SOUTH AUSTRALIA

NINETY-FOURTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO QUI TAM AND PENAL ACTIONS AND COMMON INFORMERS

1985

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

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NINETY-FOURTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO QUI TAM AND PENAL ACTIONS AND COMMON INFORMERS

To:

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

Sir,

This is another of the reports on the inherited Imperial law relating to specific topics which you have referred to us for separate report.

The Latin words "qui tam" are an abbreviation of "qui tam pro domino rege quam pro se ipso sequitur" which means "who as well for our lord the king, as for himself, sues".

A qui tam action is one species of penal action brought under a penal provision of a statute which gives part of the penalty provided to whoever will sue for it. Such actions are sometimes called popular actions. A person who brings a qui tam action or in some cases a penal action is called a common informer. Although this term now has pejorative overtones, its correct meaning is as described by Low J. In *Tranton v. Astor (1917) 33 T.L.R. 383* at 385 (in which case a common informer brought an action pursuant to 22 Geo. III c.45 and 41 Geo. III c.52 against Major the Honourable Waldorf Astor to recover £29,000 penalties for voting in the House of Commons when disqualfied) as:—

> "a private person suing for his own benefit to recover a statutory penalty. . . . the expression "common informer" is only used to distinguish him from a state or official informer such as His Majesty's Attorney-General."

The expression does not include a person who is personally aggrieved by the commission of the offence.

Only offences created by statutes which expressly or by necessary implication provide for a qui tam action may be prosecuted by a common informer. The onus of showing that a statute so provides lies on the common informer—see the judgment of the House of Lords in *Bradlaugh v. Clarke (1883) 8 App. Cas. 354.*

HISTORY

Until relatively recently in English legal history there was no clear distinction between crime and tort. Whilst those accused of serious crimes were generally brought to trial, at first by the victim or his relatives and later by the system of accusation by jury commenced in 1166 by the Assize of Clarendon, there were few other means of enforcing the statutory law. There was no police force and there were very few law enforcement officials on the King's payroll. Most offences were either presented by the grand jury or were brought for hearing before Justices of the Peace. Many of the statutes which created offences were designed to raise revenue, to protect or regulate trade, to require religious observance, to protect public morals or to ensure public order and safety. Few private citizens were sufficiently interested in them to go to the trouble of attempting to enforce them. So breaches of the law regulating elections, disqualification of members of Parliament and the like often did not aggrieve any individual sufficiently to ensure a prosecution.

From about the time of Edward III Parliament occasionally encouraged enforcement of its statutes by providing that a person found guilty of a

breach of statute should forfeit a sum of money to any person who would sue for it. Revenue laws often provided that an informat would on a successful prosecution receive a moiety of the penalty, the balance being payable to the Crown. Despite the reward offered, there were still some types of offence which were not being adequately prosecuted. To encourage enforcement of them the Tudor monarchs gave monopolies to individuals and corporations to sue for penalties under certain statutes.

Radzinowicz: *History of the English Criminal Law Volume II (1956)* says that throughout the eighteenth and early nineteenth centuries it was hoped to extend the "usefulness and vigilance" of common informers "to all the lesser infringements of the law" (p. 146). He goes on:—

> "It formed part of the deliberate and consistent policy of the legislature and pervaded the entire body of the criminal law. It acquired the character of a regular system in process of continual expansion. The result was a social situation in which the common informer was expected to act as a policeman, and as a protector of the community against a vast mass of delinquency."

However, as the author says at p. 147:—

> "These hopes were not fulfilled. Instead there arose a small but ruthless and unpricipled group of people who, from time to time, interested themselves in particular sets of statutes the enforcement of which would provide them with easy and appreciable profit."

