ONE HUNDRED AND FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

MAINTENANCE, CHAMPERTY, EMBRACERY AND BARRATRY, MALICIOUS PROSECUTION AND ABUSE OF PROCESS

1987

ONE HUNDRED AND FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO MAINTENANCE, CHAMPERTY, EMBRACERY AND BARRATRY, MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

TO:

The Honourable C.J. Sumner, M.L.C.,

Attorney-General for South Australia.

Sir,

In our Fifty-Ninth Report in respect of Imperial Laws Application in relation to the Criminal Law we recommended that the Imperial Statutes relating to champerty and maintenance not be repealed until further consideration had been given to subsuming these offences and torts under the general rubric of abuse of the processes of the Courts. You subsequently referred these topics to us for further consideration and report. In addition to maintenance and champerty we have dealt with the historically closely related topics of embracery and barratry.

We will deal with maintenance, champerty, embracery and barratry first and then with malicious prosecution and abuse of process.

Champerty, maintenance, barratry and embracery are all offences which are the subject of Imperial Statutes dating back to the thirteenth century. A substantial body of common law developed, partly from the statutes, particularly in regard to champerty and maintenance.

In the early statutes the term "maintenance" appears to have been ill-defined and to have been used to cover what later became divided into maintenance, champerty, embracery and barratry.

Coke used it in this broad sense. Conduct which later became defined as champerty was the first to meet with legislative disapproval and it may have been illegal earlier at common law.

"Maintenance" has been defined in many ways. Until the reign of Edward I it probably meant no more than to support the suit of another. This was not a wrong. It later came to mean the unlawful assistance of another in his suit and took on an increasingly technical meaning. Coke defined maintenance in 2 Inst. p.212 as:

> "an unlawful upholding of the Demandant or Plaintiffe, Tenant or Defendant in a cause depending in suit, by word, writing, countenance or deed."

He said that maintenance was of two types - firstly manutenentio curialis which was maintenance in pending litigation and secondly manutenentio ruralis which he indicated involved possession of land.

1 Hawkins P.C. Ch.83 Sect. 2 defines the latter as assisting another in his pretensions to land by taking, or holding possession of it by force or subtlety. Coke says this form of maintenance is punishable only by the King. On the other hand Winfield History of Conspiracy and Abuse of Legal Procedure p.132 is of the opinion that maintenance related only to litigation and that certainly seems to be the position today. He regards assisting in pretensions to land as akin to barratry.

Stephen's Commentaries on the Laws of England 15th ed. (1908) at p.210 defines maintenance as:

> "an officious intermeddling in an action that in no way belongs to one; by maintaining or assisting either party, with money or otherwise, to prosecute or defend it. .... This is an offence which keeps alive strife and contention, and perverts the remedial

> process of the law into an engine of oppression. ... A man may, however, with impunity, out of charity and compassion, maintain the suit of his near kinsman, servant, or poor neighbour; and he may also maintain any action or legal proceedings in which he has any pecuniary interest, actual or contingent."

The Law Commission of the United Kingdom in its Report on Maintenance and Champerty in 1966 said:

> "The modern view of maintenance is that it consists of the procurement by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings, without lawful justification."

In our opinion non-financial assistance may amount to maintenance: see Report No. 27 of the Australian Law Commission at page 176.

The word "champerty" or "champarty" is said to be derived from the Latin "campum partire" or "campi partitio" meaning a division of the field. Champerty was first legislatively defined in 1304 in the Ordinance concerning Conspirators 33 Edward I as:

> "champetors be they that move pleas and suits, or cause to be moved either by their own Procurement, or by others, and sue them at their proper costs, for to have part of the land in variance or part of the gains."

Champerty is nowadays regarded as an aggravated form of maintenance being an arrangement by which the maintainer is promised a share of the subject matter or proceeds of the litigation. Champerty has always been regarded by the law as a more serious evil than illegal maintenance and was the first to be prohibited by Act of Parliament.

Much of the modern authority on champerty involves solicitors' agreements with their clients concerning the solicitor's

remuneration, especially in relation to what in America are called "contingency fees".

"Barratry" is used in three distinct contexts - ecclesiastical law, marine law and the general criminal and civil law. Only the last is relevant to this report. The origins of the term are obscure. Although it is used in the early statutes it may not have had a very precise meaning and it appears to have been a general term indicating the stirring up of disputes or fighting between others by deceitful means. The first recorded judicial definition appears to be in Coke's report of: The Case of Barratry (30 Eliz.) 8 Rep. 36; 77 E.R. 528:

> "A common barretor is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in Courts, or in the country, in Courts of Record, and in the County, Hundred, and other Inferior Courts. And in the country in three manners.
>
> 1. In disturbance of the peace.
> 2. In taking or detaining of the possession of houses, lands of goods, & c., which are in question or controversy, not only by force, but also by subtilty and deceit.
> 3. By false invention and sowing of calumny, rumours, and reports, whereby discord and disquiet arises between neighbours."

Jowitt's Dictionary of English Law 2nd ed. p.192 defines barratry as:

> "At common law it means the offence committed by a common barrator, that is to say, one who habitually moves, excites or maintains suits or quarrels, whether at law or otherwise; the punishment therefor was fine and imprisonment, and if the offender belonged to the legal profession, he was disabled thereby from further practice."

Embracery is the attempted or actual corruption, influencing

or instruction of a jury to favour one side by money, promises, letters, threats or persuasions or other means other than by evidence and arguments in open court. A juror who is so influenced or who accepts such bribes also commits embracery. Coke treated this as a third form of maintenance - Co. Litt. 369a:

> "The third is when one laboureth the jury, if it be but to appeare, or if he instruct them, or put them in feare, or the like, he is a maintainer, and he is in law called an embraceor, and an action of maintenance lyeth against him; and if he take money; a decies tantum may be brought against him. And whether the jury passe for his side or no, or whether the jury give any verdict at all, yet shall he be punished as a maintainer or embraceor,either at the suit of the King or partie."

Although the meanings of the terms and views of what constitutes these offences has changed substantially over the seven hundred years since the first statutes about them were made, the basic idea behind them all has remained constant, namely, that no-one should be permitted to abuse, or to benefit from the abuse of, the judicial process.

Some understanding of the social and legal background in which the old statutes were passed is essential to an understanding of them and the modern concepts. Up until the time of the Tudors the King's control over England was often somewhat tenuous. The legal system was not well developed and was corrupt by our standards. Wealthy and powerful men kept households much like the King's court, consisting of retinues of advisers, officers and servants. They demanded loyalty, support by physical presence on important occasions, and contributions of

money, goods and service in return for their physical protection, patronage, education of sons and so on. As Stephen said in History of the Criminal Law of England Volume III (1883) p.238:

> "So long as all these little kingdoms were well and virtuously ruled, they secured to the age in which they existed many social advantages which are altogether wanting in our times; but they were singularly liable to abuse, and when they were abused they threw everything into confusion.
> This explains what the offence of maintenance was when the statutes referred to were passed. It was neither more nor less than chronic organised anarchy, striking at all law and government whatever. The history of the times shows how vigorous were the associations by which the members of the small courts described bound themselves to maintain and uphold each others' interests on all occasions against all comers. A king like Edward I or Edward III or Henry IV or Henry V, might by force of character or by great military success enforce the law and put down the breakers of the law; but a weak king - Edward II, Richard II, Henry VI - was powerless before them, whatever statutes he might pass. The offence of maintenance or armed anarchy was not finally suppressed till the days of the Tudors, and it is very remarkable that it was then put down, not by new laws, but by the vigorous, unflinching execution of the old ones by a severe court acting under the orders of a succession of kings of unusual force of character, who put themselves at the head of the great movement of the age in which they lived."

Holdsworth says in A History of English Law 4th ed. Volume III at p.324-5:

> "In a relatively primitive society private war is the natural and most congenial remedy of those who are or think they are wronged; and, when the strength of the law makes a recourse to this expedient dangerous or impossible, when those who are wronged are compelled to have recourse to the law, much of the unscrupulousness and trickery which accompany the waging of a war are transferred

> to the conduct of litigation. The courts are besieged with angry litigants who fight their lawsuits in the same spirit as they would have fought their private or family feuds. This, as we have seen, is a phenomenon which recurs in many nations at many periods: but it was specially apparent in mediaeval England. .....
> contemporaneously with the growth of the power of the royal courts, we get the growth of many various attempts to pervert their machinery; and, when the royal power weakened, these attempts were so frequently and successfully made that the law was subverted and civil war ensued.
> But naturally the struggle of the courts with these forms of lawlessness produced the growth of a body of law, both enacted and unenacted, which defined and distinguished many various offences. Both the statutes and the Year Books show that, by the end of the mediaeval period, it had grown to a large bulk. Such offences as rescous, escape, and prison breach were largely illustrated in the books. But more interesting than these are certain offences which were more directly designed to pervert the machinery of justice. These are the offences of forgery, perjury, conspiracy, deceit, champerty, maintenance, and embracery."

Possession or ownership of estates in the land carried social status and many rights and privileges, and was largely the basis of social and political power. There were many disputes over land, and fictitious claims or defences were not uncommon. Thus a person desiring possession of land or defending his right to land might agree with others to share the land in return for assistance in forcing the present occupant out of possession, financial support in litigation, giving or procuring false evidence, bribing, threatening or otherwise influencing Court officials judicial officers and jurors, intimidating the Court by filling the Court room with supporters dressed in livery or otherwise improperly influencing the course of justice. The

church was not immune from such chicanery. Court officials and the judiciary sometimes refused to perform their duties unless paid by the litigants to do so. Payment was sometimes a share of the proceeds of the litigation. It also appears that pleaders stirred up litigation and took shares in the proceeds in addition to or instead of payment of fees for service. Winfield says in 35L.Q.R. 143 that in early times maintenance and champerty "were known almost exclusively as modes of corruption and oppression in the hands of the King's officers and other great men."

As the importance of ownership of land diminished and as the King's rule and the judicial system increased in strength there was a gradual change in the nature of the conduct which attracted proceedings for maintenance, champerty and embracery and proceedings for barratry became rare.

Some writers including Coke assert that the common law preceded the early statutes and that maintenance and champerty were indictable as crimes and actionable as torts at common law. Halsbury 3rd. ed. Vol. 10 and Archbold Criminal Pleadings, Evidence and Practice 41st. ed. (1982) also state that they are offences at common law. The Full High Court in Clyne v. The New South Wales Bar Association (1960) 104 C.L.R. 186 at p.203, and the House of Lords in Neville v. London Express Newspaper (1919) A.C. 368 both expressed the view that maintenance was a common law offence. Winfield op. cit. demonstrates that this is historically incorrect. But for the purposes of this Report we think we must work on the basis that the offences existed at common law independently of the statutes.

Maintenance and champerty now exist:

(a) as crimes

(b) as torts

(c) as rendering void contracts tainted with them, and

(d) possibly as a grounds for obtaining an injunction or a stay of proceedings, although there is authority to the contrary.

Embracery has been confined in South Australia to criminal proceedings since the abolition of civil juries. Section 83 of the Juries Act, 1927 (S.A.) provides an indictable offence which is equivalent to the old offence of embracery. There is no express repeal of the imperial statutes or the common law of embracery, which in our opinion was received and still exists in South Australia in addition to Section 83. It is also a tort. An agreement involving embracery would be void as contrary to public policy. It could also result in the discharge of the jury or in a retrial.

Barratry seems to have fallen into oblivion in this State.

IMPERIAL STATUTES

The uncertainties as to date and meaning of some of the statutes set out below are discussed by Winfield op.cit. We have accepted as accurate the dates, titles and translations given by the editors of the Revised Statutes and, in the case of statutes repealed in England prior to the publication of the Revised Statutes, by Ruffhead.

1. Statute of Westminster I 3 Edw. I c.25(1275)

   This statute forbids champerty by the King's officers and provides for punishment at the King's pleasure. It is still in force in South Australia.

   It was not repealed in England until 1967.

2. Statute of Westminster I. 3 Edward I c.28(1275)

   The side note in the Revised Statutes indicates that this statute forbids maintenance by officers of the Courts. It forbids the King's clerks and justicers' clerks from receiving the presentment of any church which is the subject of litigation. We would now class this as champerty. It then forbids clerks of justicers or sheriffs from taking part in any pending litigation (what we would now call maintenance) or from working any fraud "whereby common right may be delayed or disturbed". The punishment for the former is loss of the church and loss of his service (i.e. his

office) and the same for the latter "or more grievously". This Statute was also repealed in England in 1967. That part which does not relate to the Church is in force in South Australia.

3. Statute of Westminster I 3 Edw. I c.29(1275)

This statute provides that if any serjeant, pleader (i.e. lawyer) or other do any manner of deceit or collusion in the King's court or consent thereto he shall be imprisoned for a year and a day and if he is a lawyer he is to be disqualified. The extent of the disqualification is not clear.

As we said in our Sixty-First Report at page 3 these matters are sufficiently covered by the general powers of the Court in relation to contempt and by the provisions of the Legal Practitioners Act, 1983 and the Statute is not needed here. It was repealed in England by the Statute Law Revision Act, 1948.

