SOUTH AUSTRALIA

NINETY-SIXTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE INHERITED IMPERIAL LAW AND CONSTITUTIONAL STATUTES

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-SIXTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE INHERITED IMPERIAL LAW AND CONSTITUTIONAL STATUTES

To:

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

Sir,

One of the remaining reports which requires to be done with regard to the Inherited Imperial Statutes Law deals with those Statutes which enshrine constitutional principles. This report deals with that topic.

1. *Magna Charta Statute 9 Henry III, Chapter 29 (1225)* (Otherwise referred to as 25 Edward I [1297])

We have already dealt shortly with this chapter of Magna Charta in the Sixty-first Report of this Committee and we will not repeat what we have there said by way of comment.

The Statute reads as follows:

> "Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae. Nulli vendemus, nulli negabimus, aut differemus justitiam, vel rectum."
>
> "No free man shall be taken or imprisoned or be disseised of his freehold or liberties or free customs or be outlawed or exiled or otherwise destroyed, nor will we pass upon him nor condemn him, but by the lawful judgment of his peers or by the law of the land. To no man will we sell, to no man will we deny or delay right or justice."

It will be a question for you in all of these constitutional statutes, whether or not you will want to re-enact them as South Australian law, that is, setting out the whole of the Statute in the South Australian Statute, or whether you simply wish to refer to the Imperial Statute and continue it as law in South Australia. We recommended in our Sixty-first Report that it remain as part of the law of the land continued by the South Australian Statute, but this question will arise with regard to every one of the Statutes dealt with in this constitutional report. The value of our recommendation lies in the fact that you will then have a much shorter Statute. If, however, you want to put it on the Statute book in a form where there is no longer any need to go back to the Statutes at large or the Ruffhead's Edition of the Statutes, then the longer form should be used and the actual wording of the preserved Statues should be set out in the South Australian Act of Parliament.

2. *Statute of Westminister I, 3 Edward I, Chapter 1 (1279)*

In Chapter one occur the famous words "that common Right be done to all, as well Poor as rich, without respect of Persons".

As we said in the Sixty-first Report these words are famous and important and should be preserved as part of the constitutional law of this State.

3. *Statutum de Tallagio (1279) 25 Edward I (in Ruffhead 34 Edward I, Statute 4)*

Chapter one of this Statute says:

> "No tallage or Aid shall be taken or levied by us, or our Heirs in our Realm, without the good Will and Assent of Archbishops, Bishops, Earls, Barons, Knights, Burgesses, and other Freemen of the Land."

This has always been construed as meaning that the King shall have no tallage or aid without the consent of Parliament. This is the first of the Statutes giving Parliament the power of the purse so it enshrines a very important constitutional principle.

The construction of the Statute in the way in which we have set it out is proved by the reference to it in *Coke's Institutes Part II (1642 Edition) Page 532 and again at 533.*

4. *Statutum de Defensione Portandi Arma 7 Edward II (1313) (In Ruffhead [1279] 7 Edward I, Statute 1)*

This Statute forbade members to come armed to Parliament or to use force against the King's peace. This is referred to in the Seventy-eighth Report as a Constitutional Statute and now requires to be dealt with. The relevant words from the Statute are:

> "That every Man shall come without all Force and Arms, well and peaceably, to the Honour of us, and the Peace of us and our Realm."

5. *Statute 14 Edward III, Chapter 14 (1340)*

We recommended in the Sixty-first Report that the Statute simply be repealed, but we think that part of it at least has a constitutional point in it which ought to be preserved namely that the Crown cannot, as it could at common law, prevent the judges by commandment from the King from dealing with any particular case. The important words are:

> "Nor that the Justices of whatsoever Place shall let (fail) to do the Common Law by Commandment which shall come to them under the Great Seal or Privy Seal."

