SOUTH AUSTRALIA

FIFTY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

on the

INHERITED IMPERIAL STATUTE LAW IN THIS STATE

RELATING TO THE TOPICS OF PROPERTY, TRUSTS, USES, EQUITY AND WILLS

1980

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.*

THE HONOURABLE MR. JUSTICE WHITE, Deputy Chairman.

THE HONOURABLE MR. JUSTICE LEGOE, Deputy Chairman.

D. W. BOLLEN, Q.C.

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FIFTY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA ON THE INHERITED IMPERIAL STATUTE LAW IN THIS STATE RELATING TO THE TOPICS OF PROPERTY, TRUSTS, USES, EQUITY AND WILLS

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

One of your predecessors, Mr. Millhouse, Q.C., referred to this committee the general topic of the applicability of inherited Imperial law within this State.

The general rules as to the inheritance of Imperial law in this State are not in doubt. It was held by the Privy Council in *Cooper v. Stuart 14 App. Cas. 286 at 291* that New South Wales, and therefore by inference the other Australian colonies, were settled colonies; to use the words of the Privy Council South Australia was a colony "which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions."

Their Lordships pointed out, following Blackstone (Bl. Comm. 1:107) that in such a case the colonists carry with them so much of the English law as is applicable to the condition of an infant colony. Their Lordships went on at page 292 to say that "as the population wealth and commerce of the Colony this time increase, many rules and principles of English law which were unsuitable to its infancy, will be gradually attracted to it;".

The date at which we inherited the law of England, both the common law and the statute law, is set by Section 48 of the Acts Interpretation Act 1915 as being the 28th day of December 1836, the date of the proclamation of the colony by Governor Hindmarsh.

The test as to whether an Act is a public general Act of the legislature of the United Kingdom applicable in south Australia appears to be that contained in the words of Grant M.R. in *Attorney-General v. Stewart (1816) 2 Merivale 143 at 160* and that is whether the English statute is a law of local policy adapted solely to England or is a general regulation of property equally applicable to any country in which it is governed by the rules of English law. That test was adopted by the High Court of Australia in *Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283* and by Poole J. in the Supreme Court of South Australia in *Winterbottom v. Vardon & Sons Limited and Another (1921) S.A.S.R. 364 AT 369.*

This test differs from that in force in the thirteen colonies prior to 1776 and in general from that in force in the then colonies of British America. That test was: Has the statute in question been recognised and acted upon in the Courts and by the local community. Accordingly English Statutes later in date than the date of the foundation of the colony could become part of the inherited law of the colony under this test. Thus for example the Waltham Black Act 1722 (9 Geo. I c.22) was held to be in force in New York which became British territory in 1665

see *Platner v. Sherwood (1822) 6 Johns Ch. R. 118* and many other similar instances could be cited. For a typical statute on the subject see Section 41 of the Interpretation Act 8 of 1968 of Jamaica which substantially re-enacted s.22 of an earlier Jamaican Act 1 Geo. II c.1 (1728) "All such laws and Statutes of England as were, prior to the commencement of 1 George II c.1 esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island" and see *R. v. Commissioner of Police (1976) 24 W.I.R. 500 at 505.* This test, although not used by their Lordships in *Cooper v. Stuart (supra)* is nevertheless a useful one in deciding which English statutes we should recommend you to preserve in their original form without repeal or re-enactment.

We are conscious that the problem has been met in some States and Territories of the Commonwealth by a general repeal of all or a large number of the Imperial Statutes inherited by the State or Territory. We do not comment on those who adopted that policy. It may well suit those States and Territories.

However when an earlier draft of the report based on a suggestion of general repeal was considered by the then Chief Justice of the Supreme Court, Dr. Bray, in July 1973, His Honour made the following comments:—

1. Recommendations as to the applicability of Imperial Acts in other parts of the Commonwealth "cannot be applied without discrimination in South Australia, first and in general because our cut off point December 28th, 1836 is different and secondly the course of the legislative history of our State since that date has been different".

2. Secondly His Honour pointed out that what he called a "rash destruction" of Statutes of major importance, as for example some of those we will be considering in this report, such as the Statutes De Donis and Quia Emptores and the State of Uses might affect radically the law by which property and titles are held in this State.

3. Thirdly he pointed out that the repealing of English Statutes may revive common law institutions or common law rights. He pointed out that Section 11 of our Acts Interpretation Act which appears on the face of it to deal only with South Australian statutes deals in any case only with the repeal of previous enactments and does not deal with the effect of the repeal of a statute which itself affects or amends the common law.

We think with respect that His Honour's strictures are soundly based. We have therefore proceeded not by general considerations repealing all, or all except a few, statutes but propose to deal with the matter topic by topic. This is a slower method of proceeding but it will ensure that every statute which it can conceivably be said that we inherited has been thoroughly considered as an individual statute and it will enable us to make recommendations statute by statute where either some amendment needs to be made in our own statutes as a consequence, or where further study of the topic is desirable as a separate topic.

