



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 75

**United Kingdom Statutes in Force in
Western Australia**

REPORT

OCTOBER 1994

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

Commissioners

Chairman

Mr P G Creighton BJuris (Hons) LLB (Hons) (WA) BCL (Oxford)

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Ms C J McLure BJuris (Hons) LLB (Hons) (WA) BCL (Oxford)

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Ms K L Chamberlain

Mr L McNamara BA (Murdoch)

Ms M A Ryan

The Commission's offices are on the 11th floor, London House, 216 St George's Terrace, Perth, Western Australia, 6000. Telephone: (09) 481 3711. Facsimile: (09) 481 4197.

To: **HON C L EDWARDES MLA**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on United Kingdom statutes in force in Western Australia.

P G CREIGHTON,
Chairman

25 OCTOBER 1994

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Table of Abbreviations

ACT 1986 Act	<i>Imperial Acts (Substituted Provisions) Act 1986 (ACT)</i>
ACT 1988 Act	<i>Imperial Acts (Repeal) Act 1988 (ACT)</i>
ACTAG'S Report	Australian Capital Territory Attorney General's Department Law Review Program <i>Audit of ACT and NSW Law Reform Initiatives</i> (1993)
ACT Report	Law Reform Commission of the Australian Capital Territory <i>Report on Imperial Acts in Force in the Australian Capital Territory and Supplementary Report</i> (1973)
Adams	P R Adams QC <i>The Law of Real Property and Conveyancing in Western Australia</i> (1950)
Bradbrook	A J Bradbrook, S V MacCallum and A P Moore <i>Australian Real Property Law</i> (1991)
CCH	<i>The CCH Macquarie Concise Dictionary of Modern Law</i> (1988)
Holdsworth	W Holdsworth <i>A History of English Law</i> (1971 reprint)
Jowitt	<i>Jowitt's Dictionary of English Law</i> (2nd ed 1977)
Kewley	G Kewley <i>Report on the Imperial Acts Application Act 1922</i> (1974-1975)
NSW Act	<i>Imperial Acts Application Act 1969 (NSW)</i>
NSW Report	Law Reform Commission of New South Wales <i>Application of Imperial Acts</i> (LRC 4 1967)
NZ Act	<i>Imperial Laws Application Act 1988 (NZ)</i>
NZ Report	New Zealand Law Commission <i>Imperial Legislation in Force in New Zealand</i> (Report No 1 1987)
NZ Property Law Report	New Zealand Law Commission <i>A New Property Law Act</i> (Report No 29 1994)
Plucknett	T F T Plucknett <i>A Concise History of the Common Law</i> (1956)
PNG Report	R S O'Regan <i>English Statutes in Papua New Guinea</i> (1973)
Qld Act	<i>Imperial Acts Application Act 1984 (Qld)</i>

- Qld Paper Queensland Law Reform Commission *Working Paper in Relation to an Examination of the Imperial Statutes in Force in Queensland* (QLRCWP 23 1979)
- Sask Report Law Reform Commission of Saskatchewan *The Status of English Statute Law in Saskatchewan* (1990)
- SA54 Law Reform Committee of South Australia Report on the *Inherited Imperial Statute Law in this State Relating to the Topics of Property, Trusts, Uses, Equity and Wills* (Report No 54 1980)
- SA55 Law Reform Committee of South Australia Report *Relating to the Inherited Imperial Statute Law on Practice and Procedure in this State* (Report No 55 1980)
- SA58 Law Reform Committee of South Australia Report *On the Inherited Imperial Statute Law with regard to Proceedings in Summary Jurisdiction* (Report No 58 1981)
- SA59 Law Reform Committee of South Australia Report in *Respect of Imperial Laws Application Within This State in Relation to the Criminal Law* (Report No 59 1980)
- SA61 Law Reform Committee of South Australia Report *Relating to the Inherited Imperial Law and the Civil Jurisdiction and Procedure of the Supreme Court* (Report No 61 1980)
- SA64 Law Reform Committee of South Australia Report *Relating to the Reform of the Law on Wills and Intestacies* (Report No 64 1983)
- SA65 Law Reform Committee of South Australia Report *Relating to the Inherited Imperial Law Regarding the Crown* (Report No 65 1981)
- SA68 Law Reform Committee of South Australia Report *Relating to the Inherited Imperial Law on Gaming and Wagering in South Australia* (Report No 68 1982)
- SA78 Law Reform Committee of South Australia Report *Dealing with Disparate Subjects in the Inherited Imperial Law* (Report No 78 1984)
- SA79 Law Reform Committee of South Australia *Dealing with the Inherited Imperial Law* (Report No 79 1984)
- SA80 Law Reform Committee of South Australia Report *Relating to the Inherited Imperial Law* (Report No 80 1984)
- SA81 Law Reform Committee of South Australia Report *Relating to the Demise of the Crown* (Report No 81 1984)

SA86	Law Reform Committee of South Australia Report <i>Dealing with the Inherited Imperial Law Between 1781 and 1800</i> (Report No 86 1984)
SA89	Law Reform Committee of South Australia Report <i>Dealing with the Inherited Imperial Law Between 1801 and 1820</i> (Report No 89 1984)
SA91	Law Reform Committee of South Australia <i>Dealing with the Inherited Imperial Law Between 1821 and 1836</i> (Report No 91 1985)
SA94	Law Reform Committee of South Australia Report <i>Relating to Qui Tam and Penal Actions and Common Informers</i> (Report No 94 1985)
SA96	Law Reform Committee of South Australia Report <i>Relating to the Inherited Imperial Law and Constitutional Statutes</i> (Report No 96 1985)
SA102	Law Reform Committee of South Australia Report <i>Relating to the Inherited Imperial Law and to Statutes Previously Covered by the Colonial Laws Validity Act 1865</i> (Report No 102 1986)
UK Report	The Law Commission <i>Statute Law Revision: First Report</i> (Law Comm No 22 1969)
Vic 1922 Act	<i>Imperial Acts Application Act 1922</i> (Vic)
Vic Act	<i>Imperial Acts Application Act 1980</i> (Vic)
VSLRC	Victorian Statute Law Revision Committee <i>Report on the Imperial Acts Application Bill, Imperial Law Re-enactment Bill and the Constitutional Powers (Request) Bill</i> (1979)

The pronouns and adjectives "he", "him" and "his", as used in this report, are not intended to convey the masculine gender alone, but include also the female equivalents "she", "her" and "hers".

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked:

"To review the Imperial Acts in force in this State at the time of its founding and to recommend which of those still in force should be repealed and which should be re-enacted (whether in the same or different form) by the Parliament of Western Australia."

1.2 Statutes enacted in the United Kingdom may have become part of the law of Western Australia in three main ways -¹

1. Statutes of the Parliament of the United Kingdom of general application in force on 1 June 1829² were inherited if they were suitable for local conditions.³
2. Statutes of the Parliament of the United Kingdom may have become part of the law of Western Australia by virtue of provisions in the Acts themselves. These Acts are commonly referred to as applying by "paramount force". Since the passage of the *Australia Acts 1986*⁴ this type of legislation can be amended or repealed by a statute of the Parliament of Western Australia. The *Australia Acts 1986* also terminate the power of the Parliament of the United Kingdom to legislate for Western Australia.⁵
3. Statutes of the Western Australian Parliament may expressly adopt or apply, in whole or part, United Kingdom statutes by merely referring to the statutes.⁶

¹ In addition, statutes of the Western Australian Parliament may repeat, in whole or part, the terms of statutes enacted in the United Kingdom for application in England and Wales.

² See *Interpretation Act 1984* s 73.

³ See *Quan Yick v Hinds* (1905) 2 CLR 345, 356 per Griffith CJ; *Rogers v Squire* (1978) 23 ALR 111, 116.

⁴ *Australia Act 1986* (UK) s 3. *Australia Act 1986* (Cth) s 3.

⁵ *Australia Act 1986* (UK) s 1. *Australia Act 1986* (Cth) s 1.

⁶ For example, s 1 of the Imperial Acts Adopting Ordinance 1867 lists a number of statutes of the Parliament of Great Britain and provides:

In accordance with the Commission's terms of reference, only statutes in the first category and those in the second category coming into force before 1 June 1829 are examined in this Report.

2. STATUS OF INHERITED UNITED KINGDOM STATUTES

1.3 Most inherited United Kingdom statutes have been repealed, expressly or impliedly, by statutes of the Parliament of Western Australia⁷ or the Commonwealth⁸ in the century and a half since Western Australia was founded, or have been simply forgotten due to lack of relevance or use. Those that have not been repealed are still in force even if they are in a state of disuse. A number of statutes still in force, such as the *Statute of Frauds* 1677, are still an important part of the law of Western Australia.

3. DEVELOPMENTS ELSEWHERE

1.4 Inherited United Kingdom statutes have been examined in South Australia,⁹ Victoria,¹⁰ New South Wales,¹¹ Queensland¹² and the Australian Capital Territory,¹³ and in New Zealand¹⁴ and Papua New Guinea.¹⁵ In Canada, law reform agencies have only recently

"And whereas it is expedient to adopt and apply the said several recited Acts of Parliament in the administration of Justice in this Colony: Be it therefore enacted by His Excellency the Governor of Western Australia and its dependencies, by and with the advice and consent of the Legislative Council thereof, that the said several recited Acts of the Parliament of Great Britain, and every clause, provision, and enactment therein respectively contained, shall be, and the same are and is hereby adopted and directed to be applied in the administration of Justice so far as they can respectively be applied to the circumstances of the Colony."

⁷ Eg *Criminal Code Act 1902* s 3 (since repealed); *Miscellaneous Repeals Act 1991*.

⁸ Eg *Admiralty Act 1988* (Cth) s 45.

⁹ South Australian Law Reform Committee reports 54, 55, 58, 59, 61, 64, 65, 66, 68, 75, 81, 94, 96 and 102 deal with particular groups of United Kingdom statutes. Reports 78, 79, 80, 85, 86, 89 and 91 go through the entire body of United Kingdom statutes, year by year, dealing with statutes not previously dealt with and referring to earlier reports where particular statutes have already been covered.

¹⁰ *Imperial Acts Application Act 1922* (Vic) (repealed); G Kewley *Report on the Imperial Acts Application Act 1922* (1974-1975); Victorian Statute Law Revision Committee *Report on the Imperial Acts Application Bill, Imperial Law Re-enactment Bill and the Constitutional Powers (Request) Bill* (1979); *Imperial Acts Application Act 1980* (Vic).

¹¹ Law Reform Commission of New South Wales *Application of Imperial Acts* (LRC 4 1967); *Imperial Acts Application Act 1969* (NSW).

¹² Queensland Law Reform Commission *Working Paper in Relation to an Examination of the Imperial Statutes in Force in Queensland* (QLRC WP 23 1979); *Imperial Acts Application Act 1984* (Qld).

¹³ Law Reform Commission of the Australian Capital Territory: *Report on Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* (1973); *Imperial Acts (Substituted Provisions) Act 1986* (ACT), *Imperial Acts (Repeal) Act 1988* (ACT). A further examination of United Kingdom statutes still applicable in the ACT has recently been completed: ACTAG's Report.

¹⁴ New Zealand Law Commission *Imperial Legislation in Force in New Zealand* (Report No 1 1987); *Imperial Laws Application Act 1988* (NZ).

conducted comprehensive reviews of inherited United Kingdom statutes. The Saskatchewan Law Reform Commission published a report in 1990¹⁶ and the Law Reform Commission of British Columbia has a reference on the matter.¹⁷

4. THE COMMISSION'S APPROACH

(a) Use of work done in other jurisdictions

1.5 Rather than examine every statute enacted in the United Kingdom between 1235¹⁸ and 1829 to determine which ones had been received in Western Australia, the Commission has decided to make use of the considerable work already done in the jurisdictions referred to above. Consequently, it has confined itself to reviewing those statutes which have been considered important enough to be examined in Victoria, New South Wales, Queensland, the Australian Capital Territory, Papua New Guinea or recommended for retention or further examination in South Australia and Saskatchewan. The process so confined involves the examination of about 300 statutes.¹⁹

1.6 Because it is not always possible to do more than speculate on whether a particular statute is in force, the Commission has not addressed this issue but has confined itself to making a judgment about whether a statute contains principles that are still relevant to the State's legal system but not reflected in State legislation.

(b) Consultation

1.7 Because of the technical nature of the matters dealt with in this Report the Commission has departed from its usual practice of publishing a discussion paper for public comment before completing the Report. Instead a number of individuals and Government departments were asked to provide comments on a draft of this Report.²⁰ The Commission wishes to express its appreciation to all the commentators for the time and trouble they took in

¹⁵ R S O'Regan *English Statutes in Papua New Guinea* (1973).

¹⁶ Law Reform Commission of Saskatchewan *The Status of English Statute Law in Saskatchewan* (1990).

¹⁷ For an overview of developments in the Commonwealth see K Patchett *Patriation of Inherited Imperial Statutes* Commonwealth Secretariat Memoranda 1986 Meeting of Commonwealth Law Ministers 315.

¹⁸ *The Statute of Merton 1235* (UK) is the first statute now recognised as such.

¹⁹ Appendix I sets out the statutes selected for particular examination. Appendix II describes in detail the process by which the selection was made.

²⁰ Appendix III contains a list of those who commented on the draft.

making comments on the draft. All views expressed have been taken into account in the preparation of this Report.

(c) Re-enactment of statutes

1.8 The Commission recommends that most United Kingdom statutes which have been inherited should cease to be in force in Western Australia.²¹ Exceptions are statutes of historical interest²² or statutes where a reform of the law in the area has been undertaken or is needed;²³ and statutes which contain provisions which are still relevant in Western Australia. Statutes which contain principles still relevant in this State should be repealed and re-enacted by the Parliament of Western Australia. The Commission recommends this approach for the following reasons -

1. It provides a settled and accessible body of State statute law. The latter is particularly important now that statutes of the Parliament of Western Australia are accessible by means of the "SWANS"²⁴ computer data base.
2. It provides a comprehensive "patriated" body of the State's own laws. The patriation of United Kingdom statutes is a logical sequel to the legal autonomy conferred on the Parliament of Western Australia as a result of the passing of the *Australia Acts 1986* by the Parliaments of the United Kingdom and the Commonwealth. The Act cut the last vestiges of the colonial ties between Western Australia and the United Kingdom.
3. In many cases it is difficult to determine whether a particular statute is in force in Western Australia.²⁵ Part of the difficulty with the application of United Kingdom statutes has to do with determining which statutes were actually received because of their suitability for local conditions. Until a statute has

²¹ Because the statutes are those of the United Kingdom Parliament and its predecessors, it may not be apt to repeal them as has occurred in New South Wales and Victoria. It would be more apt to provide that they cease to be in force as has occurred in the Australian Capital Territory and Queensland.

²² Para 1.9 below.

²³ Para 1.10 below.

²⁴ The consolidated Statutes of Western Australia Now-in-force Service available on the Law-Net system provided by State Print.

²⁵ There is no index or list of United Kingdom statutes that have been inherited in Western Australia.

For a discussion of the difficulties in determining whether a statute is in force see *K Patchett Patriation of Inherited Imperial Statutes* Commonwealth Secretariat Memoranda 1986 Meeting of Commonwealth Law Ministers 315 paras 23-34.

been considered by the courts, it is necessarily uncertain whether it applies in Western Australia. Another part of the difficulty is the relationship between an inherited statute and subsequent Western Australian legislation. While it might be considered that where Western Australian legislation covers an area dealt with by an inherited statute, the latter statute would cease to be in force,²⁶ this has not necessarily been the experience in Canada. It might be held that the State Act has to be read cumulatively with the inherited statute.²⁷

4. It may be difficult to determine authoritatively the text of a statute²⁸ and it may be difficult to give precise meaning to its terms, particularly as it would have been enacted in a social, economic and legal context far different from those of today.²⁹ Re-enactment of statutes thought still to be legally relevant provides an opportunity to modernize and contemporise their rules.
5. The inherited United Kingdom statutes are expressed in archaic and obscure language. Re-enactment of those that are still relevant provides an opportunity to redraft them in accordance with modern drafting techniques and to make them consistent with the existing legal fabric.
6. Much of the United Kingdom legislation is not well known in this State and this increases the risk ". . . of it being overlooked or treated as having historical or academic importance only."³⁰
7. Obtaining access to United Kingdom statutes that might possibly apply in Western Australia is inconvenient because only a few libraries in the State have the United Kingdom statutes dating from 1235.

²⁶ *Hazelwood v Webber* (1934) 52 CLR 268, 275.

²⁷ See Sask Report 5-6.

²⁸ There are two different collections of the early statutes, which differ in a number of respects: see Appendix II fn 1.

²⁹ For an example of this difficulty see the discussion of the requirement for "due process" in (1354) 28 Edward III ch 3 (30 below) and (1368) 42 Edward III ch 3 (32-33 below) by Priestley JA in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317, 345-353.

³⁰ ACTAG's Report 5.

(d) Statutes of historical interest

1.9 There are a number of statutes, such as *Magna Carta* and the *Bill of Rights 1688*, which it is desirable to retain because they are landmarks in the evolution of the English constitution and consequently are of historical interest in this State. Though generally they are only or mainly of historical interest, some still have some practical significance. As they are primarily of historical interest, it is not necessary to re-enact them or redraft them in accordance with modern drafting techniques. Instead they should be preserved to the extent that they are applicable to the State. However, the text of these statutes should be set out in a Schedule to the Act implementing the recommendations in this report, so that they will be more readily accessible.

(e) Statutes preserved pending review

1.10 The Commission has confined itself to removing statutes that are obsolete, unnecessary or superseded and has not recommended reforms which touch upon policy. In certain cases, the Commission has concluded that a statute that is still an important part of the law warrants detailed consideration by the Commission or another body and has made a suggestion accordingly.³¹ In some cases the Commission has recommended that a statute be preserved where reform of the law in the field has been recommended³² either in this State or at Commonwealth level. In all these cases the Commission recommends that the statute should be preserved in its present form until the review is complete. As with the statutes of historical interest, the text of these statutes should be set out in a Schedule to the Act implementing the recommendations in this Report.

(f) Appendix I

1.11 Appendix I to this Report contains a discussion of those inherited United Kingdom statutes considered important enough to be examined in the jurisdictions referred to in paragraph 1.4 above and the Commission's recommendations as to which ones should -

* cease to be in force;

³¹ For example the *Statute of Frauds 1677* (54 below), statutes relating to factors (82 below) and a number of statutes relating to insurance (71 and 74-75 below).

³² For example in relation to criminal admiralty jurisdiction: 85-87 below.

- * be re-enacted;
- * be preserved because of their historical interest; or
- * be preserved pending a review.³³

1.12 Table 1 of the index to this Report contains a chronological list of the statutes examined in Appendix I. Table 2 of the index lists the statutes according to whether the Commission has recommended that they should cease to be in force, be re-enacted, be preserved because of their historical interest or be preserved pending a review.

³³ The statutes are listed in chronological order except for a number that are considered together. This group includes statutes listed at the end of Appendix I relating to the Church of England (87-92 below), admiralty matters (85-87 below) demise of the Crown (92-94 below) and parliamentary privilege (94-96 below).

Chapter 2

IMPLEMENTATION OF RECOMMENDATIONS

1. THE BASIC APPROACH

2.1 The basic approach adopted by the Commission is that those United Kingdom statutes which remain relevant in Western Australia should be re-enacted as part of our law by the Parliament of Western Australia. A number of historical statutes should be preserved, and some other statutes which require review should also be preserved pending completion of the review. All other inherited United Kingdom statutes should cease to be in force. This approach has the advantage that it is not necessary to identify every United Kingdom statute with absolute precision. By reviewing statutes examined by other law reform bodies, the Commission is confident that none of significance have been overlooked and that it has not recommended that any inherited statute cease to be in force the effect of which there is any cogent reason to re-enact or preserve.¹

2.2 Some statutes are in force in Western Australia by express words or necessary intendment and by virtue of the paramount legislative power of the United Kingdom Parliament.² These statutes are those which are expressed to have effect outside the United Kingdom, or must necessarily be read in that sense. They could not be repealed by the Parliament of Western Australia before 1986. That bar has been removed by the *Australia Acts 1986* passed by the Parliaments of the United Kingdom and the Commonwealth. Consequently they have been reviewed in the same way as any other statute.

2. INCORPORATION INTO EXISTING LEGISLATION

2.3 Three approaches can be adopted to dealing with statutes that are re-enacted -

¹ See Appendix II.

² See para 1.2 above.

- * They can be re-enacted so that they do not affect existing Acts of the Parliament of Western Australia.³
- * The re-enactments can be incorporated into existing Acts wherever that is possible.⁴
- * A combination of the first two approaches can be adopted.⁵

The first and third approaches have the inconvenience that the re-enactment statute contains a number of entirely unrelated provisions and anyone who wants to study all the legislation on a topic must refer to more than one statute. The second approach avoids this difficulty. Accordingly, the Commission recommends that it be adopted because of its greater convenience.

3. NO CLAWBACK CLAUSE

2.4 A clawback clause is a mechanism (for example, by resolution of both Houses, or by disallowable regulation/order in council or by proclamation of the Governor⁶) reviving or declaring not to have been repealed, a statute (or part thereof) previously deemed to have been repealed. It enables statutes accidentally repealed to be revived without further legislation being required. If such a case arose, however, legislation could be passed re-enacting the statute in Western Australia. The Commission considers that no clawback clause is necessary.

4. SAVING CLAUSES

2.5 Section 37 of the *Interpretation Act 1984*⁷ contains a general saving clause where a written law repeals an Act of the Parliament of Western Australia. It does not apply to

³ This approach was adopted in New South Wales and the Australian Capital Territory. However, it has recently been recommended that the law of the retained United Kingdom statutes "be fully integrated within the body of modern ACT law": ACTAG's Report 4.

⁴ This approach was adopted in Victoria.

⁵ This approach was adopted in Queensland.

⁶ See NSW Act s 11. The Australian Capital Territory, Queensland, Victoria and New Zealand do not have clawback clauses.

⁷ S 37(1) provides:

"Where a written law repeals an enactment, the repeal does not, unless the contrary intention appears -

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
- (b) affect the previous operation of the enactment repealed or anything duly done or suffered under that enactment;

inherited United Kingdom statutes deemed to cease to apply by a statute of the Parliament of Western Australia. The Commission recommends that the statute should contain a general saving clause along the lines of section 37.

2.6 Section 37 does not preserve principles of law that have been established under an enactment that has ceased to apply in Western Australia. Preserving principles of law notwithstanding the United Kingdom statute has ceased to apply would have a number of disadvantages. It can make it difficult to ascertain the extent of a repeal. It may also mean that there would continue to be a need in some cases to refer to the United Kingdom statute. The saving may also operate to nullify the effect of a particular repeal because it preserves a principle of law established under a United Kingdom enactment which is no longer relevant. If it is necessary to preserve such a principle of law which is relevant it should be done expressly by re-enacting it,⁸ or by an express provision that the principle is not affected by the repeal of the statute.⁹

2.7 In New South Wales the savings clause provides that the repeal of a United Kingdom statute ". . . does not affect any rules of law or equity not enacted by the repealed enactment."¹⁰ This clause does not preserve a principle of law which is established by a repealed statute, but ensures that any rules of law or equity recognised or assumed to exist by that statute were not repealed by the repeal of the statute.¹¹ A similar provision along these lines should also be included in the repealing statute.

-
- (c) affect any right, interest, title, power or privilege created, acquired, accrued, established or exercisable or any status or capacity existing prior to the repeal;
 - (d) affect any duty, obligation, liability, or burden or proof imposed, created, or incurred prior to the repeal;
 - (e) subject to section 11 of *The Criminal Code*, affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;
 - (f) affect any investigation, legal proceeding or remedy in respect of any such right, interest, title, power, privilege, status, capacity, duty, obligation, liability, burden of proof, penalty or forfeiture,

and any such investigation, legal proceeding or remedy may be instituted, continued, or enforced, and any such penalty or forfeiture may be imposed and enforced as if the repealing written law had not been passed or made."

⁸ See, for example, the Commission's recommendation on a statute relating to tenures: 52-53 below.

⁹ See, for example, the Commission's recommendations on statutes relating to charity (47 below) and set-off (62-63 below).

¹⁰ NSW Act s 9(2)(c).

¹¹ See P M McDermott *Imperial Statutes in Australia and New Zealand* (1990) 2 Bond LR 162, 168.

This matter is addressed in New Zealand by a provision to the effect that the common law of England, including the principles and rules of equity, so far as it was part of the laws of New Zealand immediately before the commencement of the Act, shall continue to be part of the laws of New Zealand: NZ Act s 5.

2.8 At common law, the repeal of an Act that has itself either altered the common law or repealed a former Act revived the pre-existing law.¹² This rule has been altered, in the case of the repeal of a repealing statute enacted by the Parliament of Western Australia, by section 34 of the *Interpretation Act 1984* which provides:

"Where a written law repeals a repealing enactment, the repeal does not revive any enactment previously repealed unless words are added reviving it."

There should be a similar provision in the legislation which deems that the inherited United Kingdom statutes cease to apply in Western Australia. Inclusion of a general savings clause along the lines of section 37(1)(a) would ensure that the repeal did not revive the common law.¹³

P G CREIGHTON, *Chairman*

P R HANDFORD

C J McLURE

25 OCTOBER 1994

¹² See *Case of the Bishops* (1606) 12 Co Rep 7; 77 ER 1290.

¹³ See *Marshall v Smith* (1907) 4 CLR 1617, 1635.

APPENDIX I

INHERITED UNITED KINGDOM STATUTES EXAMINED BY THE COMMISSION¹

52 Henry III chapter 1 (1267): Distress
52 Henry III chapter 2 (1267): Distress
52 Henry III chapter 3 (1267): Resisting King's officers in replevin
52 Henry III chapter 4 (1267): Distress
52 Henry III chapter 15 (1267): Distress
52 Henry III chapter 21 (1267): Replevin

These statutes ". . . relate to the power of a landlord to distrain for arrears of rent".²

They should be repealed because distress for rent has been abolished: *Distress for Rent Abolition Act 1936*. To the extent that the statutes relate to distress damage feasant³ (which is uncertain⁴) they are obsolete because this matter is dealt with by the *Local Government Act 1960*⁵ or the common law.⁶ They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand. Chapters 2, 3 and 21 have been repealed in the United Kingdom.

52 Henry III chapter 17 (1267): Guardians in socage
12 Charles II chapter 24 (1660) sections 8 and 9: Tenures abolition

The 1267 statute relates to the duties of guardians of infant socage tenants. Guardianship in socage existed where an infant under 14 years had by descent the legal estate in land held in socage tenure.⁷ The 1267 statute provides that the guardian must not waste, sell or destroy the land and must account for the profits of the land at the end of his stewardship, and must not give or sell the ward in marriage.

When the *Tenures Abolition Act 1660* converted all land held by knight service into land of free and common socage tenure, all land held in fee simple became devisable. Section 8 gave a father power to appoint a guardian of a child until the age of 21 years, so as to exclude the old guardian in socage and the guardian appointed by the child.⁸ Section 9 of the *Tenures Abolition Act 1660* provided for the powers of the guardian and included the right to bring such actions as a guardian in common socage might bring.

The 1267 statute and sections 8 and 9 of the 1660 statute should be repealed because the appointment of guardians and their powers are governed by the *Family Court Act 1975* sections 34-44 and the Commonwealth *Family Law Act* sections 63E and 63F. Both section

¹ The titles of statutes are based on the list in the *Chronological Table of the Statutes* (HMSO).

² NZ Report para 51. They are no longer part of the law of New Zealand: NZ Act s 4.

³ That is, a common law right to impound trespassing animals or other chattels doing damage to land.

⁴ Kewley 26-27.

⁵ Ss 458-479.

⁶ R P Balkin and J L R Davis *Law of Torts* (1991) 167-168.

⁷ Socage was a kind of tenure held by services to the lord's land such as ploughing the land: Jowitt 1669.

⁸ For the existing power to appoint a guardian by will or deed see *Family Court Act 1975* s 44(1).

34(1) of the *Family Court Act 1975* and section 63E(1) of the Commonwealth *Family Law Act 1975* provide that the guardian of a child has, in relation to that child, all the powers, rights and duties that are, apart from the statute, vested by law or custom in the guardian of a child. This confers the common law powers, rights and duties on the guardian.⁹ The modern law of guardianship is also derived from the law of equity which in this State may be exercised by the Supreme Court.¹⁰ The 1267 statute and section 9 of the 1660 statute have been repealed in New South Wales, Queensland, Victoria,¹¹ New Zealand and the United Kingdom. It has been recommended that they be repealed in Saskatchewan.¹² In the Australian Capital Territory the 1267 statute was replaced with a provision setting out the powers and duties of guardians.¹³

52 Henry III chapter 23 (1267): Waste

6 Edward I chapter 5 (1278): Actions of waste

13 Edward I (St 1) chapter 22 (1285): Actions of waste

11 Henry VI chapter 5 (1433): Real actions

The 1267 statute established the principle that a leaseholder for life or lives or for years is liable for voluntary waste, that is, waste which is actual or commissive, tending to the destruction or alteration of the premises, unless the terms of the lease provide otherwise. A tenant at will is not within the statute, but is liable at common law for voluntary waste unless exempted by an instrument.¹⁴ It is doubtful whether permissive waste, such as allowing a building to fall into decay, is within the statute. At common law, a tenant is not liable for permissive waste unless an instrument imposes this liability.¹⁵ The owner of an estate for life, without impeachment of waste, is liable for equitable waste¹⁶ unless the instrument confers an exemption from this liability.¹⁷

The PNG Report¹⁸ concluded that it was unnecessary to retain the 1267 statute because of the practice of including an express covenant to repair in a lease and because such a covenant is implied in a registered lease.

In New South Wales, the *Imperial Acts Application Act 1969*¹⁹ provides that tenants are liable for voluntary waste²⁰ but not for permissive waste.²¹ Kewley²² in Victoria recommended that

⁹ *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 236 and 290. See generally A Dickey *Family Law* (2nd ed 1990) Ch 12.

¹⁰ *Supreme Court Act 1935* s 16 (1)(d)(ii). See generally A Dickey *Family Law* (2nd ed 1990) Ch 13.

¹¹ There are similar provisions to those in Western Australia in New South Wales (NSW Act s 21 and *Testator's Family Maintenance and Guardianship of Infants Act 1916* (NSW) s 19), Victoria (*Marriage Act 1958* Part VII) and Queensland (*Children's Services Act 1965* Part IX).

¹² Sask Report 257-258.

¹³ (ACT) 1986 Act Schedule 2 Part 1A. It has subsequently been recommended that the substantive rules be incorporated in the *Children's Services Act 1986* (ACT): ACTAG's Report 78.

¹⁴ Bradbrook 460.

¹⁵ *Ibid.*

¹⁶ That is acts of gross or malicious damage by tenants who were made unimpeachable of waste.

¹⁷ *Property Law Act 1969* s 17.

¹⁸ 11.

¹⁹ S 32.

²⁰ While extending the law to include a tenant at will.

²¹ In doing so, it follows the NSW Report at 48-49. The ACT Report (at 12) recommended that a clause like the New South Wales section be adopted in the Australian Capital Territory to replace the statute. For the implementation of this recommendation see ACT 1986 Act Schedule 2 Part 1. The ACTAG's Report (at 78) recommended that Part 1 be repealed and the substantive provision incorporated into the Australian Capital Territory's property law.

²² 38.

the 1267 statute be retained and clarified following the NSW precedent, but that it should expressly provide that tenants of all kinds are not liable for permissive waste.²³ The 1267 statute has been repealed in Queensland.²⁴ Liability of life tenants and lessees for waste is now dealt with by the *Property Law Act 1974*.²⁵ Both tenants for life or lives and a lessee are liable for voluntary waste but not for permissive waste.

Following a recommendation of the New Zealand Law Commission,²⁶ the 1267 statute has been declared to be part of the law of New Zealand.²⁷ It has been recommended that the 1267 statute be preserved in South Australia²⁸ and re-enacted in Saskatchewan.²⁹

The 1278 statute provides that certain tenants guilty of waste may lose the lease and be subject to triple damages. It also created a writ of waste which in practice was replaced by an action on the case.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that it be repealed with a saving provision to continue the substantive law as it was at the time, that is, the right to proceed against tenants for life and tenants for a term of years, because of the amendment effected by the statute.³⁰

The 1433 statute extends the provisions of the 1278 statute referred to above to waste committed by a sub-tenant.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³¹

The Manitoba Law Reform Commission reviewed the law of waste in 1985.³² It concluded that both life tenants and tenants for years should be liable for permissive waste (as well as voluntary waste) because there was no reason for the two to be treated differently: "In both situations there is a reversionary interest to be protected."³³ It also recommended that legislation should address what remedies are available.

The Commission considers that the law relating to waste is unsatisfactory and in need of review but it is beyond its terms of reference to conduct such a review as part of this project. Pending a review, the 1267, 1278 and 1433 statutes should be preserved.³⁴

The 1285 statute provides that one tenant in common can sue the other for waste.

²³ For the adoption of these recommendations see *Property Law Act 1958* (Vic) s 132A.

²⁴ *Property Law Act 1974* (Qld) s 3 and Sixth Schedule (since omitted).

²⁵ Ss 24 and 104, respectively.

²⁶ NZ Report para 52.

