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SOUTH AUSTRALIA

TWENTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY GENERAL

RELATING TO EVIDENCE TAKEN OUT OF THE JURISDICTION

1971

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

The Honourable Mr. JUSTICE ZELLING, C.B.E., Chairman.

B. R. COX, Q.C., S.-G.

K. P. LYNCH.

*R. G. MATHESON.

JOHN KEELER.

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

*NOTE:—Mr. R. G. Matheson was on leave overseas when this Report was signed.

TWENTY-FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO EVIDENCE TAKEN OUT OF THE JURISDICTION

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney General for South Australia.

Sir,

Your predecessor referred to us the question of whether further and better provision should be made for the examination of witnesses and parties who are outside South Australia and within a State or Territory of the Commonwealth or in New Zealand.

Our recommendations are based on the paper which was presented to the inaugural meeting of the Australian and New Zealand Law Ministers Conference outlining the New Zealand system, and forwarded to us by your predecessor.

One preliminary problem of reciprocity remains. The efficacy of the proposed legislation in relation to evidence taken interstate or overseas for use in South Australian Courts will clearly be assisted by reciprocal provisions made in the State of country where the evidence is to be taken. We recommend the securing of uniform legislation if possible throughout the Australian States and Territories, and New Zealand, so that evidence may be taken and received according to the procedure recommended below as a procedure common in any Court of that kind within that area.

At present the following procedures exist in South Australia for taking evidence at a distance from the Court or out of the State:—

(*a*) *In all Courts in South Australia*

If the witness is resident in any other State or part of the Commonwealth and it is proved that his testimony or production of documents is necessary in the interests of justice a subpoena may issue by leave of the Court pursuant to Section 16 of the Commonwealth Service and Execution of Process Act 1901-1968 compelling the attendance of the witness before the South Australian Court.

(*b*) *In the Supreme Court*

(1) Under Order 37 Rule 4 of the Rules of Court it is provided:—

"(1) The Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice make any order—

(*a*) for the examination upon oath before the Court or a Judge or any officer of the Court, or any other person, and at any place, of any witness or person,

(*b*) for the issue of a letter of request to examine witnesses outside the jurisdiction of the Court,

and may empower any party to such cause or matter to give any deposition taken upon such examination in evidence in such cause or matter upon such terms, if any, as the Court or a Judge may direct.

(2) In this Rule 'deposition' includes any document or a certified copy of any document produced at the examination and any answers made or reduced into writing to any written interrogatories presented at such examination."

(2) Under Order 37 Rule 5 it is provided:—

"A writ of commission to examine witnesses shall not be issued except on special grounds, in which case the order for the commission and the writ should be in the forms authorized by the practice of the Supreme Court of Judicature in England with such variations as circumstances may require."

(3) Under Order 37 Rule 6 it is provided:—

"Where an order is made for the issue of a request to examine witnesses in any foreign country the following procedure shall be adopted:—

(*a*) The party obtaining the order shall file an undertaking.

(*b*) The undertaking shall be accompanied by—

(i) a request together with a translation of the request in the language of the country in which such request is to be executed;

(ii) a copy of the interrogatories (if any) to accompany the request and a translation thereof; and

(iii) a copy of the cross-interrogatories (if any) and a translation thereof."

The examination of the witnesses is regulated by Rules 9-22 of the same Order.

(4) Under the Imperial Foreign Tribunals Act 1856 (19 and 20 Vict. c. 113) and Order 37 Rule 39 of the Rules of Court.

(5) Under the Imperial Evidence by Commission Acts 1859 and 1885 (22 Vict. c. 20 and 48 and 49 Vict. c. 74).

There is power to make rules of Court in this State conferred by Section VI of the 1859 Act and Section 5 of the 1885 Act but these powers do not appear to have been exercised in this State. However this would not necessarily prevent the use of these Acts in South Australia and in any case a special direction could be sought and would in a proper case be given under Order 72 Rule 2 of our Rules.

(6) In relation to the criminal law under the Imperial Extradition Act 1870 (33 and 34 Vict. c. 52) so far as this Act may still be in force in South Australia because of the provisions of Section 6 of the Extradition (Foreign States) Act No. 76 of 1966 of the Parliament of the Commonwealth. It may, however, be thought to be open to doubt whether the Commonwealth Parliament which has no general powers in relation to the criminal law, can, presumably by the use of the external affairs power, exclude or alter part of State criminal law which is itself outside Commonwealth power.