We have also been conscious, in making our recommendations, of another problem which is stated by Ruffhead in eighteenth century English at page XX of the preface to the Second edition of the Statutes at Large (1769) as follows:—

> "If, upon the Promulgation of a new Law, all former Laws thereby superseded had been consigned to Oblivion, how many curious and useful Pieces of Antiquity would have been lost; and how many Lights to Jurisprudence would have been utterly extinguished! If all the Laws which have been altered or repealed by subsequent Acts, or which, being grown old by the Introduction of new Habits and Customs, *do not agree with the present State of the Times,* were to *be left out of our Statute Books,* how greatly would posterity be at a Loss to account for several Institutions, which are only to be explained by Reference to those venerable Relicts of Antiquity!"

There is a further problem with regard to the repeal of Imperial law in this State and that is that it is possible to argue in some cases that the Imperial statute in question has already been impliedly repealed by the inclusion of a section in a South Australian Act covering the matter dealt with in the English statute. Regrettably this has been done frequently in South Australia but without the draftsman adverting to the question of repealing the imperial statute which has been copied into our law, which ought to have been done in each case but in fact has been very rarely done in the period of over one hundred and forty years with which we are dealing in this and subsequent reports on this topic.

The question of implied repeal is itself a thorny one. The general topic is dealt with in the joint judgment of Gavan Duffy C.J., Rich, Dixon and McTiernan J.J. in *Hazelwood v. Webber (1934) 52 C.L.R. 268 at 257-6.* That decision does not however deal with the difficult question of whether the statute which is deemed to effect an implied repeal has to be in exact terms with the English prototype or whether a general resemblance is sufficient. It was held by the Full Court in this State in *Adelaide and Suburban Tramway Company v. The King 1905 S.A.L.R. 39 at 55* that general affirmative words were not sufficient and it was necessary to import a contradiction so that the earlier Imperial statute and the later South Australian statute could not stand together. This test was repeated in somewhat different words in the judgment of Way C.J. in the Full Court in *McLachlan v. Parken 1909 S.A.L.R. 36 at 45* where Chief Justice Way required there to be "contrariety and repugnancy between them" or else notice taken of the former law in a subsequent one so as to indicate an intention in the law makers (sc. of the subsequent statute) to repeal it". A similar test was enunciated by Fullagar J. in *Butler v. The Attorney General for the State of Victoria (1961) 106 C.L.R. 268 at 275* where His Honour said:—

> "The books contain, of course, plenty of examples of an implied repeal—total or partial—of an earlier statute by a later statute of the same legislature. But it is a comparatively rare phenomenon, and it has been said again and again that such a repeal will not be held to have been effected unless actual contrariety is clearly apparent. I would say that it is a very rare thing for one statute in affirmative terms to be found to be impliedly repealed by another which is also in affirmative terms."

That statement of the law was accepted and acted upon by a later Full Court of this State in *The South Australian Branch of the Australian Medical Association Incorporated v. The State of South Australia (1973) 6 S.A.S.R. 350 at 358.* We have taken that as being the test of implied repeal and will do so in this and subsequent reports.

In making the recommendations which follow, we have borne very much in mind the admonitions of Bray C.J. We have suggested that a few statutes which lie at the foundation of the law remain unrepealed,

that some be repealed simpliciter, that some be repealed but with a saving clause and that some be retained pending further study of the topic concerned.

We feel that in each of the South Australian Acts which follow on our reports as they come out, there should be a general saving clause stating:—

1. That nothing in the repeal of any Imperial statute revives any doctrine of the common law affected amended or repealed by such Imperial statute.

2. That nothing in the repeal of such Imperial statute takes away any amendment to the substantive law actually effected by such Imperial statute except where such amendment is itself altered affected or repealed by an Act or Ordinance of the Parliament of South Australia.

3. That the repeal of any inherited statute does not cause the revival of any earlier statute repealed by the statute now being repealed.

4. That nothing in any repeal affects any rights powers estates or privileges which have already accrued to or in favour of any person under the repealed law prior to the enactment of the repeal.

5. That the repeal of any inherited statute does not destroy or cut down any doctrine of the common law or of equity which took its rise wholly or partly from the enactment of the statute.

6. The Committee also thinks that saving provisions in terms of those used in Section 4 of the Civil Procedure Act Repeal Act 1879 (42 & 43 Vict. c.59) might usefully be adapted for this purpose.

There are two classes of Imperial statutes with which we have not dealt in this report. The first are those which by reason of the Colonial Laws Validity Act 28 & 29 Vict. c.63 cannot be altered or repealed by any Act of Parliament of South Australia because they contain within the statute a clause indicating that the statute applies to South Australia or to the Commonwealth or to the States of Australia or generally throughout the Queen's Dominions. The second are those statutes which have been incorporated in the law of South Australia by express adoption in a South Australian statute. Most of these were adopted in the very early days of the State and have since been repealed again, but there are still some which answer this description. For example Sections 5 and 9 of the Constitution Act 1934 between them take in the law and custom of the British Parliament. Most of the lex et consuetudo parliamenti is common law but there are certain statutes which amend or in some cases define it and those statutes are of course brought into the law of South Australia by those sections of the Constitution Act. There are other similar examples. In these cases we have assumed that Parliament will attend to the matter itself and that no report is called on from us in relation to such matters.