4. Statute of Westminster I 3 Edw. I c.33(1275)

This statute was intended to suppress abuses which arose from the conduct of suits by attorneys and which Winfield op cit. at p.202 describes as "perversion of agency in litigation". It provides for grievous punishment by the King of barretors and maintainers of quarrels and persons appearing without proper letters of attorney and also of any sheriff who permits such persons to conduct suit without the permission of all the parties. We described these abuses in more detail on page 6 of our Fifty-Ninth Report. As we said

in our Fifty-Eighth Report at page 4, we do not think that the mischief against which the Statute is directed is in existence now. The statute was repealed in England by the Statute Law Revision Act, 1863.

5. Statute Westminster II 13 Edward I c.49(1285) or Statute 13 Edward I Statute I c.49.

It appears that this is the first statute in which the term "champerty" is used. It forbids the receiving of any church, advowson of a church, land or tenement in fee by gift, purchase, champerty or "to farm", the title to which is the subject of litigation.

According to Coke 2 Inst. 484 it had been uncertain whether Statute 3 Edward I c.25 extended to such high officers of the King as the Chancellor and other members of the King's Council. This statute extends the former by specific reference to them. It also provides for punishment of both parties to the illegal agreement at the King's pleasure.

The statute is probably in force in South Australia. It was repealed in England by a Statute Law Revision Act, 1948.

6. Statute 28 Edward I c.10(1300)

This Statute recites that the King has provided a remedy by a writ out of Chancery against conspirators, false informers and procurers of juries. At that time "conspirators" had a much wider meaning than nowadays and referred to conduct intended to pervert the course of justice. It then provides that notwithstanding the availability of a writ the judges of either bench and of assize are to try complaints made of

such offences by a jury even without a writ. This statute may record the beginning of a civil remedy for such offences.

This statute is probably in force in South Australia. It was not repealed in England until 1969.

7. Statute 28 Edward I c.11(1300)

This statute provides a general prohibition against champerty, although the term used is "maintenance". The punishment for a person taking the share of the proceeds of litigation is forfeiture to the King of lands and goods of equivalent value. Any subject was permitted to sue on behalf of the King. Finally it provides that it does not prohibit subjects from employing pleaders or men learned in the law for a fee or for the assistance of parents and next friends.

This statute is probably in force in South Australia. It was repealed in England by the Criminal Law Act, 1967.

8. Ordinance 33 Edward I (1305). An Ordinance concerning Conspirators. Ruffhead entitles it "A Definition of Conspirators, made Anno 33 Edw. I Stat.2. and Anno Dom. 1304.

Winfield op.cit. maintains that the Ordinance was made in 1293.

At the time the ordinance was made there was apparently no clear definition of what amounted to conspiracy, maintenance and champerty and no clear distinction between them.

According to Winfield op cit. at p.27 there was urgent need of strengthening the law against conspirators as was shown by a complaint of many Londoners to Parliament that justice would never be done to plaintiffs because of the conspiracies and machinations of the City clerks and officers and their corrupt favouring of wrongdoers.

The Ordinance first defines conspirators and includes in that definition "stewards and bailiffs of great lords, which by their seignory, office or power undertake to bear or maintain quarrels, pleas or debates, that concern other parties than such as touch the estate of their lords or themselves". We would now call this maintenance.

It then defines champetors as:

> "Champetors be they that move pleas and suits or cause to be moved either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains."

Ruffhead notes that the definition of champetors was not in the original statute but, as it is included in the Revised Statutes, was treated by the early writers as being part of the statute, and has been relied upon by the Courts (e.g. Haseldine v. Hoskin [1933] 1 K.B. 822), we consider that it should be treated here as part of the statute.

This Ordinance was partly repealed in England in 1825 in so far as it related to combinations of workmen or other persons to obtain an advance of or to fix wages, by Statute

6 George IV c.129. In this respect it never applied in South Australia, but in other respects it does. It was completely repealed in England in 1967 when the offences and torts of maintenance and champerty were abolished.

Statutum de Conspiratoribus (in Ruffhead described as "The Statute of Champerty", 33 Edward I Stat. 3(1305))

The Revised Statutes treat this as being of uncertain date. Winfield says that it was probably made in 1293. It refers to the previous prohibition of champerty and prescribes a new remedy of three years imprisonment and fine at the King's pleasure for both the person convicted of taking "for maintenance" and the person consenting thereto. Section 4 sets out the form of writ to be used. It contains a plea of conspiracy and trespass. This is another instance of the wide meaning of conspiracy.

It then provides that "if any man shall be convicted at the suit of any complainant of any such offence, let him be imprisoned until he hath satisfied the party grieved, and towards the King let him be grievously redeemed". Satisfying the party grieved probably meant making restitution or paying compensation. This appears to be separate from the three years imprisonment previously provided for and we think it is a major step in the development of a civil remedy. According to Winfield op. cit. the procedure was for the citizen or the King to issue a writ as prescribed by this statute and then the justices issued a judicial writ commanding the appearance of the alleged champetor. The

matter then apparently proceeded as a criminal trial and resulted in acquittal or conviction.

The procedural aspects are now obsolete and the form of writ was repealed in England by a Statute Law Revision Act 1887. The balance of the statute was repealed there by the Criminal Law Act 1967. As we indicated in our Fifty-Ninth Report at page 7 it is probably partly in force in South Australia.

10. Statute 1 Edward III Statute 2 c.14 (1327)

Apparently the previous statutes had not resulted in effective suppression of unlawful maintenance. It provides that none, mentioning particularly the King's councillors, ministers and household officers, "shall take upon them to maintain Quarrels nor Parties in the Country, to the Let and Disturbance of the Common Law". This may be the source of Coke's assertions of the existence of Manutenentia ruralis. The Statute is printed in Halsbury's Statutes 4th edition under the heading "Constitutional Law". It was repealed in England in 1967. It is probably still in force in South Australia.

11. Statute I Edward III Statute 2 c.16 (1327)

This Statute gives authority to appoint Justices of the Peace and contains a prohibition of the appointment of "Maintainers of Evil" and "Barretors in the Country". In our Fifty-Eighth Report at page 4 we discussed the relevance of this statute in the context of the Governor's power to appoint Justices of the Peace and recommended that

it be retained in South Australia at least for the time being. It was repealed in England by the Statute Law Revision Act, 1948.

12. Statute 4 Edward III c.11 (1330)

The Statute recites "where in times past divers people of the realm, as well great men as others, have made alliances, confederacies, and conspiracies to maintain parties, pleas, and quarrels, whereby divers have been wrongfully disinherited; and some ransomed and destroyed; and some, for fear to be maimed and beaten, durst not sue for their right, nor complain, nor the jurors of inquests give their verdicts". It then provides that justices shall "enquire, hear and determine, as well at the King's suit, as at the suit of the party, of such maintainers, bearers and conspirators, and also of them that commit champerty, and of all other things contained in the aforesaid article". This is usually regarded as the first statute conferring a purely civil remedy for maintenance, champerty, embracery, barratry and conspiracy.

This Statute is probably still in force in South Australia. It was repealed in England by the Statute Law Revision and Civil Procedure Act 1881 and the Statute Law Revision Act 1950.

13. Statute 5 Edward III c.10 (1331)

This statute provided for punishment by imprisonment of jurors who took bribes. It was repealed by the Juries Act, 1825 and so was never part of South Australian law.

14. Ordinance for the Justices = 20 Edward III (1346) (in Ruffhead printed as several separate statutes made at Westminster in 20 Edward III).

The preamble recites that the King has received many complaints that the law "is the less well kept and the execution of the same disturbed many times by maintenance and procurement, as well in the court as in the country". Chapters 1 to 3 are dealt with in our other reports concerning inherited imperial law and are not directly relevant to this topic. Chapters 4, 5 and 6 are dealt with seriatim below. All were repealed in England by the Statute Law Revision and Civil Procedure Act, 1881 and the Statute Law Revision Act, 1950.

14a 20 Edward III c.4 (1346)

This chapter forbids all persons to "take in hand quarrels other than their own" or to maintain others quarrels either privately or openly for "gift, promise, amity, favour, doubt nor fear nor for none other cause in disturbance of law and hindrance of right". This chapter is probably in force in South Australia.

14b 20 Edward III c.5 (1346)

This chapter appears in Ruffhead, but not in the Revised Statutes. It requires lords and great men to discharge from their retinue all maintainers and provides for their trial. This statute was never applicable in South Australia.

14c 20 Edward III c.6 (1346)

This chapter ordains that justices of assize shall have

commissions to inquire into and punish at the suit either of the King or a party a variety of abuses of the Courts which are listed. It is historically informative of the corruption that then existed. Included in the list are maintainers, embracers and jurors and court officials taking "gifts, rewards and other profits to execute their office". Although the statute requires the Chancellor and Treasurer to give "speedy remedy" it is not clear whether this included the award of damages or restitution.

As we said in our Sixty-First Report at page 6 such conduct could be dealt with here as the common law offence of perverting the course of justice. It was repealed in England by the Statute Law and Civil Procedure Act, 1881 and the Statute Law Revision Act, 1950.

15. Statute 34 Edward III c.8 (1360)

This statute provided that if a party to proceedings successfully sued any juror for having been improperly influenced he was to have the fine and damages and the juror was to be imprisoned for one year. This appears to have been the first Statute which clearly permitted awards of damages for embracery. It was repealed in 1825 and so was never part of South Australian law.

16. Statute 38 Edward III c.12 (1363)

This statute refers to statute 34 Edward III c.8 and provides for a more severe penalty for jurors who receive bribes and for the person giving the bribe. The penalty is payment of ten times what he has taken or given, half to the

King and half to the person suing, and in default of payment twelve months imprisonment.

Section 83 of the Juries Act, 1927 now deals with all unlawful influencing of Jurors and provides for a penalty of up to ten years imprisonment. The statute was repealed in England in 1863.

17. Statute I Richard II c.4 (1377)

This statute forbids maintenance by any person within the realm of England, this time on pain of more flexible penalties, no doubt intended to give scope for more severe penalties than those previously provided for.

In our Seventy-Eighth Report at page 25 we said that the statute appeared to be confined to events occurring within the realm of England, but recommended that for certainty it be repealed here. It was repealed in England in 1967.

18. Statute I Richard II c.7 (1377)

This statute recites that divers people give liveries in return for maintenance of quarrels, to the great mischief and oppression of the people, enjoins the observance of previous statutes and prohibits the giving of livery for maintenance of quarrels or other confederacies upon pain of imprisonment and forfeiture to the King.

It was probably never applicable to South Australian conditions. It was repealed in England by the Statute Law Revision Act, 1863.

19. Statute I Richard II c.9 (1377)

This Act recites that many people having good title to

lands or goods are delayed in actions for their recovery because the occupiers convey the property to great men so that they "cannot nor dare not" pursue their claims, and also that many disseise others of their tenements and then sometimes alienate them to great men " to have maintenance" and sometimes to persons unknown to the disseisee with the intent of fraudulently delaying the recovery of the land. It forbids such transactions, declares them void and provides for double damages as well as recovery without regard to the alienation. A one year time limit for action was set. Apparently the Statute was narrowly construed by the Courts and it was altered by subsequent statutes, particularly by Statute 32 Henry VIII c.9 (1540) which is discussed later.

The Statute may be in force in South Australia, but it serves no useful purpose. It was repealed in England by the Statute Law Revision Act 1863.

10. Statute 7 Richard II c.15 (1383)

This statute confirms and enjoins the observance of Statutes against maintenance made in the reign of Edward III and in the first year of the reign of Richard II and so does not add to the previous law. It was repealed in England in 1967.

11. An Ordinance 13 Richard II Statute 3 (1389) (in Ruffhead)

This is printed in Ruffhead only in law French but the title says that it is an Ordinance to "prevent maintenance in Judicial Proceedings". Winfield op. cit. at p.156 says that

it prohibits maintenance and the giving of liveries and required the ousting of maintainers (Winfield says "professional litigants") from their retinues. The overawing of Courts by liveried servants is something which never occurred in South Australia, and so the Statute has never been applicable here. It was repealed in England by the Statute Law Revision Act 1863.

22. Statute 4 Henry IV c.7 (1402)

This statute extended the time for bringing actions under the Statute 1 Richard II c.9 from one year to the life of the disseisor.

Time limits are adequately dealt with by South Australian legislation and this Statute is not needed now. It was repealed in England by the Statute Law Revision Act 1863.

23. Statute 4 Henry IV c.8 (1402)

This is a penal statute against wrongful forcible entry of land and taking of chattels. It gives the Chancellor of England power to grant (inter alia) special assize against anyone who makes forcible entry "by way of maintenance" and provides for a year's imprisonment and double damages payable to the aggrieved person.

This Statute was probably never in force in South Australia. It was repealed in England by the Statute Law Revision Act 1863.

24. Statute 8 Henry VI c.4 (1429)

This statute strengthened the statutes of Henry IV concerning maintenance and liveries. It was repealed by

Statute 3 Car. I c.4 and so was never part of South Australian law.