²⁷ NZ Act s 3(1). Subsequently it has been recommended that the statute be repealed and replaced with a provision in a new Property Law Act: NZ Property Law Report 421.

²⁸ SA54 8.

²⁹ Sask Report 299.

³⁰ SA54 8.

³¹ The South Australian Committee recommended that it be repealed but with a provision to continue the substantive law: SA54 9.

³² *Report on Small Projects* (1985).

³³ Id 40.

³⁴ See generally para 1.10 above.

It has been repealed in New South Wales, Queensland,³⁵ Victoria, New Zealand and the United Kingdom, but has been continued in force in the Australian Capital Territory.³⁶ The South Australian Committee recommended that the statute should be repealed, but that the position should be preserved because the right did not exist at common law.³⁷ While the Commission recommends that the statute be repealed, the right it creates should be re-enacted in the *Property Law Act 1969*.

3 Edward I chapter 1 (1275): Peace of the Church and the Realm

The South Australian Law Reform Committee said of this statute:³⁸

"In Chapter 1 occurs the famous words 'that common right be done to all, as well poor as rich, without respect of persons'. The remainder of the chapter deals with matters of ecclesiastical law and can be repealed but those words should not, and they should remain in force of their own right in South Australia."

The words were preserved in New Zealand.³⁹ The statute has been repealed in the Australian Capital Territory, New South Wales, Victoria, Queensland and the United Kingdom. This is one of the historical statutes which should be preserved.⁴⁰

3 Edward I chapter 4 (1275): Wreck

This statute deals with wrecks of the sea and what shall be adjudged a wreck of the sea.

The South Australian Committee stated that it was the source of the Admiralty jurisdiction of the Supreme Court as to wreck and recommended that if it was repealed, a section conferring the jurisdiction should be placed in the *Supreme Court Act*.⁴¹ However, it can be repealed because the law relating to wreck and salvage is dealt with in Part VII of the Commonwealth *Navigation Act 1912* in relation to certain ships and the *Wreck Act 1887*. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

3 Edward I chapter 5 (1275): Freedom of election

This statute provides that no man shall disturb any to make free elections.

Kewley recommended that it be preserved in Victoria⁴² because though safeguards against illegal practices in parliamentary elections are provided in the *Constitution Act Amendment*

³⁵ The Law Reform Commission of Queensland recommended that the liability of a co-owner for waste should be reimposed by statute: *Property Law Act* (1986 QLRC WP 30) 3, 21. This recommendation has not been implemented as yet.

³⁶ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 1. It has since been recommended that it be incorporated into the Australian Capital Territory's property law: ACTAG's Report 78.

³⁷ SA54 8. See *Ferguson v Miller* [1978] 1 NZLR 819, 826 where it was acknowledged that this statute was the basis for one co-owner committing voluntary waste for which the other co-owner could sue.

³⁸ SA61 3.

³⁹ NZ Act s 3(1) and First Schedule.

⁴⁰ Para 1.9 above.

⁴¹ SA61 3.

⁴² Kewley 27-28. The Victorian Statute Law Revision Committee also recommended that it be preserved: VSLRC 3.

Act 1958, no similar provisions are made in the *Local Government Act 1958* for municipal elections.⁴³

It can be repealed in this State because the freedom of parliamentary,⁴⁴ local government⁴⁵ and other elections⁴⁶ is safeguarded. It has been repealed in the Australian Capital Territory, New South Wales, Queensland and New Zealand. In South Australia it has been recommended that it be repealed and placed in the *Electoral Act 1919*.⁴⁷ It is still in force in the United Kingdom.

3 Edward I chapter 6 (1275): Amercements

An amercement was a pecuniary punishment for an offence. This statute provides that corporations are not to be amerced without reasonable cause.

As amercements have long been obsolete this statute should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It has been recommended that it be repealed in South Australia, but with a saving of the amendment to the law made by the statute.⁴⁸

3 Edward I chapter 16 (1275): Distress

This statute deals with distress in relation to "beasts".

It is obsolete and should be repealed because the impounding of "cattle" trespassing upon land is dealt with by the *Local Government Act 1960*.⁴⁹ Distress in relation to animals and other chattels on land is dealt with by the common law. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

3 Edward I chapter 19 (1275): Crown debts

This statute relates to the payment of debts due to the sheriff on behalf of the Crown and the giving of receipts by the sheriff for those payments.

The Queensland Law Reform Commission concluded that it should be repealed because it had been superseded by Rules of Court.⁵⁰ In South Australia it was recommended that it remain in force until the general topic of debts due to the Crown was examined.⁵¹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

⁴³ It has been preserved by s 8 (Division 1) of the Vic Act which sets it out as follows:

"And because elections ought to be free, the King commandeth upon great forfeiture, that no man by force of arms, nor by malice, or menacing shall disturb any to make free election."

⁴⁴ *Electoral Act 1907* ss 179-206.

⁴⁵ *Local Government Act 1960* ss 151-154M.

⁴⁶ *Criminal Code* ss 75 and Ch 14.

⁴⁷ SA78 12.

⁴⁸ Ibid.

⁴⁹ Ss 458-479. Provision is also made for dealing with "wild cattle" in the *Wild Cattle Nuisance Act 1871*.

⁵⁰ Qld Paper Annexure A.

⁵¹ SA54 8.

It should be repealed because Crown debts may now be recovered in the same way as a subject of the Crown may recover debts in the civil courts.⁵²

3 Edward I chapter 25 (1275): Champerty

3 Edward I chapter 28 (1275): Maintenance

Chapter 25 deals with officers of the King committing champerty.⁵³ It provides that those who commit it shall be punished at the King's pleasure. Chapter 28 deals with the King's clerks committing maintenance⁵⁴ and is an extension of Chapter 25.

Both chapters should be repealed. While tortious liability for maintenance and champerty still exists at common law, it is not a criminal offence in Western Australia. Both chapters have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁵⁵

3 Edward I chapter 27 (1275): Extortion

3 Edward I chapter 30 (1275): Extortion

Chapters 27 and 30 deal with extortion by officers of the Crown and their servants.

They can be repealed because corruption and abuse of office is dealt with in provisions of the *Criminal Code* (sections 82-88).⁵⁶ They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In South Australia, because extortion in a public office was not covered in the *Criminal Law Consolidation Act 1935*,⁵⁷ the Committee recommended that these Chapters remain in force until reports of the Mitchell Committee on the criminal law are given statutory force.⁵⁸

3 Edward I chapter 46 (1275): Order of hearing pleas

According to the South Australian Committee this is a "general law relating to adjournments - that adjournments are not to be granted except for valid reasons and this should be preserved on any repeal."⁵⁹

It can be repealed because adjournments are dealt with by Order 34 rule 4 of the *Rules of the Supreme Court 1971* and the *Local Courts Act 1904* section 75. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

⁵² *Crown Suits Act 1947* s 9.

⁵³ Champerty is assisting a party to take legal proceedings in return for a share of the proceeds of the action.

⁵⁴ Maintenance is promoting or supporting litigation without having any legal interest in the cause of action.

⁵⁵ It has been recommended that both be retained in South Australia until abuse of the process of the Court is reviewed: SA 59 5 and 6.

⁵⁶ The *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (Part II 1992) recommended that the Government review the "criminal law for the purpose of assessing its adequacy in proscribing conduct in public office for which criminal sanctions should be available" (para 4.5.5).

⁵⁷ SA59 5.

⁵⁸ Id 6.

⁵⁹ SA55 5.

6 Edward I chapter 1 (1278): Recovery of damages and costs

This statute provides that a plaintiff in an action who recovers damages may also recover the costs of the action.

Given the other statutory powers of courts to award costs,⁶⁰ the statute is unnecessary and should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. However, it has been recommended that it be preserved in South Australia because Coke says that it is the foundation of the whole of the law of costs.⁶¹

7 Edward I (1279): Mortmain

This statute provides that no lands shall be alienated in mortmain, that is, it limited ". . . the alienation of land to corporations and the consequent loss of the benefit of the incidents of tenure".⁶²

In both New Zealand⁶³ and Victoria⁶⁴ it has been held that the mortmain acts are not in force. This may also be the case here, but for certainty the statute should be repealed. The same recommendation has been made in South Australia.⁶⁵ The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

13 Edward I (St 1) chapter 18 (1285): Damages: Execution

This statute established the writ of *elegit* as an alternative to the writ of *fieri facias*. The former writ enables a judgment creditor to ". . . elect to take all the debtor's chattels and to hold half of his lands until the debt be levied out of the chattels and rent."⁶⁶ One consequence of this provision is that a recognizance with the Crown creates a charge over the land of the debtor in favour of the Crown.⁶⁷

The statute should be repealed: there are adequate means of enforcing judgment debts and the Crown's interests are adequately protected by these means and special provisions for the enforcement of recognisances.⁶⁸ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁶⁹

⁶⁰ *Supreme Court Act 1935* s 37; *District Court of Western Australia Act 1969* Part IV; *Local Courts Act 1904* ss 81-88; *Industrial Relations Act 1979* s 84A(5).

⁶¹ SA55 6.

⁶² CCH 86.

⁶³ *Mayor, etc, of Lower Hutt v Hayes* [1913] 32 NZLR 1969

⁶⁴ *Mayor Aldermen and Citizens of Canterbury v Wyburn and the Melbourne Hospital* [1895] AC 89.

⁶⁵ SA78 5 and 13.

⁶⁶ Plucknett 28. See also Plucknett 390-391.

⁶⁷ ACT Report 25.

⁶⁸ See, for example, s 154A of the *Justices Act 1902* and s 746A of the *Criminal Code*.

⁶⁹ The South Australian Committee recommended that it be repealed but with a saving of the right created by the statute: SA55 7.

13 Edward I (St 1) chapter 19 (1285): Intestates' Debts

This statute provides that the administrator, the Ordinary of the Bishop, that is, the Bishop of a diocese in the exercise of the ecclesiastical jurisdiction annexed to the office of bishop, should pay the debts of the intestate deceased out of the assets which came into his hands.

This statute should be repealed: superseded by the *Administration Act 1903*.⁷⁰ In South Australia it has been recommended that the statute be repealed, but that a section in the same terms be placed in the South Australian *Administration and Probate Act 1919*.⁷¹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom (with savings).

13 Edward I (St 1) chapter 32 (1285): Mortmain

13 Edward I (St 1) chapter 33 (1285): Forfeiture of lands

These statutes relate to mortmain.

As with other statutes relating to mortmain, they may not be in force here,⁷² but for certainty they should be repealed. The same recommendation has been made in South Australia.⁷³ They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

13 Edward I (St 1) chapter 37 (1285): Distress

This statute provides that distress is to be levied only by bailiffs.

It should be repealed because distress for rent has been abolished: *Distress for Rent Abolition Act 1936*. It has been recommended that it be repealed in South Australia.⁷⁴ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

13 Edward I (St 1) chapter 45 (1285): Execution

This statute deals with the recovery of fines and recognizances by the Crown.

The statute should be repealed because the recovery of fines and recognizances is now dealt with in various statutes in Western Australia.⁷⁵ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom and recommended for repeal in South Australia, but with a saving of the rights given by the statute.⁷⁶

⁷⁰ S 10A.

⁷¹ SA78 13.

⁷² See the discussion of 7 Edward I (1279) at 21 above.

⁷³ SA78 13.

⁷⁴ Id 14.

⁷⁵ Fines: *Fines and Penalties Appropriation Act 1909*; *Justices Act 1902* ss 155-159; *Criminal Code* s 682. Recognizances: *Recognizances (Forfeiture) Ordinance 1861*; *Justices Act 1902* s 154A; *Criminal Code* s 746A; *Bail Act 1982* ss 57 and 58.

⁷⁶ SA65 4.

13 Edward I (St 1) chapter 49 (1285): Maintenance and champerty

This is another statute dealing with maintenance and champerty

It can be repealed because maintenance and champerty are dealt with by the common law. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁷⁷

18 Edward I (St 1) chapters 1 and 2 (1290): Restraint on subinfeudation

18 Edward I (St 1) chapter 3 (1290): Mortmain

34 Edward III chapter 15 (1361): Confirmation of grants

These statutes, particularly the 1290 statute chapters 1 and 2 (Quia Emptores), were responsible for beginning the dismantling of the feudal landowning system. They ensured the alienability of land and prohibited the creation of new tenures except by the Crown. Chapter 1 authorises the alienation by every freeman of the whole or part of his land by substitution without the lord's consent: the new tenant was to hold the land by the same services as his grantor had held before him. Chapter 2 provides that on alienation of part of the land by substitution the feudal services were to be apportioned. Chapter 3 limited Quia Emptores to grants in fee simple. According to the NSW Report, the 1361 statute on "one construction . . . prohibited further subinfeudations by the King's tenants."⁷⁸

These statutes are responsible for the position today that all land is held in tenure of the Crown, the Crown being the source of all title, and the free alienability of land held of the Crown in fee simple. In Queensland,⁷⁹ Victoria,⁸⁰ New South Wales⁸¹ and the Australian Capital Territory⁸² the statutes have been repealed but replaced with legislation to the same effect. In South Australia and Saskatchewan it has been recommended that the 1290 statute remain in force.⁸³ Chapters 1 and 3 have been preserved in New Zealand.⁸⁴ The 1290 statutes are still in force in the United Kingdom.

The Commission recommends that the above United Kingdom statutes be repealed, but that a provision similar to that in other States be enacted in the *Property Law Act 1969* or the *Land Act 1933*.

20 Edward I (St 2) (1292): Waste

This statute provides that if a reversioner has a right of action for waste and dies, the action descends to the heir.

⁷⁷ It has been recommended that it be retained in South Australia until abuse of the process of the Court is reviewed: SA 59 6-7.

⁷⁸ NSW Report 54.

⁷⁹ *Property Law Act 1974* (Qld) s 21, which provides:

"Land held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect."

⁸⁰ *Property Law Act 1958* (Vic) s 18A.

⁸¹ NSW Act s 36.

⁸² ACT 1986 Act Schedule 2 Part 2. It has since been recommended that, to the extent that they remain relevant in the Australian Capital Territory, the substantive provisions should be incorporated into Australian Capital Territory property law: ACTAG's Report 79.

⁸³ SA54 9 and Sask Report 299.

⁸⁴ NZ Act 3(1) and First Schedule. It has subsequently been recommended that the statutes be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 421.

It can be repealed because such an action would survive under section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In South Australia it has been recommended that the statute be repealed but with a saving of the substantive right.⁸⁵

25 Edward I (1297): Magna Carta⁸⁶

Magna Carta comprised 37 statutes. In England most of these have been repealed. The most important one that has been retained is chapter 29.⁸⁷ This chapter is the only chapter to have been preserved in the Australian Capital Territory,⁸⁸ New South Wales, Victoria, Queensland, and New Zealand and recommended for preservation in Saskatchewan "to the extent that [it is] relevant to matters within provincial jurisdiction":⁸⁹ the others being either obsolete, superseded or never having been a part of the law of the jurisdiction. Chapter 29 provides:

"No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right."

The New South Wales Law Reform Commission recommended that it be retained even though its value was "chiefly sentimental". This is because the rights said to stem from it, such as the right to personal liberty and immunity from wrongful detention, the right not to be deprived of property without due process of law and the right to jury trial, at least in the case of serious charges, are now an integral part of common and statute law. Its preservation does not ensure that these rights are inalienable because statutes of the Parliament of Western Australia which are repugnant to Magna Carta are not for that reason invalid. Indeed, to the extent of any repugnancy, these statutes operate to repeal Magna Carta.⁹⁰ Chapter 29 is one of the historical provisions which should be declared to remain in force.⁹¹ The other chapters should be repealed.

25 Edward I (1297): Restraint on taxation, purveyance

I William and Mary Session 2 (1688) chapter 2 (1688) Bill of Rights, article 4

Both of these provisions enshrine the constitutional principle that Parliament and not the Crown may levy a tax. The New Zealand *Constitution Act 1986* deals with this matter by providing in section 22 that:

⁸⁵ SA54 9.

⁸⁶ This is the last promulgation of the Great Charter first granted by King John at Runnymede in 1215. It differs in some respect from the first version.

⁸⁷ The others, chs 1, 9 and 37, are of local interest.

⁸⁸ It has recently been recommended in the Australian Capital Territory that there should be a new law: ". . . restating the principles in the *Magna Carta* (and other similar laws . . .) in modern form and the *Magna Carta* (and those other laws) might be included as an appendix to that law. Consideration might be given to consolidating these principles (and other due process) into an ACT Bill of Rights": ACTAG's Report 81.

⁸⁹ NSW Act, Vic Act, Qld Act s 5, *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 2 and NZ Act s 3(1); Sask Report 268.

⁹⁰ See *Chia Gee v Martin* (1905) 3 CLR 649, 653 and *Vincent v Ah Yeng* (1906) 8 WAR 145, 146.

⁹¹ Para 1.9 above.

"It shall not be lawful for the Crown, except by or under an Act of Parliament,-

(a) To levy a tax".

The Commission recommends that a similar provision be enacted in the *Constitution Act 1889*.⁹² The 1297 statute should be repealed.⁹³ The 1297 statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand. It is still partly in force in the United Kingdom.

28 Edward I chapter 10 (1300): Embracery

This legislation deals with abuse of the process of the court.

It can be repealed because Part XVI of the *Criminal Code* provides a number of offences relating to the administration of justice including conspiracy to bring a false accusation. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁹⁴

28 Edward I chapter 11 (1300): Champerty

This statute deals with maintenance.

As with other statutes relating to maintenance, it can be repealed because maintenance is dealt with by the common law. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁹⁵

28 Edward I chapter 19 (1300): Restoration of issues of lands seized

This statute deals with the seizure of land by an escheator where it is found ultimately that there is no cause for the seizure.⁹⁶ It provides that the profits of the land ought to go to the person from whom the land was seized.

It should be repealed: the escheat of property is dealt with by the *Escheat (Procedure) Act 1940*, which provides protection for those who establish a legal or moral claim to the property. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁹⁷

⁹² One commentator suggested that the provision should be entrenched under s 73(2) of the *Constitution Act 1889*.

⁹³ The Bill of Rights is considered at 56-57 below.

⁹⁴ The South Australian Committee recommended that it be retained until the Committee reported on the general topic of abuse of the process of the court: SA59 7.

⁹⁵ It has been recommended that the statute be retained in South Australia until abuse of the process of the court is reviewed: SA59 7.

⁹⁶ Escheat is a:

". . . species of reversion; it was a fruit of seigniority, the Crown or lord of the fee, from whom or from whose ancestor or predecessor the estate was originally derived, taking it as ultimus haeres upon the failure, natural or legal, of the intestate tenant's family": Jowitt 719.

⁹⁷ The South Australian Committee recommended that it be repealed but with a saving of the amendment made by the statute: SA61 5.

29 Edward I (1301): Escheators

8 Henry VI chapter 16 (1429): Inquests of escheators

The 1301 statute deals with the procedure as to escheat. The 1429 statute deals with escheats and the traverse of escheats.

They can be repealed because the procedure as to escheat is governed by the *Escheat (Procedure) Act 1940* and Order 80 of the *Rules of the Supreme Court 1971*. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁹⁸

33 Edward I (St 2) (1305): Conspiracy: Maintenance and champerty

This statute deals with the general law of conspiracy and with the definition of champerty.

The statute can be repealed: conspiracy is dealt with in sections 558 and 560 of the Criminal Code. Champerty is not an offence under the legislation of the Parliament of Western Australia. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁹⁹

33 Edward I (St 3) (1305): Statute of champerty

This deals with maintenance.

As with other statutes relating to maintenance, it can be repealed because while tortious liability remains for maintenance and champerty at common law it is not a criminal offence in Western Australia. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁰⁰

51 Henry III st 4 (statute of uncertain date): Distress [of the Exchequer]

This statute relates to distress for Crown debts.

It can be repealed because the remedy is obsolete and the Crown has other adequate remedies.¹⁰¹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁰²

1 Edward III (St 2) chapter 12 (1327): Tenure in capite

1 Edward III (St 2) chapter 13 (1327): Tenure in capite

Chapter 12 provides that lands held of the King in chief alienated without licence were not to be forfeited, but a fine was to be taken in such cases. Chapter 13 provides that the alienation

⁹⁸ The South Australian Committee recommended that consideration be given to enacting a general statute governing the subject of escheat: SA55 8-9.

⁹⁹ The South Australian Committee favoured retention of the statute pending a review of the criminal law and the process of the court: SA59 7.

¹⁰⁰ It has been recommended that the statute be retained in South Australia until abuse of the process of the court is reviewed: SA59 7.

¹⁰¹ The same process is available both to the Crown and to the subject for the determination and enforcement of claims: *Crown Suits Act 1947* s 9.

¹⁰² The South Australian Committee favoured retention of the statute pending a general study of the law of distress: SA54 7.

of land without licence of lands held of the King ut de honore (that is, where the King had become possessed of the lordship by acquisition from a subject) was no longer to be invalidated against the purchaser, and forfeiture for alienating any lands so held of the King was abolished.

The statutes should be repealed: the concept of tenure in capite is an obsolete one. Dealings in Crown lands are now governed by the *Land Act 1933*, in particular, sections 143, 144 148 and 149. The statutes have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that chapter 12 be repealed.¹⁰³

1 Edward III (St 2) chapter 14 (1327): Maintenance

This is another statute dealing with maintenance.

As with the other statutes relating to maintenance it should be repealed: see page 20 above.

1 Edward III (St 2) chapter 16 (1327): Justices of the peace

This statute provides that in every county good men and lawful should be assigned to keep the peace. It has been repealed in the Australian Capital Territory, New South Wales Queensland, Victoria, New Zealand and the United Kingdom.¹⁰⁴ However, there is a substitute provision in New South Wales: NSW Act s 29.

It should be repealed because justices are now appointed under section 6 of the *Justices Act 1902*.¹⁰⁵

2 Edward III chapter 6 (1328): Confirmation of statutes

This statute provides for the grant of power to justices for the general observance of the peace.

It should be repealed because section 20 of the *Justices Act 1902* governs the criminal jurisdiction of justices. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁰⁶

4 Edward III chapter 11 (1330): Justices of assise

This statute deals with the appointment of justices to assises and justices of the peace.

It should be repealed because justices are now appointed under section 6 of the *Justices Act 1902*¹⁰⁷ and other judicial officers are appointed under other Acts.¹⁰⁸ It has been repealed in

¹⁰³ SA65 5.

¹⁰⁴ The South Australian Committee recommended that it be retained until all the "remnants of the imperial supremacy have been swept away": SA 58 4-5.

¹⁰⁵ The Commission recommended at 182 of its report on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986) that, in view of its recommendations on the appointment of justices, the statute should be repealed. The Commission also recommended at 183-184 and 186 that the following statutes not referred to in this Appendix be repealed: 13 Richard II (St 1) chapter 7 (1389) Justices of the peace; 2 Henry V (St 2) chapter 1 (1414) Qualifications of justices of the peace; 18 George II chapter 20 (1745) Justices qualifications.

¹⁰⁶ The South Australian Committee recommended that it be repealed but with a saving of the jurisdiction given by the statute: SA 65 5.

the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

18 Edward III (St 2) chapter 2 (1344): Justices of the peace

This statute provides for the assignment of men to keep the peace.

It should be repealed because justices are now appointed under section 6 of the *Justices Act 1902*.¹⁰⁹ It has been repealed in the Australian Capital Territory, New South Wales,¹¹⁰ Queensland, Victoria, New Zealand and the United Kingdom.

20 Edward III chapter 4 (1346): Maintenance

This is another statute dealing with maintenance.

As with the other statutes relating to maintenance it should be repealed: see page 20 above.

25 Edward III (St 5) chapter 4 (1351): Criminal and civil justice

This statute provides:

"Item, Whereas it is contained in the great charter of the franchises of England, that none shall be imprisoned nor put out of his freehold, nor of his franchises nor free custom, unless it be by the law of the land; (2) it is accorded, assented, and established. 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; (3) nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer, and forejudged of the same by the course of the law; (4) and if any thing be done against the same, it shall be redressed and holden for none."

It has been preserved in the Australian Capital Territory,¹¹¹ New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In South Australian and Saskatchewan it has been recommended that it be preserved.¹¹² It was preserved in the United Kingdom despite a recommendation of the Law Commission that it should be repealed. The Commission stated that it and a number of other enactments ". . . were important constitutional instruments in the context of the time they were passed, but are now only of historical interest."¹¹³ This is one of the historical statutes which should be preserved.¹¹⁴

¹⁰⁷ The Commission recommended at 182 of its report on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986) that, in view of its recommendations on the appointment of justices, the statute should be repealed.

¹⁰⁸ Eg Supreme Court judges are appointed under the *Supreme Court Act 1935* s 7.

¹⁰⁹ The Commission recommended at 182 of its report on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986) that, in view of its recommendations on the appointment of justices, the statute should be repealed.

¹¹⁰ However, there is a substitute provision: NSW Act s 29.

¹¹¹ Recently, it was recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the statute included as an appendix to that law: ACTAG's Report 81.

¹¹² SA61 6 and Sask Report 314.

¹¹³ UK Report 33.

¹¹⁴ Para 1.9 above.

25 Edward III (St 5) chapter 5 (1351): Executors of executors

This statute provides that upon the death of the last surviving executor, his executor succeeds to executorship of the estate.

It has been preserved in the United Kingdom,¹¹⁵ New South Wales,¹¹⁶ the Australian Capital Territory,¹¹⁷ Queensland,¹¹⁸ Victoria¹¹⁹ and New Zealand.¹²⁰ This statute has not been superseded by legislation in Western Australia and is still applicable.¹²¹ The Commission recommended in its Report *The Administration Act 1903* (Project No 88, 1990) that provision should be made for executorship by representation, subject to the right of renunciation in appropriate cases.¹²² With the adoption of this recommendation the statute could be repealed. In the meantime it should be preserved.

27 Edward III (St 1) chapter 2 (1353): Pardon

13 Richard II (St 2) chapter 1 (1389): Pardon of offences

The 1353 statute provides that if a pardon is granted in felony because of false information, the pardon shall be void.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that it be repealed but that a provision in its terms be placed in the *Criminal Law Consolidation Act*.¹²³

The 1389 statute provides that in a pardon of murder, treason or rape, the pardon is not valid unless the offence is specifically set forth.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australia Committee recommended that it be retained until the new Criminal Law Act comes into force and the question of pardon is dealt with comprehensively.¹²⁴

These statutes should be repealed. They were relevant to a criminal justice system totally different to our system today. At the time they were enacted pardons were issued liberally for all sorts of offences to remedy errors and to mitigate the inflexibility of the criminal law which did not, for example, recognise self-defence as a defence to a charge of murder.¹²⁵ Today our criminal justice system recognises various defences and has comprehensive means

¹¹⁵ *Administration of Estates Act 1925* (UK) s 7.

¹¹⁶ NSW Act s 13.

¹¹⁷ ACT 1986 Act Schedule 2 Part 3. The ACTAG's Report (at 81) recommended that it be repealed and the substantive provisions incorporated into Australian Capital Territory wills legislation.

¹¹⁸ *Succession Act 1981* (Qld) s 47.

¹¹⁹ *Administration and Probate Act 1958* (Vic) s 17(1).

¹²⁰ *Administration Act 1969* (NZ) s 13(1).

¹²¹ S 7(1) of the *Trustees Act 1962* provides that ". . . the personal representatives of the last surviving or continuing trustee, may by writing appoint a person or persons, whether or not being the person or persons exercising the power, to be a trustee or trustees in the place of the trustee first in this subsection mentioned."

¹²² Paras 4.11-4.12.

¹²³ SA59 9.

¹²⁴ Id 10.

¹²⁵ Plucknett 445-446.

of reviewing convictions. Pardons are not granted liberally and before one is granted for an indictable offence the case can be referred to the Court of Criminal Appeal.¹²⁶

28 Edward III chapter 3 (1354): Liberty of subject

This statute provides:

"Item, That no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."

It has been preserved in the Australian Capital Territory,¹²⁷ New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In South Australia and Saskatchewan it has been recommended that it be preserved.¹²⁸ It was preserved in the United Kingdom despite a recommendation of the Law Commission that it should be repealed. The Commission stated that it and a number of other enactments ". . . were important constitutional instruments in the context of the time at which they were passed, but are now only of historical interest."¹²⁹ This is one of the historical statutes that should be preserved.¹³⁰

31 Edward III (St 1) chapter 11 (1357): Administration on intestacy

This statute confers and imposes on administrators the same rights and accountability as executors. It also deals with the rights of action for debts of a deceased and injury to his personal estate.

The latter aspect is now dealt with by section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941*.

However, there is no equivalent of the first aspect in Western Australia. The need to preserve this aspect has led to re-enactments in New South Wales,¹³¹ Queensland,¹³² Victoria,¹³³ the Australian Capital Territory¹³⁴ and the United Kingdom.¹³⁵ The Commission recommends that there should be a similar re-enactment in Western Australia in the *Administration Act 1903*.

¹²⁶ *Criminal Code* s 21.

¹²⁷ Recently, it was recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the statute included as an appendix to that law: ACTAG's Report 81.

¹²⁸ SA59 9 and Sask Report 314.

¹²⁹ UK Report 33.

¹³⁰ Para 1.9 above.

¹³¹ NSW Act s 14, which provides:

"Every person to whom administration of the estate of a deceased person is granted shall, subject to the limitations (if any) contained in the grant, have the same rights and liabilities and shall be accountable in like manner as if he were the executor of the deceased."

¹³² *Succession Act 1981* (Qld) s 50.

¹³³ *Administration and Probate Act 1958* (Vic) s 27.

¹³⁴ ACT 1986 Act Schedule 2 Part 4. The ACTAG's Report (at 81) recommended that it be repealed and the substantive 134 Cont. provisions incorporated into the Australian Capital Territory wills legislation.

¹³⁵ *Administration of Estates Act 1925* (UK) s 21.

34 Edward III chapter 1 (1361): Justices of the peace

This statute makes provision for the appointment of justices of the peace and for their jurisdiction, including a provision relating to a surety for good behaviour.

This provision is still the basis of the power to require sureties for good behaviour in Western Australia together with the common law. The Commission recommended at 183 of its report on *Courts of Petty Sessions: Constitution, Powers and Procedure* (Project No 55 Part II 1986) that, in view of its recommendations that sureties of the peace and sureties for good behaviour should be abolished, the statute should be repealed.¹³⁶ That recommendation has not been implemented as yet. Unless the recommendation is adopted, that part of the statute relating to sureties should be re-enacted. The rest of it should be repealed.

36 Edward III (St 1) chapter 9 (1362): Breaches of statutes

This statute confers jurisdiction in Chancery for breaches of various statutes. It is declaratory of the common law and is part of the foundation of the jurisdiction of equity to deal with breaches of statutes and uses of statutes amounting to fraud.

It should be repealed because it is merely declaratory of the common law which became part of the jurisdiction of the Supreme Court under section 16(1) of the *Supreme Court Act 1935*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹³⁷

36 Edward III (St 1) chapter 15 (1362): Pleading in English **4 George II chapter 26 (1730): Proceedings in courts of justice** **6 George II chapter 14 (1732): Courts in Wales and Chester**

The 1362 statute requires pleas to be in the English language. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹³⁸ The 1730 statute provides that proceedings in courts shall be in English. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹³⁹

The 1362 and 1730 statutes should be repealed: they are unnecessary because English is the customary language of the courts and the pleadings of the courts in this State.¹⁴⁰ It is a matter that can be dealt with by the common law or by rules of court. Those disadvantaged by the use of the English language have the opportunity today to obtain the assistance of translating and interpreting services.

¹³⁶ Recently the Law Commission has recommended that the powers to bind over to keep the peace and be of good behaviour under the statute and at common law should be abolished without replacement: *Binding Over* (Law Com No 222, 1994) 81.

¹³⁷ The South Australian Committee recommended that it be repealed but with a saving of the jurisdiction conferred in equity by the statute: SA78 23.

¹³⁸ The South Australian Committee recommended that it be repealed but that the repealing Act might well contain a saving clause of the reform made by the statute: SA61 6.

¹³⁹ The South Australian Committee recommended that if it be repealed there should be a saving of the reform made by the statute: SA55 23.

¹⁴⁰ In New Zealand in *Mihaka v Police* [1980] 1 NZLR 453, 458-459 and 462 it was accepted that English is the customary language in New Zealand courts.

Section 5 of the 1732 statute provides an exception to the rule that all legal proceedings should be in English. It provides that where names of writs or other process or other technical legal words are commonly used in another language, such as Latin, it is legal to use those descriptions.

The statute should be repealed. Section 5 is unnecessary as such words are used as a matter of practice at present where appropriate. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁴¹

38 Edward III (St 1) chapter 4 (1363): Penal bonds

This statute provides that penal bonds in the third person taken in other courts out of the realm, principally the Courts of Rome, are void.¹⁴²

The statute is obsolete and should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁴³

38 Edward III (St 1) chapter 12 (1363): Embracery

This statute deals with embracery, that is, attempts to influence or instruct jurors, and with jurors taking rewards to give a verdict.

It should be repealed: the matter is now dealt with by section 123 of the Criminal Code. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁴⁴

42 Edward III chapter 3 (1368): Observance of due process of law

This statute provides:

" . . . it is assented and accorded, for the good governance of the commons. 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: (3) and if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error."

