* Under Account VII:

> "It was allowed to be a custom among merchants, that all accounts should be evened between them by way of estoppel, especially in business of the same nature, *Fashon v. Atwood, M. 1679. 2 Ch. Ca.7."*

The statutes of George II however were restricted in the relief which they gave. The rules in relation to set-off under these statutes are set out concisely in *Chitty (op. cit.) at pages 598-9* as follows:

> "The principal rules upon the subject of set-off may perhaps be here concisely alluded to with propriety. The statutes required, 1st, That the debt sued for, and that sought to be set off, should be *mutual* debts, and due to each of the parties respectively in the *same right or character;* so that a joint debt cannot, by virtue of the statutes, and in the absence of an express agreement to that effect, be set off against a separate demand, nor a separate debt against a joint one; but a debt due to a defendant as surviving partner may be set off against a demand on him in his own right, and *vice versa.* Nor can there be any set-off at law or in equity if one of the debts be due to the party in his *private* right, and the other be claimable by his opponent in *autre droit,* that is, as assignee of a bankrupt, executor &c. 2dly. With respect to the nature of the demands to be set off against each other, it will be remarked, that that statutes speak only of mutual *debts;* consequently

the demand of each party must be in the nature of a *debt,* so that a set-off is excluded in all actions *ex delicto;* and it cannot be admitted even in actions *ex contractu,* if the claim of either party be for uncertain or unliquidated damages, as for not delivering goods according to contract, &c. But if the plaintiff declared specially in assumpsit, with the common counts, (as in assumpsit for not accounting, with a count for money had and received,) and he might recover his whole demand, as well upon the common count as upon the special count, the benefit of a set-off may be obtained upon the common count, and the plaintiff shall not be permitted to exclude it by professing to rely upon the special count only. It has been held that a debt of *inferior degree* cannot be set off against one of *higher degree,* not even a bond against rent, because the latter is higher than the former. And 3rdly. The debt attempted to be set off must be *completely due* and in *arrear* at the time the action *was commenced,* not merely at the time of *pleading;* and it must, at the former period, have been a legal and *subsisting* debt, and not barred by the Statute of Limitations, or satisfied in law in consequence of the debtor having been taken in execution upon a judgment by which it was recovered. But an attorney may set off his bill although it was not delivered a month before the commencement of the action; but it ought, if possible, to be delivered time enough to be taxed, and at least should be delivered sufficiently early to prevent the plaintiff from being taken by surprise at the trial. The pendency of an action for the debt set off, or of a writ of error where the set-off is upon a judgment, will not however defeat the right."

The rules as to set-off were extended at the time of the English Judicature Acts 1873-1875. That extension now appears as Section 23 of our Supreme Court Act 1935, which reads as follows:

"(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 propertly 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 or 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 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."

And that section was given effect to in our rules of Court by Order 19 Rule 3 which reads as follows:

"Subject to the provisions of Rule 13 of Order 21, a defendant in an action may set-off, or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim."

A rule in similar form in Queensland was given a restricted connotation by Dixon J. (as he then was) in *McDonnell & East Limited v. McGregor (1936) 56 C.L.R. 50 at pages 57-63* and his judgment was concurred in by McTiernan J. This decision has been the subject of head-shaking in a number of later cases and in many learned articles, but has never been over-ruled by the High Court of Australia. It is for example criticized, though we venture to think on insufficient grounds, by S. B. Granat in *(1965) 5 Melbourne University Law Review 76.* We think that, with all respect to the learned author, Mr. Justice Dixon was dealing with the statutory set-off as fortified by the rule of court and not with the equitable set-off dealt with in later cases: see also *Petersville v. Rosgrae (1975) 11 S.A.S.R. 433.*