With these principles in mind we turn now to the discussion of the Imperial Statutes bearing on the topics at the head of this paper:

Statutes relating to Property, Trusts, Uses, Equity and Wills

Magna Carta (1225) 9 Hen. III cc.1-37 sometimes referred to as (1297) 25 Edw. I cc.1-37.

c.2: Relief of King's Tenant of full age.

This refers to the payment by a tenant in capite holding by knight service when he took his property on obtaining his majority. Knight service was impliedly repealed by the Act 12 Car. II c.24 but it was thought wise to repeal the statute expressly in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125) and we make the same recommendation here.

c.10: Distress for services.

This relates to services due to the Crown on land held by free hold tenure. These are obsolete and were repealed in England by the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62) and we make the same recommendation here.

c.18: Priority of Crown debts in a deceased estate.

This is still in force and applicable here. It was repealed in England by the Crown Proceedings Act 1947 (10 & 11 Geo. VI c.44). We recommend to you that a general study of the priority of Crown debts should be referred to this Committee and that meanwhile the statute should remain in force in South Australia.

c.22: Holding of felon's lands by the King.

The corruption of blood worked by a conviction for felony caused the felon's lands to be surrendered into the King's hands for a year and a day and then into the hands of the lord from whom the felon held immediately. Corruption of blood was repealed in this State by the Act 25 of 1874. To remove 9 Hen. III c.22 expressly from the statute book we recommend its repeal here. It was expressly repealed in England by the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62).

Statute of Merton 20 Hen. III (1235) cc.1-11.

c.2: Widow's bequest of corn on land.

This was impliedly repealed in this State by the Ordinance 16 of 1842 adopting the Imperial Act 7 Will. IV and 1 Vict. c.26 which gives a general power of bequest to testators in South Australia. It was expressly repealed in England by the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62) and we recommend that this be done here.

Statute De Districtione Scaccarrii 51 Hen. III Stat. 4 (1266) (in Statutes of the Realm inserted among the Statutes incerti temporis).

This regulates distress for Crown debts. It is still in force in South Australia. We recommend that the general study of the operation of the law of distress be referred to this Committee and that meanwhile the statute remain in force. It was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125).

Statute de Marleberge (Statute of Marlborough) 52 Hen. III cc.1-29 (1267).

cc.1-4 relate to distress. The chapters 1 and 4 are still in force in England and chapter 1 is certainly still in force in South Australia relating to the control of private distraints. Chapter 3 is partly still in force in South Australia and governs the obstruction of execution of judgments given in the Courts. One of your predecessors has already referred to us the general question of the procedures of the Courts and we recommend therefore that chapters 1 and 3 remain on the statute book until we have reported to you on the particular topics and that chapters 2 and 4 be

repealed. Chapter 2 was repealed in England by the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62).

c.15 referring to distresses taken on the King's highway is still in force here and in England. We recommend that it remain on the statute book here until we report to you on the general topic of distress.

c.23: waste by fermors.

Part of this chapter is still in force in England and part has been repealed by the Statute Law Revision Act 1881 (44 & 45 Vict. c.59). It is obsolete and we recommend its repeal. However it would appear that it still governs the substantive law as to lessors (see Hill & Redman on Landlord and Tenant 13th Edn. page 200) and a saving provision should be enacted here to preserve the substantive law position.

Statute of Westminster the First (1275) 3 Edw. I cc.1-51.

cc.16-17. These relate to distress and should be dealt with under that topic. c.16 was repealed in England by the Statute Law (Repeals) Act 1969 (1969 c.52) and c.17 was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125).

c.19: Crown debts. This was repealed in England by the Statute Law Revision Act 1881 (44 & 45 Vict. c.59). It is still in force in this State and we recommend that it remain in force until we deal with the general topic of debts due to the Crown.

Statute of Gloucester 6 Edw. I cc.1-15 (1278).

c.5. Action of waste against tenant for life or for a term of years.

This was repealed in England by the Civil Procedure Acts Repeal Act 1879 (42 & 43 Vict. c.59). The action of waste was in practice abolished by the substitution of an action on the case by the Real Property Act 1833 (3 & 4 Will. IV c.27 s.36). But the statute still governs the substantive right to proceed against tenants for life and tenants for a term of years which right did not exist at common law. The chapter should be repealed here with a saving provision to continue the substantive law as it now is because of the amendment effected by this statute.

Statute of Westminster the Second 13 Edw. I cc.1-50.

c.1: Usually referred to as the Statute De Donis, on the subject of Estates Tail:

Our Estates Tail Act 1881—228 of 1881—depends upon and assumes the existence of this English Statute. It should remain in force until estates tail are abolished in South Australia.

c.14: Actions of waste.

This statute was repealed in England by the Civil Procedure Acts Repeal Act 1879 (42 & 43 Vict. c.59). It is obsolete here following the substitution of an action on the case by 3 & 4 Will. IV c.27 s.36 and should be repealed.

c.22: Waste by one tenant in common against another.

This has been repealed in England by the Civil Procedure Act 1879 (42 & 43 Vict. c.59). However this right did not exist at common law and whilst recommending the repeal of the statute, it should be accompanied by an express saving of the position that one tenant in common can sue the other for waste.

Statute Quia Emptores 18 Edw. I c.1 (1290).

This statute is the foundation of the law of real property in this State and should remain in force. Its existence is assumed by the Real Property Act 1886—380 of 1886.

Statute de Vasto 20 Edw. I Stat. 2 (1292).

This statute amends the common law by providing that if a reversioner has a right of action for waste and dies, the action descends to the heir. The rights of the heir at law to inherit were abolished by the Administration and Probate Act 1891—537 of 1891, but as this is a descent of right by statute and not by will, it is doubtful if the 1891 Act applies to this case, as by its terms it deals only with testamentary procedure and testamentary causes. It was repealed in England by the Statute Law Repeal Act 1863 (26 & 27 Vict. c.125) and should be repealed here but with a saving of the substantive right.

Articuli super Cartas 28 Edw. I cc.1-20 (1300).

c.12: Distress for Crown debts is still in force in South Australia. It was repealed in England in 1953 (2 & 3 Eliz. II c.5). We recommend that the statute remain in force here until we report to you on the general question of Crown debts.

Praerogativa Regis 17 Edw. II Stat. I (1324) (in the Statutes of the Realm listed among the Statutes incerti temporis).

cc.9-10 (cc.11-12 in the Statutes of the Realm): The King's prerogative in relation to the lands of idiots and lunatics.

These were repealed in England by the Mental Health Act 1959 (7 & 8 Eliz. II c.72) and the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62). These statutes are the basis of the parens patriae jurisdiction in relation to persons of unsound mind. We recommend their repeal with a saving of the parens patriae jurisdiction of the Crown, and therefore through the Lord Chancellor that of the Courts, to deal with the lands and property of persons of unsound mind. The jurisdiction exists in South Australia by reason of the Imperial Act 4 & 5 Will. IV c.95 founding this State and the first Supreme Court Ordinance No. 5 of 1837, the jurisdiction of which has been passed on by the later Supreme Court Acts of 1855-6, 1878, and 1935 to the present Court.

Statute 25 Edw. III Stat. 5 c.5 (1361).

This is the statute which deals with executors of executors to this day. In the Twenty-Eighth Report of this Committee we dealt with part of the law on executors and administrators dealing principally with the shares that should be allotted to various next of kin and widows on an intestacy. We suggest that this statute be left on the books whilst we report to you on the remainder of this topic.

Statute 11 Hen. VI c.5 (1433)

This statute extends the provisions of the Statute of Gloucester 6 Edw. I c.5, referred to above, as to waste by tenants for life or for a term of years. It was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125). It should be repealed here but with a provision as in the case of 6 Edw. I c.5, to continue the substantive law as it now is.

Statute I Ric. III c.1 (1483)

The statute deals with fraudulent uses of lands. It was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125). It should be repealed here but as there are still many pieces of land in South Australia under the old system of which uses might still be declared, there should be a provision that the repeal does not amend the present state of the substantive law.

Statute 3 Hen. VII c.4 (1487).

This deals with deeds of gift made to defraud creditors. It was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125). The subject is dealt with in Sections 86 and 87 of the Law of Property Act 1936 but these sections are based not on this statute but on the statutes 13 Eliz. I c.5 and 27 Eliz. I c.4 which do not cover quite the same ground. Indeed this statute of Henry VII is made perpetual by 27 Eliz. I c.4 s.II. The statute should be repealed but a section covering this point should be inserted in Part IX of our Law of Property Act.

Statute 4. Hen. VII c.17 (1487).

This deals with waste committed against the heir of a cestui que use. The action of waste, as we have observed before, has been superseded by the action on the case given by 3 & 4 Will. IV c.27 s.36. Nevertheless, for the reasons we gave when commenting on the statute De Vasto (20 Edw. I Stat. 2), we should retain the alteration in the substantive law involved in the statute. The statute was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125). It should be repealed here but with the preservation of the substantive law.

Statute 21 Hen. VIII c.4 (1529).

This statute permits the sale of land forming part of a deceased estate by a less number of executors than the total number named in the will. It was repealed in England by the Administration of Estates Act 1925 (15 & 16 Geo. V c.23). The subject is dealt with by Section 46 (2) of the Administration and Probate Act 1919 but this exact point is not dealt with, as the draftsman no doubt assumed the continued existence of 21 Hen. VIII c.4. It should be repealed in this State and a section to this effect placed in our Administration and Probate Act.

Statute 21 Hen. VIII c.15 (1529).

This protects tenants against fraudulent recoveries by their landlord. The practice of conveying land by fine and recovery was abolished in 1833. Accordingly the statute can be repealed. It was repealed in England by the Statute Law Revision Act 1863 (26 & 27 Vict. c.125).

Statute 21 Hen. VIII c.19 (1529).

This deals with the making of avowries on land without having to name the tenant. Avowries are long since obsolete in this State even if we inherited them in 1836 which is unlikely. The statute was repealed in England by the Statute Law Revision and Civil Procedure Act 1883 (46 & 47 Vict. c.49). It should be repealed here.

Statute 27 Hen. VIII c.10 (1535)—The Statute of Uses.

This Act lies at the foundation of the whole law of trusts. It should remain on the statute book at least as long as the present system of conveyancing lasts. It has been repealed in England by the Law of Property Amendment Act 1924 (15 & 16 Geo. V c.5) and the Law of Property Act 1925 (15 & 16 Geo. V c.20) but this is because the latter of

these two Acts in particular changed the system of conveyancing in England.

Statute 31 Hen. VIII c.1. (1539).

This permits joint tenants and tenants in common to make partitions of land. This subject is dealt with in detail in Part VIII of the Law of Property Act 1936 and this statute can be repealed.

Statute 32 Hen. VIII c.9 the Pretenced Titles Act (1540).

This statute is in force in South Australia see *Nichols v. Anglo-Australian Investment, Finance and Land Co. (1890) 11 L.R. N.S.W. 354.* The Committee recommends that Section III relating to maintenance of actions and Section V relating to the proclamation of the Act be repealed and the remainder to be continued until the Committee reports generally on the topic of real property.

Statute 32 Hen. VIII c.28 (1540).

This protects lessees after death of the life tenant of a fee tail from being ejected by the successor in tail and deals also with leases made by husbands of the lands of their wives. Estates tail are rare in South Australia today. Wives now manage their own property by reason of Section 92 of the Law of Property Act 1936. The statute should be repealed and a section in modern language put in the Estates Tail Act 1881 to cover lessees of entailed lands. The statute was repealed in England by the Law of Property Amendment Act 1924 (15 & 16 Geo. V. c.5).

Statute 32 Hen. VIII c.32 (1540).

The statute 31 Hen. VIII c.1 dealing with partition was apparently construed narrowly as applying only to estates in fee simple held in joint ownership. The statute 32 Hen. VIII c.32 extends the former Act to life estates and terms of years. It was repealed in England by the Law of Property Amendment Act 1925 (15 & 16 Geo. V c.5). The subject is now dealt with in Part VIII of the Law of Property Act 1936 and this Statute can be repealed.

Statute 32 Hen. VIII c.34 (1540).

This statute permits grantees of reversions to enforce conditions in leases entered into by the proprietor of the preceding limited estate in the land. At common law the reversioner had no such right. The matter does not seem to be dealt with in our Law of Property Act 1936. This statute should be repealed and a section inserted in the Law of Property Act in the terms of Section 141 of the Law of Property Act 1925 (15 & 16 Geo. V c.20) which replaced 32 Hen. VIII c.34 in England. Whilst this amendment is being made the Committee also recommends the enactment of a section in terms of s.142(1) of the Law of Property Act 1925 to cover the case where the reversion is severed (see Hill & Redman Law of Landlord and Tenant 13th Edn. 1960 p.657 note (d)).

Statute 32 Hen. VIII c.37 (1540).

This gives a power to executors to recover arrears of rent which were owed to the deceased during his lifetime—a power which did not exist at common law. This statute has been repealed by the combined force of the Administration of Estates Act 1925 (15 & 16 Geo. V c.23) the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62) and the Statute Law (Repeals) Act 1969 (1969 c.52). The statute should be repealed and a section inserted in our Administration and Probate Act 1919 giving the

same power. We think that it would be helpful if Parliamentary Counsel considered a section in general terms making all rights vested in the deceased transmissible to executors saving only those dealt with in the Survival of Causes of Action Act 1940.

Statute 34 & 35 Hen. VIII c.20 (1542).

This prevents feigned recoveries of land where the reversion is in the Crown. As we pointed out earlier, recoveries were abolished in England in 1833. The Statute was repealed in England by the combined effect of the Statute Law Revision Act 1888 (51 & 52 Vict. c.3), and the Statute Law Repeals Act 1969 (1969 c.52). We recommend that it be repealed in this State.

Statute 13 Eliz. I c.5 (1571).

This deals with deeds and alienations in fraud of creditors. The matter is now covered by Section 86 of the Law of Property Act 1936 as well as by provisions of the Commonwealth Bankruptcy Act. It was repealed in England by the Law of Property Act 1925 (15 and 16 Geo. V c.20 s.207) and should be repealed in this State.

Statute 14 Eliz. I c.8 (1572).

The statute forbids fraudulent recoveries by tenants of life estates. As we have said earlier, recoveries are long since obsolete. The statute has been repealed in England by the Statute Law Recover Act 1863 (26 & 27 Vic. c.125) and should be repealed in this State.

Statute 27 Eliz. I c.4 (1585).

This suppresses fraudulent conveyances. The subject is now dealt with in Section 87 of the Law of Property Act 1936. The statute was repealed in England by the Law of Property Act 1925 (15 & 16 Geo. V c.20) and should be repealed here.

Statute 43 Eliz. I c.8 (1601).

The statute places fraudulent administrators of the goods of an intestate in the same position as an executor de son tort. The statute has been repealed with a saving clause in England by the Administration of Estates Act 1925 (15 and 16 Geo. V s.23). The Act still applies to administrators in South Australia today. The statute should be repealed and an equivalent section in modern English placed in our Administration and Probate Act 1919.

Statute 12 Car. II c.24—The Statute of Tenures (1660).

This swept away the whole of the mediaeval law regarding tenures. It underlies the doctrine of socage tenure under which all freehold land in South Australia is held today. The operative section is Section IV. All other sections have been repealed in England by a series of Acts. We recommend that the whole Act except Section IV be repealed in South Australia.

Statute 18 & 19 Car. II c.11—The Cestui que Vie Act 1666—(in Ruffhead 19 Car. II c.6).

This statute deals with the difficulties of proof of death of life tenants who are not heard of again. This statute is the basis of the seven year presumption of death rule acted upon by the Courts. The statute has not been wholly repealed in England. We recommend that the statute be repealed in South Australia and that sections equivalent to Sections II and V of the Statute be inserted in modern English into the Administration and Probate Act 1919.

Statute 22 & 23 Car. II c.10—The Statute of Distributions (1670)

This also is one of the statutes used by practitioners in the day to day administration of estates. We recommend, as with the Statute 25 Edw. III St. 5 c.5, that it be left on the statute book until we report fully on administration of estates. Section V of this Statute was repealed by our Act 99 of 1975 Section 720.

Statute 29 Car. II c.3—The Statute of Frauds (1677).

Part of this statute deals with the well known problems associated with the need for writing to prove contracts and land transactions. We have already reported to one of your predecessors on this topic in the Thirty-Fourth Report of this Committee. Other parts of the statute deal with wills. Some of the sections (5-6 inclusive, 12 and 18-21 inclusive) have been repealed in this State by the adoption of the Imperial Wills Act 7 Will. IV & 1 Vict. c.26 by the Ordinance 16 of 1842. We recommend that the remainder of the Act, except for Section 4 which is dealt with by the Thirty-Fourth Report referred to above, be repealed.

Statute 30 Car. II c.7 (1678).

This statute enables creditors to recover the debts of the deceased from executors de son tort. It is used in the probate law of this State today. We recommend that as with the other statutes on this topic that it remain in force until we report to you specifically on the topic.

Statute 1 Jac. II c.17 (1685).

Sections V-VIII of this Statute deal with distribution of estates. The remainder of the Act deals with the continuance of Acts passed by previous Parliaments. It is repealed in England by the Statute 15 & 16 Geo. V c.23. We recommend that Sections V, VI and VIII remain until we report to you on estates and that the balance of the Act be repealed. Section VII was revoked by our Act 99 of 1975 Section 72.

Statute 4 Will. III & Mary c.16 (1692).

This statute deals with frauds against creditors due to the giving of clandestine mortgages. It was repealed in England by the Law of Property Act 1923 (15 & 16 Geo. V. c.20). It should be repealed here and an equivalent section inserted in the Law of Property Act 1936.

Statute 4 Will. III & Mary c.24 (1692).

Section XII of this Statute gives rights to recover against executors on a devastavit. This is part of the probate law ordinarily administered in this State. The balance of the statute deals with the continuance of expiring laws. The statute has been repealed in England by the Statute Law Revision Act 1876 (39 & 40 Vict. c. 20) the Administration of Estates Act 1925 (15 & 16 Geo. V. c.23) and the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62).We recommend that Section XII be retained until we report to you on the administration of estates and that the balance of the statute be repealed.

Statute 8 & 9 Will. III c.31 (1697).

This statute deals with problems arising on writs seeking partition of lands. The subject is dealt with in this State by Part VIII of the Law of Property Act 1936. The statute was repealed in England by the Statute Law Revision Act 1867 (30 & 31 Vict. c.59). We recommend that it be repealed in this State.

Statute 10 & 11 Will. III c.22 (1699) (c.16 in Ruffhead).

This statute enables posthumously born children to take estates as if they were born in the lifetime of the parent. It is still in use in this State today. It was repealed in England by the Law of Property (Amendment) Act 1924 (15 Geo. V c.5). It should be repealed in this State and an equivalent section inserted in the Law of Property Act 1936.

Statute 6 Anne c.72 (1707) (c.18 in Ruffhead)—The Cestui que Vie Act 1707.

This statute extends the Cestui que Vie Act 1666 (18 & 19 Car. II. c.II). It deals with the difficulty of proving deaths of those who hold annuities or other personal estate for life. Most of it is still in force in England. Section 2 and part of Section 5 were repealed by the Statute Law Revision Act 1888 (51 & 52 Vict. c.3). As with the 1666 statute, we recommend that this statute be repealed and that equivalent sections be inserted in the Law of Property Act 1936.

Statute 8 Anne c.18 (c.14 in Ruffhead) (1709).

The statute deals with recovery of rent and with distress. It alters the law relating to rent due by tenants for life. It is still used in the administration of the law in this State although leases for life are rare today. It was repealed in England by the Statute Law Revision Act 1867 (30 & 31 Vict. c.59) and the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62). We recommend that it be repealed here with a saving clause protecting the amendments made to the substantive law by this statute.

Statute 4 Geo. II c.28—The Landlord and Tenant Act 1731.

This statute deals with frauds by tenants and with renewals of leases. It is still in use in South Australia today. It has been repealed in England by the combined effect of the Statute Law Revision Act 1867 (30 & 31 Vict. c.59) The Law of Property Act 1925 (15 & 16 Geo. V c.20) and the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62). We recommend that the statute be repealed in this State and that equivalent sections be inserted in the Landlord and Tenant Act 1936.

Statute 7 Geo. II c.20 (1733).

The subject of this statute is the foreclosure of mortgages by order of Court. Most foreclosures of mortgages in this State are effectuated by the use of Part XII of the Real Property Act 1886 but this statute could still apply to mortgages of land under the general law. The statute has been repealed in England by the Statute Law Revision Act 1948 (11 & 12 Geo. VI c.62). We recommend that it be repealed here with a saving clause preserving the amendments in the law made by the statute.

Statute 11 Geo. II c.19—The Landlord and Tenant Act 1737.

This statute is used in the law of landlord and tenant in South Australia today. Parts of it are still in force in England and other parts have been repealed by a series of amending Acts from 1840 to 1958. We recommend that the statute be repealed in this State and that equivalent sections be inserted in the Landlord and Tenant Act 1936. Sections 1 and 2 of the statute already appear in similar form in Section 38 of the Landlord and Tenant Act.

Statute 14 Geo. II c.20 (1741).

Most of this statute deals with common recoveries which, as we have said, are obsolete in this State. Section IX however amends the Statute

of Frauds (29 Car. II c.3) in relation to estates pur autre vie and this amendment is still in use in the rare case of an estate pur autre vie today. It was repealed in England by the Statute Law Revision Act 1867 (30 & 31 Vict. c.59). We recommend that it be repealed in this State with a saving clause preserving the amendment to the law in Section IX.

Statute 38 Geo. III c.87 (1798).

This deals with grants of probate where the executor is overseas. It is still in practical use in this State. It was repealed in England by the Administration of Estates Act 1925 (15 & 16 Geo. V c.23). We recommend that the statute be repealed here and its provisions inserted in the Administration and Probate Act 1919.

Statute 39 & 40 Geo. III c.98—The Thellusson Act 1800.

This statute deals with accumulations of income and sets limits to such accumulation. The matter is covered in this State By sections 60-62a of the Law of Property Act 1936. The statute was repealed in England by the Law of Property Act 1925 (15 & 16 Geo. V c.20). We recommend that it be repealed here.

Statute 57 Geo. III c.52—The Landlord and Tenant Amendment Act 1817.

This amends the Landlord and Tenant Act 1737. It is still used in this State. With one minor amendment it is still in force in England. We recommend that it be repealed and, as with 11 Geo. II c.19, its provisions be transferred to the Landlord and Tenant Act 1936.

Statute 1 Geo. IV c.87 (1820).

This statute deals with speedy recovery of premises by landlords because of the division of the legal year into terms. The division of the legal year into terms is abolished in South Australia—see Supreme Court Act 1935 Section 42. The statute was repealed in England by the Statute Law Revision Act 1861 (24 & 25 Vict. c.101). We recommend its repeal in this State.

Statute 11 Geo. IV & 1 Will. IV c.40 (1830).

This statute alters the law of wills by providing that undisposed of residue goes to the next of kin and not as before the statute to the executors beneficially. It is in force and in use in this State today. It was repealed in England by the Administration of Estates Act 1925 (15 & 16 Geo. V c.23). We recommend that it be repealed and that an equivalent section be inserted in the Administration and Probate Act 1919.

Statute 11 Geo. IV and 1 Will. IV c.46—The Illusory Appointments Act 1830.

This statute alters the law with regard to appointments which are not properly executed by reason of some minimal amount only being given. It was a half-hearted amendment which caused the problems adverted to in *In re Braddock deceased 1947 S.A.S.R. 329.* Since then the law has been put right by the Law of Property Act Amendment Act 1956 inserting a new Section 57a into the principal Act. The statute was repealed in England by the Law of Property Act 1925 (15 & 16 Geo. V c.20). We recommend its repeal here.