It has been retained in the Australian Capital Territory,¹⁴⁵ New South Wales, Queensland, Victoria, New Zealand and the United Kingdom, and it has been recommended that it be preserved in South Australia and Saskatchewan.¹⁴⁶ In England the Law Commission recommended that the statute be repealed because although it was an important constitutional

¹⁴¹ The South Australian Committee recommended that it be repealed but with a saving of the law made by s 5: SA80 22.

¹⁴² See Co Lit 229, 230.

¹⁴³ The South Australian Committee assumed that the "observance of this statute has continued in this State." It recommended that the statute be repealed but that "from an abundance of caution a section in those terms should be placed in the *Justices Act*": SA58 5.

¹⁴⁴ The South Australian Committee recommended that it be repealed but that the matter should be dealt with in a new Criminal Law Act: SA59 9-10.

¹⁴⁵ Recently, it was recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the statute included as an appendix to that law: ACTAG's Report 81-82.

¹⁴⁶ SA61 6-7; Sask Report 314.

instrument in the context of the time at which it was passed, it is now only of historical interest.¹⁴⁷ This is one of the historical statutes that should be preserved.¹⁴⁸

9 Richard II chapter 3 (1385): Writs of error

This statute deals with the remedy of writs of attaint or error by reversioners who are deprived of their interest by a false or erroneous judgment.

It should be repealed. The interest can be protected by modern actions such as an action for possession of land which are subject to a right of appeal. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁴⁹

13 Richard II (St 1) chapter 14 (1389): Bonds of the Crown

Before this statute was enacted, where a bond was given to the Crown for surety for debts or duties, the penal sum of the bond was twice the amount of the debt or duty. This statute removed the right to a penal sum of double the amount and provided that the bond should simply provide sufficient surety.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that it be repealed but with a saving of the amendment of the law made by the statute.¹⁵⁰ It should also be repealed in this State. The general saving clause¹⁵¹ would ensure that the repeal of the statute did not revive the law relating to the penal sum.

15 Richard II chapter 2 (1391): Forcible entries

This statute provides that no one shall make an entry upon land in a manner likely to cause a breach of the peace.

It should be repealed: the matter is dealt with by section 69 of the Criminal Code. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁵²

20 Richard II chapter 3 (1396): Justices of assize

This statute provides that nobody shall sit upon the bench with a justice of assize.

It should be repealed as assizes are not held in Western Australia. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁵³

¹⁴⁷ UK Report 33.

¹⁴⁸ Para 1.9 above.

¹⁴⁹ The South Australian Committee recommended that the jurisdiction given to a reversioner be preserved because it could be the only remedy given to the reversioner in South Australia: SA78 28.

¹⁵⁰ SA65 7.

¹⁵¹ See para 2.8 above.

¹⁵² The South Australian Committee recommended that it be retained until the new Criminal Law Act comes into force: SA59 11.

2 Henry IV chapter 1 (1400): Confirmation of liberties

This statute provides that people may freely and peaceably come to the courts to pursue the laws or to defend the same without disturbance or impediment of any other person and that full justice and right should be done as well to the poor as to the rich in the courts.

It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In the Australian Capital Territory it has been re-enacted with amendments.¹⁵⁴ The South Australian Committee recommended that it be retained because it is good law.¹⁵⁵ This is one of the historical statutes that should be preserved.¹⁵⁶

5 Henry IV chapter 1 (1403): Certain traitors' lands

This statute provides that property, the legal estate of which is vested in traitors to the use of others, is not to be forfeited to the Crown.

It should be repealed because treason is now dealt with in the Commonwealth *Crimes Act 1914* and that statute does not provide for the forfeiture of property by traitors. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁵⁷

7 Henry IV chapter 1 (1405): Confirmation of liberties

This statute provides:

". . . And that the peace within the realm be holden and kept, so that all the King's liege people and subjects may from henceforth safely and peaceably go, come, and abide, according to the laws and usages of the same realm And that good justice and even right be done to every person; saving to the same our lord the King his regalty and prerogative."

It has been repealed in the Australian Capital Territory, New South Wales, Queensland and New Zealand. The South Australian Committee recommended that it be repealed.¹⁵⁸ It has been transcribed, that is, the text of the statute has been set out in a statute, in Victoria.¹⁵⁹ It is still in force in the United Kingdom. This is one of the historical statutes that should be preserved.¹⁶⁰

¹⁵³ The South Australian Committee recommended that it be repealed but with a saving of the amendment of the law made by the statute because it was necessary for the reform to be observed in South Australia: SA78 29.

¹⁵⁴ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 6. The ACTAG's Report (at 82) recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form and this statute should be included as an appendix to that law.

¹⁵⁵ SA61 7.

¹⁵⁶ Para 1.9 above.

¹⁵⁷ The South Australian Committee recommended that it be repealed with a saving of the amendment: SA78 30.

¹⁵⁸ SA78 31.

¹⁵⁹ Vic Act s 8 Division 3. Kewley (34) recommended that it be retained together with a number of other "constitutional enactments".

¹⁶⁰ Para 1.9 above.

13 Henry IV chapter 7 (1411): Riot
2 Henry V (St 1) chapter 8 (1414): Riot

The 1411 statute provides that justices of the peace must arrest rioters and the 1414 statute imposes a punishment upon rioters and requires every able person to be of assistance to the justices and sheriffs to suppress riots.

They should be repealed: riots are dealt with under sections 62-67 of the *Criminal Code*. The statutes have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁶¹

11 Henry VI chapter 6 (1433): Continuation of indictment

This statute provides that proceedings before justices of the peace shall not be discontinued by the issue of a new general commission of the peace.

As new general commissions of the peace are still issued from time to time this statute should be repealed and re-enacted.¹⁶² It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom, but these jurisdictions do not have a general commission of the peace. The South Australian Committee recommended that the statute be repealed but with a saving of the amendment to the law made by the statute.¹⁶³

18 Henry VI chapter 1 (1439): Dating of letters patent

This statute deals with the dates of letters patent and grants from the Crown and forbids them being antedated.

The statute should be repealed: the making of Crown grants is now covered by the *Land Act 1933*, although it does not deal specifically with ante-dating Crown grants. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁶⁴

23 Henry VI chapter 14 (1444): Parliamentary elections

This statute gives a remedy where a person chosen by the voters is not the person returned as the successful candidate.

It should be repealed. The declaration of the poll is governed by section 147 of the *Electoral Act 1907*. The validity of returns may be disputed by a petition addressed to the Court of Disputed Returns: id section 157. The Court has power to declare ". . . any candidate duly elected who was not returned as elected": id section 162(e). The statute has been repealed in

¹⁶¹ The South Australian Committee recommended that both statutes be repealed once general provisions as to riot are enacted in a new Criminal Law Act: SA59 11.

¹⁶² In its report *Court of Petty Sessions: Constitution, Powers and Procedure* (Project No. 55 Part II 1986) at para 2.8 the Commission recommended that the General Commission of the Peace be abolished and replaced with appointment by a warrant. Consequent on this recommendation, it recommended (at 184) that the statute be repealed.

¹⁶³ SA58 6.

¹⁶⁴ The South Australian Committee recommended that the provision as to Crown grants be placed in the *Crown Land Act* and that the provision relating to letters patent simply be repealed with a saving of the amendment of the law made by the statute: SA96 6.

the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁶⁵

1 Richard III chapter 1 (1483): Feoffments of uses

This statute conferred on the cestui que use¹⁶⁶ the power to convey a legal estate. It treated the cestui que use as a legal owner,¹⁶⁷ and so foreshadowed the policy in the Statute of Uses.¹⁶⁸

In view of the development of the law of trusts and the recommendation for the repeal of the Statute of Uses,¹⁶⁹ the statute should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷⁰

1 Henry VII chapter 4 (1485): Clergy

This statute deals with the punishment of the clergy for "advowtry,¹⁷¹ fornication, incest, or any other fleshly incontinency".

It is obsolete and should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷²

3 Henry VII chapter 1 (1487): Star Chamber

That part of the statute that remains in force deals with murders and the jurisdiction of coroners.

It should be repealed: the jurisdiction of coroners is dealt with by section 6 of the *Coroners Act 1920*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷³

3 Henry VII chapter 4 (1487): Fraudulent deeds of gift

This statute deals with deeds of gift made to defraud creditors.

It should be repealed because the matter is dealt with in section 89 of the *Property Law Act 1969*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷⁴

¹⁶⁵ The South Australian Committee recommended that a provision be put into the *Election Act* to cover this particular redress of grievance: SA96 6.

¹⁶⁶ A person for whose benefit lands or other hereditaments were held by another person: Jowitt 310. The modern equivalent is the beneficiary of a trust.

¹⁶⁷ Plucknett 579.

¹⁶⁸ 39-40 below.

¹⁶⁹ Ibid.

¹⁷⁰ The South Australian Committee recommended that it be repealed but with a provision that the repeal does not amend the present state of the law: SA54 10.

¹⁷¹ That is, adultery: Jowitt 65

¹⁷² The South Australian Committee recommended that it be repealed but with a saving of the rights of the Church of England in relation to the statute: SA78 37-38.

¹⁷³ The South Australian Committee recommended that the sections dealing with the jurisdiction of coroners be preserved in the repealing statute because they are the foundation of the present Coroner's jurisdiction: SA78 38.

4 Henry VII chapter 17 (1488): Wardship

This statute provides that, where a cestui que use of lands held by knight service dies intestate, his heir, if an infant, should be in ward, and that, if of full age, he should pay a relief.

It should be repealed: tenure by knight service was abolished by the *Tenures Abolition Act 1660*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷⁵

4 Henry VII chapter 20 (1488): Collusive actions

This statute was enacted to prevent collusive actions being brought so as to bar a genuine action by a common informer who wished to enforce the law.

It should be repealed: this matter is now dealt with in the *Criminal Code* which makes it an offence to compound penal actions.¹⁷⁶ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷⁷

11 Henry VII chapter 12 (1495): Suing in forma pauperis

This statute allowed a poor person to bring a civil action without payment of the court fees and to have assigned to him an attorney and counsel to act for him without payment.

It should be preserved pending a review. It might be considered to be obsolete because legal aid is now available and Order 83A rule 5 of the *Rules of the Supreme Court 1971* provides that the Court or Registrar may remit fees ". . . in a particular case for special reasons". It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁷⁸ The Saskatchewan Law Reform Commission recommended that it be repealed because the existence of a legal aid programme meant there was little scope for it.¹⁷⁹

19 Henry VII chapter 7 (1503): Ordinances of corporations

This statute provides that incorporated bodies cannot prevent any person from taking proceedings in court by any ordinary by-law or other act of the corporation.

¹⁷⁴ The South Australian Committee recommended that the statute should be repealed but a section covering the point be inserted in the *Law of Property Act*: SA54 10.

¹⁷⁵ The South Australian Committee recommended that the statute be repealed with a preservation of the part of statute dealing with waste committed against the heir of a cestui que use: SA54 10.

¹⁷⁶ S 137

¹⁷⁷ The South Australian Committee recommended that it be re-enacted in a Common Informers Act if qui tam and penal actions were retained in South Australia. If they were abolished, the whole Act could be repealed: SA94 8. A qui tam action is one brought by anyone on a penal statute, that is, a statute in which penalties or forfeitures are generally made recoverable by a person aggrieved or a common informer.

¹⁷⁸ The South Australian Committee recommended that the statute be repealed but with a saving of the right to sue in forma pauperis because it is still possible to sue or defence in forma pauperis in the High Court of Australia: SA55 15.

¹⁷⁹ Sask Report 226-228.

The matter is not dealt with in the Corporations Law. The South Australian Committee concluded that the rule is a good one and recommended that consideration be given to re-enacting the provision.¹⁸⁰ The statute is still in force in the United Kingdom. However, the Law Commission has recently recommended that it be repealed because "There is no doubt now that byelaws must not be repugnant to the general law."¹⁸¹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand. The Corporations Law provides that the condition of a company has the effect of a contract under seal between the company and each member and between a member and each other member.¹⁸² A provision in the memorandum and articles which purported to oust the jurisdiction of the courts would be contrary to public policy and therefore void or unenforceable.¹⁸³ The statute is therefore unnecessary and should be repealed.

6 Henry VIII chapter 15 (1514): Crown grants

This statute relates to Crown grants of land where the land has been previously granted and the previous grant has not been disclosed to the Crown by the second applicant. It voids the second grant.

In view of the procedures in the *Land Act 1933* for making Crown grants of land it is not necessary to preserve the effect of the statute and it should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁸⁴

6 Henry VIII chapter 16 (1514): Attendance in Parliament

This statute 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.

To the extent that it applies in Western Australia, it should be repealed because the attendance of members is governed by the Standing Orders of the Houses made under section 34 of the *Constitution Act 1889*: see, for example, Chapter 7 of the Standing Orders of the Legislative Assembly. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.¹⁸⁵ It is still partly in force in the United Kingdom.

21 Henry VIII chapter 4 (1529): Executors

This statute permits the sale of land forming part of a deceased estate by a fewer number of executors than the total named in the will where one or more of the executors named in the will refuses to take on the administration of the estate.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee

¹⁸⁰ SA 61 8.

¹⁸¹ *Statute Law Revision: Fourteenth Report* (Report No 211 1993) 110.

¹⁸² S 180

¹⁸³ J W Carter and D J Harland *Contract Law in Australia* (2nd ed 1991) para 1626.

¹⁸⁴ The South Australian Committee concluded however that the statute still had applicability to Crown grants in South Australia and that it should be repealed but with a saving of the existing law: SA78 42.

¹⁸⁵ The South Australian Committee concluded that it could be repealed if it did not provide the basis of the jurisdiction under which pairs are granted and under which members have leave of absence: SA96 6.

recommended that the statute be repealed but that a section to the same effect be placed in the *Administration and Probate Act*.¹⁸⁶

It should be repealed: under the *Administration Act 1903* probate may be granted to one or more of the executors named in the will. Upon grant of probate, all real estate vests in the executor to whom probate has been granted subject to the trusts and equities affecting it: sections 7-9. The executor to whom probate has been granted may sell real estate in as full and effectual a manner as the deceased could have done in his lifetime: section 10.

21 Henry VIII chapter 5 (1529): Probate fees

This statute mainly deals with probate fees. It also requires executors and administrators to make proper inventories of testator's goods and gives power to the courts to require executors to prove the testator's will and to bring in the inventory.

It should be repealed because these matters are covered by the *Administration Act 1903* sections 25 (persons entitled to administration), 43 (inventory and accounts) and 44 (if accounts not filed Principal Registrar is to give notice etc). It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom (with savings). The South Australian Committee recommended that the statute be repealed but that sections that still go to the jurisdiction of the Court should be placed in the South Australian *Administration and Probate Act*.¹⁸⁷

27 Henry VIII chapter 10 (1535): Statute of uses

27 Henry VIII chapter 16 (1535): Enrolment of bargains of lands

The effect of the Statute of Uses was to convert uses into legal estates. It made the use nugatory by providing that where any person was seised to the use of another then the person who had the use was to be deemed to be in lawful seisin and possession for the same estate as he had in the use.¹⁸⁸ This mechanism provided a means of conveying land unknown to the common law which required a physical change in possession or livery of seisin. Under the statute, land could be conveyed without livery of seisin by raising a use in favour of a purchaser. The statute executed the use and transferred the legal estate without any physical delivery of possession as was required at common law.

The Statute of Uses should be repealed because it is not necessary as a basis for the conveyance of "Old System" land: section 39 of the *Property Law Act 1969* permits every limitation which might be made by way of a use operating under the Statute of Uses to be made by direct conveyance without the intervention of uses. Other consequences of the Statute are also no longer of importance. At common law a person could not convey land to himself or to himself and another. This could be done by means of the Statute of Uses, but it is no longer necessary for this purpose because section 44 of the *Property Law Act 1969* provides that a person may convey property to himself or to himself and another person or persons. The Statute also operated on resulting trusts. If A made a conveyance of land to B without consideration, equity implied a use in favour of A. The Statute operated to turn a resulting use into a legal estate so that the conveyance was ineffective to pass the estate to B: the legal estate reverted to A. Section 38 of the *Property Law Act 1969* provides that no use

¹⁸⁶ SA54 10.

¹⁸⁷ SA64 3.

¹⁸⁸ Its object was to "restore the Kings revenues from feudal dues, the obligations in respect of which were being evaded by conveyances to uses": Adams 50.

results merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared.

The Statute of Uses has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria,¹⁸⁹ New Zealand and the United Kingdom. It has been recommended for repeal in Papua New Guinea and for re-enactment in Saskatchewan. The South Australian Committee recommended that it be retained "at least as long as the present system of conveyancing lasts."¹⁹⁰

Chapter 16 was part of the legislative system in England relating to uses and it should be repealed consequent upon the repeal of the Statute of Uses. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

27 Henry VIII chapter 11 (1535): Clerks of the Signet and Privy Seal

This statute deals with the use of the Crown's signet and privy seal.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee stated that neither the signet nor the privy seal are in use in South Australia. It recommended that the statute be repealed but with a saving of the powers given by the statute because the Governor's commission is under the privy seal.¹⁹¹

It should be repealed: since the enactment of the *Australia Act 1986* (UK), the governor is appointed by signature or royal hand of the Sovereign and not by an instrument under Her Majesty's Royal Sign Manual (governed by the *Great Seal Act 1884* (UK)): see sections 50 and 51 of the *Constitution Act 1889*.

27 Henry VIII chapter 24 (1535): Jurisdiction of liberties

Two sections appear to be in force in Western Australia: sections 1 and 2. The other sections are local in nature. Section 1 provides that none but the King shall pardon treasons or felonies. Section 2 provides that none but the King shall appoint justices.

These sections should be repealed. The restriction on pardons is unnecessary, particularly as treason is no longer a State offence. The appointment of justices is governed by the *Justices Act 1902*. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.¹⁹²

31 Henry VIII chapter 1 (1539): Joint tenants and tenants in common

32 Henry VIII chapter 32 (1540): Joint tenants for life or years

At common law there was no power for a co-owner to compel a partition of land. These statutes conferred upon joint tenants and tenants in common a statutory right to compel

¹⁸⁹ For a substitute provision see *Property Law Act 1958* (Vic) s 19A.

¹⁹⁰ SA54 10-11

¹⁹¹ SA65 10.

¹⁹² The South Australian Committee recommended that the statute be repealed with a saving of the rights conferred by the statute because some of the powers in the Governor's commission may depend upon this statute: SA65 10.

partition by means of a writ of partition, one tenant being able to insist upon partition however inconvenient it might be.¹⁹³ According to Helmore, this procedure was gradually replaced by a more convenient machinery of a suit in Chancery for a decree for partition,¹⁹⁴ a jurisdiction which may now be exercised by the Supreme Court of Western Australia. It was not until the *Partition Act 1878* that the court was empowered to order a sale instead of partition. The latter Act was repealed by the *Property Law Act 1969* and replaced by Part XIV of the 1969 Act.

The South Australian Law Reform Committee recommended that the statutes be repealed because the subject is dealt with in Part VIII of the *Law of Property Act 1936*.¹⁹⁵ The Committee does not appear to have believed that the statutes were the basis for the right to apply for a partition of land. In Saskatchewan, the Law Reform Commission concluded that the Saskatchewan *Partition Act 1868* assumed the existence of the statutes. It therefore recommended¹⁹⁶ that legislation be enacted combining the substance of the 1539, 1540 and 1868 statutes.¹⁹⁷

The statutes have simply been repealed in New South Wales, Queensland and the United Kingdom.¹⁹⁸ They have been repealed and re-enacted in the Australian Capital Territory¹⁹⁹ and Victoria²⁰⁰ and declared to be part of the law of New Zealand.²⁰¹

The statutes should be repealed. However, though there appears to be an equitable remedy of partition, for the sake of certainty an express statutory power of partition should be incorporated in Part XIV of the *Property Law Act 1969*.

32 Henry VIII chapter 1 (1540): Wills

This statute gives a testator power to devise two-thirds of his land held by knights service and the whole of his lands held in common socage. When all military tenures were converted to common socage in 1660²⁰² the power was extended to all land other than copyhold.²⁰³ The statute was repealed in England by the *Wills Act 1837* (7 William IV and 1 Victoria chapter 26) except as to wills made before 1 January 1837 and to estates pur autre vie²⁰⁴ of persons dying before that date. The 1837 Act was adopted in this State by 2 Victoria No 1. The latter Act was repealed by the *Wills Act 1970*, section 6 of which provides that a person may by a will dispose of all his property. The statute should therefore be repealed.

¹⁹³ The Commission is preparing a report on various aspects of the law relating to joint tenancies and tenancies in common in real and personal property including the severance of a joint tenancy by notice (Project No. 78).

¹⁹⁴ B A Helmore *The Law of Real Property in New South Wales* (2nd ed 1966) 277. See also 21 Halsbury's *Laws of England* (1st ed 1912) 834-835 footnote (v) and 13 Halsbury's *Laws of England* (1st ed 1910) 40-41.

¹⁹⁵ SA54 11

¹⁹⁶ Sask Report 76, 311.

¹⁹⁷ As had been done in a number of Provinces including Ontario: *Partition Act*, RSO 1980 c 369.

¹⁹⁸ For the existing provision in these jurisdictions see *Conveyancing Act 1919* (NSW) s 66G; *Property Law Act 1974* (Qld) s 38;39 Halsbury's *Laws of England* (4th ed 1982) para 553.

¹⁹⁹ ACT 1986 Act Schedule 2 Part 4A

²⁰⁰ *Property Law Act 1958* (Vic) ss 221-222.

²⁰¹ NZ Act s 3(1). It has subsequently been recommended that the statutes be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 421.

²⁰² *Tenures Abolition Act 1660*: 52-53 below.

²⁰³ See Jowitt 463-466.

²⁰⁴ A "tenancy of land for the life of another who is called the *cestui que vie*": Jowitt 165.

In New South Wales, where the 1540 statute has a similar history to that in Western Australia, the Law Reform Commission concluded that the statute was spent in the only area where it operated and could be repealed, but that any "future operation necessary for any exceptional case will, however, be covered by the saving clause in the Bill."²⁰⁵ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, South Australia, New Zealand, and the United Kingdom (with the savings referred to in the previous paragraph).

32 Henry VIII chapter 16 (1540): Aliens

11 William III chapter 6 (1698): Aliens

The 1540 statute may be the basis for the common law rule that an alien was incapable of holding real property or a leasehold. Section XIII provides that ". . .all leases of any dwelling-house or shop within this realm, or any of the King's dominions, made by any stranger, artificer or handicraftsman, born out of the King's obeisance, not being denizen²⁰⁶ . . . shall be void and of none effect". The 1698 statute extended the jurisdiction in testamentary causes so as to enable natural born persons to inherit the estate of their ancestors notwithstanding the alienage of their parents.

The statutes were superseded with the enactment of the *Naturalization of Aliens Act 1871*, section 2 of which provided that an alien could acquire and dispose of real and personal property. The 1871 statute was repealed by the *Miscellaneous Repeals Act 1986* but this does not appear to have revived either the United Kingdom statute²⁰⁷ or the common law rule.²⁰⁸

For certainty, the United Kingdom statutes should be repealed. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. In the Australian Capital Territory, however, a provision was substituted to the effect that a person who is not an Australian citizen may hold and deal in property and property may be derived from, through or in succession to a person who is not an Australian citizen.²⁰⁹

32 Henry VIII chapter 28 (1540): Leases

This statute protects lessees, after the death of the life tenant of a fee tail, from being ejected by the successor in tail and also deals with leases made by husbands of the lands of their wives.

It should be repealed: estates tail have been abolished by section 23 of the *Property Law Act 1969* and wives now manage their own property by reason of the *Married Women's Property Act 1892*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²¹⁰

32 Henry VIII chapter 34 (1540): Grantees of reversions

²⁰⁵ NSW Report 85, Cl 9(1)(c) of the Bill (s9(1)(c) of NSW Act) provided that the repeal of this and other Acts does not "affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any Imperial enactment so repealed".

²⁰⁶ An alien who had been made a natural born subject by the exercise of the Royal Prerogative: Jowitt 592.

²⁰⁷ *Interpretation Act 1984* s 34.

²⁰⁸ Id s 37(1)(a)

²⁰⁹ ACT 1986 Act Schedule 2 Part 5. The ACTAG's Report (at 83 and 86) recommended that the Australian Capital Territory should make a new law restating the principles of these statutes in modern form.

²¹⁰ The South Australian Committee recommended that it be repealed but that a section be put in the *Estates Tail Act 1881* (SA) to cover lessees of entailed lands: SA54 11.

This statute permits grantees of reversions to enforce conditions in leases entered into by the proprietor of the preceding limited estate in the land. At common law the reversioner had no such right.

It should be repealed: covered by section 77 of the *Property Law Act 1969* which applies to leases made before or after the date on which the *Property Law Act 1969* came into operation. It has been repealed in New South Wales and Victoria where it is superseded by State legislation.²¹¹ It has also been repealed in the Australian Capital Territory and Queensland where the provisions were re-enacted.²¹² Except for one section, it was preserved in New Zealand.²¹³ It has been repealed and replaced in the United Kingdom. In South Australia it has been recommended that it be repealed and replaced with a provision similar to that in the United Kingdom.²¹⁴

32 Henry VIII chapter 37 (1540): Cestui que vie

This statute gives a power to executors to sue for arrears of rent which were owed to the deceased during his lifetime and unpaid after the death. This power did not exist at common law.

It should be repealed: covered by section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* and section 133 of the *Property Law Act 1969*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that it be repealed and replaced by a section in the *Administration and Probate Act 1919* giving the same power.²¹⁵

33 Henry VIII chapter 21 (1541): Royal assent by commission

This statute provides that royal assent may be given to an Act of Parliament by letters patent.

It should be repealed. Section 2(3) of the *Constitution Act 1889* provides for Bills to "be presented to the Governor for assent by or in the name of the Queen." At any time when the Queen is personally present in the State, any power under an Act exercisable by the Governor may be exercised by the Queen: *Royal Powers Act 1953* section 2(1). It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²¹⁶

²¹¹ *Conveyancing Act 1919* (NSW) ss 117 and 118; *Property Law Act 1958* (Vic) ss 141 and 142.

²¹² *Property Law Act 1974* (Qld) s 117; ACT 1986 Act Schedule 2 Part 6. The ACTAG's Report (at 83) recommended that it be repealed and the substantive provisions incorporated into Australian Capital Territory property law.

²¹³ It has subsequently been recommended that it be repealed and replaced by provisions in a new Property Law Act: NZ Property Law Report 421.

²¹⁴ SA54 11

²¹⁵ SA54 11-12

²¹⁶ The South Australian Committee recommended that it be repealed but that it be accompanied by a reservation of the right created by the statute in case it ever became necessary to use it: SA96 6.

33 Henry VIII chapter 27 (1541): Leases by corporations

This statute provides that any powers belonging to a corporation can be exercised by a majority of the corporators,²¹⁷ notwithstanding any directions to the contrary in their foundation statutes.²¹⁸

It should be repealed: the Corporations Law determines whether the board or general meeting, by some majority of votes, can exercise the powers of a corporation.²¹⁹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²²⁰

33 Henry VIII chapter 39 (1541): Crown debts

This statute contains numerous sections providing procedures for the recovery of debts due to the Crown.

It should be repealed: covered by section 9 of the *Crown Suits Act 1947* which provides that "the same process shall be available both to the Crown and to the subject for the determination and enforcement of claims" in the civil courts.²²¹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²²²

37 Henry VIII chapter 9 (1545): Usury

12 Charles II chapter 13 (1660): Usury

These statutes deal with usury.

They should be repealed. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that they be repealed but with a saving of the jurisdiction conferred by the statutes to relieve against corrupt and catching bargains.²²³ This is an equitable jurisdiction²²⁴ conferred on the Supreme Court under section 16(1)(d) of the *Supreme Court Act 1935*.

²¹⁷ A "member of a corporation aggregate": Jowitt 476.

²¹⁸ Holdsworth Vol IX 54.

²¹⁹ HAJ Ford and R P Austin *Ford's Principles of Corporation Law* (6th ed 1992) 430.

²²⁰ The South Australian Committee recommended that it be repealed but that any repealing statute contain a reservation of the amendment of the law made by the statute because it alters the general law relating to corporations: SA78 50.

²²¹ In *Deputy Commissioner of Taxation v Corwest Management Pty Ltd* [1978] WAR 129, 132 Burt CJ said of the statute:

"It would seem to me to be a remarkable thing if by the operation of a statute passed in England in the reign of Henry VIII the Crown in the right of the Commonwealth were to obtain a charge upon all the assets of a person assessed for tax under the *Income Tax Assessment Act* and rather more remarkable if that were to result by reason of the prerogative of extents either in chief or in aid."

²²² The South Australian Committee recommended that the statute be repealed with a reservation: SA78 50.

²²³ SA61 9-10

²²⁴ See generally R P Meagher, W M C Gummow and J R F Lehane *Equity: Doctrines and Remedies* (3rd ed 1992) Ch 16.

1 Edward VI chapter 8 (1547): Confirmation of grants
18 Elizabeth I chapter 2 (1575): Crown lands

These statutes deal with the construction of various Crown grants. The 1547 statute provides an example of a rule of construction, contrary to the general rule, that the grant is construed in favour of the Crown and not in favour of the subject. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²²⁵

The statutes should be preserved pending a review of whether there should be a special rule of construction in favour of the Crown.

7 Edward VI chapter 1 (1553): Crown revenues

This statute deals with the punishment of those who do not pay money over to the Crown when it comes into their hands and provides for remedies to recover the money from the Crown debtor.

It is obsolete and should be repealed. Such matters are dealt with in the *Financial Administration and Audit Act 1985* and in particular circumstances in acts such as the *Local Courts Act 1904* (section 22). The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²²⁶

1 Mary Sess 3 chapter 1 (1554): Queen Regents Prerogative

This statute provides that a Queen regent is to exercise the same powers as a King would exercise.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²²⁷ It was repealed in the United Kingdom following a report of the Law Commission. The Commission stated that "As the Act is purely declaratory, its repeal would not alter the law, which is now beyond dispute."²²⁸ For this reason the statute should be repealed as part of the laws of this State.

13 Elizabeth I chapter 5 (1571): Fraudulent conveyances

This statute makes void conveyances intended to defraud creditors.

It should be repealed: superseded by sections 89 (voluntary conveyances to defraud creditors voidable), 90 (voluntary disposition to defraud purchases voidable) and 92 (acquisition of reversions at an under value) of the *Property Law Act 1969* as well as section 121 of the Commonwealth *Bankruptcy Act 1966*. It has been repealed in the Australian Capital

²²⁵ The South Australian Committee recommended that they be repealed but with a saving of the rule: SA61 10.

²²⁶ The South Australian Committee recommended that it be repealed but with a saving of the rights of the Crown: SA65.

²²⁷ The South Australian Committee recommended that it be preserved as a "constitutional" statute: SA96 7.

²²⁸ UK Report 33.

Territory,²²⁹ New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²³⁰

13 Elizabeth I chapter 6 (1571): Letters Patent

This statute provides that an exemplification of letters patent is as useful as evidence as the letters patent themselves.

It should be repealed: superseded by section 57 of the *Evidence Act 1906*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand and partly repealed in the United Kingdom.²³¹

14 Elizabeth I chapter 8 (1572): Recoveries

This statute forbids fraudulent recoveries by tenants of life estates.

It should be repealed because recoveries are obsolete as a method of transfer of interests in land. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²³²

27 Elizabeth I chapter 4 (1584): Fraudulent conveyances

This statute makes void conveyances of land without consideration, for the purpose of defrauding subsequent purchasers.

It should be repealed: superseded by section 90 of the *Property Law Act 1969* (voluntary disposition to defraud purchasers voidable). It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²³³ There is a substitute provision in the Australian Capital Territory.²³⁴

31 Elizabeth I chapter 5 (1588): Common informers

This statute deals with actions by common informers and was aimed at preventing vexatious actions by common informers, that is, actions by persons for the purpose of recovering any penalty or forfeiture prescribed for the offence.

It should be repealed: proceedings by common informers have in effect been abolished in this State by the *Fines and Penalties Appropriation Act 1909* which provides, subject to a number of exceptions,²³⁵ that every fine or penalty imposed by any court of summary jurisdiction shall

²²⁹ But replaced with a substituted provision: ACT 1986 Act Schedule 2 Part 7. The ACTAG's Report (at 84) recommended that it be repealed possibly without replacement because of the Commonwealth provision.

²³⁰ The South Australian Committee recommended that it be repealed: SA54 12.

²³¹ The South Australian Committee recommended that it be repealed but that a section in its terms be inserted in the *Evidence Act*: SA61 10-11.

²³² The South Australian Committee recommended that it be repealed but with a saving of the reform effectuated by the statute because estates tail still exist in South Australia: SA55 17.

²³³ The South Australian Committee recommended that it be repealed: SA54 12.

²³⁴ ACT 1986 Act Schedule 2 Part 7. The ACTAG's Report (at 84) recommended that Part 7 be repealed and the substantive provisions incorporated into Australian Capital Territory criminal law.

²³⁵ Such as fines incurred under the *Local Government Act 1960* which shall be paid to the local authority within whose district the offences are provided to have been committed.

be paid to the Treasurer for the public use of the State. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²³⁶

43 Elizabeth I chapter 4 (1601): Charitable gifts

This statute relates to charitable uses. The concept of a valid charitable trust was developed by the Court of Chancery by analogy with the preamble to this statute.