Abuses of the system were rife. Tudor monarchs dispensed with compliance with statutes, sometimes for a consideration and they were followed by the later Stuarts. As a means of regulating the practice in qui tam actions Parliament provided for more careful procedures in the State 21 Jac I c.28—see *III Coke's Institutes (1817 Edn.) pp. 192-4.* The practice of allowing a subject to dispense with a statute received a check in 1605 when all the judges decided that that was illegal in *The case of Penal Statutes (1605) 7 Co. Rep. 36; 77 E.R. 465.* Other abuses included trumped up charges, perjury, blackmail and extortion by inveigling people into committing offences for the purpose of being able to prosecute them and recover the penalty. A typical example can be seen from Dickens' description of the activities of Noah Claypole in Oliver Twist chap. LIII. During the eighteenth century a large number of common informer statutes were passed: see the references to some typical statutes of this type in *Radzinowicz (op. cit.) at pp.143-145.* Evidence was given before a Parliamentary Committee in 1808 of a practice of alleging several offences so that bail would not be granted without the informer's consent. then arresting the accused at an inconvenient time such as Saturday evening, extorting a large sum of money for consent to bail and then never proceeding with the charges. According to Radzinowicz (op. cit.) p. 151, after the establishment of the police force in England, common informers occasionally joined "forces with police officers to avoid an undersirable competition and to reach an amicable division of the spoils". This position did not improve in the twentieth century—see *Orpen v. Haymarket Capitol Limited (1931) 145 L.T. 614* and a comment on that case in *172 L.T. Jo. 67-8.*

Several statutes were passed in England to attempt to eliminate these abuses such as 27 Geo. III c.1 s.2 and 33 Geo. III c.62 s.38. Finally, in 1951 qui tam actions were virtually abolished in England by the Common Informers Act, 1951 (14 & 15 Geo VI c.39). In 1957 qui tam actions for sitting and voting in Parliament while disqualified were also abolished—see 5 & 6 Eliz. II c.20—the Fourth Schedule.

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A number of statutes providing for qui tam actions were inherited by South Australia in 1836 or absorbed into its law. Some of these have not been repealed in South Australia, although we have recommended the repeal of some of them in our reports on the inherited Imperial law.

The South Australian Parliament has seen fit to legislate for penal actions in the *Constitution Act, 1934.*

The relevant provisions are:—

(a) Section 46 concerning the effect of election to Parliament of disqualified persons, subsection (2) of which provides:—

> "If any person so elected and returned, contrary to the provisions of this Act, sits or votes as an elected member of Parliament he shall forfeit the sum of one thousand dollars, to be recovered by any person who sues for it in the Supreme Court or in any other court of record in the State having competent jurisdiction."

(b) Section 52 concerns members of Parliament having interests in public contracts. Subsection (2) provides:—

> "If any person who has entered into or accepted any such contract, agreement, or commission (except a contract, agreement or commission referred to in section 51 of this Act), admits any member of Parliament to any part or share thereof, or to receive any benefit thereby, he shall forfeit and pay the sum of one thousand dollars, to be recovered, with full costs of suit, by any person who sues for it in the Supreme Court, or in any other court of competent jurisdiction."

(c) Section 53 provides:—

> "If any person disabled or declared by section 49 or 50 incapable of being elected, sits or votes as a member of either House of the Parliament, he shall forfeit the sum of one thousand dollars, to be recovered, with full costs of suit, by any person who sues for it in the Supreme Court or any other court of competent jurisdiction."

(d) Section 54 imposes a twelve calendar month time limitation on proceedings for forfeiture.

The only South Australian legislation now in force (as distinct from inherited Imperial Law) other than the Constitution Act, so far as we are aware, authorising penal actions, is contained in sections 23 and 33 of the Pawnbrokers Act 1884 but we understand that this Act is in any event under consideration by you. There are several provisions in statutes and rules of court concerning the conduct of qui tam actions and several Imperial statutes also apply. These are discussed at p.10 et seq. Section 284 of the Local Government Act 1934 which deals with the revenue of a council refers by subsection iv to:—

> "Fines and penalties imposed in respect of offences committed within the area under any Act which are directed by that Act to be paid to the council. All such fines and penalties shall be paid over to the council for the use of the area, save such part of any fine or penalty as is ordered to be paid to other persons; but no portion thereof shall be paid to any informer as such where the council or any officer thereof is the informer."

We have failed to find any section in the Local Government Act or in any other Act relating to councils empowering common informers to sue so that we can only think that section 284 (iv) of the Local Government Act is a hold-over from sections appearing in older Acts now repealed or amended.

Before decisions can be made on how the Imperial statutes should be dealt with in the proposed revision of inherited imperial law it is necessary to decide whether qui tam actions should be permitted in South Australia either generally or for offences under the Constitution Act.