6. *Statute 25 Edward III, Statute 5, Chapter 4 (1350)*

The Statute provides that no one shall be put out of his freehold or of any other property by action of the Crown but only by process of the Courts after he has been sued and made his answer. We dealt with this in the Sixty-first Report of this Committee and as this is a Constitutional Statute, we deal with it again now. The important words are:

> "That from henceforth none shall be taken by Petition or Suggestion made to our Lord the King, or to his Council, unless it be by Indictment or Presentment of good and lawful People of the same Neighbourhood where such Deeds be done, in due Manner or by Process made by Writ original at the common law; nor that none be out of his Franchises, nor of his Freeholds, unless he be duly brought in to Answer and forejudged of the same by the Course of the Law; and that if any Thing be done against the same, it shall be redressed and holden for none."

7. *Statute 42 Edward III, Chapter 3 (1368)*

This is dealt with in the Sixty-first Report of this Committee. The Statute provides that no person shall suffer damage by action taken by the Crown but the due process of law must be observed.

Any action contrary to the Statute is void. Part of the Statute which ought to appear in our Constitutional Statute is:

> "That no Man be put to answer without Presentment before Justices, or Matter of Record or by due Process and Writ original, according to the old Law of the Land; And if any Thing from henceforth be done to the contrary, it shall be void in the Law and the holden for Error."

We should add that this Statute was discussed in detail in relation to Royal Commissions by the High Court of Australia in *The State of Victoria and another against Australian Building Construction Employees' and Builders Labourers' Federation (1982) 41 A.L.R. 71.*

8. *Statute 2 Henry IV, Chapter 1 (1400)*

This Chapter is the subject of conflicting recommendations in our Sixty-first and Seventy-eighth Reports. The recommendation of the Sixty-first Report is correct. It is a Constitutional Statute and should find its place amongst the Constitutional Statutes. The relevant part of the chapter is:

> "And that all his liege People and Subjects may freely and peaceably in his sure and quiet Protection go and come to his Courts to pursue the Laws, or defend the same without Disturbance or Impediment of any; And that full Justice and Right be done, as well to the Poor as to the Rich, in his Courts aforesaid."

9. *Statute 8 Henry V, Chapter 1 (1420)*

This deals with the return of writs into Parliament where the King was out of the country at the time when the writs were issued and provides that his return shall not affect the lodgement of the election returns into the Parliament. Ruffhead deals with this Statute as being expired. There is nothing on the face of it which shows that it has expired although it certainly arose out of the fact that Henry V was away getting married to Queen Katherine when the returns went out for a new Parliament. On further consideration we think that this is so unlikely a matter to happen in South Australia that Chapter one may safely be repealed, but we draw the matter to your attention in case you may think otherwise.

10. *Statute 6 Henry VI, Chapter 4 (1427)*

This Statute is referred to in the Seventy-eighth Report of the Committee and we now proceed to deal with its Constitutional aspect. On further consideration of this Statute, it appears to deal only with the returns for Knights of the Shire to Parliament and the means of traversing an incorrect return. As it does not apply to all members and there is no such distinction of membership in Parliament in the present day, we think, on further consideration, that Chapter four may safely be repealed.

11. *Statute 10 Henry VI, Statute 1, Chapter 2 (1432)*

Chapter two was partly repealed by 14 George III Chapter 58 and is referred by our Seventy-eighth Report to the report on Constitutional Statutes. As with the Statute 6 Henry IV Chapter 4, it appears to apply only to Knights of Shires and for that reason, we think that the balance of the statute now remaining may safely be repealed.

12. *Statute 18 Henry VI, Chapter 1 (1439)*

This chapter deals with the dates of letters patent and grants from the Crown and forbids them being antedated. Insofar as it deals with Crown grants, the matter can now be better dealt with by being placed in the Crown Lands Act where one would expect to find it. Insofar as it forbids the antedating of letters patent, it may be sufficient simply to repeal the Statute with a saving of the amendment of the law made by the Statute without preserving it as a Constitutional Statute.