25. Statute 8 Henry VI c.9 (1429)

This is another statute against wrongful entry of land and concerns maintenance in connection with wrongfully taking possession of another's land. It recites the loopholes in Statute 15 Richard II c.2 and that "many wrongful and forcible entries be daily made in lands and tenements by such as have no right, and also divers gifts, feoffments, and discontinuances sometimes made to Lords, and other puissant persons, and extortioners ... to have maintenance, and sometimes to such persons as be unknown to them ... to the intent to delay and defraud ..." It confirms the previous statutes and provides a procedure for the recovery of such lands. Section 3 renders void all such transactions involving maintenance. Section 6 increases the penalty for forcible entry to treble damages, fine and ransom.

Transactions involving maintenance are still today regarded as void, although so far as we can determine the penalty has never been applied in this State.

Section 243 of the Criminal Law Consolidation Act deals with part of the subject matter of this Act.

As we said in our Fifty-Ninth report, at page 12 the statute is still in force in South Australia, was not repealed in England until 1977, and should not be repealed here until the matter is dealt with in a new criminal statute.

26. Statute 32 Henry VIII c.9 (1540)

This statute again recites that the just administration of the law is greatly hindered by maintenance, embracery, champerty, subornation of witnesses, sinister labour, buying of titles and pretenced rights of persons not being in possession, whereupon great perjury has ensued, and much "inquietness, oppression, vexation, troubles, wrongs and disinheritance hath followed". It confirms all previous statutes concerning maintenance, champerty and embracery.

Section 2 is designed to prevent fraudulent land transactions by way of pretenced titles.

Section 3 comprehensively prohibits unlawful maintenance in any proceedings in any court of champerty and other abuses of the judicial process which it describes as "embrace any freeholders or Jurors, or suborn any Witness, by Letters, Rewards, Promises, or any other Sinister Labour or Means, for to maintain any Matter or Cause, or to the Disturbance or Hindrance of Justice, or to the Procurement or Occasion of any manner of Perjury by false Verdict or otherwise, in any manner of Courts aforesaid. The penalty is forfeiture of £10, half to the King and half to whoever will sue. The Law Commission of the United Kingdom in its report concerning Abolition of Certain Ancient Criminal Offences dated 1966 expressed the view that the original purpose of this section was to introduce as an alternative to a criminal prosecution, an action by a common informer for interference with the course of justice in proceedings concerned with the title to land, that abolition of the

section would not affect proceedings on indictment at common law for maintenance and that the section should be repealed. Section 4 excepts transactions by those in lawful possession.

Section 5 provides for proclamation of the Statute and has expired.

Section 6 limits prosecutions to a time within one year of the offence.

In England Section 2 was repealed by the Land Transfer Act, 1897, part of section was repealed by the Perjury Act, 1911, section 5 was repealed by a Statute Law Revision Act, 1863 and the balance was repealed by the Criminal Law Act, 1967. It was repealed in Queensland by the Criminal Code Act, 1899.

The statute was held to be in force in New South Wales in Nichols v. Anglo-Australian Investment Finance & Land Co. (1890) 11 L.R. N.S.W. 354 and in Victoria in a'Beckett v. Mathewson (1861) 1 W. & W. (L) 29 and in our opinion is still in force in South Australia.

We confirm our recommendation in our Fifty-Fourth Report at page 11 that section 3, which deals with criminal sanctions for a variety of abuses of judicial process and section 5 which has expired, be repealed in South Australia now; but that the balance be retained until we have reported generally on the topic of real property.

7. Statute 33 Henry VIII c.10 (1541)

This statute required Justices to conduct additional

sittings to enquire of several prevalent offences including maintenance and embracery. It was repealed by Statute 37 Henry VIII c.7(1545) when it was discovered that six-weekly sessions were too onerous. It was never part of South Australian law.

28. Statute 37 Henry VIII c.7 (1545)

This statute, which repealed the 1541 statute mentioned above, was itself repealed in England by the Statute Law Revision Act, 1863. It is not needed now.

29. Statute 18 Elizabeth I c.5 (1576)

This is a statute to reform proceedings for penal and qui tam actions and to eliminate abuses by common informers. We discussed its provisions in our Ninety-fourth Report. Section 6 (Section 5 in Ruffhead) exempts from these reforms any person "grieved by Means of any Manner of Maintenance, Champerty, Buying of Titles or Imbracery", who is entitled to proceed in the same way as before the passing of this Statute. This indicates that maintenance, in its broad sense, was then regarded as sufficiently pernicious to warrant prosecution. In our previous report we recommended that Section 6 should be repealed here.

THE COMMON LAW

Some aspects of these imperial statutes have fallen into disuse. Originally they were probably only applied to conduct which resulted in perversion or delay of the course of justice, but later were applied so strictly that even giving evidence without the compulsion of a subpoena was thought to amount to illegal maintenance. More recently their application in respect of maintenance has been watered down by the Courts.

1. Much conduct which would once have been held to be contrary to the Statutes has been held to be within exceptions e.g. maintaining litigation of some relatives and servants or out of motives of charity (Brew v. Whitlock (1967) V.R. 449) or because the maintainer has what the Court regards a sufficient interest in the subject matter of the proceedings. The Courts have taken an increasingly liberal view of what amounts to sufficient interest. The leading case on this is Martell v. Consett Iron Co. Ltd. [1955] 1 Ch. 363. As Lord Denning M.R. said in Hill v. Archbold [1968] 1 Q.B. 686 at p.694 in disapproving Oram v. Hutt [1914] 1 Ch. 98:

> "Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the State itself. Comparatively few litigants bring suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of

the other side."

Likewise the prohibition of champerty has been relaxed where the champertous maintainer has a common interest: see Bulli Coal Mining Co. v. Patrick Hill Osborne and Another (1899) A.C. 351 and Hauber v. The Halifax Fire Insurance Co. Ltd. (1940) S.A.S.R. 341.

2. It has been said that an action for the tort of maintenance applies only to litigation actually pending, but since the English Court of Appeal decision in Bradlaugh v. Newdegate (1883-4) 11 Q.B.D. 1 and the House of Lords decision in Neville v. London Express Newspaper (1919) A.C. 368 it appears to be available in respect of concluded proceedings.

3. It is not necessary to prove malice. The question of reasonable and probable cause is irrelevant. Actual intention is relevant to proving whether proceedings were maintained out of charity, but it is not clear whether actual intention is relevant in any other respect: Eischer v. Naicker (1860) 8 Moo. Ind. App. 170; Bradlaugh v. Newdegate (supra); Southern Cross Assurance Co. Ltd. v. Shareholders Mutual Protection Society (No.2) (1935) S.A.S.R. 480 at p.491; Stevens v. Keogh (1946) 72 C.L.R. 1 at p.28 and Brew v. Whitlock (1967) V.R. 449 at p.454. The Australian Law Commission op. cit. says at p.177 that the maintainer's motive is irrelevant.

4. The success of the maintained action is not a bar to proceedings for maintenance: Neville v. London Express Newspaper supra and Clark v. P.K.I.U. (1977) 15 A.L.R. 71 at

p.78.

5. The fact that an action involves champerty or is being illegally maintained is not a defence to that action: Skelton v. Baxter (1916) 2 K.B. 321; Kroeker v. Harkema Express (1973) 42 D.L.R. (3d.) 350; Pioneer Machinery (Rentals) Ltd. v. El-Jay Inc. (1978) 6 W.W.R. 484.

5. A court may make a finding of maintenance or champerty and act upon that finding even though it is not pleaded: George Biro Real Estate Ltd. v. Sheldon (1965) 46 D.L.R. (2d.) 610; and Newton v. Gapes (1910) 12 W.A.R. 86.

7. It is uncertain whether a finding of maintenance or champerty would empower the Court to stay or dismiss the maintained proceedings or to grant an injunction restraining the maintainer or maintained party from prosecuting the action further. The majority decision in The Southern Cross Assurance Co. Ltd. v. Shareholders Mutual Protection Society (No.2)(1935) S.A.S.R. 480 indicates that it would not, but some other cases indicate that it would if the maintenance or champerty amounted to an obvious abuse of process.

8. One of the most important refinements of the common law is that since the 3:2 majority decision of the House of Lords in Neville v. London Express Newspaper (supra) the Courts have held that there is no cause of action on the tort of maintenance without proof of special damage. Lord Finlay L.C. said at p.380 "It cannot be regarded as damage sufficient to sustain an action that the plaintiff has had to discharge his legal obligations or that he has incurred

expenses in endeavouring to evade them". The other law Lords did not dissent from this. No one has quarrelled with the first part of this proposition, i.e. that the cost of paying the amount of the judgment and any order for costs made against the plaintiff is not special damage. In so far as it has been taken to mean that the difference between solicitor/client costs and party/party costs is not special damage for the purpose of maintenance proceedings there has been criticism -

(a) that this ruling prevents actions in tort for maintenance being brought before finalisation of the maintained proceedings: see Viscount Haldane, one of the dissenting Lords in Neville's Case at p.390 - 391

and

(b) that there will now be very few, if any, cases involving an unsuccessful maintained civil suit in which special damage can be proved: see Winfield 35 L.Q.R. 233 at p.237-8; Holdsworth op. cit. 3rd ed. Vol. III at p.401 Salmond Law of Torts 7th ed. p.631, and Fleming, The Law of Torts 6th ed. p.591.

As the plaintiff had been found to have defrauded numerous small investors it is easy to see why the House of Lords did not wish to find in his favour in his maintenance suit against a newspaper which had advertised for those defrauded to consult the paper's solicitors and which had financed proceedings by over 100 successful plaintiffs for return of their money. But the case could have been decided on the

finding that the conduct of the defendant did not amount to illegal maintenance because it did not result in "the delaying, the interference with, the distortion or the perversion of justice in the Courts": see the speeches of two of the majority, Lord Shaw of Dunfermline at pp.408 to 421 and Lord Phillimore at pp.422 to 433, who analysed the old statutes and the common law and concluded that only maintenance which delayed, perverted or defeated justice was illegal and a civil wrong. Nevertheless Neville's case has ever since been cited and applied as good authority for holding that -

(a) proof of actual pecuniary damage is an essential ingredient of the tort of maintenance and

(b) that costs incurred additional to party/party costs are not actual pecuniary damage:

(e.g. Wiggins v. Lavy (1928) 44 T.L.R. 721. Sievwright v. Ward (1935) N.Z.L.R. 43. The Southern Cross Assurance Co. Ltd. v. Shareholders Mutual Protection Assoc. Ltd. & Ors (No. 2) 1935 S.A.S.R. 480 and J.C. Scott Constructions v. Mermaid Waters Tavern (1984) 2 Qd.R. 413). It is interesting to note that the English Court of Appeal in Bradlaugh v. Newdegate (1882-3) 11 Q.B.D 1 ordered that the maintainer pay the plaintiff, who had successfully defended a prosecution by a common informer by way of damages a sum equivalent to the difference between the party/party costs and his solicitor/client costs in the prosecution. But the House of Lords in Neville's Case distinguished that case.

The ruling in Neville's Case applies if the plaintiff's order for costs has not been made enforceable by taxation - Schultz v. The Ocean Accident & Guarantee Corp. (1923) 23 S.R.(N.S.W.) 153. It also appears from Neville's case that the fact that the costs order against a maintained party is unenforceable (e.g. because that party has disappeared or is impecunious) does not entitle the plaintiff to make a claim against the maintainer, unless he can prove some pecuniary loss other than legal costs. The ruling probably also applies even though no order for costs has been made, provided the Court does have a discretion to make a costs order: see Fridman (1964) 114 L.J.N.335, referring to Wight v. Persaud 6.W.I.R.1 a 1963 decision of the Supreme Court of British Guiana in a malicious civil prosecution suit.

9. According to Coke an assignment of a chose in action to a stranger was illegal maintenance as being "the occasion of multiplying of contentious suits". The mercantile community found this most inconvenient and the Courts found ways around it. Although Coke's statement can no longer be regarded as good law, it has led to a number of rules and fictions which still continue: see Winfield 35 L.Q.R.143. Except where statutes provide otherwise in particular circumstances, an assignment of a bare right of action in which the assignee has no legitimate interest is still invalid on the ground of public policy in that it savours of or is likely to lead to maintenance: see Clegg v.