For this reason, legislation in New South Wales and Queensland repeals the statute but provides that the established rules of law relating to charity were not affected by the repeal.²³⁷ In the Australian Capital Territory the preamble was continued in force with amendments.²³⁸ In the United Kingdom, the statute was repealed by section 13(1) of the *Mortmain and Charitable Uses Act 1888*.²³⁹ The statute has also been repealed in Victoria and New Zealand.²⁴⁰

As the definition of charitable purpose developed by analogy with the preamble,²⁴¹ and is not dependent on the statute of 1601 the Commission recommends that the statute be repealed but, as in New South Wales, the repeal should not affect the established rules of law relating to charity.²⁴² There should be an express provision to this effect in the repealing legislation.

43 Elizabeth I chapter 8 (1601): Fraudulent administration of intestates' goods

This statute deals with the liability of a person who fraudulently intermeddles in the estate of a person who dies intestate.

The Law Reform Commission of New South Wales and the Queensland Law Reform Commission recommended that it be repealed, without the substitution of any provision.²⁴³ However, it has been repealed and replaced in the Australian Capital Territory,²⁴⁴ Victoria,²⁴⁵ Queensland²⁴⁶ and the United Kingdom.²⁴⁷ It has been recommended that it be repealed and re-enacted in both South Australia and Saskatchewan.²⁴⁸

²³⁶ The South Australian Committee recommended that a part of it relating to time limited be re-enacted in a Common Informers Act if qui tam and penal actions were retained in South Australia. If they were abolished, the whole Act could be repealed: SA94 10-12.

²³⁷ NSW Act s 9(2)(a) which provides that the repeal of this statute does not affect the established rules of law relating to charity. The same approach was adopted in Queensland (*Trusts Act 1973* s 103(1)) and recommended in Papua New Guinea: PNG Report 8.

²³⁸ *Imperial Acts Application Act 1986* (ACT) Schedule 4. The Sask Report (301) recommended that the preamble be re-enacted and the South Australian Committee recommended that it be retained: SA61 11.

²³⁹ S 38(4) of the *Charities Act 1960* (UK) provides that any reference in any enactment or document to a charity within the meaning of the statute or of the preamble, shall be construed as a reference to a charity within the meaning which the word bears as a legal term according to the law of England and Wales.

²⁴⁰ Vic 1922 Act s 7 (repealed); NZ Act s 4.

²⁴¹ S 4 of the *Charitable Trusts Act 1962* provides that unless the context otherwise required “ ‘charitable purpose’ means every purpose that in accordance with the law of Western Australia is charitable”.

²⁴² See Halsbury’s *Laws of Australia* paras 75-1 to 75-10.

²⁴³ NSW Report 92; Qld Paper Annexure A. It has been repealed without replacement in New South Wales and New Zealand.

²⁴⁴ ACT 1986 Act Schedule 2 Part 8. The ACTAG’s Report (at 84) recommended that it be repealed and the substantive provisions be incorporated into the Australian Capital Territory wills legislation.

²⁴⁵ *Administration and Probate Act 1958* (Vic) s 33.

²⁴⁶ *Succession Act 1981* (Qld) s 54.

²⁴⁷ *Administration of Estates Act 1925* (UK) s 28.

²⁴⁸ SA54 12; Sask Report 302.

The Australian Capital Territory, Victoria and Queensland provisions are similar to the United Kingdom provision. It has been pointed out that the United Kingdom provision is wider than the 1601 statute. The 1601 statute:

". . . dealt only with the case where the next-of-kin procured a grant of administration to 'some stranger of mean estate' as his agent or attorney, in order to take the property free from the deceased's liabilities; the executor de son tort was never in other contexts regarded as a creature of the statute. The present section, however, is wide enough to cover all cases in which liability could in practice arise: it might be difficult to contend that there survives a concurrent and independent liability at common law".²⁴⁹

The Law Reform Commission of the Australian Capital Territory recommended the enactment of a provision in terms of the United Kingdom Act of 1925 because it would make the law clear and easier to discover if it were expressed in a compendious modern form. This Commission has already recommended that the Queensland provision be incorporated in the *Administration Act 1903*.²⁵⁰ The statute can be repealed if this recommendation is adopted. In the meantime it should be preserved.

7 James I chapter 12 (1609): Shop-books evidence

This statute makes tradesmen's books evidence in the courts.

It should be repealed: the admissibility of documentary statements is dealt with in the *Evidence Act 1906*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. The South Australian Committee recommended that it be repealed and that a section to the same effect be placed in the *Evidence Act 1929*.²⁵¹

7 James I chapter 15 (1609): Crown debts

This statute was passed to stop the practice of assigning debts to the Crown in order to obtain the advantage of the procedure by way of extent in aid against the debtor.

It should be repealed: the procedure is obsolete, the writ of extent having been abolished by section 11 of the *Crown Suits Act 1947*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁵²

21 James I chapter 3 (1623): Statute of monopolies

Section 1 of this statute forbids the exercise of the prerogative power to grant monopolies. Section 6 provides that section 1 does not prevent the grant of certain letters patent for inventions. It is the historical foundation of patent law but that law is now governed by the Commonwealth *Patents Act 1990*.

²⁴⁹ J H G Sunnucks, J G Ross Martyn and K M Garnett *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (16th ed 1982) 93-94 (footnotes omitted).

²⁵⁰ Law Reform Commission of Western Australia *Report on the Administration Act 1903* (Project No. 88, 1990) paras 4.7 and 4.8.

²⁵¹ SA61 11-12

²⁵² The South Australian Committee recommended that the statute be repealed but with a saving of the rights of the Crown established by it: SA65 11.

The sections have been preserved in New South Wales, Victoria and Queensland.²⁵³ They are still in force in the United Kingdom. The statute has been repealed in the Australian Capital Territory and New Zealand. It is not one of the statutes recommended for preservation in Saskatchewan because "its subject matter is now largely encompassed by combines investigation, trademark and patent law."²⁵⁴ The Australian Capital Territory Law Reform Commission recommended that the whole Act be repealed. It stated that ". . . the likelihood of an attempt to set up a monopoly by prerogative is so remote as to be non-existent."²⁵⁵ The New South Wales Law Reform Commission recommended that it be preserved: "Although the law relating to patents for inventions has been taken over by the Commonwealth, we think it desirable to continue the Imperial Act in force by reason of the prohibitions it contains regarding other monopolies."²⁵⁶ In Victoria, Kewley recommended that the sections be preserved because "they contain prohibitions regarding monopolies generally."²⁵⁷ The Victorian Statute Law Revision Committee concluded that the sections had no "practical importance" but concluded that "their historical significance to be sufficient to warrant their retention".²⁵⁸

As there is no other legislation to guard against the establishment of monopolies by prerogative, the Commission recommends that the sections be repealed and re-enacted.

21 James I chapter 4 (1623): Common informers

This is another general statute relating to common informers.

It should be repealed: proceedings by common informers have in effect been abolished in this State by the *Fines and Penalties Appropriation Act 1909*.²⁵⁹ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁶⁰

21 James I chapter 14 (1623): Intrusions

The effect of section 4 of this statute is, where the Crown has been out of possession of land for 20 years, to allow the defendant on an information of intrusion, by a plea of not guilty, to put the Crown to the proof of its title in the same way as an ordinary plaintiff in ejectment.²⁶¹ The statute also enabled the defendant to retain possession of the land until trial.

The information of intrusion is a prerogative right which may be waived by the Crown.²⁶² This it does when it commences an action to recover possession of land under section 9 of the *Crown Suits Act 1947* which provides that ". . . the same process shall be available to the Crown and to the subject for the determination and enforcement of claims in Her Majesty's civil Courts." As a result, although the information of intrusion has not been repealed, it has

²⁵³ NSW Act Section Schedule; Vic Act Part II Division 4; Qld Act s 5.

²⁵⁴ Sask Report 250.

²⁵⁵ ACT Report 33.

²⁵⁶ NSW Report 59.

²⁵⁷ Kewley 96.

²⁵⁸ VSLRC 10.

²⁵⁹ See 46 above.

²⁶⁰ The South Australian Committee recommended that it could be repealed if its previous recommendations were accepted: SA94 12-13.

²⁶¹ In Western Australia, no title can be obtained by adverse possession against the Crown: *Limitation Act 1935* s 36.

²⁶² *Housing Commission New South Wales v Panayides* (1963) 63 SE (NSW) 1, 4.

fallen into desuetude. The Commission suggests that it be abolished. If it is abolished, the statute should also be repealed. Otherwise it should be repealed and re-enacted. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁶³

21 James I chapter 15 (1623): Forcible entry

This statute provides for the restitution of the possession of land withheld by force or entered upon by force.

It should be repealed because possession can be obtained by a writ of possession. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁶⁴

21 James I chapter 16 (1623): Limitation

This statute deals with limitation of actions and avoiding suits in law. It has been repealed in New South Wales, Victoria, Queensland and New Zealand. The provisions relating to limitations are unnecessary and can be repealed: covered by the *Limitation Act 1935*.

Sections 5 and 6 have been continued in force in the Australian Capital Territory with amendments.²⁶⁵ The other sections were considered to be unnecessary.

Section 5 provides that in cases of negligent or involuntary trespass to land, where the defendant disclaims title to the land and tenders sufficient amends before action, the defendant is entitled to succeed and further action by the plaintiff is barred. It was transcribed in Victoria in 1922.²⁶⁶ Despite a recommendation by Kewley that it be retained in more modern terms,²⁶⁷ the transcribed provision was repealed in 1980.²⁶⁸ Kewley argued that it may be useful to retain the provision "as a means of preventing delays in the already overloaded law courts by enabling prospective defendants to discourage unreasonable litigation in cases of negligent or involuntary trespass where no real damage has resulted."²⁶⁹ As section 5 is not covered by any other law,²⁷⁰ the Commission recommends that it be repealed and re-enacted.

Section 6 provides that in actions of slander under 40 shillings, the plaintiff shall recover no greater costs than damages. The purpose of this provision is to discourage frivolous actions of slander.²⁷¹ It is still the law in Western Australia and should be preserved pending a

²⁶³ The South Australian Committee recommended that it be repealed: SA61 12. It did so because of the rarity of the matter and because directions could be given in a proper case under their *Supreme Court Rules*.

²⁶⁴ The South Australian Committee recommended that it be retained until a general criminal law Act was passed: SA59 16.

²⁶⁵ *Imperial Acts Application Act 1986* Schedule 3 Part 9. The ACTAG's Report (at 84) recommended that the substantive provisions of s5 be repealed and be placed in Australian Capital Territory legislation dealing with tort law. S 6 is being considered for repeal by the Australian Capital Territory Community Law Reform Committee in its defamation reference.

²⁶⁶ Vic 1922 Act Part II Division 3.

²⁶⁷ Kewley 16.

²⁶⁸ Vic Act s 7.

²⁶⁹ Kewley 16.

²⁷⁰ While tender is a defence to liquidated claims, it does not lie against an unliquidated claim for damages: *Davys v Richardson* (1888) 21 QBD 202, 205.

²⁷¹ Plucknett 495 fn 2.

review. In particular, the sum of 40 shillings should be reviewed. If the law of defamation in this State is reformed, the need for the statute should be reviewed in the light of that reform and any other means used to deal with trivial actions.²⁷²

21 James I chapter 25 (1623): Crown lands

This statute contains provisions for the relief of tenants of the Crown from forfeiture for non-payment of rent or default in some service or duty. One section provides that if a person holds from the Crown upon a rent, service or other duty under a condition of re-entry or to be void in default of payment of the rent or performance of the service or duty, and if, after default made, the rent, service or other duty has been answered, paid or done to the Crown before advantage of the forfeiture has been taken, then no advantage is to be taken by the Crown by reason of the forfeiture or cause of the forfeiture. Another section provides that no person claiming under the Crown may take advantage of the default. The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand. It is still in force in the United Kingdom.²⁷³

The *Land Act 1933*, which covers leases from the Crown, provides some protection for those who breach the conditions of a lease or other holding of land under the Act.²⁷⁴ The statute, so far as it applies to land held under the *Land Act 1933*, is also inconsistent with section 162 of the *Land Act 1933* which provides that acceptance of rent does not waive the right of the Crown to the forfeiture for breach of any condition before receipt of the rent.

The *Land Act 1933* does not apply to leases of other land. There is provision for relief against forfeiture of leases in section 81 of the *Property Law Act 1969*. The *Property Law Act 1969* does not bind the Crown expressly but it may do so if its provisions disclose an intention to do so.²⁷⁵ If it does not bind the Crown the general equitable jurisdiction to grant relief against forfeiture is available against the Crown.²⁷⁶ If it does bind the Crown, the Full Court of the Supreme Court has held that the court still has the equitable jurisdiction to grant relief in any circumstances in which the statutory jurisdiction is not available.²⁷⁷ Bradbrook, MacCallum and Moore suggest, however, that the matter is still unsettled because in England Walton J in *Smith v Metropolitan City Properties Ltd*²⁷⁸ rejected the argument that the court still has an equitable jurisdiction to grant relief in any circumstances in which the statutory jurisdiction is not available.²⁷⁹ In view of the provision which applies to land held under the *Land Act 1933*

²⁷² See generally Law Reform Commission of Western Australia *Report on Defamation* (1979 Project No. 8) ch 18.

²⁷³ The South Australian Committee recommended that the statute be repealed, but with a saving of the amendment of the law of the statute, and that a section in those terms be placed in the *Crown Lands Act 1939*; SA79 12.

²⁷⁴ See *Land Act 1933* s 23 which empowers the Minister to waive any forfeiture and reinstate a lessee or licensee to his former estate.

²⁷⁵ See *Bropho v Western Australia* (1990) 171 CLR 1. S 81 may apply to Crown lands because s 69 of the Act provides that Part VII, which includes s 81, applies to “leases and sub-leases of land under the *Transfer of Land Act 1893*”. That is, “any estate or interest registered under” the *Transfer of Land Act 1893*. This includes grants in fee, whether alienated or not, and Crown Leases registered under the *Transfer of Land Act 1893* (see ss 18 and 20 and 81A and 81B of the *Transfer of Land Act 1893*).

²⁷⁶ *Dyson v Attorney General* [1911] 1 KB 410, which decided that equitable relief is available against the Crown in a suit against the Attorney General. See also W S Holdsworth *The History of Remedies Against the Crown* (1922) 38 LQR 280, 282 and P W Hogg *Liability of the Crown* (1971) 4. S 7(c) of the *Crown Suits Act 1947* provides that the Act does not affect any right to sue the Attorney General on behalf of the Crown.

²⁷⁷ *Esther Investments Pty Ltd v Cherrywood Park Pty Ltd* [1986] WAR 279.

²⁷⁸ (1985) 227 EG 753.

²⁷⁹ Bradbrook 397.

and the availability of equitable relief,²⁸⁰ the Commission recommends that the statute be repealed. It suggests, however, that consideration be given to providing expressly that section 81 of the *Property Law Act 1969* binds the Crown.

3 Charles I chapter 1 (1627): Petition of Right

This statute was enacted at a time when the House of Commons was attempting to compel the Crown to pursue policies at the dictates of the Commons.²⁸¹ The Petition of Right contains a list of demands of the Commons and provides that the King has no right to billet soldiers without the consent of the house-holders or to levy loans and taxes without the consent of Parliament, or to commit any person to prison.

It has been preserved in the Australian Capital Territory,²⁸² New South Wales, Queensland, Victoria and New Zealand, generally because of its historical significance. Part of it is still in force in the United Kingdom. Because of its historical significance in affirming traditional liberties the Saskatchewan Law Reform Commission recommended that it be declared to remain in force to the extent that it relates to matters within provincial jurisdiction and is applicable to the Province.²⁸³

The Commission has recommended that a provision be included in the *Constitution Act 1889* enshrining the principle that Parliament and not the Crown may levy a tax.²⁸⁴ The balance of the statute is of historical interest and should be preserved.²⁸⁵

16 Charles I chapter 10 (1640): Habeas Corpus

This statute abolishes the Court of Star Chamber. It also contains a provision relating to habeas corpus.

The latter provision has been preserved or retained in New South Wales, Victoria, Queensland and New Zealand. It has been repealed in the Australian Capital Territory and the United Kingdom. The South Australian Committee recommended that it be repealed but with a saving of the right of habeas corpus given by section 8 of the statute.²⁸⁶

The Law Reform Commission of the Australian Capital Territory recommended that the provision relating to habeas corpus be repealed because it did no more than reaffirm the common law and could safely be repealed.²⁸⁷ In Victoria, Kewley also recommended that this provision be repealed because writs of habeas corpus "are almost invariably issued at common law and not under the statutes".²⁸⁸ Given the common law right, the Commission agrees that the statute should be repealed.

²⁸⁰ As to the power of the District Court, and Local Courts, to grant equitable relief, see fn 324 below.

²⁸¹ See Plucknett 52-53.

²⁸² *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 10. The ACTAG's Report (at 85) recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the Act included as an appendix to that law.

²⁸³ Sask Report 271 and 314.

²⁸⁴ 25 above.

²⁸⁵ Para 1.9 above.

²⁸⁶ SA65 12.

²⁸⁷ ACT Report 34.

²⁸⁸ Kewley 33.

12 Charles II chapter 24 (1660): Tenures abolition, section 4

Apart from section 9²⁸⁹ the only section of this statute which has been re-enacted elsewhere is section 4 which provides that all tenures to be created after the enactment of the statute shall be free and common socage. It underlines the doctrine of socage tenure under which all freehold land in this State is held. In Queensland section 4 has been re-enacted in section 20(1) of the *Property Law Act 1974* which provides:²⁹⁰

"All tenures created by the Crown upon any grant of an estate in fee simple made after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown."

The Commission recommends that a similar provision be enacted in this State.²⁹¹

13 Charles II St 1 chapter 1 (1661): Sedition

This statute deals with sedition and with Parliament, declaring that no statute is valid without the concurrence of the King and both houses of Parliament.

It should be repealed. Sedition is dealt with in Chapter VII of the *Criminal Code*. Section 2(1) of the *Constitution Act 1889* provides that it ". . . shall be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good Government of the Colony of Western Australia." It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁹²

17 Charles II chapter 8 (1665): Death between verdict and judgment

This statute provides that if a party to an action dies between the verdict and the judgment, the death does not cause a judgment to abate before execution and judgment may be obtained by an executor.

Although the matter is dealt with by Order 34 rule 16 of the *Rules of the Supreme Court 1971* and Order 25 (Div 1) rule 11 of the *Local Court Rules 1961* it should be given a statutory basis. The statute should therefore be repealed and re-enacted. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.²⁹³

²⁸⁹ As to s 9 of this statute see 15 above.

²⁹⁰ There are similar provisions in New South Wales (NSW Act s 37) and the Australian Capital Territory (ACT 1986 Act Schedule 2 Part 9). The ACTAG's Report (at 85) recommended that the provision be repealed and the substantive provision incorporated into Australian Capital Territory property law.

²⁹¹ S 4 is the only section of the statute to have been retained in the United Kingdom and the only section that the South Australian Committee recommended be retained (SA54 12).

²⁹² The South Australian Committee recommended retention of the declaration: SA79 14.

²⁹³ The South Australian Committee recommended that it be repealed but with a saving of the amendment of the law made by the statute: SA79 17.

18 & 19 Charles II chapter 11 (1666): Cestui que vie
6 Anne chapter 72 (1707): Cestui que vie

The 1666 statute deals with difficulties of proof of death of life tenants who are not heard of again. The 1707 statute provides for the production of the cestui que vie in order to prevent concealment of death.

These statutes have been re-enacted in New South Wales and the Australian Capital Territory.²⁹⁴ They have been repealed in Victoria, Queensland and New Zealand. The South Australian Committee recommended that the statutes be repealed and replaced by equivalent provisions.²⁹⁵

Both statutes are still applicable and should be repealed and re-enacted as has been done in New South Wales and the Australian Capital Territory.

22 & 23 Charles II chapter 10 (1670): Statute of distribution

This statute deals with the settling of intestates' estates.

It should be repealed: superseded by provisions of the *Administration Act 1903*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand and repealed with savings in the United Kingdom.²⁹⁶

29 Charles II chapter 3 (1677): Statute of frauds
14 George II chapter 20 (1740): Common recoveries, section 9

The parts of the Statute of Frauds which have not been repealed are still applicable, there being no modern equivalent of them.²⁹⁷ They are in need of review but pending a review they should be preserved.

29 Charles II chapter 7 (1677): Sunday observance

This statute deals with observance of Sunday. The only section considered worthy of preservation elsewhere is section 6 which relates to the service of process on Sunday.

The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. However, express provision as to the service of process was substituted in New South Wales and Victoria.²⁹⁸ The New South Wales provision has since been repealed.²⁹⁹

²⁹⁴ NSW Act s 38; ACT 1986 Act Schedule 2 Part 10. The ACTAG's Report (at 85 and 86) recommended that these statutes be repealed and the substantive provisions incorporated into Australian Capital Territory property law.

²⁹⁵ SA 54 12 and 14.

²⁹⁶ The South Australian Committee recommended that it be repealed but that matters in the statute not dealt with in local legislation be included in that legislation: SA64 4.

²⁹⁷ The 1740 statute amends the Statute of Frauds. The Statute of Frauds has also been amended by the *Sale of Goods Act 1895*.

²⁹⁸ NSW Act s 41 (repealed); Qld Act s 12.

²⁹⁹ See now *Sunday (Service of Process) Act 1984* (NSW).

As section 6 is still applicable it should be preserved. However, the Commission considers that it is out of date and should be reviewed.³⁰⁰

30 Charles II chapter 7 (1678): Executors of executors

4 William and Mary chapter 24 (1692) section 12: Estreats: personal representatives, section 12

The 1678 statute deals with the liability for waste (to the extent of the assets) of a personal representative whether as an executor or administrator.³⁰¹

It has been repealed in Victoria and New Zealand and repealed and replaced in New South Wales, Queensland and the Australian Capital Territory.³⁰² In Queensland, section 52A of the *Succession Act 1981* provides:³⁰³

"Where a personal representative in his own wrong wastes or converts to his own use any part of the estate of the deceased person and dies, his personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living."

However, according to W A Lee³⁰⁴ this section is otiose because section 66(1) of the Queensland *Succession Act 1981* provides for the survival of actions on death. Given that there is a similar provision in section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* the United Kingdom statute should be repealed without being replaced.

31 Charles II chapter 2 (1679): Habeas corpus³⁰⁵

This statute was enacted to deal with some abuses that had crept into daily practice and devices by which the common law right to the writ had been evaded. It made the writ readily accessible during court vacations and fixed periods for the return of the writ.

The statute has been preserved in whole or part in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It has been repealed in the Australian Capital Territory following a recommendation of its Law Reform Commission. It did so because it believed that the abuses could not occur now.³⁰⁶ The Commission agrees and recommends that the statute be repealed. In any case, Order 57 of the *Rules of Supreme Court 1971* provides a modern procedure for dealing with applications for a writ of habeas corpus.

³⁰⁰ If it is repealed, O 38 r 14 of the *Local Court Rules 1961* may have to be reviewed also. In its *Report on Local Courts: Jurisdiction, Procedures and Administration* (Project No. 16 Part 1 1988) para 10.20 the members of the Commission at the time were unable to arrive at a conclusion on whether the prohibition on service on Sunday should be abolished.

³⁰¹ The 1692 provision makes the earlier statute perpetual.

³⁰² NSW Act s 15; Act 1986 Act Schedule 2 Part 12. The ACTAG's Report (at 85 and 86) recommended that these statutes be repealed and the substantive provisions incorporated into Australian Capital Territory wills legislation.

³⁰³ Following a recommendation of the Queensland Law Reform Commission: Qld Paper 3.

³⁰⁴ *Manual of Queensland Succession Law* (3rd ed 1991) para 924 fn 67.

³⁰⁵ S 7 of the statute was repealed by the *Criminal Code Act 1902*.

³⁰⁶ ACT Report 36.

1 James II chapter 17 (1685): Administration of intestates' estate, section 6

This section provides that administrators are not compellable to account (except by an inventory) but at the instance of persons interested.

It should be repealed: superseded by section 43 of the *Administration Act 1903*. It has been repealed in Queensland, Victoria, New Zealand and in the United Kingdom (with savings). It has been repealed and replaced in New South Wales and the Australian Capital Territory.³⁰⁷

1 William and Mary Sess 1 chapter 30 (1688): Royal mines

5 William and Mary chapter 6 (1693): Royal mines

Section 4 of the 1688 statute provides in part that a mine for copper, tin, iron or lead shall not be taken to be a Royal mine though gold or silver may be extracted therefrom. The 1693 statute is a "better explanation" of the 1688 statute.

The subject is now covered by the *Mining Act 1978* and both statutes should be repealed: section 9(1)(a) of the Act declares that, subject to the Act, all gold, silver and any other precious metal existing in its natural condition on or below the surface of any land in the State is the property of the Crown. They have been repealed in the Australian Capital Territory, Queensland, Victoria and New Zealand.³⁰⁸ Section 3 of the 1688 statute has been preserved in New South Wales³⁰⁹ and retained in the United Kingdom.

1 William and Mary Sess 2 chapter 2 (1688): Bill of Rights

This statute was part of the settlement following the fall of James II. James II claimed that by his prerogative he could dispense individual cases from the operation of a statute and he even attempted to suspend the operation of a number of religious laws.³¹⁰ The statute has been preserved in whole or part in New South Wales, the Australian Capital Territory,³¹¹ Victoria, Queensland and New Zealand and is still in force in the United Kingdom. The Bill establishes the following rights of subjects -

No dispensing power

"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."

This section of the Bill was applied in New Zealand in 1976 when a declaration was granted that the Prime Minister was in breach of it in the exercise of a pretended power of suspending the laws or their execution.³¹²

³⁰⁷ NSW Act s 14; ACT 1986 Act Schedule 2 Part 4. The ACTAG's Report (at 85) recommended that Part 4 be repealed and the substantive provisions incorporated into Australian Capital Territory wills legislation.

³⁰⁸ The South Australian Committee recommended that it be repealed: SA65 13.

³⁰⁹ NSW Act s 6.

³¹⁰ Plucknett 59.

³¹¹ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part II. The ACTAG's Report (at 85-86) recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the statute included as an appendix.

³¹² *Fitzgerald v Muldoon* [1976] 2 NZLR 615, 622-623. Mr Muldoon made an unequivocal pronouncement that the requirement in an Act of Parliament that the requirement for employee deductions and employer contributions for a superannuation scheme were to cease. It was held in doing so he was purporting to

Late dispensing illegal

"2. *That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been affirmed and exercised of late, is illegal.*"

Ecclesiastical courts illegal

"3. *That the commission for erecting the late court of commissioners for ecclesiastical causes, and all other commissions and courts of like nature are illegal and pernicious.*"

Levying money

"4. *That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.*"³¹³

Right to petition

"5. *That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.*"³¹⁴

Standing army

"6. *That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of parliament, is against the law.*"

Subjects arms

"7. *That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.*"

Freedom of election

"8. *That election of members of parliament ought to be free.*"

Freedom of speech

"9. *That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.*"

suspend the law without the consent of Parliament. For another case in which it was applied see *Professional Promotions and Services Ltd v Attorney-General* [1990] 1 NZLR 501.

³¹³ The Commission recommends above (at 25) that a similar provision be incorporated in the *Constitution Act 1889*.

³¹⁴ This protection was provided because the Archbishop of Canterbury and six of his suffragans were charged with seditious libel when they sent a petition to King James II seeking to be excused from reading a Declaration of Indulgence which profession to suspend the laws against Catholics: W J V Windeyer *Lectures on Legal History* (2nd ed Revised 1957) 220-221. Petitions to Parliament are protected from liability for defamation: *Criminal Code* s 351(2).

Excessive bail

"10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishment inflicted."

Juries

"11. That jurors ought not to be duly impannelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders."

Grants of forfeiture

"12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void."

Frequent parliaments

"13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently."

This is a historical statute which should be preserved.³¹⁵

2 William and Mary Sess 1 chapter 5 (1689): Distress for rent³¹⁶

This statute provides for the sale of goods distrained for rent.

It should be repealed because distress for rent has been abolished: *Distress For Rent Abolition Act 1936*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and, in part, in the United Kingdom. Except for sections 3 and 4, it has been declared to be part of the laws of New Zealand.³¹⁷

4 William and Mary chapter 16 (1692): Clandestine mortgages

This statute deals with frauds by clandestine mortgages. If a mortgage is created without disclosure of a prior judgment or mortgage it was penalized by the forfeiture of the equity of redemption.

In view of the modern law as to registration it is obsolete and should be repealed. The registration of mortgages for "Old System" land is dealt with under the *Registration of Deeds Act 1856* and the registration of mortgages for other land is dealt with under the *Transfer of Land Act 1893*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³¹⁸

³¹⁵ Para 1.9 above.

³¹⁶ This statute was amended by 52 Vict No 17 (1888).

³¹⁷ NZ Act s 3(1). It has subsequently been recommended that the statute be repealed together with the abolition of the right to distrain: NZ Property Law Report 421.

³¹⁸ The South Australian Committee recommended that it be repealed but that an equivalent section be inserted in the *Law of Property Act 1936*: SA54 13.

7 & 8 William III chapter 7 (1695): Parliamentary elections (returns)
12 & 13 William III chapter 5 (1700): Returns to Parliament

These statutes deal with false returns of members of Parliament.

They should be repealed: superseded by the *Electoral Act 1907* Part V (disputed returns) and Part VII (electoral offences). They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.

8 & 9 William III chapter 11 (1696): Administration of justice
4 & 5 Anne chapter 3 (1705): Administration of justice, sections 12 and 13

By the end of the seventeenth century the Court of Chancery would grant relief against penalties due on money bonds, on the payment of the principal, interest and costs. It would also grant relief in respect of double bonds other than common money bonds, that is, for failure to perform covenants, on payment of damages and costs.

Section 8 of the 1696 statute gave relief in the common law courts similar to this equitable doctrine without recourse to a court of equity.³¹⁹ It required the plaintiff to assign breaches of the conditions of the bond and the jury to assess the damages suffered for each breach. Judgment could be entered for the whole penalty, but the plaintiff could only recover the damages assessed, the action being stayed on payment of these damages together with costs.

The 1705 provisions authorized the court to discharge an obligor who brought into court the principal, interest and costs due on the money bond. It also reversed the ancient common law rule by allowing payment (without acquittance by deed) to be pleaded in bar to an action on a bond.

The provisions have been repealed in the Australian Capital Territory,³²⁰ Queensland, Victoria, New Zealand and United Kingdom. Although it was considered that the procedure was obsolete and would probably disappear with any review of Supreme Court procedure, section 8 was re-enacted in New South Wales for safety's sake.³²¹

In England:

"After the fusion of law and equity by the *Judicature Act 1873*, there was no real need for the statutory relief, but the special procedure established by the Act of 1696 was thought to have advantages and s. 8 of that Act was therefore kept in force."³²²

It has since been revoked:

"The present position is therefore that there is no longer any statutory relief against a penalty in a bond, but the equitable rule as to penalties has effect and prevails over the common law . . . and will be applied without the need for the defendant to bring separate proceedings for relief."³²³

³¹⁹ It has been held to be a part of the substantive law of this State: *Geraldton Food Distributors Pty Ltd v Spencer* [1985] WAR 261, 267.

³²⁰ *Imperial Acts Application Act 1986* (ACT) s 4(1)-(3)

³²¹ NSW Act s 3. See NSW Report 50-51

³²² 12 Halsbury's *Laws of England* (4th ed 1975) para 1423 fn 2.

³²³ *Ibid.*

Given that there has been a similar development of our legal system with law and equity administered concurrently,³²⁴ the Commission recommends that the provisions be repealed.

10 William III chapter 22 (1698): Posthumous children

This statute enables posthumous children to take estates as if born in their father's lifetime.

The statute should be repealed: the law now considers that every child en ventre sa mere is actually born, for the purpose of taking any benefit to which, if born, it would be entitled.³²⁵ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³²⁶

11 William III chapter 12 (1698): Governors of plantations

This statute declares how and where oppression by governors of plantations abroad may be tried. It has been repealed in part in the United Kingdom.

It is obsolete and should be repealed. It has been repealed in the Australian Capital Territory and New Zealand and the South Australian Committee recommended that it be repealed.³²⁷ It has not been affected in Queensland.³²⁸ Its repeal was thought to be beyond the power of the Parliaments of Victoria and New South Wales, but this is no longer the case because of section 3 of the *Australia Act 1986* (UK).

12 & 13 William III chapter 2 (1700): Act of Settlement

As Queen Anne (1702-1714), who succeeded William III, was the last of the reigning Stuarts, the Act of Settlement was passed to secure the succession. It limited the descent of the Crown and added a few constitutional provisions to supplement those in the Bill of Rights. For example, it required the monarch to be in communion with the Church of England and not to leave the country without parliamentary consent.³²⁹

³²⁴ If the District Court, under s 55 of the *District Court of Western Australia Act 1969*, or a Local Court, under s 33 of the *Local Courts Act 1904*, has jurisdiction with respect to the action before it, it has power to grant equitable relief: *Hondros and Tholet v Chesson* [1981] WAR 146 and *Commercial Developments Pty Ltd v Mercantile Mutual Insurance (Worker's Compensation) Limited* (1991) 5 WAR 208, 213.