Statute 11 Geo. IV and 1 Will. IV c.60 (1830).

The statute empowers trustees, committees of lunatics and infant mortgagees to make valid transfers of property. As far as trustees are

concerned, the matter is dealt with by the Trustee Act 1936. Committees' powers are dealt with in the Mental Health Act 1935. The statute probably still governs transfers by infant mortgagees. Mortgages held by infants are a rarity in practice in this State. The Act was repealed in England by the statute 13 & 14 Vict. c.60. We recommend that it be repealed here and that a provision in the terms of Section VI enabling valid transfers to be made by infant mortgagees be placed in the Law of Property Act.

Statute 11 Geo. IV & 1 Will. IV c.65 (1830).

This is a consolidating statute relating to the property of infants married women idiots lunatics and persons of unsound mind. The property of married women is dealt with by the Law of Property Act 1936 and the property of idiots lunatics and persons of unsound mind by the Mental Health Act 1935. The provisions of this statute relating to leases and renewals of leases by infants are still in force in this State. The statute was repealed in England by the Law of Property (Amendment) Act 1925 (15 Geo. V c.5). We recommend that it be repealed here and that provisions in terms of Section XVI and XVII dealing with leases and renewals of leases of infants' land be placed in the Law of Property Act 1936.

Statute 2 & 3 Will. IV c.71—The Prescription Act 1832.

This statute governs the right to acquisition of and the loss of rights to easements, rights of way and profits á prendre. It is in force and in use in this State today. It has been the subject of much litigation and the whole subject of prescriptive rights is in need of review and reform. We recommend that you refer the subject to this Committee for consideration and report and that meanwhile the statute remain in force in South Australia. The statute is partly repealed and partly still in force in England.

Statute 3 & 4 Will IV c.27—The Real Property Limitation Act 1833.

This governs the times at which actions for recovery of land are statute barred. Most of the ground is covered by our Limitation of Actions Act 1935. There are however a few alterations to the substantive law which were naturally taken for granted by the draftsman of our Act. The statute was repealed in England by the Limitation Act 1939 (2 & 3 Geo. VI c.21.) We recommend that the statute be repealed here with a saving clause preserving the amendments made by the statute to the substantive law.

3 & 4 Will. IV c.74—The Fines and Recoveries Act 1833.

This abolishes the ancient method of conveyancing by fine and recovery. It therefore deals in detail with conveyancing with regard to estates tail. Estates tail are a rarity in this State today. Nevertheless our Estates Tail Act 1881—228 of 1881—assumes the existence of this statute. We think that the statute should remain in force in this State until estates tail are abolished here. The statute is still partly in force in England.

3 & 4 Will. IV c.104 (1833).

This statute makes freehold estate assets for the payment of debts in a deceased estate. The position in this State is governed by Section 51 of the Administration and Probate Act 1919. Section 51 however assumes the alteration of the law made by this statute. The statute was repealed in England by the Administration of Estates Act 1935 (15 & 16 Geo. V

c.23). We recommend its repeal here but with a saving of the amendment of the law effectuated by the statute.

3 & 4 Will. IV c.105 (1833).

A widow was by the common law, or by custom in some cases, entitled to dower out of all freehold estate of which her husband was seised during his lifetime. The statute gave a power to bar dower but did not extinguish dower or at least all forms of dower. Whether either this statute or the South Australian legislation has succeeded in barring all rights to dower and in particular dower ad ostium ecclesiae is controversial and uncertain. We suggest that the matter be referred to us for study and report and that meanwhile the statute remain in force. It still remains in force in England.

3 & 4 Will. IV c.106 (1833).

This statute amends the law of inheritance. As we said in reference to the earlier statutes of distribution, we recommend that the statute remain in force until we report further to you on this topic. In any event the existence of the statute is expressly referred to in Section 49 of our Administration and Probate Act under the definition of "owner". The statute remains partly in force in England.

4 & 5 Will. IV c.22 (1834).

This deals with the apportionment of rents and other periodical payments. This is covered in South Australia by the provisions of Part VII of the Law of Property Act 1936. The statute is still partly in force in England. We recommend its repeal in this State.

4 & 5 Will. IV c.23 (1834).

When a trustee was attainted or died without heirs the normal rules of law applied and the legal estate escheated to the Crown. The statute alters the law in this regard to protect the interests of the beneficiaries. Attainder and corruption of blood on conviction were abolished in South Australia by the Act 25 of 1874. The statute was repealed in England by the Trustee Act 1850 (13 & 14 Vict. c.60). We think the statute should be repealed in South Australia but with a saving clause preserving the amendments to the law made by the statute.

We have the honour to be

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The Law Reform Committee of South Australia.

7th March, 1980.

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200—5.80 L7909 O