Bromley (1912) 3 K.B. 474 at p.489-90; Laurent v. Sale & Co. (1963) 1 W.L.R. 829 and Trendtex Trading Corp. v. Credit Suisse (1982) A.C. 679. But an assignment of property is valid even though possession of the property can be recovered only with the aid of litigation. Also the mere assignment of the proceeds of litigation is generally legal, provided that there is no understanding that the assignee will participate in the litigation. The facts of the Trendtex case illustrate which assignments of choses in action will be held valid on the ground that the assignee has a sufficient interest. Trendtex had assigned a claim against the Central Bank of Nigeria for damages for breach of contract to Credit Suisse which had previously lent money to Trendtex to finance the transaction which resulted in the breach of contract action. Credit Suisse had also guaranteed Trendtex's legal costs and had paid off some of Trendtex's other creditors thereby saving Trendtex from liquidation. The House of Lords found that the assignment was valid because Credit Suisse had a "genuine and substantial" or "genuine commercial" interest in the success of the litigation. This was applied in Re Timothy's Pty. Ltd. (1981) 2 N.S.W.R. 706. The House of Lords expressed the view that a subsequent assignment by Credit Suisse by way of sale to an undisclosed third party of Trendtex's cause of action against the Central Bank of Nigeria, which the third party shortly thereafter settled for an amount far greater than it paid Credit Suisse, was champertous and

void. Lord Wilberforce at p.694 described the transaction as "trafficking in litigation". The House of Lords was unable to give judgment on the assignments as it found that it did not have jurisdiction to make a final determination of the case because of a Swiss jurisdiction clause in the contract. We anticipate that the decision will be followed here. Meagher, Gummow and Lehane in Equity, Doctrines and Remedies 2nd ed. (1984) at p.195 et. seq. deal in detail with the law of equity relating to assignments of choses in action. See also Section 15 of the Law of Property Act, 1936, 10 Sydney Law Rev. 166 and Norman v. Federal Commissioner of Taxation (1962-3) 109 C.L.R. 9 at p.26-7.

10. Special considerations apply to lawyers as, in a sense, it is a lawyer's business to maintain litigation for his clients. As discussed earlier, some of the imperial statutes expressly exempted lawyers from the operation of some aspects of their provisions.

Subject to two conditions a lawyer may nowadays act for a client who has no means and may expend his own money in payment of disbursements (including counsel fees) even though he has no prospect of being paid either his fees or disbursements, except by virtue of a judgment or order against the other party to the proceedings. The first condition is that he has considered the case and believes that his client has a reasonable cause of action or defence. The other condition is that he must not in any case bargain with his client for an interest in the subject matter of the

litigation, or for remuneration proportionate to the amount which may be recovered by his client in any proceedings: Clyne v. The New South Wales Bar Association (1960) 104 C.L.R. 186; Sievwright v. Ward (1935) N.Z.L.R. 43.

It is now not uncommon for a solicitor to act for a client who has interests in a country, such as the United States of America, in which it is permissible for parties to litigation in some circumstances to enter into agreements which are champertous under our law. It has been held that the fact that the solicitor is aware that his client has made a champertous agreement does not affect his ability to act for the client. Nor does it affect the validity of his own retainer provided that he does not give positive assistance in implementing the champertous agreement: see In re Trepca Mines (No.2) (1963) Ch 199 and Cordery on Solicitors 7th ed. (1981) p.206.

A lawyer who instituted or continued legal proceedings on behalf of a client knowing that there was no cause of action or knowing that the facts upon which the cause of action was founded were false, or knowing that the proceedings were being brought to further an illegal or improper purpose such as to extort money or to prevent another from prosecuting a legitimate claim or appeal, would probably be guilty of illegal maintenance, by virtue of Statute Westminster I 3 Edward I c.29 and the common law. So far as we are aware no lawyer has either been prosecuted for the offence of maintenance or sued for damages in such circumstances in

modern times.

SOUTH AUSTRALIAN STATUTES

There are no South Australian statutes which deal specifically with maintenance, champerty or barratry, although Section 83 of the Juries Act, 1927 prohibits embracery without using that term. Several other State Acts contain provisions which are applicable to perversion of the course of justice, although they are also of wider application.

Juries Act 1927

Section 83 provides:

> "A person who unlawfully influences, or unlawfully attempts to influence, a juror, or consents thereto, shall be guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years."

Section 78 provides for other offences by jurors failing to attend when summoned, failing to answer when called, or taking a sum beyond the scale allowed. It also provides an offence of personating or attempting to personate a juror for the purpose of sitting as a juror.

The Mitchell Committee's Fourth Report (The Substantive Criminal Law) at p.265 in its recommendations concerning offences relating to perverting or obstructing the course of justice recommended retention of Sections 78(1) (c) and 83. We agree and also recommend retention of Section 78(1)(a), which covers conduct which in some cases may be the first observable manifestation that a juror has been bribed or threatened and Section 78(1)(d).

The Criminal Law Consolidation Act, 1935

This Act contains a Part entitled "Offences of a Public Nature". The Sections of this part which relate to matters dealt with in the Imperial Statutes previously listed and to abuse perversion of legal process are:

Section 237 concerning compounding penal actions, which we discussed in our Ninety-Fourth Report.

Section 239 (as amended by Act No. 56 of 1984) concerning perjury and subornation of perjury.

Sections 240 and 241 concerning Court officials and gaolers exacting fees from persons charged with offences or from prisoners.

Section 242 concerning the unlawful administration of oaths.

Section 243 which provides:

> "Any person who, by force or threats or by collecting together an unusual number of people, enters on any lands or tenements in order to take possession thereof, whether he has a legal right to enter thereon or not, shall be guilty of a misdemeanour and liable to be imprisoned for a term not exceeding three years."

Blatant cases of maintenance, champerty, embracery, barratry and some other conduct involving perversion of or abuse of legal process might sometimes also be punishable at common law, under Section 264 concerning intimidation or annoyance by violence or other means, Sections 204 and 205 concerning false personation and Part VI concerning forgery.

The Summary Offences Act, 1953

Sections 61, 62 and 62a deal with offences of bribery of

police, false reports to police and creating a false belief as to events calling for police action. Section 66 prohibits a person who has laid an information or complaint for an alleged offence from subsequently receiving valuable consideration for withdrawing, seeking the dismissal of, or delaying the hearing of the matter. Some conduct prohibited by the old imperial statutes discussed previously would also be punishable under these sections.

The Local and District Criminal Courts Act 1926 Section 71a provides:

> "Where an action is brought-
>
> (a) vexatiously and oppressively;
>
> or
>
> (b) against a person who is not liable on the plaintiff's claim and without proper precaution to ensure -
>
> (i) that that person is the person to whom the claim properly relates;
>
> or
>
> (ii) that the debt the subject matter of the claim had not been paid or satisfied prior to such action being brought,
>
> the court or a Judge or special magistrate may, notwithstanding the discontinuance or termination of the action, order the plaintiff to pay to the person against whom the action was brought such sum, in addition to costs, as the court, Judge or special magistrate deems necessary adequately to compensate that person for the injury, embarrassment, inconvenience and expense, if any, that he has suffered or incurred in consequence of the action."

A person in South Australia in the position of the plaintiff in Corbett v. Burge, Warren & Ridgley Ltd. (1931-2) 48 T.L.R. 626,

/ho unsuccessfully sued for damages for malicious prosecution /hen he was sued for a relatively small debt that he had already)aid, would have a remedy under this section.

Section 181(2) empowers the Local Court to order a judgment :reditor to pay compensation not exceeding $100.00 to a judgment lebtor who has been summoned vexatiously and oppressively. An mending Act, No. 87 of 1978, repeals this section, but the mending Act has not yet been proclaimed.

he Wrongs Act, 1936

By a 1983 amendment Section 36 of this Act provides a civil emedy in damages for perjury in civil proceedings.

he Real Property Act, 1886

Part XX of this Act provides for the punishment of forgery, aking false oaths and declarations, false or negligent ertification of the correctness of documents under the Act and raudulent conduct in relation to land transactions which fall ithin the ambit of the Real Property Act. Some conduct which is unishable under this Act would also amount to an offence under he Criminal Law Consolidation Act (see R. v. McHale (1952) .S.R. 54) or at common law. Some conduct punishable under his Act would also be punishable under some of the imperial tatutes listed earlier and in particular under Statute 32 Henry III c.9 (1540).

he Law of Property Act, 1936

As we said earlier, it was the policy of the common law that o chose in action should be assigned, but nevertheless equity

recognized the assignability of some choses in action. Section 15 of the Law of Property Act gives legal effect to absolute assignments of choses in action subject to fulfilment of conditions.

Sections 86 and 87 deal with the voidability of conveyances of property made with intent to defraud creditors and voluntary dispositions of land made with intent to defraud a subsequent purchaser. They are a reenactment of the old statutes 13 Eliz. I c.5 and 27 Eliz. I c.4. These sections would render voidable some transactions which Statute 32 Henry VIII c.9 and other imperial statutes also render void.

RECOMMENDATIONS CONCERNING THE IMPERIAL STATUTES

"Maintenance" (using the word in its broadest sense) as known in the thirteenth to the sixteenth centuries was very different from the concept of maintenance today. The result is that the old imperial statutes on this topic are now not only difficult to understand, but are in many respects inappropriate to our times. For instance, application of the mandatory penalties prescribed by the more severe statutes for conduct falling within the modern definition of maintenance would be harsh compared to the penalties prescribed by our Criminal Law Consolidation Act and Summary Offences Act for more anti-social behaviour and some of the procedures prescribed are completely obsolete. Even the nature of the conduct aimed at has changed.

So far as we have been able to determine, no-one has been prosecuted for an offence under any of these statutes for at least a century, although there have been at least five prosecutions arising out of two instances for common law offences, which we discuss later. Instances of maintenance involving dishonesty or violence would be punishable under other South Australian legislation or as an offence at common law such as conspiracy or perverting the course of justice.

Although there have been a significant number of reported civil cases of maintenance or champerty, we have found none in the last century which specifically relied on the old statutes as distinct from the common law.

All the imperial statutes listed earlier in this Report have been repealed in England, New South Wales, Queensland and

Victoria.

We recommend repeal of all the imperial statutes listed with three exceptions. The first exception is Statute I Edward III Statute 2 c.16 (1327) concerning the appointment of Justices of the Peace, which we discussed in more detail in our Fifty-Eighth Report. The second exception is Statute 8 Henry VI c.9 (1429) concerning wrongfully taking possession of land which we discussed in our Fifty-Ninth Report at p.12. The third exception is the Maintenance and Embracery Act, 1540 (Statute 32 Henry VIII c.9) of which only sections 3 and 5 should be repealed now. The balance, which concerns pretenced titles, should be retained until the law relating to real property has been considered further.

RECOMMENDATIONS CONCERNING THE COMMON LAW

All branches of maintenance involve one principle which we consider is still appropriate and still of considerable importance, namely, that no-one should use the process of criminal or civil litigation vexatiously, oppressively or in any other way that constitutes an abuse of the process of the Court or corrupts or obstructs the administration of justice. In America maintenance and champerty have been treated as "bargains tending to obstruct the administration of justice", at least since the American Restatement of the Law of Contracts in 1932. But in common law jurisdictions this principle has sometimes been obscured by the technical common law rules associated with maintenance and by unmeritorious claims.

In England and Victoria the common law offences of

maintenance, champerty and being a common barrator, but not embracery, have been abolished by the Criminal Law Act, 1967, and the Abolition of Obsolete Offences Act, 1969 respectively. Also tortious liability at common law for maintenance and champerty was abolished by those statutes. The effect of maintenance on the validity of contracts has been preserved in both jurisdictions. Sub section (2) of Section 14 of the English Act provides:

> "The abolition of criminal and civil liability under the law of England Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal."

Section (3) of the Victorian Act specifically provides that the abolition effected by the Act will not affect the law relating to misconduct of solicitors. Copies of the relevant sections of the Victorian and English Acts are annexed.

So far as we are aware the other Australian States, New Zealand and Canada have taken no steps to abolish any of the common law of maintenance.

In our opinion the law of maintenance is in need of reform. We discuss hereunder the criminal, tortious, contractual and public policy aspects of embracery, barratry, maintenance and champerty (in that order) but we foreshadow that we recommend the abolition of most aspects of the common law of "maintenance" and the enactment of a civil cause of action for remedies for malicious prosecution of civil proceedings and for other abuses of the process of the Court, in which those aspects of the law of maintenance which are worth retaining would be subsumed.

EMBRACERY

Crime

For centuries it has been recognised that the prohibition and punishment of embracery is essential to ensure the proper functioning of the jury system. All Australian States and the Commonwealth, New Zealand and England have enacted the offence in modern form.

We have already recommended that the offence of embracery and the related offences set out in the Juries Act, 1927 be retained. In this state it has been the usual practice not to abolish common law offences when a statutory offence has been enacted. We see no reason to depart from this practice in relation to embracery. England and Victoria have expressly saved the offence of embracery at common law from abolition although they both have statutory offences of embracery.

We recommend no changes to the criminal law of embracery other than the repeal of the Imperial Statutes.

Tort

The question whether a tort of embracery still exists at common law and whether it should be retained seems not to have been discussed in recent times and we have found no recent cases. The United Kingdom Law Commission in its 1966 Report on Maintenance and Champerty and its 1966 Report on Abolition of Certain Ancient Criminal Offences did not address this question. It is not clear whether "maintenance" as used in Section 14 of the U.K. Criminal Law Act, 1967 which abolishes liability in tort for "maintenance and champerty as known to the common law"

includes embracery. Section 13, which abolishes the common law crime of maintenance uses the phrase "maintenance (including champerty, but not embracery"). In our opinion it is uncertain whether a remedy in tort for embracery still exists in England. The Victorian Act uses the same words and the 1969 Report of the Victorian Chief Justice's Law Reform Committee which recommended the Act does not consider the question.