We turn then to equitable set-off which has received most attention in recent years. It is dealt with in an article by Dr. Spry in *(1969) 43 A.L.J. "Equitable Set-Offs"* at page 265 and again in the 1st Edition of his book on *Equitable Remedies (1971) at pages 164-169;* and in considerable detail in Chapter 37 of *Meagher, Gummow & Lehane's book on Equity (1975).* The learned authors of the latter book say at paragraph 3706: "There are now four kinds of equitable set-off, (1) where a right of set-off exists at law it will be recognized in equity, (2) an equitable set-off will exist by analogy with a legal set-off, (3) an equitable set-off can exist by agreement, (4) an equitable set-off exists whenever a party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand," and they refer to the judgment of Lord Cottenham, L.C. in *Rawson v. Samuel [1841] Cr. & Ph.161 at 178; 41 E.R. 451 at 458.* The great value of equitable set-off is that in some cases a cross-claim for unliquidated damages could be the subject of an equitable set-off against a common law claim for a liquidated amount provided the cross-claim in some way impeached the plaintiff's title to his claim. There is a discussion of how this came about in the judgment of Gowans J. in *Edward Ward & Co. v. McDougall [1972] V.R. 433 at 435-439.*

Equitable set-off was recognized first in the High Court of Australia in *Hill v. Ziymack (1908) 7 C.L.R. 352 at 361* where Griffiths C. J. said:

> "We speak familiarly of equitable set-off, as distinguished from the set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demands. The mere existence of cross demands is not sufficient. . .".

One of the difficulties with the discussion of this branch of the law is the decision of the Court of Appeal in *Hanak v. Green [1958] 2 Q.B. 9.* In that case the plaintiff sued a defendant builder for breach of contract for failing to complete or properly complete certain work to be done by the builder. The defendant claimed by way of set-off (1) on a quantum meruit in respect of extra work done outside the contract, (2) on the ground that loss was caused by the plaintiff's refusal to admit the defendant's workmen, and (3) for trespass to the defendant's tools. The Court of Appeal held that a court of equity would have held that neither the plaintiff's claim nor the defendant's could have been insisted on without the other being taken into account, and the defendant had therefore an equitable set-off which defeated the plaintiff's claim. We agree with respect with the criticism of this case in *Meagher, Gummow & Lehane (supra).* It is quite impossible to see how the first two of the three claims sought to be set-off in any way impeached the contract upon which the plaintiff was suing.

The cases are discussed in our Supreme Court by the Chairman of this Committee (at pages 7-14 of his judgment) in *Adelaide Steamship Industries Pty. Ltd. v. The Commonwealth* (judgment delivered 18th February 1976).

Cases where unliquidated amounts have been allowed to be set off are such as *Popular Homes Ltd. v. Circuit Developments Ltd. [1979] 2 N.Z.L.R. 642* where Barker J. allowed a set-off in circumstances where the plaintiff, a building contractor, agreed to build five town houses for the first defendant, and after certain negotiations to enable the plaintiff to carry out the work, the first defendant undertook to provide development finance to be secured by mortgage. The first defendant claimed repayment of the mortgage money and the plaintiff was held entitled to set-off damages caused by the plaintiff's inability to complete the project because of the first defendant's default in making finance available.

So, too, where the plaintiffs let warehouses to the defendant and defects appeared causing the warehouses to be evacuated, the plaintiffs were held entitled to their unpaid rent and mesne profits but they were compelled to allow the defendant to set-off the damages which the defendants had suffered through the defective nature of the warehouses: see the judgment of Forbes J. in *British Anzani (Felixstowe) Ltd. v. International Marine Management (U.K.) Ltd. [1979] 2 All E.R. 1063.*

A majority of the Court of Appeal would have gone further in *Federal Commerce & Navigation Co. Ltd. v. Molena Alpha Inc. [1978] Q.B. 927* and would have allowed damages for breach of contract by a ship owner to be set-off against hire under a time charter. However when the matter went on further appeal to the House of Lords in *[1979] A.C. 757* Lord Wilberforce at page 776 refused to pronounce on whether the majority or the minority were right on the point and the other Law Lords did not deal with it. The problems arising from the case are well set out in an article by K. P. E. Lasok called *"Equitable Set-Off"* in *123 Solicitors' Journal (1979) page 379.*

However, although the right of set-off has been extended so considerably in recent years, there are still two exceptions to the rule. The first is that there is no right of set-off as against a claim for freight: see *The Alfa Nord [1977] 2 Ll.LR. 434* and *James & Co. Scheepvaarten Handelmij B.V. v. Chinecrest Ltd [1979] 1 Ll.L.R. 126.* The second exception is that there is no set-off against a claim under a bill of exchange, cheque or letter of credit as these are dealt with in the mercantile world as the equivalent of cash: see the judgment of Connelly J. in *Eversure Textiles Manufacturing Co. Ltd. v. Webb [1979] Q.R.347.*

In England the difference is partly due, in recent years at least, to the fact that their rule of court has been redrawn. It now reads as Order 18 Rule 17 as follows:

> "17. Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim."