A. *Arguments in favour of abolition*

1. Qui tam actions are now rarely, if ever, brought in South Australia.
2. The social and governmental circumstances which made qui tam actions attractive to English Parliaments of the past no longer exist. Nowadays the police and other government departments have the duty and the resources to enforce penal statutes. This, together with the right of aggrieved persons to prosecute privately is sufficient to ensure a reasonable level of law enforcement.
3. The idea of citizens acting in their private capacity suing for reward for offences which have not personally aggrieved them is repugnant to modern views of "fair play". It is the State's responsibility to enforce penal laws and today, unless a person is affected by another's unlawful conduct, it is not considered his business to prosecute the offender. His rights and duties extend no further than reporting the alleged offence to the relevant authority and giving evidence if required.
4. History has shown that the procedure has always been open to abuse by unprincipled common informers.
5. Apart from the Constitution Act, no recent South Australian legislation of which we are aware authorises penal or qui tam actions.
6. There is no need to preserve qui tam actions in relation to inherited Imperial statutes because we have recommended repeal of most of those which authorise qui tam actions and secondly because there appears to have been a policy of substituting other procedures and penalties when such Acts have been re-enacted here. Parliament could substitute liability to conviction for misdemeanour or summary offence for any existing penalties prosecutable by common informer, by a Common Informers Act, as has been done in England.

B. *Arguments against abolition*

1. For a number of reasons including corruption or political motives, some offences or types of offences may be overlooked or not prosecuted by the police or other government departments.
2. The fact that qui tam actions are now rarely brought may not indicate that they are useless in principle but that *(a)* they are mostly available for offences under old Imperial Statutes of little importance to South Australians today; and *(b)* the forfeitures or penalties provided are not large enough to compensate a private citizen for the time, effort and expense involved in suing. If qui tam actions were authorised for offences of relevance today and the penalties were increased, there would probably be an increase in the use of the procedure. This would assist in enforcing the laws creating minor but socially significant offences, particularly those which are difficult for the police and other public officers to detect and prove. It may also lessen the public cost of law enforcement.

3. Payment of penalties to a person bringing a qui tam action is a fair and convenient way of compensating him for his efforts and expense in bringing the offender to justice.

4. Some offences, such as those dealt with in sections 46, 52 and 53 of the Constitution Act 1934 are very worthy of enforcement as they relate to the honesty and integrity of Parliament. However, public servants may not wish to prosecute a Member of Parliament and there is a substantial risk that breaches will not be prosecuted except privately. Although any elector may enforce the provisions of the Constitution Act pursuant to section 88, it is unlikely that any private citizen would go to the trouble and expense of doing so unless there is provision for some compensation or reward for successful prosecutors.

5. The Commonwealth Constitution Act, 1900-63 & 64 Vict. c.12 s.46 still provides for enforcement of the provisions relating to disqualfication of Members of Parliament by penal action. The Australian Parliament has as recently as 1975 passed legislation in contemplation of future penal actions (Common Informers (Parliamentary Disqualifications) Act, 1975). Consistency between State and Commonwealth is desirable.[1]

On the whole however we doubt if the penal actions provided for in the Constitution Act 1934 serve any useful purpose today. A majority of us think that it might be better if the Courts were given jurisdiction to find the facts and the law in any such case and then make a bare declaration thereon, leaving it to Parliament to decide what action should be taken thereafter.

We do not favour giving the Courts jurisdiction to enforce their declarations, as for example by injunction, because that would give the Courts power to interfere in the internal working of Parliament.

Since *The Case of the Sheriff of Middlesex (1840) 11 Ad.& E 273; 113 E.R. 419* the Courts have been careful not to intrude upon the workings and privileges of Parliament see e.g. *R. v. Graham-Campbell Ex. p. Herbert (1935) IK.B.594.*

We think this constitutional distinction as to the boundaries of curial power is right and proper and ought to be observed in making these recomendations.

C. *Conclusion and recommendations*

We recommend that:—

1. *(a)* Qui tam and other penal actions be abolished for all offences other than those contained in the Constitution Act 1934

   and

   (b) In all cases coming within *(a)* above, liability to conviction of a summary offence be substituted for liability to prosecution by qui tam or penal action and forfeiture, if these actions are to continue.

2. That in the case of the Sections referred to in the South Australian Constitution Act 1934 that the penal actions be abolished, that the Courts be empowered to make declarations in respect to such situation and that what happens after such a declaration is made should be left to action by Parliament. On the basis of these con-

[1] However, the 1975 Commonwealth Act was passed in haste and without full debate on the desirability or otherwise of qui tam actions when it was discovered that Senator Webster might be liable for penalties amounting to $100 000—see Hansard 22nd April, 1975 p.1236.

clusions we will discuss the existing South Australian and inherited Imperial legislation concerning common informers and the steps we consider necessary to implement the above recommendations.