(7) In relation to the criminal law, by the Commonwealth Act just referred to, which is at the very least cumulative upon the Imperial Act of 1870.

The Imperial Acts of 1856, 1859 and 1885 (and the 1870 Act if and so far as applicable) are all by their terms Acts of the Imperial Parliament extending to the State of South Australia within the meaning of the Imperial Colonial Laws Validity Act 1865 (28 and 29 Vict. c. 63).

(8) In relation to overseas judgments by the Administration of Justice Act 1921-1926 Section 9 and the Rules of Court made thereunder.

(*c*) *In Local and Districts Courts*

The Local Courts Act 1926-1969 provides by Section 285 as follows:—

"If, in any action in any Local Court, where the debt or damages claimed exceed Thirty Pounds, it is made to appear to the satisfaction of a Judge or Special Magistrate, upon the application of any of the parties to such action, that any material witness is resident out of the State, or more than one hundred miles from the place where the Court for the trial of such action is situated, such Judge or Special Magistrate—

(*a*) may order a commission to issue under the seal of the said Court for the examination of such witness on oath by interrogatories or otherwise; and

(*b*) may, by the same or any subsequent order, give all such directions touching the time, place, and manner of such examination, and all other matters and circumstances connected with such examination, as may appear proper."

The procedure for taking evidence is governed by Sections 286-292 of that Act.

(*d*) *In Courts of Summary Jurisdiction*

(1) Sections 152 and 153 of the Justices Act 1921-1969 deal with the cases of seriously ill witnesses and witnesses for the prosecution whose evidence was taken in the presence of the defendant or his solicitor or counsel after opportunity for full cross-examination but where the witness is outside South Australia the usual practice is to rely upon Section 16 of the Service and Execution of Process Act (supra).

(2) In maintenance cases the Social Welfare Act 1926-1965 gives power to the Court by Section 99j to take evidence for use in other Australian States and by Section 99n for use overseas in reciprocating States. Evidence taken elsewhere in similar circumstances can be used in this State pursuant to Sections 99q, 99zb and 99zj of that Act.

1. *Reciprocal taking of Evidence between this State and New Zealand*

The New Zealand proposal would if adopted take away the need for much of this legislation as between this State and New Zealand and in particular it would abolish the time consuming (and cost consuming) transmission of letters rogatory through Governors and Governors-General.

Basically the scheme would operate thus:—

If the evidence was needed for use in the Supreme Court of New Zealand, a request would be sent directly from that Court to our Supreme Court. The evidence would be taken here, and saving all just exceptions would be admissible in New Zealand. The same process would operate *mutatis mutandis* in respect of inferior Courts. If the evidence was required for use in a Magistrates' Court on the civil side in New Zealand, the request would come to and be dealt with by the appropriate Local and District Court. If the evidence was required for use in a Magistrates' Court on the criminal side in New Zealand, the request would come to and be dealt with by the appropriate Court of Summary Jurisdiction.

The Committee referred the proposals to the Senior Judge of the Local and District Court (His Honour Senior Judge Ligertwood, Q.C.) and the Chief Stipendiary Magistrate (Mr. V. C. Matison, S.M.). Both these gentlemen agree with the proposed reforms. Mr. Matison recommends that all evidence in such cases in Courts of Summary Jurisdiction should be taken by a Special Magistrate and not by Justices of the Peace and the Committee agrees entirely with this recommendation.

The Committee thinks that the proposals are eminently sensible and would result in a considerable saving of time and cost and recommends that they be adopted. It would, of course, be necessary to provide in the legislation for the definition of the issues or topics on which the evidence is to be taken, as to what rules of evidence are to apply, and as to judicial notice of the signatures of the appropriate authorities in New Zealand (including where necessary of the seals of their respective Courts).

We understand from the materials submitted to us that if such legislation were to be enacted by us, New Zealand would favourably consider the enactment of reciprocal legislation in the same or similar form.

However, one problem which may arise when such legislation is enacted to apply to the taking of evidence between this State and another country is that such legislation may be repugnant under Section 2 of the Imperial Colonial Laws Validity Act 1865 to the Imperial Statutes set out above.