In our opinion a person who suffers damage as a result of embracery ought to have a civil remedy. We think that the double damages" provided by Statutes 1 Richard II c.9 (1377) and Henry IV c.7 (1402) is no longer appropriate.

We recommend that liability at common law for embracery be abolished, but that a civil remedy for damages be given under a new section to be added to the Wrongs Act, 1936 as set out on page

Contracts and Public Policy

It has never been questioned that an agreement involving embracery is void as being contrary to public policy. We recommend no change in this regard.

BARRATRY

Crime

So far as we are aware there has been no prosecution for at least a century. The Crime Statistics Section of the South Australian Police Department has informed us that there have been 0 prosecutions in the fifteen years for which their computerised records have been maintained. The type of conduct which the old statutes attempted to suppress is now uncommon and any instances

would now be more appropriately punished under other South Australian legislation such as that discussed earlier or as some other common law offence such as conspiracy. It serves no useful purpose nowadays.

We recommend that the common law offence of being a common barrator as well as the statutory offence of barratry be abolished.

Tort, Contract and Public Policy

We have found no civil cases relating to barratry reported this century. In the very few instances of barratry that might occur these days civil redress would be available through other more modern torts. Contracts involving barratry would be held unenforceable as being contrary to public policy without need for recourse to any old notions of barratry (e.g. because it involved fraud or conspiracy or incitement to violence). It now serves no useful purpose.

We recommend abolition of any tort of barratry at common law as well as under the Imperial Statutes.

MAINTENANCE AND CHAMPERTY

Crimes

The most strongly worded support for the continued existence of the crime of champerty that we have found expressed this century was that of Middleton J. in Colville v. Small (1910) 22 Q.L.R. 33 when at p.34 he quoted Lord Clare in Kenney v. Browne (1796) 3 Ridg. P.C. 462 at p.498 with approval when he said of champerty:

> "This most mischievous practice is further restrained by ... several statutes ... These statutes, very much to the injury of society,

> have fallen ... much into disuse ... In my judgment, their disuse has been essentially injurious to society, and I should wish to see some public examples of men prosecuted to justice for breach of these most salutary laws."

We understand that the statutes of at least some Canadian Provinces still include offences of maintenance and champerty. The Tasmanian Criminal Code, 1924 - Section 92 provides for a crime of maintenance.

On the other hand the Full Bench of the High Court in Clyne v. The New South Wales Bar Association (supra) questioned whether maintenance as a crime ought now to be regarded as obsolete. The United Kingdom Law Commission in its Report on Maintenance and Champerty said at page 4:

> "Maintenance and champerty as crimes are a dead letter in our law. There are no records of any prosecution for either for many years past. They do no more today than add unnecessarily to the length of legal textbooks and the Statute book. To rid the law of these crimes would be merely to clear away lumber discarded in practice, though not in theory destroyed."

We have been informed by the Crime Statistics branch of the Police Department of South Australia that there have been no prosecutions during the last fifteen years for maintenance or champerty. The only reported prosecutions this century of which we are aware were a prosecution for maintenance and champerty in Canada in 1939 (Goodman v. R. (1939) 4 D.L.R. 361) and four prosecutions in New South Wales by a Mr. Jacombe of a solicitor acting for Mr.Jacombe's estranged wife, referred to in Clyne's case supra. The Canadian case resulted in a conviction which was quashed on appeal by the Supreme Court of Canada on the basis

that the accused's conduct did not amount to illegal maintenance. The New South Wales prosecutions apparently did not continue to judgment.

England and Victoria have abolished the offences of maintenance and champerty, both statutory and at common law. In New South Wales and Queensland neither are statutory offences now, but as in the other Australian States and New Zealand, the offences at common law have not been formally abolished.

Any instances of maintenance or champerty involving violent or overtly threatening conduct, perjury or subornation of perjury would be punishable as statutory or common law offences other than maintenance or champerty or as contempt of Court. The Mitchell Committee in its Fourth Report on the Criminal Law recommended the enactment of offences of:

(a) tampering with or fabricating evidence with the intention of being reckless to, perverting the course of justice in a judicial proceeding (which it recommended be widely defined),

(b) preventing a witness from giving evidence or inducing a witness not to give evidence, by whatever means, with the intention of, or being reckless to, perverting the course of justice,

(c) making an unwarranted demand with menaces that a person should not institute judicial proceedings or that he should withdraw or agree to settle any such proceedings or that a defendant in criminal proceedings should plead in a particular way.

f these recommendations are adopted these offences would cover
ny other conduct likely to be involved in maintenance or
hamperty of a kind which calls for punishment as a crime.

Maintenance or champerty which does not involve conduct which is otherwise an offence ought not to be a crime.

We recommend abolition of the common law offences of maintenance and champerty as well as repeal of the Imperial statutes.

Tort

Views on the nature and utility of the torts of maintenance and champerty are divided.

As early as 1867 the South Australian Supreme Court expressed reluctance in having to apply the law of maintenance in Klingbeil v. Palmer (1867) 1 S.A.L.R. 76 when the Full Court felt that the defendant had not acted disgracefully. In Bradlaugh v. Newdegate (1882-3) 11 Q.B.D. 1 Coleridge C.J. and in Alabaster v. Harness (1895) 1 Q.B. 339 Lord Esher M.R. expressed the view that if it were not for the specific law on the topic there would not necessarily be any wrong in assisting another in his litigation. Lord Esher said at p.342:

> "The doctrine of maintenance,.... does not appear to me to be founded so much on general principles of right and wrong or of natural justice as on considerations of public policy. I do not know that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. But it seems to have been thought that litigation might be increased in a way that would be mischievous to the public interest if it could be encouraged and assisted by persons who would not be responsible for the consequences of it, when unsuccessful."

The U.K. Law Commission op. cit. said at p.5:

> "In the light of the cases on lawful justification and proof of damage, our

> conclusion is that the action for damages for maintenance is today no more than an empty shell.
> Further, it is doubtful whether the retention of maintenance as a tort is consistent with other developments in the practice of litigation. Today trade unions, trading associations, many friendly and benefit societies, provide their members with financial assistance in pursuing claims or defences in certain classes of civil action. Similarly, there is widespread throughout our society the beneficent practice of third party liability insurance, under which insured persons are entitled to indemnity against damages and costs awarded against them in actions based upon negligence, nuisance or breach of statutory duty and under which the conduct of the proceedings is normally in the hands of the insurers.
> Finally, there is the deeply significant fact that since the passing of the Legal Aid and Advice Act 1949 the volume of civil litigation which is, in fact, supported in whole or part by legal aid has been progressively increasing....
> The truth is that today the great bulk of the litigation which engages our courts is maintained from the sources of others, including the state, who have no direct interest in its outcome but who are regarded by society as being fully justified in maintaining it. When one further reflects how little is the scope left to the action for damages for maintenance and how formidable the difficulties of proof, one is bound to ask whether its retention in the law serves any useful purpose."

The torts of maintenance and champerty have also been riticised because they allow a revengeful person to sue a aintainer or champetor for litigation which turned out to have een well founded - as happened in Neville's Case (supra).

We briefly mentioned some of the uncertainties of the law of aintenance under the heading "Common Law". We also refer to the ustralian Law Commission's Report No. 27 at page 178.

On the other hand the Queensland case of J.C. Scott

Constructions v. Mermaid Waters Tavern (1984) 2 Qd. R. 413 in which $9,000 damages was awarded for maintenance indicates that there are still occasional cases where maintenance is a useful tort. In that case the Plaintiff was a builder which had sued a building proprietor for breach of a building contract. Several subcontractors of the Plaintiff had not been paid. Instead of paying the subcontractors direct, as the Defendant could have done, it entered into agreements with them by which it lent them the amounts due in consideration of them suing the Plaintiff for debt, diligently prosecuting their claims to judgment and enforcing the judgments by obtaining an order to wind up the Plaintiff. The subcontractors were to be liable to repay the loans only to the extent that they recovered moniesfrom the Plaintiff and they were to keep the Defendant continuously informed of the progress of the proceedings. The Defendant vigorously pursued the subcontractors' obligations until the Plaintiff amended its statement of claim in the breach of contract proceedings to claim damages for maintenance, whereupon it wanted no more to do with the subcontractors' litigation. McPherson J. found as a matter of fact that the Defendant had procured the subcontractors to sue the Plaintiff, not as a legitimate means of protecting its commercial interest, but for the purpose of embarrassing the Plaintiff financially and if possible procuring its winding up in order to prevent it from prosecuting its breach of contract claim. The Plaintiff proved that as a result of the subcontractors' litigation its bank reduced or withdrew its overdraft facilities. The damages

awarded represented the increased interest payments which the plaintiff incurred in obtained credit through other channels to carry on its normal operations. It is very doubtful whether under the present law the plaintiff had any other cause of action. But in view of the fact that:

(a) a great deal of litigation - (possibly most civil litigation), is maintained by third parties,

(b) the application of the rules laid down over the centuries to present cases is uncertain,

(c) the common law torts of maintenance and champerty are now limited to cases in which actual pecuniary damage other than legal costs can be proved,

(d) there has been a considerable amount of criticism which has tended to cloud the fact that there is a useful principle behind the outdated statutes, cases and legal writings and the modern rhetoric.

We recommend the abolition of the tort of maintenance. The Mermaid Waters' case, if it occurred again, could be dealt with as an abuse of civil process.

Champerty, which involves the maintainer receiving a share of the proceeds of litigation, raises different problems and issues. Despite the commentators' negative views about maintenance and champerty as crimes and torts, the prevailing legal view is still that agreements which involve champerty should continue to be void and unenforceable. The Courts have consistently declared such contracts void. The following are

examples. In Newton v. Gapes [1910] 12 W.A.R. 86 the Court declined to order specific performance of a contract on the ground that it savoured of maintenance and champerty. In Wild v. Simpson [1919] 2 K.B. 544 it was held that a solicitor could not recover his costs under a champertous agreement. Similar cases are In re Trepca Mines 1963 Ch. 199 and In re Collins 1936, a case before Richards J. of the Supreme Court of South Australia reported shortly in 10 A.L.J. 153-4. The English Court of Appeal in Wallersteiner v. Moir [1975] 1 Q.B. 373 expressed the view that it was still unlawful for an English solicitor to be retained on a contingency fee basis as being contrary to public policy, even though criminal and tortious liability for champerty had been abolished there. Other consequences have been that in Haseldine v. Hosken [1933] 1 K.B. 822 it was held that a solicitor could not recover from his professional indemnity insurer loss arising from his having entered into a champertous agreement (the solicitor had paid out money to settle a claim against him for damages for champerty). In Danzey v. Metropolitan Bank of England and Wales [1912] 28 T.L.R. 327 a solicitor who conducted litigation on a champertous basis was ordered to pay the other side's costs. In George Biro Real Estate v. Sheldon [1964] 46 D.L.R. (2d) 610 a land agent's claim for damages was dismissed as being based on a champertous agreement which was therefore void both at common law and pursuant to the Revised Statutes of Ontario 1897, c.327. In Trendtex v.Credit Suisse supra the House of Lords indicated that the laws of maintenance and champerty were still relevant to the

ssignment of choses in action and should have rendered one of he assignments void. In Timothy's Pty. Ltd. [1981] 2 N.S.W.L.R. 06, Trendtex v. Credit Suisse was applied.

A contrary view has been expressed by some writers who point ut that such arrangements are legal in other countries, ncluding some in Europe. These views have been expressed ainly in relation to agreements between lawyers and their lients. Lord Denning M.R. in Wallersteiner v. Moir (supra) at .395 expressed the view that the law against champerty should be elaxed to allow contingency fees in derivative actions subject o the approval of the Law Society in each particular case. In he U.S.A. contingency fee agreements are permissible for most ivil litigation provided that there is no agreement:

a) that the attorney will pay the expenses of litigation, although he may properly expend his own moneys as needed for this purpose if the client is impecunious, or

b) that the client will not settle the matter without his attorney's consent.

ee Calamari and Perillo on Torts 1970 at p.553 and The estatement of the Law of Contracts para. 542.

t is there argued that the arrangements between a party to itigation and his backer ought to be of no interest to anyone lse unless they involve or result in other illegal or improper onduct.

The traditional answers to this are first, that English law has lways discouraged litigation unless the parties are interested nough to prosecute or defend it themselves. Secondly, that even

though a particular agreement does not involve or result in any other illegal or improper conduct, such agreements tend to encourage such conduct (particularly perversion or obstruction of the course of justice) and are therefore contrary to public policy: see e.g. Lord Denning M.R. in Re Trepca Mines Ltd. (No.2) supra at p.219:

> "The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame damages, to suppress evidence, or even to suborn witnesses...."

Further the share in the verdict obtained through the champertous agreement almost certainly will far exceed the proper costs to which the lawyer would otherwise be entitled on taxation.
Also such agreements encourage people to litigate through a man of straw for the purpose of defeating the other party's order for costs in the event of the claim or defence failing, as happened in the prosecution which later resulted in the claim for damages for maintenance in Bradlaugh v. Newdegate (1882-3) 11 Q.B.D. 1. Further they encourage the buying of litigation purely for the purpose of profit to the purchaser: see e.g. The Southern Cross Assurance Company Ltd. v. Shareholders Mutual Protection Association Ltd. & Others (No.2) supra and Trendtex v. Credit Suisse supra.