IMPERIAL STATUTES

1. *Statute 4 Henry VII c.20 (1488-9)*

This recites that many good statutes provide for popular actions but are not well enforced because of a common covinous practice for stopping bona fide prosecutions. It recites that when a person had committed an offence or else when he had been sued bona fide for an offence, he would arrange to be sued for it (we assume by a friend) while delaying the bona fide prosecution if necessary. The offender would then obtain a release in the covinous action and thereby bar a bona fide prosecution. The statute permits the plaintiff who sued in good faith to plead covin and collusion at the trial of his bona fide action. If the defendant is found guilty of covin or collusion he is to be convicted of the offence prosecuted bona fide (despite any collusive release) and the bona fide plaintiff is to receive the penalty. Furthermore, persons convicted of covin are to be imprisoned for two years.

Clause 9 (Ruffhead) provides that no release by a private prosecutor relating to an offence subject to qui tam action is to bar the Crown's right to prosecute for the offence. Clause 10 (Ruffhead) provides that covin or collusion cannot be pleaded after trial on the merits of the case or after trial of the same allegations of collusion. We consider that this Act was received into South Australian law. It was repealed in England by the Statute Law Revision Act, 1958 (6 & 7 Eliz. II c.46—the first schedule) no doubt because qui tam actions were generally abolished in England in 1951 and in relation to disqualification of members of Parliament, in 1957.

Recommendations

Our recommendations in regard to this statute are:—

(a) If qui tam and penal actions are retained either generally or for offences under the Constitution Act, 1934 then the substance of the provisions numbered 7, 8, 9 and 10 in Ruffhead should be re-enacted here in a Common Informers Act. Clause 9 is of particular importance to the Crown.

(b) If qui tam and penal actions are abolished then the whole Act may be repealed.

2. *Statute 18 Elizabeth I c.5 (1575)*

This statute was enacted to eliminate abuses in prosecutions by common informers.

Section 1 requires common informers to pursue all suits in person or by their attorneys. It also requires that the true date of the laying of the information be noted on the document.

Section 2 requires that the name of the prosecutor and the name of the Act sued upon be shown on the information on pain or forfeiture of forty shillings, one half of which is payable to the Queen and the other half to the person against whom the defective process was issued.

Section 3 provides that no jury shall be compelled to appear at Westminster for the trial of proceedings for any offence committed more than thirty miles from Westminster unless the Attorney-General for good cause requires otherwise.

Section 4 forbids common informers to compound any suit until after the accused person has made answer in Court and then only with the consent of the Court. The common informer is to be ordered to pay costs and damages assessed by the Court if he delays, discontinues, or is nonsuited or if the accused is acquitted. The section also provides for the enforcement of payment under such orders.

Section 5 provides that it is an offence for a person to sue for or to compound an action contrary to the provisions of this Act or to make any composition or take any reward to himself or a third person upon pretence of suing or upon pretence that an offence has been committed. A person convicted is to be pilloried, is thereby disabled from bringing any qui tam action in future and is to forfeit £10 (half to the Queen and half to the aggrieved person). It vests jurisdiction under the section in certain judicial officers including Justices of the Peace.

Section 6 exempts from the provisions of the Act aggrieved persons suing under the penal provisions of statutes against maintenance, champerty, buying of titles and embracery.

Section 7 makes it clear that the statute is limited to actions under statutes which enable any person to sue and does not override any past or future provisions enabling specified persons or bodies politic or corporate to sue or entitling them to receive the forfeitures.

Section 8 exempts officials whose duties include exhibiting informations or suing on penal laws. It appears from Ruffhead that the Act was originally of limited duration.

Although those parts of the statute which refer to Westminster and the pillory were not applicable to South Australia in 1836 we think that most of the provisions of the Act were received or absorbed into South Australian law. We are supported in this view by the report of Sir Leo Cussen which led to the enactment of the Imperial Acts Application Act, 1922 (Vic.) and which treats this Act and the other two main statutes on common informers as being in force in Victoria.

It was repealed in England by 7 & 8 Eliz. II c.68.

Recommendations

(a) If qui tam or penal actions are retained for offences under the Constitution Act or generally, then for the sake of simplicity, we recommend that the procedures applicable to prosections of summary offences should apply to qui tam or penal actions so far as not otherwise provided by the penal statute. For this reason we recommend repeal of this statute. If qui tam or penal actions are to be retained, certain provisions of the statute, 18 Eliz. I.c.5 should be re-enacted in modern form. We comment as follows:—

(i) The procedural safeguards provided by this Act are adequately covered by our local statutes, court rules and practice.