13. *Statute 23 Henry VI, Chapter 14 (1444)*

This chapter was partly repealed by 14 George III, Chapter 58. It gives a remedy where the person chosen by the vote is not the person returned as the successful candidate. We think, on consideration, that this matter should be considered in relation to the Election Act and not in relation to Constitutional Statutes, and if it be thought necessary, an amendment be put into the Election Act to cover this particular redress of grievance in the Statute 23 Henry VI, Chapter 14 and that when that is done, the Statute may be repealed.

14. *Statute 4 Henry VIII, Chapter 8 (1512)*

This chapter is always treated as establishing the right of a member of Parliament to speak freely in Parliament without being called to account anywhere else for his freedom of speech. The matter arose out of the case of a man named Richard Strode and the Statute reads as follows:

> "All Suits, condemnations, executions, charges and impositions, put or hereafter to be put on Richard Strode, and every of his Complices that be of this Parliament or any other hereafter, for any Bill, speaking, or reasoning of any Thing concerning the Parliament to be communed and treated of, shall be void."

15. *Statute 6 Henry VIII, Chapter 16 (1514)*

This provides that no member of the House of Commons may leave Parliament before the end of the Parliament without the consent of the Speaker of the House. We ourselves are unaware how much this constitutes a problem at the present day, and therefore we refer the statute to you for consideration. No doubt it is the probable basis of the jurisdiction under which pairs are granted and under which members have leave of absence, and it may be that you will think that for those reasons, it ought to find a place in the Constitutional Statutes, but if you do not think so on either of those grounds, then the Statute may safely be repealed.

16. *Statute 33 Henry VIII, Chapter 21 (1541)*

Part of this statute deals with the attainder of Queen Katherine and has expired long since. There is, however, a provision in the Statute that royal assent may be given to an Act of Parliament by letters patent. This may be of some importance if speedy assent is required to an Act of Parliament when neither the Governor nor the Lieutenant-Governor are going to be easily accessible at the time. It is probably of less importance these days when air travel reduces everything to a matter of hours. We doubt whether it needs to be kept among the Constitutional Statutes, but it may be that the repeal ought to be accompanied by a reservation of the right created by the statute in case it ever becomes necessary to use it.

17. *Statute 1 Mary, Section 3, Chapter 1 (1554)*

This chapter provides that a Queen regnant is to exercise the same powers as a King would exercise. As this is the Statute which enables our present Queen to do all the things which a King could do if he were ruling, the Statute ought to be preserved amongst the Constitutional Statutes.

18. *Statutes 3 Charles I, Chapter 1 (1627) and 16 Charles I, Chapter 14 (1640)*

The Statute 3 Charles I, Chapter 1 is the famous Petition of Right, one of the most famous of all Constitutional Statutes, being the Statute which limited the unbounded power of the Crown claimed by James I and Charles I. As is pointed out in our Seventy-ninth Report, there was for a long while an historical argument as to whether 3 Charles I, Chapter 1 was a Statute at all, because the King did not give assent to this Statute in the normal form, "Le roy le veult". He gave assent as to a petition "soit droit fait comme est desiré". However, these doubts were put to rest by the Statute 16 Charles I, Chapter 14, which deals basically with the reversal of the proceedings against John Hampden for ship money, but by section II deals with the Petition of Right made in the third year of Charles I, and Section III provides that all the particulars prayed or desired in the Petition of Right are to be put into execution hence forth and to be as strictly held and observed as they are prayed and expressed in the Petition.

19. *Statute 16 Charles I, Chapter 10 (1640)*

This is the Statute which abolished the court of Star Chamber, provided that neither the King nor his Privy Council shall have the jurisdiction over any man's estate and provided that no such court as the Star Chamber or the Councils of the Marches or any similar court should ever be erected again. It further provided that everything disposing of the lands, tenements, hereditaments, goods or chattels of any subjects of the King should be tried and determined in the ordinary courts of justice and by the ordinary courts of law. This Statute is still of importance to the present day and not least in relation to the Royal Commissions. (See the Judgment of the High Court of Australia in the *State of Victoria and Others against the Australian Building and Construction Employees' and Builders Labourers' Federation (1982) 41 A.L.R. 71).*

This Statute provides that no Statute is valid unless it has been passed by both Houses of Parliament and assented to by the King. It also provides for the privilege of debates in Parliament and the redressing of public grievances. All those parts of Chapter 1 need to be kept, the other parts of it dealing with the safety and preservation of King Charles II expired with his death.

21. *Statute 13 Charles II Statute 1 c.5 (1661)*

This is the Act against tumultuous petitions to Parliament and giving all Members of Parliament freedom of access to the Crown (or in this State to the Governor).

22. *Statute 31 Charles II, Chapter 2 (1679)*

This is the first of the major habeas corpus statutes and is still used as the bulwalk of the liberty of the subject today. It ought to appear in any list of Constitutional Statutes.

23. *Statute 1 William III and Mary, Chapter 1 (1689)*

This is the Parliament Act 1689 and is of importance in that it shows that Parliament can by a Statute confirm any defect in its

calling or assembling or sitting. When James II fled the kingdom, he threw the Great Seal into the Thames and there was no provision for calling a new Parliament. The Convention Parliament, which was called to ratify the Glorious Revolution of 1688 and the accession of William III and Mary, could not therefore be called in normal form. This Statute provides that the Parliament itself and the Acts of Parliament are valid, notwithstanding any defect in its assembling or sitting.

24. *Statute 1 William III and Mary, Session 1, Chapter 6*

This provides for the Coronation Oath and is administered to each King or Queen at their accession. As long as we have a monarchy in Australia, the Coronation Oath is, of course, a Constitutional Statute.

25. *Statute 1 William III and Mary, Session II, Chapter 2 (1689)*

This is the most famous Bill of Rights, which is certainly in force in South Australia and is the major statute on the rights of the subject in force in this State. Part of the preamble was repealed by 6 George IV Chapter 50 section 62, but the remainder is still in force, and should be included in any table of Constitutional Statutes.

26. *Statute 7 and 8 William III, Chapter 7 (1695)*

This chapter deals with returns to Parliamentary elections and as we pointed out in our Seventy-ninth Report, is probably carried forward as part of the law and custom of Parliament into our own constitution. Basically it deals with false returns of elections for members of Parliament and provides a remedy for anybody who is affected by such false returns. We do not know whether this is a problem at the present day or whether the Statute should remain or not. We simply refer the matter to you for your consideration. It may well be that the present electoral laws may cover the subject satisfactorily.

27. *Statute 7 and 8 William III c.15 (1695)*

Since writing our Seventy-ninth Report we have done a report on the statutes relating to the demise of the Crown, of which this is one, in our Eighty-first Report. If you think that the matter is not sufficiently covered in that report and the statute should be preserved as a Constitutional Statute, even though the likelihood of the state of affairs occurring which is sought to be cured by the statute are remote, then it should go amongst Constitutional Statutes. However, on the whole we do not think this is so and that the remedies set out in our Eighty-first Report should be sufficient.

28. *Statute 12 and 13 William III, C. 2 (1700)*

This is the Act of Settlement which regulates the succession to the Crown and must of course appear in any set of Constitutional Statutes. It was partly repealed by 4 and 5 Anne Chapter 20, Sections XXVII and XXVIII and by 1 George I, Statute 2, c. 51. Otherwise it is still in force in South Australia and the balance of the Statute should be inserted as we have said in the Constitutional Statutes in this regard.

29. *Statute 12 and 13 William III c. 3 (1700)*

This regulates privilege of Parliament and so much of as does not refer to Peers of the Realm is the foundation of the privileges of Parliament to this day. It certainly forms part of the law and custom of Parliament in South Australia and except so far as it refers to Peers it should be retained as a Constitutional Statute.

30. *Statute 12 and 13 William III c. 5 (1700)*

This is another Statute against false and double returns to members of Parliament. It does not appear to break new ground and we think, on consideration, that it can be repealed.