Because of doubt expressed in an article by S Owen-Conway *The Equitable Jurisdiction of the Inferior Courts in Western Australia* 14 UWAL Rev 150, 163 as to the power of a Local Court to grant an equitable relief, redress or remedy as ancillary relief on a common law claim within its jurisdiction, the Commission has previously recommended that s 33 of the *Local Courts Act 1904* be reworded to avoid that doubt: *Report on Local Courts: Jurisdiction, Procedures and Administration* (Project No 16 Part I 1988) paras 4.44-4.45.

³²⁵ *Villar v Gilbey* (1907) AC 139. See WA Lee *Manual of Queensland Succession Law* (3rd ed 1991) para 1610.

³²⁶ The South Australian Committee recommended that it be repealed but an equivalent section be inserted in the *Law of Property Act 1936*: SA54 14.

³²⁷ SA102 4.

³²⁸ Qld Act s 6.

³²⁹ Plucknett 60.

It has been preserved in the Australian Capital Territory,³³⁰ New South Wales, Victoria,³³¹ Queensland and New Zealand and is still in force in the United Kingdom.³³² This is one of the historical statutes that should be preserved.³³³

4 & 5 Anne chapter 3 (1705): Administration of justice

Sections 12 and 13 have been dealt with above.³³⁴

Prior to this statute, when property changed hands the legal position of a lessor was incomplete unless the tenant acknowledged his obligations to the new landlord, that is, attorned. Section 9 removes the need for attornment and section 10 adds that the tenant will not be prejudiced by the provision, so that the tenant who pays rent to the old landlord without knowledge of the change of ownership is protected.

Sections 9 and 10 can be repealed: superseded by sections 77 and 70 of the *Property Law Act 1969*. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and the United Kingdom.³³⁵ They were preserved in New Zealand.³³⁶

As there was some doubt as to whether the provisions of the *Limitation Act 1623* applied to suits for seamen's wages, section 17 of the statute expressly provides a six year limitation period for the recovery of seamen's wages in Admiralty. Section 18 provides for an extension of time where the plaintiff in such cases suffers from certain disabilities. Section 19 deals with absence beyond the seas of defendants in suits for seaman's wages, and in cases within the *Limitation Act 1623*.

Although there is now a provision relating to the limitation period for actions for seamen's wages in the Commonwealth *Admiralty Act 1988*,³³⁷ sections 17, 18 and 19 should be preserved. The law will be reviewed in the Commission's report on limitation and notice of actions. A discussion paper was published in 1992.³³⁸

6 Anne chapter 8 (1706): Maintenance of the Church of England

This statute provides for the maintenance of the Church of England in relation to the impending union with Scotland. It has been repealed in part in the United Kingdom.

It should be repealed: it is unnecessary in Western Australia. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.³³⁹

³³⁰ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 12. The ACTAG's Report (at 86) recommended that the Australian Capital Territory should make a new law restating the principles in this statute in modern form with the statute included as an appendix.

³³¹ Vic Act s 4(1)(b).

³³² The South Australian Committee recommended that it be preserved: SA96 8.

³³³ Para 1.9 above.

³³⁴ At 58-59 above.

³³⁵ The South Australian Committee recommended that the sections be repealed: SA55 21.

³³⁶ NZ Act s 3(1). It has subsequently been recommended that ss 9 and 10 be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 422.

³³⁷ S 37.

³³⁸ *Limitation and Notices of Actions* (Project No. 36 Part II 1992).

³³⁹ The South Australian Committee recommended that it be repealed but with a saving in favour of the Church of England: SA80 5.

6 Anne chapter 11 (1706): Union with Scotland

This statute deals with the union of the kingdoms of England and Scotland. It has been repealed in part in the United Kingdom.

To the extent that it applies in Western Australia, it too should be repealed because it is unnecessary in Western Australia. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.³⁴⁰

6 Anne chapter 40 (1706): Union with Scotland

This is another statute dealing with the union of the kingdoms of England and Scotland. It has been repealed in part in the United Kingdom.

To the extent that it applies in Western Australia, it too should be repealed: it is unnecessary in Western Australia. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.³⁴¹

8 Anne chapter 18 (1709): Landlord and tenant

Section 1 of this statute provides that the landlord is entitled to be paid any rent due before another creditor executes against the goods of a tenant. The officer levying the execution is required to levy the amount due for the rent as well as the execution of money. The provision stands notwithstanding the abolition of distress for rent³⁴² under which the landlord could seize goods of the tenant, without legal process, as a pledge for the satisfaction of a demand for any rent due. The section has been repealed in the Australian Capital Territory, New South Wales, Queensland and Victoria. It has been preserved in New Zealand.³⁴³ It is still in force in the United Kingdom.

In Local Courts this section has been superseded by sections 128 and 129 of the *Local Courts Act 1904*. In the Supreme and District Courts provisions for execution by means of a writ of fieri facias or sequestration are subject to the 1709 statute.³⁴⁴ The section should therefore be repealed and re-enacted.

The provisions relating to these courts were enacted before distress for rent was abolished by the *Distress For Rent Abolition Act 1936*. The priority given to landlords by the *Local Courts Act 1904* is being examined by the Commission in its project on enforcement of judgments and orders of Local Courts. Pending completion of the project, the priority should be retained.

Section 4 gave a landlord an action of debt for rent against a tenant for life or lives "as they might have done in case such rent were due and reserved upon a lease for years", there being

³⁴⁰ The South Australian Committee stated that it was a constitutional statute which, until the ending of the Imperial ties, still affects South Australia: SA80 5.

³⁴¹ The South Australian Committee stated that it was a constitutional statute which, until the ending of the Imperial ties, still had constitutional significance in South Australia: SA96 9.

³⁴² *Marcus Clark & Co Ltd v Coates* (1937) 37 SR(NSW) 493.

³⁴³ It has subsequently been recommended that the section be repealed consequent upon the abolition of the right to distrain: NZ Property Law Report 422.

³⁴⁴ *Supreme Court Act 1935* s 145, S 56(1) of the *District Court of Western Australia Act 1969* provides that a judgment of the District Court may be enforced in the same manner and to the same extent as though it were a judgment of the Supreme Court.

no such action at common law for any arrears during the continuance of the term. It has been repealed in New South Wales and Queensland, but re-enacted in Victoria, the Australian Capital Territory and preserved in New Zealand.³⁴⁵ It is still in force in the United Kingdom. In South Australia and Saskatchewan it has been recommended that it be preserved.³⁴⁶ Although an action of debt is obsolete, the right to sue a tenant for life for any arrears of rent during the continuance of the term may remain of practical significance. The Commission accordingly recommends that the section be repealed but the right should be incorporated in the *Property Law Act 1969*.

The rest of the sections of the statute are obsolete and can be repealed.

2 George II chapter 22 (1728): Insolvent debtors relief

8 George II chapter 24 (1734): Set-off

The 1728 statute relates mainly to debtors in prison. As imprisonment for debt has been abolished³⁴⁷ those sections of the statute should be repealed. They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁴⁸

Section 13 of the 1728 statute allows for mutual debts to be set-off. Section 4 of the 1734 statute makes the earlier provision perpetual. Section 13 was preserved in the Australian Capital Territory and New Zealand.³⁴⁹ It has been repealed in New South Wales, Queensland, Victoria and the United Kingdom and recommended for repeal in Saskatchewan.³⁵⁰

At the time the statutes were enacted law and equity were not administered concurrently. Equity would in some cases allow a defence by way of set-off but, before the enactment of the statutes, set-off was not permitted at law. After their enactment the circumstances in which set-off would be permitted at law were governed by the rigorous application of the statutes. However, the Courts of Chancery adopted a more flexible practice.³⁵¹

In England, in 1873 the superior courts of equity and common law were abolished and their jurisdiction was transferred to and vested in the new High Court of Justice and the rules of law and equity on certain points were assimilated. As part of this process, section 24(3) of the Supreme Court of *Judicature Act 1873* gave the courts the right to grant ". . . all such relief

³⁴⁵ *Landlord and Tenant Act 1958* (Vic) s 7; ACT 1986 Act Schedule 2 Part 13; NZ Act s 3(1). The ACTAG's Report (at 87) recommended that the statute be repealed and the substantive provisions incorporated into Australian Capital Territory property law. It has subsequently been recommended that s4 be repealed without replacement: NZ Property Law Report 422.

³⁴⁶ SA54 14; Sask Report 304

³⁴⁷ See the *Debtors Act 1871*. As an exception, a person may be committed to prison "... where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same": id s 3. This imprisonment does not operate as a satisfaction or extinguishment of the debt or demand.

³⁴⁸ The South Australian Committee recommended that they should be repealed: SA55 23.

³⁴⁹ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Parts 15 and 16: NZ Act s 3(1). The ACTAG's Report (at 87-88) recommended that the statute be repealed and the substantive provisions incorporated into Australian Capital Territory debt law.

In South Australia, the right of set-off "arises from section 23 of the *Supreme Court Act 1935*": R M Lunn QC *Civil Procedure in South Australia* (1992) R47.03.10. Nevertheless, the South Australian Committee recommended that the statutes be preserved: SA55 23 and 23-24.

S 23 is similar to s 24(3) of the *Supreme Court Act 1935* (WA).

³⁵⁰ Sask Report 222-223.

³⁵¹ Id 218-219.

against any plaintiff. . . as such defendant shall have properly claimed by his pleading". The right of set-off was dealt with in rules of court.³⁵² Consequently, the statutes were repealed by the *Civil Procedure Acts Repeal Act 1879* and the *Statute Law Revision and Civil Procedure Act 1883*. The 1879 statute contained a saving of any jurisdiction or principle or rule of law or equity established or confirmed by a repealed statute.³⁵³ As a result the substance of the law of set-off was not affected by the repeal of the statutes.

In Western Australia, as in England, there is now a concurrent administration of law and equity and all matters relevant to the conflict should be litigated in the same proceedings so as to avoid a multiplicity of actions.³⁵⁴ Thus, all defences, whether legal or equitable, must be pleaded in the same proceedings. The plaintiff can raise both legal and equitable claims and the defendant can plead both legal and equitable defences. By analogy with the development of the law in England (and New South Wales³⁵⁵), the statutes can be repealed without affecting the law of set-off so long as the repeal is accompanied by a saving of the law established by the statutes as was done in England.

2 George II chapter 23 (1728): Attorneys and solicitors

12 George II chapter 13 (1738): Price of bread, etc

The 1728 statute regulates solicitors. The 1738 statute continues and amends the 1728 statute. It should be repealed: superseded by the *Legal Practitioners Act 1893*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁵⁶

4 George II chapter 28 (1730): Landlord and tenant

Section 1 of the statute provides for the payment of double the yearly rent by yearly or longer tenants who hold over after the end of the lease. There is a similar provision in section 18 of the *Distress For Rent Act 1737* (UK).

There are modern equivalents of these provisions in Victoria, Queensland and Tasmania.³⁵⁷ The section is still in force in the United Kingdom. It has been repealed in New South Wales,³⁵⁸ the Australian Capital Territory and New Zealand. The New Zealand Property Law and Equity Reform Committee recommended that the section be repealed because it was draconian by present day standards, did not meet any present day social need and was virtually obsolete.³⁵⁹

³⁵² The *Rules of the Supreme Court 1883* (UK) O 19 r 2 (Rule 199).

³⁵³ S 4(1)(b): see *Hanak v Green* [1958] 2 All ER 141, 149

³⁵⁴ See *Supreme Court Act 1935* s 24(3), (6) and (7). S 24(3) is in similar terms to s 24(3) of the *Supreme Court of Judicature Act 1873* (UK). For the position in the District Court and Local Courts see fn 324 above.

³⁵⁵ See the discussion of the effect of the repeal of the statutes in New South Wales in *Stehar Knitting Mills Pty Ltd v Southern Textile Converters Pty Ltd* [1980] 2 NSWLR 514 and comments on this case by R P Meagher, W M C Gummow and J R F Lehane: *Equity: Doctrines and Remedies* (3rd ed 1992) para 3714.

³⁵⁶ The South Australian Committee recommended that it be repealed but with a saving of sections relating to oaths by solicitors and the one sixth rule on the taxation of costs: SA80 19. The one sixth rule on the taxation of costs no longer applies in Western Australia.

³⁵⁷ See *Landlord and Tenant Act 1958* (Vic) ss 9 and 10, *Property Law Act 1974* (Qld) s 138 and *Landlord and Tenant Act 1935* (Tas) ss 9 and 10. The South Australian Committee recommended that it be repealed and replaced with an equivalent section in the *Landlord and Tenant Act 1936*: SA54 14.

³⁵⁸ There were similar provisions in the *Landlord and Tenant Act 1899* (NSW) but they have been repealed.

³⁵⁹ *Final Report on Legislation Relating to Landlord and Tenant*(1986) para 36.

In Western Australia, so far as "residential premises"³⁶⁰ are concerned, the position is governed by the *Residential Tenancies Act 1987* which provides for the means of terminating tenancies of residential premises³⁶¹ and for the payment of compensation to an owner for holding over by a tenant.³⁶² The Commission recommends that the section be repealed and re-enacted in relation to other premises but for the reasons given by the New Zealand Property Law and Equity Reform Committee consideration should be given to simply repealing it.

Section 2 of the statute deals with a tenant's right to forestall ejectment for the recovery of possession of the leased premises by paying the arrears.

This section should be repealed: although there is no equivalent provision in Western Australia, section 81 of the *Property Law Act 1969* provides restrictions on and relief against the forfeiture of leases and under-leases.³⁶³ The section has been repealed in the Australian Capital Territory, Victoria, Queensland and the United Kingdom. It was repealed and re-enacted in New South Wales.³⁶⁴ It has been preserved in New Zealand.³⁶⁵

Section 3 of the statute deals with the interaction of courts of equity and law. It requires a lessee seeking relief in equity against proceedings at law to lodge a security for the sum due and in arrears before an injunction is granted against the proceedings.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It should be repealed because the procedure for dealing with claims for possession of land is dealt with in statutes relating to the courts and rules of court.

Section 4 of the statute deals with relief from forfeiture of a lease.³⁶⁶

This section should be repealed: as with section 2, although there is no equivalent provision in Western Australia, section 81 of the *Property Law Act 1969* provides restrictions on and relief against the forfeiture of leases and under-leases. The section has been repealed in the Australian Capital Territory, Victoria, Queensland and the United Kingdom. It has been preserved in New Zealand.³⁶⁷

Section 5 of the statute deals with the recovery of distress of rents seck, rents of assize and chief rents.

The section is obsolete: distress for rent has been abolished: *Distress For Rent Abolition Act 1936*.

³⁶⁰ That is, "premises that constitute or are intended to constitute a place of residence": *Residential Tenancies Act 1987* s 3.

³⁶¹ Id Part V.

³⁶² Id s 76.

³⁶³ As to the availability of equitable relief against forfeiture see 51 above.

³⁶⁴ For the new provision see *Landlord and Tenant Act 1899* (NSW) s 8(3).

³⁶⁵ It has subsequently been recommended that the section be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 422.

³⁶⁶ As to the availability of equitable relief against forfeiture see 51 above.

³⁶⁷ It has subsequently been recommended that the section be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 422.

Section 6 of the statute deals with the situation of the surrender of a head lease for the purpose of renewal, when sub-leases are in existence, and operates to preserve the rights and liabilities of the head lessee and the sub-lessees.

The section should be repealed: superseded by section 83 of the *Property Law Act 1969*. It has been repealed in the Australian Capital Territory,³⁶⁸ New South Wales, Queensland, Victoria, and the United Kingdom. It has been preserved in New Zealand.³⁶⁹

7 George II chapter 20 (1733): Mortgage

This statute deals with the foreclosure of mortgages by order of a court. It gave jurisdiction to the Court of Chancery, on the application of the defendant and on his admitting the title of the plaintiff, to make a decree before the hearing. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁷⁰

The New South Wales Law Reform Commission concluded that the statute was unnecessary because ". . . the Court of Chancery had inherent jurisdiction to stay proceedings in any cause, and at any stage of the cause, whenever the defendant submitted to a decree establishing the full demand made by the bill, and giving the whole relief prayed in respect of that demand with costs."³⁷¹ The Commission recommends that it be repealed.

11 George II chapter 19 (1737): Distress for rent

Sections 1-10 and 19-23 relate to distress for rent.

These sections should be repealed: distress for rent has been abolished by the *Distress For Rent Act 1936*.

Section 11 relates to attornment. This section provides that attornments made by tenants to strangers claiming title to the estate of their landlords are null and void. It can be repealed because it is unnecessary in the context of modern land titles registration. In any case attornment in relation to leases is obsolete: see *Property Law Act 1969* s 77. Formerly, attornment was necessary to perfect the grant of a reversion or remainder.

Sections 12 and 13 relate to proceedings for ejectment, now called an action for possession of land.³⁷² Section 12 requires a tenant to whom any declaration in ejectment is delivered to give notice of it to his landlord. Section 13 allows a landlord, in an action by a third party for ejectment, to join himself with the tenant as a defendant or to appear alone if the tenant did not appear. It was designed to prevent a tenant in possession, the plaintiff and the casual ejector conspiring to defraud the landlord of his property. Ejectment was abolished in England by the *Common Law Procedure Act 1852*. This Act was not adopted in Western Australia, but the various forms of action were replaced by a writ of summons in the *Supreme*

³⁶⁸ For a substituted provision see ACT 1986 Act Schedule 2 Part 14. The ACTAG's Report (at 88) recommended that the statute be repealed and the substantive provision incorporated into Australian Capital Territory property law.

³⁶⁹ It has subsequently been recommended that the section be repealed and replaced by a provision in a new Property Law Act: NZ Property Law Report 422.

³⁷⁰ The South Australian Committee recommended that it be repealed but with a saving of the amendments in the law made by the statute: SA54 14.

³⁷¹ NSW Report 108.

³⁷² J G Fleming *The Law of Torts* (8th ed 1992) 48.

Court Ordinance 1861.³⁷³ Although there is no provision requiring a tenant to give a landlord notice of proceedings for possession of land,³⁷⁴ rules of court allow those not named as a defendant to be joined as a party to the proceedings.³⁷⁵ Accordingly the sections can be repealed.

Section 14 relates to actions for use and occupation of land. In this form of action the amount of rent reserved was regarded as a measure of damages. Such an action might, at common law, be brought either as an action of assumpsit (an action for breach of a simple contract not under seal) or as an action of debt. Before the Act of 1737, proof of an actual demise, whether by deed or otherwise, was a defence to the action of assumpsit. An action for debt for use and occupation was not defeated by the proof of an actual demise not under seal. That is, an action for debt existed independently of an action of assumpsit and was not defeated by proof of an actual demise unless it was under seal. The effect of the section was that an action was not nonsuited by evidence of any parole demise or any agreement (not being by deed) and the plaintiff could use it as evidence of the quantum of damages to be recovered.

Section 14 has been repealed and replaced by a similar provision in Victoria.³⁷⁶ It has been preserved in New Zealand³⁷⁷ and it is still in force in the United Kingdom. It has been repealed in New South Wales and Queensland. The Australian Capital Territory Law Reform Commission saw no point in preserving the distinction between the two forms of action or in preserving the defence of demise by deed.³⁷⁸ This recommendation was adopted.³⁷⁹

The Commission agrees with the Australian Capital Territory Law Reform Commission, and recommends that section 14 be repealed and replaced with a provision along the same lines as that in the Australian Capital Territory.

Section 15 provides that rents are recoverable from an under tenant by the executor or administrator of a tenant for life where the life tenant dies between two rent days. Prior to the enactment of this section, the executor or administrator was not entitled to any rent, and since the lease was at an end, the lessee was not bound to pay any rent due, on a proportionate basis, to the tenant for life at the time of his death. As a result of the section, the executor was entitled to a proportion of the rent.

This section should be repealed: superseded by the provisions as to apportionment in the *Property Law Act 1969*.³⁸⁰ It has been repealed in New South Wales, Victoria, Queensland, the Australian Capital Territory, New Zealand and the United Kingdom.

Sections 16 and 17 are discussed below.³⁸¹

³⁷³ S 23.

³⁷⁴ Except s 102 of the *Local Courts Act 1904* which relates particularly to old system land and which the Commission has recommended be repealed: Law Reform Commission of Western Australia *Report on Local Courts: Jurisdiction, Procedures and Administration* (Project No.16 Part I 1988) para 18.5

³⁷⁵ *Rules of the Supreme Court 1971* O 12 r 8, O18 r 10; *Local Court Rules 1961* O 10 r 10.

³⁷⁶ *Landlord and Tenant Act 1958* (Vic) s 8. The South Australian Committee recommended that it be repealed and be replaced with an equivalent section in the *Landlord and Tenant Act 1936*: SA 54 14.

³⁷⁷ NZ Act s 3(1). It has subsequently been recommended that the section be repealed without replacement: NZ Property Law Report 422.

³⁷⁸ ACT Report 17-18.

³⁷⁹ ACT 1986 Act Schedule 2 Part 15. The ACTAG's Report (at 88) recommended that this provision be repealed and the substantive provision incorporated into Australian Capital Territory property law.

³⁸⁰ Part XV.

³⁸¹ See the discussion of 57 George III chapter 52 (1817): Deserted tenements at 80-81 below.

Section 18 is discussed above.³⁸²

12 George II chapter 27 (1738): Justices of Assize

This statute gives power to judges to act as judges of gaol delivery in their own area.

This statute should be repealed: it is unnecessary because section 16(1)(b) of the *Supreme Court Act 1935* provides that the Supreme Court is a court of oyer and terminer and general gaol delivery for the State. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁸³

14 George II chapter 20 (1740): Common recoveries

Most of this statute deals with common recoveries which are obsolete in this State and those provisions can be repealed. Section 9, however, amends the Statute of Frauds, in relation to estates pur autre vie (a tenancy of land for the life of another, the cestui que vie). The section should be preserved and reviewed as part of a review of the Statute of Frauds.³⁸⁴ The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁸⁵

16 George II chapter 18 (1742): Justices jurisdiction

This statute provides that justices are not disqualified from hearing rate and tax cases by reason of the fact that they are ratepayers or taxpayers of the area involved.

It should be repealed: superseded by section 15(2) of the *Justices Act 1902*³⁸⁶ and the common law on disqualification for bias.³⁸⁷ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁸⁸

19 George II chapter 22 (1745): Harbours

This statute deals with the discharge of ballast or rubbish from vessels and vessels sunk or stranded in any harbour.

It should be repealed: superseded by the Western Australian *Marine Act 1982* (section 71 deals with vessels which are a hazard or obstruction) and the Western Australian *Marine (Sea Dumping) Act 1981* (section 5 deals with the dumping of waste or other matter from vessels

³⁸² See the discussion of 4 George II chapter 28 (1730): Landlord and tenant at 63-65 above.

³⁸³ The South Australian Committee recommended that it be repealed but with a saving of the reform made by the statute: SA61 17.

³⁸⁴ See 54 above.

³⁸⁵ The South Australian Committee recommended that it be repealed but with a saving clause preserving the amendment made to the law by section 9: SA54 14-15.

³⁸⁶ Which provides:

“No justice shall be disqualified from acting in the discharge of his duties in any matter relating to any municipality, board of health, or any local authority by reason only of being a ratepayer or interested in common with the public.”

³⁸⁷ *R v Watson: ex parte Armstrong* (1976) 136 CLR 248, 262-263

³⁸⁸ The South Australian Committee recommended that it be repealed but a section in similar terms be placed in the *Justices Act* (SA): SA80 30.

into coastal waters or ports). It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁸⁹

24 George II chapter 23 (1750): Calendar (New Style)

This statute adopted the Gregorian Calendar in lieu of the Julian Calendar. It declared the Gregorian system to be in effect in England. Much of the original statute, which contained transitional provisions, is spent. It also contained provisions requiring the observance of certain days and tables in aid of the calculation of the date of Easter.

The New South Wales Law Reform Commission recommended the repeal of the statute and its replacement with a modern provision. It did so to provide ". . . in general terms for the determination of certain matters, including the ordering of Easter Day in accordance with the universally accepted practice." The recommendation was adopted in section 16 of the NSW Act. The ACT Report doubted whether this section served a practical purpose "since it mentions - and requires, for its full understanding, reference to - the Act of 1750."³⁹⁰ The statute has been preserved in Queensland. In New Zealand the title, preamble, part of section 1 and section 2 have been preserved. The other parts were repealed because they were transitional provisions or related to Easter. The parts relating to Easter were repealed because they were inaccurate and not observed in practice. The words "in Europe, Asia, Africa and America" were omitted from section 1 because the continents mentioned did not include New Zealand. The South Australian Committee suggested that section 2 and the parts dealing with computing Easter and moveable feasts could be preserved.³⁹¹

The Saskatchewan Law Reform Commission concluded that the statute could be repealed:

"The English Calendar Act was adopted more to effect a change in custom than to provide a legal basis for the calendar. After more than two centuries, it is hardly necessary to retain an obscure English statute to prevent calendar makers from falling into error."³⁹²

It has been repealed in Victoria³⁹³ and the Australian Capital Territory. Notwithstanding its repeal in the Australian Capital Territory, the years (including leap years), months and days continue to occur, and be reckoned, in accordance with the Calendar established by the statute.³⁹⁴

The Commission recommends that the approach in New Zealand be adopted, that is, that only those parts that may still be relevant be re-enacted.

24 George II chapter 44 (1750): Constables protection

This statute gives protection to justices, constables and others for what they do in the execution of their office.

³⁸⁹ The South Australian Committee recommended that it be reviewed to see if any part of it should be brought into modern legislation: SA80 33.

³⁹⁰ ACT Report 9.

³⁹¹ SA80 38.

³⁹² Sask Report 274.

³⁹³ Following a recommendation by Kewley (104) who agreed with the PNG Report that the computing of time by the Gregorian Calendar was so well established that it did not require legislative support.

³⁹⁴ ACT 1988 Act s 7(3).

It should be repealed: superseded by Part IX of the *Justices Act 1902* and section 138 of the *Police Act 1892* which incorporates section H of the *Shortening Ordinance 1853*.³⁹⁵ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.³⁹⁶ In the United Kingdom only section 6 relating to police constables has been retained.

32 George II chapter 28 (1758): Debtors imprisonment

This statute deals with the arrest and detention of persons in the course of civil proceedings.

It should be repealed: arrest in pending actions is dealt with in sections 63-68 of the *Supreme Court Act 1935*. It has been repealed in the Australian Capital Territory, New South Wales,³⁹⁷ Queensland, Victoria, New Zealand and the United Kingdom.

4 George III chapter 10 (1763): Recognizances (Discharge)

This statute deals with the discharge of recognizances.

It should be repealed because there is adequate machinery for estreating recognizances.³⁹⁸ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.³⁹⁹

6 George III chapter 12 (1766): American colonies

This statute provides for the Parliament of Great Britain to have power to make laws throughout the dominions and colonies of the Crown.

It should be repealed because of the enactment of the *Australia Act 1986* (UK). It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁰⁰

7 George III chapter 38 (1766): Engraving copyright

This statute created a right to copyright in engravings.

It should be repealed: superseded by the Commonwealth *Copyright Act 1968* which provides protection for works made before the first Copyright Act in 1911. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁰¹

³⁹⁵ See Law Reform Commission of Western Australia *Report on Police Act Offences* (Project No 85 1992) 258-259.

³⁹⁶ The South Australian Committee recommended that it be repealed but that consideration be given to whether a saving of the law ought to be inserted in the repealing statute: SA58 10.

³⁹⁷ Ss 1, 3 and 4 have been re-enacted in New South Wales: NSW Act s 40.

³⁹⁸ *Recognizances (Forfeiture) Ordinance 1861*; *Justices Act 1902* s 154A; *Criminal Code* s 746A; *Bail Act 1982* ss 57 and 58.

³⁹⁹ The South Australian Committee recommended that it be repealed but with a saving of the jurisdiction given by the statute: SA 61 18.

⁴⁰⁰ The South Australian Committee recommended that it be repealed once residual links with South Australia had been severed: SA96 9.

⁴⁰¹ The South Australian Committee recommended that it be repealed but with a preservation of any rights existing in the State under the statute: SA85 23.

9 George III chapter 16 (1769): Crown suits

This statute provides a limitation period of sixty years from the accrual of the right to possession for the recovery of land by the Crown, unless the Crown had, during that time, received the rents and profits. After sixty years, the title of the Crown to the land was extinguished, and an estate vested in the adverse possessor.

It should be repealed: it is of no effect because section 36 of the *Limitation Act 1935* provides that the right and title of the Crown in any land cannot be affected by the possession of the land adverse to the Crown.⁴⁰² It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁰³

10 George III chapter 51 (1770): Entail improvement

This statute provides for improvements in the process relating to entails.

This statute should be repealed because fee tail estates no longer exist in Western Australia: *Property Law Act 1969* s 23. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and partly repealed in the United Kingdom.⁴⁰⁴

12 George III chapter 11 (1772): Royal marriages

This statute prohibits descendants of the Sovereign from marrying without Royal consent and invalidates any marriage entered into without that consent. It has been preserved in New South Wales, Victoria, Queensland, the Australian Capital Territory and New Zealand. The South Australian Committee recommended that it be preserved. Sections 1 and 2 are still in force in the United Kingdom. The Saskatchewan Law Reform Commission recommended that it be declared to remain in force to the extent that it related to matters within provincial jurisdiction because of its historical interest.⁴⁰⁵

The Commission recommends that this statute be preserved. However, it may have no effect for two reasons. First, the statute excludes all persons descended from King George II through princesses who have married into foreign families. This possibly exempts all, or nearly all, those who are in close succession to the Crown.⁴⁰⁶ Secondly, it might have been impliedly repealed by the Commonwealth *Marriage Act 1961*. At common law the prevailing view is that the essential validity of a marriage is governed by the law of the antenuptial domicile of each of the intending spouses.⁴⁰⁷ As such, the statute would have applied to those to whom it was relevant if they were domiciled in the United Kingdom. Now "[m]arriages celebrated in Australia [involving foreign parties] on or after 7 April 1986 are subject exclusively to Australian law as regards validity both as to form and as to essence: *Marriage Act 1961* s 23A(1)(a)."⁴⁰⁸

⁴⁰² Bradbrook para 15.05.

⁴⁰³ The South Australian Committee recommended that it be repealed but the provisions of the statute so far as relevant to South Australia be placed in the *Limitation of Actions Act*: SA65 14.

⁴⁰⁴ The South Australian Committee recommended that it be retained pending a general review of the law of property: SA55 25.

⁴⁰⁵ Sask Report 314-315.

⁴⁰⁶ C d'O Farran *The Royal Marriages Act 1772* (1951) 14 MLR 53.

⁴⁰⁷ P E Nygh *Conflict of Laws in Australia* (5th ed 1991) 355.

⁴⁰⁸ Id 347.

14 George III chapter 48 (1774): Life assurance

At common law, insurances by way of gaming or wagering were valid, subject to certain qualifications. Section 1 of the statute provides (notwithstanding its name) that insurances on lives or other events⁴⁰⁹ where the person for whose benefit the policy was made has no interest, or by way of gaming or wagering, are void. Its object was to prevent gambling under the form and pretext of a policy of insurance by those who had no interest in the subject-matter of the insurance.⁴¹⁰ Under section 2 the policy is also required to contain the name of the person interested, or for whose benefit the policy is made. In *Davjoyda Estates Pty Ltd v National Insurance Co (NZ) Ltd*⁴¹¹ Manning J concluded that section 2 supplements section 1 so that the requirement for inserting the names of persons interested applies only where the person effecting the policy has no interest but is acting on behalf of a person with an interest. The effect of section 2 is to validate such a policy. No greater sum is to be recovered from the insurers than the amount or value of the interest of the assured in the life or event insured. The statute specifically excludes from its ambit insurances bona fide made on ships, goods or merchandises.

The extent to which this statute is in force in this State is unclear for two reasons. First, the statute has been repealed by the Commonwealth *Insurance Contracts Act 1984* in its application to a contract of insurance or proposed contract of insurance to or in relation to which the Act applies so far as it is "part of the law of the Commonwealth". According to Sutton, the 1774 statute will cease to have effect with regard to contracts within the Commonwealth Act if the view is taken that the reference to a law of the Commonwealth is "a reference to the law of the whole of Australia, and not merely to federal law as opposed to State law."⁴¹² Secondly, some contracts are excluded from the operation of the Commonwealth Act. Excluded contracts include those for reinsurance and State insurance.⁴¹³ These excluded contracts may be outside the scope of the 1774 statute in any case because Manning J concluded in *Davjoyda Estates Pty Ltd v National Insurance Co of New Zealand Ltd*⁴¹⁴ that the statute could not be concerned with contracts of insurance and other contracts of indemnity ". . . since it was completely inconsistent with the notion of indemnity that there should be an absence of interest or a contract made by way of gaming or wagering."⁴¹⁵

The statute is in need of review. In the meantime it should be preserved. It could be replaced by a provision in similar terms to that applicable in New South Wales and Queensland.⁴¹⁶ The New South Wales legislation expressly adopts the view of Manning J as to the correct interpretation of the statute. To the extent that it covers the same ground as and is inconsistent with the Commonwealth Act, it would be invalid.

14 George III chapter 78 (1774): Fire prevention (Metropolis)

Two provisions of this statute are still important: sections 83 and 86.

⁴⁰⁹ It has been held to apply to personal accident insurance and to insurance on events.

⁴¹⁰ For a discussion of the scope of the statute see K Sutton *Insurance Law in Australia* (2nd ed 1991) 356-360.

⁴¹¹ (1965) 69 SR(NSW) 381, 426-427.

⁴¹² K Sutton *Insurance Law in Australia* (2nd ed 1991) 355 and 361.

⁴¹³ That is "...insurance business organised and conducted by the government of the State": id 16.

⁴¹⁴ (1965) 69 SR (NSW) 381, 428.

⁴¹⁵ K Sutton *Insurance Law in Australia* (2nd ed 1991) 357.

⁴¹⁶ NSW Act s 23; Qld Act s 8.

Section 83 provides that an insurer of a building against loss or damage by fire is required, on the request of any person interested in the building, to cause the money for which it has been insured to be expended in repairing or reinstating it, unless -

1. the person claiming the insurance money within a certain period after the claim is adjusted gives security to the insurer that the money will be so expended; or
2. the insurance money is disposed of to all contending parties to their and the insurer's satisfaction.

It was passed to restrict the incidence of arson for the purpose of obtaining insurance moneys.

The section has been repealed in New South Wales, Victoria and the Australian Capital Territory. It has been preserved in New Zealand.⁴¹⁷ It has been repealed and re-enacted in Queensland and Tasmania.⁴¹⁸

The statute has been abrogated with respect to contracts of insurance caught by the Commonwealth *Insurance Contracts Act 1984*.⁴¹⁹ See the comments above⁴²⁰ on the effect of this statute on United Kingdom statutes in force in Western Australia. In Western Australia the 1774 statute is still in force with respect to contracts, but only those involving State insurance, which are not covered by the 1984 Act.⁴²¹ Notwithstanding the privatisation of the SGIO, the State Government Insurance Commission can still undertake insurance operations: see section 6 of the State Government *Insurance Commission Act 1986*.

Although there has not been any discernible mischief in New South Wales since it was impliedly repealed in 1879,⁴²² the Commission recommends that it be repealed and re-enacted. The Commission suggests that the need for its retention should be reviewed. There is already a statutory power for a mortgagee to require the mortgagor to apply any insurance moneys received towards reinstatement of the mortgaged property.⁴²³

Section 86 provides that no action shall be maintained against ". . . any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin." Judicial decisions have established that any fire caused or allowed to spread by the negligence of the defendant, or intentionally created by him or those for whom he was responsible, is not an accidental one.⁴²⁴ The purpose of the provision was to modify the special *ignis suus* rule relating to the liability of an occupier for damage caused by the escape of fire from his premises. The High Court concluded that as the special *ignis suus* rule does not survive in our common law the provision can be treated by the courts as no longer applicable.⁴²⁵ It can therefore be repealed.⁴²⁶

⁴¹⁷ It has subsequently been recommended that the section be repealed: NZ Property Law Report 422.

⁴¹⁸ *Property Law Act 1974* (Qld) s 58; *Conveyancing and Law of Property Act 1884* (Tas) s 90E.

⁴¹⁹ S 3(1).

⁴²⁰ 71.

⁴²¹ For a discussion of reinstatement under the statute see K Sutton *Insurance Law in Australia* (2nd ed 1991) 862-866.

⁴²² Australian Law Reform Commission *Insurance Contracts* (Report No. 20 1982) 77.

⁴²³ *Property Law Act 1969* s 64 (3).

⁴²⁴ *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331, 334.

⁴²⁵ Id 337.

⁴²⁶ In any case, it might not be part of the inherited law of the State: see *Burnie Port Authority v General Jones Pty Ltd* (1994) 68 ALJR 331, 334.

It has been repealed in New South Wales and Queensland. It has been repealed and re-enacted in Victoria, Tasmania and the Australian Capital Territory.⁴²⁷ It has been preserved in New Zealand.⁴²⁸

15 George III chapter 39 (1775): Oaths

This statute gives justices of the peace a general power to administer oaths and affirmations for the purpose of levying penalties and levying distress prescribed in an Act of Parliament, but there is no express direction in that Act. It has been repealed in the Australian Capital Territory, New South Wales, Queensland and New Zealand. It is still in force in the United Kingdom and it was re-enacted in Victoria⁴²⁹ though the provision has since been repealed.

There are still statutes in Western Australia that direct the levying of distress.⁴³⁰ The Commission therefore recommends that the 1775 statute be repealed and re-enacted. However, it suggests that the statutes that direct the levying of distress and penalties be reviewed to provide for recovery or execution under either the *Justices Act 1902* or the *Local Courts Act 1904*. Once completed, the statute could be repealed.

22 George III chapter 75 (1782): Colonial leave of absence

54 George III chapter 61 (1814): Public office of colony

The 1782 statute provides for the removal from office, by the governor in council of a colony or plantation, of a person holding an office in the colony by virtue of letters patent. The 1814 statute amends it.

These statutes have been repealed in the Australian Capital Territory, Queensland, Victoria, New Zealand and the United Kingdom.⁴³¹ The New South Wales Law Reform Commission expressed doubt whether the repeal of the 1782 statute in the United Kingdom in 1964 extended to the Australian States because of section 4 of the Statute of Westminster 1931.⁴³² However, the accepted view appears to be that section 4 only refers to the law of the Commonwealth and the repeal of the statute in the United Kingdom would have extended to Western Australia. It could therefore be removed from our Statute Book. Even if that is not the case, it should be removed because it has no further application: Western Australia is not a colony and it would not apply to anyone anymore. Likewise, the 1814 statute should be repealed.

⁴²⁷ *Supreme Court Act 1986* (Vic) s 48; *Supreme Court Civil Procedures Act 1932* s 11(15); ACT 1986 Act Schedule 2 Part 15A. The ACTAG's Report (at 89) recommended that the statute be repealed and the substantive provisions be placed in the Australian Capital Territory legislation dealing with tort law.

⁴²⁸ It has subsequently been recommended that the section be repealed: NZ Property Law Report 422.

⁴²⁹ *Evidence Act 1958* (Vic) s 110A (repealed).

⁴³⁰ See *Masters and Servants Act 1892* s 10 and *Pawnbrokers Act 1860* s 26.

The examination of judgment debtors is dealt with in both the *Supreme Court Rules 1971* (O 48) and the *Local Court Rules 1961* (O 27 r 13).

⁴³¹ The South Australian Committee recommended that it be retained until some mechanism was provided for a right of appeal against removal "from office by resolution of both Houses of Parliament concurred in by the Governor": SA102 5.

⁴³² The effect of this section is that the repealing statute does not apply to a Dominion unless it is expressly declared in the statute that the Dominion has requested, and consented to, the enactment thereof.

25 George III chapter 35 (1785): Crown debtors

This statute relates to the sale by the Crown of the property of debtors of the Crown by a writ of extent or diem clausit extremum.

It should be repealed: the Crown may sue in any court of competent jurisdiction in the same manner as a subject: *Crown Suits Act 1947* section 5. The *Crown Suits Act* also abolished the writ of extent: id section 11. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴³³

26 George III chapter 38 (1786): Imprisonment of debtors

This statute provides that process cannot be issued simultaneously both to imprison and to execute against the goods of a debtor.

It should be repealed and re-enacted because the *Debtors Act 1871* (which governs imprisonment for debt) does not give a debtor such a right.⁴³⁴ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴³⁵

27 George III chapter 29 (1787): Competency of witnesses

This statute provides that the inhabitants of a local government area are competent witnesses for the purpose of proving the commission of any offence where the fine goes to the benefit of the local government area.

It should be repealed: the question of the competency of interested witnesses is dealt with by section 6 of the *Evidence Act 1906*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴³⁶

28 George III chapter 56 (1788): Marine insurance

This statute provides that no policy on any ship or any goods or other property should be effected unless it names -

1. one or more of the persons interested;
2. the consignor or consignee of the property insured;
3. the person resident in Great Britain who effected the policy; or
4. the person who gave the order to the agent to effect it.

According to Sutton, the courts ". . . gave this Act the most liberal construction so that in practice it was reduced to a mere prohibition of policies in blank."⁴³⁷

⁴³³ The South Australian Committee recommended that it be repealed but with operative parts of it included in the *Crown Proceedings Act 1972*: SA55 25.

⁴³⁴ S 3 of the Act provides that no imprisonment under the section shall operate as a satisfaction of any debt or cause of action or deprive any person to take out execution against the property of the person imprisoned.

⁴³⁵ The South Australian Committee recommended that it be repealed but that an equivalent provision be put in the *Debtors Act 1936*: SA86 12.

⁴³⁶ The South Australian Committee recommended that it be repealed but with a saving of the law made by the statute: SA58 13.

⁴³⁷ K Sutton *Insurance Law in Australia* (2nd ed 1991) 353.

It has been repealed in New Zealand.⁴³⁸ It has been repealed and re-enacted in Victoria.⁴³⁹ It was repealed by the United Kingdom by the *Marine Insurance Act 1906* and a simpler provision was substituted. Section 23(1) of that Act provides that a marine policy must specify the name of the assured or of some person who effects the insurance on his behalf. This provision was reproduced in section 29 of the Commonwealth *Marine Insurance Act 1909*. The statute has been repealed in both New South Wales and Queensland but section 29 of the Commonwealth Act has been adopted.⁴⁴⁰

The statute was repealed by the *Marine Insurance Act 1907* so far as it relates to marine insurance.⁴⁴¹ It is still in force in relation to contracts of insurance for any goods or other property not within the ambit of the Commonwealth *Insurance Contracts Act 1984* which repealed it in its application to a contract of insurance to which the Commonwealth Act applies in so far as it is part of the law of the Commonwealth.⁴⁴² For the reasons given above⁴⁴³ the extent to which this statute is in force in this State is unclear. It should be preserved pending any Government review of the provision.

32 George III chapter 58 (1792): Information in nature of Quo Warranto

This statute provides that in an information in the nature of quo warranto for the exercise of a municipal office, the defendant may plead the holding of the office for six years or more.

It should be repealed: section 155(1) of the *Local Government Act 1960* abolishes writs of quo warranto, informations in the nature of quo warranto, and other proceedings in the Supreme Court, to try or question the title of a person to act in office of member of a council. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁴⁴

32 George III chapter 60 (1792): Libel (Fox's Act)

This statute provides that it is the function of the jury in a trial for criminal libel to find a general verdict of guilty or not guilty. It has been repealed in Queensland and New Zealand. It has been repealed and replaced in the Australian Capital Territory and Victoria.⁴⁴⁵ In New South Wales it has been repealed because there are equivalent provisions in section 53 of the *Defamation Act 1974* (NSW). It is still in force in the United Kingdom.

The statute can be repealed because it has been superseded by section 643 of the *Criminal Code*. This section provides that:

⁴³⁸ The South Australian Committee recommended that it be repealed: SA86 16-17

⁴³⁹ See *Instruments Act 1958* (Vic) s 18

⁴⁴⁰ NSW Act s 28; Qld Act s 11.

⁴⁴¹ S 93 and Second Schedule

⁴⁴² Contracts not within the ambit of the Commonwealth Act include State insurance (other than marine insurance), aviation insurance and contracts of reinsurance.

⁴⁴³ 71.

⁴⁴⁴ The South Australian Committee recommended that it be repealed and a provision put in the *Crown Proceeding Act*: SA65 14.

⁴⁴⁵ ACT 1986 Act Schedule 2 Part 16; *Crimes Act 1958* (Vic) s 420A. The South Australian Committee recommended that it be repealed but with a saving of the amendment made by the statute: SA61 20. In the Australian Capital Territory the statute is being considered for repeal by the Community Law Reform Committee in its defamation reference: ACTAG's Report 89.

". . . the jury,⁴⁴⁶ on the trial of a person charged with the unlawful publication of defamatory matter, may give a general verdict of guilty or not guilty upon the whole matter in issue in like manner as in other cases."

33 George III chapter 13 (1793): Acts of Parliament (Commencement)

This statute requires the Clerk of the Parliament to endorse on every Act of Parliament the day, month and year of its passing and the endorsement shall be taken to be part of the Act and to be the date of its commencement where no other commencement is provided. It is still in force in part in the United Kingdom.

To the extent that it applies in Western Australia, it should be repealed: the commencement of statutes is dealt with in sections 20-24 of the *Interpretation Act 1984*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.⁴⁴⁷

38 George III chapter 87 (1798): Administration of estates

This statute deals with the administration of assets in cases where the executor to whom probate was granted is out of the jurisdiction.

It should be repealed: the matter is now covered by the *Administration Act 1903*: section 33 (where infant is executor), 34 (where person entitled to probate or administration is out of the jurisdiction), 37 (probate or administration if executor etc absent etc) or 38 (special letters of administration if executor or administrator not within jurisdiction). It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom (with savings).⁴⁴⁸

39 & 40 George III chapter 54 (1800): Public accountants

This statute provides for the charging of those who collect revenue for the Crown who die or leave office indebted to the Crown, with the payment of interest on the outstanding sum and for compelling the payment of the balance due.

The statute should be repealed. The procedure for the collection of public monies is now governed by the *Financial Administration and Audit Act 1985*.⁴⁴⁹ The statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁵⁰

⁴⁴⁶ S 347 of the *Criminal Code* provides that the question whether any matter is or is not defamatory is a question of fact, a matter which is determined by a jury.

⁴⁴⁷ The South Australian Committee recommended that it be repealed and put into the *Acts Interpretation Act*: SA86 24.

⁴⁴⁸ The South Australian Committee recommended that it be repealed and its provisions inserted in the *Administration and Probate Act 1919*: SA54 15.

⁴⁴⁹ It does not provide for the payment of interest on outstanding sums.

⁴⁵⁰ The South Australian Committee recommended that s 1, which allows for interest on Crown debts, be embodied in modern legislation: SA86 39-40. In Western Australia s 32 of the *Supreme Court Act 1935* provides that the Court may make an order for pre-judgment interest.

42 George III chapter 85 (1802): Criminal jurisdiction

This statute provides for the trying and punishing in Great Britain of persons holding public employment for offences committed abroad.

It should be repealed: it is obsolete. Anyone committing an offence in this State could be dealt with under State or federal criminal law. Both the New South Wales Law Reform Commission and Kewley, which reported before the enactment of the United Kingdom *Australia Act 1986*, considered that it applied by paramount force and its repeal was beyond the power of a State Parliament.⁴⁵¹ It can now be repealed by the Parliament of Western Australia.⁴⁵² Two jurisdictions which had the power to repeal it have done so: the Australian Capital Territory and New Zealand.⁴⁵³

43 George III chapter 46 (1803): Costs

All but one of the sections of this statute deal with arrest on mesne process.⁴⁵⁴ These sections should be repealed because arrest in pending actions is dealt with in Part V of the *Supreme Court Act 1935*.

The other section provides that a plaintiff issuing execution against the goods of a defendant may also levy poundage fees and expenses of the execution. These costs can be recovered in the Supreme Court,⁴⁵⁵ the District Court⁴⁵⁶ and the Local Courts.⁴⁵⁷ The statute should therefore be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁵⁸

44 George III chapter 102 (1804): Habeas corpus

This statute provides that judges of superior courts in England may award writs of habeas corpus for bringing prisoners before courts of record to be examined as witnesses.

It should be repealed: superseded by section 22 of the *Prisons Act 1981*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.⁴⁵⁹ Part of it is still in force in the United Kingdom.

46 George III chapter 37 (1806): Witnesses

This statute provides that a witness cannot refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or expose him to a penalty or forfeiture, on the ground that the answering of the question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the

⁴⁵¹ NSW Report 123-124; Kewley 56-58.

⁴⁵² *Australia Act 1986* (UK) s 3.

⁴⁵³ The South Australian Committee recommended that it be repealed: SA102 5-6.

⁴⁵⁴ A writ intervening in the progress of an action between its beginning and end: Jowitt 1178.

⁴⁵⁵ *Supreme Court Act 1935* s 118.

⁴⁵⁶ *District Court of Western Australia Act 1969* s 56(1)

⁴⁵⁷ *Local Courts Act 1904* s 159(1). *Local Court Rules 1961* Appendix Form 103 provides for the recovery of poundage fees by bailiffs.

⁴⁵⁸ The South Australian Committee recommended that it be repealed but a section to the same effect should be placed in the *Supreme Court Act*: SA55 25.

⁴⁵⁹ The South Australian Committee recommended that it be repealed but a section to the same effect should be placed in the *Supreme Court Act*: SA61 21.

Crown or any person. It was probably unnecessary being merely declaratory of the common law.⁴⁶⁰

Out of caution it should be repealed and re-enacted in *Evidence Act 1906*.⁴⁶¹ It is still part of the law of Western Australia and there is no equivalent provision in the Act.⁴⁶² A similar recommendation was made by the South Australian Committee.⁴⁶³ The statute is still in force in the United Kingdom,⁴⁶⁴ but it has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria⁴⁶⁵ and New Zealand.

47 George III Sess 2 chapter 24 (1807): Crown lands, escheats

This statute deals with trusts on land that escheats to the Crown. If a sole trustee died without heirs or intestate there was an escheat to the Crown and the Crown was not bound by the trust.⁴⁶⁶ To overcome the hardship caused by this law, the statute provides that the sovereign may direct the execution of the trusts and grant land to any trustee for the execution of the trust.

In Western Australia, if no heir-at-law is available to inherit a deceased's real and personal property, the whole of the intestate property passes to the Crown by way of escheat.⁴⁶⁷ The *Escheat (Procedure) Act 1940* provides a special procedure for dealing with escheats. It does not expressly deal with property held by the deceased as a sole trustee, but a person claiming title to property which is the subject of an application for an order of escheat to the Supreme Court may appear and give evidence in support of the claim. Property which is the subject of a trust could then be excluded from a declaration that the property the subject of an application had become the property of the Crown by way of escheat.⁴⁶⁸ If a sole trustee dies, his personal representatives are invested with the requisite powers until a new trustee is appointed.⁴⁶⁹ Any new trustees oust the personal representatives.

In view of the law in Western Australia relating to escheat the statute is unnecessary and should be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁷⁰

⁴⁶⁰ NSW Report 124

⁴⁶¹ The privilege against answering questions which would expose a person to the risk of a civil penalty or forfeiture still exists in Western Australia: D Byrne and J D Heydon *Cross on Evidence* (Aus ed) paras 25115, 25125 and 25130.

⁴⁶² Id para 25165.

⁴⁶³ SA55 25.

⁴⁶⁴ It must, however, be read in the light of ss 14(1) and 16(1) of the *Civil Evidence Act 1968* (UK) which abolish the privilege in relation to a penalty in civil proceedings or a forfeiture.

⁴⁶⁵ For a similar provision see s 29 of the *Evidence Act 1958* (Vic).

⁴⁶⁶ Holdsworth Vol III 72.

⁴⁶⁷ *Administration Act 1903* Item 11 of the Table to s 14(1).

⁴⁶⁸ If this did not occur, the Governor in Executive Council could repay out of consolidated revenue the amount due to any person who eventually establishes a legal or equitable claim: *Escheats (Procedure) Act 1940* s 8(2). Payments may also be made to those who establish a moral but no legal or equitable claim: id s 9(1).

Further, the *Trust Property, Escheat Act 1834* (UK) which was adopted in this State by 7 Vict No 13 (1844) empowers the Court of Chancery, where a trustee dies without an heir, to appoint a person to convey land the subject of a trust to such person and in such manner as the Court thinks proper.

⁴⁶⁹ *Trustee Act 1962* s 45(2).

⁴⁷⁰ The South Australian Committee recommended that it be repealed but a section to the same effect should be placed in the *Law of Property Act*: SA89 14.

48 George III chapter 106 (1808): Acts of Parliament (Expiration)

This statute deals with an act of Parliament which expires while a bill to continue the act is still pending in Parliament. It enables it to continue in force notwithstanding that it expired if the bill continuing its operation is passed.

It may have been impliedly repealed by the *Interpretation Act 1918* which contained a similar provision (section 18). This provision was not incorporated in the *Interpretation Act 1984* which repealed almost all of the 1918 Act, including section 18. As Parliament appears to have concluded that such a provision is unnecessary, the United Kingdom statute should be expressly repealed if it is still in force. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.⁴⁷¹ It is still in force in the United Kingdom.

49 George III chapter 118 (1809): Parliamentary elections

This statute deals with bribery at Parliamentary elections.

It should be repealed: superseded by section 181 of the *Electoral Act 1907*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁷²

52 George III chapter 101 (1812): Charitable procedure

This statute enables two or more persons to apply to a court for directions in respect of the administration of a charitable trust, and for an order on the application to be made in a summary way subject to a right of appeal to the House of Lords within 2 years.

It should be repealed: sections 20-21 of the *Charitable Trusts Act 1962* provide for the supervision of charitable trusts by the Attorney General. Section 20 enables the Attorney General to inquire into the condition and management of charitable trust and section 21 provides that the Attorney General, a public servant or any other person may apply to the Supreme Court to enforce or vary a charitable trust. It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁷³ It has been repealed and replaced in the Australian Capital Territory.⁴⁷⁴

54 George III chapter 168 (1814): Informal attestation of certain deeds

This statute provides that deeds which are executed without memorandum of attestation are deemed valid.

It should be repealed: the method of execution of deeds is dealt with in sections 9 (formalities of deed) and 97 (relating to the execution of powers) of the *Property Law Act 1969*. It has

⁴⁷¹ The South Australian Committee recommended that it be repealed that a section to the same effect be put in the *Acts Interpretation Act*: SA89 16.

⁴⁷² The South Australian Committee referred it to the Attorney General for further consideration because the forms of bribery dealt with by it may not be covered by the *Electoral Act*: SA89 18.

⁴⁷³ The South Australian Committee recommended that it be repealed: SA61 22.

⁴⁷⁴ ACT 1986 Act Schedule 2 Part 18. The ACTAG's Report (at 89) recommended that Part 18 be repealed and the substantive provision incorporated into Australian Capital Territory legislation dealing with the jurisdiction of the Supreme Court.

been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁷⁵

56 George III chapter 100 (1816): Habeas corpus

With one exception statute makes no substantial changes to the common law. It deals with the issue of and return of the writ during vacation and makes it contempt of court to fail to comply with the writ. It also provides that on the return of the writ, the court shall inquire into the truth of the matter. This reverses the common law rule in civil cases that facts deposed by the jailor upon the writ cannot be impeached. The Saskatchewan Law Reform Commission recommended that this part be retained.⁴⁷⁶ It was the only part retained in the Australian Capital Territory.⁴⁷⁷ It has been preserved in New South Wales, Queensland, Victoria and New Zealand. It is still in force in part in the United Kingdom.

It should be repealed: the procedure for dealing with writs of habeas corpus is dealt with in Order 57 of the *Rules of the Supreme Court 1971*. The provisions relating to terms and vacations would be difficult to apply in this State. Contempt of court is dealt with in Order 55 of the Rules. A saving clause⁴⁷⁸ would ensure that the common law rule was not revived by the repeal of the statute but for the sake of certainty a provision similar to that in the Australian Capital Territory should be included in the *Supreme Court Act 1935*.

57 George III chapter 52 (1817): Deserted tenements

11 George II chapter 19 (1737): Distress for rent, sections 16 and 17

Section 16 of the 1737 statute permits the landlord to regain possession of tenements in a number of circumstances including where they are deserted and left uncultivated or unoccupied by the tenant and the tenant is in arrears for one year's rent. *Section 17* gives a right of appeal from a decision in proceedings authorized under section 16. It appears that the purpose of section 16 was "to compensate in part for the absence of sufficient distress to countervail arrears of rent."⁴⁷⁹ The 1817 statute amends these provisions so that they apply to tenants in arrears for one half year's rent.

Sections 16 and 17 have been repealed in the Australian Capital Territory, New South Wales, Queensland and Victoria.⁴⁸⁰ They have been preserved New Zealand⁴⁸¹ and are still in force in the United Kingdom. The 1817 statute has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand. It is still in force in the United Kingdom.⁴⁸²

⁴⁷⁵ The South Australian Committee recommended that it be repealed but that a provision covering the point should be put in the section of the *Law of Property Act* dealing with attestation of deeds: SA 61 23.

⁴⁷⁶ Sask Report 306.

⁴⁷⁷ For a substituted provision to the effect that a court may inquire into the truth of the matters set forth in the return of the writ see ACT 1986 Act Schedule 2 Part 19. The ACTAG's Report (at 89) recommended that the statute should be repealed and the substantive provision placed in Australian Capital Territory legislation dealing with the jurisdiction of the Supreme Court.

⁴⁷⁸ Para 2.8 above.

⁴⁷⁹ NSW Report 50.

⁴⁸⁰ For a similar provision in Victoria see *Landlord and Tenant Act 1958* s 30.

⁴⁸¹ It has subsequently been recommended that ss 16 and 17 be repealed consequent upon the abolition of the right to distrain: NZ Property Law Report 422.

⁴⁸² The South Australian Committee recommended that ss 16 and 17 and the 1817 statute be repealed but that the provisions be transferred to the *Landlord and Tenant Act 1936*: SA54 14 and 15.

At common law, a landlord had no right to repossess leased premises prior to the determination of the lease unless the lease contained a covenant creating that right. The provisions of the 1737 and 1817 statutes create an exception to this rule. In Western Australia, the abandonment of residential tenancies is covered by sections 77-79 of the *Residential Tenancies Act 1987*. However, there is no provision applicable to other tenancies.⁴⁸³ The Commission, therefore, recommends that the above provisions be repealed but, so far as tenancies other than residential tenancies are concerned, provision should be made for dealing with the abandonment of properties using either the model of the *Residential Tenancies Act 1987* or section 30 of the Victorian *Landlord and Tenant Act 1958*.

58 George III chapter 30 (1818): Costs

To prevent frivolous and vexatious actions of assault and battery and slander, this statute provides that if the damages do not exceed 40 shillings, the plaintiff may recover no more costs than damages.

It should be preserved pending a review. In particular, the sum of 40 shillings should be reviewed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁸⁴

59 George III chapter 69 (1819): Foreign enlistment

This statute forbids the Queen's subjects from enlisting in foreign armies or navies. It was repealed in the United Kingdom by the *Foreign Enlistment Act 1870*, an Act which applies in the Dominions.

It should be repealed: superseded by the Commonwealth *Crimes (Foreign Incursions and Recruitment) Act 1978*.⁴⁸⁵ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.⁴⁸⁶

60 George III & 1 George IV chapter 8 (1819): Criminal libel⁴⁸⁷

This statute provides that after a judgment against a person for composing, printing or publishing a blasphemous or seditious libel, the court may make an order for the seizure of

Recently the English Law Commission has recommended that ss 16 and 17 of the 1737 statute and the 1817 statute be repealed. It recommended the implementation of a new scheme for the termination of tenancies: *Landlord and Tenant Law: Termination of Tenancies Bill* (Law Com No. 221 1994).

⁴⁸³ See, however, s 93(ii) of the *Transfer of Land Act 1893* which applied to leases made under the Act. S 6 of the *Distress for Rent Abolition Act 1936* allows a landlord to determine a tenancy on giving seven days' notice in writing where the rent is unpaid for seven days and after that notice to bring proceedings in ejectment under the *Justices Act 1902* but it does not expressly deal with abandonment of premises.

⁴⁸⁴ The South Australian Committee recommended that it be repealed but a provision to that effect be put in the *Local Courts Act 1965* with a sum of \$100 instead of 40 shillings: SA55 26. It considered that such a provision would be "a salutary check on bringing neighbourly squabble to Court".

⁴⁸⁵ S 9 provides that it is an offence to recruit a person to serve in or with an armed force in a foreign country.

⁴⁸⁶ The South Australian Committee reserved consideration of the statute: SA59 33-34. It pointed out that it might have been repealed in its application to South Australia (and Western Australia) by the *Foreign Enlistment Act 1870* (UK) (assuming it was proclaimed in the colony). At the time of its report, if it had not been repealed, it would have continued in force by virtue of the *Colonial Laws Validity Act 1865* (UK). It can now be repealed in Western Australia: *Australia Act 1986* (UK) s 3. So too can the 1870 statute if it was proclaimed in the colony.

⁴⁸⁷ S 4 relating to the punishment of a defendant convicted of an offence for a second time was repealed by the *Criminal Code Act 1902*.

copies of the libel. This part is still in force in the United Kingdom. Blasphemous libel is not an offence in Western Australia. Sections 44-53 of the *Criminal Code* deal with sedition, including the misdemeanour of advisedly publishing any seditious words or writing.⁴⁸⁸

A number of jurisdictions have repealed the statute and replaced it with a provision empowering a court to make an order for seizure of any document containing the libel: New South Wales, Victoria and the Australian Capital Territory.⁴⁸⁹ It was simply repealed in Queensland and New Zealand. As there is no provision for a court to make an order for the seizure of copies of documents containing any seditious words or writing, the Commission recommends that a provision based on that in the Australian Capital Territory be enacted in Western Australia. The statute should then be repealed.

1 George IV chapter 55 (1820): King's Bench, Justice of Assize

This statute gives power to judges to sit in vacation.

It should be repealed: superseded by sections 38-45 of the *Supreme Court Act 1935*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁰

1 & 2 George IV chapter 121 (1821): Commissariat accounts

This statute deals with public accounts. It extends to the State by paramount force.

The statute should be repealed: it is obsolete so far as State administration is concerned. Public accounts are now governed by the *Financial Administration and Audit Act 1985*. The statute has been repealed in the Australian Capital Territory and New Zealand. It was retained in Queensland. It has also been retained in New South Wales and Victoria, but at the time of their repealing legislation the statute could not be repealed by the State Parliament.

3 George IV chapter 39 (1822): Warrants of attorney

The purpose of this statute is to prevent frauds on creditors by secret warrants of attorney to confess judgment.

It should be repealed: it has been superseded by Part III of the *Debtors Act 1871*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹¹

⁴⁸⁸ *Criminal Code* s 52(2).

⁴⁸⁹ *NSW Act* s 35; *Crimes Act 1958* (Vic) s 469AA; *ACT 1986 Act* Schedule 2 Part 20. In the Australian Capital Territory the statute is being considered for repeal by the Community Law Reform Committee in its defamation reference: ACTAG's Report 89.

⁴⁹⁰ The South Australian Committee recommended that it be repealed but that the relevant provision be put in the *Supreme Court Act*: SA89 39-40.

⁴⁹¹ The South Australian Committee recommended that it be repealed but with a saving of the amendment made by the statute: SA61 24-25.

4 George IV chapter 83 (1823): Factor**6 George IV chapter 94 (1825): Factor**

These statutes together with the *Factors Act 1842* (UK) (5 & 6 Victoria chapter 39) (adopted by 7 Victoria No 13 (1844)) and 29 Vict No 5 (1865) and 42 Vict No 3 (1878) govern the law relating to factors in Western Australia.

In the United Kingdom the Factors Acts of 1823 and 1825, together with further Factors Acts of 1842 and 1877, were repealed by the *Factors Act 1889*. This statute, which is still in force, consolidated and to some extent extended the earlier Acts. The law is in need of review: it is unsatisfactory that the law in this State is based on inherited and adopted United Kingdom statutes which have been subsequently repealed in the United Kingdom. Pending a review, the 1823 and 1825 statutes should be preserved.

5 George IV chapter 114 (1824): Marine assurance

This statute repeals so much of earlier statutes that restrained corporations from writing policies of marine assurance or from lending money by way of bottomry.⁴⁹²

It should be repealed because it is unnecessary. The provisions relating to implementing the Commission's recommendations would ensure that the repeal of the statute would not revive the earlier statutes.⁴⁹³ It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁴

6 George IV chapter 53 (1825): Lunatics

This statute deals with inquisitions of lunacy, petitions to traverse inquisitions, and the making of orders to manage the person and estates of lunatics.

It should be repealed: superseded by Part 6 of the *Guardianship and Administration Act 1990*. Further, the repeal of the statute would not affect the power of the Supreme Court to conduct inquisitions of lunacy under section 16(1)(d)(ii) of the *Supreme Court Act 1935*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁵

6 George IV chapter 56 (1825): Forgery

This statute deals with certain problems in the law of forgery.

⁴⁹² A “species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged”: Jowitt 242.

⁴⁹³ Para 2.8 above.

⁴⁹⁴ The South Australian Committee recommended that it be repealed but the relevant provision should appear in the *Marine Act*: SA91 10.

⁴⁹⁵ The South Australian Committee recommended that the provisions relating to inquisitions be re-enacted because they might be necessary if a lunatic has property outside Australia: SA61 25. However, a local order would not affect foreign immovables: E I Sykes and M C Pryles *Australian Private International Law* (3rd ed 1991) 379. Property outside the State is governed by s 73 of the *Guardianship and Administration Act 1990*.

It should be repealed: superseded by sections 409 (fraud) and 473 (forgery and uttering) of the *Criminal Code*. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁶

6 George IV chapter 91 (1825): Bubble companies

This statute repeals the "Bubble Act" of 1720 which was enacted to stem the growth of joint stock companies, that is, large unincorporated associations or partnerships of investors with transferable stock.

As its repeal would not revive the *Bubble Act* it can be repealed. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁷

7 & 8 George IV chapter 38 (1827): Presentments by constables

This statute provides that petty constables of parishes are not required to make presentments at Petty Sessions for certain offences.

It should be repealed because it is obsolete. It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom.⁴⁹⁸

9 George IV chapter 14 (1828): Statute of Frauds amendment

This statute is known as Lord Tenterden's Act. It deals in detail with the law of contract and was passed to remedy matters that had come to light since the enactment of the *Statute of Frauds 1677*.

Sections 1, 3 and 4 of this statute can be repealed because they have been superseded by sections 44(2) and (3), 45 and 46 of the *Limitation Act 1935*.

Section 2 provides that if a defendant in any action on a simple contract pleads a matter in abatement to the effect that any other person ought to be jointly sued and issue is joined on such plea and it is found at the trial that an action could not be maintained against that person the issue shall be found against the defendant. A plea of abatement is an obsolete form of pleading. Under existing rules the court may, on the application of a defendant, stay proceedings until any other persons who are jointly liable under a contract are added as defendants.⁴⁹⁹ Accordingly the section should be repealed.

⁴⁹⁶ The South Australian Committee recommended that it be repealed but with a saving of the amendment to the law made by the statute: SA59 37.

⁴⁹⁷ The South Australian Committee recommended that it be repealed but that two sections be put into the relevant company legislation: SA91 12. One ensured that, despite the repeal of the *Bubble Act*, the undertakings of joint stock companies "should be adjudged and dealt with in the like Manner as the same might have been adjudged and dealt with according to the Common Law", notwithstanding the *Bubble Act*. It therefore related to pending suits and need not be retained. Under the second "there is a liability created for individual corporators under a Corporation erected by Royal Charter." It need not be retained because the power to grant incorporations by Royal Charter is exercised by the Governor-General, and is therefore a Commonwealth and not a State matter: H A J Ford and R P Austin *Ford's Principles of Corporations Law* (6th ed 1992) para 105.

⁴⁹⁸ The South Australian Committee recommended that it be repealed but with a saving of the amendment made by the statute: SA59 38.

⁴⁹⁹ *Rules of the Supreme Court 1971* O 18 r 4(3).

Section 5, which deals with confirmation of promises made by infants, was examined by the Commission in its report on Minors' Contracts (Project No 25 - Part II 1988). In paragraph 6.14 of the report, the Commission recommended that the section be repealed in Western Australia. Unless the recommendation is adopted the section should be repealed and re-enacted.

Section 7 was repealed by the *Sale of Goods Act 1895*.

Sections 8-10 are not of importance in this State and can be repealed.⁵⁰⁰

Section 6 provides that no action can be brought based upon a representation or assurance as to the credit or ability of a person unless it is in writing and signed by the defendant. It is still in force in South Australia and the United Kingdom, and has been declared to be part of the law of New Zealand.⁵⁰¹ There are enactments to the same effect in the Australian Capital Territory, Tasmania and Victoria.⁵⁰² It has been repealed in New South Wales and Queensland. Because the section applies only to fraudulent misrepresentation,⁵⁰³ it has the anomalous effect that absence of written evidence is a defence to a claim for damages for fraudulent misrepresentation but not negligent misrepresentation.⁵⁰⁴ If the Statute of Frauds is reviewed,⁵⁰⁵ section 6 should be included in the review. Pending a review the section should be repealed and re-enacted.

10 George IV chapter 22 (1829): Government of Western Australia

This statute dealt with the government of Western Australia following the establishment of the colony. It provided for the King to:

". . . make, ordain, and (subject to such Conditions and Restrictions as to Him or them shall seem meet), to authorize and empower any Three or more Persons resident and being within the said Settlements to make, ordain, and establish all such Laws, Institutions, and Ordinances, and to constitute such Courts and Offices, as may be necessary for the Peace, Order, and good Government of His Majesty's Subjects and others within the said Settlements".

It continued in operation until 1870⁵⁰⁶ when it was impliedly repealed after the issue of writs for the election of members of the Legislative Council of Western Australia.⁵⁰⁷ All laws and Ordinances made under the statute were continued in force upon its repeal.⁵⁰⁸ It was expressly repealed in the United Kingdom in 1873. Its repeal did not affect any office or appointment made under it.⁵⁰⁹ It therefore no longer has any effect in Western Australia. In any case, the structure of the Government of Western Australia is now dealt with in the

⁵⁰⁰ S 8 relates to stamp duty, s 9 relates to Scotland and s 10 relates to the commencement date of the statute.

⁵⁰¹ It has subsequently been recommended that the section be repealed: NZ Property Law Report 422-423.

⁵⁰² *Mercantile Law Act 1962* (ACT) s 16; *Mercantile Law Act 1935* (Tas) s 11; *Instruments Act 1958* (Vic) s 128.

⁵⁰³ *Banbury v Bank of Montreal* [1918-1919] All ER Rep 1.

⁵⁰⁴ J W Carter and D J Harland *Contract Law in Australia* (2nd ed 1991) para 1105.

⁵⁰⁵ 54 above.

⁵⁰⁶ E Russell *A History of the Law in Western Australia and its Development from 1829 to 1979* (1980) 329-330.

⁵⁰⁷ *Australian Constitutions Act 1850* (UK) s 10.

⁵⁰⁸ *Id* s 25.

⁵⁰⁹ *Statute Law Revisions Act 1873* (UK) s 1.

Constitution Act 1889 and *Constitution Acts Amendment Act 1899*. For the sake of certainty it should be repealed.

ADMIRALTY STATUTES

The law relating to civil and criminal admiralty jurisdiction, piracy, prize and slavery has been reviewed by the Australian Law Reform Commission in two reports -

- * Civil Admiralty Jurisdiction (Report No 33 1986);
- * Criminal Admiralty Jurisdiction and Prize (Report No 48 1990).

As a result of this review, the Commonwealth Parliament enacted the *Admiralty Act 1988* dealing with civil admiralty jurisdiction. Legislation dealing with criminal admiralty jurisdiction, prize and slavery has not been enacted as yet. According to the ACTAG's Report (at 83) the Commonwealth is currently drafting Crimes at Sea legislation as a result of the recommendations of the Australian Law Reform Commission. The Commission recommends that the following United Kingdom statutes, other than those relating to piracy, be preserved until Commonwealth legislation is enacted.⁵¹⁰ Once Commonwealth law is in place, the statutes should be reviewed to determine whether they can be repealed or whether they should be re-enacted by the Parliament of Western Australia.

13 Richard II (St 1) chapter 5 (1389): Jurisdiction of admiral and deputy 15 Richard II chapter 3 (1391): Admiralty jurisdiction

These statutes deal with Admiralty jurisdiction. Their effect was to deny to the Admiral jurisdiction over anything taking place "within the bodies of the countries" and to grant to him jurisdiction over matters arising on the sea (which included "the main stream of great rivers").

28 Henry VIII chapter 15 (1536): Offences at sea

The statute relates to the jurisdiction in piracy and the punishment of other offenders within the jurisdiction of the Admiral.

2 William and Mary Sess 2 chapter 2 (1690): Admiralty

This statute declares that the powers of the Lord High Admiral may be executed by Commissioners.

39 George III chapter 37 (1799): Offences at sea

This statute provides that offences committed on the high seas out of the body of a country are to be tried in the same way as those committed on shore.

46 George III chapter 54 (1806): Offences at sea

The effect of this statute is to make all offences committed at sea triable in the colonies or dominions, in accordance with the provisions of the *Offences at Sea Act 1536*.

⁵¹⁰ The ACTAG's Report (at 83) recommended that the Australian Capital Territory retain its laws relating to piracy (see *Imperial Acts Application Act 1986* (ACT) Schedule 1) until the Commonwealth has enacted that legislation.

1 George IV chapter 90 (1820): Offences at sea

This statute deals with the law with respect to certain offences committed upon the sea, or within the jurisdiction of the Admiralty.

7 George IV chapter 38 (1826): Admiralty offences

This statute empowers the commissioners appointed by virtue of the *Offences at Sea Act 1536*, and the *Offences at Sea Act 1806*, to take informations on oath touching offences at sea, and to commit the persons charged.

46 George III chapter 52 (1806): Slave trade

47 George III Sess 1 chapter 36 (1807): Abolition of slave trade

51 George III chapter 23 (1811): Slave trade

53 George III chapter 112 (1813): Slave trade

54 George III chapter 59 (1814): Slave trade

55 George III chapter 172 (1815): Support of captured slaves

58 George III chapter 49 (1818): Slave trade

58 George III chapter 98 (1818): Slave trade

59 George III chapter 97 (1819): Slave trade

5 George IV chapter 17 (1824): Slave trade

5 George IV chapter 113 (1824): Slave trade

9 George IV chapter 84 (1828): Slave trade

These statutes relate to the abolition of the slave trade.

Piracy has been dealt with in the Commonwealth by the *Crimes Legislation Amendment Act 1992* and in Western Australia by the *Criminal Law Amendment Act 1988*. The Commonwealth Act inserted a new Part IV relating to piracy in the Commonwealth *Crimes Act 1914* and repealed certain Acts relating to piracy. The Western Australian Act repealed sections 76-80 of the *Criminal Code* relating to piracy because ". . . a much broader jurisdiction can be secured for offences such as robbery, which constitute acts of piracy by the application of the provisions in chapter III of the code, particularly section 14A dealing with offences committed in adjacent offshore areas and the WA *Crimes (Offences at Sea) Act 1979*."⁵¹¹ The provisions listed below relating to piracy can therefore be repealed.

27 Henry VIII chapter 4 (1535): Offences at sea

22 & 23 Charles II chapter 11 (1670): Piracy

11 William III chapter 7 (1698): Piracy

4 George I chapter 11 (1717): Piracy

8 George I chapter 24 (1721): Piracy⁵¹²

5 George IV chapter 113 (1824): Slave trade, section 9

STATUTES RELATING TO THE CHURCH OF ENGLAND

The following statutes relating to the Church of England should be repealed because the Anglican Church of Australia is autonomous and separate from the Church of England with

⁵¹¹ Western Australian *Parliamentary Debates* (1988) Vol 272, 2529.

⁵¹² S 1 was repealed by the *Criminal Code Act 1902*.

its own tribunals: see *Anglican Church of Australia Constitution Act 1960*.⁵¹³ They have been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria and New Zealand.

The South Australian Committee favoured the repeal of the 1285, 1376, 1391, 1531, 1532, 1533, 1534, 1536, 1547, 1558, 1562, 1566, 1571, 1575, 1580, 1588, 1592, 1603, 1661, 1662, 1663, 1677, 1688, 1692, 1708, 1713, 1749, 1765, 1815 and 1816 statutes with a saving in favour of the Church of England in South Australia.⁵¹⁴ It also favoured the repeal of the 1548, 1551 and 1558 statutes with a saving in favour of the Church of England in South Australia and also with a saving of the tables of kindred and affinity referred to in the 1548 statute insofar as they do not apply to marriage and divorce because there are still family relationships in relation to which they may be of some importance.⁵¹⁵

In Tasmania various United Kingdom statutes relating to the Church of England were repealed if and so far as they had any force in the State but so far as they had any such force were deemed, notwithstanding their repeal, to be binding:

- "(a) on the bishops, clergy, and laity being and as members of the Church in the Diocese; and
- (b) for all purposes connected with or in any way relating to the property of the Church,

as if they had been, at the time of their enactment, agreed to in time of Parliament and with the assent of the King that then was by both houses of the Convocations of the provinces of Canterbury and York.⁵¹⁶

13 Edward I (St 1) chapter 5 (1285): Recovery of advowsons

This statute deals with the recovery of advowsons.⁵¹⁷
It has been repealed in England.

50 Edward III chapter 1 (1376): Confirmation of liberties

This statute is a confirmation of the liberties of the Church of England. A liberty is an authority to do something which would otherwise be wrongful or illegal. It has been repealed in England.

15 Richard II chapter 6 (1391): Appropriation of benefices

This statute provides that in all appropriations of benefices⁵¹⁸ there shall be some provision made for the poor and the vicar. It has been repealed in England.

23 Henry VIII chapter 9 (1531): Ecclesiastical jurisdiction

⁵¹³ See generally *Scandrett v Dowling* (1992) 27 NSWLR 483.

⁵¹⁴ See generally SA78 3.

⁵¹⁵ SA78 52.

⁵¹⁶ *Anglican Church of Australia Constitution Act 1973* (Tas) s 2(2).

⁵¹⁷ An advowson is the right of presentation to a church or benefice. It is in the nature of a temporal property and spiritual trust: Jowitt 64.

⁵¹⁸ According to Jowitt at 204: "This, in its wider sense, means any ecclesiastical promotion or spiritual living whatsoever."

This statute deals with ecclesiastical jurisdictions and the citation of persons within their own diocese and the exercise of jurisdiction by Church Courts. It has been repealed in England.

24 Henry VIII chapter 12 (1532): Ecclesiastical appeals

This statute forbids appeals to Rome and constitutes the ecclesiastical jurisdiction of the Church of England. It has been repealed in England.

25 Henry VIII chapter 19 (1533): Submission of the clergy

This statute deals with the submission of the clergy and the restraint of appeals to Rome. It is still partly in force in England.

25 Henry VIII chapter 20 (1533): Appointment of Bishops

This statute deals with the appointment and jurisdiction of bishops. It is still partly in force in England.

25 Henry VIII chapter 21 (1533): Ecclesiastical licences

This statute deals with ecclesiastical licences and powers of dispensation by bishops. It is still partly in force in England.

26 Henry VIII chapter 14 (1534): Suffragan Bishops

This statute deals with the suffragan bishops and the right of Archbishops to consecrate them. It is still partly in force in England.

28 Henry VIII chapter 16 (1536): Ecclesiastical licences

The purpose of this statute is to ratify marriages solemnized prior to the break with Rome. It also alludes to certain prohibited degrees. It has been repealed in England.

1 Edward VI chapter 1 (1547): Sacrament

This statute deals with the sacraments. It is still partly in force in England.

2 & 3 Edward VI chapter 1 (1548): Uniformity

5 & 6 Edward VI chapter 1 (1551): Uniformity

1 Elizabeth I chapter 2 (1558): Act of uniformity

Section 1(4) of the 1548 statute makes the Book of Common Prayer a part of the statute. The tables of kindred and affinity in the Book of Common Prayer have been taken as being given statutory force, the Book being part of a statute. This no longer matters in Australia in relation to marriage because very different tables of kindred and affinity are provided for marriage and for matrimonial causes. The Book of Common Prayer is also referred to in the 1551 statute. The 1548 and 1558 statutes have been partly repealed in England. The 1551 statute has been repealed.

1 Elizabeth I chapter 19 (1558): Alienation of bishops

This statute deals with the alienation of land by bishops. It has been repealed in England.

5 Elizabeth I chapter 1 (1562): Supremacy of the Crown

This statute deals with the Royal Supremacy in relation to the Church of England. It has been repealed in England.

8 Elizabeth I chapter 1 (1566): Bishops

This statute relates to the consecration of bishops and the making of priests and deacons to be according to the Book of Common Prayer. It has been repealed in England.

13 Elizabeth I chapter 10 (1571): Ecclesiastical leases

This statute deals with ecclesiastical leases. It has been partly repealed in England.

13 Elizabeth I chapter 12 (1571): Ordination of ministers

This statute provides for the ordination of ministers of the church to be of sound religion. It has been repealed in England.

13 Elizabeth I chapter 20 (1571): Benefices

This statute provides that livings are not to be corruptly transferred. It has been repealed in England.

18 Elizabeth I chapter 11 (1575): Ecclesiastical leases

This statute deals with leases of spiritual promotions. It has been partly repealed in England.

23 Elizabeth I chapter 1 (1580): Religion

This statute deals with religious conformity. It provides penalties for not attending Church. It has been repealed in England.

31 Elizabeth I chapter 6 (1588): Simony

This statute deals with simony⁵¹⁹ in Church offices. Part of it is still in force in England.

35 Elizabeth I chapter 1 (1592): Religion

This statute imposes a duty to attend divine service. It has been repealed in England.

1 James I chapter 3 (1603): Episcopal lands

⁵¹⁹ According to Jowitt at 1662 simony "...a corrupt presentation or agreement to present to an ecclesiastical benefice; a deliberate act, or a premeditated will and desire, of selling such things as are spiritual, or of anything annexed thereto, by giving something of a temporal nature for the purchase thereof." For the origin of the term, see *Acts of Apostles* 8:9-25.

This statute deals with leases of Bishops' land. It has been repealed in England.

13 Charles II St 1 chapter 12 (1661): Ecclesiastical jurisdiction

This statute deals with ecclesiastical jurisdiction. It has been repealed in England.

14 Charles II chapter 4 (1662): Act of uniformity

15 Charles II chapter 6 (1663): Act of uniformity explanation

These statutes deal with uniformity of public prayers, and administration of sacraments and other rites and ceremonies. The 1662 statute is still partly in force in England.

29 Charles II chapter 8 (1677): Augmentation of benefices

This statute confirms and perpetuates augmentations made by ecclesiastical persons of small vicarages and curacies. It has been repealed in England.

29 Charles II chapter 9 (1677): Ecclesiastical jurisdiction

This statute saved the jurisdiction of the ecclesiastical courts on the repeal of a writ. It has been repealed in England.

1 William and Mary Sess I chapter 16 (1688): Simony

This statute deals with simoniacal promotions. It is still partly in force in England.

4 William and Mary chapter 12 (1692): Repairs of church

This statute deals with apportionment of the liability to repair when parishes are united. It has been repealed, with savings, in England.

7 Anne chapter 14 (1708): Parochial libraries

This statute deals with parochial libraries. It has been repealed in part in England.

13 Anne chapter 11 (1713): Simony

This statute provides that payments to secure appointment in the Church of England are void. It has been repealed in England.

23 George II chapter 28 (1749): Uniformity of worship

This statute deals with uniformity of worship and the power of archbishops and bishops to remove impediments in appointments. It has been repealed in England.

5 George III chapter 17 (1765): Ecclesiastical leases

This statute alters the law dealing with the recovery of arrears of rent and the enforcement of other covenants by ecclesiastical corporations. It has been repealed in England.

24 George III Sess 2 chapter 35 (1784): Ordination of aliens

This statute deals with the ordination of deacons and priests who are not British subjects. It has been repealed in England.⁵²⁰

55 George III chapter 147 (1815): Glebe exchange**56 George III chapter 52 (1816): Glebe exchange**

These statutes relate to glebe land, land possessed as part of the property of an ecclesiastical benefice. Both statutes are still partly in force in England.

DEMISE OF THE CROWN

The statutes dealt with in this section relate to demise of the Crown. The Commission recommends that consideration be given to enacting a general Demise of the Crown Act.⁵²¹ A similar recommendation was made by the South Australian Committee.⁵²² The Commission makes recommendations below as to how each statute should be dealt with in the absence of such general legislation.

1 Edward VI chapter 7 (1547): Justices of the peace

Section 4 of this statute was repealed in Western Australia by the *Miscellaneous Repeals Act 1991*. Of the other sections, only section 1, which deals with the continuation of actions in the courts after the death of the Monarch, is of any importance and it should be re-enacted. It has been continued in force in the Australian Capital Territory.⁵²³

7 & 8 William III chapter 15 (1695): Parliament

This statute 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. The power of the King to prorogue or dissolve Parliament is not altered by these provisions.

It has been repealed in the Australian Capital Territory, New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. It may have been impliedly repealed in 1707 by 6 Anne chapter 41,⁵²⁴ in which case it would not be part of the law of this State. The South Australian Committee proceeded on the basis that it had been received in South Australia for the purpose of its report. Although there were arguments that no legislation was necessary to ensure that Parliament continues to sit upon demise of the Crown,⁵²⁵ it recommended that express provision be made for the continued sitting of Parliament and that the 1696 statute be repealed. The Commission agrees.

⁵²⁰ The South Australian Committee concluded that it could be repealed because it would be contrary to the ethnic laws in the State: SA86 9.

⁵²¹ See for example, *Demise of the Crown Act 1901* (UK) and *Demise of the Crown Act 1910* (Qld). In Victoria, provisions as to demise of the Crown have been incorporated in the *Constitution Act 1975* (ss 9-11). This is also the case in Tasmania: *Constitution Act 1934* ss 4-7.

⁵²² SA55 16-17 and SA81 14.

⁵²³ *Imperial Acts Application Act 1986* Schedule 3 Part 7. The ACTAG's Report (at 83) recommended that it be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

⁵²⁴ SA81 6-7.

⁵²⁵ Id 7.

1 Anne chapter 2 (1702): Demise of the Crown

Sections 4 and part of sections 5 and 6 of this statute are still important because they provide the basis for the continuation of legal proceedings notwithstanding the demise of the Crown.

While the statute should be repealed, the effect of the sections should be preserved by the enactment of a provision to the same effect. This has been done in Victoria and the Australian Capital Territory.⁵²⁶ Section 4 has been preserved in New South Wales and Queensland.⁵²⁷ The South Australian Committee recommended that a modern version of the sections should be included in South Australian legislation.⁵²⁸

6 Anne chapter 41 (1707): Succession to the Crown

The only section of this statute which has been preserved in the other jurisdictions studied is section 9 which provides that the Great Seal and other public seals in being at the demise of the Crown continue until further order.⁵²⁹ It should also be preserved in this State.

1 George III chapter 23 (1760): Commissions and salaries of judges

Section 1 of this statute provides that the commissions of judges shall continue during their good behaviour notwithstanding the demise of the Sovereign. Section 2 provides for the removal of judges upon the address of both Houses of Parliament. Section 3 provides for judges' salaries.

It should be repealed: sections 1 and 2 are superseded by sections 54 and 55 of the *Constitution Act 1889*.⁵³⁰ Judges' salaries are set under *the Judges' Salaries and Pensions Act 1950*. It has been repealed in New South Wales, Queensland, Victoria, New Zealand and the United Kingdom. Section 1 has been continued in force in the Australian Capital Territory.⁵³¹

37 George III chapter 127 (1797): Meeting of Parliament

This statute provides for shortening of notice for summoning Parliament and for the meeting of Parliament in the case of demise of the Crown.

It should be repealed: section 3 of the *Constitution Act 1889* provides for the Governor to fix the place and time for holding sessions of the Parliament and from time to time to vary the same giving sufficient notice of the variation. It has been repealed in the Australian Capital

⁵²⁶ *Constitution Act 1975* (Vic) s 11; *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 13. The ACTAG's Report (at 86) recommended that the statute should be repealed and the substantive provisions incorporated into Australian Capital Territory legislation dealing with proceedings.

⁵²⁷ NSW Act s 6; Qld Act s 5.

⁵²⁸ SA81 7.

⁵²⁹ S 11(3) of the *Constitution Act 1975* (Vic) provides; for example:

“The Public Seal of the State and other Public Seals in being at the time of the demise of the Crown shall continue and be made use of as if no such demise had happened.”

The ACTAG's Report (at 87) recommended that the statute should be repealed because it is irrelevant to the Australian Capital Territory; the Crown in the right of the Australian Capital Territory is an abstract notion rather than an office capable of being filled by a person.

⁵³⁰ See also *Supreme Court Act 1935* s 9(1); *District Court of Western Australia Act 1969* ss 11(1) and 14; *Family Court Act 1975* ss 12 and 16; *Stipendiary Magistrates Act 1957* s 5.

⁵³¹ *Imperial Acts Application Act 1986* (ACT) Schedule 3 Part 17.

Territory, New South Wales, Queensland, Victoria, New Zealand and partly repealed in the United Kingdom.⁵³²

STATUTES RELATING TO PARLIAMENTARY PRIVILEGE

The following statutes relating to parliamentary privilege should be repealed because parliamentary privilege is dealt with in the *Parliamentary Privileges Act 1891*.

The repeal of the statutes would not affect the privileges because section 1 of the *Parliamentary Privileges Act 1891* provides:

"The Legislative Council and Legislative Assembly of Western Australia respectively, and the Committees and members thereof respectively, shall hold, enjoy, and exercise such and the like privileges, immunities, and powers as, and the privileges, immunities, and powers of the said Council and Assembly, and of the Committees and members thereof, respectively, are hereby defined to be the same as are, at the time of the passing of this Act, or shall hereafter for the time being be, held enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland and by the Committees and members thereof, so far as the same are not inconsistent with the said recited Act or this Act, whether such privileges, immunities, or powers are or shall be, held, possessed, or enjoyed by custom statute or otherwise. Provided always, that with respect to the powers hereinafter more particularly defined by this Act, the provisions of this Act shall prevail."

This provision incorporates such of the privileges, immunities and powers conferred by the following statutes that are in force in the United Kingdom, that is, the statutes of 1512,⁵³³ 1603, 1737,⁵³⁴ 1770⁵³⁵ and Article 9 of the Bill of Rights 1688.⁵³⁶ Repealing them in Western Australia would not affect this incorporation. In any case, the statutes might not have been inherited when the colony of Western Australia was founded because they were not reasonably capable of being applied under local conditions, there being no local legislature.

4 Henry VIII chapter 8 (1512): Privilege of Parliament

This statute is 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.

1 James I chapter 13 (1603): Privilege of Parliament

This statute deals with a case where a writ of execution is discharged because a member of Parliament has his privilege during the session of Parliament and the filing of a second execution later.

⁵³² The South Australian Committee recommended that it be repealed if a provision were enacted in South Australia as suggested in the discussion of 6 Anne c 41 (93 above): SA81 10.

⁵³³ Parts of this statute were repealed in the United Kingdom in 1888 and 1948.

⁵³⁴ Parts of this statute have been repealed in the United Kingdom in 1867.

⁵³⁵ Parts of this statute have been repealed in the United Kingdom.

⁵³⁶ 56-57 above. The 1700 and 1703 statutes were repealed in the United Kingdom in 1867, The 1805 and 1807 statutes were repealed in the United Kingdom in 1872.

12 & 13 William III chapter 3 (1700): Privilege of Parliament

This statute regulates privilege of Parliament.

2 & 3 Anne chapter 12 (1703): Privilege of Parliament

This statute 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.

11 George II chapter 24 (1737): Parliamentary privilege

This statute regulates civil actions against members of parliament.

10 George III chapter 50 (1770): Parliamentary privilege

This statute prevents delays of justice by reason of privilege of Parliament.

45 George III chapter 124 (1805): Privilege of Parliament

This statute deals with proceedings against persons within the description of the acts relating to bankrupts having privilege of parliament.

47 George III Sess 2 chapter 40 (1807): Practice in Court of Chancery

This statute deals with the practice in Courts of Chancery where the defendant is a member of parliament.

Appendix II

NOTE ON THE COMPILATION OF APPENDIX I

1. The task of the Commission in this reference was considerable. Approximately 7,000 statutes were enacted by the English Parliament (from 1707, the British Parliament; from 1801, the United Kingdom Parliament) between 1235, the date of the *Statute of Merton*, which is generally accepted as the first statute on the official roll of statutes,¹ and 1 June 1829, the date of reception of English law in Western Australia,² and which remained in force in the United Kingdom on that date. The list of statutes in Appendix I does not contain anything like this number of statutes. This Commission, like law reform commissions in other States which have already examined the problem, has had to select from the total corpus of United Kingdom statute law those as respects which there is a serious argument for the statute being received in Western Australia (because applicable to local conditions) and still potentially applicable. It is the object of this Appendix to explain how it went about this process.

2. First, in order to see the problem in its true perspective, it is necessary to understand that much of the statute law passed in the United Kingdom before the 19th century was concerned with strictly local matters, such as the building of a road between two particular towns, or peculiarly English institutions, for example the Bank of England or the Duchy of Cornwall. For example, in the Parliamentary session of 37 George III (1796-1797), of 180 statutes passed, 78 deal with a variety of obviously local matters, including the Tweed fisheries, the Scottish distilleries, bread-making in London and the improvement of St Pancras, or authorise the building of a large number of roads, bridges and turnpikes. Ten others relate to particular overseas territories, such as the East India Company or trade with the Cape of Good Hope. Many of the remaining 92 statutes deal with revenue raising and other matters which have no obvious implications for Western Australia, for example the

¹ *The Statutes of the Realm*, prepared by the Record Commissioners, giving statutes down to the end of the reign of Anne in 1713, gives the Statute of Merton as the first statute. An alternative source, Ruffhead's *Statutes at Large*, giving statutes to the end of the 25th year of George III's reign in 1785, gives Magna Carta 1225 (9 Hen III) as the first statute. The 1225 statute was the fourth version of the charter originally signed by King John at Runnymede in 1215. *Statutes of the Realm* lists the later version of Magna Carta in 1297 (25 Edw I). See *Chronological Table of the Statutes 1235-1974* viii, and the Table of Variances between the *Statutes of the Realm* and Ruffhead at 1-6. Apart from the original version of Magna Carta, there are other early instruments of a legislative nature that are not now regarded as statutes, for example the Assize of Clarendon 1166, the Assize of Northampton 1176 and the Provisions of Oxford 1258.

² See *Interpretation Act 1984* s 73.

bounty on pilchards, stage coach duties, militia allowances and the victualling of the navy. Even the statutes which dealt with more general matters did not, as a general rule, have much effect on the ordinary laws applying between citizens, at any rate after the 13th century. As Maitland said to students at Cambridge University in 1887:

"Piles of statutes are heaped up . . . but we may turn page after page of the statute book of any century from the 14th to the 18th, both inclusive, without finding any change of note made in the law of property, or of the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished. Consequently in Hale's day and in Blackstone's day, a lawyer whose business lay with the common affairs of daily life had to keep the statutes of Edward I constantly in mind; a few statutes of Henry VIII, of Elizabeth, of Charles II he had to remember, but there were large tracts of past history which had not supplied one single law which was of any importance to him in the ordinary course of his business."³

3. In drawing up the list of statutes appearing in Appendix I that were thought worthy of serious examination, the Commission relied much on research already done in other jurisdictions. The pioneering work was that of Sir Leo Cussen, a judge of the Supreme Court of Victoria. As part of the process of ascertaining the imperial law in force in Victoria, he considered every statute passed in the United Kingdom which was still in force in New South Wales on 25 July 1828 and thereby potentially became part of the law of New South Wales,⁴ and which had subsequently become part of the law of Victoria when Victoria became a separate State in 1851.⁵ The Victorian *Imperial Acts Application Act 1922* which implemented the work of Sir Leo Cussen⁶ codified some of these statutes (that is, re-enacted them in Victorian legislation),⁷ and preserved others.⁸ The remaining statutes were repealed.⁹

4. Sir Leo Cussen was breaking new ground and understandably adopted a cautious approach, tending to resolve doubt about a statute by recommending that it remain in force.¹⁰ By 1975, when Gretchen Kewley produced a Report for the Victorian Parliament which

³ F W Maitland *The Constitutional History of England* (1963) 19-20, quoted in Sask Report 37.

⁴ 25 July 1828 was the reception date for New South Wales as determined by *Australian Courts Act 1828* (UK) s 24. At that date the territory of the colony of New South Wales included the present-day States of Victoria and Queensland.

⁵ He thus eliminated statutes expressly or impliedly repealed by New South Wales legislation between 1828 and 1851.

⁶ See also the *Report from the Joint Select Committee of the Legislative Council and Legislative Assembly on the Imperial Acts Application Bill* (1922).

⁷ *Imperial Acts Application Act 1922* (Vic) Part III.

⁸ Id s 4 and Part II. In some cases these were transcribed in the Act: see id First Schedule. In other cases they were enumerated without being transcribed: id Second Schedule.

⁹ Id s 7.

¹⁰ *Imperial Laws Application Bill: Explanatory Note* (1986) (NZ) xiii.

conducted a further examination of those statutes which had been preserved by the 1922 Act,¹¹ there was a much greater willingness to repeal out of date imperial enactments. She stated that the object of this review was:

". . . to clear away as much as possible of the dead wood, recommending for repeal those enactments which appear meaningless, unnecessary, or uncertain in their application or adequately covered by present-day Victorian law, and recommending for retention only those English Acts which are undoubtedly in operation in Victoria or with which the Victorian law is so inextricably bound, that to repeal them would be impossible".¹²

The resulting legislation¹³ preserved some statutes preserved in 1922,¹⁴ re-enacted others¹⁵ and repealed the remainder.¹⁶

5. The next jurisdiction to consider its inherited imperial law was New South Wales. The Report of the New South Wales Law Reform Commission in 1967¹⁷ relied heavily on the work of Sir Leo Cussen,¹⁸ who had, as already mentioned, identified and considered all United Kingdom Acts in force on the date of reception of English law in New South Wales. The New South Wales *Imperial Acts Application Act 1969* which implemented the Commission's Report preserved certain enactments,¹⁹ re-enacted others as New South Wales statute law,²⁰ and repealed the rest.²¹ The Report gives express consideration to all the Acts recommended to be preserved or re-enacted and the most important ones recommended to be repealed. The Commission commented: "We think that those mentioned are the only ones of any real significance."²²

¹¹ Kewley.

¹² Id 7.

¹³ Vic Act; *Imperial Law Re-enactment Act 1980* (Vic). See also Victorian Statute Law Revision Committee *Report from the Statute Law Revision Committee upon the Imperial Acts Application Act 1922* (1978); VSLRC.

¹⁴ Vic Act s 3, Part II and Schedule.

¹⁵ *Imperial Law Re-enactment Act 1980* (Vic).

¹⁶ Vic Act s 7; *Imperial Law Re-enactment Act 1980* (Vic) s 8.

¹⁷ NSW Report.

¹⁸ Id 29. The NSWLRC also derived assistance from *Imperial Statutes in force in New South Wales* prepared by Mr H B Bignold of the New South Wales Bar, and A Oliver's *The Statute Index* (1874), which included a chronological table of imperial statutes relating to or judicially decided or presumed to be in force in New South Wales: id 28.

¹⁹ S 6 and Second Schedule.

²⁰ S 5 and First Schedule. These enactments are set out in modern English in Part 3 of the Act.

²¹ S 8.

²² NSW Report 31.

6. In 1973 the Law Reform Commission of the Australian Capital Territory reported on its examination of the imperial legislation applying in the ACT.²³ It in its turn relied on the work of Sir Leo Cussen and the New South Wales Law Reform Commission.²⁴ Its task was to identify the laws of New South Wales which were applicable in the Australian Capital Territory. As regards the laws received in New South Wales, the Commission said:

"We are satisfied that the list of Imperial Acts which were treated by the New South Wales Commission as in force in New South Wales when that Commission reported, can be accepted as a substantially exhaustive list of such Acts passed before the *Australian Courts Act 1828*. We have found very few Acts indeed which that Commission did not mention, and we do not believe that there are any such which are of any importance."²⁵

This Report again makes express mention only of legislation thought to be important enough to require comment. Legislation resulting from the Report re-enacted some Acts,²⁶ preserved others,²⁷ and repealed the remainder.²⁸ A more recent Report by the Australian Capital Territory Attorney General's Department²⁹ makes recommendations for integrating retained imperial Acts within the body of modern ACT law.

7. The Queensland Law Reform Commission prepared a Working Paper on the application of imperial legislation in Queensland in 1979.³⁰ The *Imperial Acts Application Act 1984* which resulted from the work of the Queensland Commission again preserved certain Acts,³¹ re-enacted others as part of Queensland legislation³² and repealed the remainder.³³ Queensland was originally part of New South Wales, and so when it became an independent State in 1859 it inherited all the New South Wales law then in force. As regards the Acts received in New South Wales in 1828, the Queensland Commission relied on the

²³ ACT Report.

²⁴ Id 1.

²⁵ Ibid.

²⁶ ACT Act 1986.

²⁷ *Imperial Acts Application Act 1986* (ACT).

²⁸ ACT Act 1988. The Explanatory Memorandum accompanying the Bill listed the statutes intended to be covered by the repeal by reference to earlier inquiries: all statutes not to be preserved or re-enacted which were referred to in the reports of the Australian Capital Territory Law Reform Commission, the Queensland Law Reform Commission (para 7 below), the South Australian Law Reform Committee (para 9 below), the Explanatory Note circulated with the New Zealand Imperial Laws Application Bill 1986 (para 10 below), and others not mentioned in any of these sources. The sources listed covered all statutes mentioned in the reports of the New South Wales Law Reform Commission and Kewley.

²⁹ ACTAG's Report.

³⁰ Qld Paper.

³¹ S 5 and First Schedule.

³² Part III.

³³ S 7.

work done by Sir Leo Cussen and Gretchen Kewley in Victoria and the New South Wales Law Reform Commission in New South Wales.³⁴

8. It can thus be seen that each Australian jurisdiction working in this area built on the foundation established by its predecessors. The Law Reform Commission of Western Australia has in its turn relied upon the earlier work of the other commissions.

9. The Law Reform Committee of South Australia, before its discontinuation by the South Australian Government in 1987, did much valuable work on the application of the inherited imperial law in South Australia. Between 1980 and 1986 the Committee submitted 14 Reports dealing with particular groups of inherited imperial statutes³⁵ and a further seven Reports³⁶ dealing with the entire body of inherited imperial law between 1225³⁷ and 28 December 1836, the date of reception for South Australia.³⁸ As noted in the Committee's 54th Report, under the influence of Dr Jeremy Bray, the then Chief Justice of South Australia, the Committee decided that it was not appropriate to rely on the approach of a general repeal of all statutes not identified for preservation or re-enactment. Instead the Committee decided to proceed by a method which ultimately ensured that every statute passed in the United Kingdom between 1225 and 1836 was separately examined and commented upon in the Committee's Reports. This work has been of particular value to this Commission. Appendix I includes every statute which the South Australian Law Reform Committee did not simply recommend for repeal. It is clear that the process of relying on the foundation laid by Sir Leo Cussen and identifying statutes for special consideration followed by the New South Wales, Australian Capital Territory and Queensland Commissions, as the Australian Capital Territory Law Reform Commission said, ensured that nothing of importance was missed; however, the check on this process which this Commission was able to carry out by using the work of the South Australian Law Reform Committee, which disclosed a few additional statutes worthy of consideration, confirms that all relevant statutes have been identified.

³⁴ Qld Paper.

³⁵ SA54 (property, trusts, uses, equity and wills); SA55 (practice and procedure); SA58 (proceedings in summary jurisdiction); SA59 (criminal law); SA61 (civil jurisdiction and procedure of the Supreme Court); SA64 (wills and intestacies); SA65 (the Crown); 66th Report (distress); SA68 (gaming and wagering); 75th Report (set-off); SA81 (demise of the Crown); SA94 (qui tam and penal actions and common informers); SA96 (constitutional statutes); SA102 (statutes previously covered by the *Colonial Laws Validity Act 1865* (UK)).

³⁶ SA78, SA79, SA80, 85th Report, SA86, SA89 and SA91.

³⁷ The list used by the South Australian Law Reform Committee commences with *Magna Carta 1225* (9 Hen III): see fn 1 above.

³⁸ *Acts Interpretation Act 1915* (SA) s 48 (repealed).

10. The Commission has also been able to rely on work done in other countries. In New Zealand, an Imperial Laws Application Bill was prepared in 1986 as a result of work done by the New Zealand Law Reform Council.³⁹ This Bill was referred to the New Zealand Law Commission, who reported in 1987.⁴⁰ As a result of this Report, a revised version of the Bill was prepared, and this became law as the *Imperial Laws Application Act 1988*. The process of reform in New Zealand was somewhat different from that in Australia, because the initial need was to identify all United Kingdom legislation in force in New Zealand on 14 January 1840, the date of the Treaty of Waitangi,⁴¹ and so enactments repealed between 1828 and 1840 were not considered. Moreover, the New Zealand Act does not re-enact legislation as part of New Zealand law: it either preserves it or repeals it. However, the New Zealand Law Reform Council, and later the New Zealand Law Commission, made considerable use of the Victorian, New South Wales, Australian Capital Territory, Queensland and South Australian material already referred to.⁴² Appendix I includes any statute specifically referred to in the New Zealand materials that had not already been identified by using the Australian materials as described above.

11. It remains to mention the work done in Papua New Guinea and Saskatchewan. The Report of R S O'Regan on English Statutes in Papua New Guinea (1973) covers English statutes to 1828, the year of the *Australian Courts Act*,⁴³ but the number of statutes examined is comparatively small and somewhat selective. The Report of the Law Reform Commission of Saskatchewan⁴⁴ covers all English statutes received in Saskatchewan on 15 July 1870.⁴⁵ Where relevant, information from these sources is considered in Appendix I.

³⁹ An earlier version of the Bill had been prepared in 1981.

⁴⁰ NZ Report.

⁴¹ See *English Laws Act 1908* (NZ).

⁴² See *Imperial Laws Application Bill: Explanatory Note* (1986) iv -v.

⁴³ Papua received all laws in force in Queensland on 17 September 1888 that were applicable to that Territory; New Guinea received all laws in force in Queensland on 9 May 1921 that were applicable to that Territory.

⁴⁴ Sask Report.

⁴⁵ *Northwest Territories Act 1886* (Can).

Appendix III

LIST OF THOSE WHO COMMENTED ON THE DRAFT REPORT

Hon Justice C J Carr, Federal Court Judge

Mr N H Crago, Senior Lecturer in Law, Law School, University of Western Australia

Dr A F Dickey QC, Associate Professor, Law School, University of Western Australia

Hon D K Malcolm AC, Chief Justice of Western Australia

Mr L B Marquet, Clerk of the Legislative Council

Mr P M McDermott, Senior Lecturer in Law, Law School, University of Queensland

Mr J R McKechnie QC, Director of Public Prosecutions

Mr D Mulcahy, Commissioner of Titles and Mr A Skinner, Chief Executive Officer,
Department of Land Administration

Mr K H Parker QC, Solicitor General, Western Australia

L C Ranford, Acting Director General, Department of Minerals and Energy

Mr P J Tremlett, Assistant Parliamentary Counsel

Hon Mr Justice Zelling CBE, former Judge of the Supreme Court of South Australia

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		c 20	Appointment of Bishops
		c 21	Ecclesiastical licences
1534	26 Henry VIII	c 14	Suffragan Bishops
1535	27 Henry VIII	c 4	Offences at sea
		c 10	Statute of uses
		c 11	Clerks of the Signet and Privy Seal
		c 16	Enrolment of bargains of lands
		c 24	Jurisdiction in liberties
1536	28 Henry VIII	c 15	Offences at sea
		c 16	Ecclesiastical licences
1539	31 Henry VIII	c 1	Joint tenants and tenants in common
1540	32 Henry VIII	c 1	Wills
		c 16	Aliens
		c 28	Leases
		c 32	Joint tenants for life or years
		c 34	Grantees of reversions

1541	33 Henry VIII	c 37 c 21 c 27 c 39	Cestui que vie Royal assent by commission Leases by corporations Crown debts
1545	37 Henry VIII	c 9	Usury
Edward VI			
1547	1 Edward VI	c 1 c 7 c 8	Sacrament Justices of the peace Confirmation of grants
1548	2 & 3 Edward VI	c 1	Uniformity
1551	5 & 6 Edward VI	c 1	Uniformity
1553	7 Edward VI	c 1	Crown revenues
Mary I			
1554	1 Mary Sess 3	c 1	Queen Regents Prerogative
Elizabeth I			
1558	1 Elizabeth I	c 2 c 19	Act of uniformity Alienation by bishops
1562	5 Elizabeth I	c 1	Supremacy of the Crown
1566	8 Elizabeth I	c 1	Bishops
1571	13 Elizabeth I	c 5 c 6 c 10 c 12 c 20	Fraudulent conveyances Letters Patent Ecclesiastical leases Ordination of ministers Benefices
1572	14 Elizabeth I	c 8	Recoveries
1575	18 Elizabeth I	c 2 c 11	Crown lands Ecclesiastical leases
1580	23 Elizabeth I	c 1	Religion
1584	27 Elizabeth I	c 4	Fraudulent conveyances
1588	31 Elizabeth I	c 5 c 6	Common informers Simony
1592	35 Elizabeth I	c 1	Religion
1601	43 Elizabeth I	c 4 c 8	Charitable gifts Fraudulent administration of intestates' goods
James I			
1603	1 James I	c 3 c 13	Episcopal lands Privilege of Parliament
1609	7 James I	c 12 c 15	Shop-books evidence Crown debts
1623	21 James I	c 3 c 4 c 14 c 15 c 16 c 25	Statute of monopolies Common informers Intrusions Forcible entry Limitation Crown lands

Charles I

1627	3 Charles I	c 1	Petition of Right
1640	16 Charles I	c 10	Habeas Corpus

Charles II

1660	12 Charles II	c 13 c 24	Usury Tenures abolition
1661	13 Charles II St 1	c 1 c 12	Sedition Ecclesiastical jurisdiction
1662	14 Charles II	c 4	Act of uniformity
1663	15 Charles II	c 6	Act of uniformity explanation
1665	17 Charles II	c 8	Death between verdict and judgment
1666	18 & 19 Charles II	c 11	Cestui que vie
1670	22 & 23 Charles II	c 10 c 11	Statute of distribution Piracy
1677	29 Charles II	c 3 c 7 c 8 c 9	Statute of frauds Sunday observance Augmentation of benefices Ecclesiastical jurisdiction
1678	30 Charles II	c 7	Executors of executors
1679	31 Charles II	c 2	Habeas Corpus

James II

1685	1 James II	c 17	Administration of intestates' estate
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William III and Mary II

1688	1 William & Mary Sess 1	c 16 c 30	Simony Royal mines
1688	1 William & Mary Sess 2	c 2	Bill of Rights
1689	2 William & Mary Sess 1	c 5	Distress for rent
1690	2 William & Mary Sess 2	c 2	Admiralty
1692	4 William & Mary	c 12 c 16 c 24	Repairs of church Clandestine mortgages Estreats: personal representatives
1693	5 William & Mary	c 6	Royal mines
1695	7 & 8 William III	c 7 c 15	Parliamentary elections (returns) Parliament
1696	8 & 9 William III	c 11	Administration of justice
1698	10 William III	c 22	Posthumous children
1698	11 William III	c 6 c 7 c 12	Aliens Piracy Governors of plantations
1700	12 & 13 William III	c 2 c 3 c 5	Act of Settlement Privilege of Parliament Returns to Parliament

Anne

1702	1 Anne	c 2	Demise of the Crown
1703	2 & 3 Anne	c 12	Privilege of Parliament
1705	4 & 5 Anne	c 3	Administration of justice
1706	6 Anne	c 8	Maintenance of the Church of England
		c 11	Union with Scotland
		c 40	Union with Scotland
		c 41	Succession to the Crown
		c 72	Cestui que vie
1708	7 Anne	c 14	Parochial libraries
1709	8 Anne	c 18	Landlord and tenant
1713	13 Anne	c 11	Simony
George I			
1717	4 George I	c 11	Piracy
1721	8 George I	c 24	Piracy
George II			
1728	2 George II	c 22	Insolvent debtors relief
		c 23	Attorneys and solicitors
1730	4 George II	c 26	Proceedings in courts of justice
		c 28	Landlord and tenant
1732	6 George II	c 14	Courts in Wales and Chester
1733	7 George II	c 20	Mortgage
1734	8 George II	c 24	Set-off
1737	11 George II	c 19	Distress for rent
		c 24	Parliamentary privilege
1738	12 George II	c 13	Price of bread, etc
		c 27	Justices of assize
1740	14 George II	c 20	Common recoveries
1742	16 George II	c 18	Justices jurisdiction
1745	19 George II	c 22	Harbours
1749	23 George II	c 28	Uniformity of worship
1750	24 George II	c 23	Calendar (New Style)
		c 44	Constables protection
1758	32 George II	c 28	Debtors imprisonment
George III			
1760	1 George III	c 23	Commissions and salaries of judges
1763	4 George III	c 10	Recognizances (Discharge)
1765	5 George III	c 17	Ecclesiastical leases
1766	6 George III	c 12	American colonies
1766	7 George III	c 38	Engraving copyright
1769	9 George III	c 16	Crown suits
1770	10 George III	c 50	Parliamentary privilege
		c 51	Entail improvement
1772	12 George III	c 11	Royal marriages
1774	14 George III	c 48	Life assurance
		c 78	Fire prevention (Metropolis)
1775	15 George III	c 39	Oaths
1782	22 George III	c 75	Colonial leave of absence
1784	24 George III Sess 2	c 35	Ordination of aliens

1785	25 George III	c 35	Crown debtors
1786	26 George III	c 38	Imprisonment of debtors
1787	27 George III	c 29	Competency of witnesses
1788	28 George III	c 56	Marine insurance
1792	32 George III	c 58	Information in nature of Quo Warranto
		c 60	Libel (Fox's Act)
1793	33 George III	c 13	Acts of Parliament (Commencement)
1797	37 George III	c 127	Meeting of Parliament
1798	38 George III	c 87	Administration of estates
1799	39 George III	c 37	Offences at sea
1800	39 & 40 George III	c 54	Public accountants
1802	42 George III	c 85	Criminal jurisdiction
1803	43 George III	c 46	Costs
1804	44 George III	c 102	Habeas Corpus
1805	45 George III	c 124	Privilege of Parliament
1806	46 George III	c 37	Witnesses
		c 52	Slave trade
		c 54	Offences at sea
1807	47 George III Sess 1	c 36	Abolition of slave trade
1807	47 George III Sess 2	c 24	Crown lands, escheats
		c 40	Practice in Court of Chancery
1808	48 George III	c 106	Acts of Parliament (Expiration)
	78		
1809	49 George III	c 118	Parliamentary elections
1811	51 George III	c 23	Slave trade
1812	52 George III	c 101	Charitable procedure
1813	53 George III	c 112	Slave trade
1814	54 George III	c 59	Slave trade
		c 61	Public office in colony
		c 168	Informal attestation of certain deeds
1815	55 George III	c 147	Glebe exchange
		c 172	Support of captured slaves
1816	56 George III	c 52	Glebe exchange
		c 100	Habeas Corpus
1817	57 George III	c 52	Deserted tenements
1818	58 George III	c 30	Costs
		c 49	Slave trade
		c 98	Slave trade
1819	59 George III	c 69	Foreign enlistment
		c 97	Slave trade
1819	60 George III & 1 George IV	c 8	Criminal libel
George IV			
1820	1 George IV	c 55	King's Bench, Justices of Assize
		c 90	Offences at sea
1821	1 & 2 George IV	c 121	Commissariat accounts
1822	3 George IV	c 39	Warrants of attorney
1823	4 George IV	c 83	Factor
1824	5 George IV	c 17	Slave trade
		c 113	Slave trade

1825	6 George IV	c 114	Marine assurance
		c 53	Lunatics
		c 56	Forgery
		c 91	Bubble companies
		c 94	Factor
1826	7 George IV	c 38	Admiralty offences
1827	7 & 8 George IV	c 38	Presentments by constables
1828	9 George IV	c 14	Statute of Frauds amendment
		c 84	Slave trade
1829	10 George IV	c 22	Government of Western Australia

TABLE 2 - ANALYSIS OF THE COMMISSION'S RECOMMENDATIONS

STATUTES THAT SHOULD CEASE TO BE IN FORCE

Statute

Henry III

1267	52 Henry III		<i>Statute of Marlborough</i>
		c 1	Distress
		c 2	Distress
		c 3	Resisting King's officers in replevin
		c 4	Distress
		c 15	Distress
		c 17	Guardians in socage
		c 21	Replevin

Edward I

1275	3 Edward I		<i>Statute of Westminster I</i>
		c 4	Wreck
		c 5	Freedom of election
		c 6	Amercements
		c 16	Distress
		c 19	Crown debts
		c 25	Champerty
		c 27	Extortion
		c 28	Maintenance
		c 30	Extortion
		c 46	Order of hearing pleas
1278	6 Edward I		<i>Statute of Gloucester</i>
		c 1	Recovery of damages and costs
1279	7 Edward I		Mortmain
1285	13 Edward I St 1		<i>Statute of Westminster II</i>
		c 5	Recovery of advowsons
		c 18	Damages: execution
		c 19	Intestates' debts
		c 32	Mortmain
		c 33	Forfeiture of lands
		c 37	Distress
		c 45	Execution
		c 49	Maintenance and champerty
1292	20 Edward I St 2		Waste
1300	28 Edward I		Articles upon the Charters
		c 10	Embracery
		c 11	Champerty
		c 19	Restoration of issues of lands siezed
1301	29 Edward I		Escheators
1305	33 Edward I St 2		Conspiracy: maintenance and champerty

	33 Edward I St 3		Statute of champerty
Statute of uncertain date			
	[51 Henry III St 4]		Distress [of the Exchequer]
Edward III			
1327	1 Edward III St 2	c 12	Tenure in capite
		c 13	Tenure in capite
		c 14	Maintenance
		c 16	Justices of the peace
1328	2 Edward III		[Statute of Northampton]
		c 6	Confirmation of statutes
1330	4 Edward III	c 11	Justices of assise
1344	18 Edward III St 2	c 2	Justices of the peace
1346	20 Edward III St 1	c 4	Maintenance
1353	27 Edward III St 1	c 2	Pardon
1362	36 Edward III St 1	c 9	Breaches of statutes
		c 15	Pleading in English
1363	38 Edward III St 1	c 4	Penal bonds
		c 12	Embracery
1376	50 Edward III	c 1	Confirmation of liberties
Richard II			
1385	9 Richard II	c 3	Writs of error
1389	13 Richard II St 1	c 14	Bonds to the Crown
1389	13 Richard II St 2	c 1	Pardon of offences
1391	15 Richard II	c 2	Forcible entries
		c 6	Appropriation of benefices
1396	20 Richard II	c 3	Justices of assize
Henry IV			
1403	5 Henry IV	c 1	Certain traitors' lands
1411	13 Henry IV	c 7	Riot
Henry V			
1414	2 Henry V St 1	c 8	Riot
Henry VI			
1429	8 Henry VI	c 16	Inquests by escheators
1439	18 Henry VI	c 1	Dating of letters patent
1444	23 Henry VI	c 14	Parliamentary elections
Richard III			
1483	1 Richard III	c 1	Feoffments to uses
Henry VII			
1485	1 Henry VII	c 4	Clergy
1487	3 Henry VII	c 1	Star Chamber
		c 4	Fraudulent deeds of gift
1488	4 Henry VII	c 17	Wardship
		c 20	Collusive actions

1503	19 Henry VII	c 7	Ordinances of corporations
Henry VIII			
1512	4 Henry VIII	c 8	Privilege of Parliament
1514	6 Henry VIII	c 15	Crown grants
		c 16	Attendance in Parliament
1529	21 Henry VIII	c 4	Executors
		c 5	Probate fees
1531	23 Henry VIII	c 9	Ecclesiastical jurisdiction
1532	24 Henry VIII	c 12	Ecclesiastical appeals
1533	25 Henry VIII	c 19	Submission of the clergy
		c 20	Appointment of bishops
		c 21	Ecclesiastical licences
1534	26 Henry VIII	c 14	Suffragan Bishops
1535	27 Henry VIII	c 4	Offences at sea
		c 10	Statute of uses
		c 11	Clerks of the Signet and Privy Seal
		c 16	Enrolment of bargains of lands
		c 24	Jurisdiction of liberties
1536	28 Henry VIII	c 16	Ecclesiastical licences
1539	31 Henry VIII	c 1	Joint tenants and tenants in common
1540	32 Henry VIII	c 1	Wills
		c 16	Aliens
		c 28	Leases
		c 32	Joint tenants for life or years
		c 34	Grantees of reversions
		c 37	Cestui que vie
1541	33 Henry VIII	c 21	Royal assent by commission
		c 27	Leases by corporations
		c 39	Crown debts
1545	37 Henry VIII	c 9	Usury
Edward VI			
1547	1 Edward VI	c 1	Sacrament
1548	2 & 3 Edward VI	c 1	Uniformity
1551	5 & 6 Edward VI	c 1	Uniformity
1553	7 Edward VI	c 1	Crown revenues
Mary I			
1554	1 Mary Sess 3	c 1	Queen Regents Prerogative
Elizabeth I			
1558	1 Elizabeth I	c 2	Act of uniformity
		c 19	Alienation by bishops
1562	5 Elizabeth I	c 1	Supremacy of the Crown
1566	8 Elizabeth I	c 1	Bishops
1571	13 Elizabeth I	c 5	Fraudulent conveyances
		c 6	Letters Patent
		c 10	Ecclesiastical leases
		c 12	Ordination of ministers
		c 20	Benefices

1572	14 Elizabeth I	c 8	Recoveries
1575	18 Elizabeth I	c 11	Ecclesiastical leases
1580	23 Elizabeth I	c 1	Religion
1584	27 Elizabeth I	c 4	Fraudulent conveyances
1588	31 Elizabeth I	c 5	Common informers
		c 6	Simony
1592	35 Elizabeth I	c 1	Religion
1601	43 Elizabeth I	c 4	Charitable gifts ¹
James I			
1603	1 James I	c 3	Episcopal lands
		c 13	Privilege of Parliament
1609	7 James I	c 12	Shop-books evidence
		c 15	Crown debts
1623	21 James I	c 4	Common informers
		c 15	Forcible entry
		c 25	Crown lands
Charles I			
1640	16 Charles I	c 10	Habeas Corpus
Charles II			
1660	12 Charles II	c 13	Usury
		c 24	Tenures abolition, ss 8 and 9
1661	13 Charles II St 1	c 1	Sedition
		c 12	Ecclesiastical jurisdiction
1662	14 Charles II	c 4	Act of uniformity
1663	15 Charles II	c 6	Act of uniformity explanation
1670	22 & 23 Charles II	c 10	Statute of distribution
		c 11	Piracy
1677	29 Charles II	c 8	Augmentation of benefices
		c 9	Ecclesiastical jurisdiction
1678	30 Charles II	c 7	Executors of executors
1679	31 Charles II	c 2	Habeas Corpus
James II			
1685	1 James II	c 17	Administration of intestates' estate
William III and Mary II			
1688	1 William & Mary Sess 1	c 16	Simony
		c 30	Royal mines
1689	2 William & Mary Sess 1	c 5	Distress for rent
1692	4 William & Mary	c 12	Repairs of church
		c 16	Clandestine mortgages
		c 24	Estreats: personal representatives
1693	5 William & Mary	c 6	Royal mines
1695	7 & 8 William III	c 7	Parliamentary elections (returns)
1696	8 & 9 William III	c 11	Administration of justice

¹ But repeal should not affect the established rules of law relating to charity.

1698	10 William III	c 22	Posthumous children
1698	11 William III	c 6	Aliens
		c 7	Piracy
		c 12	Governors of plantations
1700	12 & 13 William III	c 3	Privilege of Parliament
		c 5	Returns to Parliament
Anne			
1703	2 & 3 Anne	c 12	Privilege of Parliament
1705	4 & 5 Anne	c 3	Administration of justice, ss 12 and 13
1706	6 Anne	c 8	Maintenance of the Church of England
		c 11	Union with Scotland
		c 40	Union with Scotland
1708	7 Anne	c 14	Parochial libraries
1713	13 Anne	c 11	Simony
George I			
1717	4 George I	c 11	Piracy
1721	8 George I	c 24	Piracy
George II			
1728	2 George II	c 22	Insolvent debtors relief ²
		c 23	Attorneys and solicitors
1730	4 George II	c 26	Proceedings in courts of justice
1732	6 George II	c 14	Courts in Wales and Chester
1733	7 George II	c 20	Mortgage
1734	8 George II	c 24	Set-off ³
1737	11 George II	c 19	Distress for rent ss 16 and 17 ⁴
		c 24	Parliamentary privilege
1738	12 George II	c 13	Price of bread, etc
		c 27	Justices of Assize
1742	16 George II	c 18	Justices jurisdiction
1745	19 George II	c 22	Harbours
1749	23 George II	c 28	Uniformity of worship
1750	24 George II	c 44	Constables protection
1758	32 George II	c 28	Debtors imprisonment
George III			
1760	1 George III	c 23	Commissions and salaries of judges
1763	4 George III	c 10	Recognizances (Discharge)
1765	5 George III	c 17	Ecclesiastical leases
1766	6 George III	c 12	American colonies
1766	7 George III	c 38	Engraving copyright
1769	9 George III	c 16	Crown suits
1770	10 George III	c 50	Parliamentary privilege
		c 51	Entail improvement
1872	22 George III	c 75	Colonial leave of absence

² But with an express saving of the law established by the statute.

³ But with an express saving of the law established by the statute.

⁴ But with a substituted provision.

1784	24 George III Sess 2	c 35	Ordination of aliens
1785	25 George III	c 35	Crown debtors
1787	27 George III	c 29	Competency of witnesses
1792	32 George III	c 58	Information in nature of Quo Warranto
		c 60	Libel (Fox's Act)
1793	33 George III	c 13	Acts of Parliament (Commencement)
1797	37 George III	c 127	Meeting of Parliament
1798	38 George III	c 87	Administration of estates
1800	39 & 40 George III	c 54	Public accountants
1802	42 George III	c 85	Criminal jurisdiction
1803	43 George III	c 46	Costs
1804	44 George III	c 102	Habeas Corpus
1805	45 George III	c 124	Privilege of Parliament
1807	47 George III Sess 2	c 24	Crown lands, escheats
		c 40	Practice in Court of Chancery
1808	48 George III	c 106	Acts of Parliament (Expiration)
1809	49 George III	c 118	Parliamentary elections
1812	52 George III	c 101	Charities procedure
1814	54 George III	c 61	Public office of colony
		c 168	Informal attestation of certain deeds
1815	55 George III	c 147	Glebe exchange
1816	56 George III	c 52	Glebe exchange
		c 100	Habeas Corpus
1817	57 George III	c 52	Deserted tenements
1819	59 George III	c 69	Foreign enlistment
George IV			
1820	1 George IV	c 55	King's Bench, Justices of Assize
1821	1 & 2 George IV	c 121	Commissariat accounts
1822	3 George IV	c 39	Warrants of attorney
1824	5 George IV	c 113	Slave trade, section 9
		c 114	Marine assurance
1825	6 George IV	c 53	Lunatics
		c 56	Forgery
		c 91	Bubble companies
1827	7 & 8 George IV	c 38	Presentments by constables
1829	10 George IV	c 22	Government of Western Australia

STATUTES THAT SHOULD BE REPEALED AND RE-ENACTED IN WHOLE OR PART

Edward I

1285	13 Edward I St 1		<i>Statute of Westminster II</i>
		c 22	Actions of waste
1290	18 Edward I St 1		
		c 1	Restraint of subinfeudation
		c 2	Restraint of subinfeudation
		c 3	Mortmain
1297	25 Edward I		Restraint on taxation, purveyance

Edward III

1357	31 Edward III St 1	c 11	Administration on intestacy
1361	34 Edward III	c 1	Justices of the peace
		c 15	Confirmation of grants

Henry VI

1433	11 Henry VI	c 6	Continuation of indictment
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Edward VI

1547	1 Edward VI	c 7	Justices of the peace
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James I

1623	21 James I	c 3	Statute of monopolies
		c 16	Limitation

Charles II

1660	12 Charles II	c 24	Tenures abolition, section 4
1665	17 Charles II	c 8	Death between verdict and judgment
1666	18 & 19 Charles II	c 11	Cestui que vie

William III and Mary II

1688	1 William & Mary Sess 2	c 2	Bill of Rights
1695	7 & 8 William III	c 15	Parliament

Anne

1702	1 Anne	c 2	Demise of the Crown
1707	6 Anne	c 41	Succession to the Crown
		c 72	Cestui que vie
1709	8 Anne	c 18	Landlord and tenant

George II

1730	4 George II	c 28	Landlord and tenant
1737	11 George II	c 19	Distress for rent
1750	24 George II	c 23	Calendar (New Style)

George III

1774	14 George III	c 78	Fire prevention (Metropolis)
1786	26 George III	c 38	Imprisonment of debtors
1806	46 George III	c 37	Witnesses
1819	60 George III & 1 George IV	c 8	Criminal libel

**STATUTES THAT SHOULD BE PRESERVED BECAUSE
OF THEIR HISTORICAL INTEREST**

Edward I

1275	3 Edward I		<i>Statute of Westminster I</i>
		c 1	Peace of the Church and the Realm
1297	25 Edward I		<i>Magna Carta</i> , chapter 29

Edward III

1351	25 Edward III St 5	c 4	Criminal and civil justice
1354	28 Edward III	c 3	Liberty of subject
1368	42 Edward III	c 3	Observance of due process of law

Henry IV

1400	2 Henry IV	c 1	Confirmation of liberties
1405	7 Henry IV	c 1	Confirmation of liberties

Charles I

1627	3 Charles I	c 1	Petition of Right
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William III and Mary II

1688	1 William & Mary Sess 2	c 2	Bill of Rights
1700	12 & 13 William III	c 2	Act of Settlement

George III

1772	12 George III	c 11	Royal marriages
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STATUTES THAT SHOULD BE PRESERVED PENDING A REVIEW**Henry III**

1267	52 Henry III	c 23	<i>Statute of Marlborough</i> Waste
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Edward I

1278	6 Edward I	c 5	<i>Statute of Gloucester</i> Actions of waste
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Edward III

1351	25 Edward III St 5	c 5	Executors of executors
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Richard II

1389	13 Richard II St 1	c 5	Jurisdiction of admiral and deputy
1391	15 Richard II	c 3	Admiralty jurisdiction

Henry VI

1433	11 Henry VI	c 5	Real actions
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Henry VII

1495	11 Henry VII	c 12	Suing in forma pauperis
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Henry VIII

1536	28 Henry VIII	c 15	Offences at sea
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Edward VI

1547	1 Edward VI	c 8	Confirmation of grants
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Elizabeth I

1575	18 Elizabeth I	c 2	Crown lands
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1601	43 Elizabeth	c 8	Fraudulent administration of intestates' goods
James I			
1623	21 James I	c 14	Intrusions
Charles II			
1677	29 Charles II	c 3 c 7	Statute of frauds Sunday observance
William III and Mary II			
1690	2 William & Mary Sess 2	c 2	Admiralty
Anne			
1705	4 & 5 Anne	c 3	Administration of justice
George II			
1740	14 George II	c 20	Common recoveries
George III			
1774	14 George III	c 48	Life assurance
1775	15 George III	c 39	Oaths
1788	28 George III	c 56	Marine insurance
1799	39 George III	c 37	Offences at sea
1806	46 George III	c 52 c 54	Slave trade Offences at sea
1807	47 George III Sess 1	c 36	Abolition of slave trade
1811	51 George III	c 23	Slave trade
1813	53 George III	c 112	Slave trade
1814	54 George III	c 59	Slave trade
1815	55 George III	c 172	Support of captured slaves
1818	58 George III	c 30 c 49 c 98	Costs Slave trade Slave trade
1819	59 George III	c 97	Slave trade
George IV			
1820	1 George IV	c 90	Offences at sea
1823	4 George IV	c 83	Factor
1824	5 George IV	c 17 c 113	Slave trade Slave trade (except s 9)
1825	6 George IV	c 94	Factor
1826	7 George IV	c 38	Admiralty offences
1828	9 George IV	c 14 c 84	Statute of Frauds amendment Slave trade