(ii) Four dollars is unlikely to be a real penalty under Section 2.

(iii) Section 3 is not relevant to South Australia.

(iv) Sections 4 and 5—we do not think Parliament is likely to reintroduce the pillory. All but two other aspects of sections 4 and 5 are covered by section 237 of the Criminal Law Consolidation Act, 1935 together with section 66 (1) of the Police Offences Act, 1953, sections 69 and 77 of the Justices Act, 1921, section 40 of the Supreme Court Act, 1935 and our rules as to jurisdiction. Although the consequences provided by section 237 of the Criminal Law Consolidation Act, 1935 for illegally compounding a penal action (conviction of a misdemeanour and imprisonment for up to three years) differ from the consequences provided by section 5, section 237 can be traced back to section 5 through the side note to the equivalent section 289 of the 1876 Criminal Law Consolidation Act which appears to have been intended to replace section 5. The aspects not covered are:—

First: costs—we recommend that a section be included in a Common Informers Act empowering Courts to order common informers to pay costs on a solicitor and client basis to the defendant upon an order of dismissal or upon withdrawal of the case.

Secondly: damages—if the Imperial Act is repealed there would then be no power for the Courts to order the common informer to pay the defendant damages if he delays or withdraws or if the defendant is acquitted. We *do not recommend* re-enactment of this provision as we consider that the right to full costs on a solicitor-client basis and the right to sue for damages for malicious prosecution (particularly if that cause of action is reformed in accordance with our recommendations in our Eighty-Third Report) will be sufficient protection for the defendant.

Thirdly: disablement—there is no exact equivalent of the provision in section 5 that a person illegally compounding a qui tam or penal action is disabled from bringing any similar actions in future. You may wish to preserve this consequence, but in our opinion it is not necessary as the penalty imposed by section 237 of the Criminal Law Consolidation Act and the possibility of an order to pay costs would be sufficient deterrent and punishment.

(iv) Section 6 should not be preserved.

(v) If you decide to retain the disabling provision of section 5 then an equivalent of sections 7 and 8 will be needed.

(b) If common informers are abolished altogether, then the whole statute may be repealed.

3. *Statute 27 Elizabeth I c.10 (1584)*

This statute is recorded in Ruffhead, but not in the Revised Statutes. It makes the Statute 18 Elizabeth I c.5 perpetual. It may be repealed here. It was repealed in England in 1863.

4. *Statute 31 Elizabeth I c.5 (1588-9)*

It appears from the preamble that the 1575-6 Statute of Elizabeth was not sufficient to prevent vexatious informations by common informers.

Section 1 orders that all previous statutes relating to common informers be observed. It enjoins the Courts not to entertain suits brought by any legally disabled common informer unless he has been aggrieved by the offence.

Section 2 requires that informations on penal statutes be laid only in the county where the offence was in truth committed. The defendant is permitted to plead that the offence was not committed in the county and if a finding is made in his favour or if the plaintiff nonsuited then the plaintiff may not sue again for the same offence. This is of course irrelevant in South Australia.

Section 3 exempts officers of record from the Act.

Section 4 exempts persons laying informations for offences against the statutes concerning champerty, buying of titles, extortion and against two now repealed Customs Acts; also statutes concerning corrupt usury, ingrossing, regrating and forestalling where the penalty is £20 or more. Informations alleging those offences may be laid in any county the informer chooses.

Section 5 (and 6 in Ruffhead) limits the time within which an action may be brought in the absence of any shorter time limitation prescribed by the particular penal statute. The time limit for prosecution of offences which may be prosecuted only by the Crown is two years from commission of the offence. The time limit for qui tam actions is one year for members of the public and in default of prosection by a common informer the Crown has a further two years within which to take proceedings. It is open to argument whether these time limits have been repealed by the Justices Act, 1921 or by s.37 of the Limitation of Actions Act, 1936 (South Australia).

Section 6 (7 Ruffhead) repeals Statute 7 Henry VIII c.3 concerning time limits for informations. The rest of the section concerns laws which are now obsolete.

We think this statute is still partly in force in South Australia (see Cussen Report (Supra)).

The statute was repealed in England by 7 & 8 Eliz. II c.68.