The U.K. Law Commission and the Victorian Chief Justice's Law Reform Committee were both of the view that the law relating to the illegality of champertous agreements was still in accord with prevailing views of propriety and was still useful. We

gree.

The sub-section of the English Act resulting from this ecommendation (Section 14(2)) uses the phrase "maintenance and hamperty". It might be argued that an agreement involving imple maintenance without the added element of champerty falls ithin the ambit of the sub-section and is still "to be treated s contrary to public policy or otherwise illegal", although we hink that the intention of the Law Commission was to include nly champertous agreements and that the conjunction of both erms arises from the traditional use of the phrase "maintenance nd champerty" when referring to champertous agreements. The ictorian section is open to the interpretation that agreements nvolving only simple maintenance may be contrary to public olicy.

An analysis of the reported modern cases discloses that what as attracted the court's adverse rulings is an element of profit o the maintainer. In view of the court's steady extension of the ircumstances in which simple maintenance is justifiable, cases in hich the Courts would now hold a contract void on the basis olely of simple maintenance will be rare.

We recommend the enactment of a section similar to sub-ection (2) of Section 14 of the English Criminal Law Act, 1967, ut with the omission of the word "maintenance" so that it is lear that only champertous agreements may be treated as void or s justifying a refusal by the Courts to countenance proceedings.

OTHER TORTS CONCERNING ABUSE OF PROCESS

In addition to maintenance and champerty, and possibly

embracery, our law recognises tortious liability for:

(a) perjury in civil proceedings under Section 36 of the Wrongs Act, 1936 (since the end of 1983). This follows the recommendations in the Eighty-Third report of this Committee.

(b) malicious prosecution for a crime. In our Eighty-Third Report we made recommendations for reform of some aspects of the common law relating to this tort.

(c) malicious prosecution for a summary offence where damage to the plaintiff's property, fame or person within the meaning of Holt C.J's. statement in Savill v. Roberts (1698) Holt K.B. 150 and 193; 90 E.R. 981 and 1005, as restrictively interpreted by later Courts, has been suffered: see Wiffen v. Bailey and Romford Urban Council (1915) 1 K.B. 600 and Berry v. British Transport Commission (1962) 1 Q.B. 307. This is very closely related to malicious prosecution for a crime, the only difference being that where a person is prosecuted for a crime, damage to fame is assumed, whereas damage to fame or other damage must be proved where the plaintiff was prosecuted for a summary offence. In our Eighty-third Report we dealt with them as one tort.

(d) malicious prosecution of bankruptcy proceedings (Johnson v. Emerson and Sparrow (1871) L.R. 6 Ex. 329), of proceedings for winding up on the ground of insolvency (Quartz Hill Consolidated Gold Mining Co. v. Eyre (1883) 11 Q.B.D. 674) and of civil proceedings for arrest of a person or ship or for execution against property or for issue of a search

warrant: see Pike v. Waldrum Peninsula Oriental Steam Navigation Co. (1952) 1 Ll.R. 431; Varawa v. Howard Smith Co. Ltd. (1911) 13 C.L.R. 35.

The law may also recognise two more general torts of -

(a) malicious prosecution of a civil action (in the U.S.A. called "wrongful process"), of which the actions referred to in (d) above are examples; and

(b) abuse of the process of the Court.

The scope of these two torts and even their existence is uncertain.

Malicious Prosecution of a Civil Action

In order to found an action for malicious prosecution of any civil proceedings the plaintiff must prove -

. That the defendant instituted the primary proceedings or took an active step in their continuation, although it is not necessary to prove that he was a party named in the title to the proceedings. In Johnson v. Emerson & Sparrow (supra) the solicitor for the petitioner in bankruptcy was held liable. See also Coleman v. Buckinghams (1964) N.S.W.R. 363.

. That the defendant prosecuted the primary action without reasonable and probable cause. This is a question of fact.

. That the defendant prosecuted it maliciously i.e. with indirect or improper motives and not in furtherance of justice: Garthus v. Van Caeseele 19 D.L.R. (2d.) 157. Malice has sometimes been implied from a finding of fact that the defendant actually knew that there was no basis

whatsoever for the proceedings. Malice is notoriously difficult to prove.

4. That the proceedings terminated in favour of the plaintiff (if they are capable of termination). An adjudication of the Court is not necessary. Withdrawal or dismissal for want of prosecution is sufficient: see Bayne v. Blake (1909) 9 C.L.R. 347 and Yarawa v. Howard Smith Co. Ltd. (supra).

5. That the plaintiff suffered damage of the type laid down by Holt C.J. in Savill v. Roberts as narrowly construed by later courts, i.e.

   (a) damage to the plaintiff's property. This has been confined to actual pecuniary damage and damage such as execution against the plaintiff's property or other deprivation of the use of property. Pecuniary damage has been limited by the ruling in the Quartz Hill Case (supra) that the difference between the plaintiff's actual legal costs (even if reasonable) and any costs awarded by the Court in the primary action are not "damage" within the meaning of the rule in Savill v. Roberts. The English Court of Appeal in Berry's Case (supra) refused to extend the Quartz Hill ruling to malicious prosecution for a summary offence, although the earlier Court of Appeal decision in Wiffen v. Bailey (supra) strongly indicated otherwise. Also in Coleman v. Buckingham (supra) the Full Court of the New South Wales Supreme Court held that the Quartz Hill

ruling did not apply where the Court in the primary case had no power to order costs.

(b) damage to the plaintiff's fame. This type of damage has been restricted to imputations affecting the plaintiff's fair fame which necessarily and naturally flow from the proceedings. The fact that the plaintiff's reputation has been affected is not sufficient: see Wiffen v. Bailey and Berry's case.

(c) damage to the plaintiff's person. This has been confined to injury to the life, limb or liberty of the plaintiff as e.g. where the prosecution results in the arrest of the plaintiff. The fact that a warrant has been obtained is not sufficient: Bayne v. Baillieu (1908) 6 C.L.R. 382. We have found no cases where illness resulting from the worry of a malicious prosecution has been recognised as damage.

However, even the existence of this tort in respect of civil :oceedings other than those mentioned on page 58 is uncertain.

Some of the textbook writers assert that such a tort exists. ıe editors of Halsbury 4th edition Volume 45 para. 1371 say ıder the heading "Malicious Civil Proceedings":

> "In civil proceedings which result in damage to reputation, person or property an action analogous to the action for malicious prosecution lies if these proceedings are undertaken maliciously and without reasonable and probable cause. Only in exceptional circumstances will such an action succeed, because generally no damage can be proved."

t judicial opinion has been divided.

The leading case is Quartz Hill Consolidated Gold Mining Co. v. Eyre (supra). In that case the English Court of Appeal held that a cause of action lay for maliciously and without reasonable or probable cause taking winding up proceedings against a company for alleged insolvency. The company had suffered damage to its credit before it had an opportunity to rebut the allegations of insolvency. The bankruptcy procedure ensured that such damage was inevitable. Bowen L.J. also made remarks which, although obiter dicta, have been cited by subsequent courts as authority for the proposition that there is no cause of action for malicious prosecution of civil proceedings except for those specific exceptions mentioned in (d) on page 58 . Bowen L.J. at p.689, after discussing Holt C.J's. test of damage said:

> "To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action. Apply the second head of damage, namely, those injuries which are done to the person: the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the

> existence of which will support such an action as this, is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

e discuss later several criticisms of this reasoning. Brett .R. did not express such a definite view and his remarks at page 82 could be construed as supporting the view that a cause of ction does exist, but only where damage within the rule in avill v. Roberts is proved.

The application of Bowen L.J's. remarks by later Courts is llustrated by the following cases.

In Jones v. Foreman (1917) N.Z.L.R. 728 the court held that ffiliation proceedings alleging that the plaintiff was the ather of an illegitimate child, even though malicious and ithout reasonable cause, would not give rise to a cause of ction for malicious prosecution. Although the court cknowledged that the plaintiff had suffered a wrong it held that o cause of action lay, principally because there was no

precedent, although the difficulty of proving damage was discussed. Chapman J. said at p.825:

> "It may be quite true that the doctrine referred to [Quartz Hill] leaves a man in the position that he really suffers an injury for which he has no redress. In this respect, however, what he complains of does not differ from several other non-actionable wrongs from which the subject must occasionally suffer without redress."

In Fenn v. Paul (1932) 32 S.R. (N.S.W.) 315 the Full Court gave a judgment similar to that in Jones v. Foreman when it held that no action for damages lay for maliciously and without reasonable or probable cause naming the plaintiff as a co-respondent in proceedings for dissolution of marriage on the ground of adultery. The court was impressed by the argument of Stout C.J. in Jones v. Foreman at p.808 that allowing an action would result in the commencement of unheard of actions and the possibility of claims of malicious prosecution of malicious prosecution actions.

In Mohamed Amin v. Jogendra Kumar Bannerjee (1947) A.C. 322 the Privy Council, relying on Quartz Hill, expressed the opinion obiter that no action lies for maliciously prosecuting an ordinary civil action because a civil case does not necessarily and naturally involve damage to the party sued. This point was not in issue before the Privy Council, and as A.M. Gleeson says in 5 Australian Lawyer 37, the Privy Council and others appear to have taken it for granted that, with two well defined exceptions, an action for malicious prosecution of civil proceedings does not exist.

In Coleman v. Buckinghams the majority of the Full Court of

ew South Wales held that there was no such general rule, lthough the dissenting judge said there was. Herron C.J. and alsh J. analysed Quartz Hill and concluded that it did not in act support the wide proposition that there was no cause of ction for malicious prosecution of civil proceedings. They ppear to have considered that Quartz Hill simply laid down the rinciples applicable to determining in each case whether there as damage sufficient to found an action. With respect we agree.

In Coleman's Case the plaintiff had been sued by the efendant in the small claims jurisdiction for a debt. Judgment ad been entered against the plaintiff on a false affidavit of ervice. The plaintiff incurred legal expenses in having the udgment set aside but the court of Petty Sessions had no power o award him costs. He then sued the defendant for damages for is legal expenses, injury to his credit and in his employment nd mental anguish, alleging that the plaintiff had prosecuted im maliciously and without reasonable or probable cause. The ull Court held that as the Court of Petty Sessions had no power o award him costs, his legal expenses were special damage within he meaning of Savill v. Roberts and he had a good cause of ction. The majority also raised the question whether, in view f the fact that malice had been proved, damages should be at arge. Application was made for leave to appeal to the High ourt, but the result has apparently not been reported. Nor have e found a report of any assessment of damages.

Another Australian case in which it was held that the laintiff could recover damages for malicious prosecution of

civil proceedings of a type which did not fit into the recognised categories was Jervois Sulphates (N.T.) Ltd. v. Petrocarb Explorations N.L. & Ors (1974-5) 5 A.L.R. 1. The primary proceedings in that case were brought by the defendants in the Mining Warden's Court for various orders including injunctions restraining the plaintiffs from entering certain mining leases near Alice Springs and from using housing on another lease. Orders had been obtained on deliberately false evidence. The plaintiffs eventually had the orders set aside. Forster J. found that the Warden's Court proceedings had been prosecuted by the defendants maliciously and without reasonable or probable cause and that the plaintiffs had suffered special damage and held that they had a good cause of action for malicious prosecution. In so holding he relied on Quartz Hill, Wiffen v. Bailey and Coleman v. Buckinghams. He awarded damages for the legal costs of having the injunction declared void. He also awarded aggravated damages because of the manner in which the tort was committed, including the defendant's wish to hurt and be rid of one of the plaintiffs, their conspiracy to misrepresent the boundaries of a lease in order to deny access to the housing, the fraudulence of the proceedings, insults and groundless threats, andthe heartless ejection into the road of an employee of a plaintiff and his family.

Although in our view, the reasoning of the majority in Coleman's Case is correct, and although that case has been applied in Jervois v. Petrocarb, it cannot be said with certainty that in South Australia there is a tort of malicious prosecution

of a civil action. Even if the tort exists, it suffers (in the same way as the tort of maintenance) from the extreme restrictions on the type of damage which the plaintiff must prove.

The editors of Winfield & Jolowicz on Tort 11th ed. 1979 at p.521 point out that it is anomalous to allow an action for malicious prosecution of bankruptcy proceedings, but not for maliciously suing a person for some scandalous tort like deceit and, we would add, for suing in contract in an action based on fraud, or under the Trade Practices Act for deceptive and misleading conduct, or for any other cause of action based on conduct of a scandalous nature.

We consider that the rule as to damage in Savill v. Roberts is restrictively interpreted by Bowen L.J. in Quartz Hill and some other cases is now out of step with the law of tort generally. As Danckwerts L.J. said in Berry v. British Transport Commission (1962) 1 Q.B. 307 at p.335:

> "It would appear that the action in the time of Holt C.J. was in the early stages of its evolution, and what would appear to be sensible or desirable in the seventeenth century is not necessarily reasonable in 1961. In the course of the treatment of the subject in the cases which have been decided in more modern times there appear to me to have been introduced a number of developments which, with all respect, I do not think should have been allowed to occur."