It is true that *Spry (op. cit.) pages 168-9* does not think that this rule extends the principles by which set-offs may otherwise be established but has merely a procedural effect. Nevertheless it must be said that the rule now deals separately with set-off and distinguishes it completely from counterclaim which is an important difference.

However the position may stand with regard to the English rule of Court just referred to, it is an inescapable fact that, whether or not *Hanak v. Green (supra)* was rightly decided in the first place, Courts in England, Australia and New Zealand have used it to widen the categories of set-off. Once one gets to the position where some unliquidated demands can be the subject of a set-off, there is really no logical reason why all cannot be. The purists used to cite as their stock example the alleged impossibility of setting off unliquidated damages for libel due to a defendant by a plaintiff against a liquidated claim by the plaintiff against that defendant. Really it is impossible to maintain the distinction. If A claims money from B and B has a right to have a valid claim against A assessed and quantified, there is no logical reason why B should not have his claim quantified and set off against the demand by A, unless, as Maitland said, the forms of action are to rule us from their graves.

Accordingly we recommend that the statutes of set-off be repealed as part of the repeal of imperial law in this State and that is its place that it be enacted that set-off be an allowable plea in relation to all cross-claims, liquidated or unliquidated, whether assessed or not assessed at the date of the plea, and whether arising out of the same transaction or series of transactions or not. This would of course require an amendment to Section 23 of our Supreme Court Act. It should further be enacted that this rule is not to apply to a set-off claimed against money due under a negotiable instrument, or letter of credit, as we think that the mercantile usage by which these are treated as the equivalent of cash should be preserved. We have not in this report dealt with the subject of cross claims in the Industrial Court as these are the subject of special legislation in the Industrial Code 1967.

We think that the special type of set-off, appearing mainly in building cases, following a decision of the Court of Exchequer in *Mondel v. Steel [1841] 7 Meeson & Welsby 858; 151 E.R. 1288* as discussed in the judgment of Windeyer J. in *Healing (Sales) Pty. Ltd. v. Inglis Electrix Pty Ltd. (1968) 121 C.L.R. 584 at 619-620,* is only a special instance of the general rule and should be subject to our recommendations in this report. On the other hand the special set off in relation to Sale of Goods contained in Section 52 of the Sale of Goods Act 1895 is complementary to Section 11 of that Act and we think it better to leave the law as it is in relation to sale of goods as this would raise problems outside our present remit (see the notes in Chalmers' Sale of Goods 16th Edn. 1971 on the English cognate sections 51 and 11) and this matter would be better dealt with in a revision of our Sale of Goods Act.

Mr G. Hackett-Jones, the Parliamentary Counsel, has been kind enough to draft a bill to give effect to our recommendations and we attach it as an appendix to this report.

We have the honour to be

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
M. F. GRAY
A. L. C. LIGERTWOOD
G. F. HISKEY

Law Reform Committee of South Australia

Mr P. R. Morgan and Mr D. F. Wicks were absent when this report was signed.

14th July, 1983.

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A BILL FOR

An Act to amend the law relating to counterclaims and set-off: and for other purposes.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:

Short title.

1. This Act may be cited as the "Counterclaims and Set-Off Act, 1983".

Commencement.

2. This Act shall come into operation on a day to be fixed by proclamation.

Interpretation.

3. (1) In this Act, unless the contrary intention appears—

"action" means an action or proceedings before a court:

"claim" means the assertion, in action, of any estate, title, interest or right at law or in equity:

"court" means a court of tribunal invested under the law of the State with jurisdiction to adjudicate upon a claim but does not include an industrial tribunal:

"industrial tribunal" means any court, commission, committee or tribunal established under the Industrial Conciliation and Arbitration Act, 1972.

(2) Where the words "claim" and "cross-claim" are used in contradistinction, they differentiate opposing claims between the parties to an action.

(3) For the purposes of this Act, a claim and cross-claim constitute mutual claims where—

(a) both are claims for the recovery of pecuniary amounts;

and

(b) no party to both claim and cross-claim sues in a capacity that is different from the capacity in which he is sued.