Recommendations

The whole of this statute may be repealed, but there are two matters which should be considered if qui tam or penal actions are to continue:—

(a) Jurisdiction

(i) Sections 52 and 53 of the Constitution Act vest jurisdiction in the Supreme Court and in "any other court of competent jurisdiction". Section 46 vests jurisdiction in the Supreme Court and "any other court of record in the State having competent jurisdiction". We consider this adequate. As a point of interest we notice that the Australian Parliament has provided in the Common Informers (Parliamentary Disqualfications) Act, 1975 that only the High Court of Australia has jurisdiction.

(ii) If qui tam or penal actions are retained for offences under other statutes then it would be as well to eliminate any doubt about jurisdiction by including in a Common Informers Act a provision that qui tam and penal actions may be brought only in the

Court of competent jurisdiction nearest to the place where the offence was committed or to the place of residence or place of business of the defendant.

(b) Time limits

(i) The time limit for actions under section 46 of the Constitution Act should be the same as for actions under 52 and 53, namely twelve months. It is arguable that at present there is no time limit under section 46 [2]. It can also be argued that it is two years [2].

If qui tam or penal actions are to be retained, *we recommend* enactment of a provision in a Common Informers Act that the time limit for qui tam and penal actions under the Constitution be twelve months. This would also be consistent with the time limit for penal actions under the Commonwealth Constitution.

(i) If qui tam and penal actions are retained generally, we consider uniformity of time limits desirable. We would recommend enacting in a Common Informers Act a time limit of twelve months for all qui tam and penal actions (unless expressly provided otherwise in the penal statute).

5. *Statute 21 James I c.4 (1623)*

It is clear from the preamble to this Act that the previous statutes had not prevented common informers from vexatiously suing in the Courts of Westminster and illegally compounding with accused persons. It appears that some common informers had been able to obtain the consent of the Attorney-General to actions being brought at Westminster contrary to the intent of the previous Acts. A body of complex common law had developed about jurisdiction and procedure in qui tam actions (see Coke's Institutes (supra)). This Act is principally a procedural reform Act.

Section 1 requires that actions under penal statutes be prosecuted by common informers in the county where the offence was committed. It provides that all actions commenced by the Attorney-General, any officer or any common informer or other person whatsoever in Westminster for offences not committed there shall be void. It also declares which judicial officers shall hear such actions in the counties and that the procedure to be used is to be that used in actions of trespass vi et armis.

[2] Section 37 of the Limitation of Actions Act, 1936 provides:—

"All actions for slander and all actions for penalties, damages or sums of money given to any party by any statute . . . shall be commenced within two years next after the cause of action accrued, but not after."

The meaning of "actions for penalties, damages or sums of money" is not clear; nor is the reason for juxtaposition of "actions for slander". For discussion on the interpretation of the section see *Mort v. Bradley (1916) S.A.L.R. 129, John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd. 129 C.L.R. 65* (especially per McTiernan A-C.J. & Menzies J.) and *Thomson v. Clanmorris (1900) 1 Ch. 718.*

If section 37 does not apply, then section 5 of the Statute 31 Elizabeth c.5 would still apply to qui tam actions generally. However, it may be that neither section 37 (1936 Act) nor section 5 (1589 Act) apply to actions under section 46 of the Constitution Act, particularly if one Member of Parliament sued another—see *The Speaker of the Legislative Assembly of Victoria v. Glass 1871 L.R. 3 P.C. 560; 17 E.R. 170* and *Barton v. Taylor (1886) 11 App. Cas. 197* which established that Australian Parliaments have the same powers, immunities and privileges as the House of Commons at the date of the relevant colonial Constitution Act and *Bradlaugh v. Gossett (1884) 12 Q.B.D. 271,* one of the leading authorities for the rule that House of Commons is not subject to the control of the Courts in its administration of that part of the statute law which has relation to its internal procedure only.

Section 2 requires the informant in all actions to prove not only the offence but that it was committed in the county in which the action is brought—otherwise the defendant is to be found not guilty.

Section 3 forbids court officials to receive any information or other proceeding under a penal statute until the informer etc. has sworn before some of the judges of that court that the offence was committed in the county and that he believes that it was committed within the previous year.

Section 4 entitles defendants to plead the general issue and to give evidence at the trial of relevant matters even though such matters had not been previously pleaded.

Section 5 rather curiously excludes from the operation of the Act certain offences some of which are now obsolete but including some offences created to protect the revenue and also actions for maintenance, champerty and buying of titles.

Although there are some aspects of this Act which have never been applicable to South Australia, the general tenor of the Act and in particular the important reforming provisions of section 4 were applicable in 1836. We consider that this Act was received in South Australia (see also Imperial Acts Application Act, 1922 (Victoria)).

In England this Act was repealed by the Statute Law Revision Act 1959 (7 & 8 Eliz. II c.68—second schedule) as it was rendered unnecessary by the Common Informers Act, 1951 which abolished common informers.

Recommendations

If our previous recommendations are accepted, then the whole of this Act can be repealed.

6. *Statute 2 & 3 Victoria c.71 (1839)—The Metropolitan Police Courts Act, 1839*

This Act deals with many procedural and jurisdictional matters. Sections 32, 33 and 34 make it clear that abuse of the qui tam procedure was still common in England at that time.

We consider that this Act was never part of South Australian law as a Magistrates' Court was established here in 1837 prior to the enactment of this statute whose procedures and remedies were prescribed by various South Australian Ordinances and Statutes. Section 33 was the predecessor of section 66 (1) of our Police Offences Act, 1953.

Recommendations

If any qui tam or penal actions are retained or authorised by future statutes, other than those in the Constitution Act, 1934, then a modern equivalent of section 34 would be worthwhile. Section 34 gives the Court a discretion to order that an informer who is not aggrieved by the offence shall receive none or only part of the penalty to which he is entitled under the penal statute. The section remained in force in England until the abolition of qui tam and penal actions.

7. *Statute 14 & 15 George VI c.39 (1951)*

The Common Informers Act 1951 "being an Act to abolish the common informer procedure". This Act does not apply in South Australia but is included to complete the history of qui tam and penal actions in England.

It was prompted by the case of *Houghton-le Touzel v. Mecca Limited (1950) 2 K.B. 612* in which a common informer obtained for himself the then large penalty of £200 upon successfully prosecuting a cinema company for a breach of the Sunday Observance Act, 1781—21 Geo. III c.49.

The Act prohibits the institution in Great Britain of any proceedings for a penalty or forfeiture, including proceedings by the Crown acting as a common informer, under any of forty eight Acts listed in the schedule or under any private or local Act. We understand that this had the effect of abolishing qui tam and penal actions in Great Britain. The Act does not abolish prosecutions by the Crown or aggrieved persons. Nor does it abolish private prosecutions. It does not abolish the offences created by the Acts referred to, but abolishes qui tam and penal actions in relation to them and changes the consequences of conviction.

A person committing an offence previously subject to prosecution by a common informer is still liable to prosecution and upon summary conviction he is liable to a fine (to be paid to the Revenue) not exceeding £100 plus any non-pecuniary forfeiture provided for by the Act creating the offence unless the Act provides for summary conviction or conviction on indictment in which case the penalties normally applicable to such convictions apply in lieu of the fine prescribed by the Common Informers Act.

The provisions of the penal statutes which relate to the burden of proof of which provide defences for the offences created are preserved.

SOUTH AUSTRALIAN LEGISLATION

Criminal Law Consolidation Act 1935

Section 237 provides:—

> "Any person who, having brought, or under colour of bringing, any action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without the order or consent of the Supreme Court, shall be guilty of a misdemeanour, and liable to be imprisoned for any term not exceeding three years."

This section is derived from section 289 of the Criminal Law Consolidation Act 1876, the side note of which refers to section 4 of Statute 18 Elizabeth I c.5. The section is designed to prevent abuse of the qui tam procedure, particularly that of "trumped up" charges. The offences created by this section is now classified as a minor indictable offence.

Recommendations

This section needs no change but it should be referred to in the proposed Common Informers Act to avoid risk of it being overlooked by persons involved in qui tam or penal actions.

The Police Offences Act, 1953

Section 66 (1) provides:—

> "Any person who having laid an information or complaint before a justice for an alleged offence, subsequently receives any valuable consideration for withdrawing, seeking the dismissing of, or delaying the hearing of, that information or complaint shall be guilty of an offence. Penalty $100."

This section is derived from section 80 of the Police Act, 1916 which was repeated in the Police Act, 1936. Apart from immaterial changes, section 80 of the 1916 Act is in the same terms as section 33 of the Imperial Metropolitan Police Courts Act 1839 (2 & 3 Vict. c.71). Section 66 (1) quoted above is of wider application than its predecessors in that it applies to all informants and complainants. The earlier sections applied only to informants who were not personally aggrieved. The English section, when taken in the context of their sections 32 and 34, was clearly aimed at common informers. Sections 32 and 34 of the English Act were not included in the South Australian Act of 1916. This omission and the change in emphasis indicates that, even in 1916, either qui tam and penal actions were not common here or that there was little abuse of the procedure.