We specifically comment that:

. The requirement that the damage to fame must naturally and necessarily flow from the prosecution excludes cases where, although the damage would not necessarily result, the

plaintiff has actually suffered damage. Such cases are excluded even if the defendant intended or should have known that such damage would result. Nowadays it is not true to say in all civil cases that "the poison and the antidote are administered simultaneously" as was said by Buckley L.J. in Wiffen v. Bailey at p.607 i.e. that the publicity comes at the same time as the judgment. The existence and nature of civil commercial proceedings sometimes comes to the notice of a party's business associates and customers long before judgment. Where those actions involve allegations of dishonesty or incompetence, damage to reputation and subsequent financial loss may well be suffered before a judgment vindicating the defendant is given. We think it is artificial to draw a line between damage done by the proceedings themselves and damage done as a result of the proceedings coming to the notice of other people, although it appears that Bowen L.J. did so Quartz Hill at p.689 and so did the New Zealand Court in Jones v. Foreman (supra).

2. The ruling that the difference between party/party and solicitor/client costs is not damage has also been strongly criticised by both judges and writers. Devlin L.J. said in Berry's Case at p. 320:

> "The rule is not easy to apply with justice because it embodies a presumption, which the law finds convenient and maybe necessary to make; but which it has to, and does in other contexts, admit not to be in accordance with fact....
> The reason for the rule is not that the costs incurred in excess of the party and party allowance are deemed to be unreasonable; it

is that what is presumed to be the same question cannot be gone into twice...."

at p.322 he said:

"It would be a rational rule and in accordance with the ordinary principle as to res judicata if in truth it were the same point. But it is not. It may be that when the rule was first laid down by Mansfield C.J. in 1807 the two standards of assessment were not so far apart as they are now.... I find it difficult to see why the law should not recognize one standard of costs as between litigants and another when those costs form a legitimate item of damage in a separate cause of action flowing from a different and additional wrong. Limitation of liability is a principle that is now well recognised. In the case of damage done by a ship it has been in force for the last two centuries in this country, and for longer in others, and the basis of it is simply that it is not in the public interest that shipowners should be deterred from seafaring by the prospect that they might be crippled by awards of heavy damages. The stringent standards that prevail in a taxation of party and party costs can be justified on the same sort of ground; see, for example, Smith v. Buller per Malins V.C. It helps to keep down extravagance in litigation and that is a benefit to all those who have to resort to the law. But the last person who ought to be able to share in that benefit is the man who ex hypothesi is abusing the legal process for his own malicious ends."

He went on at p. 323:

"If the matter were res integra, I should for myself prefer to see the abandonment of the fiction that taxed costs are the same as costs reasonably incurred and its replacement by a statement of principle that the law for reasons which it considers to be in the public interest requires a litigant to exercise a greater austerity than it exacts in the ordinary way, and which it will not relax unless the litigant can show some additional ground for reimbursement over and above the bare fact that he has been successful. Without a restatement of that

> sort, there is undoubtedly a practical need for the rule in civil cases. Otherwise, every successful plaintiff might bring a second action against the same defendant in order to recover from him as damages resulting from his original wrongdoing the costs he had failed to obtain on taxation.... The rule is thus essential to the administration of justice in civil suits and will continue to be so until the time comes, if it ever does, when the law either allows to a successful litigant all the costs he has reasonably incurred or recognises openly that an assessment of damage and a taxation of costs as between party and party are two different things."

We pose the question - if a plaintiff has reasonably incurred legal costs which he cannot recover under a costs order in defending what he has proved were malicious and unfounded proceedings against him, why should he not be able to recover that loss? In our opinion he should be able to. We came to the same conclusion in our Eighty-Third Report. Also this rule as to costs defeats a person who has a worthless order for costs against a man of straw in proceedings maliciously procured by a third party. If the restriction were lifted the plaintiff would be able to recover his expenses from the controlling third party, which seems to us to be fair to all parties. It would also deter this type of abuse of litigation.

3. Arrest in civil proceedings is now rare, except on default after an order made on an Unsatisfied Judgment Summons, for non-attendance while under summons, or on enforcement by the Crown on a capias which is not frequently used today. Damage to the person will often be in the form of illness caused by the anxiety of being maliciously prosecuted, which has not

yet been recognised as damage for the purposes of the rule in Saxill v. Roberts. As the action is to redress a deliberate wrong we consider that the law should take notice of that type of injury as damage for the purpose of founding an action.

It has also been argued that placing the burden of proving malice on the plaintiff as well as of proving lack of reasonable and probable cause renders the tort too difficult to prove.

Apart from the judicial precedent, which we have discussed, we think that the reluctance of past Courts to grant compensation for malicious prosecution, or for other conduct which we discuss later under the heading Abuse of Process of the Court, stems from an underlying and usually unexpressed evaluation of competing policy considerations. These are the policy of encouraging citizens to assist in law enforcement, the policy of encouraging citizens to seek a resolution of disputes through judicial process without fear of reprisal litigation against a losing party, the undesirability of litigating substantially the same facts twice, the desirability of a quick and final resolution of litigation, on the one hand and on the other hand, the need to discourage the misuse of judicial process for the purpose of harrassment, oppression, extortion or "legal" blackmail or for obvious political or other objectionable purposes and the need to compensate persons who have suffered damage as a result of such wrongful use of litigation.

In the U.S.A. the majority of the States have apparently

given greater weight to the second set of policy factors, as about two-thirds of the States now recognise torts of wrongful civil proceedings and abuse of process. The fact that American Courts have only very limited powers to award costs has had an effect on the development of these actions, but it is not the only factor. The Restatement of the Law of Torts (2d.) 1965 states:

> "One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex parte, the proceedings have terminated in favour of the person against whom they are brought."

Liability for the American tort extends to wrongful civil proceedings against another before an administrative board that has power to take action adversely affecting the legally protected interests of the other, e.g. by revocation of a licence or suspension of an officer. The plaintiff must prove all elements of the tort including lack of probable cause and improper purpose. It is interesting to note that the term "malice" is not used but it appears that "primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based", means the same: see Prosser on Torts 1971 ed. p.855. Prosser says the plaintiff must also prove "actual damages in excess of the costs recoverable in the

original action" as one of the elements of the cause of action. The Restatement para. 681A describes this as "special harm", but the majority of the States are more liberal in this regard than British jurisdictions. A successful plaintiff is entitled to damages for: (para 681 Restatement):

> "(a) the harm normally resulting from any arrest or imprisonment, or any dispossession or interference with the advantageous use of his land, chattels or other things, suffered by him during the course of the proceedings, and
>
> (b) the harm to his reputation by any defamatory matter alleged as the basis of the proceedings, and
>
> (c) the expense that he has reasonably incurred in defending himself against the proceedings, and
>
> (d) any specific pecuniary loss that has resulted from the proceedings, and
>
> (e) any emotional distress that is caused by the proceedings."

In our opinion the restrictions on the limited tort of malicious prosecution of civil proceedings result from too little weight being given to the deterrence of malicious proceedings and compensation of persons aggrieved by such proceedings in favour of the other policy considerations mentioned earlier. We refer to our Eighty-Third Report in which we recommended that it should be made easier for people to bring actions for malicious prosecution of criminal proceedings for much the same reasons.

ABUSE OF CIVIL PROCESS

"Abuse of process" is a term which is used in both a broad and a narrow sense. In its broad sense it includes a variety of objectionable uses of litigation, including, inter alia,

malicious prosecution, maintenance and champerty. In its narrow sense it means the objectionable use of litigation which does not amount to one of the specifically named and defined abuses which give rise to another cause of action. It is in this sense that we use the term in this part of this Report.

The Courts have an inherent jurisdiction to refuse to hear, stay or dismiss proceedings which are an abuse of process: D.P.P. v. Humphrys (1977) A.C. 1 and Rozenbes v. Kronhill & Anor (1956) 95 C.L.R. 407.

It is uncertain whether the conduct of proceedings which are an abuse of process gives rise to tortious liability independently of any liability under any of the other named torts.

In America such a tort is recognised in a majority of the States. The Restatement of the Law of Torts (2d.) says at para. 682:

> "One who uses legal process whether criminal or civil, against another primarily to accomplish a purpose for which it was not designed, is subject to liability to the other for harm caused by the abuse of process."

Prosser op. cit. at p.856 says:

> "The action for malicious prosecution, whether it be permitted for criminal or civil proceedings, has failed to provide a remedy for a group of cases in which the legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. In such cases a tort action has been developed for what is called abuse of process."

and at p.857 he gives an example:

> "Thus if the defendant prosecutes an innocent plaintiff for a crime without reasonable grounds...it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process."

Some English and Australian writers of comprehensive texts on the law of Torts do not include such a tort e.g. the editors of Clerk and Lindsell on Torts (1982) 15th ed. and Winfield & Jolowicz on Torts (1979) 11th ed. On the other hand the editors of Halsbury's Laws of England 4th ed., Street on Torts (1983) 7th ed. and Fleming, The Law of Torts (1983) 6th ed. assert that such a tort does exist. Street says at p.406:

> "It is a tort to use legal process in its proper form in order to accomplish a purpose other than that for which it was designed and thereby cause damage."

Halsbury's text is almost identical, but apart from Grainger v. Hill 4 Bing.(N.C.) 208 (1838); 132 E.R. 769 the authorities cited do not support the existence of a tort, as they involved only applications to stay proceedings or to refuse the relief sought. Fleming says at p.589:

> "Apart from malicious prosecution, there are certain other abuses of legal procedure, like malicious arrest on mesne process and malicious execution which resemble the parent action too much to warrant separate treatment. Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted to serve some extraneous purpose, such as extortion or oppression. Here an action will lie at the suit of the injured party for what has come to be called "abuse of process" - probably the clearest illustration in our law of what civilians call an "abuse of right".
> .....
> Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful

> launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve. It involves the notion that the proceedings were 'merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate.' It is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator: the improper purpose is the gravamen of liability.
>
> Of course, not every collateral advantage sought by a litigant becomes improper merely because it is beyond the court's power to grant it. Actions are commonly settled on terms that a court could not impose, e.g. an apology for libel, specific performance of certain contracts. In order to be improper the ulterior advantage must be one not reasonably related to the subject matter of the litigation and but for which the defendant would not have commenced the proceedings. Thus it would be an abuse of process if actions for libel against secondary distributors of a controversial periodical were brought in order to induce them to cease all further distribution and thereby suppress the periodical; not however, if the primary purpose was to vindicate the plaintiff's reputation. Goldsmith v. Sperrings [1977] 1 W.L.R. 478."

The leading case is Grainger v. Hill (supra). In that case the plaintiff had borrowed money from the defendant on the security of his ship. The defendant threatened to arrest the plaintiff if he did not repay the loan immediately although it was not yet due. The plaintiff refused to pay and the defendant then had the plaintiff arrested under a capias and kept him imprisoned until he gave up the ship's register. The defendant was not entitled to the register and he thereby prevented the plaintiff from putting the ship to sea, as the plaintiff was entitled to do under the terms of the loan agreement. The

plaintiff sued the defendant for damages. He could not sue for malicious prosecution because the debt proceedings were still on foot. The Court of King's Bench Division unanimously held that the plaintiff had a good, but novel, cause of action on the case. Tindal C.J. said at p.773 of E.R. (page 221 of the nominate report)

> "...the Plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause."

Park J. said at the same page of the English Reports (page 222 of the nominate report)

> "But this is a case primae impressionis, in which the Defendants are charged with having abused the process of the law, in order to obtain property to which they had no colour of title; and, if an action on the case be the remedy applicable to a new species of injury, the declaration and proof must be according to the particular circumstances."

These statements would appear to be sufficient authority for the existence of a tort of abuse of process, but later Courts have been reluctant so to apply them and we have found only one reported case (other than in the U.S.A.) in which there is a clear ruling that there is such a tort.

That one case is Guildford Industries Ltd. v. Hankinson Management Services Ltd. & Ors [1974] 40 D.L.R. 398. The plaintiff sued the defendants for damages in relation to

litigation arising from a lien that the defendants had registered on the plaintiff's land, on the ground that it was an abuse of process. The trial judge of the Supreme Court of British Columbia found that the defendants had registered the lien knowing that there was not the slightest hope of their succeeding on the lien claim and for the improper and malicious purpose of compelling the plaintiff to make a settlement in favour of the defendants on terms dictated by them. The judge described their conduct at p.405 as "legal blackmail". He awarded $50,000 damages (based on the cost of the delay caused to the plaintiff's development project and the forced sale of some land) and exemplary damages of $10,000. The judge cited Fleming op. cit. with approval. It is noteworthy that he found lack of reasonable and probable cause and malice, although no action for malicious prosecution could have been brought because the lien proceedings were still on foot.

Some further support for the existence of the tort is given by Goldsmith v. Sperrings [1977] 1 W.L.R. 478. The appeal concerned an order for the dismissal or stay of libel proceedings against "Private Eye" and some of its distributors, but Lord Denning M.R. asserted obiter that the Courts have power to award damages for damage caused by abuse of process. He said at page 489:

> "In a civilised society, legal process is the machinery for keeping and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a

> wrong known to the law. The judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer."

On the other hand the High Court of Australia in a series of cases early this century refused to make any ruling on whether a tort exists: see Bayne v. Rigall and Bayne v. Baillieu both (1908) 6 C.L.R. 382, Bayne v. Blake (1909) 9 C.L.R. 347 and Yarawa v. Howard Smith Company Ltd. (1911) 13 C.L.R. 35. In Bayne v. Blake Griffith C.J. said at p. 353:

> "Although some of the authorities say that such an action will lie, there is no instance of an action of that sort ever having been brought, and what are the principles applicable to such an action seems to me to be a matter of great obscurity."

He did not refer to Grainger v. Hill. Guildford Industries Ltd. v. Hankinson came later. In Bayne v. Rigall at p.401 O'Connor J. distinguished Grainger v. Hill on the basis that the case before him was "not that the defendants fraudulently and oppressively used process lawfully and regularly obtained for a purpose not warranted by the process, but rather that [the defendants] set the law in motion to obtain the process under circumstances which amounted to an abuse of the remedy sought and a fraud upon the Court, and therefore without either reasonable or probable cause." The line between the two is very fine.

In those cases the High Court expressed some views obiter as to what the elements of the tort would be, if it did exist. All judges who expressed an opinion on the point considered that proof of actual damage would be a necessary element, but did not

define what would amount to actual damage. In Bayne v. Blake Barton J. said at p.356 that the plaintiff would have to prove that the proceedings effected a fraud on him. Also in that case Griffith C.J. expressed the view that motive would not be relevant and that he was inclined to agree with Warrington J's. objective test of what amounted to abuse of process in Egbert v. Short (1907) 2 Ch. 205 at 211, namely, whether "to allow it [the proceedings] to proceed would be so oppressive and vexatious to the defendant as to amount to such an injustice to him that it ought not to be permitted."

We have found no report of the High Court having been called upon since 1911 to decide whether a tort of abuse of process exists.

Thus it is uncertain whether in Australia a person who is wronged by oppressive legal proceedings, but who cannot satisfy the stringent requirements of malicious prosecution or maintenance or champerty has any cause of action which will entitle him to compensation. In our opinion he should have a cause of action.

Further, assuming that no tort of abuse of process exists, the abolition of the tort of maintenance would widen the range of cases in which a person has no remedy for the damage he has suffered as the result of the improper use of legal proceedings.

RECOMMENDATIONS

We recommend the enactment of two new sections of the Wrongs Act, 1936, providing for civil liability in damages:

(a) for embracery and

(b) for abuse of the process of the Court in the wide sense.

Both sections should bind the Crown.

Embracery

With regard to civil liability for embracery we recommend that either or both the person who unlawfully influenced the juror and the juror who was unlawfully influenced should be jointly and severally liable. The elements of the cause of action should be:

(a) that the defendant has unlawfully influenced a juror or, if the defendant is the juror, that he has been unlawfully influenced (in the same sense as applies to Section 83 of the Juries Act, 1927); and

(b) that as a result of that unlawful influence the plaintiff has suffered damage.

The plaintiff should bear the onus of proving:

(a) the unlawful influence,

(b) damage, and

(c) the causal link between them.

Abuse of Process

With regard to civil liability for abuse of process of the Court we recommend that liability be provided for:

(a) maliciously and without reasonable and probable cause prosecuting another for:

(i) a crime

(ii) a summary offence,

(b) maliciously and without reasonable or probable cause

prosecuting civil proceedings of any type,

(c) otherwise prosecuting civil, criminal or summary proceedings in circumstances which constitute an abuse of the process of the Court.

With regard to malicious prosecution for a crime or summary offence we refer to our Eighty-Third Report.

The elements of the cause of action for malicious prosecution of civil proceedings should be:

(i) that the defendant has prosecuted the plaintiff in the sense that he instituted, continued or defended civil proceedings against him or procured such prosecution,

(ii) that the proceedings have terminated in favour of the plaintiff,

(iii) that the defendant prosecuted the proceedings without reasonable or probable cause,

(iv) that the defendant prosecuted the proceedings maliciously,

(v) that the prosecution caused damage to the plaintiff.

For reasons of consistency with our Eighty-Third Report we recommend that the plaintiff should bear the onus of proving (i), (ii), (iii) and (v). Upon the plaintiff proving lack of reasonable and probable cause the defendant should assume the onus of disproving malice.

We think that the meanings of the terms "malice" and "reasonable and probable cause" are sufficiently well-known that no legislative definition is required.

We intend that the cause of action under (c) above for otherwise abusing legal process be in the nature of a "catch-all"

cause of action which would be available to give a civil remedy for any wrongful use of the Court's process which causes damage to the plaintiff and which does not give rise to another cause of action (such as malicious prosecution or material perjury in civil proceedings under Section 36 of the Wrongs Act), at that time.

The elements of the cause of action should be:

(a) that the defendant has prosecuted criminal, summary or civil proceedings in the sense that he has instituted, continued or defended the proceedings or procured such prosecution,

(b) that the proceedings were or are being prosecuted primarily for the purpose of vexation, oppression, extortion or to exert pressure on another for the purpose of achieving an advantage not related to the legal claim upon which the Court is required by the proceedings to adjudicate,

(c) that the prosecution of the proceedings caused damage to the plaintiff.

The plaintiff should bear the onus of proving all elements of the cause of action.

We recommend that the legislation expressly negative the application of the rule in Savill v. Roberts (as interpreted by Quartz Hill) to all proceedings amounting to abuse of process, whether the plaintiff's cause of action is brought as malicious prosecution or as being otherwise an abuse of process.

We also recommend that proceedings be defined to include proceedings before a tribunal which may result in the tribunal taking action adverse to the rights of the party prosecuted, e.g.

proceedings before a licensing authority to revoke a licence or proceedings before a disciplinary tribunal for suspension or deregistration.

With regard to damages we recommend as follows:

1. Malicious prosecution.

   (a) In our Eighty-Third Report we recommended that the plaintiff be entitled to:

   (i) special damages

   (ii) general damages

   but, if he is to be relieved of the burden of proving malice, then he not be entitled to:

   (iii) aggravated damages, or

   (iv) punitive damages

   We recommend the same with regard to malicious prosecution of civil proceedings.

   (b) If it is decided that the plaintiff is to continue to have the onus of proving malice as well as lack of reasonable or probable cause, then we recommend that the court have a discretion in all malicious prosecution cases to award aggravated damages as well as special and general damages.

2. <u>Other abuse of process</u>

   We recommend that the plaintiff be entitled to:

   (i) special damages

   (ii) general damages

   and that the Court have a discretion to award:

   (iv) aggravated damages.

Finally we draw attention to our recommendations numbered (5) and (6) on the last page of our Eighty-third Report concerning a summary remedy of an award of solicitor/client costs where summary proceedings have been brought without reasonable or probable cause. This recommendation would be best embodied in the Justices Act but should not be overlooked in the drafting of new provisions in the Wrongs Act.

SUMMARY OF RECOMMENDATIONS

In summary we recommend:

1. The repeal of all the Imperial Statutes listed under the heading "Imperial Statutes" except for Statute 1 Edward III Stat. 2 c.16 (1327), Statute 8 Henry VI c.9 (1429) and part of Statute 32 Henry VIII c.9 (see page 24).
2. The abolition of the common law offences of:
   maintenance,
   champerty, and
   being a common barrator.
3. The abolition of the common law torts of:
   maintenance,
   embracery, and
   barratry.
4. The enactment of a section in the Wrongs Act providing that:
   (a) champertous agreements and arrangements which would have been treated as contrary to public policy or otherwise illegal, and
   (b) agreements involving embracery

   shall continue to be illegal and void despite the repeal of the Imperial Statutes and the abolition of criminal and

civil liability at common law recommended above.

5. The enactment of a Section in the Legal Practitioners Act, 1983 similar to section 3 of the Victorian Abolition of Obsolete Offences Act, 1969 to the effect that the repeals and abolitions referred to above are not to affect a solicitor's liability to be found guilty of misconduct if he enters into a champertous agreement with his client.

6. The enactment of a section in the Wrongs Act, 1936 providing for civil liability for embracery, as set out on page 80 .

7. The enactment of a section of the Wrongs Act, 1936 providing for civil liability for prosecuting proceedings which are an abuse of the Court, as set out on pages 83 to 85.

We have the honour to be:

Law Reform Committee of South Australia.

(Mr. M.F. Gray, S.-G., Q.C. and Mr. P.R. Morgan had ceased to be members of the Committee at the time this report was signed.)

1969

VICTORIA.

ANNO DUODEVICESIMO

ELIZABETHÆ SECUNDÆ REGINÆ

No. 7884.

An Act to amend the *Crimes Act* 1958, the *Legal Profession Practice Act* 1958, and the *Wrongs Act* 1958 for Abolishing certain Obsolete Criminal Offences and for Purposes connected therewith.

[*2nd December*, 1969.]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):—

Short title.

1. This Act may be cited as the *Abolition of Obsolete Offences Act* 1969.

Amendment of No. 6231 s. 1. Division Table.

2. (1) In the Table in section 1 of the *Crimes Act* 1958 after the portion of the Table relating to Part I. there shall be inserted the expression—"Part IA.—Abolition of Obsolete Offences s. 322A."

New section inserted.

(2) After section 322 of the *Crimes Act* 1958 there shall be inserted the following heading and section :—

"PART IA.—ABOLITION OF OBSOLETE OFFENCES.

Maintenance and certain other offences abolished.

322A. Any distinct offences under the common law of maintenance (including champerty but not embracery), or of being a common barrator, a common scold, or a common night walker are hereby abolished."

Amendment of No. 6291 s.28.

3. After sub-section (3) of section 28 of the *Legal Profession Practice Act* 1958 there shall be inserted the following sub-section:-

Abolition of law as to maintenance not to affect law as to misconduct.

"(4) Notwithstanding the abolition by the *Abolition of Obsolete Offences Act* 1969 of the common law offence of maintenance a practitioner who enters into an agreement with a client to accept part of any amount received by the client in proceedings instituted or conducted by the practitioner on behalf of the client shall be guilty of misconduct to the same extent after the commencement of the said Act as before the said commencement."

Amendment of No. 6420 s. 1. Division Table.

4. (1) At the end of the Table in section 1 of the *Wrongs Act* 1958 there shall be inserted the expression - "Part VII. - Abolition of Liability in Tort for Maintenance or Champerty s. 32."

New section inserted.

(2) After section 31 of the *Wrongs Act* 1958 there shall be inserted the following heading and section:-

"PART VII. - ABOLITION OF LIABILITY IN TORT FOR MAINTENANCE OR CHAMPERTY.

Abolition of civil liability n maintenance champerty.

32. (1) No person shall be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law except in the case of a cause of action accruing before the commencement of the *Abolition of Obsolete Offences Act* 1969.

olition of iability not to affect illegality of contract on account of maintenance or champerty.

(2) The abolition of criminal and civil liability for maintenance and champerty shall not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or as being otherwise illegal and any contract which would have been illegal and void before the commencement of the *Abolition of Obsolete Offences Act* 1969 on the ground that its making or performance involved or was in aid of maintenance or champerty shall continue to be illegal and void after the said commencement."

(6) In this Part of this Act references to felony shall not be taken as including treason; but the procedure on trials for treason or misprision of treason shall be the same as the procedure as altered by this Act on trials for murder.

(7) Any provision of this Part of this Act relating to proceedings on indictment shall, so far as applicable, apply also to proceedings on an inquisition.

PART II
OBSOLETE CRIMES

Abolition of certain offences, and consequential repeals.

13. (1) The following offences are hereby abolished, that is to say -

(a) any distinct offence under the common law in England and Wales of maintenance (including champerty, but not embracery), challenging to fight, eavesdropping or being a common barrator, a common scold or a common night walker; and

(b) any offence under an enactment mentioned in Part I of Schedule 4 to this Act, to the extent to which the offence depends on any section or part of a section included in the third column of that Schedule.

(2) Accordingly the enactments mentioned in Parts I and II of Schedule 4 to this Act are hereby repealed to the extent specified in the third column of the Schedule, but subject to the provisions of Part III of the Schedule.

(3) This section shall extend to Northern Ireland only in so far as it relates -

(a) to offences under any Act of the Parliament of Ireland; or

(b) to offences under any other enactment of which the repeal is in Schedule 4 to this Act expressed to extend to Northern Ireland;

and in so far as it repeals any such Act or enactment.

PART III
SUPPLEMENTARY

Civil rights in respect of maintenance and champerty.

14. (1) No person shall, under the law of England and Wales, be liable in tort for any conduct on account of its being maintenance or champerty as known to the common law, except in the case of a cause of action accruing before this section has effect.

(2) The abolition of criminal and civil liability under the law of England and Wales for maintenance and champerty shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal.

Short title.

15. This Act may be cited as the Criminal Law Act 1967.

D. J. Woolman, Director and Government Printer, South Australia