31. *Statute 12 and 13 William III c. 10 (1700)*

As is set out in our Seventy-ninth Report, Sections LXXXIX to XCI deal with disqualification of members of Parliament. On further consideration we do not think that these Sections need to be retained today and that the Statute may be repealed in respect to South Australia.

32. *Statute 2 and 3 Anne Chapter 12; (Ruffhead) Statute 2 and 3 Anne Chapter 18 (1703)*

This is the Statute which provides that any person holding an office or place of public trust can be sued for breach of trust or prosecuted for misdemeanour notwithstanding that he is a Member of Parliament. We would certainly have received this Statute as part of the law and custom of Parliament and it should appear in the list of Constitutional Statutes.

33. *Statute 6 Anne c. 11 (1706)*

This is the Statute dealing with the Union with Scotland and the making of Acts of the Parliament of Great Britain. Until the residual ties are finally cut, this Statute of course still has constitutional significance in South Australia. It may be that by the time legislation is prepared in relation to this report, this Statute may not at that stage retain constitutional significance.

34. *Statute 6 Anne c. 40 (1706)*

This deals with the same subject of the union of the two Crowns as the last Statute to which we referred and exactly the same considerations apply in relation to it.

35. *Statute 2 George I c. 56 (1715)*

This is the Crown Pensioners Disqualification Act and is an act related to the law and custom of Parliament. It was explained by 22 George III c. 82 Section XXX. Without doubt we received it as part of the law and custom of Parliament in 1857. We draw your attention to it. It may be that this particular disqualification is not of importance at the present day in which case the Statute can simply be repealed.

36. *Statute 6 George III c. 12 (1766)*

This Statute provides for the Parliament of Great Britain to have power to make laws throughout the dominions and colonies of the Crown. Again, this Statute will not need to be kept provided that the final residual links with South Australia have been severed, but it will probably require one more exercise of statutory power in Britain to bring that about. Until that happens, this Statute 6 George III c.12 is a Constitutional Statute of some importance to South Australia.

37. *Statute 10 George III c. 50 (1770)*

This is an Act preventing delays of justice by reason of privilege of Parliament. We would certainly have inherited it here in 1857. It may be that Section 39 of our present Constitution Act may seem to you to be sufficient without preserving this Statute and we would therefore draw the matter to your attention.

38. *Statute 12 George III c. 11 (1772)*

This is the statute which requires the consent of the Queen to the marriage of any member of the Royal family and invalidates any marriage entered into without that consent. This statute therefore could affect marriages of the Royal family in relation to Australia and as long as Australia remains a monarchy this will remain one of the Constitutional Statutes.

39. *Statute 43 George III c. 140*

This is the next of the Habeas Corpus Acts and directs habeas corpus to courts martial, bankruptcy, public accounts and any other commissioners acting under any commission or warrant from the Crown. It must go into the Constitutional Statutes.

40. *Statute 56 George III c. 100 (1816)*

This is the third of the major Acts on Habeas Corpus. It improves the procedure in relation to habeas corpus and gives power to the Court to enquire into the true facts contained in the return. Again, it is a Constitutional Statute of the highest importance.

41. *Statute 4 and 5 William IV c. 95 (1834)—The South Australia Act 1834*

This is of course the Statute under which South Australia was founded. It was repealed in 1842 by the Statute 5 and 6 Victoria c. 61, but the repeal had a saving clause for all things lawfully done under the Statute of 1834 before its repeal, and it is for this reason that the 1834 Act still ranks as a Constitutional Statute in South Australia. As is pointed out in our Ninety-first Report, the Act is still of importance in regard to major institutions created prior to 1842. Those institutions include the Executive Council, the Supreme Court and the Corporation of the City of Adelaide amongst others. Accordingly, the Statute 4 and 5 William IV chapter 95 still ranks as an important Constitutional Statute in South Australia.

We have the honour to be:—

Howard Zelling

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