Recommendation

No changes to this section are needed.

The Constitution Act, 1934

We quoted the relevant provisions of this Act on pages 5-6. If contrary to our recommendations the present format of the relevant sections is to be retained then subject to the provision of a time limit for actions under section 46 we think that the only aspect of sections 46, 52 and 53 which needs consideration is the amount of the forfeiture. This is a policy matter on which we make no recommendation but comment as follows:—

(a) Sections 52 and 53 provide for a forfeiture of $1 000 plus the full costs of the suit. Section 46 provides for forfeiture of $1 000 only. Should this difference be continued?

(b) The amount of the forfeiture was set at $1 000 one hundred and thirty years ago when the first South Australian Act was passed. The Commonwealth Common Informers (Parliamentary Disqualifications) Act, 1975 provides for a forfeiture of $200 for every day on which the member sits while disqualified. Should the amount of the forfeiture be increased?

Supreme Court Rules

Order 50 rule 12 of the Supreme Court rules provides:—

"12 (1) Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall first have been given to the Attorney-General, but in other cases it may be given without notice to any officer.

(2) The order to compound a penal action shall expressly state that the defendant undertakes to pay the sum for which the Court or a Judge has given him leave to compound the action.

(3) When leave is given to compound a penal action, where part of the penalty goes to the Crown, the King's half of the composition shall be paid to the Treasurer."

RECOMMENDATIONS

No change is needed.

SUMMARY OF RECOMMENDATIONS

1. Abolish qui tam and penal actions except possibly for those now or hereafter authorised by the Constitution Act 1934.

2. As a means of implementing our primary recommendation we recommend:—

A. The enactment of a Common Informers Act containing the following provisions:—

(1) All qui tam and penal actions other than those now or hereafter authorised by the Constitution Act 1934 be abolished.

(2) Liability to prosecution and conviction of a misdemeanour or a summary offence with appropriate maximum penalties be substituted for liability to prosecution by qui tam or penal action and forfeiture in all other cases.

(3) That the penal actions in the Constitution Act be deleted; that Courts be empowered to make declarations in such cases; and that the enforcement of such declarations be in the hands of Parliament.

(4) The following Imperial Statutes be no longer in force in South Australia:—

Statute 4 Henry VII c.20 (1488-9)
Statute 18 Elizabeth I c.5 (1575-6)
Statute 27 Elizabeth I c.10 (1585)
Statute 31 Elizabeth I c.5 (1588-9)
Statute 21 James I c.4 (1623-4)

(5) If qui tam or penal actions are not abolished, the following provisions be enacted or re-enacted in a modern form:—

(a) the substance of sections 7, 8 and 10 (as numbered in Ruffhead) of Statute 4 Henry VII c.20 concerning covinous qui tam actions brought for the purpose of barring bona fide qui tam and penal actions;

(b) Section 9 of Statute 4 Henry VII c.20 preserving the Crown's right to prosecute an offence previously prosecuted without conviction by a private citizen;

(c) qui tam and penal actions to be heard as minor indictable offences or summary offences except in so far as otherwise provided.

(d) a Court (including a Court of Summary Jurisdiction) hearing a qui tam or penal action be empowered to order, at its discretion, that the common informer pay to the defendant his full costs on a solicitor-client basis or any part thereof on withdrawal, adjournment or dismissal of the action (see Statute 18 Elizabeth I c.5);

(e) an absolute time limit of twelve months for commencing penal actions under section 46 of the Constitution Act and any other actions authorised in future by the Constitution Act, unless otherwise provided in the Constitution Act.

We also recommend that if the Constitution Act remains in its present form, that you give consideration to:—

(i) the adequacy of the forfeiture provided by sections 46, 52 and 53 of the Constitution Act;

(ii) the lack of provision for payment of costs by a convicted defendant under section 46 of the Constitution Act.

B. That no change be made to section 237 of the Criminal Law Consolidation Act 1935 section 66 of the Police Offences Act 1953, or Order 50 rule 12 of the Supreme Court rules.

C. That section 37 of the Limitation of Actions Act 1936 be amended so that it can not be interpreted as applying to qui tam or penal actions.

We have the honour to be:—

HOWARD ZELLING
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