Cross-claims.

4. (1) A party to an action against whom a claim has been made may, subject to any relevant rules of court, introduce a cross-claim into the action.

(2) A cross-claim may be introduced into an action notwithstanding that—

(a) the claim and the cross-claim are founded on separate and unrelated causes of action;

(b) the nature of the relief sought upon the cross-claim differs from the nature of the relief sought upon the claim;

(c) the claim is for a liquidated amount and the cross-claim is for an unliquidated amount or the claim is for an unliquidated amount and the cross-claim is for a liquidated amount;

(d) the capacity in which a party sues upon the claim or the cross-claim is different from the capacity in which he is sued on the cross-claim or the claim;

(e) the cross-claim introduces new parties into the action;

or

(f) the claim is a claim for rental payable under a lease, or otherwise arises from or relates to, an interest in land.

(3) Where claim and cross-claim constitute mutual claims—

(a) it is unnecessary for either claim to be pleaded as a set-off against the other;

(b) unless the court otherwise orders—

(i) the claim shall, without further pleading, operate as a defence or partial defence to the cross-claim;

and

(ii) the cross-claim shall, without further pleading, operate as a defence or partial defence to the claim,

(but this paragraph does not prevent a party from pleading additional defences);

and

(c) if the court finds liabilities to have been established upon both claim and cross-claim, it may give judgment based wholly or in part upon the difference, or differences, between the respective liabilities.

(4) Notwithstanding the foregoing provision of this section—

(a) no cross-claim may be introduced into an action founded entirely upon rights alleged to arise under a negotiable instrument;

(b) no cross-claim may be introduced into an action if the whole or any part of the subject-matter of the cross-claim lies within the exclusive jurisdiction of an industrial tribunal.

Procedure to be followed where cross-claim is not justiciable by the court in which the action was commenced.

5. (1) Subject to this Act, a cross-claim may be introduced into an action notwithstanding that it is not justiciable by the Court before which the action was commenced, but in the event of such a cross-claim being introduced, the following provisions apply:

(a) the action shall not proceed to trial until an order has been made by the Supreme Court under this section;

(b) any party to the action may apply to the Supreme Court for an order under this section (but the costs of the application shall, unless the Supreme Court otherwise orders, be borne by the party by whom the cross-claim was introduced);

(c) upon an application under this section the Supreme Court may, after considering the nature of the claim and cross-claim and any other relevant factors, order—

(i) that action be heard and determined in the court before which it was commenced;

or

(ii) that the action be removed to some other court;

(d) the court that is, in accordance with the order of the Supreme Court, to hear and determine the action shall, notwithstanding any other Act or law, have jurisdiction to hear and determine both the claim and cross-claim;

(e) where a court (not being the Supreme Court) before which an action is, in accordance with the order of the Supreme Court, to be heard and determined does not have, independently of

this section, jurisdiction to hear and determine both claim and cross-claim, its judgment may, by leave of the Supreme Court, be enforced as a judgment of the Supreme Court.

(2) The powers of the Supreme Court under this section may be exercised by a Judge or Master in Chambers.

Powers of court.

6. (1) Where a court is of the opinion that a cross-claim has been introduced for the purpose of obstruction or delay, it may—

(a) strike out the cross-claim;

or

(b) order that the claim and cross-claim be separately tried.

(2) Where a court is of the opinion that there is proper cause to do so, it may order that a claim and cross-claim be separately tried.

Exclusion of certain Acts of the Imperial Parliament and saving provision.

7. (1) The following Acts of the Imperial Parliament have no further force or effect in this State:

2 Geo. II c.22

3 Geo. II c.27

8 Geo. II c.24

(2) Except as provided in subsection (1), this Act does not derogate from—

(a) any other law that provides for—

(i) the adjustment of rights and liabilities as between the parties to a transaction;

or

(ii) the reduction or abatement of rights or liabilities by reference to other rights or liabilities;

or

(b) rules—

(i) governing the ranking of claims;

or

(ii) providing, in the case of mutual credits, mutual debts or other mutual dealings, for the taking of an account and the adjustment of rights and liabilities on the basis of that account,

in the winding-up of a body corporate.

D. J. WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA