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SOUTH AUSTRALIA

EIGHTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE DEMISE OF THE CROWN

1984

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.*

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M. J. DETMOLD.

G. F. HISKEY, S.M.

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

EIGHTY-FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE DEMISE OF THE CROWN

To:

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

Sir,

You referred to us for report the topic of a general Demise of the Crown Act for South Australia and we now report as follows:—

"Demise of the Crown" is defined in Jowitt's Dictionary of English Law as "the death of the sovereign, . . . an expression which signifies merely a transfer of property; for when we say the demise of the Crown, we mean only that in consequence of the disunion of the sovereign's natural body from his body politic, the kingdom is transferred or demised to his successor, and so the royal dignity remains perpetual. A demise of the Crown may occur on the death of the sovereign or on his being deposed". Since the reign of Edward VIII that definition has now to be expanded by the inclusion of abdication as a deemed demise of the Crown. It is expressed by the maxim "The King never dies" (see *1 Bla. Comm. 241*). *Chitty: Prerogatives of the Crown (1820) page 11* says:—

> "Immediately on the demise of the King, his successor is entitled to the prerogatives attached to the Crown: no coronation, no formal recognition of the claim of the successor is necessary to the perfection of his title; he becomes instantly on the dissolution of his ancestor, a King for every purpose. Much inconvenience would occur if the realm were deprived, even for a short period, of a sovereign; without whom no act of legislation however trifling can be perfected, or executive affair, however immaterial, be legally performed. Hence it is a maxim in the English law that the King never dies: his political existence is never in abeyance, or suspended."

The Judges of England resolved in *Calvin's Case 7 Co. Rep. (1609) 1 at 10a (77 E.R. 377 at 388)*:—

> ". . . (T)he King hath two capacities in him: one a natural body, being descended of the blood Royal of the realm; and this body is of the creation of Almighty God, and is subject to death, infirmity, and such like; the other is a politic body or capacity, so called, because it is framed by the policy of man (and in 21 E.4.39.b. is called a mysticall body;) and in this capacity the King is esteemed to be immortal, invisible, not subject to death, infirmity, infancy, nonage, &c."

Holdsworth: A History of English Law Volume IX pages 5-6 says:—

> "Thus, although the Tudor speculations as to the infallibility, the immortality, and the corporate character of the King remained part of the law, they remained as complimentary mystifications, and not as legal doctrines from which any real deductions were drawn. Though the King was said to be a corporation sole, though he was said never to die, it has been necessary to pass many statutues, from the sixteenth century to the twentieth to make it clear that the King can own property in his private capacity as distinct from his politic capacity, and to prevent 'all the wheels of state stopping or even running backwards' on a demise of the Crown."

So, despite the apparent clarity of the maxim, England and therefore her colonies have not applied it literally, and have in the absence of statutory authorization, acted upon the basis that things done in the name or by the authority of the sovereign ceased to have effect upon his demise. Thus (inter alia), Parliament, if sitting, was dissolved, therefore Ministers of the Crown lost their offices, legal proceedings abated, the King's peace ceased, judges and other public officials and military officers ceased to hold office, some grants of property or privilege granted by the Crown came to an end, and some claims against the Crown were treated as dying with the sovereign in whose reign the claim arose (see *Viscount Canterbury v. The Queen (1842) 4 S.T.N.S. 767 at 779-780* per Lord Lyndhurst). Appointments made during the pleasure of the sovereign caused particular difficulty, it being argued that the sovereign's pleasure could not continue when he was dead.

In earlier centuries there was an actual gap in the Kingship until the new Sovereign was crowned. That ceased with the accession of Edward I who was on a crusade in Palestine when Henry III died.

The inconvenience and hardship arising from this were dealt with in piecemeal fashion by successive Acts of Parliament, both in Britain and in the colonies. Some dealt with questions arising from the death of a particular sovereign. A typical example is the South Australian Confirmation of Appointments Act, 1901, which provided that oaths taken, appointments made and things done during the reign of Queen Victoria remained valid and effectual as if taken or granted by or done during the reign of Edward VII. Others purported to deal with questions arising from the death of any sovereign—for example: 1547 1 Edward VI c.17, which provided for the continuance of legal proceedings upon any future demise, and the Imperial Demise of the Crown Act, 1901, 1 Edward VII c.5 which validated the holding of all offices of the Crown whether within or without His Majesty's dominions, notwithstanding a demise of the Crown. Although the wording of some Acts is very wide and oaths of office are taken to the ruling sovereign and "His Heirs and Successors", Courts and Crown advisers have sometimes insisted that there remains some doubt and Parliaments have legislated further.

South Australian law on the topic is largely inherited Imperial Law. Some of the inherited statutory provisions have been repealed or amended in England, but the changes do not always extend to South Australia. There is no uniformity between the Australian States, although the problem is identical for each. The law in the other States and England's present law are summarized later.

There are several difficulties in determining what is the law in South Australia. In addition to those discussed in the Fifty-Fourth Report of this Committee in determining what law has been received or absorbed, there are the following:

(a) Some statutes containing specific provisions on demise also (sometimes primarily) deal with other topics and are not listed in indices under "Demise" or "Crown", e.g. (1702) 1 Anne c.2 (in Ruffhead 1 Anne (1701) c.8) is listed under "Justices of the Peace" and 4 William III & Mary (1692) c.18 is listed under "Malicious Information in Court of King's Bench)" in the Chronological Table.

(b) The Revised Statutes (1867) omit some sections which are relevant in South Australia as they were repealed in England after 1836 and before 1867.

(c) Ruffhead's Statutes, which usually include the full text, sometimes differ textually from the Revised Statutes and the Statutes at Large, and also give a Statute a different reference in several reigns. In addition, Volume 1 of Ruffhead is difficult for the younger lawyer as it is in Latin or Law French and in any event is not readily accessible to lawyers or to the public.

(d) It is sometimes difficult to determine which Statutes or parts of Statutes have been impliedly repealed. For example the editors of the Revised Statutes included 6 Anne (1707) c.41 in an appendix with the statement—

> "The portions of the Acts printed below were omitted from the Volume when in course of preparation, as being either actually or virtually repealed. On consideration, however, it appeared doubtful whether they could properly be treated as no longer in force, and it has therefore been thought desirable to print them in an Appendix, with references to the later Acts by which they may be considered to have been repealed or superseded."

The part the editors did include is only a small part of the Statute (Sections 4 and 5) and so one must assume that the editors considered that the balance had been repealed in England. The editors of Halsbury's 4th Edition of The Statutes of England regard it as still being in force and include sections omitted by the editors of the Revised Statutes. Hood Phillips in the 5th Edition of "Constitutional and Administrative Law" (at page 104) treats the Act as being in force.

In addition to whatever Imperial law applies, there is also some South Australian legislation which is either limited in time or covers only some aspects of the topic.

The possible lack of legislative authority for the continuance of Parliament has been the subject of several articles and passages in textbooks which propound arguments that no legislation is necessary in the Australian States in any event: *(1952) 25 A.L.J. 633: Quick and Garran "The Australian Constitution (1902)" at page 463; Inglis Clark: Australian Constitutional Law (2nd edition) page 206 et seq.* It has also been argued that every appointment which has a statutory basis is unaffected by demise, but all of this is doubtful to say the least. There is a better argument that as the State Parliaments owe their origin to enabling powers given by Imperial Statutes and not to the common law that the common law doctrine of demise does not affect them.

Besides these factors it is inconvenient to have such scattered legislation; the language of some of the old Acts is not in keeping with modern times and might lead to ingenious and technical legal argument on the validity of certain things done; and (at least in New South Wales in 1936) it was thought doubtful whether "demise" included demise as a result of abdication (His Majesty's Declaration of Abdication Act 1936) was limited to the abdication of Edward VIII.

Further, with the severing of the last colonial links, South Australia must have its own legislation on the topic. It should be made quite clear in the proposed statute that in South Australia the demise of the Crown does not affect the sitting of Parliament, the holding of public office or the doing of anything in the name of the Crown which would otherwise be valid. Tasmania and Victoria amended their Constitutions in 1934 and 1959 respectively to achieve this. The Victorian provisions were derived from 1876 to 1888 statutory provisions in their State.

It will be necessary to have the Imperial Acts which apply or might apply to South Australia by paramount force and are caught by the Colonial Laws Validity Act 1865 repealed by the Imperial Parliament or by power given by Imperial statute to the State Parliament. It is desirable to repeal expressly all others which were or might have been received or absorbed into South Australian law and to amend the remnants of the common law. South Australia could either pass a Demise of the Crown Act or an Act amending the Constitution Act 1934. The latter would presumably have to be reserved "for the signification of Her Majesty's pleasure" pursuant to Section 1 of the Australian Constitution Act, 1907 (Imp.) until the last vestiges of the colonial ties are abolished.

Imperial Statutory Law:

The Imperial Statutory Law on the topic is as follows:—

1. *Statute 1 Edward VI (1547) c.7* entitled "An Acte for the continuaunce of Actions after the Deathe of anny King of this Realme".

It was enacted to remedy the fact that at common law legal proceedings became discontinued upon the sovereign's death.

Section 1 provides that legal proceedings between party and party shall not be discontinued by demise of the Crown.

Sections 2 to 6 deal with the continuity of civil and criminal proceedings.

As recommended in the Fifty-Fifth Report of this Committee, Sections 2 to 6 can be repealed now and Section 1 can be repealed when it has been re-enacted by South Australian legislation.

The whole of the Act has been expressly repealed in England by statutes between 1863 and 1968.

2. *Statute 4 William III & Mary (1692) c.18:*

This Act primarily deals with malicious informations in the King's Bench but Section 6 provides that upon a demise of the Crown all pleas to informations in the King's Bench shall stand good without calling the defendant to plead again unless he elects to do so within five months.

This provision is no longer needed in South Australia and as recommended in the Fifty-Fifth Report of this Committee the whole statute can be repealed.

3. *Statute 7 & 8 William III (1696) c.15:*

entitled: "An Act for the continuing, meeting, and sitting of a Parliament, in case of the Death or Demise of His Majesty, his Heirs and Successors."

The Act provides that Parliament is to continue to sit for six months after the demise of the King, unless it is sooner dissolved by his successor. If there is no Parliament in existence at the time of the demise, then the last preceding Parliament is to be revived. Section 3 provides that the power of the sovereign to prorogue or dissolve Parliament is not altered by Sections 1 and 2.

The Act was expressly repealed in England in 1867. It is arguable that it was impliedly repealed in 1707 by 6 Anne c.41 and therefore has never been part of South Australian law. The Cussen Report considered that it had not been received into Victorian law. The Chairman of this Committee in his Seventy-Ninth Report considered that it had been received in South Australia. As has been said previously, the cases have

construed very narrowly the concept of implied repeal and so the statute will be treated as having been received in South Australia for the purposes of this Report.

Although there are arguments that no legislation is necessary to ensure that the South Australian Parliament continues to sit upon a demise of the Crown (see *Inglis Clark: "Australian Constitutional Law" 2nd edition at page 208; Quick and Garran: "The Australian Constitution" (1901 edition) at page 463* and *Devine v. Holloway [1861] 14 Moo. P.C. 290)*, and it has in fact done so (see Hansard), the Tasmanian and Victorian Parliaments have each considered legislation to be necessary. In the new South Australian legislation it is recommended that there be included a provision for the continued sitting of Parliament (in line with Section 51 of the Representation of the People Act (United Kingdom) 1867) and that the 1696 Act be repealed.

4. *Statute 1 Anne (1702) c.2 (Ruffhead 1 Anne (1702) stat. 1 c.8):*

This Statute was passed to explain more fully the 1696 Act.

Section 1 dealt with the continuation of offices and Section 3 with the continuation of criminal proceedings. Both expired in the eighteenth century and have never been part of South Australian law. Both sections were expressly repealed in England in 1867.

Section 2 provides that no patent or grant of any office or employment either civil or military made in the future shall cease on the demise of Her Majesty or any of her Heirs or Successors, but shall continue for six months unless sooner determined. This was expressly repealed in England in 1867.

Sections 4 and 5 provide that notwithstanding the demise of any King or Queen the legal proceedings set out in the section (probably all of the then existing types of criminal, civil, prerogative, equitable and ecclesiastical proceedings) are to continue and that certain commissions and writs are to continue for six months from the demise unless earlier determined.

Section 6 extends the Act to "all Her Majesty's Dominions in America and elsewhere".

Sections 2, 4 and 5 were in force in England in 1836 and were received into South Australian law. Sections 1, 2 and 3 were expressly repealed in England in 1867.

Section 2 is not needed in South Australia as the field is covered by 1 Edward VII c.5 (Demise of the Crown Act 1901—Imp.).

Section 4 and part of sections 5 and 6 are still in force in England. They are of importance in South Australia as the basis for the continuation of legal proceedings. A modern version of Sections 4 and 5 should be included in South Australian legislation. As the statute is caught by the Colonial Laws Validity Act it will have to await the repeal of that Act before the repeal of the 1702 Act in its application to South Australia.

5. *Statute 4 & 5 Anne (1705) c.20 (in Ruffhead 4 Anne (1705) c.8):*

This Statute is not printed in the Revised Statutes. It is summarised in Ruffhead with the explanation "This Statute is re-enacted 6 Anne c.7". It is not needed in South Australia. It does not appear from the summary that it extends by paramount force to South Australia. It should be repealed.

6. *Statute 6 Anne (1707) c.41 (in Ruffhead 6 Anne (1707) c.7)—Succession to the Crown Act 1707:*

The long title is "An Act for the Security of Her Majesty's Person and Government, and of the Successor to the Crown of Great Britain in the Protestant line".

Sections 1 and 3 deal with treason, were of limited duration and have never been part of South Australian law.

Section 2 deals with the power of Parliament to limit the descent of the Crown and is in force in South Australia, but has no relevance to the present report.

Sections 4, 5 and 6 provide that upon a demise of the Crown, Parliament, if sitting at the time of the demise—

(a) shall not be dissolved, but shall continue to sit for six months and if it is prorogued then for the rest of the six months (Section 4),

(b) if it is separated by adjournment or prorogation it shall immediately convene and sit and act for six months after the demise (Section 5),

(c) if there is at the time of the demise no Parliament that has met and sat, then the preceding Parliament shall immediately convene and sit at Westminster as if it had never been dissolved (Section 6), but subject to earlier prorogation or dissolution by the Successor.

Section 7 preserves the prerogative of the Crown to dissolve Parliament.

Section 8 provides that the Privy Council shall continue for six months after the demise unless sooner determined by the Successor. Also that all offices, places and employment, civil and military in "Her Majesty's Plantations" are to continue for six months unless sooner determined.

Section 9 provides that the Public Seals shall continue to be used until the successor orders otherwise.

Section 10 deals with the proclamation of the successor and is not relevant to this report.

Section 11 provides that if the successor is out of the realm at the time of the demise, seven Lords Justices are to govern.

Sections 12-17 and 19 and 23-24 deal with the machinery provisions to be used if Lords Justices have to govern and are not material to this report.

Section 18 provides, inter alia, that all persons whose employment is continued by virtue of this Act shall take the prescribed oaths and qualify themselves as if they had been newly elected or appointed.

Sections 20-21 deal with the Oath of allegiance to the successor. These sections have obviously expired.

Section 22 refers to the use of the Great Seal by the successor before arriving in England. This likewise has expired.

Sections 25-26 and 29-31 deal with disqualification by reason of holding an office of profit under the Crown and are not material to this report.

Section 27 is a merely temporary section relating to the number of commissioners for executing an office.

Section 28 prevents the operation of the Act in relation to new or other commissions in the armed forces. This has also expired.

Section 6 was expressly repealed in 1797 by 37 George III c.127 s.2, and was never part of South Australian law. Some of the other sections have been repealed in England from 1867 onwards.

The Privy Council in *Devine v. Holloway (1861) 15 E.R. 314* appears to have reached its decision on the basis that Section 8 was part of New South Wales law. In *In re Cardew; ex parte Bank of Australasia (1901) Q.L.J. 176* Griffiths C. J., as a member of the Full Court, expressed the view that the Statute was part of Queensland law.

For the purposes of this report the preamble and sections 4, 5, 7, 8, 9 and 18 will be treated as having been received in South Australia.

Section 18 has been superseded in South Australia insofar as it applies to Members of Parliament by Section 42 (2) of the Constitution Act 1934 and insofar as it applies to other offices by the Imperial Demise of the Crown Act 1901 which applies by paramount force.

It is recommended that Sections 1-5, 7-9 and 18 be repealed in their application to South Australia after the repeal of the Colonial Laws Validity Act and that a provision similar to Section 51 of 30 & 31 Victoria (1867) c.102, Section 4 of the Tasmanian Constitution Act and Section 6 of the Victorian Constitution Act be enacted in South Australia.

7. *Statute 1 George II (1727) stat. 1 c.5:*

This Statute was passed to explain 6 Anne (1707) c.41 and to overcome some of the inconvenience caused by Section 18. In particular it was enacted that the taking of fresh oaths of office on the demise of the Crown was no longer necessary where the taking of such oath was a precondition to holding office. Apart from that part of the statute which deals with some offices which are irrelevant to South Australia, it adds nothing to the 1707 Act and can be repealed in its application to South Australia.

8. *Statute 24 George II (1750-1) c.24* provided for the administration of Government in case the Crown should descend to any child of the Prince of Wales and such child should be under the age of eighteen years. This statute has expired, was never part of South Australian law and can be repealed.

9. *Statute 1 Geo. III (1760) c.13.*

This statute is also dealt with in our Fifty-Eighth Report and (inter alia) obviates the necessity for Justices of the Peace to take fresh oaths of office on a demise of the Crown. It was repealed in England in 1948 but the Act should not be repealed here without a reservation of the amendment of the law relating to demise of the Crown contained in the statute.

10. *Statute 1 George III (1760) c.23:*

Section 1 provides that the Commissions of Judges shall continue during their good behaviour notwithstanding the demise of His Majesty or any of his heirs and successors. Notwithstanding Dr. Johnson's well-known disapproval of the section on the ground that it took away the only opportunity of getting rid of ineffectual Judges, it was without doubt inherited by us in 1836.

Section 2 provides for the removal of Judges upon the address of both Houses of Parliament.

Section 3 provides for Judges' salaries.

Sections 1 and 2 are covered in South Australia by Sections 74 and 75 of the Constitution Act 1934 and Section 3 by the Supreme Court Act 1935 in so far as they relate to Supreme Court Judges. The various statutes under which other judicial officers are appointed provide for remuneration and in some cases removal, but none of them include an equivalent of Section 1.

It is recommended that the statute be repealed and an equivalent of Section 11 of the Victorian Constitution enacted.

11. *Statute 5 George III (1765) c.27:*

This statute is similar to 24 George II c.24 and can also be repealed.

12. *Statute 37 George III c.127—The Meeting of Parliament Act 1797:*

Section 1 is not relevant to this topic and will be referred to in the Report on inherited Imperial constitutional statutes.

Section 2 repeals section 6 of the 1707 Act.

Sections 3, 4 and 5 provide that in the case of demise, "after the dissolution or expiration of Parliament, and before the day appointed by the writs of summons for assembling a new Parliament, the last preceding Parliament is immediately to convene and sit at Westminster, and be a Parliament for six months, subject in the meantime to prorogation or dissolution. In the event of a demise . . . during this interval of six months, and before the dissolution of the Parliament thus revived, or before the meeting of the new Parliament, it is to convene again and sit immediately, as before, and to be a Parliament for six months from the date of such demise, subject in the same manner, to prorogation or dissolution. If the demise . . . should occur on the day appointed by the writs of summons for the assembling of a new Parliament, or after that day and before it has met and sat, the new Parliament is immediately to convene and sit." (Erskine May).

The chronological index to the Revised Statutes states that Section 2 and parts of Sections 3, 4 and 5 were repealed in 1888. The Cussen Report thought the Statute was not part of Victorian law. Erskine May in "Parliamentary Practice" 17th Edition 1964 cites it together with part of the 1707 Act and the Representation of the People Act 1867 as the basis for English Parliamentary practice.

If a provision is enacted in South Australia as suggested in the discussion of 6 Anne c.41, this statute will not be necessary and can be repealed.

13. *Statute 11 George IV and 1 William IV c.43—The Demise of the Crown Act 1830:*

This statute abolished certain fees and stamp duties chargeable on the renewal of warrants, commissions, letters patent, grants and other appointments and pensions consequent on the demise of the Crown.

Section 4 provides that Commissions for taking affidavits shall remain in force notwithstanding any demise until revoked or otherwise avoided. Section 4 would be adequately covered by the more general provisions suggested on page 23.

The rest of the statute is of no importance in South Australia today. It was repealed in England in 1977 and can be repealed in South Australia.

14. *Statute 1 William IV (1830) c.4:*

This statute was passed because it was found impracticable to renew all warrants etc. in the remoter Colonies within six months of demise.

Section 1 provided that the warrant of the Governor or other officer administering the Government of any colony at the demise of George IV should continue until renewed. Section 2 extended the period within which patents, commissions, warrants, or other authorities for the exercise of civil and military employment remained valid from six months to eighteen months from demise of the Crown.

Section 1 has expired. Section 2 was received as part of South Australian law. It may have been impliedly repealed by the Imperial Demise of the Crown Act 1901, which applies to South Australia by paramount force. It was repealed in England in 1973.

To avoid any doubt it is recommended that when the Colonial Laws Validity Act ceases to apply to South Australia, we enact an equivalent to Section 11 of the Victorian Constitution and Section 6 of the Tasmanian Constitution.

15. *Statute 1 William IV (1830) c.6:*

This statute provided that all commissions etc. which were in force at the death of George IV and had not been terminated, were to continue for six months from the passing of the Act. It expired before South Australia was settled and therefore was not received. It was repealed in England in 1874 and can be repealed in South Australia.

16. *Statute 7 William IV and 1 Victoria (1837) c.31:*

This statute provided that the commissions of all military and naval officers given by William IV were to continue until cancelled and that upon any future demise such commissions were to continue until cancelled by the successor.

This statute may have been absorbed into South Australian law. It was repealed in England in 1973. If the legislation suggested at page 23 is enacted the unexpired part of this statute will be unnecessary and the Statute can be repealed.

17. *Statute 7 William IV and 1 Victoria (1837) c.72:*

This statute made provision for what was to happen if the successor to the Crown was out of the realm at the time of the demise of Queen Victoria as the putative successor had become King of Hanover because of the operation of the Salic law which excluded Queen Victoria from succeeding to the throne of Hanover. It is of no importance now. It was repealed in England in 1937. It appears to apply to colonies (Section 7) but has expired from the birth of Queen Victoria's first child.

18. *Statute 30 & 31 Victoria c.102—The Representation of the People Act 1867:*

This statute deals with a number of constitutional matters which will not be dealt with here.

Section 51 provides "Whereas great Inconvenience may arise from the Enactments now in force limiting the Duration of the Parliament in being at the demise of the Crown: Be it therefore enacted, That the Parliament in being at any future Demise of the Crown shall not be determined or dissolved by such Demise, but shall continue so long as it would have continued but for such Demise, unless it should be sooner prorogued or dissolved by the Crown, anything in" 6 Anne (1707) c.7 notwithstanding.

This Act was passed after South Australia became self-governing and does not apply in South Australia. Section 51 probably provides the basis for section 4 of the Tasmanian Constitution and section 6 of the Victorian Constitution and a similar section should be enacted here.

19. *Statute 1 Edward VII c.5—The Demise of the Crown Act, 1901:*

This statute applies to South Australia by paramount force. It provides that "The holding of any office under the Crown whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown." As soon as the Colonial Laws Validity Act ceases to apply to South Australia the statute should be repealed and a section in similar terms inserted in our projected legislation, as it affects the tenure of office of cabinet ministers (see *Holdsworth op. cit. Volume X page 435*).

20. *Statute 1 Edward VIII and 1 George VI (1936) c.3:*

This statute gave effect to Edward VIII's declaration of abdication. It extends to the Commonwealth of Australia by virtue of the Statute of Westminster. It was of temporary use but can probably only be repealed by the Commonwealth Parliament.

South Australian legislation:

The Confirmation of Appointments Act, 756 of 1901 which provides that oaths taken to Queen Victoria whereby commissions were granted and offices and appointments were made shall be valid as if the oaths had been taken to Edward VII and as if the offices had been granted or appointed by Edward VII and that all things done since the demise of Queen Victoria were valid.

This Act was passed to dispel doubts as to whether office holders had to take fresh oaths and qualify themselves for re-appointment. It is submitted that the Imperial Demise of the Crown Act 1901 rendered this Act unnecessary. It has lapsed due to the passing of time and was repealed by Act 2293 of 1936 section 2.

The following South Australian Acts are in force:

Constitution Act 1934:

Section 42(1) provides the form of oath for members of Parliament, which includes the words "Her Heirs and Successors according to law".

Section 42(2) provides that Members of Parliament need not take fresh oaths on a demise of the Crown.