These statutes as appears above all deal in some way with the taking of oral evidence and the production of documents between England, its colonies and foreign countries.

On the question of repugnancy the Committee are divided. One view is that as the Imperial Acts are merely facultative no repugnancy ensues. The other is that a State Act may be caught by Section 2 of the Colonial Laws Validity Act 1865 even where the Statute is facultative (see *Nadan* v. *R.* 1926 *A.C.* 482 and *Roberts-Wray on Commonwealth and Colonial Law p.* 398).

It may be possible to overcome questions of repugnancy by enacting that the provisions referred to above are cumulative upon the powers given by the Imperial Statutes to which reference has been made.

Whilst these amendments are being considered, may we suggest a minor reform in this field which we think would be beneficial.

We draw to your attention Section 85 of the English County Courts Act 1959 7 and 8 Eliz. II c. 22 which reads—

> "85. (1) The High Court shall, on application made in manner prescribed by Rules of the Supreme Court, have the same power to issue a commission, request or order to examine witnesses abroad for the purpose of proceedings in a county court as it has for the purpose of an action or matter in the High Court.
>
> (2) Where such an application is made, the High Court may, if it thinks fit, order that the proceedings be transferred to the High Court."

As the note (*g*) to Section 285 in Hannan's Local Court Practice page 303 correctly states, if a Local Court wants letters of request or letters rogatory to be issued at present the action has to be transferred automatically to the Supreme Court. This seems to us to be quite unnecessary and the 1959 English Section to be a better way of handling the matter.

We have also referred this suggestion to His Honour Senior Judge Ligertwood, Q.C., and he concurs in the suggestion that this reform is beneficial and ought to be made.

2. *Reciprocal taking of Evidence between Australian States and Territories*

In general, except where the witness is at a very great distance, for example in the Highlands of New Guinea, this is not a great problem in practice. If the evidence is of a formal kind, or if not formal nothing turns on the credibility of the witness, either an affidavit is put in by consent or alternatively the provisions of the Evidence Act Amendment Act No. 36 of 1949 are used and a statement is put in. If the witness's credibility is in issue then in general it is essential for the party who wants to rely on the evidence of that witness to have the witness actually present in Court at the trial. The cost of setting up a commission, instructing interstate solicitors, briefing interstate counsel and paying the fees of the interstate Court would normally be greater than the cost of bringing the witness to Adelaide. However, it may be that in some cases justice may be denied by not having provision for taking of evidence, for use in South Australia, outside South Australia and within some other State or Territory of the Commonwealth.

Accordingly we recommend that legislation to enable this to be done be introduced. However, we can envisage cases where the threat to use the procedure might be very burdensome when the litigant on the other side is neither a large corporation nor has an insurance company standing behind him.

Accordingly we feel that there ought to be provision in the legislation that such an order shall not be made unless it is proved that a request has been first made for admissions in terms of the evidence to be sought and those admissions have been refused or only admitted in part and that in any event a Taxing Master should have a discretion as between party and party though not as between solicitor and client as to whether the costs of such an application should be allowed wholly or in part or at all on taxation.

3. *Reciprocity outside the States and Territories of the Commonwealth and New Zealand*

This raises difficult and complicated problems to which we felt we should address some remarks.

The actual machinery for reciprocity poses no difficulty as it can be found in a number of previous Statutes such as the Social Welfare Act, and the Administration of Justice Act provisions relating to the enforcement of judgments from other parts of the Commonwealth.

We think, however, that before such legislation is considered two matters will have to be decided:—

1. Have the States sufficient international competence today to enter into reciprocal arrangements of this kind with other parts of the Commonwealth or with foreign countries: and
2. Whether it is wise in any event to proceed with provision for reciprocity outside the suggested provisions with New Zealand, having regard to the fact that there are certain members of the Commonwealth, the Zanzibar half of Tanzania for example, from whom any request for reciprocity would necessarily have to be rejected because they do not have Courts in the sense in which we understand them at all, and accordingly invidious positions may arise if one country of the Commonwealth is recognized and another is not.

Both of these matters are, of course, policy matters for you but we felt it was our duty as a Committee to draw your attention to them so that you could consider them.

We have the honour to be

HOWARD ZELLING

K. P. LYNCH

B. R. COX

JOHN KEELER

The Law Reform Committee of South Australia

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