Section 74 provides that Supreme Court Judges shall hold office during their good behaviour, notwithstanding a demise of the Crown.

Section 42(1) and (2) should be retained. If a general section similar to Section 11 of the Victorian Constitution Act is included in the South Australian Constitution Act, then Section 74 will no longer be necessary—otherwise it is necessary.

Oaths Act 1936:

This Act provides that the Governor, members of Executive Council, Chief Justice and puisne Judges of the Supreme Court, the Judge in Insolvency, Special Magistrates, and Justices of the Peace shall take oaths or affirmations prescribed by the Act, which all include the words "Her Heirs and Successors, according to law". No change is needed.

Other Jurisdictions:

England:

According to Halsbury's Statutes (4th Edition) the law in England is embodied in the following statutes—

The Succession to the Crown Act 1707 (6 Anne c.41) Sections 4 and 5, 7 and 8 and 9.

The Meeting of Parliament Act, 1797 (37 George III) c.127.

The Representation of the People Act 1867 (30 & 31 Vict. c.102).

The Demise of the Crown Act 1702 (1 Anne c.2) part sections 4, 5 and 6.

The Demise of the Crown Act 1727 (1 George II c.5) preamble and Section 7.

The Demise of the Crown Act 1830 (11 George IV and 1 Will. IV c.43) part section 1 and section 2.

The Demise of the Crown Act 1837 (7 Will. IV and 1 Vict. c.31) part section 1.

The Great Seal Act 1884.

The Demise of the Crown Act 1901.

His Majesty's Declaration of Abdication Act 1936.

The Crown Proceedings Act 1947.

Tasmania:

In Tasmania the Constitution Act 1934 contains provisions that upon demise of the Crown:

1. The Houses of Parliament are not dissolved and their terms are not affected (Section 4).

2. Things done before proclamation of the demise, which might otherwise have been affected by the demise, are not affected (Section 5).

3. All appointments made by the Governor or by any other person in the name of or on behalf of the sovereign or under authority of any Act of the Imperial, Commonwealth or Tasmanian Parliaments or any rules or regulations made thereunder remain valid (Section 6).

4. No legal process is affected (Section 7(1)).

5. All contracts to which the Crown is a party and all benefits and liabilities in respect thereof attach and belong to the successor to the Crown (Section 7(2)).

Victoria:

In Victoria the Constitution Act, 1975 (No. 8750) sections 9-13 contain the same provisions as Tasmania and in addition provide that:

1. The public seal shall continue to be used (Section 11(3)).

2. The successor to the Crown is to take the benefit of all exceptions and reservations in all land grants and Crown Leases (Section 12).

New South Wales:

New South Wales has not consolidated the provisions relating to demise of the Crown. The subject is covered by both Imperial and State Acts, as in South Australia. The Constitution Act, 1902 provides that no member of Parliament shall be permitted to sit or vote unless he has taken a fresh oath of allegiance to the successor to the Crown. The Demise of the Crown Act (New South Wales) 1901 provides that the holding of public office is not affected and new oaths need not be taken upon demise of the Crown. By a 1936 amendment it provides that demise shall include demise by abdication.

Queensland:

Queensland law is basically the same as in New South Wales.

Western Australia:

Western Australian law is similar to the law in South Australia except that due to it having a different settlement date, some Imperial Acts may not apply.

Suggested Changes in South Australia:

We recommend as follows:—

1. As soon as the Colonial Laws Validity Act 1865 is repealed in its application to South Australia, expressly repeal all the Imperial Statutes relating to demise of the Crown in so far as they apply or may apply in South Australia by virtue of that Act.

2. Either:—

(a) Amend the Constitution Act 1934 to include the provisions contained in Sections 4-7 of the Tasmanian Constitution Act and Sections 11 (3) and 12 of the Victorian Constitution Act (with the possible exception of the provision for the continued sitting of Parliament). Section 74 of our Constitution Act could either be repealed and placed in a new Demise of the Crown Act or left to stand as it is. The amendment would at present have to be reserved as previously mentioned because of the Australian States Constitution Act 1907 (Imp.);

or

(b) Enact a Demise of the Crown Act containing the above provisions. The prior or contemporaneous repeal of Imperial Statutes applying by paramount force is necessary.

We have the honour to be

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
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Law Reform Committee of South Australia.

3 May, 1984.

D. J. WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA