1967

PARLIAMENT OF NEW SOUTH WALES

REPORT

OF THE

LAW REFORM COMMISSION

ON THE

APPLICATION OF IMPERIAL ACTS

(L.R.C.4)

November, 1967

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PREFACE

The Law Reform Commission has been functioning since the beginning of 1966 and has been constituted by the Law Reform Commission Act, 1967. The Commissioners are—

The Honourable Mr Justice Manning, Chairman

Professor D. G. Benjafield

Mr R. D. Conacher

Mr H. M. Scott

The Executive Member of the Commission is Mr R. E. Walker. The offices of the Commission are at Park House, 187 Macquarie Street, Sydney.

This report is the fourth report of the Commission made to the Attorney General pursuant to a reference by him to the Commission. The short citation of this report is L.R.C.4.

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[1] Ruffhead edit.
[2] 4 Edward I, St. 2. Ruffhead edit.

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[1331]	5 Edward III—		
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[1340]	14 Edward III, St. 1—		
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[1] Ruffhead edit.
[2] 9 Henry III. Ruffhead edit.
[3] 33 Edward I, St. 2. Ruffhead edit.
[4] [1324] 17 Edward II, St. 1, c. 6. Ruffhead edit.
[5] 17 Edward II, St. 1, c. 11. Ruffhead edit.
[6] Given this general heading in Halsbury's Statutes, 2nd edit. Vol. 4, p. 61.

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[1414]	2 Henry V, St. 1—		
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[1] C. 8. Ruffhead edit.
[2] C. 14. Ruffhead edit.

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[1488]	4 Henry VII—		
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[1515]	7 Henry VIII—		
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[1] Short title acquired by usage.

[2] Also known as the Pretenced Titles Act.

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	c. 37—The Cestui que vie Act, 1540.	Repealed	87-88
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[1571]	13 Elizabeth—		
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[1] Short title acquired by usage.

[2] S. 4. Ruffhead edit.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

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[1] Short title acquired by usage.

[2] [1604] 2 (vulgo 1) James I. Ruffhead edit.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

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[1667]	19 and 20 Charles II—		
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	c. 11—The Piracy Act, 1670.	Repealed	95
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[1] Part preceding c. 1. Ruffhead edit.
[2] C. 1 (2). Ruffhead edit.
[3] [1667] 19 Charles II, c. 6. Ruffhead edit.
[4] 19 Charles II, c. 11. Ruffhead edit.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

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[1692]	4 William and Mary—		
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[1] 1 William & Mary, sess. 1. Ruffhead edit.
[2] s. 4. Ruffhead edit.
[3] 2 William & Mary, sess. 1. Ruffhead edit.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

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[1702]	1 Anne, St. 2—		
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[1] 8 William III, c. 8. Ruffhead edit.
[2] 9 and 10 William III, c. 7. Ruffhead edit.
[3] [1698] 9 and 10 William III, c. 15. Ruffhead edit.
[4] [1698] 9 and 10 William III, c. 41. Ruffhead edit.
[5] [1699] 10 and 11 William III, c. 16. Ruffhead edit.
[6] [1699] 10 and 11 William III, c. 17. Ruffhead edit.
[7] [1700] 11 and 12 William III. Ruffhead edit.
[8] [1701] 1 Anne, St. 1, c. 8. Ruffhead edit.
[9] C. 17. Ruffhead edit.
[10] 4 Anne, c. 16. Ruffhead edit.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Year
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[1707]	6 Anne—		
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	c. 72[3]—The Cestui que Vie Act, 1707.	Replaced	56
[1708]	7 Anne—		
	c. 12—The Diplomatic Privileges Act, 1708.	Repealed	104
	c. 21—The Treason Act, 1708: s. 14.	Repealed	104
[1709]	8 Anne—		
	c. 18[4]—The Landlord and Tenant Act, 1709.	Repealed	105
[1710]	9 Anne.		
	c. 25[5]—The Municipal Offices Act, 1710.	Repealed	105
[1713]	13 Anne—		
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[1714]	1 George I, St. 2—		
	c. 5—The Riot Act.	Repealed	106
[1716]	3 George I—		
	c. 15—The Estreats Act, 1716: ss. 8 and 13.	Repealed	106
[1717]	4 George I—		
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	c. 12—Wilful destruction of ships to prejudice insurers: s. 3.	Repealed	107
[1719]	6 George I—		
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[1721]	8 George I—		
	c. 24—The Piracy Act, 1721,	Preserved in part.	68-69
[1725]	12 George I—		
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	c. 34—Woollen manufactures.	Repealed	107

[1] 5 Anne, c. 9. Ruffhead edit.
[2] C. 7. Ruffhead edit.
[3] C. 18. Ruffhead edit.
[4] C. 14. Ruffhead edit.
[5] C. 20. Ruffhead edit.
[6] 12 Anne, St. 2, c. 18. Ruffhead edit.
[7] Shown as 4 George I, c. 2 in Piracy Punishment Act, 1902, No. 69.

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[1730]	4 George II—		
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[1731]	5 George II—		
	c. 19—The Quarter Sessions Appeal Act, 1731.	Repealed	108
[1732]	6 George II—		
	c. 35—The Lotteries Act, 1732.	Repealed	132-135
[1733]	7 George II—		
	c. 8—Stock Jobbing.	Repealed	108
	c. 20—The Mortgage Act, 1733: s. 2.	Repealed	108
[1734]	8 George II—		
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[1735]	9 George II—		
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[1737]	11 George II—		
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	c. 22—The Corn Exportation Act, 1737: ss. 1, 2 and 4.	Repealed	109
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	c. 28—The Gaming Act, 1738.	Repealed	132-135
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	c. 8—Frauds by workmen.	Repealed	110
	c. 18—Laws continuance, etc. (Lord Jervis' Act): s. 5.	Repealed	110
	c. 19—The Gaming Act, 1739.	Repealed	132-135
[1741]	15 George II—		
	c. 20—The Gold and Silver Thread Act, 1741.	Repealed	79
	c. 27—Thefts of cloth, etc.	Repealed	110
	c. 30—Marriage of lunatics.	Repealed	110

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1742]	16 George II—		
	c. 31—The Prison (Escape) Act, 1742.	Repealed	111
[1744]	18 George II—		
	c. 30—The Piracy Act, 1744.	Preserved in part.	68-69
	c. 34—The Gaming Act, 1744.	Repealed	132-135
[1745]	19 George II—		
	c. 21—The Profane Oaths Act, 1745.	Repealed	111
	c. 37—The Marine Insurance Act, 1745.	Replaced	43-45
[1746]	20 George II—		
	c. 19—Regulation of servants and apprentices.	Repealed	111
	c. 37—Return of process by Sheriffs.	Repealed	111
[1748]	22 George II—		
	c. 27—The Frauds by Workmen Act, 1748.	Repealed	111
	c. 46—Continuance of laws, etc.: s. 11—Attorneys.	Repealed	111
[1750]	24 George II—		
	c. 23—The Calendar (New Style) Act, 1750.	Replaced	39-40
	c. 44—The Constables Protection Act, 1750.	Repealed	112
[1751]	25 George II—		
	c. 36—The Disorderly Houses Act, 1751.	Repealed	112
	c. 37—The Murder Act, 1751: s. 9—Rescues.	Repealed	112
[1753]	26 George II—		
	c. 19—Stealing shipwrecked goods: ss. 1–4.	Repealed	113
	c. 27—The Justices Act, 1753.	Repealed	113
[1754]	27 George II—		
	c. 3—The Offenders (Conveyance) Act, 1754.	Repealed	113
	c. 7—Frauds in manufacture of clocks, etc.	Repealed	111
[1758]	32 George II—		
	c. 28—The Debtors Imprisonment Act, 1758: ss. 1, 3 and 4.	Replaced	57
[1760]	1 George III—		
	c. 13—The Justices' Qualification Act, 1760.	Repealed	113
	c. 23—Commissions and salaries of judges.	Repealed	113

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1764]	4 George III—		
	c. 10—The Recognizances (Discharge) Act, 1764.	Repealed	113
	c. 37—Manufacture of cambrics: s. 16.	Repealed	113
[1766]	6 George III—		
	c. 25—Regulation of apprentices.	Repealed	113
[1766]	7 George III—		
	c. 9—The Justices Oaths Act, 1766.	Repealed	113
[1767]	7 George III—		
	c. 48—The Public Companies Act, 1767.	Repealed	113
	c. 50—Post Office.	Repealed	114
[1769]	9 George III—		
	c. 30—Seamen's Wages.	Repealed	114
[1770]	10 George III—		
	c. 50—The Parliamentary Privileges Act, 1770: ss. 1, 2 and 5.	Repealed	114
[1772]	12 George III—		
	c. 11—The Royal Marriages Act, 1772: ss. 1, 2.	Preserved	61
	c. 24—The Dockyards, &c., Protection Act, 1772.	Not affected.	136
[1772]	13 George III—		
	c. 63—The East India Company Act, 1772: ss. 42 and 45.	Repealed	114
[1774]	14 George III—		
	c. 44—Reeling false or short yarn.	Repealed	114
	c. 48—The Life Assurance Act, 1774.	Replaced	42-43
[1775]	15 George III—		
	c. 14—Reeling false or short yarn.	Repealed	115
[1776]	17 George III—		
	c. 55—Manufacture of hats.	Repealed	115
[1777]	17 George III—		
	c. 56—The Frauds by Workmen Act, 1777.	Repealed	115
[1779]	19 George III—		
	c. 49—Payment of lace makers' wages.	Repealed	115
[1782]	22 George III—		
	c. 75—The Colonial Leave of Absence Act, 1782.	Repealed	115
[1785]	25 George III—		
	c. 35—The Crown Debtors Act, 1785.	Repealed	89,115
[1786]	26 George III—		
	c. 71—The Knackers Act, 1786.	Repealed	116

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1788]	28 George III—		
	c. 7—The Gold and Silver Thread Act, 1788.	Repealed	79
	c. 55—Protection of stocking frames, etc.	Repealed	116
	c. 56—The Marine Insurance Act, 1788.	Replaced	44-45
[1790]	30 George III—		
	c. 31—The Silver Plate Act, 1790.	Repealed	79
	c. 48—The Treason Act, 1790.	Repealed	116
[1792]	32 George III—		
	c. 56—The Servants' Characters Act, 1792.	Repealed	116
	c. 58—Information in nature of quo warranto: s. 1.	Repealed	116
	c. 60—The Libel Act, 1792 (Fox's Act).	Repealed	117
[1793]	33 George III—		
	c. 13—The Acts of Parliament (Commencement) Act, 1793.	Repealed	117-118
	c. 67—The Shipping Offences Act, 1793.	Repealed	118
[1795]	36 George III—		
	c. 7—The Treason Act, 1795.	Preserved in part.	65-67
	c. 8—Seditious meetings.	Repealed	118
	c. 9—The Passage of Grain Act, 1795.	Repealed	118
[1797]	37 George III—		
	c. 70—The Incitement to Mutiny Act, 1797.	Repealed	119
	c. 123—The Unlawful Oaths Act, 1797.	Repealed	118-119
	c. 127—The Meeting of Parliament Act, 1797.	Repealed	119
[1798]	38 George III—		
	c. 69—The Gold Plate (Standard) Act, 1798.	Repealed	79
	c. 87—The Administration of Estates Act, 1798.	Repealed	119
[1799]	39 George III—		
	c. 37—The Offences at Sea Act, 1799.	Repealed	120
	c. 79—The Unlawful Societies Act, 1799.	Repealed	120
[1799]	39 and 40 George III—		
	c. 14—The Meeting of Parliament Act, 1799.	Repealed	122

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1800]	39 and 40 George III—		
	c. 54—The Public Accountants Act, 1800.	Repealed	89
	c. 77—The Collieries and Mines Act, 1800.	Repealed	122
	c. 93—The Treason Act, 1800.	Repealed	122
[1801]	41 George III, U.K.—		
	c. 78—The Constables Expenses Act, 1801.	Repealed	122
	c. 79—The Public Notaries Act, 1801.	Repealed	122
	c. 85—The Fines by Justices Act, 1801.	Repealed	122
[1802]	42 George III—		
	c. 85—The Criminal Jurisdiction Act, 1802: s. 1.	Not affected.	136
	c. 119—The Gaming Act, 1802.	Repealed	132-135
[1803]	43 George III—		
	c. 46—Vexatious arrests.	Repealed	122-123
	c. 140—The Habeas Corpus Act, 1803,	Repealed	124
[1804]	44 George III—		
	c. 102—The Habeas Corpus Act, 1804.	Replaced	58
[1806]	46 George III—		
	c. 37—The Witnesses Act, 1806.	Repealed	124
	c. 54—The Offences at Sea Act, 1806.	Repealed	120
	c. 148—The Lotteries Act, 1806.	Repealed	132-135
[1808]	48 George III—		
	c. 58—The Bail Bonds Act, 1808: s. 1.	Repealed	124
	c. 106—The Acts of Parliament (Expiration) Act, 1808.	Repealed	124
[1809]	49 George III—		
	c. 126—The Sale of Offices Act, 1809.	Repealed	124
[1810]	50 George III—		
	c. 59—The Embezzlement by Collectors Act, 1810: s. 2.	Repealed	125
	c. 85—The Government Offices Security Act, 1810.	Repealed	125

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1812]	52 George III—		
	c. 101—The Charities Procedure Act, 1812.	Replaced	40
	c. 102—The Charitable Donations Registration Act, 1812.	Repealed	125
	c. 104—The Unlawful Oaths Act, 1812.	Repealed	125
	c. 143—The Land Tax Certificates Forgery Act, 1812: s. 6.	Repealed	125
	c. 155—The Places of Religious Worship Act, 1812: s. 12.	Replaced	56
	c. 156—The Prisoners of War (Escape) Act, 1812.	Not affected.	137
[1813]	53 George III—		
	c. 141—Inrolment of grants of annuities.	Repealed	125
[1813]	54 George III—		
	c. 15—The New South Wales (Debts) Act, 1813: s. 4.	Not affected.	137-138
[1814]	54 George III—		
	c. 61—Public Offices in Colonies.	Repealed	115
	c. 145—The Corruption of Blood Act, 1814.	Repealed	126
	c. 146—The Treason Act, 1814.	Repealed	126
	c. 168—The Powers Act, 1814[1].	Repealed	126
[1815]	55 George III—		
	c. 134—The Crown Pre-emption of Lead Ore Act, 1815.	Repealed	126
	c. 184—The Stamp Act, 1815: s. 37.	Repealed	126
	c. 194—The Apothecaries Act, 1815.	Repealed	126
[1816]	56 George III—		
	c. 16—Receivers of Crown Rents.	Repealed	126
	c. 50—The Sale of Farming Stock Act, 1816.	Repealed	127
	c. 58—The Manufacture of Beer.	Repealed	127
	c. 100—The Habeas Corpus Act, 1816.	Preserved	60, 63-65
[1817]	57 George III—		
	c. 6—The Treason Act, 1817.	Preserved in part.	65-67
	c. 19—The Seditious Meetings Act, 1817.	Repealed	127
	c. 53—The Murders Abroad Act, 1817.	Repealed	120
	c. 93—The Distress (Costs) Act, 1817.	Repealed	127
	c. 115—Payment of cutters' wages.	Repealed	128
	c. 117—The Extents in Aid Act, 1817.	Repealed	128

[1] Short title acquired by usage.

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1818]	58 George III—		
	c. 30—The Costs Act, 1818.	Repealed	128
[1819]	59 George III—		
	c. 60—The Ordinations for Colonies Act, 1819.	Not affected.	138-139
[1819]	60 George III and I George IV—		
	c. 1—The Unlawful Drilling Act, 1819.	Repealed	128
	c. 4—The Pleading in Misdemeanour Act, 1819.	Repealed	128
	c. 8—The Criminal Libel Act, 1819: ss. 1, 2 and 8.	Replaced	51-52
[1820]	1 George IV—		
	c. 87—Recovery of possession by landlords.	Repealed	128
	c. 90—The Offences at Sea Act, 1820.	Repealed	129
[1821]	1 and 2 George IV—		
	c. 41—The Steam Engine Furnaces Act, 1821.	Repealed	129
	c. 48—Solicitors.	Repealed	129
	c. 88—The Rescue Act, 1821.	Repealed	129
	c. 121—The Commissariat Accounts Act, 1821: ss. 27 – 29.	Not affected.	138-139
[1822]	3 George IV—		
	c. 39—The Warrants of Attorney Act, 1822.	Repealed	129
	c. 46—The Levy of Fines Act, 1822.	Repealed	129
	c. 114—The Hard Labour Act, 1822.	Repealed	129
[1823]	4 George IV—		
	c. 29—Apprenticeship.	Repealed	130
	c. 34—Masters and servants.	Repealed	130
	c. 35—The Statutory Commissioners Act, 1823.	Repealed	130
	c. 37—The Levy of Fines Act, 1823: s. 1.	Repealed	130
	c. 52—The interment of suicides.	Repealed	130
	c. 60—The Lotteries Act, 1823.	Repealed	132-135
[1824]	5 George IV—		
	c. 96—Masters and Workmen Arbitration.	Repealed	130
	c. 113—The Slave Trade Act, 1824.	Not affected.	137
[1825]	6 George IV—		
	c. 129—Combinations of workmen.	Repealed	130

CHRONOLOGICAL TABLE OF STATUTES TO WHICH REFERENCE IS MADE—*continued*

Year	Regnal Year	How dealt with	Page
[1827]	7 and 8 George IV—		
	c. 17—The Distress (Costs) Act, 1827.	Repealed	130
	c. 65—The Admiralty Act, 1827.	Repealed	131
[1828]	9 George IV—		
	c. 31—The Offences against the Person Act, 1828.	Repealed	121
	c. 32—The Civil Rights of Convicts Act, 1828: s. 3.	Repealed	131
	c. 66—The Nautical Almanack Act, 1828.	Repealed	131
	c. 69—The Night Poaching Act, 1828.	Repealed	132

LAW REFORM COMMISSION

REPORT

To the Honourable K. M. McCaw, M.L.A.,
Attorney General.

By letter dated 11th March, 1966, you made a reference to this Commission in the following terms:

> "To review all Imperial Acts in force in this State (as a first step towards general Statute Law Revision) and so far as practicable, the preparation of legislation to repeal them as Imperial Acts and re-enact such part of them as should remain part of the law of New South Wales."

Imperial Acts in force in New South Wales fall into three groups:

(1) Those which are in force here by express words or necessary intendment and by virtue of the paramount legislative power of the Imperial Parliament (for example, the Merchant Shipping Act, 1894);

(2) Those which are in force here by virtue of the Imperial Act 9 Geo. IV, c. 83 (for example, the Statute of Uses), which we discuss below; and

(3) Those which are in force here because they have been adopted by legislation of New South Wales (for example, the Real Property Limitation Act, 1833).

Imperial Acts in the first group are not susceptible of repeal by the Parliament of New South Wales (Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63), ss. 1, 2): we have taken it that our terms of reference do not extend to these Imperial Acts. Imperial Acts in the third group are not in force here because they are Imperial Acts but merely because they have been made the object of referential legislation of New South Wales; the fact that an Imperial Act, rather than some other body of words, has been chosen as the object of referential legislation of New South Wales is ultimately not relevant to the characterization of the law in force here pursuant to New South Wales Acts. We therefore regard Imperial Acts in the third group as outside our terms of reference. Except for some incidental matters, we have therefore confined our work to that great body of Imperial Acts in force, or possibly in force, in New South Wales by virtue of the Imperial Act 9 Geo. IV c. 83 s. 24.

The history of the government of New South Wales may be divided into four periods:

(1) The period of military and "despotic" government from 1788 to 1823.

(2) That from 1823 to 1843 under a Governor and a Legislative Council appointed by the Crown. This form of government was provided for by the Imperial Acts 4 Geo. IV c. 96, and 9 Geo. IV c. 83, the latter of which has already been referred to. In this period the Supreme Court was established by the Charter of Justice in 1823.

(3) The period from 1843 to 1856, during which period the Legislative Council was partly representative.

(4) The period from 1856 when full responsible government was inaugurated by the "Constitution Statute", the Imperial Act 18 and 19 Vict. c. 54, which contained the Constitution Act in a schedule (*Burge, Colonial and Foreign Law* (1907), Vol. 1, p. 289).

It was during the second period that the Act 9 Geo. IV c. 83 was passed.

At the time of the foundation of the colony of New South Wales in 1788 it had become a well-established principle of English law that, the law of England being the inheritance of the subjects of the realm, on the settlement of a colony the settlers carry that law with them as far as it is applicable to their new situation, and by that law their rights, duties and obligations are determined. It is, however, only the law of England in force at the time of first settlement that the settlers carry with them. English statute law is constantly being added to and altered by fresh enactments, and no Act of the Imperial Parliament coming into force after a colony is first settled extends to the colony unless the Act is expressly made to extend to it. (See *Webb's Imperial Law,* 2nd Edn. pp. 14–20.)

This principle has been stated and applied on many occasions. In particular, it was applied by the judges in New South Wales in the early days of the colony. But there were difficulties in the application of the principle. There were doubts as to the time which was to be taken as the time of first settlement and consequently there were doubts as to the date from which new Imperial Acts did not apply in New South Wales. It was to settle these doubts that the twenty-fourth section of the Act 9 Geo. IV c. 83 was enacted. The section provides as follows:

> "Provided also, and be it further enacted, That all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act, (not being inconsistent herewith, or with any Charter or Letters Patent or Order in Council which may be issued in pursuance hereof,) shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be

applied within the said Colonies; and as often as any Doubt shall arise as to the Application of any such Laws or Statutes in the said Colonies respectively, it shall be lawful for the Governors of the said Colonies respectively, by and with the Advice of the Legislative Councils of the said Colonies respectively, by Ordinances to be by them for that Purpose made, to declare whether such Laws or Statutes shall be deemed to extend to such Colonies, and to be in force within the same, or to make and establish such Limitations and Modifications of any such Laws and Statutes within the said Colonies respectively as may be deemed expedient in that Behalf: Provided always, that in the meantime, and before any such Ordinances shall be actually made, it shall be the Duty of the said Supreme Courts, as often as any such Doubts shall arise upon the Trial of any Information or Action, or upon any other Proceeding before them, to adjudge and decide as to the Application of any such Laws or Statutes in the said Colonies respectively."

The section contains three substantive declarations:

(1) That all the laws of England in force at the time of the passing of the Act (i.e., 25th July, 1828) shall be applied, so far as they can be, in the administration of justice.

(2) When any doubt should arise as to whether any law applied to the Colony, the Governor, with the advice of the Legislative Council, was to declare whether it extended to the Colony or not, and to limit and modify such law as seemed expedient.

(3) Before the Governor made such declaration the Supreme Court, as often as any doubt should arise upon any proceeding before it, was to adjudge and decide as to the applicability thereof. (See *Webb* op. cit., p. 31.)

The opening passage of section 24 was virtually as drafted by Sir Francis Forbes, the then Chief Justice of New South Wales who, however, had suggested the date 19th July, 1823, that being the date of the Act 4 Geo. IV c. 96. The actual date of 1828 adopted in the statute was chosen deliberately in order to bring into force in New South Wales and Van Diemen's Land the benefit of the improvements recently made by Parliament in the criminal law of England, reforms mitigating the harshness of the criminal law made by Peel's Acts. See Sir Victor Windeyer's E. W. Turner Memorial Lecture, *"A Birthright and Inheritance"*, 1 Tas. U.L.R. 635, at p. 668.

Section 24 of 9 Geo. IV c. 83 is in practice taken as the foundation of the Imperial law in force in New South Wales received by inheritance, but it is not the source of the inheritance; the source is the common law itself; the law of England had come to Australia with the First Fleet forty years before 1828. Section 24 of 9 Geo. IV c. 83 got over a particular difficulty and fixes a date, but does not originate a doctrine (Sir Victor Windeyer's Lecture above cited, 1 Tas U.L.R. 635 at p. 636).

Differences existed after the passing of 9 Geo. IV c. 83 as to the significance of section 24, Chief Justice Forbes taking the view that the section did not introduce any new principle but was merely declaratory of the common law. Other judges considered that the common law doctrine of the introduction of English law by settlement could not be reasonably construed to extend to a community of English subjects not voluntarily settling as free immigrants in a newly discovered country but brought thither as a place of punishment and exile. These differences have persisted amongst writers, but for practical purposes it may be taken that Chief Justice Forbes' view was correct, as Lord Watson, in delivering the opinion of the Privy Council in *Cooper* v. *Stuart* (1889) 14 A.C. 286, treated New South Wales as an ordinary settled colony.

Various views were taken as to the scope of the first declaration in section 24, that eventually adopted being that all the laws of England were declared to be in force so far as the same can be applied, that is, "can be reasonably applied". The test applicable was re-stated by the High Court in 1905, in *Quan Yick* v. *Hinds*, 2 C.L.R. 345, as being whether the particular Imperial Act (or the part of it which was in question) was suitable or unsuitable in its nature to the needs of the colony, and that that question must be determined by a consideration of the condition of the colony in 1828 (per Griffith C.J. at p. 356). Some years later in *Mitchell* v. *Scales* 5 C.L.R. 405 the view was expressed that in considering whether an Imperial Act was introduced into New South Wales by 9 Geo. IV c. 83, regard must be had to the suitability of the Imperial Act as a whole to local conditions.

In carrying out the work of the reference, our first problem is to determine what Imperial Acts are in force in New South Wales by virtue of 9 Geo. IV c. 83. The next step is to attempt as far as practicable to bring up to date such of them as it is desirable to retain.

In determining what Acts are in force, great assistance is to be derived from the collection known as "Imperial Statutes in force in New South Wales" prepared by the late Mr H. B. Bignold of the New South Wales Bar, and from the Victorian statute known as the Imperial Acts Application Act 1922, prepared by Sir Leo Cussen, a Judge of the Supreme Court of Victoria, as a result of what has been described as "years of patient and erudite labour". Before their time Alexander Oliver, parliamentary draftsman of New South Wales, had brought out what he called "The Statute Index" in 1874. This included a "Chronological Table of Statutes of the Imperial Legislature (not specifically adopted by local Acts) which relate to the Colony of New South Wales, or affect the Colony as part of Her Majesty's Possessions or Dominions; also of those judicially decided or presumed to be in force in New South Wales". This table contained a list of 214 statutes up to the time of the passing of 9 Geo. IV c. 83, beginning with 9 Henry III c. 29, the Great Charter of Henry III of 1225 (a re-issue of Magna Carta of 1217).

The work of Sir Leo Cussen has been of great value to us. Victoria until separation in 1851 formed part of New South Wales and was subject to the same laws. By the Imperial Act 13 and 14 Vict. c. 59, section 25, and the Victorian Constitution Statute, 18 and 19 Vict. c. 55, Schedule 1, section 40, all laws applicable to New South Wales up to 1851 were carried over and made applicable to Victoria, so that the English laws introduced by 9 Geo. IV c. 83 remained in force in Victoria except so far as they were to be repealed or modified by subsequent Acts of the Victorian Legislature or were to become inconsistent therewith. (*Webb,* op. cit., pp. 39–40.)

In the 19th century, doubts surrounded the power of colonial legislatures to alter or repeal the Imperial Acts which had become applicable to them under the common law or, in the case of New South Wales, by 9 Geo. IV c. 83. (cf. *Ex parte Lyons; In re Wilson,* 1 Legge 140, at p. 153, per Stephen J.). This problem became very acute in South Australia and eventually the British Parliament passed the Colonial Laws Validity Act, 1865. As a result of this Imperial Act of 1865 a colonial Act—or since Federation an Act of an Australian State—is only void on the ground of repugnancy to British laws when the local statute is repugnant to a British law which applies to the Colony or State by express words or necessary intendment. (The Australian States are also subject to the limitation of the "manner and form" provision contained in section 5, relating to the local alteration of their own constitutions—*Attorney General for New South Wales* v. *Trethowan* (1932) A.C. 526). At the time of its passing, the Colonial Laws Validity Act was looked upon as one of the charters of colonial legislative independence, next in importance to the famous Declaratory Act, 18 Geo. III c. 12, in which the British Parliament, profiting by the lessons of the American Rebellion, renounced its intention to again tax the colonies (Quick and Garran *Australian Constitution,* p. 348). Lord Birkenhead, in *McCawley* v. *The King,* 1920 A.C. 691, referred to it as "in Imperial history *clarum et venerabile nomen*" (p. 709). The Colonial Laws Validity Act removed the doubts as to the powers of colonial legislatures to alter or repeal the general mass of English law. Following the enactment of the Colonial Laws Validity Act the status of English law in a Colony or an Australian State could be defined with reasonable clarity. On the one hand, subject to their own constitutions and the Colonial Laws Validity Act itself the Colonies or the Australian States could repeal or amend the Imperial Acts and unenacted English law which had been received under the common law constitutional principles including the law applicable by the Imperial Act 9 Geo. IV c. 83, section 24. On the other hand the Colonies or States were still bound by Imperial Acts passed before or after 1865 which applied to them by paramount force. (Castles, *The Reception and Status of English Law in Australia,* 2 Adelaide Law Review 1, at pp. 22–28.)

Although the Commonwealth by the adoption in 1942 of the Statute of Westminster 1931 has been able to remove the legal limitations of colonial status which occasionally fettered the operations of Colonial or Dominion Legislatures, the States are still subject to some of the legal fetters of the colonial era. However, for practical purposes the Australian States are now autonomous political entities *vis-à-vis* the British Government (Castles, *Limitations on the Autonomy of the Australian States*, Public Law, 1962, p. 176). This political reality justifies, today, a difference in approach to inherited Imperial Acts from that adopted at the time of the preparation of the Victorian Imperial Acts Application Act 1922.

The Act 9 Geo. IV c. 83 was given the short title "The Australian Courts Act, 1828" by the Short Titles Act, 1896 but it is more familiar to New South Wales lawyers by its citation by reference to the chapter in the regnal year of Geo. IV. (In the early days of New South Wales it was called The Constitution Act, and sometimes the New South Wales Act.)

Appendix I to this report contains a list of Imperial Acts which we consider to be in force today, and to require continuance in force or substitution either wholly or in part.

The Imperial Acts in Appendix I fall into two categories, namely:

A. Those which in our view should not be re-enacted in full, but which contain provisions, the substance of which should, in our opinion, continue to be part of the law of this State. In each instance the draft Bill contains a provision to take the place of the Imperial enactment. These provisions of the Bill are referred to as substituted enactments.

B. Those for which it is impracticable to enact substituted provisions but which it is desirable to continue in force in their ancient form. These are primarily constitutional enactments, but also include provisions relating to such matters as treason and piracy. In addition, there are the Imperial Acts before 25th July, 1828, applying irrespective of 9 George IV, c. 83—Appendix III.

Appendix I (A) to this report contains a discussion of the enactments which we think should be replaced by substituted enactments.

Appendix I (B) contains a discussion of the enactments which we think should be continued in force in their old form.

The draft Bill would declare all enactments listed in Appendix I (other than those in Appendix III) to have been in force in New South Wales since 1828 by virtue of 9 Geo. IV c. 83, and would provide that the substituted enactments shall be substituted for the relevant Imperial Acts.

The draft Bill would also repeal all other Imperial Acts which were in force in New South Wales by 9 Geo. IV c. 83 and have not already been repealed. A considerable number of Imperial Acts which were applicable in New South Wales were repealed by various Acts of the Parliament of the United Kingdom after the establishment in 1823 of a local legislature in New South Wales, and these latter English Acts were adopted in New South Wales by local Acts. Examples of such adopting Acts are 4 Will. IV No. 4, 5 Will. IV No. 8, and 3 Vic. No. 5. (A list of adopted Imperial Acts is given in Oliver's *Statute Index* of 1874, at p. 136.) Other Imperial statutes have been directly repealed in whole or in part in their application to New South Wales by various New South Wales Acts—e.g., the Lunacy Act of 1878 (42 Vic. No. 7), the Criminal Law Amendment Act of 1883 (46 Vic. No. 17), the Liquor Act, 1912, the Sale of Goods Act, 1923, the Factors (Mercantile Agents) Act, 1923, the Conveyancing Act, 1919, and the Sunday Entertainment Act, 1966. In addition, the Usury, Bills of Lading, and Written Memoranda Act, 1902, section 3 (replacing 5 Will. IV No. 10, section 1) provides that no Imperial Act relating to usury shall extend or be applicable to New South Wales. (The New South Wales Parliament has passed three Statute Law Revision Acts—those of 1898, 1924, and 1937. The Statute Law Revision Act, 1924 repealed the residue of 7 Geo. IV c. 64, but otherwise these three Acts did not deal with Imperial enactments.)

Appendix II contains a discussion of our reasons for proposing the repeal of the Imperial enactments therein mentioned. We think that those mentioned are the only ones of any real significance. We have not included Imperial enactments which have been held not to be in force in New South Wales, nor have we included those which have been repealed expressly or (in all cases) by implication. In some instances, repeal by implication results from the same subject matter being dealt with by local legislation. An example is the Imperial Act 14 Geo. III c. 78 (Fires Prevention (Metropolis) Act, 1774) which is discussed in *Hazlewood* v. *Webber*, 52 C.L.R. 268 at pp. 275–6. Other Imperial enactments were included in the general body of law made applicable by 9 Geo. IV c. 83 but we do not think that any of them is of sufficient significance to warrant express mention or to warrant preservation from repeal.

As a matter incidental to the terms of reference we also deal with certain other Imperial Acts which appear to be in force in New South Wales, not by virtue of 9 Geo. IV c. 83, but by virtue of their terms which expressly make them applicable in New South Wales. Appendix III contains a short discussion of or reference to some of those Acts which your Government may think ought to be repealed. The repeal would, we think, have to be effected by the Imperial Parliament because it is beyond the power of the Parliament of New South Wales to repeal them.

We have included in Appendix III a note in relation to the offences of badgering, engrossing, forestalling and regrating.

Appendix IV contains a draft Bill for giving effect to our proposals.

A principal object of the Bill is to re-enact such part of the Imperial Acts in question as should continue in force in this State and are appropriate for re-enactment. Those not appropriate for re-enactment are the constitutional and other enactments set out in Appendix I (B). Thus, with these and one other minor exception, reference to the original terms of the Imperial Acts made applicable to New South Wales by 9 Geo. IV c. 83 presently in force in New South Wales should be unnecessary.

In some instances, the proposed substitution or repeal may involve questions of government policy. So far as we have thought that any of the provisions of the Bill do or may involve questions of policy, we have invited your attention to the problem and you have given us your decision.

Apart from comparatively minor matters which do not call for specific mention, the following were the subject of discussion on which you gave us a decision which has been incorporated in the draft Bill:

(a) The repeal of the residue of section 4 of 29 Car. II c. 3 (The Statute of Frauds, 1677).

(b) Laws relating to privileges of Parliament.

(c) The repeal of 1 Geo. I St. 2 c. 5 (The Riot Act, 1714).

(d) Laws relating to Habeas Corpus.

(e) Laws relating to lotteries and gaming.

(f) Laws relating to the Sheriff.

(g) Laws relating to disturbance of religious worship and Sunday observance.

We have concerned ourselves only with problems which, on the best consideration we can give, do not involve questions of policy.

The Bill has been prepared as far as possible so as not to affect existing Acts of the New South Wales Parliament, but the adoption of the recommendations embodied in the Bill would entail the repeal of the Landlord and Tenant Act, 1899–1964, sections 40 and 43 (2) and the repeal or amendment of the Small Debts Recovery Act, 1912–1965, section 49, and consideration of the Usury, Bills of Lading and Written Memoranda Act, 1902, section 8. The Imperial Acts mentioned in Part II of the Crimes Act, 1900, and in the Piracy Punishment Act, 1902, have been preserved in the second Schedule to the extent provided for by those Acts respectively, but consideration might be given to revising Part II of the Crimes Act and the Piracy Punishment Act.

We desire to refer to clause 9 of the draft Bill.

This clause adopts the savings of section 38 of the Interpretation Act 1889 of the Parliament of the United Kingdom. In England, since the passing of the Statute Law Revision Act, 1958, it has been the practice to rely on that provision as containing sufficient savings for Statute Law Revision Acts. The draft Bill is in part different in scope from a Statute Law Revision Act though it is in part similar in that it proposes to repeal obsolete enactments. In England from the Statute Law Revision Act, 1863, up to and including the Statute Law Revision Act, 1953, it was the practice to insert special and indeed elaborate savings in Statute Law Revision Acts which had become known as the "Westbury savings", after Lord Westbury, who when Lord Chancellor introduced the Statute Law Revision Bill, 1863 and is said to have been primarily responsible for the development of these savings. (See *Halsbury's Laws of England,* 3rd Edition, vol. 36, p. 473, note (r).)

A similar saving clause was adopted in the three Statute Law Revision Acts passed in New South Wales in 1898, 1924 and 1937. The Commissioner for the Consolidation and Revision of the Statute Law, His Honour, Judge Heydon, in his memorandum to the Bill of 1898 said "Revision Acts of this character have been periodically prepared and passed in England for now a number of years back. To prevent the possibility of any injury being done by these repeals, a saving clause very carefully drawn has been inserted in every Revision Act, and has been found, under the test of actual use, to be quite sufficient for its purpose. It has, therefore, been placed in this Bill." This clause was also adopted in section 7 of the Imperial Acts Application Act 1922 of Victoria. (See Sir Leo Cussen's evidence, Victorian Statutes, 1922, p. 106.)

The clause embodying the "Westbury savings" apparently has come to be considered to go too far, it having been argued that the savings may operate to nullify the effect of a particular repeal. (Cf. *Woodfall's Landlord and Tenant* 24th Edition (1939), p. 453.) The Westbury savings were discussed by Mr C. H. Chorley, Parliamentary Counsel, in his evidence before the Joint Select Committee of the House of Lords and the House of Commons in May, 1958. (See *7th Report of the Joint Committee on Consolidation and Statute Law Revision Bills* for the Session 1957–58: H.L. Papers 1957–58, Nos 5–VI, 108–I and H.C. Papers 1957–58, No. 209–I, cited *Hals,* op. cit., p. 474.) It was then decided to dispense with the Westbury savings and to rely on the general provisions in the Interpretation Act, 1889, section 38, and accordingly in the Statute Law Revision Act of 1958 and later Statute Law Revision Acts, there is no special saving clause.

In justice to the memory of Lord Westbury it might be mentioned that a note to the Bill for the Statute Law Revision Act, 1863, contains the following: "The early statutes stand in a peculiar position with relation to modern law. Many of their provisions remain, in some sense, embodied in the existing law, notwithstanding that their immediate subject matter may no longer exist. (To mention one instance: 6 Ed. 1 Stat. Gloucester, c. 5, respecting the Writ of Waste, forms part of the existing law as to waste, although the Writ of Waste has been abolished.)

This peculiarity has always been borne in mind in the compilation of the schedule and the very special terms of the saving in the repealing clause of the Bill have been adopted in order to preclude any apprehension of a substantive alteration of the law being produced by the repeal of any of these early statutes."

Section 8 of our Interpretation Act of 1897 resembles section 38 of the English Interpretation Act of 1889 except that it does not contain paragraph (a) of section 38 of the English Act, which provides that unless the contrary intention appears the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect. Such a provision is essential in a Bill such as this. Accordingly the provisions of section 38 of the Act of 1889 have been adopted in the Draft Bill.

The "Westbury clauses" are, we think, inappropriate in the Bill for the following reasons—

(1) The Bill is intended to make substantial alteration in the law (for example, by the repeal of the remaining provisions of the Statute of Frauds (29 Chas. II, c. 3), while a Statute Law Revision Act is intended, in general, merely to cut away statutory material which has ceased to have a present effect.

(2) The wider the saving clauses, the greater the problems will be of ascertaining the extent of the repeal.

(3) The wider the saving clauses, the more need there will be to refer to the repealed Imperial Acts. The utility of the Bill will be measured by the extent to which it makes such reference unnecessary.

(4) If, despite the attention which we have given to the problems, the repeals turn out to have gone too far, the position can be restored by proclamation under clause 11. This is better than reliance on the necessarily vague words of a saving clause.

Clause 9 (2) (c) will preserve the case law which may be originally based wholly or partly on any of the repealed Imperial enactments.

Following the example of Sir Leo Cussen, we have included in clause 11 of the draft Bill a provision to empower the Governor in Council to revive any Imperial enactment which the draft Bill would repeal. The purpose is to enable any accidental omission from the First or Second Schedules to be cured without further legislation being required.

In conclusion we wish to express our thanks to the many persons who have given us most welcome advice and assistance in our work.

J. K. MANNING,
Chairman.

H. M. SCOTT,
Member.

14th November, 1967.

APPENDIX I

Imperial Enactment			Where dealt with in Draft Bill	
1267	52 Henry III,	Statute of Marlborough, c. 23.	Part III—Division 9 ..	s. 32
1289–90	18 Edward I	St. 1 cc. 1 & 3 Quia Emptores.	Part III—Division 12 ..	s. 36
1297	25 Edward I,	Magna Carta, c. 29.	Second Schedule Part I ..	....
1326–7	1 Edward III	St. 2 c. 16	Part III—Division 8 ..	s. 29
1344	18 Edward III	St. 2 c. 2 ..	Part III—Division 8 ..	s. 29
1351	25 Edward III	St. 5 c. 2 (The Treason Act, 1351).	Second Schedule Part II (Treason)	....
1351–2	25 Edward III	St. 5 c. 4	Second Schedule Part I ..	....
1351–2	25 Edward III	St. 5 c. 5	Part III—Division 1 ..	s. 13
1354	28 Edward III	c. 3 ..	Second Schedule Part I ..	....
1357	31 Edward III	St. 1 c. 11	Part III—Division 1 ..	s. 14
1360–1	34 Edward III	c. 1 (The Justices of the Peace Act, 1361).	Part III—Division 8 ..	s. 30
1361	34 Edward III	c. 15 ..	Part III—Division 12 ..	s. 36
1368	42 Edward III	c. 3 ..	Second Schedule Part I ..	....
1381–2	5 Richard II	St. 1 c. 7 (The Forcible Entry Act, 1381).	Part III—Division 4 ..	s. 18
1429	8 Henry VI	c. 9 (The Forcible Entry Act, 1429).	Part III—Division 4 ..	s. 19
1536	28 Henry VIII	c. 15 (The Offences at Sea Act, 1536).*	Second Schedule Part II (Piracy)	....
1588–9	31 Elizabeth	c. 11 (The Forcible Entry Act, 1588).	Part III—Division 4 ..	s. 19
1623–4	21 James I	c. 3 (The Statute of Monopolies) ss. 1 and 6.	Second Schedule Part I ..	....
1627	3 Charles I	c. 1 (The Petition of Right).	Second Schedule Part I ..	....
1640	16 Charles I	c. 10 (The Habeas Corpus Act, 1640) s. 6.	Second Schedule Part I ..	....

* To the extent provided in the Piracy Punishment Act, 1902.

APPENDIX I—*continued*

Imperial Enactment			Where dealt with in Draft Bill		
1660	12	Charles II c. 24 (The Tenures Abolition Act, 1660)—			
		s. 4	Part III—Division 12	..	s. 37
		s. 9	Part III—Division 5	..	s. 21
1666	18 and 19	Charles II c. 11 (The Cestui que Vie Act, 1666).	Part III—Division 13	..	s. 38
1677	29	Charles II c. 7 (The Sunday Observance Act, 1677) s. 6.	Part III—Division 16	..	s. 41
1678	30	Charles II c. 7 ..	Part III—Division 1	..	s. 15
1679	31	Charles II c. 2 (The Habeas Corpus Act, 1679) ss. 1-8, 11, 15-19.	Second Schedule Part I	..	....
1685	1	James II c. 17 s. 6 ..	Part III—Division 1	..	s. 14
1688	1	William and Mary c. 30 (The Royal Mines Act, 1688) s. 3.	Second Schedule Part I	..	....
1688	1	William and Mary sess. 2 c. 2 (The Bill of Rights).	Second Schedule Part I	..	....
1688	1	William and Mary c. 18 (The Toleration Act, 1688) s. 15.	Part III—Division 14	..	s. 39
1692	4	William and Mary c. 24 s. 12.	Part III—Division 1	..	s. 15
1695		7 and 8 William III c. 3 (The Treason Act, 1695), ss. 5 & 6.	Second Schedule Part II	..	....
1696–7	8	and 9 William III c. 11 (The Administration of Justice Act, 1696) s. 8.	Part III—Division 10	..	s. 33
1698–9	11	and 12 William III (or 11 William III) c. 7 (The Piracy Act, 1698).*	Second Schedule Part II (Piracy)		....
1698–9	11	William III c. 12 ..	Third Schedule		....
1700	12	and 13 William III c. 2 (The Act of Settlement).	Second Schedule Part I	..	....

* To the extent provided in the Piracy Punishment Act, 1902.

APPENDIX I—*continued*

Imperial Enactment			Where dealt with in Draft Bill
1702	1	Anne c. 2 (The Demise of the Crown Act, 1702) s. 4.	Second Schedule Part I .. ....
1702	1	Anne St. 2 c. 21 (The Treason Act, 1702) s. 3.	Second Schedule Part I .. ....
1705	4	and 5 Anne c. 3 (or c. 16) (The Administration of Justice Act, 1705) ss. 12 & 13.	Part III—Division 10 .. s. 34
1707	6	Anne c. 41 (or 6 Anne c. 7) (The Succession to the Crown Act, 1707) s. 9.	Second Schedule Part I .. ....
1707	6	Anne c. 72 (or c. 18) (The Cestui que Vie Act, 1707).	Part III—Division 13 .. s. 38
1717–18	4	George I c. 2 (or c. 11) (The Piracy Act, 1717) s. 7.*	Second Schedule Part II (Piracy). .. ..
1721–2	8	George I c. 24 (The Piracy Act, 1721).*	Second Schedule Part II (Piracy) .. ..
1737	11	George II c. 19 (The Distress for Rent Act, 1737) s. 14.	Part III—Division 9 .. s. 31
1744–5	18	George II c. 30 (The Piracy Act, 1744).*	Second Schedule Part II (Piracy). .. ..
1745	19	George II c. 37 (The Marine Insurance Act, 1745).	Part III—Division 7 .. s. 26
1750	24	George II c. 23 (The Calendar (New Style) Act, 1750).	Part III—Division 2 .. s. 16
1758–9	32	George II c. 28 (The Debtors Imprisonment Act, 1758) ss. 1, 3, 4.	Part II—Division 15 .. s. 40
1772	12	George III c. 11 (The Royal Marriages Act, 1772) ss. 1 and 2.	Second Schedule Part I .. ....
1772	12	George III c. 24 (The Dockyards, &c., Protection Act, 1772).	Third Schedule .. ..
1774	14	George III c. 48 (The Life Assurance Act, 1774).	Part III Division 6 .. .. s. 23

* To the extent provided in the Piracy Punishment Act, 1902.

APPENDIX I—*continued*

Imperial Enactment			Where dealt with in Draft Bill
1788	28	George III, c. 56 (The Marine Insurance Act, 1788).	Part III Division 7 .. ss. 27, 28
1795	36	George III c. 7 (The Treason Act, 1795).*	Second Schedule Part II (Treason).
1802	42	George III c. 85 s. 1 (The Criminal Jurisdiction Act, 1802).	Third Schedule .. ..
1804	44	George III c. 102 (The Habeas Corpus Act, 1804).	Part III, Division 17 .. s. 42
1812	52	George III c. 101 (The Charities Procedure Act, 1812).	Part III—Division 3 .. s. 17
1812	52	George III c. 155 (The Places of Religious Worship Act, 1812) s. 12.	Part III—Division 14 .. s. 39
1812	52	George III c. 156 (The Prisoners of War (Escape) Act, 1812).	Third Schedule .. ..
1813	54	George III c. 15 (The New South Wales (Debts) Act, 1813) s. 4.	Third Schedule .. ..
1816	56	George III c. 100 (The Habeas Corpus Act, 1816).	Second Schedule Part I .. ....
1817	57	George III c. 6 (The Treason Act, 1817).†	Second Schedule Part II (Treason).
1819	59	George III c. 60 (The Ordinations for Colonies Act, 1819).	Third Schedule .. ..
1819	60	George III & 1 George IV c. 8 (The Criminal Libel Act, 1819) ss. 1, 2, and 8.	Part III—Division 11 .. s. 35
1821	1	and 2 George IV c. 121 (The Commissariat Accounts Act, 1821) ss. 27-29.	Third Schedule .. ..
1824	5	George IV c. 113 (The Slave Trade Act, 1824).	Third Schedule .. ..

* To the extent provided in the Piracy Punishment Act, 1902.
† To the extent provided in the Crimes Act, 1900, s. 11.

APPENDIX I (A)

Enactments to be replaced

Part III of the Draft Bill

The Imperial enactments proposed for reproduction in Part III of the draft Bill are arranged below in alphabetical order of subject-matter, and not in chronological order. The short titles were given by later Imperial Acts, in most cases by the Short Titles Act, 1896. The Interpretation Act of 1897, section 36, permits citation by these short titles, as well as by the year of the reign in which the Act was passed and its chapter. They are:

1. ADMINISTRATION OF ESTATES

(i) 25 Edward III St. 5, c. 5

This Imperial Act has current utility in its provisions to the effect that executors of executors represent the original testator. The draft Bill, clause 13, adopts the expanded provision made by the Imperial Administration of Estates Act, 1925 (15 George V, c. 23), section 7.

(ii) 31 Edward III St. 1, c. 11
(1 James II c. 17, s. 6)

The Imperial Act, 31 Edward III St. 1, c. 11, confers and imposes on administrators the same rights and accountability as executors.

The Imperial Act, 1 James II c. 17, s. 6, provided that administrators are not compelled to account (except by an inventory) but at the instance of persons interested. See clause 14 of the draft Bill.

(iii) 30 Charles II c. 7
4 William and Mary c. 24, s. 12

These Imperial Acts deal with the liability for waste (to the extent of the assets) of a personal representative whether of an executor or administrator of right or of an executor de son tort (cf. the Imperial Administration of Estates Act, 1925, section 29). See clause 15 of the draft Bill.

2. CALENDAR—NEW STYLE

(1750) 24 George II, c. 23—The Calendar (New Style) Act, 1750

This Act adopted the Gregorian Calendar in lieu of the Julian Calendar, which had long since become inaccurate.

Section 1 of the Act was by its terms made applicable in and throughout all His Majesty's dominions and countries in Europe, Asia, Africa and America, belonging or subject to the crown of Great Britain.

The Act consisted of six sections, with a number of Tables and Rules annexed. Much of the original Act is spent, the Act having provided for the transition to the new calendar. The Tables and Rules contain much concerned with religious matters, one Rule relating to the occurrence of Easter Day with reference to the occurrence of the full moon after 21st March in a year. Some Tables contain material for the ascertainment of the day upon which Easter Day will fall according to the calendar in future years.

Section 3 enacts that the Feast of Easter . . . shall be observed according to the new calendar, tables and rules annexed to the Act.

We have had the advantage of consultation with the Government Astronomer, who has pointed out that the rule in the Table relating specifically to the determination of Easter Day—in the Table "Tables and Rules for the moveable or immoveable Feasts", etc., is inaccurate and is not observed in practice, and that it is inconsistent with the general provisions of section 3, which import the Tables generally.

Following the Government Astronomer's useful suggestion we have adopted in clause 16 a provision in general terms for the determination of certain matters, including the ordering of Easter Day in accordance with the universally accepted practice. Otherwise the draft Bill would reproduce only a small portion of section 1, as well as section 2 of the Act of 1750.

3. CHARITIES

(1812) 52 George III c. 101—The Charities Procedure Act, 1812

The Draft Bill reproduces the Charities Procedure Act, 1812, which is frequently applied in New South Wales and is referred to in the Charitable Collections Act, 1934–1941: see clause 17 of the Draft Bill.

4. FORCIBLE ENTRIES AND DETAINERS

(1381) 5 Richard II St. 1, c. 7—The Forcible Entry Act, 1381

This enactment was confirmed by (1391) 15 Rich. II c. 2 which added remedies. 8 Henry VI c. 9, the Forcible Entries Act, 1429, applied the earlier Acts to both forcible entry and forcible detainer and empowered justices to put back in possession the person forcibly turned out. The Act of 1429 and the Forcible Entry Act, 1588 (31 Elizabeth c. 11) precluded restitution against parties who had been in possession for at least three years. The Forcible Entry Act, 1623 (21 James I c. 15) extended the power of restitution to forcible entries made against tenants for years. (*Halsbury's Statutes,* 2nd Edn. Vol. 13, p. 840.)

The Act 5 Richard II St. 1, c. 7 (1391) prohibits a forcible entry but does not in terms give a civil remedy. However, many actions were brought under it, and the Act of 1429 did give a civil action for forcible entry. It is with regard to civil actions under both statutes that it is held that they do not lie if the defendant had a right of entry against

the plaintiff. They do lie if he had no right of entry. It appears to follow that an entry pursuant to a right of entry was not made ineffective or civilly unlawful even though the entry was forcible—per Scrutton L.J. in *Hemmings* v. *Stoke Poges Golf Club* (1920) 1 K.B. 720, at p. 746. In that case it was held that an owner of land may enter and turn a trespasser out, provided that he uses no more force than is necessary to eject him. (See also *Aglionby* v. *Cohen* (1955) 1 Q.B. 558.)

A forcible entry must be . . . "accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within the statutes." *Russell on Crime,* 12th edn., vol. 1 at p. 284.

At page 286 of *Russell* it is said, in reliance on old authorities: "Forcible detainer is where a man, who enters peaceably, afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible will also make a detainer forcible. It seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt is made to re-enter; and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault anyone who shall attempt to make an entry into it; . . ."

The Draft Bill in Part III, Division 4, clauses 18 to 20, contains provisions against forcible entry and forcible detainer, subject to the three-year period of possession.

5. GUARDIANS

(1660) 12 Charles I c. 24, The Tenures Abolition Act, 1660, section 9

Chapter 17 of the Statute of Marlberge, or Marlborough, laid certain duties on guardians in socage. Guardianship in socage existed only where the infant was under the age of fourteen and had by descent the legal estate in land held in socage tenure. (In that case it was not confined to the land which he held in socage but extended to his other land and property and to his person.)

The guardianship belonged to such one of the infant's nearest in blood as could not inherit the socage land by descent and in the case of his death while the infant was still under fourteen it devolved upon the next in blood who could not so inherit. The guardianship continued only until the age of fourteen. After its termination the infant could choose for himself a guardian during the remainder of his minority (*Halsbury's Laws of England,* 1st edn, vol. 17, pp. 121–122). The powers of a guardian in socage, as described in 1809 in *R.* v. *Inhabitants of Oakley,* 10 East 491, at p. 494, were as follows: "The law considers a guardian in socage as entitled to the possession of the ward's

property and incapable of being removed from it by any person. He may maintain trespass and ejectment, avow for damage feasant, make admittance to copyhold, and lease in his own name. He cannot indeed convey the property absolutely as an executor or administrator . . . but he may dispose of it during his guardianship though accountable afterwards to the heir."

12 Chas. II c. 24

Sections 8 and 9 of the Statute 12 Chas. II c. 24, The Tenures Abolition Act, 1660, dealt with the matter of guardianship.

Section 8 authorized the father to appoint a guardian by deed or will and section 9 provided that a guardian so appointed might bring actions in relation to the matters mentioned in the section—"as by law a guardian in common socage might doe".

The New South Wales Act, the Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954—in section 13 (1) provides, inter alia, that on the death of the father of an infant the mother, if surviving, shall, subject to the provisions of the Act, be guardian of the infant, either alone or jointly with any guardian appointed by the father. By section 14 (1) of the same Act, a father of an infant may by deed or will appoint any person to be guardian of the infant after his death. By section 14 (2) the mother of an infant may by deed or will appoint any person to be guardian of the infant after her death. By section 19 of the same Act, every guardian under the Act shall have all such powers over the estate and the person, or over the estate (as the case may be) of an infant, as any guardian appointed by will or otherwise now has.

On the assumption on which the Act of 1916 proceeded, namely that the Tenures Abolition Act was in force in New South Wales, section 19 with the other sections would give the guardian the powers referred to in section 9 of the Tenures Abolition Act, 1660.

Section 14 (1) of the Testator's Family Maintenance and Guardianship of Infants Act, 1916–1954, renders the retention of s. 8 of the Tenures Abolition Act unnecessary.

The draft Bill includes in clause 21, provisions in substitution for s. 9 of the Tenures Abolition Act, but having regard to the proposed repeal of Chapter 17 of the Statute of Marlborough, and as the powers of a guardian in common socage are not readily ascertainable and are not suitable for the present day, general words as to remedies are added at the end of clause 21.

6. INSURANCE

Fire and Other Policies

(1774) 14 George III c. 48—The Life Assurance Act, 1774

The long title of this Act is an Act for regulating Insurance upon Lives, and for prohibiting all such Insurances except in cases where the Persons insuring shall have an Interest in the Life or Death of the Persons Insured. But though the Act in its long title refers to life insurance only, it is not in its operative language so limited.

At common law, insurances by way of gaming or wagering were valid, subject to certain qualifications. In 1745 an Act (19 Geo. II c. 37), the Marine Insurance Act, 1745, was passed to prohibit policies dispensing with proof of interest and other policies by way of gaming or wagering in relation to British ships and merchandise. In 1774 the Life Assurance Act above listed was passed to prohibit insurances on lives or other events except where the persons insuring had an interest (*Halsbury's Laws of England,* 3rd edn., vol. 22, pp. 277, 278). The object of the statute was to prevent gambling under the form and pretext of a policy of insurance by parties who have no interest in the subject-matter of such assurance.

No insurance is to be made on the life of any person or persons, or on any other event, wherein the person for whose benefit the policy is made, has no interest, or by way of gaming or wagering; every insurance made contrary to this provision is void.

No policy is to be made on the life of any person or other event without inserting the name of the person interested, or for whose benefit the policy is made.

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 Act has been held to apply to personal accident insurance, and generally to insurances upon events. It is not, however, of universal application. Insurances on ships, goods, and merchandise are expressly excluded from its operation . . . (*Halsbury,* op. cit., p. 278).

The Act has been held to be in force in New South Wales—see the recent case of *Davjoyda Estates Pty Ltd* v. *National Insurance Co. of New Zealand Ltd* (85 W.N. (Pt 1) 184).

The Act has on occasions led to hardship or injustice.

In *Davjoyda Estates Pty Ltd* v. *National Insurance Co. of New Zealand Ltd,* supra, one view taken was to the effect that section 2 of the statute, which requires the names of persons interested etc. to be inserted in policies, under penalty of avoiding the policy, did no more than supplement section 1, and was not an unqualified and independent provision. It was also said that the statute did not apply to contracts of indemnity. The substitution for the statute in Division 6 of Part III of the draft Bill proceeds upon these views and adapts the text of the old provisions accordingly.

7. MARINE INSURANCE

(1745) 19 George II c. 37—The Marine Insurance Act, 1745

This Act was discontinued by the Marine Insurance Act 1909 (Commonwealth) as to contracts or policies to which that Act applies, i.e.,

(i) contracts or policies of marine insurance other than State marine insurance, and

(ii) State marine insurance extending beyond the limits of the State concerned.

Section 1 of the Act of 1745 prohibited the making of insurances on British ships and their cargoes "interest or no interest" or "without further proof of interest than the policy" or by way of gaming or wagering or "without benefit of salvage to the assurer". This provision was replaced in England by the Marine Insurance Act, 1906, section 4, which, however, is not restricted to British ships. Section 4 of the Act of 1906 is represented by section 10 of the Commonwealth Act of 1909.

By the law of England, as it stood at the time of the passing of the Act of 1745, a wager policy properly so called, i.e. one in which the parties by express terms, such as the words "interest or no interest" or "without proof of interest", disclaimed making a contract of indemnity, was then deemed a valid contract of insurance—*Arnould on Marine Insurance,* 13th ed., para. 311, page 299.

Further, a policy containing no such clause disclaiming or dispensing with the proof of interest, but effected in the common form, was at common law at the time of the passing of the Act of 1745, and still is, considered to be a contract of indemnity only, upon which the assured could never recover without averment and proof of interest (*Arnould,* loc. cit.).

Clause 23 of the draft Bill replacing the Life Assurance Act, 1774 would except insurances on ships or goods from the scope of that clause.

The field remaining after the Marine Insurance Act 1909 (Commonwealth) is a small one. As it is undesirable, however, to leave the matter dealt with by section 1 of the Act of 1745 unregulated by law, clause 26, similar to section 4 of the Imperial Act, and section 10 of the Commonwealth Act, confined to the area of State power, is proposed for adoption.

To complete the discussion of this Act, we would add that the Imperial Statute Law Revision Act, 1867 (30 & 31 Vic. c. 59) repealed secs 4, 5 and 8 as to all Her Majesty's Dominions. S. 4, which, subject to exceptions, prohibited re-insurance, had already been displaced by the New South Wales Act 29 Vic. No. 19 s. 1. The latter provision was re-enacted by the Life, Fire and Marine Insurance Act, 1902–1938, s. 17, which is still operative in the field of domestic State marine insurance, that is State marine insurance not extending beyond the limits of the State. The other provisions of the Act of 1745, that is, sections 2, 3, 6 and 7, are unnecessary.

(1788) 28 George III c. 56—The Marine Insurance Act, 1788

An Act to repeal 25 George II c. 44 for regulating insurances on ships and on goods, merchandises or effects and for substituting other provisions.

This Act was discontinued as to marine insurance by the Marine Insurance Act 1909 (Commonwealth) as to contracts and policies of marine insurance to which that Act applies, that is, contracts or policies of marine insurance other than State marine insurance and contracts of State marine insurance extending beyond the limits of the State concerned. See sections 5 and 6 and the First Schedule of the Act of 1909.

The Statute 25 George II c. 44, which was repealed by the Act of 1788, was construed by the Courts strictly, and was considered to go too far, and accordingly the Act of 1788 was passed providing that no policy should be effected without first inserting therein "the name or names, or the usual style and firm of dealing" either—first, of one or more of the persons interested; or, second, of the consignor or consignee of the property to be insured; or, third, of the person resident in Great Britain who received the order for and effected the policy; or, fourth, of the person who gave the order to the agent immediately employed to effect it. Policies made contrary to the Act were to be null and void. The Courts gave this Act the most liberal construction the words would bear so that in practice it was reduced to a mere prohibition of policies in blank. Accordingly, when it was repealed in England by the Marine Insurance Act, 1906, the simpler provision of section 23 (1) of that Act was substituted declaring that a marine policy must specify the name of the assured or of some person who effects the insurance on his behalf—see *Arnould* op. cit., para. 170, page 173.

Section 23 of the English Act of 1906 was reproduced in section 29 of the Commonwealth Act of 1909.

The Marine Insurance Act of 1778 could still have an operation in the field of "domestic" State insurance. As mentioned in relation to the Marine Insurance Act of 1745, the clause in the draft Bill reproducing the Life Assurance Act, 1774 does not extend to bona fide insurances on ships or goods, so that there would be no requirement in New South Wales law as to domestic State insurance to take the place of the Act of 1788.

Clauses following sections 22 and 23 of the Imperial Act and sections 28 and 29 of the Commonwealth Act are proposed for adoption in the draft Bill—see clauses 27 and 28.

8. JUSTICES OF THE PEACE

(1326–7) 1 Ed. III St. 2 c. 16

(1344) 18 Ed. III St. 2 c. 2

(1360–1) 34 Ed. III c. 1—The Justices of the Peace Act, 1361

There is no express local statutory power to appoint justices of the peace in New South Wales. There is, of course, power in the Justices Act to appoint stipendiary magistrates, but there is no power in that statute to appoint justices of the peace. The Justices Act, however, assumes their existence.

Sir Leo Cussen referred to the position in Victoria (as inherited from New South Wales) in giving evidence before the Statute Law Revision Committee of Victoria, as reported at pages 109 and 110 and page 122 of the Victorian Statutes 1922. The three Acts above listed were reproduced in Part II of the Victorian Imperial Acts Application Act.

The office of the justice of the peace in England is an ancient one and said to be obscure in origin (*Harding* v. *Pollock* 6 Bing. 25, at p. 63).

There were at common law persons called conservators of the peace. These conservators were discontinued, and justices of the peace were constituted. The origin of justices of the peace is to be found in the above statutes of the reign of Edward III—1 Edward III St. 2, c. 16, 18 Edward III St. 2, c. 2 and 34 Edward III c. 1, and in addition, 4 Edward III c. 2 (*Harding v. Pollock*, supra, at pp. 48, 64–65).

1 *Edward III* St. 2 c. 16 (1326–7) contained the simple enactment that in every county good men and lawful . . . should be assigned to keep the peace.

4 *Edward III c.* 2 (1330), three years later, after some regulations respecting the appointment of justices of assize and gaol delivery, ordained that there should be assigned good and lawful men in every county to keep the peace; and the justices assigned to deliver the gaols had power given them to deliver the gaols of those that should be indicted before the keepers of the peace; and such keepers were directed for that purpose to send their indictments before those justices.

18 *Edward III c.* 2 (1344). The title of this statute was "Justices of the Peace shall be appointed and their authority", and the statute provided "Item—'That two or three of the best of reputation in the counties shall be assigned keepers of the peace by the King's commission; and at what time need shall be the same with other wise and learned in the land shall be assigned by the King's commission to hear and determine felonies and trespasses done against the peace in the same county, and to inflict punishment reasonably according to law and reason, and the manner of the deeds'."

34 *Edward III c.* 1 (1360–1). This Act provided that "In every county in England shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy in the county . . . and they shall have power to restrain the offenders . . . and to take of all them that be not of good fame . . . sufficient surety . . . of their good behaviour towards the King and his people . . ."

The statutes 18 Edward III c. 2 and 34 Edward III c. 1 were referred to in *Regina* v. *Windeyer* (Legge 369), as if in force in New South Wales.

The Act of 1360–1, 34 *Ed. III c.* 1 has been referred to as an Act for preventive justice. It appears to be the foundation or part of the foundation of the jurisdiction to bind over to keep the peace (e.g., see *Reg.* v. *Sharp* (1957) 1 Q.B. 552 and other cases cited at page 562 of the report of that case; see also *Reg* v. *London Quarter Sessions Appeals Committee* (1948) 1 Q.B. 670 at page 674, and *Thomas* v. *Sawkins* (1935) 2 K.B. 249). In *Lansbury* v. *Riley* (1914) 3 K.B. 229 at p. 235 it is pointed out that it had been held that the judges of the Queen's Bench as conservators of the peace had original jurisdiction independently of the statute of 34 Edward III to require sureties for good behaviour, but in later cases the statute is founded upon.

New South Wales Acts also empower Courts to require recognizances to keep the peace or to be of good behaviour. See Crimes Act, 1900, sections 547, 554, 567A and 558, and the Vagrancy Act, 1902, section 8A.

It is the practice in New South Wales to appoint justices of the peace by commission under the Great Seal or Public Seal of the State. This follows ancient usage—cf. the Act of 1344, 18 Ed. III St. 2 c. 2. (It appears that the form of commission in use in England was settled by the judges in 1590—*Stephen's Commentaries on the Laws of England,* 9th edn., vol. 2, pp. 645 and 646.) The form of commission currently in use commands justices to "hear determine and perform and fulfil" (the matters set forth) "doing therein what to justice appertains, according to the Law and Custom of England and of our said State". The form in use is printed in *Smail's Justices Act,* 1902–1966, p. 456. (Cf. *Reg.* v. *Windeyer* (Legge 366 at pp. 369–371) as to variations in form.) An historical note is given in *Smail's Justices Act* at p. 113 et seq.

In Queensland there is express power in the Justices Acts 1886–1965, section 6, to appoint justices, and section 5 of the same Act provides that nothing in that Act shall be construed to diminish or take away any power or authority conferred on justices of the peace by any other Act except so far as the provisions of the Justices Act are inconsistent with the existence or exercise of such power or authority. A provision similar to section 5 is contained in the South Australian Justices Act, 1921–1936, section 7.

In *Stephen's Commentaries,* 9th edn., vol. 2, at pp. 648–649, it is said that as the office of justices of the peace is conferred by the Crown, so it subsists only during the Crown's pleasure. The passage proceeds to discuss the methods by which the office is terminable. These include (a) an express writ under the Great Seal discharging any particular person from being justice any longer, (b) by superseding the commission by writ of supersedeas, which suspends but does not destroy the powers of all the justices, and (c) a new commission which discharges all the former justices not included therein.

The Queensland Justices Act in a schedule contains a form of General Commission of the Peace. The Queensland Act in section 7 contains a provision for removing or discharging a justice from office, and the Victorian Justices Act 1958, in section 15, empowers the Governor to prohibit a justice from acting as such. This same Act in section 11 recognizes the old method of discharge by exclusion from a new superseding commission.

Clause 29 of the Draft Bill empowers the Governor to appoint justices of the peace and clause 30 reproduces the power of binding over conferred by 34 Ed. III c. 1.

As to Courts of Quarter Sessions, see the Crimes Act, 1900, ss. 568 and 570.

9. LANDLORD AND TENANT

Waste

(1267) 52 Henry III (Statute of Marlborough) c. 23

In the absence of express agreement, the liability of the tenant for the maintenance of the premises depends partly on the doctrine of waste, and partly on an implied contract to use the premises in a tenant-like manner. (*Marsden* v. *Edward Heyes Ltd* (1927) 2 K.B. 1, at p. 6.)

At common law there was no action for waste, and the liability for waste in the case of lessees was first imposed by the Statute of Marlborough, 52 Henry III, c. 23.

The Statute of Marlborough, c. 23, enacts that: "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, men, nor of anything belonging to the tenements that they have to ferm, without special licence had, by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

The term "fermors" in the Statute of Marlborough comprehends all who hold by a lease for life or lives or for years, by deed or without deed—*Woodhouse* v. *Walker* (1880), 5 Q.B.D. 404, at p. 406.

" 'The special licence' mentioned in the Statute of Marlborough is commonly expressed by the well-known phrase 'without impeachment of waste' "—*Woodhouse* v. *Walker*, supra, at p. 407.

Voluntary Waste

Tenants for years, or from year to year, or for any other period, are liable for voluntary waste—*Halsbury's Laws of England*, 3rd edn, vol. 23, p. 568.

Tenants from year to year are in the absence of express stipulation as to repairs, liable for voluntary waste—*Woodfall, Landlord and Tenant*, 26th edn, vol. 1, p. 750; *Marsden* v. *Edward Heyes Ltd* (1927) 2 K.B. 1.

A tenant at will is not liable for waste under the statute. *Woodfall*, op. cit., p. 750. Since a tenant under a periodic tenancy is liable, we see no reason why a tenant at will should not be similarly liable and clause 32 of the draft Bill will procure that he will be liable.

Permissive Waste

It is doubtful whether permissive waste falls within the statute—Woodfall, op. cit., p. 748; *Brian Stevens Pty Ltd* v. *Clarke*, 83 W.N. 32.

A weekly tenant is not liable for permissive waste; *Warren* v. *Keen* (1954) 1 Q.B. 15.

Equitable Waste

A tenant for life holding without impeachment of waste is liable at law as well as in equity for equitable waste unless the express right to commit such waste is given in the instrument creating the estate—Conveyancing Act, 1919–1967, section 9.

Subject to what is stated in the preceding paragraph, a tenant for life is liable for voluntary waste but not for permissive waste either at common law or in equity: *Re Cartwright* (1889) 41 Ch. D. 532.

The almost universal insertion of the express covenant to repair in leases very greatly diminishes the practical importance of the question —whether liability for permissive waste is within the statute. Woodfall, op. cit., at p. 749. Cf. also Conveyancing Act, section 84 (1) (b), and section 23D.

The draft Bill proposes the omission of liability for permissive waste, but provides in short terms that the law as regards voluntary waste shall continue as formerly, subject to the above comments.

Use and Occupation

11 Geo. II c. 19—The Distress for Rent Act, 1737, s. 14

Action for Use and Occupation and Recovery of Deserted Premises

Some of the provisions of the Distress for Rent Act, 1737 have been adopted into local legislation but the provisions of section 14 of the Act which gave an action on the case for use and occupation have not been expressly adopted. There is no reported decision on the question whether section 14 is applicable in New South Wales. An action for use and occupation existed at common law before 1737 in the form of both an action of assumpsit and an action of debt. Before the Statute of 1737, however, proof that there was an actual agreement under which the defendant held the premises resulted in a nonsuit in an action of assumpsit for use and occupation and it was this difficulty which seetion 14 of the Act of 1737 was passed to overcome. An action of debt for use and occupation was not defeated by the proof of an actual demise not under seal, that is, the action of debt for use and oecupation existed independently of the action of assumpsit and was not defeated by proof of an actual demise, at any rate if not under seal. But the position is unsatisfactory. The matter, which involves technicalities, is discussed by Sholl J. in *Specktor* v. *Lees* (1964) V.R. 10 at pp. 18 and 19. Under the Common Law Procedure Act, 1899, the distinction between the forms of action becomes less important. It is, however, preferable to enact a provision in substitution for section 14 of the Distress for Rent Act, 1737, and to make it clear that it does not affect the action of debt for use and occupation.

The substance of section 14 of the Distress for Rent Act, 1737, has been reproduced in Victoria and is now represented by the Landlord and Tenant Act 1958, section 8.

Section 16 of the Distress for Rent Act contains provision for recovery of premises where they are deserted and left uncultivated or unoccupied by the tenant. The motive of this section, as originally enacted, appears to have been to compensate in part for the absence of sufficient distress to countervail arrears of rent. The section was not reproduced in the Landlord and Tenant Act of 1899, and there is no decision as to whether the section is applicable in New South Wales —*Hammond and Davidson, Law of Landlord & Tenant in New South Wales*, 3rd edn (1929), p. 480. It has been re-enacted in Victoria and now appears there as section 30 of the Landlord and Tenant Act 1958.

Section 17 of the Distress for Rent Act 1737 gave a right of appeal from a decision in proceedings authorized under section 16 of that Act.

It is not in our opinion necessary to reproduce sections 16 and 17 of the Act of 1737.

10. LEGAL PROCEDURE—ACTION ON BONDS

(1696) 8 and 9 William III c. 11
(1705) 4 and 5 Anne c. 16 (or c. 3)

Section 132 of the Common Law Procedure Act provides that nothing in the Act shall in any way affect the provisions of the Imperial Act 8 and 9 Will. III c. 11 as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches.

In view of this section, the draft Bill reproduces the provisions of 8 and 9 Will. III c. 11 there referred to. The Act of Will. III has now been given the short title of Administration of Justice Act, 1696. The explanation of the provisions is that in the latter part of the seventeenth century it had become established that the Court of Chancery would grant relief against penalties due on money bonds, on the payment of principal, interest and costs, and against penalties for failure to perform covenants on payment of damages and costs. In the former case the court would also order the refund of penalties paid. The obligor therefore paid the penalty, and exhibited a bill in Chancery to recover the excess over principal, interest and costs; the court decreed accordingly. In the latter case the practice was for the Chancery to relieve against the penalty on condition that the defaulting party paid damages, the cause being remitted to a trial at law to assess the damages.

In the case of money bonds the common law adopted the equitable principle by the mid-1670s; the device employed was to grant the defendant a perpetual imparlance unless the plaintiff would accept a tender of principal, interest and costs. The position was eventually regularized by statutes passed in 1696–97 and 1705 (8 and 9 Will. III c. 11, and 4 and 5 Anne c. 3 (or c. 16)). The first of these statutes permitted a plaintiff who sued for a penalty due on a bond conditioned

for the performance of covenants to assign as many breaches as he wished. It was then the jury's duty 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 the costs. The statute of 1705 authorized the court to discharge an obligor who brought into court principal, interest and costs due on a 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 effect of these two statutes was merely to regularize the position which had already been achieved by the combined efforts of the courts of common law and the Court of Chancery. See article "The Penal Bond with Conditional Defeasance" (1966) 82 L.Q.R. 392 by A. W. B. Simpson.

An example of the application of the Act of 1696–97 in modern times is found in *Workington Harbour and Dock Board* v. *Trade Indemnity Co. Ltd (No. 2)*, (1938) 2 All E.R. 101.

The statute 8 and 9 Will. III c. 11 s. 8 and statute 4 and 5 Anne c. 3 (c. 16) ss. 12 and 13 were made repealable in England by rules of court under the Supreme Court of Judicature (Consolidation) Act 1925. The statute 8 and 9 Will. III c. 11 was together with sections 16 and 18 of the Civil Procedure Act 1833 repealed by R.S.C. Order 53 G in 1957. The order provided that the procedures prescribed by the Act of 1696 section 8 and by the Act of 1833 sections 16 and 18 in the case of actions and bonds shall no longer be followed. The sections are thereby repealed. The order goes on to provide as follows: "2. In an action on a bond the endorsement of the writ and the statement of claim shall be framed so as to claim the amount which the plaintiff is entitled to recover regard being had to the rules of equity relating to penalties and not the penalty provided for by the bond. And these rules shall apply to any such action as they apply to any other action."

Although still kept alive by section 132 of the Common Law Procedure Act, 1899 the procedure is obsolete and will probably disappear with any review of Supreme Court procedure. For safety's sake the effect of the 8 and 9 William III c. 11 section 8, and 4 and 5 Anne c. 16, sections 12 and 13 is stated shortly. See clauses 33 and 34 of the draft Bill.

11. LIBELS—BLASPHEMOUS AND SEDITIOUS LIBELS

(1819) 60 George III and 1 George IV c. 8—The Criminal Libel Act, 1819—ss. 1, 2, and 8

Under these provisions, after verdict or judgment against a person for composing printing or publishing any blasphemous or seditious libel, the Court may make an order for the seizure of copies of the libel.

Search may thereupon be made for such copies. The copies may be restored if judgment is stayed, etc., but otherwise shall be disposed of as the Court shall direct. There is a limitation of actions against persons for things done under the Act.

These provisions are not displaced by the Defamation Act, 1958 —see section 42.

(A portion of this Act, relating to proceedings against and punishment of persons convicted of a second offence—sections 4 and 7, was repealed in England by the Criminal Law Act 1967.)

The effect of this Imperial Act of 1819 is stated shortly in clause 35 of the draft Bill.

12. REAL PROPERTY

(1290) 18 Edward I St. 1, Quia Emptores

(Uncertain date) 17 Edward II, St. 1 c. 6—Prerogativa Regis
(See *In re Holliday* (1922) 2 Ch. 698 at pp 708, 710, 711)

(1327) 1 Edward III, St. 2 c. 12

(1327) 1 Edward III, St. 2 c. 13

(1360–1) 34 Edward III. c. 15

(1660) 12 Charles II, c. 24, ss. 1, 4.—The Tenures Abolition Act, 1660

By English law movable goods are the object of absolute ownership, that is one may be the absolute owner of the goods, but no one but the Queen can enjoy absolute ownership of land. A subject can, at most, have some form of tenure, and this tenure must, if for an estate in fee simple, be held of the Queen unless it is held of another person by virtue of "subinfeudation' (explained below) made before subinfeudation was abolished by the statutes Quia Emptores (18 Edw. I St. 1), or 34 Edward III c. 15 or both. At the present day, tenure for an estate in fee simple is in its incidents for all practical purposes as good as absolute ownership, but it is still in legal theory a holding from the Queen of certain of the Queen's rights—*In re Stone*, 36 S.R. 508, at p. 515, per Jordan C.J.

Tenure is the relation between lord and tenant of land. According to the construction placed upon grants of land made after the Norman Conquest, whether to King William's own followers or to the former owners, the lands were not bestowed as absolute gifts but were granted on the condition of the feudal system of landholding; that is the grantees were regarded as holding the land of the King as lord on the obligation of fidelity and service to him, in which, if they failed, the lands would be forfeited and the King might resume them as his own. The service required of the grantees, as an incident of the tenure, was in general military service. The law of military tenure so applied to the immediate tenants of the Crown, spread downwards as the King's tenants made gifts of lands to their followers as under-tenants on condition of like military service as was required of themselves. (*Williams on Real Property,* 23rd edn, pp. 12–14.)

The right of a tenant to alienate his holding without his lord's consent was gradually established, and by the time of Edward I alienation was common, but the alienation was rarely accomplished by transfer of all of the owner's rights in the land: it was usually effected by subinfeudation, that is by the grant of a fee to the grantee and his heirs to be held by them as tenants of the grantor and his heirs. On the subinfeudation a grantor and his heirs remained the tenants of their own superior lord and a new tenure was created between the grantor and the grantee and the former became the mesne lord between his new tenant and his own superior lord (*Williams,* op cit., 6. 39).

It appears from the preamble to the Statute, Quia Emptores, that the "chief lords" complained that the practice of alienation by the creation of a sub-tenure might deprive them of escheats, marriages and wardships of land belonging to their fees.

The alternative to subinfeudation was substitution. This was established, in general, by the statute Quia Emptores, as a result of which all persons except the King's tenants in capite were left at liberty to aliene all or any part of their lands at their own discretion, subject only to the provision that all conveyances of the fee should be to hold of the chief lord, and not of the grantor. Tenants in capite were by the Statute 1 Edward III St. 2 c. 12 permitted to aliene on paying a fine to the King. Fines for alienation were, in all cases of free tenure, abolished by the Tenures Abolition Act 1660 (12 Car. II c. 24)—*Stephen's Commentaries,* 9th edn, vol. 1, pp. 470–471; *Megarry and Wade, Law of Real Property* (1957) p. 30.

"Quia Emptores marked the victory of the modern concept of land as alienable property over the more restrictive principles of feudalism." (*Megarry and Wade,* op. cit., p. 31.)

Quia Emptores conferred no right of free alienation upon tenants in chief because the Crown was not bound by the statute. An Ordinance of 1276 forbidding them to alienate without a royal licence remained effective. However, in 1327 (1 Edw. 3 St. 2 c. 12) tenants in chief were given a right of free alienation, subject only to the payment of a reasonable fine in some cases and the Tenures Abolition Act 1660, to which further reference is about to be made, abolished this fine.

"Quia Emptores, 1290, is still in force today and may be regarded as one of the pillars of the law of real property. It operates every time that a conveyance in fee simple is executed, automatically shifting the status of tenant from grantor to grantee and fulfilling the rule that all land held by a subject shall be held in tenure of the Crown either mediately or immediately." (*Megarry and Wade,* op. cit., pp. 31–32.)

Statute of Uncertain Date—De Prerogativa Regis (17 Edward II St. 1 c. 6—(Ruffhead): see *In re Holliday* (1922) 2 Ch. 698, at pp. 708, 710, 711)

This Statute enacted or ordained in chapter 6, that no one holding of the King in chief by Knights service might alien . . . his lands . . . except by the King's licence . . .

(1327) 1 Edward III St. 2 c. 12

This Statute enacted that lands held of the King in chief aliened without licence were not to be forfeited, but a fine was to be taken in such cases.

(1327) 1 Edward III St. 2 c. 13

By this Statute, purchases of land held by the King *ut de honore* (that is, where the King had become possessed of the lordship by acquisition from a subject) were not to be treated as held *ut de corona* (in right of the Crown). That is, alienation without licence of lands held of the King *ut de honore* was no longer to be invalidated against the purchaser, and forfeiture for aliening any lands so held of the King was abolished (*In re Holliday*, supra at p. 710).

(1361) 34 Edward III c. 15

This Statute confirmed alienations made by tenants of Henry III or his predecessors. On one construction it also prohibited further sub-infeudations by the King's tenants. (*In re Holliday*, supra at p. 710, 718, 719.)

12 Charles II c. 24 ss. 1, 4—The Tenures Abolition Act, 1660

"The system of landholding in return for services fell into decay long before the most onerous incidents of tenure were legally abolished. In particular, the incidents of military tenure, such as wardships, marriages and aids, were zealously preserved by the Crown for the sake of revenue . . . But, like certain other items of unparliamentary revenue, they were swept away in the seventeenth century. The Tenures Abolition Act, 1660 . . . converted all tenures into free and common socage with the exceptions of frankalmoign and copyhold. The Statute also abolished many burdensome incidents . . . and most fines for alienation . . . The Crown was compensated for its loss of revenue by the imposition of a tax on beer and other beverages. Fixed rents . . . were expressly saved, and reliefs were restricted to those payable for land of socage tenure, i.e., one year's rent. Since it was uncommon for military tenure to be subject to rent, relief in effect disappeared with the other incidents. The principal results of the Act may be summarized thus:

(i) Nearly all burdensome incidents were abolished for all land of free tenure. Escheat and forfeiture survived as the only important incidents of free tenure.

(ii) All free tenures were converted into free and common socage and no other type of tenure might be created in future . . . " (*Megarry and Wade*, op. cit., pp. 32 and 33).

The argument for the Crown *In re Holliday* (1922) 2 Ch. 698, reported at pp. 701, 702, and recorded by Astbury J. at pp. 712, 713, appears to be correct. The argument is stated by Astbury J. to have been as follows:

> "The Statute (i.e., the Statute 12 Car. 2 c. 24, the Tenures Abolition Act, 1660) turned all tenures in capite into tenures in free and common socage and brought the lands under the operation of the Statute Quia Emptores. The enactment, as has often been pointed out, is very badly drawn, inasmuch as it seems to proceed upon the notion that a tenure in free and common socage (into which it turns all other tenures) would if the lands were held of the King direct be something other than a tenure in capite of the King (which tenures the Act purports to abolish). It had, however, long been usual (see Co. Litt., 108A) to use the words 'in capite' to distinguish tenures of the King in right of his Crown or *ut de corona* from tenures of the King where he had become possessed of the lordship by acquisition from a subject (*tenures ut de honore*), and in the case of the latter the King was in no better position that the lord he succeeded and the tenants were within Quia Emptores. This gives a clue to the intention of 12 Car. 2, c. 24, which was to turn all tenures of the King into tenures of the King in free and common socage on the same footing as if the King were a subject—i.e., *tenures ut de honore*. No other interpretation can give any effect to the abolition of the tenures 'by socage in capite from the King' which is expressly enacted in the Statute."

In Helmore—The Law of Real Property (N.S.W.), 1961, page 14, it is said that when the English land law was transplanted here there were inevitable differences from the English scene. First, all titles originated in a direct grant from the Crown . . . Secondly, all tenures were in free and common socage . . .

Usually no services were reserved but sometimes a monetary quit-rent was made payable to the Crown.

By section 234A of the Crown Lands Consolidation Act, added in 1964, all quit-rents were released.

The only other tenurial incident which ever was significant in New South Wales was escheat on death intestate and without heirs or on conviction for treason or felony. Today, if a man dies intestate and without leaving anyone entitled to his estate, his land goes to the Crown as bona vacantia and not by way of escheat: Wills, Probate and Administration Act, 1898–1965, s. 49 (1) (b). Further, there is now no escheat for "felony": Crimes Act, 1900, s. 465 (1). There remains the slight possibility of escheat for treason as an incident of tenure. If not already abolished, it would be abolished by clause 37 as to land granted in fee simple by the Crown after the commencement of an Act founded on the Bill. This form of escheat is, however, of no practical importance and we think that its survival is merely inadvertent.

Clauses 36 and 37 of the draft Bill state in simple form the effect of Quia Emptores and the subsequent legislation of Edward III, and the effect of the relevant portion of the Tenures Abolition Act, 1660, taking account of the Crown Lands Consolidation Act, section 234A.

13. RECOVERY OF PROPERTY ON DETERMINATION OF A LIFE OR LIVES

(1707) 6 Anne c. 72—The Cestui que Vie Act, 1707

Difficulties in proving the existence of a cestui que vie were dealt with by an Act of 1666 (18 and 19 Car. II c. 11)—as to presumption of death after seven years' absence from the realm, and by the above Act of Anne (6 Anne c. 72) as to the production of a cestui que vie in order to prevent concealment of death—*Megarry and Wade, Law of Real Property* (1957) p. 95.

The Act of Anne was in force in England at the end of 1966. (See 20 *Halsbury's Statutes*, 2nd edn., p. 379, and 1965 *Supplement; Chronological Table of the Statutes*, 1235–1966). An application of the statute is to be found in *Re Owen* (1878) 10 Ch. D. 166.

An adaptation of the original provision appears in clause 38 of the draft Bill.

14. RELIGIOUS WORSHIP—DISTURBANCE OF

5 and 6 Edward VI c. 4—The Brawling Act, 1551

(1553) 1 Mary Sess. 2 c. 3—The Brawling Act, 1553

1 Elizabeth c. 2—The Act of Uniformity, 1558, s. 3

1 William and Mary c. 18—The Toleration Act, 1688, s. 15

52 George III c. 155—The Places of Religious Worship Act, 1812, s. 12

A reproduction of the substance of section 68 of the Victorian Statute the Imperial Acts Application Act 1922, is proposed in clause 39 of the draft Bill. That section in turn reproduces the substance of section 207 of the Queensland Criminal Code. These provisions are based mainly on section 15 of the Toleration Act, 1688, and section 12 of the Places of Religious Worship Act, 1812.

The English Criminal Law Act 1967, repealed 1 Mary st. 2, c. 3, there referred to as the Brawling Act 1553, certain portions of which were repealed at various dates in England, namely, in 1888, 1948 and 1963.

The following further short references to the other Statutes listed above are given:

5 and 6 Edward V c. 4—The Brawling Act, 1551.

Brawling in Church and Churchyards.

The whole Act was repealed in England by Ecclesiastical Jurisdiction Measure, 1963 (No. 1) section 87.

1 Elizabeth c. 2—The Act of Uniformity, 1558, s. 3.

Imposes a penalty on persons depraving, etc. the Book of Common Prayer, or causing any other form to be used in Churches, or interrupting any Minister.

15. SHERIFF

(1758) 32 Geo. II c. 28—The Debtors Imprisonment Act, 1758—ss. 1, 3 and 4

These provisions forbid the sheriff or other officer arresting or having in custody any person in the course of a civil proceeding to take the person to gaol within twenty-four hours of arrest unless he refuses to be carried to some safe and convenient place of his own nomination within three miles of the place of arrest, not being the person's private dwelling-house.

The sheriff is forbidden to convey the person arrested without his free consent to a house licensed for the sale of intoxicating liquor or to the sheriff's private house, or to charge the person for liquor etc., except what the person freely asks for.

Section 1 is confined to persons arrested on mesne process, the object being that they might have an opportunity of procuring bail or of agreeing with the persons at whose instance they were arrested. The enactments also struck at certain abuses.

We think that there was not an implied repeal of 32 Geo. II c. 28 in its application to New South Wales or any exclusion of the Statute in relation to the colony by the Charter of Justice, clause XI, or by the course of legislation in 7 Vict. No. 13, the Sheriff Act, 1900, or 3 Vict. No. 15, and the Arrest on Mesne Process Act, 1902 (see *Supreme Court Practice* (1912) Rolin and Innes, p. 189; 3rd edn. (1939) Betts and Louatt, p. 456); nor otherwise.

As the enactments are in favour of the liberty of the subject we recommend them for reproduction. They still remain in force in England as consolidated in the Sheriffs Act, 1887, section 14.

Sections 1–4 of 32 George II c. 28 were consolidated in Victoria by the Imperial Acts Application Act 1922, section 77, and are now consolidated in the Supreme Court Act 1958, section 207.

16. SUNDAY OBSERVANCE

(1677) 29 Charles II c. 7—The Sunday Observance Act, 1677

Sections 1 and 6 have been held to be in force in New South Wales.

Section 1 provides that no tradesman, artificer, workman labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day . . . (works of necessity and charity only excepted) . . . The exception was applied to the driving of sheep on Sunday—*Melbourne Banking Co.* v. *Brewer*, 1 S.C.R. (N.S.) 103.

Section 6 of the Act makes service of process on the Lord's Day void, and also prohibits the execution of certain process on Sundays, and makes the person serving or executing the process liable at the suit of the party grieved.

Section 2 relates to drovers and others travelling on Sunday.

Section 3 contains a proviso for the dressing of meat in families, the dressing or selling of meat in inns, shops or victualling houses for such as otherwise cannot be provided, and the crying or selling of milk before 9 a.m. or after 4 p.m.

Section 4 imposes a ten-day limitation of prosecutions.

Section 5 was, we think, never in force in New South Wales.

Section 1 was very partial in its operation, as the expression "other person whatsoever" has been taken to refer only to persons who are ejusdem generis with tradesmen, with artificers, with workmen or with labourers. Various classes of person have been held to be outside the statute. Thus in *Land Development Co. Ltd* v. *Provan,* 43 C.L.R. 583, the High Court in 1930, reversing the decision of the Supreme Court of New South Wales, held that neither the appellant company nor its agent selling land in subdivision came within the provisions of this section.

The provisions of the Act are now subject to Division 3 of Part IV of the Factories, Shops and Industries Act, 1962–1965 (cf. s. 84).

The only portion of the statute which we recommend for reproduction is that portion of section 6 which relates to service of process on the Lord's Day. As already mentioned, section 6 has been held to be in force in New South Wales, an instance of the operation of the section being given in *Noyes* v. *Noyes* (1945) 62 W.N. 128, where Bonney J. held that section 6 operated on service of New South Wales process not only inside but also outside the State. The reporter's note to the report of the case, however, says that in England the accepted view appears to be that the statute does not affect the validity of service of process outside the United Kingdom.

The proposal is contained in clause 41 of the draft Bill.

17. WITNESSES

(1804) 44 George III c: 102—The Habeas Corpus Act, 1804

This Act enables judges of superior courts in England to award writs of habeas corpus for bringing prisoners before courts of record to be examined as witnesses.

The General Rules of the Supreme Court Order XXIX rule 10 make provision as to applications by the Crown for writs of habeas corpus for the attendance of persons in custody.

The material portion of the Act has been reproduced in short form.

APPENDIX I (B)

This part of the report deals with the enactments for which it is impracticable to make substituted provision but which it is desirable to continue in their present form—primarily constitutional enactments, and provisions relating to such matters as treason and piracy.

First, as to enactments of constitutional significance.

CONSTITUTIONAL ENACTMENTS

(1297) 25 Edward I, Magna Carta, c. 29.

(The notable chapter—no imprisonment contrary to law; administration of justice.)

(1351) 25 Edward III, St. 5, c. 4.

(None to be taken upon suggestion without lawful presentment, etc.)

(1354) 28 Edward III, c. 3.

(1368) 42 Edward III, c. 3.

(None to be condemned without due process of law.)

The text of the four abovementioned chapters is set out in the note below.

(1623) 21 James I, c. 3—The Statute of Monopolies.

In view of the historical or constitutional significance of the Imperial Act the Bill would retain part of it in force. It is the foundation of the law of patents for inventions.

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.

(1627) 3 Charles I, c. 1—The Petition of Right.

(1640) 16 Charles I, c. 10—The Habeas Corpus Act, 1640, s. 6.

Section 6 of this statute gives to any person restrained of his liberty or suffering imprisonment by command of the Sovereign or her Privy Council the right, upon demand or motion made in open court, to the immediate issue of a writ of habeas corpus directed to the gaoler or other person in whose custody he may be. Further provision is made as to the return of the writ and the examination and determination of the matter by the Court. (*Halsbury's Laws of England*, 3rd edn, vol. 11, p. 28.)

(1679) 31 Charles II, c. 2—The Habeas Corpus Act, 1679.

(1688) 1 William and Mary, Sess. 2, c. 2—The Bill of Rights.

(1816) 56 George III, c. 100—The Habeas Corpus Act, 1816.

(A note on the Habeas Corpus Acts of 1679 and 1816 is given below.)

In addition to the above enactments there are the following, of which short particulars are given:

(1688) 1 William and Mary c. 30, s. 3 (s. 4, Ruffhead) The Royal Mines Act, 1688.

Section 3 of this Act was passed to resolve doubts as to whether the Crown, by virtue of the Royal Prerogative, owned the minerals in mines of copper, tin, etc., which contained traces of gold and silver. It provides that Royal Mines are not to include them even though gold and silver may be extracted. This is a provision in favour of the subject and the draft Bill will preserve it.

(1700) 12 and 13 William III, c. 2—The Act of Settlement.

It is in ultimate pursuance of this Act that the Sovereign occupies the throne. (*Hals Stats.* 2nd edn, vol. 4, p. 158).

(1702) 1 Anne, c. 2, s. 4—Demise of the Crown.

Section 4—proceedings upon indictment, etc., or for any debt, etc., due to the Crown continue in force notwithstanding the demise of the Crown.

(1702) 1 Anne, St. 2, c. 21, s. 3—Security of the succession.

Section 3—Endeavouring to hinder succession to the Crown according to the limitations in the Act and attempting the same by overt act is made high treason.

(1707) 6 Anne, c. 41 (or c. 7)—Security of the succession.

Section 9—The Great Seal and other public seals in being at the demise of the Crown to continue until further order.

Sections 1, 2, and 3 deal with criminal offences and were repealed by the Imperial Criminal Law Act 1967. In our opinion they are obsolete and need not be retained in force.

The only other sections of this Imperial Act to which we think it necessary to refer are sections 4, 5, and 7. In our opinion they never have been in force in New South Wales. The effect of them is as follows:

Section 4—Parliament not dissolved on the Sovereign's death.

Section 5—Where Parliament is adjourned at the death of a Sovereign, Parliament to meet, sit, and act notwithstanding the demise of the Crown.

Section 7—Proviso preserving power of the Sovereign to prorogue or dissolve Parliament, etc., and the affirmation of statute 6 and 7 Will. and Mary, c. 2.

(1772) 12 George III, c. 11—The Royal Marriages Act, 1772, ss. 1 and 2.

Sections 1 and 2 remain in force. They prohibit descendants of the Sovereign from marrying without Royal consent, but permit such marriages after notice in stated circumstances.

Section 3 is obsolete and was repealed by the Imperial Criminal Law Act 1967. It need not be retained. Its effect is as follows:

Persons wilfully solemnizing or assisting at a marriage without consent under the Act are made liable to the pains and penalties of praemunire.

Note on (1297) 25 Edward I (Magna Carta) c. 29

Nowadays the earliest set of laws regarded as a statute is that known as the "Provisions of Merton" or the Statute of Merton, of A.D. 1236. In earlier times, Magna Carta had come to be considered as the beginning of English statute law. But there are four versions of the Charter, that of 1215, that of 1216, that of 1217, and that of 1225. John died in October, 1216. At that time Henry III was a child. An amended version of the Charter was issued by Henry's two guardians in November, 1216. Several clauses contained in the Charter of 1215 were omitted in that of 1216 and were never again inserted. In 1217, a longer and more carefully revised version of the Charter was issued. In 1225, when Henry III had become of an age to act for himself, he reissued the Charter, substantially the same as that of 1217. Although substantially the Charter took its final form in 1217, it is the Charter of 1225 which is the Magna Carta of future times. When printing was introduced, Magna Carta, that is, the Charter of 1225, took its place as the first statute on the statute roll. "This, and not the Runnymede Charter, was the one enforced in the Courts . . . expounded clause by clause by Coke in the *second Institute*; the Charter of which nine clauses are still (i.e., 1965) the law of the land" —"Magna Carta—Event or Document", Selden Society Lecture, 7th July, 1965, by Professor Helen Cam, p. 13. (See also pp. 11, 12; see also *Pollock and Maitland, History of English Law,* 2nd edn (1923), pp. 178, 179; *Maitland's Constitutional History of England,* 1941 reprint, pp. 15, 16.)

Edward I confirmed the Charter in 1297. This Confirmation, a restatement of the Great Charter of Henry III issued in 1225, is the version which is currently treated as a statute. It is printed in the *Revised Edition of the Statutes,* 2nd edn, 1868, vol. 1, p. 44 et seq.

The notable chapter is that which forbids imprisonment, etc., contrary to law. This is chapter 29 in the version of 1225 (Ruffhead vol. 1, pp. 7, 8) and in that of 1297, 25 Edward I (Cf. *Halsbury's Statutes,* 2nd edn, vol. 4, p. 26) and is chapter 39 in most earlier versions. (See *Magna Carta*—J. C. Holt (1965) pp. 327 and 355.)

The chapters of Magna Carta which survived on the statute book in England (up to 1965) were (in the version of 1225 or of 1297) the following nine:

c. 1, Confirmation of Liberties;
c. 8, The King's Debtor—pledges;
c. 9, Liberties of London, etc.;
c. 14, Amercements;
c. 15, Making of Bridges;
c. 16, Obstructing of Rivers;
c. 23, Weirs;
c. 29, Imprisonment, etc., contrary to law (see above);
c. 30, Foreign Merchants.

(As to these, see Holt, *Magna Carta,* p. 1.)

(The provision in chapter 37 as to escuage, or scutage, was repealed in England in 1863; portion of chapter 37 does appear to survive; it contains, inter alia, reservations of previous liberties and an undertaking as to observance by the Crown, and records a grant to the Crown by the subjects.)

Of the nine chapters listed above as surviving in England in 1965, Chapters 9, 15, 16 and 23 are not applicable to New South Wales; neither is chapter 1, as to the rights and liberties of the Church of England; the remainder of chapter 1 refers to the subsequent provisions of the charter. Chapters 8 and 14 are obsolete. The Imperial Criminal Law Act 1967 repealed chapter 14. Chapter 30 is obsolete or superseded and so also is chapter 37. This leaves chapter 29, the value of which is chiefly sentimental—cf. Windeyer, *Lectures on Legal History,* 2nd edn (1949), p. 90. In our view, of all the provisions of the Charter, this alone requires to be preserved.

For convenience of reference the provisions of Magna Carta, chapter 29, and the statutes of Edward III are as follows:

(1297) 25 Edward I (Magna Carta) c. 29.

> 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.

(1351) 25 Edward III. St. 5, c. 4.

> 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; it is accorded, assented, and stablished, that from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done, in due manner, or by process made by writ original at the common law; nor that none be out of his franchises, nor of his freeholds, unless he be duly brought into answer, and forejudged of the same by the course of the law; and if any thing be done against the same, it shall be redressed and holden for none.

(1354) 28 Edward III, c. 3.

> . . . 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.

(1368) 42 Edward III, c. 3.

> . . . 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: And if any thing from henceforth be done to the contrary, it shall be void in the law, and holden for error.

Notes on the Habeas Corpus Acts

(1679) 31 Car. II c. 2—The Habeas Corpus Act, 1679

(1816) 56 Geo. III c. 100—The Habeas Corpus Act, 1816

These Acts, though rarely having any direct operation to-day, are of great historical and constitutional importance and have influenced the practice and proceedings outside the Acts for habeas corpus. For these reasons we recommend that they be saved from repeal.

The Habeas Corpus Act, 1679

Abuses which had crept into daily practice, had in some measure defeated the benefit of the constitutional remedy of habeas corpus. The party imprisoning was at liberty to delay his obedience to the first writ, and might await until a second and third, called an alias and a pluries, were issued, before he produced the party imprisoned, and many vexatious shifts were practised to detain state prisoners in custody.

These abuses at length gave rise to the enactment of the Habeas Corpus Act, 1679, which was frequently considered another Magna Carta. By analogy the Act improved the proceedings upon the writ when issued under the common law (*Stephen's Commentaries on the Laws of England,* 9th edn, vol. III, pp. 635–637).

The Act of 1679 was passed "for the better securing the liberty of the subject". This is effected by specifically meeting the various devices by which the common law right to the writ had thitherto been evaded and in particular by making the writ readily accessible during court vacations, by obviating the necessity for the issue of a second and a third writ (the alias and pluries), by imposing penalties on judges for the refusal of the writ, and generally by regulating the granting and issue of the writ and the procedure upon its return (*Halsbury's Laws of England,* 3rd edn, vol 11, p. 28).

To obviate the delays which had been used in making returns to writs of habeas corpus in criminal cases, section 1 of the statute fixed periods for the return to the writ.

The Act of 1679 required writs to be marked as issued under the Act and provided for proceedings thereon in vacation time (s. 2). Persons neglecting for two whole terms after imprisonment to pray a habeas corpus were not to have a habeas corpus in vacation time under the Act (s. 3). Officers not obeying such writs are liable at the suit of a prisoner or party grieved (s. 4). Persons set at large are not to be recommitted for the same offence except by order of the court (s. 5). Persons committed for treason or felony are to be indicted the next term or let to bail (s. 6). Persons committed for a criminal matter are not to be removed from prison except by habeas corpus or some other legal writ (s. 8). The Lord Chancellor or other judges denying in vacation writs of habeas corpus required to be granted by the Act are liable to the prisoner or party grieved (s. 9). Subjects of the realm or inhabitants or residents of the kingdom are not to be sent prisoner into other parts (s. 11) . . .

It was still open to a judge or other magistrate to refuse or release a prisoner except on payment of excessive bail. This defect was removed by the Bill of Rights in 1688.

The Habeas Corpus Act, 1816

The Act of 1679 applies only to imprisonment on criminal or supposed criminal charges. Civil imprisonment was entirely outside the purview of the Act. In all such cases the issue of the writ during vacation depended solely upon the common law and remained unregulated by statute until the Act of 1816.

It was still possible for the respondent to assign a false cause of detention and the Court was unable to go behind the return. These last two defects were remedied by the Act of 1816 (*Stephen's Commentaries on the Laws of England,* 21st edn (1950), vol. 3).

The Habeas Corpus Act, 1816 (56 Geo. III c. 100 s. 2) enacted that a writ of habeas corpus issued in vacation might be made returnable in court in the next term, and a writ issued in term might be made returnable in vacation before a judge where the writ was awarded too late in the term or vacation to be conveniently obeyed within the term or vacation respectively; and these provisions were made applicable to writs issued under the Habeas Corpus Act, 1679 (31 Car. II c. 2) (Habeas Corpus Act, 1816, s. 6)—*Hals.* 1st edn, vol. 10, pp. 66–67, note.

General

Today, proceedings for habeas corpus are not taken under the Acts of 1679 and 1816, but under the common law or under other local statutes.

The operation of the Habeas Corpus Act, 1679 has at various periods been temporarily suspended by the Legislature on the ground of urgent political necessity, but it is said that an enactment suspending the Act, while the enactment remains in force, in no sense abrogates or suspends the general right to the writ at common law. "These so-called Suspending Acts operate in effect as a temporary suspension of the rights of the subject with regard to bail and speedy trial in the case of the specific offences which are enumerated in the Suspending Act but the common law right to the writ of habeas corpus in all other cases remains unaffected." (*Hals.* 1st edn, vol. 10, p. 44.)

The English Criminal Law Act 1967 substitutes imprisonment for life for the pains, etc., of praemunire for those guilty of imprisonments beyond the seas.

In the draft Bill, Second Schedule, Part I, we have omitted reference to the punishment of praemunire. Any penalty would be fixed by clause 43.

TREASON, PIRACY, &c.

Also proposed to be preserved in the draft Bill are certain Acts relating to treason and certain Acts relating to piracy. The Acts relating to treason are those referred to in the Crimes Act, 1900, Part II and the Acts relating to piracy are those set out in the Schedule to the Piracy Punishment Act, 1902.

Statutes relating to Treason

A considerable number of Imperial Acts on the subject of treason were made applicable by 9 George IV, c. 83 (e.g., see *Archbold's Pleading, Evidence and Practice in Criminal Cases,* 32nd edn, pp. 1090–1096; 36th edn, paras. 3001–3012 (pp. 1133–1137)).

Except to the extent that the Crimes Act, 1900, contains provisions referring to these Imperial Acts, we think it unnecessary to continue them in force. (This is apart from 1 Anne st. 2 c. 21, s. 3—p. 60.)

Part II of the Crimes Act, which is headed "Offences against the Sovereign—Treason—Felony", originally consisted of secs 11–16. (Sec. 16A was added in 1951.) The Part derives from the Treason Felony Act, 1848, 11 and 12 Victoria c. 12, which was adopted in New South Wales by the Treason Felony Act of 1868 (31 Vic. No. 25).

Section 11 of the Crimes Act (which is derived originally from section 1 of the Treason Felony Act, 1848) provides that the provisions of 36 George III, c. 7, and the provisions of the Imperial Act 57 George III c. 6 in relation thereto, save such of the same respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim, or wounding, imprisonment, or restraint of the persons of the heirs and successors of King George III, &c. are thereby repealed.

Section 11 of the Crimes Act preserved the following portions of 36 George III c. 7 (the Treason Act, 1795), namely, section 1 (in effect as amended by the Treason Felony Act, 1848), section 5 and section 6. Section 5 applied the benefit of 7 and 8 William III c. 3, and 7 Anne c. 21. The Act of William III provided for a three-year limitation (s. 5) except in case of assassination, etc., of the King (s. 6), and the Statute of Anne, although applying chiefly in relation to Scotland, contained in section 14 a provision of general application requiring delivery of a list of witnesses and jurors and a copy of the indictment to the person indicted.

In the case of 57 George III c. 6, section 4 thereof also provided that persons accused of offences declared high treason by 57 George III c. 6 (the Treason Act 1817) were entitled to the benefit of 7 and 8 William III, c. 3, and 7 Anne c. 21, except in cases of high treason in compassing or imagining the death of any heir or successor of His Majesty or of the death of the Prince Regent, etc., or any direct attempt against the life of any heir or successor of His Majesty, etc.

Section 5 of 57 George III c. 6, provided that nothing in the Act should extend or be construed to extend to prevent or affect any prosecution, etc., to which any person would have been or be liable if the Act had not been enacted for any offence within the provisions of 57 George III c. 6, unless the party had been first prosecuted under the Act. Section 6 of 57 George III c. 6, provided that the Statute 54 George III c. 146, should have the same effect as to sentences and judgments to be pronounced and awarded under 57 George III c. 6, as if the Act had been made and passed before the Act 54 George III c. 146. Section 1 of 54 George III c. 146, provided in effect that the form of sentence in the case of high treason was death by hanging, the head to be severed after death. The effect of section 2 was to authorize the King to substitute the sentence of beheading for hanging.

The Act of 57 George III, c. 7, as printed in 5 *Hals. Stats.* pp. 613–615 seems to accord with section 11 of the Crimes Act.

Section 12 of the Crimes Act (derived from section 3 of the Act of 1848 except in regard to the penalty) makes specified offences, that is to say, compassing, etc., the deposition of the Sovereign, levying war against the Sovereign in order by force or constraint to compel Her Majesty to change her measures or counsels, or in order to intimidate or overawe the Parliament of the United Kingdom or either House thereof or the Parliament of New South Wales, etc., punishable by penal servitude for life. (This was based upon section 3 of the Imperial Treason Felony Act, 1848, except in regard to the penalty.)

Section 16 of the Crimes Act (following section 6 of the Imperial Treason Felony Act, 1848) provides that nothing in Part II of the Act shall lessen the force of or in any manner affect anything enacted by the statute passed in the Twenty-fifth Year of King Edward III "A declaration which offences shall be adjudged treason".

25 Edward III, St. 5, c. 2 has been repealed in part, namely: as to petit treason, by 9 Geo. IV c. 31 (passed on 27th June, 1828, cf. sec. 17 of the Crimes Act, 1900, repealed in 1951); as to counterfeiting the King's great or privy seal, by 11 Geo. IV and 1 Will. IV c. 66, adopted in New South Wales by 4 Will. IV No. 4 and as to counterfeiting the King's money and bringing false money into the realm by 2 and 3 Will. IV c. 34, sec. 1, adopted by 9 Vic. No. 1 (since repealed by 46 Vic. No. 17).

The Imperial Criminal Law Act 1967 repeals the concluding passage of 25 Ed. III St. 5, c. 2.

Thus only a small portion of the old Imperial Law as to treason was expressly continued in force in this State (by local legislation) after the Crimes Act.

In 1960 the Commonwealth Parliament amended the Commonwealth Crimes Act and enacted a new section 24 and inserted new sections in Part II of that Act, which is headed "Offences against the Government". Part II seems to provide a comprehensive code and contains in section 24 provisions in substantially the same terms as the relevant portion of the old Imperial Act, 25 Edward III St. 5, c. 2.

The Government may think it desirable at some stage to repeal Part II of the Crimes Act and to substitute for it provisions in similar terms to the relevant enactment in the Commonwealth Crimes Act.

In the meantime the draft Bill would preserve the relevant parts of the Treason Act 1351 and of the Acts of 1795 and 1817, that is, 25 Edward III St. 5, c. 2, and 36 George III, c. 7, and 57 George III, c. 6, as mentioned in Part II of the Crimes Act, 1900.

Statutes Relating to Piracy

In the case of piracy, the Piracy Punishment Act, 1902 (N.S.W.) repeals so much of the Imperial Acts mentioned in the Schedule to the Act of 1902 as relates to the punishment of piracy or any offence by those Acts declared to be piracy, or of accessories thereto. These Acts are:

28 Henry VIII, c. 15. (The Offences at Sea Act, 1536.)

11 and 12 William III, c. 7. (The Piracy Act, 1698.)

4 George I, c. 2 (or c. 11), s. 7. (The Piracy Act, 1717.)

8 George I, c. 24. (The Piracy Act, 1721.)

18 George II, c. 30. (The Piracy Act, 1744.)

As regards accessories to piracy, sections 9 and 10 of 11 and 12 William III, c. 7 (the Piracy Act, 1698), and section 3 of 8 George I, c. 24 (the Piracy Act, 1721) declare certain persons to be accessories. "Until 1700, accessories to piracy were triable only by the civil law if their offence was committed on the sea, and one who within the body of a county knowingly received and abetted a pirate was not triable by the common law, the original offence being solely cognizable by another jurisdiction. This rule flowed from the theory that piracy not being a common law felony, the common law rule as to accessories did not apply, and from the common law rules as to jurisdiction. This anomaly was removed by the Piracy Act, 1698, sections 9 and 10, which prescribed for accomplices in piracy the same tests of liability and punishment as applied to accomplices in crimes committed on land in England . . . and by the Piracy Act, 1721, section 3, which disposed of the procedural difficulty which at that period existed in the case where the principal who committed piracy could not be apprehended and brought to justice." *Russell on Crime,* 12th edition (1964), at p. 1538.

Section 7 of the Accessories and Abettors Act, 1861 (24 and 25 Vic., c. 94) covers the same ground as sections 9 and 10 of the Piracy Act, 1698, except perhaps as to piracy jure gentium (which includes a frustrated attempt to commit a piratical robbery). Section 7 of the Imperial Act of 1861 was not adopted in Part VII of the Criminal Law Amendment Act of 1883 (46 Vic., No. 17), nor in Part IX of the Crimes Act, 1900, but section 346 in Part IX of the Crimes Act, 1900 renders accessories before the fact to felonies liable to the same punishment as the principal felon, whether the principal felon has been tried or not, or is not amenable to justice, and section 347 enables accessories after the fact to be convicted and sentenced as accessories whether the principal felon has been tried or not, or is not amenable to justice (cf. ss. 1, 2 and 3 of 24 and 25 Vic., c. 94).

The punishment of accessories to felonies punishable under the Piracy Punishment Act, 1902, is dealt with by section 6 of that Act.

The Imperial Criminal Law Act 1967 repeals sections 9 and 10 of 11 William III c. 7 and section 3 of the Act 8 George I, c. 24.

The Act 4 George I c. 2, the Piracy Act, 1717, which is one of the Imperial Acts mentioned in the Schedule to the Piracy Punishment Act, 1902 (section 7 of the Act of 1717 being there specified), did not create any offence amounting to piracy or made punishable with death (cf. Piracy Punishment Act, 1902, section 5). The whole Act, with the exception of section 7, was repealed by 7 and 8 George IV c. 27 (i.e., before 25th July, 1828) and section 7 relates to the trial of offenders. Section 7 of the Act of 1717—4 George I c. 2—is repealed in the United Kingdom by the Criminal Law Act 1967.

The Criminal Law Act 1967 also repeals 28 Henry VIII c. 15—the whole Act, and 18 George II c. 30, the Piracy Act, 1744—the whole Act. The 1967 Act also repeals a passage in section 1 of 8 George I c. 24 (the Piracy Act, 1721) which imported the statute of Henry VIII and that of 11 and 12 William III c. 7 (the Act of 1698–9).

Thus four of the Imperial Statutes or enactments listed in the Schedule to the Piracy Punishment Act, 1902 (N.S.W.) are repealed in England, namely:

28 Henry VIII c. 15. (The Offences at Sea Act, 1536.)

11 & 12 William III c. 7. (The Piracy Act, 1698.)

4 George I c. 11, s. 7. (The Piracy Act, 1717.)

18 George II c. 30. (The Piracy Act, 1744.)

In the case of the other statute, 8 George I c. 24 (The Piracy Act, 1721), a portion of section 1 is repealed.

Pending reconsideration of the Piracy Punishment Act, 1902, the Imperial enactments mentioned in the Schedule to it are proposed in the draft Bill for retention to the extent mentioned in the Act of 1902, those enactments being listed in the second Schedule to the draft Bill.

APPENDIX II

Imperial Acts proposed for repeal

(1235) 20 Henry III (The Statute of Merton)

A "heterogeneous collection" of enactments.

Contained inter alia, provisions as to dower; dower has been abolished in New South Wales (Conveyancing Act, 1919–1964, s. 21).

The Statute also contained a provision as to illegitimacy; that was superseded by the Legitimation Act, 1902, which in turn has been superseded by Part VI of the Marriage Act 1961 (Commonwealth).

The other provisions of the Statute are obsolete.

(1266–1267) 51 Henry III St. 4 (A Statute of Distress of the Exchequer)

What distress may be taken for the King's debts, and how it shall be used.

Obsolete or unnecessary in view of the abolition of distress for rent by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930.

(1267) 52 Henry III (Statute of Marlborough)

This was a group of twenty-nine enactments, of which the following related to distress:

c. 1. None shall take distresses but by award of the King's Court.

c. 2. None but suitors shall be distrained to come to a court.

c. 3. Distresses to be delivered by the King's officers.

c. 4. Distresses not to be driven out of the county.
Distresses to be reasonable.

c. 15. In what places distresses not to be taken.
Distress not to be made out of the fee nor in the highway, etc., but only to the King or his officers.

c. 21. Of the replevying of distress.

In view of the abolition of distress for rent in New South Wales by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930, the foregoing provisions are obsolete or unnecessary in relation to distress for rent. It is not established whether the Statute of Marlborough applies to distress damage feasant. (Glanville Williams, Liability for Animals (1939), pp. 61–64.)

Other forms of distress are obsolete or inapplicable in New South Wales.

Apart from chapter 17 (see clause 21 of Bill) and chapter 23 (see clause 32 of Bill), the other provisions of the Statute of Marlborough are obsolete.

(1275) 3 Edward I—Statute of Westminster the First

This statute comprised 50 chapters (or 51, according to the arrangement). The following are mentioned:

c. 6. *Amerciaments shall be reasonable*

Obsolete. Repealed in England by the Criminal Law Act 1967.

c. 9. *All men shall be ready to pursue and arrest felons.* Unnecessary in view of local provisions for law enforcement, and other assistance available to the Sheriff.

Punishment for concealment by Sheriff of felonies. Not adapted to local conditions.

c. 16. *Distress.* (Confirmatory of 52 Henry III c. 15.) Unnecessary in view of the Landlord and Tenant Amendment (Distress Abolition) Act.

c. 25. *Champerty by the King's Officers*—obsolete. Repealed in England by the Criminal Law Act 1967—see below under (1292 (?)) 20 Edw. 1.

c. 28. *Frauds by officers of the Courts* (Maintenance). Unnecessary and obsolete. Repealed in England by the Criminal Law Act 1967. See page 73 below under (1292 (?)) 20 Edw. 1.

c. 29. *Deceits by pleaders.* Unnecessary and obsolete. Repealed in England by the Statute Law Revision Act, 1948 (11 and 12 George VI c. 62).

The other chapters of the Statute of Westminster the First are obsolete or unnecessary or not in force.

(1276) 4 Ed. I. St. 2—Statute De Officio Coronatis

—Of what things a coroner shall inquire.

This is referred to as an "apocryphal statute"—*Pollock and Maitland, History of English Law,* 2nd Edn, Vol. II, p. 644, note. It is said to be in affirmance or declaratory of the common law. The Coroners Act, 1960–1963, regulates the jurisdiction of the coroner in New South Wales. Some common law functions may still survive—e.g., in relation to treasure trove—cf. *Jervis on Coroners,* 9th Edn (1957), p. 28, but in view of the declaratory nature of the Statute 4 Edward I St. 2, its retention is unnecessary.

11 Ed. I (of uncertain date)—Statute Concerning Conspirators

This is treated as a statute of 33 Ed. I, under the title of "The Statute of Champerty"—see note in *The Statutes Revised*, 2nd edn, vol. 1, p. 77, and in *Halsbury's Statutes*, 2nd edn, vol. 5, p. 446—see page 73 post under (1292) 20 Ed. I.

(1278) 6 Edward I—(Statute of Gloucester)

c. 1. Several actions wherein damages shall be recovered.

At common law, parties were not entitled to costs. By this provision, the plaintiff in actions in which he recovered damages, also recovered costs of suit. (*Chitty's Archbold's Practice*, 11th edn, vol. 1, p. 470; *Garnett* v. *Bradley* (1878) 3 App. Cas. 944 at 962.) The enactment is now superseded in New South Wales—See Common Law Procedure Act, 1899–1967, sections 261 and 265; Supreme Court Procedure Act, 1900–1965, section 11A. *Spicer* v. *Carmody* 48 S.R. 348 at 350; the Costs Rules; District Courts Act, 1912–1965, s. 129. The enactment has been repealed in England—see the Statute Law Revision and Civil Procedure Act, 1883 (46 and 47 Vic. c. 49).

The other provisions of the Statute of Gloucester are obsolete and have been repealed in England by various Acts.

(1285) 13 Ed. I. Stat. 1—Statute of Westminster the Second

c. 1. *De Donis*—In gifts in tail the donor's will shall be observed.

Real Property—Estates Tail. In view of the virtual abolition of estates tail by the Conveyancing Act, 1919–1964, section 19, the Statute De Donis is obsolete and unnecessary. The repeal should be supplemented by an amendment of the Conveyancing Act. The matter is further dealt with in our report on the limitation of actions.

c. 2. *Vexatious Replevins.* Pledges to prosecute a suit—Second Deliverance. (Duties of Sheriff.)

Repealed in England by the Statute Law Revision and Civil Procedure Act, 1881 (44 and 45 Vic. c. 59). Obsolete—see note to c. 37 below.

c. 36. Distress taken upon a suit commenced by others.

c. 37. No distress to be taken but by bailiffs known and sworn.

cc. 2, 36, and 37 in part superseded by Landlord and Tenant Act of 1899–1964, Part V, and obsolete and unnecessary since the Landlord and Tenant Amendment (Distress Abolition) Act, 1930.

As mentioned in our report, sections 40 and 43 (2) of the Landlord and Tenant Act of 1899–1964 should be repealed as a consequential step upon repeal of the Imperial enactments.

cc. 3–12. Various subject matters—obsoletc.

c. 13. Liability of the sheriff for wrongful imprisonment—unnecessary—see *Ward* v. *Murphy* (1937) 38 S.R. 85.

cc. 14–18. Various subject matters—obsolete. (As to c. 18, see *Helmore, Law of Real Property* (1961), p. 169, note, and see reference to 54 Geo. III c. 15, the New South Wales (Debts) Act, 1913—post, Appendix III, page 136, and Third Schedule to Draft Bill.)

c. 19. Superseded.

By this provision the goods of an intestate came to the Ordinary for disposition, and the Ordinary was bound to pay the intestate's debts. The modern representation of the principle is contained in the Wills, Probate and Administration Act, 1898–1965, sections 61 and 46 and 46A.

cc. 20–22. Various subject matters—obsolete.

c. 23. See below.

cc. 24–48 and 50. Various subject matters—obsolete.

c. 49. See below (Maintenance and Champerty).

(1285)—13 Edward I. St. 1 c. 23
(1330)—4 Edward III. c. 7
(1357)—31 Edward III St. I. c. 11

These statutes dealt with rights of action for debts of a deceased and injury to personal estate of a deceased.

The Law Reform (Miscellaneous Provisions) Act, 1944–1962, section 2, covers these matters in so far as not previously covered by local legislation.

The substance of the provisions of 31 Ed. III St. 1 c. 11 relating to the powers of administrators are included in sections 46 and 46A of the Wills, Probate and Administration Act.

(1292 (?)) 20 Edward I—Statutum de Conspiratoribus (Statute of Uncertain Date)

(1305) 33 Edward I. St. 2—Ordinance de Conspiratoribus

As to the citation of these two statutes see note in *Statutes Revised* 2nd Edn. Vol. 1 p. 77 and 5 *Hals. Stats.* 2nd Edn. p. 446.

(1300) 28 Edward I, c. 11—Champerty.

(1327) 1 Edward III, St. 2 (Confirmation of Charters) c. 14—Maintenance.

(1377) 1 Richard II, c. 4—Penalties for maintenance.

(1383) 7 Richard II, c. 15—Maintenance and Embracery.

Statutes against maintenance and embracery confirmed.

(See also (1540) 32 Henry VIII c. 9, mentioned at page 87. 3 Edward I cc. 25 and 28 have been mentioned above.)

Maintenance is an offence at common law, the old statutes on the subject being all merely declaratory of the common law, only enacting additional penalties—*Pechell* v. *Watson* 8 M and W. 691, 700; *Russell on Crime,* 12th edn, vol. 1, p. 346. Champerty is a species of maintenance (Russell, p. 354). See also *Archbold, Criminal Pleading and Practice,* 36th edn, p. 1263, pars. 3454 and 3455 (and cf. 32nd edn at p. 1230).

These ancient statutes had fallen into disuse. *Halsbury's Laws of England,* 1st edn, vol. 9, at p. 500.

In New South Wales, a prosecution was launched in 1959 by a private individual against a solicitor for alleged maintenance, four informations being laid. The Attorney General did not proceed in the matter. The prosecution was considered later by the High Court in *Clyne* v. *N.S.W. Bar Association* (1960) 104 C.L.R. 186; the Court, at p. 203, said that it might be necessary some day to consider whether maintenance as a crime at common law ought not now to be regarded as obsolete.

The above listed statutes dealing with maintenance or champerty were repealed in England by the English Criminal Law Act 1967, and we recommend their repeal.

The Law Commission in a Memorandum laid before the British Parliament recommended, inter alia, that the offences of maintenance and champerty under the common law should be abolished. It also recommended that maintenance and champerty as actionable wrongs should cease to exist, champertous agreements (including "contingency fee" arrangements between solicitor and client) to continue to remain unlawful as contrary to public policy. These recommendations have been adopted by the Criminal Law Act 1967.

(1300) 28 Edward I (Articles upon the Charters) c. 12—Distresses for the King's Debt

This statute regulated distress for Crown debts. The remedy of distress for Crown debts is obsolete and so is the statute.

(1324) 17 Edward II. St. 1, c. 13—De Prerogativa Regis

(A statute of uncertain date—in printed copies, a statute of 17 Edward II, St. 1 c. 11—1324.)

This chapter related to wreck of the sea (as well as to whales and great sturgeons), declaring that the King should have it.

The words "wreck of the sea" were repealed by the Merchant Shipping Act, 1894, which applies to the Dominions except as displaced by legislation of the local legislature—sections 735 and 736. (As to the position of the Commonwealth see now Statute of Westminister Adoption Act 1942, and sections 2 and 5 of the Statute of Westminster.)

Section 523 of the Merchant Shipping Act, 1894, provides that Her Majesty and Her Majesty's Royal successors are entitled to all unclaimed wreck found in any part of Her Majesty's dominions, except in places where Her Majesty or any of Her Royal predecessors has granted to any other person the right to that wreck.

The Navigation Act 1912–1961 (Commonwealth), Part VII, deals with wrecks and salvage (in cases within Commonwealth power). Section 308 in that Part provides that the Commonwealth shall be entitled to all unclaimed wrecks found in Australia.

(As to the document Prerogativa Regis, see *Holdsworth, History of English Law*, 6th edition, vol. 1, p. 473, note 8. See also *In re Holliday* (1922) 2 Ch. 698 at pp. 708, 710–711.)

The retention of this Imperial provision is unnecessary.

(1328) 2 Edward III (Statute of Northampton) c. 3—Affrays and Riots

This enactment was repealed in England by the Criminal Law Act 1967. It is obsolete.

(1328) 2 Edward III, c. 5

Sheriff to give receipt for writ.

Unnecessary.

(1331) 5 Edward III, c. 9—Justice and Liberty

This provision forbids attachments and other deprivations against the form of the Great Charter and the law of the land. Unnecessary.

The following group of Imperial Acts deals with amendments to proceedings.

(1340) 14 Edward III, St. I, c. 6

A record which is defective by misprision of a clerk shall be amended.

(1421) 9 Henry V. St. I, c. 4

Made perpetual by 4 Henry VI, c. 3, 8 Henry VI, c. 12, c. 15.

The Justices may amend defaults in records or process after judgment given.

(1425–6) 4 Henry VI, c. 3

Makes perpetual 9 Henry V. St. 1, c. 4.

(1429) 8 Henry VI, c. 12

No judgment or record shall be reversed nor avoided for any writ, return, process, etc., rased or interlined.

Judges may reform all defects in records which appear to them misprision of the clerks.

What defects may not be amended.

(1429) 8 Henry VI, c. 15

The Justices may in certain cases amend defaults in records.

The King's Justices, before whom any misprision or default found, be it in any records and processes which now be, or shall be, depending before them as well by way of error or otherwise, or in the returns of the same made or to be made by sheriffs, coroners, bailiffs of franchises, or any other, by misprision of the clerks, of any of the said courts of the King . . . shall have power to amend such defaults.

These enactments were repealed in England except as to criminal proceedings by the Civil Procedure Acts Repeal Act, 1879, and were later repealed completely by the Statute Law Revision and Civil Procedure Act, 1883 (46 and 47 Vic. c. 49). Their retention is unnecessary.

(1584) 27 Elizabeth c. 5—Amendments of pleadings

The Court may amend defects of form after demurrer (exception in case of criminal proceedings).

The Act of 27 Elizabeth c. 5 was with others extended to writs of mandamus and informations in the nature of a quo warranto by 9 Anne c. 25 (c. 20 in Ruffhead). It was repealed in England by the Statute Law Revision and Civil Procedure Act, 1883.

The Act is unnecessary.

(1351–2) 25 Edward III, St. 5, c. 3—Juries

Challenge of an indictor upon an inquest.

Obsolete and unnecessary.

(1389) 13 Richard II, St. 1 c. 5—Admiralty
(1391) 15 Richard II, c. 3—The Admiralty Jurisdiction Act, 1391

These statutes were passed to settle a controversy as to the jurisdiction of the Admiral. In the course of his judgment in *Reg.* v. *Keyn* (1876) 2 Ex. D.63, Cockburn, C.J., at pp. 167 and 168 referring to these statutes, said: "In the reign of the latter King" (i.e., Richard II) "arose the dispute as to the jurisdiction of the Admiral, who, not content with the authority exercised in the previous reign, now asserted a claim to jurisdiction in respect of matters arising not only on the sea, but in the inland tidal waters of England, as also in respect of matters of contract though made on the land, if at all connected with the sea, a usurpation which gave rise to complaints on the part of the Commons, the procedure in the Courts of Admiralty having been that of the civil law, which appears to have been distasteful to the people. Accordingly, by the Statute, 13 *Ric. II*, c. 5, it is provided—

> 'That the Admirals and their deputies shall not meddle from henceforth with anything done within the realm of England, but only with things done upon the sea, according to that which hath been duly used in the time of the noble King Edward, grandfather of King Richard the Second.'

"Two years later it was thought necessary still more expressly to declare the limits of the Admiral's jurisdiction. Accordingly, by statute 15 *Ric. II, c.* 3 it was enacted—

> 'That the Court of the Admirall hath no manner of conusance, power, nor jurisdiction of any manner of contract, plea, or querell, or of any other thing done, or rising within the bodies of the counties, either by land or by water, and also of wrecks of the sea; but all such manner of contracts, pleas, and querels and all other things rising within the bodies of the counties, as well by land as by water, as is aforesaid, and also wrecks of the sea, shall be tried, determined, discussed, and remedied by the laws of the land, and not before, nor by the Admirall or his Lieutenant, in no manner.'

"At the same time it was deemed expedient to give the Admiral concurrent jurisdiction with the common law, in respect of murder and mayhem committed in ships at the mouths of great rivers. The statute (15 *Ric. II, c.* 3) accordingly proceeds:

> 'Neverthelesse of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of the great rivers, only beneath the points of the same rivers, and in no other place of the same rivers, the Admirall shall have conusance.'

"Upon this footing the criminal law has remained ever since" (i.e., until 1876). "Whatever of the sea lies within the body of a county is within the jurisdiction of the common law. Whatever does not, belonged formerly to that of the Admiralty, and now belongs to the Courts to which the jurisdiction of the Admiral has been transferred by statute; while in the estuaries or mouths of great rivers, below the bridges, in the matter of murder and mayhem, the jurisdiction is concurrent. On the shore of the outer sea the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the two jurisdictions, that, as regards the shore between high and low-water mark, the jurisdiction has been divided between the Admiralty and the common law according to the state of the tide. Such was the law in the time of Lord Coke; and as regard offences such it is still" (i.e., in 1876). "As regards civil matters the jurisdiction of the Admiral has been extended to inland seas by statute 3 and 4 Vic., c. 65."

The Act 13 Ric. II, c. 5, was repealed in England by the Statute Law Revision and Civil Procedure Act, 1881 (44 and 45 Vict., c. 59), but with a saving of its effect so far as jurisdiction was concerned. The other Act, 15 Ric. II, c. 3, was partly repealed for England by 42 and 43 Vict., c. 59, the Civil Procedure Acts Repeal Act, 1879, and now the Criminal Law Act 1967, repeals for England the remainder of 15 Ric. II, c. 3.

In New South Wales, the criminal jurisdiction which was originally vested in the Courts of Vice-Admiralty has, since 1823, been exercised by the Supreme Court. This was by the Statute 4 Geo. IV, c. 96, section 3, repealed by 9 Geo. IV, c. 83, and re-enacted by section 4 of that Act. (See also the Admiralty Offences (Colonial) Act, 1849, 12 and 13 Vict., c. 96 and the Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60) section 686.)

The Supreme Court of New South Wales also has civil jurisdiction in Admiralty under the Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict., c. 27). (See *The Admiralty Jurisdiction in New South Wales. Being Notes for lectures in the Law School of the University of Sydney,* by the late Sir Frederick Jordan (1937), pp. 12–16, and Act No. 43 of 1939 (Commonwealth) repealing section 30A of the Judiciary Act.)

The Justices Act, 1902–1967, enables an information to be laid for any treason or other indictable offence committed "on the high seas, or in any creek, harbour, or other place in which the Admiralty of England have or claim to have jurisdiction" (s. 21 (b)). According to Coke, the localities where the Admiral "claimed to have jurisdiction" related to the area between high and low tide, according to the state of the tide.

It is unnecessary to reproduce either of these Acts.

(1392–3) 16 Richard II, c. 5—The Statute of Praemunire

The penalties imposed by this statute—loss of the law's protection, forfeiture, imprisonment for life—have been made applicable to offences created by various other statutes—e.g., the Statute of Monopolies (1623) (s. 4), the Habeas Corpus Act, 1679 (s. 11), the Succession to the Crown Act, 1707 (s. 2), and the Royal Marriages Act, 1772 (s. 3), but have long been obsolete. The English Criminal Law Act 1967 repeals the statute in England (substituting the punishment of imprisonment for life in the special case of section 11 of the Habeas Corpus Act, 1679).

In view of the obsolete character of the penalties the retention of the statute is unnecessary.

(1393) 17 Richard II, c. 6

Upon an untrue suggestion in the Chancery damages may be awarded.

Obsolete (Repealed in England as obsolete by 42 and 43 Vic., c. 59, the Civil Procedure Acts Repeal Act, 1879).

(1393) 17 Richard II, c. 8—Affrays and Riots

The enactment prohibited riots and required sheriffs to suppress them by the power of the county and country. It is doubtful whether this provision was applicable to New South Wales.

The statute was repealed in England by the Criminal Law Act 1967, and is obsolete.

(1411) 13 Henry IV, c. 7—Affrays and Riots

This statute requires Justices of the Peace and Sheriffs to arrest rioters. If it was applicable here it is now obsolete; the unrepealed residue was repealed in England by the Criminal Law Act 1967.

(1414) 2 Henry V, St. I, c. 8—Affrays and Riots

This enactment imposed a punishment upon rioters and required every able person to be of assistance to the Justices and Sheriffs to suppress riots.

A more modern method of obtaining the assistance of private persons is the appointment of special constables—see Police Offences Act, 1901, as amended, Part IV.

The enactment was repealed in England by the Criminal Law Act 1967, and is obsolete.

(1423) 2 Henry VI c. 17 (c. 14)—Quality and Marks of Silver Work

(1696–7) 8 and 9 William III c. 8, s. 8—Silverware

(1719) 6 George I c. 11, The Plate Duty Act, 1719, ss. 1, 2, 3 and 41—Silverware

(1738–9) 12 George II c. 26—The Plate (Offences) Act, 1738

(1741–2) 15 George II c. 20—The Gold and Silver Thread Act, 1741

(1787–8) 28 George III c. 7—The Gold and Silver Thread Act, 1788

(1790) 30 George III c. 31—The Silver Plate Act, 1790

(1798) 38 George III c. 69—The Gold Plate (Standard) Act, 1798

This is a group of Acts about gold and silverware and marks on other articles. They are referred to by Sir L. Cussen—with some other statutes—in his explanatory memorandum (p. 78) where he said that "The applicability of many of them (i.e., to Victoria) is more than doubtful". Some of them depend on the machinery for assay. They seem esoteric at the present day. But the latest of them, 38 Geo. III, c. 69, the Gold Plate (Standard) Act 1798, was applied in England in *Westwood* v. *Cann* (1952) 2 All E.R. 349 where penalties under the Act were recovered against the defendant (the action was commenced before the Common Informers Act, 1951). Denning, L.J. as he then was, at p. 356, referred to the reports by select committees in 1856 and 1879 that the law as to hall-marking was uncertain, and in which the committees had recommended consolidation and amendment without delay. Denning, L.J. said that 73 years later, in 1952, he might be permitted to express the same opinion.

The Statutes 2 Henry VI, c. 17 (c. 14) and (so far as then unrepealed) 36 George III, c. 60 were repealed in England by the Statute Law Revision Act, 1953.

We understand that these Imperial Statutes are not enforced locally.

We also understand further that the Goldsmiths' and Silversmiths' Association, now the Manufacturing Jewellers, a branch of the Chamber of Manufactures, O'Connell Street, Sydney, introduced a system of hallmarking for a period of twelve months; that was more than thirty years ago. The matter died because of lack of support.

If regulation of the quality of gold and silverware is required, the Factories, Shops and Industries Act, 1962–1965, might be amended to meet the case (see especially ss. 120–131). However, we are not aware of any need for regulation.

The retention of these Imperial Acts is unnecessary.

(1444–5) 23 Henry VI, c. 9—Sheriff's and Bailiff's Fees, etc.

Provisions as to Sheriff's fees in certain cases.

Provisions as to what persons may be bailed, etc.

These are not necessary in view of local conditions and provisions.

(1488–9) 4 Henry VII c. 20—The Collusive Actions Act, 1488

This Act struck at collusive actions for penalties brought to enable the judgment in a collusive action to be pleaded in bar against another action brought by a common informer who might really wish to enforce the law. The Act of 1488 was repealed in England by the Statute Law Revision Act, 1958. Qui tam actions, or actions by common informers (those brought by a person *qui tam pro domino rege quam pro se sequitur*), were abolished in England by the Common Informers Act, 1951. One or two apparently lingered on, but nobody in England in 1958 thought of getting a collusive qui tam action on foot.

One or two New South Wales statutes which enable common informers to sue for penalties to be paid to or retained by them may be traced, for example the Printing Act, 1899–1934, section 9. There may be some old Imperial Acts still applicable (21 George III c. 49, the Sunday Observance Act 1781, referred to in the Fines and Penalties Act, 1901–1954, has of course recently been repealed in New South Wales). But none, we think, would survive the passage of the draft Bill.

However, section 8 of the Fines and Penalties Act, 1901–1954, enables the Governor to remit any penalties recoverable by action and payable to parties other than the Crown.

As qui tam actions are obsolete here, it does not seem necessary to retain the Collusive Actions Act, 1488.

(1495) 11 Henry VII, c. 1—Treason

The effect of this Act is to provide that service to a *de facto* King is not an act of treason against a King *de jure*. (*Hals. Stats.*, 2nd edn., vol. 5, p. 478.)

We recommend the repeal of this provision as unnecessary.

(1495) 11 Henry VII, c. 12—Poor Persons' Suits

Superseded by local legislation.

(1512) 4 Henry VIII, c. 8, s. 2, Strode's Act—Freedom of Speech in Parliament

This Act, known as Strode's Act, was given the short title the Privilege of Parliament Act, 1512, by the Statute Law Revision Act, 1948.

The Act was passed following the prosecution of Strode in the time of Henry VIII after Strode had been fined and imprisoned. Section 2 declares suits, etc., for bills or speeches, etc., in Parliament are void and gives an action on the case to the party aggrieved.

In 1629, arising out of the prosecution of Elliot and others the Commons resolved that Strode's Act was a general Act confirming and declaring the existing privilege of the House of Commons. After the Restoration the Commons carried a resolution declaring that Statute (1512), 4 Henry VIII, c. 8, was a general law extending to all members of both Houses of Parliament and that it was a "declaratory law of the ancient and necessary rights and privileges of Parliament".

The Bill of Rights, 1 William and Mary Sess. 2, c. 2, declares or enacts freedom of speech at debates of Parliament. In In re Parliamentary Privilege Act, 1770 (1958) A.C. 331, it was mentioned in a reference by the Committee of Privilege of the House of Commons (p. 350). The Privy Council, referring to Strode's Act, at page 352, said that "though the form was new, this was but an assertion of an ancient privilege".

It has been held, of course, that the *lex et consuetudo Parliamenti* apply exclusively to the Lords and Commons of the United Kingdom and do not apply to the Supreme Legislature of a colony by the introduction of the common law there—*Fenton* v. *Hampton,* 11 Moo. P.C. 347, at page 397. There have been a number of applications of this in relation to New South Wales itself. That case also shows that it was not introduced as a whole by 9 George IV, c. 83.

The crucial date for ascertaining applicability of an Imperial Act to New South Wales is 25th July, 1828, the date of the passing of 9 George IV, c. 83. That Act itself provided for the creation of an enlarged Council (not exceeding 15 nor less than 10) for New South Wales.

The Privy Council, in *Chenard & Co.* v. *Joachim Arissol* (1949) A.C. 127 approved of the statement of Martin C.J. in *Gipps* v. *McElhone* (1881) 2 N.S.W.L.R.18, at p. 21, that "There is no doubt in my mind of the existence of this privilege" (i.e., of free speech in Parliament) "and that it is absolute. It arises from inherent necessity. The necessity is just as great here as in the Imperial Parliament." Their Lordships added that they saw "no reason . . . to draw any distinction in this matter between representative and non-representative legislative assemblies" (p. 134).

We think that Strode's Act probably never was in force in New South Wales. In any event, so far as we know, there has never been any occasion on which the Act has been treated as being in force here. There are the absolute privilege against liability as for defamation contained in section 11 of the Defamation Act, 1958, and the common law principle of inherent necessity referred to in the above cited cases.

We think it unnecessary to preserve Strode's Act.

(1515) 7 Henry VIII, c. 4—Avowries for rents and services

Obsolete—

See Landlord and Tenant Amendment (Distress Abolition) Act, 1930.

Repealed in England by the Statute Law Revision Act, 1863.

(1529) 21 Henry VIII, c. 5, s. 4—Probate fees, inventories, etc.

Obsolete.

(1529) 21 Henry VIII, c. 15—Recoveries

(1529) 21 Henry VIII, c. 19—Avowries

(1529) 21 Henry VIII, c. 15—Tenants shall enjoy their leases against recoveries by feigned titles. Obsolete. Repealed in England by the Statute Law Revision Act, 1863.

(1529) 21 Henry VIII, c. 19—Replevin—Avowries may be made by the (land)lord without naming his tenant.

Cf. 11 George II, c. 19, Distress for Rent Act, 1737, s. 22.

Obsolete. Repealed in England by the Statute Law Revision and Civil Procedure Act, 1883.

(1533) 25 Henry VIII, c. 22—Succession to the Crown

(1536) 28 Henry VIII, c. 7, s. 7—Succession to the Crown: Marriage

(1536) 28 Henry VIII, c. 16—Ecclesiastical licenses

(1540) 32 Henry VIII, c. 38—Marriage

(1548) 2 and 3 Edward VI, c. 23, s. 4—Marriages (pre-contract)

(1558–9) 1 Eliz., c. 1, s. 3—Act of Supremacy

The abovementioned statutes relate, inter alia, to marriages within the prohibited degrees of consanguinity and affinity.

(1533) 25 Henry VIII, c. 22—"An Act concerning the King's succession", dealt in part with the succession to the Crown, but section 3 specified prohibited degrees and section 4 forbade marriages within such degrees. Section 14 declared that the prohibitions related to consummated marriages.

(1536) 28 Henry VIII, c. 7, s. 7, set out prohibited degrees.

(See *Hals. Stats.* 2nd edn., vol. 11. p. 692.) Section 7 was repealed by 1 and 2 Ph. and M, c. 8, s. 17 (the section number as printed in Ruffhead) and the repeal was confirmed by 1 Eliz., c. 1, the Act of Supremacy, 1558–9, section 4 (s. 13, Ruffhead).

(1536) 28 Henry VIII, c. 16 (Ecclesiastical Licences).

The general purpose of this Act was to ratify marriages . . . solemnized prior to the break with Rome (7 *Hals. Stats.*, p. 44) and it alludes to certain prohibited degrees. The Act was repealed by 1 and 2 Ph. and M., c. 8, but was restored by 1 Eliz., c. 1, the Act of Supremacy (1558–9).

(1540) 32 Henry VIII c. 38—The Marriage Act, 1540.

This Act declared, inter alia, that no marriages without the Levitical degrees should be impeached. "The fact that this statute does not specify the prohibited degrees has led the Courts to refer for guidance to 28 Henry VIII, c. 7 (1536) s. 7 and to the Ecclesiastical Licences Act, 1536 (c. 16), s. 2 . . . In *R.* v. *Chadwick, R.* v. *St Giles in the Fields* (*Inhabitants*) (1847) 11 Q.B. 173 . . . it was held that the degrees are those prohibited by 28 Henry VIII c. 7 (1536) and the Ecclesiastical Licences Act, 1536 (c. 16), and not the Levitical degrees mentioned in this statute" (i.e., 32 Henry VIII c. 38)—*Hals. Stats.* 2nd edn, vol. 11, p. 691.

(1548) 2 and 3 Edward VI c. 23

Section 2 of this statute repealed so much of the Statute 32 Henry VIII c. 38 as related to pre-contracts, but section 4 confirmed the latter statute otherwise. (Section 4 is the citation in Ruffhead, vol. 2, p. 409; it is printed as section 3 in 11 *Hals. Stats.*, 2nd edn, p. 694.)

(1558–9) 1 Eliz. c. 1

This Act in section 3 revived so much of the Act of 32 Henry VIII c. 38 as had not been repealed by 2 and 3 Edward VI, c. 23.

In view of the Marriage Act 1961 (Commonwealth) Part III, and the Matrimonial Causes Act 1959 (Commonwealth) sections 18, 19, and 20, and Schedule 2, the abovementioned Imperial Acts so far as they applied to New South Wales are displaced.

(1535–6) 27 Henry VIII c. 10 ss. 1, 2, 3, 8—Real Property—Statute of Uses

The Conveyancing Act, 1919, section 44, provides, inter alia, that every limitation which may be made by way of use operating under the Statute of Uses or the Conveyancing Act may be made by direct conveyance without the intervention of uses.

The Statute of Uses was not repealed by the Conveyancing Act, 1919. In Mr Justice Harvey's Report as Royal Commissioner he said inter alia as to section 44 of the Conveyancing Act: "In the Bill as originally introduced into the House it was provided that the Statute of Uses should be repealed. This raised very strong opposition on the part of the legal profession. It was represented quite truly that the whole of the present system of conveyancing of old title lands was very largely based upon the Statute of Uses. On inquiry in New Zealand, I found that old system lands were quite satisfactorily conveyed there without the assistance of the Statute of Uses, which was repealed there many years ago. In deference, however, to the strong opposition to the proposal to repeal the Statute, I have adopted the middle course of drafting a section which permits every limitation which might be made by way of a use operating under the Statute to be made by direct conveyance without the intervention of uses. This will enable conveyancers, if they so desire, to draw their documents so as to express exactly what estates they wish to convey in simple direct language. In time such a system of conveyancing may wholly displace the present types of conveyance. Meanwhile two modes of conveyancing will exist side by side, and practitioners may adopt either . . ."

The Statute of Uses was repealed in England by the Law of Property Act, 1925 (see section 207 and the 7th Schedule to that Act). Section 1 (10) of that Act provides that the repeal of the Statute of Uses does not affect the operation thereof in regard to dealings taking effect before the commencement of the Act of 1925.

The time has now come to repeal the Statute of Uses. The saving clause proposed in the Bill will be sufficient to preserve the past operation of the Statute.

(1535) 27 Henry VIII c. 16—Real Property—Enrolments

In *Slapp* v. *Webb* (1850) 1 S.C.R., App. 54, Stephen, C.J. said that in an earlier case it had been held that the Statute of Uses was in force, though the enactment as to enrolments could not, for the want of machinery, be applied, and therefore was not in force. (See *Helmore, Law of Real Property*, p. 294, and note 88.)

Since the Statute of Enrolments was part of the legislative system in England relating to uses, there is no need to reproduce this Statute. Indeed its repeal is consequential upon the repeal of the Statute of Uses.

(1535–6) 27 Henry VIII c. 24 ss. 1 and 2—Jurisdiction in liberties

Section 1 provides that none but the King shall pardon treasons or felonies.

Section 2 provides that none but the King shall appoint justices. This section was repealed in England by the Justices of the Peace Act, 1949.

The Act is now unnecessary.

31 Henry VIII, c. 1—(Partition Act, 1539)
32 Henry VIII, 32—(Partition Act, 1540)

The Conveyancing (Amendment) Act, 1930, section 17, repealed the Partition Act, 1900 (New South Wales) and substituted Division 6 of Part IV of the Conveyancing Act—s. 66F–66I. Neither of these local Acts (or the earlier Partition Act, 1878 (41 Vic. No. 17)) expressly repealed either of these Acts of Henry VIII; the latter were repealed in England by the Law of Property (Amendment) Act, 1924, as being obsolete.

These Partition Acts of 1539 and 1540 conferred upon joint tenants and tenants-in-common a statutory right to compel partition, one tenant being able to insist upon partition however inconvenient it might be (*Megarry and Wade, Law of Real Property* (1957) p. 398).

We recommend the repeal of these two statutes as obsolete.

(1540) 32 Henry VIII c. 1—The Statute of Wills. (Wills, Wards, Primer Seisin)

The residue remaining after 3 Vic. No. 5 applies only to wills made before 1840 and estates pur autre vie of persons dying before 1840.

At common law, under the feudal system, no lands or tenements of freehold tenure were devisable by will, except by custom in certain localities. The difficulty was obviated by the doctrine of uses. Shortly after the passing of the Statute Quia Emptores, 1290, feoffments to uses were invented. It was held that the use of the land might be devised, and accordingly by means of feoffment to the uses of a testator's will made prior to the will, a testator had for all practical purposes the right of devising the land itself. The Statute of Uses, 1535, is generally understood to have abolished this right, but shortly afterwards by the above statute, 32 Henry VIII c. 1, express powers were given of devising two-thirds of the lands of a testator held by knights service and the whole of the lands held in common socage for "an estate of inheritance". The statute 34 and 35 Henry VIII c. 5 (1542) explained this expression in the statute of 1540 to mean "fee simple only", but as so explained it was construed to include determinable fees, and other modified fees other than fees tail. The Statute 12 Car. II c. 24 (1660) by converting military tenures into common socage extended the powers to all land other than copyhold. A devise could be made under the statutes of equitable estates as well as of the legal estate. The Statute of Frauds 1677 s. 12, extended the power of disposition to estates pur autre vie.

The Statute of Wills, 1540 was repealed in England by the Wills Act, 1837 (7 Wm. IV and 1 Vic. c. 26) except as to wills or estates pur autre vie to which the Act of 1837 did not extend. By section 34, the Act did not extend to wills made before 1st January, 1838, nor to estates pur autre vie of persons dying before that date. The Wills Act, 1837, was adopted in New South Wales by 3 Vic. No. 5 as from 1st January, 1840, and is now consolidated in the Wills, Probate and Administration Act, 1898.

(As to the above, see *Halsbury's Laws of England,* 2nd edn, vol. 34, p. 22; *Williams, Executors,* 12th edn, pp. 2 and 3; *Helmore, Law of Real Property in New South Wales* (1961) p. 424; cf. 7 *Cambridge Law Journal,* p. 354.)

The Wills Act, 1540, could therefore apply only to wills made before 1840 and estates pur autre vie of persons dying before that date, and is doubtless spent in that respect. Any future operation necessary for any exceptional case will, however, be covered by the saving clause in the Bill.

(1540) 32 Henry VIII, c. 2—Limitation of Prescription

This statute provided periods of limitation for the variety of actions to recover land then in use. For the majority of actions then in use the periods of limitation prescribed by this statute varied from 60 to 30 years.

Subsequently, by 21 James I, c. 16, the period for a writ of formedon and for enforcing a right of entry was fixed at 20 years, subject to exceptions in the case of disability, and the possessory action of ejectment which had in practice superseded all other remedies for the recovery of land, was limited to 20 years. The Statute 3 and 4 Wm. IV, c. 27, the Real Property Limitations Act, 1833, which was framed almost entirely upon the recommendations of the Commissioners on the Law of Real Property in their first report, 1829, allowed only one kind of action for the recovery of land, and with certain immaterial exceptions made it applicable to all cases of legal claims and limited all persons to the period of 20 years for the prosecution of their rights or for taking peaceable possession of the land. Claims to incorporeal hereditaments enforceable by distress were made subject to similar limitations and the Statute provides for the extinction of the title as well as remedy of the claimant. (*Darby & Bosanquet, Statute of Limitations* (1893), pp. 271, 273.)

The Real Property Limitations Act, 1833, was adopted in New South Wales by the Act 8 Wm. IV, No. 3. The effect of this is that the Statutes of 32 Henry VIII, c. 2 and, so far as it relates to real property, 21 James I, c. 16, are superseded.

We recommend the repeal of 32 Henry VIII, c. 2.

(1540) 32 Henry VIII, c. 9—The Maintenance and Embracery Act, 1540—otherwise known as the Pretenced Titles Act

The Conveyancing Act, 1919, section 50, repeals sections 2 and 4 of the Pretenced Titles Act and re-enacts the substance of sections 2 and 4 of the old Act, without the penalty. (For a lively criticism of the course there taken see article "The Mystery of Pretenced Titles" 31 A.L.J. 450.)

Section 1 of the Act 32 Henry VIII, c. 9 declared that all statutes against maintenance, etc., be put in execution. Section 6 enacted a limitation period of one year for proceedings for offences under the Act.

Section 3 imposed a penalty on the unlawful maintenance of suits, the penalty being recoverable by a common informer.

The whole Act has been repealed in England by the Criminal Law Act 1967.

The residue of 32 Henry VIII, c. 9, remaining after the Conveyancing Act is obsolete and we recommend its repeal.

(1540) 32 Henry VIII, c. 16—Aliens

Superseded as to holding of property by Naturalization and Denization of Aliens Act of New South Wales, 1898.

Otherwise obsolete.

(1540) 32 Henry VIII, c. 28—Leases

(*Sempill* v. *Rashleigh*, 4 S.C.R. 184 at p. 190.)

Leases by tenants in fee simple, in fee tail, in own right or in right of their wives valid against their heirs and successors, etc.

Obsolete.

(1540) 32 Henry VIII, c. 30—Jeofails

Referred to in *Deane* v. *Niccol* (1885) 6 N.S.W.L.R. 145, at pp. 156, 157, as if in force.

Obsolete.

(1540) 32 Henry VIII, c. 34—The Grantees of Reversions Act, 1540

The effect of this Act was that the benefit and burden of all covenants, conditions and agreements contained in a lease (by deed) which touched and concerned the land (or in the modern phrase, had reference to the subject-matter of the lease) passed with the reversion —*Megarry and Wade, Law of Real Property* (1957) p. 663.

This Act is superseded by the Conveyancing Act, 1919–1967, secs. 117 and 118 (*Hammond and Davidson, Law of Landlord and Tenant in New South Wales*, 3rd Edn, pp. 201–203; *Stuckey and Needham, The Conveyancing Acts* (1953), pp. 248, 250).

(1540) 32 Henry VIII, c. 36—Fines

An Act for the exposition of the Statute of Fines.

Unnecessary in view of virtual abolition of estates tail by Conveyancing Act, 1919, section 19.

(1540) 32 Henry VIII, c. 37—Cestui que vie

Recovery of arrears of rent by executors and administrators.

Section 1 is replaced by section 56 of the Landlord and Tenant Act of 1899 (reproducing 5 Vic. No. 9, section 27).

Section 3. Husband's remedy after death of his wife for rent due in right of, and in life of his wife. See now Married Women's Property Act, 1901, sections 5, 8 and 16.

Section 4. Persons entitled pur autre vie may recover rent after death of cestui que vie.

At common law the executors or administrators of a man seised of a rent-service, etc., in fee simple or fee tail or for his own life or pur autre vie, could not distrain for the arrears incurred iu the lifetime of the testator or intestate. To remedy this the Statute 32 Henry VIII, c. 37, was passed. By section 4, tenants pur autre vie, their executors or administrators, may sue or distrain for arrears due during the life, and unpaid after the death, of the cestui que vie in like manner as at common law they might have done during his life—*Williams, Executors and Administrators,* 11th edn (1921), vol. 1, p. 690.

The effect of the Conveyancing Act, 1919–1964, section 146, and the Landlord and Tenant Amendment (Distress Abolition) Act, 1930, section 4, render it unnecessary to preserve section 4 of 32 Henry VIII, c. 37.

The remaining section, i.e., section 2, applied only to Wales and is inapplicable.

(1542) 34 and 35 Henry VIII, c. 5—Concerning the explanation of Wills

This Act is explanatory of the Statute of Wills 1540 (32 Henry VIII c. 1) referred to at page 85.

(1541–2) 33 Henry VIII, c. 39, ss. 36, 37, 40–58—The Crown Debts Act, 1541

This Act is referred to later at pages 137–138 in connection with 54 George III, c. 15, the New South Wales (Debts) Act, 1813.

Other Acts relating to Debtors to the Crown

(1571) 13 Elizabeth, c. 4—Debtors to the Crown

Repealed by 6 Geo. IV, c. 105—i.e., before 1828—as to so much as makes lands, etc., of receivers of H.M. Customs liable to payment of debts to the Crown.

Residue repealed in England by the Law of Property (Amendment) Act, 1924.

(1584–5) 27 Elizabeth, c. 3—Debtors to the Crown

An Act for the explanation of 13 Elizabeth, c. 4 (s. 2), as to the sale of lands of accountants.

Repealed in England by the Law of Property (Amendment) Act, 1924.

(See provisions of Audit Act, 1902 (N.S.W.) as to Accounting Officers.)

(1609–10) 7 or 7 and 8 James I, c. 15—The Crown Debts Act, 1609

None but bona fide debts shall be assigned to the King by his accountants.

This Act 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—*Halsbury's Statutes,* 2nd edn., vol. 6, p. 20. That procedure is obsolete in New South Wales. The Act is accordingly obsolete.

(1785) 25 George III, c. 35—The Crown Debtors Act, 1785

An Act for the more easy and effectual sale of lands, etc., of Crown Debtors or their sureties.

Repealed in England by the Crown Proceedings Act, 1947.

(1800) 39 and 40 George III, c. 54—The Public Accountants Act, 1800—Debtors to the Crown

An Act for more effectually charging public accountants with the payment of interest, for allowing interest to them in certain cases, and for compelling the payment of balances due from them.

Repealed in England by the Statute Law Revision Act, 1948 (so far as then unrepealed).

The above Acts are referred to in Sir Leo Cussen's Explanatory Memorandum to the Victorian Imperial Acts Application Bill, at p. 78, where he said, inter alia, that the applicability of many of them is more than doubtful and the subject-matters would probably be better dealt with in entirely new legislation.

The procedures referred to in these Imperial Acts are not applicable to New South Wales and we recommend their repeal.

(1547) 1 Edward VI, c. 7, s. 4—Judicial Officers

An Act for continuing actions after the death of any King of the Realm.

Section 4—Preferment of Justices of assize, etc. not to abate their commissions.

Unnecessary.

(1547) 1 Edward VI, c. 12—Repeal of Statutes as to Treasons, Felonies, etc.

Declares certain matters to be treason, etc.

Repealed in part by 9 Geo. IV, c. 31 (that is, before 9 Geo. IV, c. 83) and in England by various Statute Law Revision Acts, and the residue by the Statute Law Revision Act, 1948.

Obsolete.

(1548) 2 and 3 Edward VI, c. 13—Tithes

Repealed in part—5 Wm. IV No. 8, adopting 1 Wm. IV c. 21, s. 2. (Repealed with savings in England by the Statute Law Revision Act, 1887.) Unnecessary.

(1551–2) 5 and 6 Edward VI, c. 11—Treason

The preamble was repealed in England by the Statute Law Revision Act, 1948. The Act is obsolete.

(1551–2) 5 and 6 Edward VI, c. 16—Sale of Offices

The Act deals with bargaining or selling any office, or the deputation of any office, and declares the sales and agreements to be void.

As to deputations, nowadays appointments require personal discharge of duties and are made directly by the Crown or other authorities.

The Queensland Code substitutes section 118. And see Second Schedule to the Queensland Criminal Code Act, 1899.

The Secret Commissions Prohibition Act, 1919, covers some of the ground.

The Act does not appear to be repealed in England.

In New South Wales the Act was referred to in *Taylor* v. *Taylor* (1890) 11 N.S.W.L.R. 323.

The Act has fallen into disuse, and is obsolete.

(1553) 1 Mary, Sess. 1, c. 1, ss. 1 and 3—The Treason Act, 1533

Section 1 provided that no act or offence be treason, petty treason or misprision of treason but such as were so declared by the statute, 25 Edward III, St. 5, c. 2.

By section 3 all offences made felony, or within the case of praemunire, since the beginning of the reign of Henry VIII, were repealed.

The Criminal Law Act 1967 repealed this Act for England. The retention of the Act here is unnecessary.

(1554–5) 1 and 2 Phillip and Mary, c. 10, ss. 6 and 8—The Treason Act, 1554

Section 6 provided that all trials for treason were to be according to the common law. Section 8 declared concealment of treason to be misprision only.

The Act is now unnecessary, and has been repealed in England by the Criminal Law Act 1967.

(1554–5) 1 and 2 Phillip and Mary c. 12—Distress

No distresses of cattle to be driven except to a pound within the shire, and not above three miles from the place of taking, nor to be impounded in different places.

The statute applied to distresses for all causes.

It is obsolete in relation to distress for rent since the abolition of distress for rent by the Landlord and Tenant Amendment (Distress Abolition) Act, 1930 and is superseded in relation to distress damage feasant by local legislation—by the Local Government Act, 1919 within municipalities and shires, and elsewhere by the Impounding Act, 1898 (see Local Government Act, s. 423); see also the Crown Lands Consolidation Act, 1913, s. 250.

(1572) 14 Elizabeth c. 8—Recoveries

An Act for the avoiding of collusive recoveries.

Obsolete—repealed in England by the Statute Law Revision Act, 1863.

(1575–6) 18 Eliz. c. 5—Penal Statutes

Punishment of informers compounding offences under penal Acts.

This Act was repealed in England by the Statute Law Revision Act, 1959, and is unnecessary here.

(1588–9) 31 Elizabeth, c. 5—Penal Statutes. (Only the party aggrieved to inform)

(1623–4) 21 or 21 and 22 James I, c. 4—Penal Statutes—Process upon Popular Actions

These two Acts were repealed in England by the Statute Law Revision Act, 1959. They are unnecessary here. Section 5 of 31 Elizabeth c. 5 is referred to in our report on the limitation of actions (L.R.C. 3).

(1575–6) 18 Elizabeth, c. 14—Jeofails

Obsolete. Repealed in England by the Statute Law Revision and Civil Procedure Act, 1883.

(1586–7) 29 Elizabeth, c. 4—Sheriff's poundage, etc.

(1716–7) 3 George I, c. 15—Estreats

Unnecessary.

(1586–7) 29 Elizabeth, c. 5, s. 21—Defence by Attorney

Explained by (1588) 31 Elizabeth, c. 10, s. 20.

An Act for the continuance and perfecting of divers statutes.

Section 21. The defendant in suits upon penal statutes may appear by attorney.

Obsolete.

(1601) 43 Elizabeth c. 4—The Charitable Uses Act, 1601

The conception of a valid charitable trust still substantially depends upon the preamble to this Imperial Statute although the rest of the statute had been repealed in England in 1888. Whilst not re-enacting this preamble, special provision has been made in clause 9 (2) (a) of the draft Bill which will preserve the established rules of law upon this subject.

(1601) 43 Elizabeth c. 6—Frivolous suits

Section 1—Penalty upon Sheriff and others arresting or summoning without warrant. Obsolete.

Section 2—No costs in certain actions in the Supreme Court when amount recovered is less than 40s. and Judge so certifies. See now Common Law Procedure Act, 1899–1967, sec. 267. Obsolete. (See *Rolin and Innes, Supreme Court Practice*, 1912, p. 151.) The Act contained only these two sections.

(1601) 43 Elizabeth c. 8—Fraudulent administration of intestate's goods

This dealt with the liability of a person fraudulently obtaining the personal estate of a deceased.

We think that this statute is unnecessary, although it was reproduced in the Victorian Statute—The Imperial Acts Application Act 1922, section 17, and now represented by the Administration and Probate Act 1958, section 33 (1), and is reproduced in the English Act 15 George V, c. 25, the Administration of Estates Act, 1925, section 28.

(1603-4) 1 or 2 James I, c. 13—The Privilege of Parliament Act, 1603

In view of the limited character of Parliamentary privilege in New South Wales (see *Norton* v. *Crick* (1894) 15 N.S.W.L.R. 172) the reproduction of this Act is unnecessary. Furthermore, the Act was probably never in force here.

(1606) 4 James I, c. 3—Costs

An Act to give costs to the defendant upon a non-suit of the plaintiff, or verdict against him.

Unnecessary.

(1623–4) 21 or 21 and 22 James I, c. 8—Process of the Peace in Superior Courts

In view of the provisions of our law with respect to the institution of criminal proceedings, this Act is not necessary or applicable. It was repealed in England by the Administration of Justice (Miscellaneous Provisions) Act, 1938.

(1623) 21 James I c. 16—Limitation of Actions

We have already made a report on the limitation of actions (L.R.C. 3). The draft Bill recommended in that report would repeal sections 3, 4 and 7 of the Limitation Act, 1623. The remainder of the Act of 1623 is obsolete.

(1609) 7 James I c. 5
(1623) 21 James I c. 12
} Protection of Justices of the Peace, Constables and others

The Act of 1623 made the Act of 1609 perpetual, and enabled justices of the peace and constables, and others acting in their aid and assistance, or by their commandment, to plead the general issue and to give special matter in evidence. So much of the Act as related to actions against justices of the peace was repealed by 11 and 12 Vic., c. 44, adopted by 14 Vic. No. 43.

The Police Regulation Act, 1899–1965, section 26, extends protection to members of the police force for acts done in obedience to justices' warrants, and gives the right to plead the general issue. The Crimes Act, section 563, also protects persons acting under that Act. (See also the Police Offences Act, 1901–1967, section 103, as to special constables.)

In view of the course of local legislation these Imperial Acts are unnecessary.

Compare (1750) 24 George II, c. 44, s. 6 at page 112.

(1623) 21 or 21 and 22 James I, c. 25—Crown Lands, Forfeitures, etc.

This Act contains provisions for the relief of tenants of the Crown from forfeiture for non-payment of rent.

It is inconsistent with the Crown Lands Consolidation Act, sections 16, 207, 271, 278. (Sections 204–212 of the Crown Lands Consolidation Act deal with forfeiture generally.)

In the case of other leases from the Crown, we do not think it necessary to preserve the Act.

We recommend its repeal.

(1625) 1 Charles I, c. 1—The Sunday Observance Act, 1625

(1627) 3 Charles I, c. 2—The Sunday Observance Act, 1627

The Act of 1625 applied to the "dominions" but its application depended upon the existence of parishes in the English sense, and accordingly we think that it did not apply in New South Wales. The Act forbade "meetings, assemblies, or concourse of people out of their own parishes on the Lord's Day within the realm of England or any of the dominions thereof, for any sports or pastimes whatsoever"; and forbade also common plays and sports.

In any event, the Act appears to be repealed in part by the Sunday Entertainment Act, 1966, section 7.

The Sunday Observance Act, 1627

This Act recites that the Lord's Day "is much broken and profaned by carriers, waggoners, carters, wain-men, butchers and drovers of cattle," and enacts that "no carrier with any horse or horses, nor waggonmen . . . nor carmen . . . nor drovers with any cattle . . . shall . . . travel upon the said Day, upon pain that every person . . . so offending shall lose and forfeit twenty shillings for every such offence: or if any butcher, by himself or any other for him by his privity or consent, shall . . . kill or sell any victual upon the said Day, then every such butcher shall forfeit and lose for every such offence the sum of six shillings and eight pence . . ."

This Act did not depend on the existence of parishes for its operation but its provisions are obsolete.

(1640) 16 Charles I c. 10—The Habeas Corpus Act, 1640

This Act abolishes the Court of Star Chamber, but s. 6 contains provisions relating to habeas corpus, and this section would be preserved by the draft Bill, Second Schedule, Part I.

(1640) 16 Charles I c. 14—Ship Money

Unnecessary.

(1661) 13 Charles II, St. 1, c. 5—Tumults and Disorders

An Act against tumults and disorders upon pretence of preparing or presenting public petitions or other addresses to His Majesty or to the Parliament.

Unnecessary now if ever applicable.

(1661) 13 Charles II, St. 1, c. 6, Preamble—Sea and Land Forces

The preamble recites that the command of the militia and of all forces by sea and land is the undoubted right of His Majesty.

The retention of the preamble as part of New South Wales Statute Law is unnecessary. (The remainder of this Act was repealed in England by the Statute Law Revision Act, 1863—26 and 27 Vict. 125.)

(1661) 13 Charles II, St. 1, c. 1, s. 6—Privilege of Debate in Parliament

This was a saving in an Act for the safety and preservation of "His Majesties Person and Government" against treasonable and seditious practices and attempts. The reproduction of the saving is unnecessary.

(1661) 13 Charles II, St. 2, c. 2—Oppressive Arrests

Obsolete—refers to old procedures.

(1665) 17 Charles II, c. 7—Distresses and Avowries for Rents

An Act for a more speedy and effectual proceeding upon Distresses and Avowries for Rents (Second Distress). (Repealed in England by the Statute Law Revision and Civil Procedure Act, 1881, as to which see *Woodfall, Landlord and Tenant*, 24th edn., p. 453.)

Obsolete since the abolition of distress for rent.

(1665) 17 Charles II, c. 8—Abatement

(Made perpetual I James 2, c. 17, s. 5.)

See now Common Law Procedure Act, section 156. Unnecessary.

(1667–8) 19 and 20 Charles II, c. 3—Prize Ships

(19 Car. II, c. 11 in Ruffhead.)

An Act to make prize ships free for trade.

Repealed in England by the Statute Law Revision Act, 1863—Unnecessary.

(1670–1) 22 and 23 Charles II, c. 9—Costs

Certificate of Judge necessary in certain cases of action for trespass, etc.

By this statute, in actions of trespass, assault and battery and other personal actions in which the judge at the trial does not certify that an assault and battery was sufficiently proved or that the title to the land was chiefly in question, if the jury award less than forty shillings, the plaintiff shall not recover more costs than the damages. The Act appears to have been regarded as in force here; *Major* v. *Bullock* (1880) 1 N.S.W.L.R. 139.

The certificate under this Act is not now necessary in view of section 267 of the Common Law Procedure Act.

(1670–1671) 22 and 23 Charles II, c. 10—The Statute of Distributions

Sections 1 and 2

Unnecessary in view of section 64 of the Wills, Probate and Administration Act, 1898–1965.

Sections 3, 5, 6 and 7

Unnecessary in view of section 61A of the Wills, Probate and Administration Act, 1898–1965.

Section 8

Unnecessary in view of the provisions in section 92 of the Wills, Probate and Administration Act protecting distribution on publication of notices by the executor or administrator.

Section 9

Unnecessary in view of sections 40 and 44 of the Wills, Probate and Administration Act.

The remaining provisions of this Act are inapplicable.

(1670–1) 22 and 23 Charles II, c. 11—The Piracy Act, 1670. Defence of Merchant Ships

This Act is obsolete in New South Wales. It was repealed as obsolete in England by the Statute Law Revision Act 1966.

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

Section 4 of this Statute, as amended by the Conveyancing (Amendment) Act, 1930, is the only portion of it remaining in force in New South Wales.

The position in regard to the statute in New South Wales appears from the following table:

Section of Statute of Frauds	*Position in relation to Statute in New South Wales*
Sections 1 and 2. Leases by parol ..	Repealed by Conveyancing (Amendment) Act, 1930, s. 2 and Schedule. Replaced by s. 23D of Conveyancing Act, 1919–1967.
Section 3. Grants of estates in land ..	Repealed by Conveyancing (Amendment) Act, 1930, s. 2, and Schedule. Replaced by s. 23C (1) of Conveyancing Act.
Section 4. Contracts by parol	The words "or upon any contract or sale of lands . . . or any interest in or concerning them"—repealed by Conveyancing (Amendment) Act, 1930, s. 2 and Schedule, and replaced by s. 54A of the Conveyancing Act. Otherwise s. 4 still stands as affected by the Usury, Bills of Lading, and Written Memoranda Act, 1902, s. 8. See further as to s. 4 overleaf.
Sections 5 and 6. Wills ..	Repealed by the Wills Act, 1837, adopted by the New South Wales Act, 3 Vic. No. 5—see now Wills, Probate and Administration Act, 1898–1965, ss. 7, 8; 17 and 16 and 18.
Sections 7, 8, and 9. Trusts ..	Repealed by Conveyancing (Amendment) Act, 1930, s. 2 and Schedule. Replaced by s. 23C of Conveyancing Act, 1919–1967.
Section 10. Lands, etc., liable to judgments against cestui que trust. Equitable estate assets by descent and heir chargeable ..	See now Judgment Creditors' Remedies Act, 1901–1957, ss. 10, 11, and 12, and Wills, Probate and Administration Act, 1898–1965, ss. 44, 46, and 46A.
Section 11. No heir by reason of the statute to become chargeable of his own estate	Unnecessary.

Section of Statute of Frauds	*Position in relation to Statute in New South Wales*
Section 12. Estates pur autre vie devisable ..	Repealed by Wills Act, 1837, adopted by 3 Vic. No. 5. See now Wills, Probate and Administration Act, s. 5.
Section 13. (Recital) ..	
Sections 14, 15, and 16. As to time when writs of execution bind	As to writs binding land—see Judgment Creditors' Remedies Act, s. 13; Real Property Act, 1900–1967, s. 105, and Conveyancing Act, ss. 188 and 186. As to writs binding goods—see Sale of Goods Act, 1923–1953, s. 29. Section 16 was repealed by the Sale of Goods Act, s. 3 (1) and the Schedule.
Section 17. Sale of goods ..	See now Sale of Goods Act, s. 9. The matter was previously dealt with by s. 11 of the Usury, Bills of Lading, and Written Memoranda Act, 1902, repealed by the Sale of Goods Act, which also repealed s. 17. See s. 3 (1) and Schedule of the Sale of Goods Act.
Section 18. Enrolment of recognizances ..	Superseded by the Conveyancing Act, s. 189 (1)—see *Helmore Real Property*, p. 169.
Sections 19, 20, and 21. Nuncupative wills	Repealed by the Wills Act, 1837, adopted by 3 Vic. No. 5.
Section 22. Repeal of wills ..	Repealed by the Wills Act, 1837, adopted by 3 Vic. No. 5—see now Wills, Probate and Administration Act, ss. 7, 15, 16, and 17.
Section 23. Exception of soldiers' and mariners' wills	Replaced by Wills Act, 1837, s. 11, adopted by 3 Vic. No. 5—see now Wills, Probate and Administration Act, s. 10.
Section 24. Jurisdiction of Courts saved	Cf. Wills, Probate and Administration Act, s. 33.
Section 25. Husbands not compellable to make distribution of personal estates of their wives	See now Wills, Probate and Administration Act, ss. 49–53, and 61A.

Section 4. Section 4 of the Statute of Frauds provided in effect that five classes of contracts should not be enforceable by action unless the agreement upon which the action was brought, or some memorandum or note thereof in writing, signed by the party to be charged under the contract or by some person lawfully authorized by the party, could be proved. The five classes of contracts or agreements to which this section applied were as follows:

(1) Special promises of executors and administrators.

(2) Promises to answer for the debt default or miscarriages of another person; that is, contracts of guarantee.

(3) Agreements upon consideration of marriage.

(4) Contracts or sale of lands or any interest in them.

(5) Agreements not to be performed within the space of one year from the making thereof.

As shown in the above table, contracts for the sale of land or any interest therein are now dealt with in section 54A of the Conveyancing Act, replacing the relevant passage in section 4 of the Statute of Frauds, which passage has been repealed.

The Statute of Frauds was stated in its preamble to be an Act "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury". What is left of it today does no more than require certain instruments to be in writing. Thus a meritorious claim may well fail not because, for example, the agreement alleged was not entered into, but that it was not made in the prescribed form.

The Statute has led to innumerable abuses. It has been referred to as being itself an instrument of fraud and was described by Bacon, V. C. in *Morgan* v. *Worthington* (38 L.T. 443) as "that unfortunate statute, the misguided application of which has been the cause of so many frauds".

In 1766 Lord Mansfield subscribed to the opinion that it did more harm than good. In 1851 Lord Campbell was of the opinion that "the Act promotes more frauds than it prevents". As recorded in the Report of the Law Revision Committee (1937 Cmnd. 5449) Mr Justice Stephen wrote in 1885 "In the vast majority of cases its operation is simply to enable a man to break a promise with impunity because he did not write it down with sufficient formality".

Professor Williams in his work on *The Statute of Frauds Sec. IV* points out that in general the parties may be trusted to secure that their contracts are evidenced in a satisfactory and adequate manner and that the case for the repeal of the Statute seems to be unanswerable. He cites such eminent authorities as Sir William Holdsworth in 1924 and Sir Frederick Pollock in 1913 for the view that the need for its repeal is generally accepted both in legal and commercial circles.

In England the Law Revision Committee in their Sixth Interim Report, presented to Parliament in May, 1937 (Cmnd. 5449), recommended by a majority that the remaining portion of the Statute of Frauds be repealed, that is to say the requirements of section 4 as to writing in the case of agreements within Classes 1, 2, 3 and 5 above. A minority, however, recommended that the requirement of the section as to writing in relation to contracts of guarantee (Class 2 above) be retained. In England the Law Reform Committee in their report presented to Parliament in April, 1953 (Cmnd. 8809), modified the earlier majority recommendation of the Law Revision Committee and recommended the repeal of section 4 with regard only to special promises of executors, agreements upon consideration of marriage and agreements not to be performed within the space of a year of the making thereof (classes 1, 3 and 5 above), and recommended the retention of the requirement of writing with respect to contracts of guarantee (class 2). The Imperial Parliament adopted that recommendation by enacting the Law Reform (Enforcement of Contracts) Act, 1954. That course has been followed in Western Australia by the Law Reform (Statute of Frauds) Act, 1962, of that State.

We recommend the abolition of the requirement of writing with respect to all the remaining classes of contracts dealt with in section 4 of the Statute of Frauds. The result would be to abolish the requirements of writing also in regard to contracts of guarantee, as well as those dealt with in the Law Reform (Enforcement of Contracts) Act, 1954.

If that course is adopted, the Usury, Bills of Lading, and Written Memoranda Act, 1902, section 8, will become unnecessary.

(1677) 29 Charles II c. 5—Affidavits

The only portion of this Act not dealt with by the Oaths Act or other local provision is the passage in section 2 that judges of assize in their circuits may take affidavits concerning matters in the King's Bench, Common Pleas or Exchequer. The Act is unnecessary.

(1679) 31 Charles II, c. 1, s. 32—The Billeting Act, 1679—Quartering Soldiers

This Act has been repealed in England by the Statute Law Revision Act, 1966 as unnecessary (in view of the declaration against billeting or quartering in the Petition of Right, 1627). In any case the matter now depends upon federal law.

(1689) 2 William and Mary c. 5—Distress for Rent

An Act for enabling the sale of goods distrained for rent. Superseded by local legislation consolidated in the Landlord and Tenant Act of 1899, which is obsolete since the abolition of distress for rent.

(1690) 2 William and Mary sess. 2, c. 2—Admiralty

The Act declares that the powers of the Lord High Admiral may be executed by Commissioners. This is unnecessary in New South Wales.

(1692) 4 William and Mary c. 4—Special Bails in the Country in Civil Actions

Related to old procedure—obsolete. (Repealed as to any offence thereby made felony by 11 Geo. IV and 1 Will. IV c. 66, adopted by 4 Will. IV, No. 4.)

(1692) 4 William and Mary c. 16, ss. 1, 2, 3—Real Property—Mortgage

An Act to prevent frauds by clandestine mortgages.

By the Act, creating a mortgage without disclosure of a prior judgment or mortgage was penalized by the forfeiture of the equity of redemption.

In *Langdon* v. *Reuss* 4 N.S.W.L.R. Eq. 28, Faucett J., at p. 35 referred to this old statute and said that the second mortgage in that case comprised additional land, "So that, supposing the old statute to be in force in the colony, this case is taken out of it".

In *Fisher's Law of Mortgages,* 7th edition, p. 585, it is said that the modern law as to registration of judgments and puisne mortgages rendered the statute obsolete and it has been repealed by the Law of Property Act, 1925 (English) Seventh Schedule. In the 6th edition of Fisher (1910) it is said (p. 713, par. 1399) that: "Being penal, it will be strictly applied to such instruments only as fall within the technical description of a mortgage . . ."

This Act is obsolete and unnecessary.

(1692) 4 William and Mary c. 18—Malicious Information in Court of King's Bench

This Act is unnecessary.

(1692) 4 William and Mary c. 22—Crown Office Procedure

Persons having grants by charters and enrolled not bound to plead them to an inquisition.

Probably never in force.

Obsolete if ever applicable.

(1693) 5 William and Mary c. 6—The Royal Mines Act, 1693

This Act was passed for "the better explanation" of 1 William and Mary c. 30—The Royal Mines Act, 1688 referred to in Appendix I (B) at page 60. The Act of 1688 may bear upon ownership.

As explained in *Attorney General* v. *Morgan* (1891) 1 Ch. 432, the Royal Mines Act, 1693, assumes that there is some copper, tin, iron or lead mine worth working by the owner, and it authorizes him to work it, though it contains gold or silver; but the Act protects the Crown by giving it an option to take the ore, with the gold or silver in it, at certain prices. If the Crown does not desire to buy the ore at these prices, then the mine owner can deal with the whole ore as he pleases, though there may be gold or silver in it. (The Act is confined to British subjects, including bodies politic or corporate.) This statute is superseded by the Mining Act, 1906–1964 (cf. s. 70 (12)), and is obsolete and unnecessary.

(1694) 5 and 6 William and Mary c. 11—Certiorari

Section 2—certiorari in term grantable only upon motion.

Recognizance to be given for trying the Issue next assizes.

Section 4—how certiorari grantable in vacation.

Before this Act, certiorari was granted almost of course to private prosecutors, who were said to represent the Crown, at whose suit all indictments are issued. (*Archbold, Criminal Pleading and Evidence,* 15th edn, p. 85.)

The statute is obsolete.

(1695) 7 and 8 William III c. 3—Treason

Sections 5 and 6 of this Act are proposed for preservation—see draft Bill, Second Schedule, Part II.

The remaining provisions of this Act are obsolete, and in any event, have been displaced by the Crimes Act, 1900, section 16A.

(1695) 7 and 8 William III c. 24—Oaths, etc.

This Act required barristers and solicitors to take the oath of allegiance (and certain other oaths and a certain declaration). In *Kahn* v. *Board of Examiners* (*Victoria*) (1939) 62 C.L.R. 422, Rich J., at p. 432, said "This Act" (i.e. 7 and 8 Will. III, c. 24) "has always been regarded as applicable in New South Wales and is so recognized by the Act 20, Vict., No. 9 (N.S.W.) . . ."

The reproduction of the Act is unnecessary in view of clause X of the Charter of Justice which authorized the Supreme Court to admit persons as barristers and solicitors . . . according to such general rules and qualifications as the Court shall for that purpose make and establish. Rules of Court have been made requiring the taking of the Oath of Allegiance by barristers and solicitors on admission.

(1696–7) 8 and 9 William III c. 11—Frivolous and Vexatious Suits, ss. 4 and 7

These are obsolete provisions dealing with matters now dealt with by the Common Law Procedure Act, 1899–1967, sections 153 and 265 et seq.

(1696–7) 8 and 9 William III c. 33—Certiorari to remove indictments

This Act made perpetual the Act 5 and 6 William and Mary c. 11 which we have already said at page 101 is obsolete.

(1697) 9 (or 9 and 10) William III c. 15—Arbitration

An Act for determining differences by arbitration.

Superseded as a substantive Act by local legislation—see Common Law Procedure Act, 1857, ss. 2–8 (which were repealed by 31 Vict. No. 15) and section 4 of the Arbitration Act, 1902. (Cf. *In re Smith & Service and Nelson & Sons* (1890) 25 Q.B.D. 545.) The retention of the Act is unnecessary.

(1697–8) 9 William III c. 7—Fireworks

See Police Offences Act, 1901–1967, sections 9A and 75.

Obsolete and unnecessary.

(1698) 9 (or 9 and 10) William III c. 41—Seamen's Wages

Obsolete.

(1698) 10 William III c. 22 s. 1—Real Property—Posthumous Children

This is an Act to enable posthumous children to take estates as if born in their father's lifetime.

The Conveyancing Act, 1919–1967, section 16 (1) and 23A, and the Wills, Probate and Administration Act, 1898–1965, section 44, and the rule of construction mentioned in the next paragraph are sufficient to render this Imperial Act unnecessary.

The law now considers every child en ventre sa mere as actually born, for the purpose of taking any benefit to which, if born, it would be entitled: *Villar* v. *Gilbey* (1907) A.C. 139.

The Act is unnecessary.

(1698) 11 William III c. 6—Aliens

Unnecessary—see Naturalization and Denization of Aliens Act of New South Wales, 1898.

(1705) 4 and 5 Anne c. 3 (or c. 16)—The Administration of Justice Act, 1705

Ss. 9 and 10—Attornment

These sections were repealed by the Conveyancing Act 1919–1967, s. 125.

Ss. 12 and 13—Actions on bonds

The draft Bill proposes the reproduction of these sections. (See clause 34 of the Bill.)

Ss. 17, 18 and 19—Seamen's Wages

Sections 17 and 18 deal with the time for bringing suits and actions for seamen's wages. Section 19 deals with absence beyond the seas of defendants in cases to which section 17 applies, and in other cases within section 3 of 21 James 1 c. 16 (the Imperial Limitation Act, 1623). Sections 17, 18 and 19 are referred to in our report on the limitation of actions (L.R.C. 3). The draft Bill recommended in that report would repeal these sections.

S. 21—Warranties by Tenant for Life and Collateral Warranties by Ancestor having no estate in possession made void as against reversioner and heir.

The matter of warranties is discussed in *Blackstone's Commentaries, Fourth Edition* ("adapted to the present state of the law"), Vol. 2, p. 255, Note (The note is virtually a reproduction of the 3rd Edition of 1768). The topic is also discussed in an article by H. W. Elphinstone 6 L.Q.R. 280 (at p. 283) cited in *Holdsworth's History of English Law*, 3rd edition, vol. 3, at p. 118. The subject is also discussed in *Stephen's Commentaries*, 9th edition, vol. 1, pp. 490–491.

In *Megarry and Wade, Law of Real Property* (1957), at p. 559 it is said, "The old law of warranty was bound up with the real actions and the feudal land law, and it fell out of use with them (*H.E.L.*, vol. 7, p. 257). But its place was taken by the practice of giving express covenants for title, and in the course of the sixteenth and seventeenth centuries the ordinary form for these became settled (*H.E.L.*, vol. 3, p. 103, vol. 7, p. 374, pp. 557, 559). These modern covenants sounded in damages only, and the idea of specific compensation was forgotten".

The section is obsolete.

In England section 21 was repealed by the Law of Property (Amendment) Act, 1924, sections 10, 12 and Tenth Schedule.

S. 27—Civil Procedure—Actions of Account

This section gave an action of account to one joint tenant against another. In 1918 Harvey J. in *Lane* v. *Hinks*, 35 W.N. 90, refused to strike out a count in a declaration for an account. His Honour said: "The action of account is certainly, according to modern notions of common law procedure, an anomalous one" (pp. 91–92). The judgment obtained in that action was an interlocutory one directing the defendant to furnish an account. The account when delivered is investigated by auditors appointed by the Court, and on their finding a final judgment is obtained from the Common Law Court. The more modern procedure is by suit in Equity.

This provision is unnecessary.

Other sections of the Administration of Justice Act, 1705, have been repealed, and the remaining sections are obsolete or have been superseded.

(1706–7) 6 Anne c. 12 s. 5—Prison (Escape)

Unnecessary in view of the Judgment Creditors' Remedies Act, 1901–1957, section 23.

(1708) 7 Anne c. 12—The Diplomatic Privileges Act, 1708—Ambassadors

The occasion of the enactment of this Act is described in the judgment of Lord Mansfield—*Triquet* v. *Bath* (1764) 3 Burr. 1478.

The statute provides that writs and processes of certain kinds against persons received as ambassadors or other public Ministers by Her Majesty, or against "the domestick or domestick servant" of the ambassador or other public Minister (persons in his "suite") are utterly null and void. The Act referred to civil process in vogue at the time, but certain of its provisions have been held to be declaratory of the common law—and not to create new law (*The Amazone* [1940] P. 40; *Empson* v. *Smith* (1965) 2 All. E.R. 881 at p. 886) and it contains some additional provisions. Thus, one section imposes a penalty upon attorneys, sheriffs, and bailiffs who issue or execute writs of the specified kind against the person of the ambassador or his suite. The Act provides certain machinery for notifying a list of persons entitled to diplomatic immunity. It remained in force in England until quite recently, being repealed and replaced by the Diplomatic Privileges Act 1964, which gave effect to an international Convention on Diplomatic Relations, the Vienna Convention of 18th April, 1961. The Diplomatic Privileges and Immunities Act 1967 (Commonwealth), section 7, gives the force of law to various articles of the Convention, including Article 31, which confers upon "diplomatic agents" immunity from criminal jurisdiction, and also immunity from civil jurisdiction except in certain specified cases. (See also article 38 and sec. 11.) Section 6 of the Commonwealth Act is expressed to exclude the operation, inter alia, of Imperial Acts in force in a State dealing with matters dealt with by the Commonwealth Act.

As the Act of Anne is substantially declaratory of the common law, and if it was ever in force in New South Wales (which is doubtful), its retention as New South Wales law is unnecessary, and the Commonwealth Act displaces it.

(1708) 7 Anne c. 21—The Treason Act, 1708, s. 14

This enactment is referred to above in Appendix I (B) in relation to 36 Geo. III c. 7. It required a list of witnesses and jurors to be given to persons indicted for treason or misprision of treason at the same time as a copy of the indictment was given and to be given ten days before the trial.

Section 16A of the Crimes Act provides that in all cases of treason, the person charged shall be arraigned and tried in the same manner and according to the same course and order of trial as if such person stood charged with murder.

Section 14 of the Act of Anne is unnecessary.

(1709) 8 Anne c. 18 (c. 14—Ruffhead)—Landlord and Tenant: Execution

Section 1 of this Act provides in effect that no goods shall be taken in execution unless the judgment creditor shall before the removal of the goods by the execution pay to the landlord all rent due from the land not exceeding one year's rent, and the sheriff or other officer is required to levy and pay to the judgment creditor the money so paid for rent as well as the execution money.

The Landlord and Tenant Amendment (Distress Abolition) Act, 1930 (N.S.W.) by section 2 (1) abolishes the landlord's right of distress for rent. By section 49 of the Small Debts Recovery Act, 1912, no execution awarded against the goods of any party shall deprive the landlord of his power under the Statute of 8 Anne c. 14.

In *Marcus Clark & Co. Ltd* v. *Coates,* 37 S.R. 493, the Full Court held that the Landlord and Tenant (Distress Abolition) Act, 1930, did not impliedly repeal section 1 of the Statute 8 Anne c. 14. Jordan C.J., at page 499, said, "The argument that it is anomalous that the right" (under the Act of Anne) "should exist when distress has been abolished is one that should be addressed to the Legislature".

We think that the Act 8 Anne c. 14, s. 1 should be repealed; and the Small Debts Recovery Act will need to be consequentially amended by omitting section 49. Sections 2, 3, 5, 6 and 7 related to distress. Section 8 is a proviso for the Crown. These provisions are obsolete.

Section 4 gave an action for debt for rent against a tenant for life. This provision is obsolete since the abolition of real actions by 3 and 4 William IV c. 27, The Real Property Limitation Act, 1833, s. 36, adopted by 8 William IV No. 3 (3 Bl. Com., pp. 231, 232; *Carson, Real Property Statutes,* 2nd Edn (1910), p. 120; *Thomas* v. *Sylvester* (1873) L.R. 8 Q.B. 368).

(1710) 9 Anne c. 25 (or c. 20, Ruffhead)—Municipal Offices

Sections 1, 2, 3, and 6 are replaced by the Prohibition and Mandamus Act, 1901.

Section 7, as to mandamus, is replaced by the Common Law Procedure Act, 1899.

Sections 4 and 5, as to quo warranto, are unnecessary in relation to substantive right or relief.

Section 5 is the authority for granting costs in certain proceedings for quo warranto, but it has a limited operation. It does not apply to any case in which the Attorney General is the officer in whose name and by whose authority the information is presented. (*The Queen* v. *North* (1865) 4 S.C.R. (L) 182; *Liston* v. *Davies* (1937) 57 C.L.R. 424 at pp. 436, 437.)

Adequate provisions as to costs are made by the existing rules of Court.

(1713) 13 Anne c. 21 (12 Anne St. 2 c. 18 Ruff.) s. 5—Stranded ships and goods

Dealt with by Crimes Act, ss. 241 and 243. Unnecessary.

(1714) 1 George I St. 2 c. 5—The Riot Act

This Act in section 1 enacts that twelve or more persons unlawfully, riotously, and tumultuously assembled and not dispersing after being commanded by a justice of the peace (or certain other named persons) by proclamation under the Act, but unlawfully, etc., remaining together for an hour after the command or request by the proclamation shall be adjudged guilty of felony.

Section 2 prescribes the form of the proclamation.

Section 3 provides that if such persons unlawfully, etc., assembled do not disperse within the hour they may be apprehended and carried before justices to be proceeded against, and if they resist and happen to be killed or hurt the justice (who read the proclamation) and persons assisting him are indemnified.

Sections 4 and 6 were repealed by 7 and 8 Geo. IV c. 27—that is before 1828. Section 5 makes it a felony to obstruct, etc., the making of the proclamation.

Section 7 directs the reading of the Act at every quarter sessions. (This provision is no longer observed either in New South Wales, or in England.)

By section 8, prosecutions for offences against the Act are to be commenced within twelve months.

The Imperial Act 1 Vic., c. 91 abolished the punishment of death for offences against the Riot Act (as well as for offences against certain other Acts) and substituted transportation or imprisonment. The Act 1 Vic., c. 91 was adopted by the New South Wales Act 2 Vic. No. 10 (later repealed in this respect by the Criminal Law Amendment Act of 1883 (46 Vic. No. 17)).

In Victoria, the Riot Act 1714 is replaced by the Unlawful Assemblies and Processions Act 1958, sections 5 and 6, which replace an earlier consolidation.

In Queensland, the Riot Act has been replaced in part by section 64 of the Criminal Code, supplemented by sections 261–265. These provisions omit the specific indemnity conferred by the Riot Act, but confer a limited authority to use force to suppress a riot.

The retention of the Riot Act 1714 is unnecessary in view of the means for enforcement of order now existing. The Act was repealed in England by the Imperial Criminal Law Act 1967.

(1716) 3 George I, c. 15, ss. 8 and 13—Estreats

S. 8—Sheriff dying before his office expired, Under Sheriff shall execute the office and be answerable.

Unnecessary and inappropriate in New South Wales as the Sheriff is now appointed under the Public Service Act.

S. 13—Unnecessary in view of the Execution against Property Rules—Rule No. 19.

(1717) 4 George I, c. 12, s. 3—Wilful Destruction of Ships to Prejudice Insurers

Covered by Crimes Act, 1900, secs. 235 and 236.

(1719–20) 6 George I, c. 11, ss. 1, 2, 3 and 41—Silverware

See page 79, under 2 Henry VI, c. 17 (c. 14).

(1725–6) 12 George I, c. 29, s. 4—Attorneys

An Act to prevent frivolous and vexatious arrests.

S. 4. Persons convicted of perjury and practising as attorneys—to be transported.

Obsolete.

(1725) 12 George I, c. 34—An Act to Prevent Unlawful Combinations of Workmen Employed in the Woollen Manufactures, and for Better Payment of their Wages

Repealed in England by Master and Servant Act, 1889, c. 24 as having ceased to be put in force, or as unnecessary.

Obsolete. (As to payment of wages, see Truck Act of 1900; Industrial Arbitration Act, 1940–1966, sec. 92.)

(1728) 2 George II, c. 22—An Act for the Relief of Imprisoned Debtors

See now Arrest on Mesne Process Act, 1902–1957, section 4, and Judgment Creditors' Remedies Act, 1901–1957, section 19.

Section 13, set-off.

Now unnecessary.

(1728) 2 George II c. 23—An Act for the Better Regulation of Attorneys and Solicitors

Superseded.

(1730) 4 George II, c. 26—Proceedings of Courts to be in English

Repealed in England by 42 and 43 Vict. c. 59.

Unnecessary.

(1730) 4 George II, c. 28—The Landlord and Tenant Act, 1730

An Act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases.

Section 1. Double rent payable on wilfully holding over after demand for possession.

Replaced by Landlord and Tenant Act of 1899, sections 11–15.

Sections 2, 3 and 4. Reproduced in the Act of 1899, sections 8–10.

Section 5. Distress—obsolete.

Section 6. Repealed and replaced by Conveyancing Act, 1919, section 121.

Whole Act displaced or obsolete.

(1731) 5 George II, c. 19—The Quarter Sessions Appeal Act, 1731

Section 2 provided that no certiorari be allowed to remove justices' order without a recognizance of fifty pounds to prosecute the same with effect. Section 3 was ancillary thereto.

Section 1 required Justices in Quarter Sessions to rectify defects in form, and is unnecessary—see Justices Act, 1902–1967, s. 132.

Section 2 is comparable with 13 George II c. 18 (Lord Jervis' Act), s. 5, the repeal of which is recommended at page 81. The repeal of The Quarter Sessions Appeal Act, 1731, is also recommended.

(1733–4) 7 George II, c. 8—Stock Jobbing

"An Act to prevent the infamous practice of stock jobbing". (Sir John Barnard's Act.)

Made perpetual by 10 Geo. II, c. 8.

Repealed in England by 23 and 24 Vic. c. 28.

The Act 23 and 24 Vic. c. 28 recites 7 George II, c. 8, and 10 George II, c. 8 and further recites that the said Acts impose unnecessary restrictions on the making of contracts for the sale and transfer of public stocks and securities, and that it is therefore expedient to repeal them.

Unnecessary, if ever applicable.

(1733–4) 7 George II, c. 20—The Mortgage Act, 1733, s. 2

Gave jurisdiction to the Court of Chancery in a foreclosure suit, on the application of the defendant, and on his admitting the title of the plaintiff, to make a decree before the hearing. But this seems to have been unnecessary because the Court of Chancery had inherent jurisdiction to stay the 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—*Fisher and Lightwood's Law of Mortgage*, 7th edn, p. 321.

Unnecessary.

(1734–5) 8 George II, c. 24, s. 5—Set-off

An Act to explain 2 George II, c. 22.

S. 5—set-off.

Now unnecessary—see page 107.

(1735–6) 9 George II, c. 5, ss. 3 and 4—Witchcraft, etc. Pretence of Witchcraft

Section 3 provided that after 24th June, 1736, no person was to be prosecuted for witchcraft, etc.

Section 4 provided for imprisonment for pretence of witchcraft and fortune-telling.

The repeal of section 3 would not revive the old liability—and provision for dealing with fortune-telling is now made by the Vagrancy Act, 1902, section 4 (2) (n).

Provision for forbidding the prosection of witchcraft is unnecessary. Further, fortune-telling is an indictable offence under 9 George II, c. 5, and the remedy by summary procedure under the Vagrancy Act is prompter and more convenient. (*Bignold's Police Offences and Vagrancy Act*, 9th edn, p. 288.)

(1737) 11 George II, c. 19—The Distress for Rent Act, 1737

Certain of the provisions of this Act have been held to have been in force in New South Wales, and section 3 was recognized as then in force by the Fair Rents (Amendment) Act, 1926, section 12. Certain other provisions of the Act were replaced by local legislation.

It is only necessary to mention here sections 14, 16 and 17. These provisions have not been replaced.

We have recommended the reproduction of section 14. See draft Bill, clause 31 and p. 36.

Section 16 gave power to justices to put the lessor in possession of abandoned premises and, as extended by the statute 57 George III, c. 52, the section applied although no right of re-entry was reserved or given. Section 17 made proceedings of the justices examinable on appeal.

The occasion for the use of section 16 would be rare nowadays, especially in view of the implied power of re-entry under the Conveyancing Act, section 85 1 (d). The re-enactment of sections 16 and 17 is accordingly unnecessary.

(1737) 11 George II, c. 22—The Corn Exportation Act, 1737, ss. 1, 2 and 4. An Act for punishing persons doing injuries and violences to the persons or properties of His Majesty's subjects, with intent to hinder the exportation of corn

Repealed in part by 7 and 8 George IV, c. 27 and 9 George IV, c. 31. Residue repealed in England by the Statute Law Revision Act, 1948.

Obsolete and unnecessary.

(1737) 11 George II, c. 24, s. 4—Privilege of Parliament

In view of the limited nature of parliamentary privilege in New South Wales, these provisions are not necessary and probably indeed were never applicable.

(1738) 12 George II, c. 13, ss. 4–9—Regulation of Attorneys

Unnecessary or superseded by local legislation.

(1738–9) 12 George II, c. 26 }
(1741–2) 15 George II, c. 20 } Gold and Silverware

See page 79 under 2 Henry VI c. 17 (c. 14).

(1739–40) 13 George II, c. 8—Abuses in the working of woollen and linen manufactures—Frauds by workmen

An Act to explain and amend 1 Anne St. 2 c. 18, and to extend it to the manufactures of leather.

Obsolete. See 13 Vic. No. 22, which dealt with similar matters, and was repealed by 46 Vic. No. 17.

(1739 or 1740) 13 George II, c. 18, s. 5 (Lord Jervis' Act)

Section 5 of 13 George II, c. 18, known as Lord Jervis' Act, forbids the granting or issuing of any Writ of Certiorari to remove any conviction, judgment, order, or other proceedings had or made by or before any Justice or Justices or General or Quarter Sessions unless such certiorari be moved or applied for within six months next after such conviction, etc., and unless six days notice in writing has been given to the Justice or Justices to the end that the Justices or the parties concerned may show cause against the granting, etc., of such certiorari.

The enactment has on several occasions been held to be in force in New South Wales—*Young* v. *Campbell,* 49 S.R. 103 at p. 107, and was recognized as in force in the recent case of *Bridie* v. *Messina* (1965) N.S.W.R. 332 (affirmed on another ground by the High Court 114 C.L.R. 354) although Wallace J. did say that he had considerable doubt whether the provision was now applicable in the State.

The relevant provision seems unnecessary at the present time, and may on occasions cause hardship or injustice. Further, the provision seems to be of limited application, as in the recent case of *Ex parte Thomas, Re Arnold* (1966) 2 N.S.W.R. 197, where the writ was applied for about twenty-six years after the conviction, the Court of Appeal held that the section did not apply to the prerogative writ to bring up and quash a conviction for want of jurisdiction on the face of the record (per Wallace P., at p. 198).

We recommend the repeal of this provision.

(1741–42) 15 George II, c. 27—An Act for . . . preventing cloth, etc., left out to dry from being stolen . . .

Repealed in England by the Master and Servant Act, 1889.

Obsolete.

(1742) 15 George II, c. 30—An Act to prevent the marriage of lunatics

Superseded. See now Federal Matrimonial Causes Act 1959, ss. 18–21.

(1742–3) 16 George II, c. 31—An Act for the further punishment of persons aiding or assisting prisoners to attempt to escape out of lawful custody

See Prisons Act, 1952–1964, ss. 32 and 33.

Superseded.

(1745–6) 19 George II, c. 21—Prevention of profane swearing

Sufficiently covered by Vagrancy Act, 1902, s. 7.

(1746) 20 George II, c. 19—An Act for the better adjusting and more easy recovery of the wages of certain servants, etc., and for the better regulation of such servants, and of certain apprentices

Obsolete and superseded.

(1746) 20 George II. c. 37—Return of Process by Sheriffs
(1823) 4 George IV, c. 37—Levy of fines, s. 1

Sheriffs at expiration of their office, to turn over to succeeding Sheriff all process unexecuted (20 Geo. II, c. 37)—Sheriff on quitting office to deliver to successor all rolls and writs in his possession, particularizing fines, etc. (4 Geo. IV, c. 37, s. 1).

Compare the New South Wales Act, the Fines and Forfeited Recognizances Act, 1954 (No. 25, 1954), s. 15 (3).

Unnecessary.

(1748) 22 George II, c. 27—An Act to prevent frauds and abuses by persons employed in the manufacture of hats, etc., and other manufactures and for preventing unlawful combinations of journeymen and others employed in the said manufactures and for the better payment of their wages

See 12 George I, c. 34 at page 107.

Obsolete or superseded.

(1754) 27 George II, c. 7—An Act for the more effectual preventing of frauds and abuses committed by persons employed in the manufacture of clocks and watches

Cf. 13 George II, c. 8 at page 8.

Obsolete.

(1748–9) 22 George II, c. 46, s. 11—Attorneys

Sworn attorneys or solicitors acting as agents for unqualified persons to be struck off the roll and for ever disabled from practising as an attorney or solicitor.

In *Ex parte Card*, 10 N.S.W. L.R. 43, the Court dealt with a practitioner under its inherent power instead of dealing with him under 22 George II, c. 46, s. 11 (the proceedings not being taken under that section); see report, at pp. 50 and 51.

This provision is not necessary (cf. Legal Practitioners Act, 1898–1967, section 40F).

(1750) 24 George II, c. 44—The Constables Protection Act, 1750—ss. 6 and 8

This was an Act for indemnifying constables and others acting in obedience to a justice's warrant. No action was to be brought against the constable or persons acting by his order or in his aid until demand had been made for perusal and a copy of the warrant and the same had been refused or neglected for the space of six days after the demand. If after compliance with the demand the constable or other person was sued without the justice being made a defendant, the jury were to give a verdict for the defendants notwithstanding any defect of jurisdiction in the justice. If the action were brought jointly against the justice and constable or other person, then on proof of the warrant the jury were to find for the constable or other person notwithstanding defect of jurisdiction. Provision was made as to costs in the case of a verdict against the justice.

By section 8, no action was to be brought against any justice for anything done in the execution of his office or against any constable or other person acting as aforesaid unless commenced within six months after the commission of the Act.

The Act was held to be in force in New South Wales in 1909 in *Feather* v. *Rogers* (9 S.R. 192). It was also considered to be in force in Tasmania (under 9 George IV, c. 83) in the recent case *Gerard* v. *Hope* (1965 Tas. S.R. 15).

Section 6 of the Constables Protection Act is reproduced in Victoria in the Justices Act, 1958, section 183.

Virtually the same protection given to constables by section 6 of the Act of 1750 is given to constables by section 26 of the Police Regulation Acts.

Reference has been made above to section 563 of the Crimes Act, 1900 as to persons acting under that Act. (See under (1609) 7 or 7 and 8 James I, c. 5, and (1623) 21 James I, c. 12.)

In view of the course taken in the Police Regulation Act, 1899, we do not recommend the preservation of the Act of 1750.

(1751–2) 25 George II, c. 36, s. 8—Disorderly Houses

This section enacted that any person appearing to act as master or mistress or as having the management of any gaming house or other disorderly house shall be deemed and taken to be the keeper and liable to be prosecuted and punished as such, notwithstanding that he or she shall not be in fact the real owner or keeper.

The provision seems inconsistent with modern notions of fairness, and we do not recommend its preservation.

(1751–2) 25 George II, c. 37, s. 9—Murder—Escapes and Rescues

Section 9 imposed the death penalty for the offence of rescuing a convicted murderer. The section was amended as regards the punishment by the Imperial Act 1 Vic. c. 91, adopted by 2 Vic. No. 10, which was repealed by the Criminal Law Amendment Act of 1883 (46 Vic. No. 17). The provision is obsolete, and unnecessary in view of the Prisons Act, 1952–1964, Part VII.

(1753) 26 George II, c. 19, ss. 1–4—Stealing Shipwrecked Goods

Covered sufficiently by Crimes Act, sections 522 and 523.

(1753) 26 George II, c. 27—An Act to confirm acts and orders of Justices of the Peace of the Quorum

Unnecessary and not now applicable.

(1754) 27 George II, c. 3—An Act for the better securing to constables and others the expenses of conveying offenders to gaol, and for allowing the charges of poor persons bound to give evidence against felons

Obsolete.

(1760–1) 1 George III, c. 13—The Justices' Qualification Act, 1760

The Act relieves Justices from taking oaths on demise of the Crown and provides that those who have taken oaths under writ of dedimus potestatem are exempted from suing another writ for the administration again of the oath.

Not necessary—see Demise of the Crown Act, 1901.

(1760–1) 1 George III, c. 23—An Act for rendering more effectual provisions in 12 and 13 William III, c. 2, relating to the Commissions and salaries of judges

Superseded by local legislation—Supreme Court and Circuit Courts Act, 1900–1965.

(1764) 4 George III, c. 10—The Recognizance (Discharge) Act, 1764 (Cf. 2 Vic. No. 8, s. 12.)

Superseded by local legislation: see now the Fines and Forfeited Recognizances Act, 1954.

(1764) 4 George III, c. 37, s. 16—Breaking into shop etc, with intent to steal or destroy, etc. any materials or implements declared to be felony

Unnecessary in view of local legislation—Crimes Act, 1900.

(1766) 6 George III, c. 25—An Act for better regulating apprentices and persons working under contract

Obsolete.

(1766–7) 7 George III, c. 9—Explains 1 George III c. 13 (see page 113.)

Unnecessary.

(1766–1767) 7 George III, c. 48—The Public Companies Act, 1767 Chartered Companies

The whole Act was repealed in England by the Statute Law Revision Act 1964.

In view of the local regulation of companies the Act is unnecessary in New South Wales.

(1766–7) 7 George III, c. 50—Post Office

Offences in relation to the mails.

Unnecessary as State legislation.

(1768–9) 9 George III, c. 30—Seamen's Wages

Section 6 imposed penalty for uttering any false letter of attorney etc., to obtain wages due to any officer or seaman or other person who has served on any ship or vessel of His Majesty, with intent to defraud.

Repealed in England by 28 and 29 Vict. c. 112 (Admiralty, etc., Acts Repeal Act, 1865).

Unnecessary as State legislation.

(1769) 9 George III c. 16, The Crown Suits Act, 1769

We have already made a report on the limitation of actions (L.R.C.3). The draft Bill recommended in that report would repeal this Act.

(1770) 10 George III, c. 50, ss. 1, 2 and 5—Privilege of Parliament

Suits may be prosecuted against peers and members of the Houses of Commons, and their servants, etc.

These provisions are unnecessary in New South Wales and were probably never applicable.

(1772–3) 13 George III, c. 63—The East India Company Act, 1772—ss. 42 and 45

Extended to all colonies by 1 Will. IV, c. 22 (The Evidence on Commission Act, 1831).

The Imperial Act 1 Will. IV c. 22 provided that all the powers in 13 George III c. 63 as to the examination of witnesses in India were thereby extended to all colonies . . . and places under the dominion of His Majesty in foreign parts and the judges of the several courts therein.

The Act 1 Will. IV c. 22 was applied by the New South Wales Act 5 Vict. No. 9, section 15. The Witnesses Examination Act, 1900 repealed section 15 of 5 Vict. No. 9.

The Act 13 George III c. 63 was repealed by 6 and 7 George V c. 37, the Government of India Amendment Act, 1916, section 7 (2), and as the Witnesses Examination Act, 1900 repealed section 15 of 5 Vict. No. 9 which applied The Evidence on Commission Act, 1831, 1 Will. IV c. 22, we do not recommend the preservation of 13 George III c. 63 (as extended) for New South Wales. (The Evidence on Commission Act, 1831 was repealed by the Statute Law Revision Act 1963.)

(1774) 14 George III, c. 44—An Act to amend 22 George II, c. 27 (see page 112.)

The principal Act is obsolete or superseded.

(1774–5) 15 George III, c. 14—Amends 14 George III c. 44

Also obsolete or superseded.

(1766) 17 George III, c. 55—An Act for the better regulating the hat manufactory

Obsolete.

(1777) 17 George III, c. 56—An Act to amend etc. the Acts for the preventing of frauds and abuses by persons employed in the manufacture of hats and in the woollen and other manufactures

Obsolete and unnecessary (Cf. 13 George II, c. 8 at page 110).

(1779) 19 George III, c. 49—An Act to prevent abuses in the payment of wages to persons employed in the bone and thread lace manufactory

Obsolete or superseded—See Truck Act of 1900; Industrial Arbitration Act, 1940–1966, sec. 92.

(1781–2) 22 George III, c. 75—The Colonial Leave of Absence Act, 1782 (Burke's Act)

(1814) 54 George III, c. 61—Public Offices in Colonies

The Colonial Leave of Absence Act has been applied in Australia—*Willis* v. *Gipps*, 5 Moo P.C. 379; *Montagu* v. *Lieutenant Governor and Executive Council of Van Diemen's Land*, 6 Moo, P.C. 489; *Hood Phillips, Constitutional and Administrative Law*, 3rd Edn (1962), p. 728, note. See article "The Independence of Judges", 26 A.L.J. 462, by Zelman Cowen and David P. Derham. The Act was repealed by the Imperial statute, the Statute Law Revision Act 1964. In view of sec. 4 of the Statute of Westminster, 1931 (adopted by the Commonwealth by the Statute of Westminster Adoption Act 1942), there is an unresolved question how far the repeal would apply to the Australian States. (A similar question arises with respect to The Offences at Sea Act, 1806, and The Murders Abroad Act, 1817, referred to at p. 88 post.) The subject-matters dealt with by The Colonial Leave of Absence Act, 1782 are now sufficiently provided for by local legislation. If the repeal by the Statute Law Revision Act 1964 does not extend to New South Wales, the Act of 1782 would be excepted by clause 7 of the draft Bill from the general repeal in clause 8, and repugnancy avoided.

The Colonial Leave of Absence Act, 1782 was amended by (1814) 54 George III, c. 61, but that Act was repealed by The Colonial Officers (Leave of Absence) Act, 1894, and the provision substituted by the latter Act does not apply in the Australian States.

(1785) 25 George III, c. 35—Debtors to Crown

See note at page 88 under heading "Other Acts relating to Debtors to the Crown".

(1786) 26 George III, c. 71—An Act for regulating houses and other places kept for the purpose of slaughtering horses

Superseded.

(1788) 28 George III, c. 55—An Act for the more effectual protection of stocking frames and preventing the destruction or injury to them

Obsolete and unnecessary.

(1790) 30 George III, c. 48—An Act for discontinuing the judgment required by law to be given against women convicted of certain crimes and substituting another judgment.

Treason and petit treason.

Obsolete. (Cf. Crimes Act, 1900, s. 17 as to petit treason, repealed by the Crimes (Amendment) Act, 1951.)

(1792) 32 George III, c. 56—Servants

This Act related to offences, such as impersonation of a master or mistress, and falsely asserting in writing that a servant had been hired for a period of time in a station or capacity.

The Act is unnecessary. (The various matters dealt with in the Act could be dealt with as constituting some other offence under the Crimes Act.)

(1792) 32 George III, c. 58—Information in nature of quo warranto s. 1

The defendant in an information in the nature of quo warranto for the exercise of a municipal office (an office in a city, borough or town corporate) may plead the holding of the office for six years or more.

The limitation provided for by the Act was extended by analogy to informations in the nature of quo warranto in respect of offices other than informations in respect of a municipal office. (*Lightwood, Time Limit on Actions,* p. 408.)

It was argued that the Act was in force in New South Wales—*Reg.* v. *Pinkstone* (1888) 9 N.S.W. L.R. 201, a case brought at common law after the expiration of the time limited by the Municipalities Act of 1867, 31 Vic. No. 12, s. 99, although the point was not decided. Compare now the Local Government Act, 1919, s. 43 (1) (a) and (b), and s. 43 (2).

In our view, as there was not any city, borough, or town corporate in New South Wales in 1828, the Act was never in force here. In any event, in view of the provisions of the Local Government Act as to ouster, and of the discretionary nature of the remedy of quo warranto, we think that the re-enactment of the Act of George III is unnecessary.

(1792) 32 George III c. 60—Fox's Act

"Although this statute only applies to criminal proceedings, it has been followed by analogy in actions for libel"—*Clerk and Lindsell, Torts,* 11th edn. (1954), p. 744.

The Act is one of historical significance, settling a great controversy in the second half of the eighteenth century, and may be said, in effect, to establish the modern foundations of the right of the subject to liberty of discussion. An account of the controversy and the settlement effected by Fox's Act is given in *Holdsworth's History of English Law* (1938), vol. 10, p. 672, et seq.

Prior to Fox's Act, the judges had restricted the jury to the finding of the fact of publication and of the truth of the innuendo. Whether the writing, of such a meaning, published without a lawful excuse was criminal (i.e. presumably, was a libel) was considered by the judges to be a question of law. The jury could not decide it *finally* against a defendant, because after the verdict it remained open on the record (i.e. presumably, for determination by the Court on motion for arrest of judgment) and the judge was not necessarily bound to tell the jury his own opinion—the general verdict "guilty" was equivalent to a special verdict in other cases; it found all which belonged to a jury; it found nothing as to the question of law. See Holdsworth, vol. 10, pp. 677, 678.

Section 1 of Fox's Act is now represented by section 29 of the Defamation Act, 1958. Section 2 of Fox's Act is not explicitly re-enacted in the Defamation Act, 1958, but it seems to be implicit from the terms of section 6. Section 3 of Fox's Act is not re-enacted at all in the Defamation Act. Section 4 would be unnecessary in New South Wales in view of the general provisions of the Criminal Appeal Act of 1912. A jury may always return a special verdict, and in early days the special verdict was the ordinary one—*R.* v. *Ireland* (1910) 1 K.B. 654, 657. The Criminal Appeal Act, section 7 (3), appears to recognize the right to find a special verdict.

The law of defamation is under consideration by the Commission in another respect.

We do not recommend the preservation of Fox's Act.

(1793) 33 George III, c. 13—The Acts of Parliament (Commencement) Act, 1793

This Act requires the Clerk of the Parliaments 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.

The Interpretation Act of 1897, in sections 3 and 4, contains provisions as to the commencement of Acts and as to the date of assent.

Legislative Council Standing Order 213 requires that all Public Bills assented to on behalf of Her Majesty and all Public Bills reserved for the signification of Her Majesty's pleasure shall be numbered by the Clerk with the date of assent or reservation added next after the title, commencing a new series of numbers with each year of Our Lord.

We think that the Act was probably never in force in New South Wales. It is, however, unnecessary and, so far as it may be in force, we recommend its repeal.

(1792–3) 33 George III, c. 67—The Shipping Offences Act, 1793—Offences by Seamen

An Act for better preventing offences in obstructing, destroying, etc., ships or other vessels and in obstructing seamen (and others) from pursuing their lawful occupations.

Various sections in the Crimes Act relate to malicious damage to vessels—section 28, and sections 235–239.

This Act is unnecessary.

(1795) 36 George III, c. 8—Seditious Meetings

Repealed in England by 32 and 33 Vic. c. 24, the Newspapers, Printers, and Reading Rooms Repeal Act, 1869.

Obsolete.

(1795) 36 George III, c. 9—The Passage of Grain Act, 1795

An Act to prevent obstructions to the free passage of grain within the kingdom.

Complementary to the Corn Exportation Act, 1737 (11 Geo. II, c. 22), see page 109.

The residue then remaining was repealed in England by the Statute Law Revision Act, 1948.

Obsolete, and unnecessary.

(1796–7) 37 George III, c. 123—Unlawful Oaths

In *R.* v. *Lovelass and others*, 6 C. & P. 596, it was held that the above statute is not confined to oaths administered for the purposes of either sedition or mutiny.

It appears that the accused, Lovelass, was forming an employees' union, "The General Society of Labourers", and he conducted "a kind of initiation ceremony at which an oath of loyalty to the union was taken"—see *Australian Encyclopaedia*, vol. 8, p. 520.

A note to the report at p. 601, says "This case was afterwards the subject of discussion in the House of Commons, and much interest was made to procure a remission of the sentence; however, the sentence was carried into effect, and the prisoners were sent to New South Wales." The prisoners were the "Tolpuddle Martyrs".

The article in the *Australian Encyclopaedia* in vol. 8, p. 520, on the "Tolpuddle Martyrs" gives an account of the historical background of the case. See also *Holdsworth's History of English Law*, vol. 13 at pp. 168, 173, and 203.

The Statute was passed at a time of social unrest, and appears to have been extended to combinations of labourers in an oppressive way. It is out of harmony with contemporary ideas, and we recommend its repeal.

(1797) 37 George III c. 70—Incitement to Mutiny

(This Act was made perpetual by 57 George III c. 6.)

The Commonwealth has enacted section 25 of the (Commonwealth) Crimes Act which reproduces 37 George III. c. 70 section 1 which is the substantive provision.

There is no necessity to retain or reproduce the Act in New South Wales.

(1796–7) 37 George III c. 127—Meeting of Parliament

This was an Act to shorten the notice for summoning Parliament and for providing for the meeting of Parliament in the case of the demise of the Crown.

We think that probably this Act was never made applicable by 9 George IV c. 83 in view of the non-representative character of the Council constituted under that Act.

These provisions are unnecessary in view of the Constitution Act, 1902, secs 10 and 12.

(1798) 38 George III c. 69—Goldware

See under 2 Henry VI c. 17 (c. 14) at page 79.

(1798) 38 George III c. 87—Administration of Estates

The Act relates to the administration of assets in cases where the executor to whom Probate was granted was out of England.

Its provisions, so far as are material, are sufficiently dealt with by the Wills, Probate and Administration Act, 1898–1965.

Its preservation is unnecessary.

(1806) 46 George III c. 54—The Offences at Sea Act, 1806
(1817) 57 George III c. 53—The Murders Abroad Act, 1817

(1806) 46 George III c. 54—The Offences at Sea Act, 1806

This Act provided that all . . . offences . . . committed upon the sea . . . might be enquired of, tried, heard, determined, and adjudged according to the common course of the laws of the realm used for offences committed upon the land . . . in any of His Majesty's islands, plantations, colonies, dominions . . . under and by virtue of the King's commission or commissions under the great seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor of Great Britain, lord keeper, or commissioners for the custody of the great seal of Great Britain for the time being should . . . think fit to appoint . . .

The effect of the statute was 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 (28 Henry VIII, c. 15).

The Act was repealed by the Imperial Criminal Law Act 1967.

(1817) 57 George III c. 53—The Murders Abroad Act, 1817

Section I of this Act provided that murders and manslaughters committed within . . . places not within His Majesty's dominions nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel . . . or by any person sailing in or belonging thereto . . . (or by certain others named) . . . should and might be tried, adjudged, and punished in any of His Majesty's . . . colonies, dominions . . . under commissions issued under 46 George III c. 54 (The Offences at Sea Act, 1806).

Sections 2 and 3 were repealed by the Imperial Statute Law Revision Act, 1873. The residue of the Act was repealed by the Imperial Criminal Law Act 1967.

Section 4 of the Statute of Westminster, 1931 (adopted by the Commonwealth by the Statute of Westminster Adoption Act 1942) provides that no Act of Parliament of the United Kingdom passed after the commencement of the Act of 1931 shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof. By section 9 (3), in the application of the Statute of Westminister to the Commonwealth of Australia the request and consent referred to in section 4 shall mean the request and consent of the Parliament and Government of the Commonwealth. Section 9 (2) provides that nothing in the Statute of Westminster shall

be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of the Statute of Westminister that the Parliament of the United Kingdom should make that law without such concurrence. It is an unresolved question, whether, as applied to Australia, section 4 would refer only to the law of the Commonwealth, as distinct from the law of a constituent State.

On the view that the repeals of the two Acts here discussed effected by the Criminal Law Act 1967 would not be within section 4 of the Statute of Westminster, these two Acts would have ceased to be in force here by virtue of those repeals. If the repeals do not extend to New South Wales the Acts would be saved by clause 7 of the draft Bill.

(1799) 39 George III c. 37—The Offences at Sea Act, 1799

(1828) 9 George IV c. 31—The Offences against the Person Act, 1828

The Imperial Act 9 George IV c. 31 was repealed by the Criminal Law Amendment Act of 1883 except for sections 8 and 32 and so much of section 22 (which dealt with bigamy) as related to punishment.

Section 8 is not now necessary in view of section 25 of the Crimes Act.

Section 22 was replaced by section 92 of the Crimes Act, which has in turn now been displaced by section 94 of the (Commonwealth) Marriage Act 1961.

The preservation of 9 George IV c. 31, section 32, and of 9 George III c. 37 (The Offences at Sea Act, 1799), both of which, in their application to New South Wales, deal with jurisdiction of State Courts in respect of offences committed outside New South Wales but on the high seas, is not necessary in view of the provisions of the Imperial Act 12 and 13 Vic. c. 96 (The Admiralty Offences (Colonial) Act, 1849) which by its express terms, applies to New South Wales.

(1799) 39 George III, c. 79—The Unlawful Societies Act, 1799

Obsolete and unnecessary—Cf. *Luby* v. *Warwickshire Miners' Association* (1912) 2 Ch. 371.

See page 118 as to 37 George III, c. 123, the Unlawful Oaths Act, 1797, and see page 125 as to 52 George III, c. 104, the Unlawful Oaths Act, 1812, and page 127 as to 57 George III, c. 19, the Seditious Meetings Act, 1817.

(1799–1800) 39 and 40 George III, c. 14—Meeting of Parliament

This Act empowered the Crown to shorten the time for the meeting of Parliament in cases of adjournment. The Act was probably never applicable to New South Wales, and the Constitution Act, 1902, section 10, deals with the subject matter.

Unnecessary.

(1799–1800) 39 and 40 George III, c. 54—Debtors to the Crown

See note at page 89 under heading "Other Acts relating to Debtors to the Crown".

(1799–1800) 39 and 40 George III, c. 77—An Act for the security of collieries and mines and for the better regulation of colliers and miners.

Obsolete and unnecessary.

(1800) 39 and 40 George III, c. 93—Treason

This Act provides that in all cases of high treason in encompassing the death of the sovereign where the overt act was assassination or any direct attempt endangering the sovereign's life, and of misprision of such treason, the persons charged shall be indicted, arraigned, tried and attainted in the same manner and according to the same course and order of trial in every respect, and upon like evidence, as if such persons stood charged with murder.

The Act is unnecessary now in New South Wales in view of section 16A of the Crimes Act (added in 1951).

(1801) 41 George III, c. 78—An Act to extend 27 George II, c. 3—expenses of conveying offenders to gaol

Obsolete.

(1801) 41 George III, c. 79—Notaries Public

The Act regulates the admission of notaries public to practise. There is in fact no local regulation of the admission of notaries as such in New South Wales and the Act is unnecessary, even if applicable or capable of adoption.

(1801) 41 George III c. 85—Fines and Forfeitures

Superseded. (Cf. Justices Act, 1902–1967, ss. 87 et seq. Fines and Penalties Act, 1901–1954.)

(1802–3) 43 George III, c. 46—Vexatious Arrests

Section 2 was held in force in *Bayless* v. *Dixon* (1883) 4 N.S.W.L.R. 62, in the absence of rules of the Supreme Court under the Mesne Process Act (3 Vic. No. 15) as to paying out of Court money deposited by the defendant.

The only material portion of this Act is section 2 which must be read with the Arrest on Mesne Process Act, 1902–1957. A defendant arrested under that Act may obtain his discharge from custody by, inter alia, depositing with the Sheriff the sum endorsed on the writ of capias together with twenty dollars for costs. By rule 19 of the Arrest on Mesne Process Rules, the defendant must within 10 days of his release give the special bail prescribed by that rule.

If, after having made the abovementioned deposit, he fails to give the special bail, the effect of s. 2 of 43 George III c. 46 is that the sum of money so deposited shall, by order of the Court, be paid over to the plaintiff.

All other matters relating to arrest on mesne process are now dealt with by the Arrest on Mesne Process Act and the rules thereunder. The single exception is the effect of section 2 abovementioned.

It is undesirable that this one point of procedure should be governed by an Imperial Act of 1802. The rules should comprise a complete code.

The matter has been drawn to the attention of the Chief Justice with an intimation that we would propose that 43 George III c. 46 be repealed. The point outstanding may be dealt with by a comparatively simple rule of Court.

(1802) 42 George III c. 85—The Criminal Jurisdiction Act, 1802—Offences Abroad

This Act contained six sections.

Section 1 made provision for the prosecution of offences committed by persons employed in any Public Service abroad. The section had been employed for the purpose of trying Colonial Governors for oppressions and other illegalities (*R.* v. *Eyre* (1868) L.R. 3 Q.B. 487) and also for trying officers for frauds on the Crown committed in foreign countries (*R.* v. *Turner* (1889) 24 L.Jo. 469).

Section 2 empowered the Court of King's Bench to award writs of mandamus to the Chief Justice and judges of courts of the country where the offence was committed to obtain proofs of the matters charged in the indictments.

Section 3 enabled the Court of King's Bench to order an examination de bene esse in cases where viva voce evidence could not be had.

Section 4 required persons to whom writs of mandamus should be directed to do all things necessary for the due execution thereof by compelling appearance of and giving evidence by witnesses, etc.

Section 5 provided that persons giving false evidence (either under the Act 24 George III, c. 25 or this Act) were made subject to penalties for perjury.

By section 6, the protection of 21 James I c. 12 against troublesome and contentious suits was extended to persons having public employment out of the United Kingdom and empowered to commit persons to safe custody.

It also provided that an action brought for an act done out of the United Kingdom may be laid in Westminster or in any county where the defendant should reside.

Section 1 was repealed in part by the Criminal Justice Act, 1948, and was further amended by the Criminal Law Act 1967, and sections 2 to 6 were repealed by the Statute Law Revision Act, 1964.

We think that it is beyond the power of Parliament to deal with this Act. It is referred to in Appendix III at page 136.

(1803) 43 George III, c. 140—The Habeas Corpus Act, 1803—An Act to enable the awarding of writs of Habeas Corpus for bringing persons detained in gaol before courts martial or before Bankruptcy Commissioners and others

Unnecessary as State Law.

(1806) 46 George III, c. 37—An Act to declare the law with respect to witnesses refusing to answer. Witness cannot refuse to answer on the ground of subjecting himself to a suit for debt

This Act was probably unnecessary as being merely declaratory of the common law. The Judges were consulted and a substantial majority was of that view.

In view of the provisions of the Evidence Act, 1898–1966 and the common law we recommend that it be repealed. We have invited your attention to the matter and you have indicated that you agree.

(1808) 48 George III, c. 58—The Bail Bonds Act, 1808, s. 1

The procedure referred to is obsolete or inapplicable in New South Wales. In England the Act was partly repealed by the Statute Law Revision Act, 1872 (No. 2) (35 and 36 Victoria c. 97) and the residue was repealed by the Administration of Justice (Miscellaneous Provisions) Act 1938, 1 and 2 George VI c. 63 (which indeed repealed "the whole Act").

(1808) 48 George III, c. 106—Acts of Parliament (expiration)

Unnecessary, if ever in force.

Virtually the same ground is covered by section 5 of the Interpretation Act of 1897.

(1809) 49 George III, c. 126—The Sale of Offices Act, 1809—Public Offices

Provision in relation to the sale of offices is unnecessary in New South Wales. Provision in relation to corrupt dealings not covered by the Secret Commissions Prohibition Act, 1919, would be more fittingly made the subject of separate legislation if thought necessary.

(See page 90 as to 5 and 6 Edward VI, c. 16.)

(1810) 50 George III, c. 59, s. 2—Criminal Law Procedure

This was a provision for punishing offences by collectors of public money. It is unnecessary in view of other provisions of the local criminal law.

(1810) 50 George III, c. 85—Persons appointed to offices of Public Trust to give security

Obsolete.

(1812) 52 George III, c. 102—An Act for the registering and securing of Charitable Donations

This Act has never been applied in New South Wales (nor in Victoria—see *Sir L. Cussen's Explanatory Paper,* p. 90).

Unnecessary.

(1812) 52 George III, c. 104—An Act to render 37 George III, c. 123 (the Unlawful Oaths Act 1797) for preventing the administering or taking of unlawful oaths more effectual

Amended as to punishment by 1 Vic. c. 91, s. 1, adopted by 2 Vic. No. 10. The adopting Act was later repealed by the Criminal Law Amendment Act of 1883, 46 Vic. No. 17 (except in relation to 1 Vic. c. 88).

Obsolete and unnecessary.

(1812) 52 George III, c. 143, s. 6—Land Tax Certificate Forgery

Section 6—relates to forging certificates for redemption or sale of land tax.

It is questionable whether the Act was ever applicable. It is unnecessary.

(1812) 52 George III, c. 155, s. 12—Disturbance of Religious Worship

See the draft Bill, clause 39, and Appendix I (A), page 56, under "Religious Worship—Disturbance of".

Disturbance of religious worship is an offence at common law—*R.* v. *Darling* 5 N.S.W.L.R. 405.

(Compare the Crimes Act, 1900, s. 56.)

(1812–13) 53 George III, c. 141—An Act for . . . the better protection of infants against . . . grants (of Life Annuities) . . .

Section 2—Annuities and rent charges to be enrolled in the High Court of Chancery, in the form set out in the Act.

Section 8—Contracts for purchase of annuities by persons under age, void.

Repealed in England by the Usury Laws Repeal Act, 1854.

The Act has not been applied in New South Wales, and we think that the protection at common law is sufficient.

(1814) 54 George III, c. 145—The Corruption of Blood Act, 1814. —An Act to take away corruption of blood save in certain cases.

Forfeiture for felony was abolished in New South Wales by the Criminal Law Amendment Act of 1883 (46 Vic. 17, s. 416).—See now Crimes Act, 1900, s. 465. (As to "felony" see Crimes Act, 1900, s. 9; Interpretation Act of 1897, s. 29.) The Act of 1814 was repealed in England by the Statute Law Revision Act, 1960.

Unnecessary.

(1814) 54 George III, c. 146—Sentences in cases of High Treason

Obsolete. (See the reference to this Act in Appendix I (B) at page 66.)

(1814) 54 George III, c. 168—The Powers Act, 1814. Attestation of Instruments of Appointment and Revocation

The Powers Act, 1814 was followed in New South Wales by the Trust Property Act of 1862, 26 Vic. No. 12, section 12, which was repealed and re-enacted as section 35 of the Conveyancing and Law of Property Act, 1898. Section 35 still applies to the exercise of powers prior to 1st July, 1920 (*Stuckey and Needham, Conveyancing Acts* (1953) p. 93, note 91).

See now Conveyancing Act, 1919-1967, section 41.

The Powers Act, 1814, has been displaced.

(1815) 55 George III, c. 134—An Act for altering the rate at which the Crown may exercise its right of pre-emption of ore in which there is lead

Obsolete and unnecessary.

(1815) 55 George III, c. 184, s. 37—Stamp

The same ground is covered by the Stamp Duties Act, 1920, as amended, section 118.

(1815) 55 George III, c. 194—An Act for better regulating the practice of apothecaries

Obsolete or superseded.

(1816) 56 George III, c. 16, ss. 4 and 13—Distress for Rent

An Act for better regulating the offices of Receivers of Crown Rents.

Section 4 related to appointments of Receivers of Crown Rents. Section 13 empowered Receivers to distrain for rents in arrear.

The Act was treated as in force in *Windeyer* v. *Riddell* (1847) Legge 295, but is now obsolete.

(1816) 56 George III, c. 50—The Sale of Farming Stock Act, 1816

Under this Act no produce of lands let to farm is to be sold or carried off from the lands in execution contrary to covenants or agreements for the benefit of the owner or landlord of the farm. The tenant is to give notice to the Sheriff of the covenants or agreements and the Sheriff is to give notice to the owner or landlord of the taking of possession. The Sheriff may dispose of the produce subject to an agreement to expend the proceeds on the land. The Sheriff may assign the agreement to the owner or landlord.

There are subsidiary provisions.

The Act has fallen into disuse and it is obsolete.

(1816) 56 George III, c. 58—The Manufacture of Beer

Superseded—See Liquor Act, 1912, Part VI, Div. 1.

(1817) 57 George III, c. 19—The Seditious Meetings Act, 1817—An Act for the more effectually preventing seditious meetings and assemblies

Many sections of this Act were not in force in 1828, or were subsequently repealed.

The Criminal Law Act 1967 (English) repealed sections 25 to 28; sections 30 and 31; sections 34 to 38, and amended section 29. That leaves in force in England section 29 (Licenses of public houses) as amended and section 39 (as to Act not extending to Ireland).

The Act was assumed by the Friendly Societies Act, 1873 (37 Vic. No. 4), section 12, to be in force in New South Wales.

The Act was held to be in force in Victoria in 1862 in *Regina* v. *Wood*, 1 W. and W. 371, a case concerning the embezzlement of the funds of a friendly society. It was there said that it had been held that "Secret Societies" could not have the benefit of the law for the protection of their property unless the requirements of the law had been complied with. As the moneys embezzled were received under unregistered rules the prisoner could not be convicted.

In Victoria, section 3 of the Unlawful Assemblies and Processions Act 1958 prohibits certain meetings near Parliament House. Acts such as the Friendly Societies Act would impliedly repeal this Act pro tanto. (Cf. *Luby* v. *Warwickshire Miners Association* (1912) 2 Ch. 371.) Section 12 of the Friendly Societies Act, 1873, was not reproduced in the Friendly Societies Act, 1899, or in the present Act of 1912–1963.

The Act is a dead letter in New South Wales, and we recommend its repeal.

(1817) 57 George III, c. 93—An Act to regulate the costs of distresses levied for payment of small rents

Impliedly repealed by Landlord and Tenant Act of 1899. See also Landlord and Tenant Amendment (Distress Abolition) Act, 1930.

(1817) 57 George III, c. 115—An Act to extend the provisions of 12 George I, c. 34 and 22 George II c. 27 to labourers employed in the manufacture of articles made of steel etc.

Obsolete.

(1817) 57 George III, c. 117—Extents in Aid

"This Act and other causes . . . rendered extents in aid obsolete . . . " Stuart Robertson, *Civil Proceedings By and Against The Crown*, p. 205.

Halsbury's Laws of England, 2nd edition, volume 9, p. 678, says that the extent in aid, after many years of misuse by persons who utilized the process as a ready remedy for the recovery of their own debts, having constituted themselves for the purpose, or being in fact, Crown debtors, was ultimately reduced to its legitimate purpose and thereby became practically extinct.

The procedure is obsolete in New South Wales and the Act is unnecessary.

(1818) 58 George III, c. 30—An Act for preventing frivolous and vexatious actions of assault and battery and for slanderous words

In actions of trespass or assault in inferior Courts if damages are given under 40s. the plaintiff to recover only so much costs as damages given.

Superseded or inapplicable—See District Courts Act, 1912–1965, ss. 39 and 129; *Pillar* v. *Arthur* (1912) 15 C.L.R. 18.

(1819) 60 George III and 1 George IV, c. 1—The Unlawful Drilling Act, 1819

The Queensland Criminal Code Act repealed the Act for Queensland and substituted section 51 of the Criminal Code.

The Commonwealth has enacted a provision like section 51 of the Criminal Code in the Crimes Act 1914–60, section 27.

The preservation of the Act as part of the law of New South Wales is unnecessary as the matter dealt with by it is now one within Federal competence and has been dealt with by Federal law.

(1819) 60 George III and 1 George IV, c. 4—The Pleading in Misdemeanour Act, 1819

The Act is now obsolete (with the possible exception of section 8) and was repealed in England by the Administration of Justice (Miscellaneous Provisions) Act, 1938.

Section 8 requires the delivery of a copy of the information in all cases of prosecutions for misdemeanours instituted by the Attorney General or Solicitor General. Such a provision is now unnecessary.

(1820) 1 George IV, c. 87—An Act for enabling landlords more speedily to recover possession of land and tenements unlawfully held over by tenants.

Re-enacted by Landlord and Tenant Act of 1899, ss. 11–14.

(1820) 1 George IV, c. 90—The Offences at Sea Act, 1820

An Act to remove doubts, and to remedy defects, in the law, with respect to certain offences committed upon the sea, or within the jurisdiction of the Admiralty.

Section 1—clergyable crimes.

Section 2—offences under 43 George III, c. 58, to be dealt with in the same manner as offences under 28 Henry VIII, c. 15.

Section 2—was repealed by 9 George IV, c. 31, that is before 9 George IV, c. 83.

Section 1 is obsolete.

The whole Act, so far as unrepealed, was repealed by the Imperial Criminal Law Act 1967.

(1821) 1 and 2 George IV, c. 41—Prosecution and abatement of nuisances arising from furnaces used and in the working of steam engines, except furnaces erected solely for the working of mines, or for smelting ores

Obsolete and unnecessary—e.g., see Clean Air Act, 1961–1964.

(1821) 1 and 2 George IV, c. 48—An Act for amending Acts for the regulation of attorneys and solicitors

Superseded by local provisions.

(1821) 1 and 2 George IV, c. 88—An Act for the amendment of the law of rescue—rescuing persons charged with felony

Repealed by 9 George IV, c. 31, so far as relates to the offences of assaulting, beating and wounding therein mentioned. Residue unnecessary.

(1822) 3 George IV, c. 39—An Act for preventing frauds upon creditors, by secret warrants of attorney to confess judgment

(Repealed in England by the Administration of Justice Act, 1956.)

Subject matter dealt with by local Rules of Court but now rescinded.

Obsolete.

(1822) 3 George IV, c. 46—An Act for the more speedy return and levy of fines, penalties and forfeitures, and estreated recognizances (Cf. 2 Vic. No. 8, s. 12)

Superseded. See now the Fines and Forfeited Recognizances Act, 1954.

(1822) 3 George IV, c. 114—The Hard Labour Act, 1822—An Act to provide for the more effectual punishment of certain offences by imprisonment with hard labour

Unnecessary.

See now Crimes Act, 1900, ss. 432 and 554.

(1823) 4 George IV, c. 29—An Act to increase the power of magistrates in cases of apprenticeships

Superseded—See Apprentices Act, 1901, Industrial Arbitration Act, 1940–1966.

(1823) 4 George IV, c. 34—An Act to enlarge the powers of justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others

Superseded. See Apprentices Act and Industrial Arbitration Act.

(1823) 4 George IV, c. 35—Statutory Commissioners

This Act provides that where trustees or commissioners cannot meet on the day appointed by an Act for their first meeting by reason of the day appointed having been antecedent to the passing of the Act, any three may meet on the fourteenth day after the passing of the Act.

Repealed in England by Statute Law Revision Act, 1963.

Its slight utility is not enough to warrant its preservation.

(1823) 4 George IV, c. 37—An Act amending 3 Geo. IV, c. 46 for the more speedy return and levying of fines, penalties and forfeitures and estreated recognizances

Superseded—See the Fines and Forfeited Recognizances Act, 1954.

(1823) 4 George IV, c. 52—The interment of suicides

Obsolete.

(1824) 5 George IV, c. 96—An Act to consolidate and amend the laws relative to the arbitration of disputes between masters and workmen

Superseded by local legislation. See Industrial Arbitration Act, 1940–1966.

(1825) 6 George IV, c. 129—An Act to repeal the laws relating to the combination of workmen and to make other provisions in lieu thereof

Superseded by local legislation—Industrial Arbitration Act, 1940–1966; Crimes Act, 1900, s. 545B.

(1827) 7 and 8 George IV, c. 17—The Distress (Costs) Act, 1827—Regulation of costs of certain distresses for rent

This Act extends the provisions of 57 George III, c. 93, as to which see p. 127.

(1827) 7 and 8 George IV, c. 27—Criminal Statutes Repeal

Adopted by 9 George IV, No. 1, which was repealed by the Criminal Law Amendment Act of 1883.

(1827) 7 and 8 George IV, c. 65—The Admiralty Act, 1827

This is an Act to explain and remove doubts touching the Admiralty.

The Act has been repealed in the United Kingdom and there is no need to retain it here.

(1828) 9 George IV, c. 32, s. 3—Criminal Law and Procedure

This provision declares that punishment for a felony not punishable with death after it has been endured shall have the effect of a pardon under the Great Seal.

An illustration of the working of the Act is found in *Leyman* v. *Latimer* (1877) 3 Ex. D. 15, affirmed 3 Ex. D. 352, where, in an action for a libel for calling the plaintiff a felon editor, the plaintiff's reply to the effect that after his conviction he underwent his sentence . . . and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the Great Seal, was held a good reply.

The Act applies only to felonies not punishable with death. In 1828 there were many felonies so punishable. It never applied to misdemeanours.

If the Act were preserved, its effect upon the law of defamation would be difficult to resolve. In England, mere truth is a defence to such an action whereas, in this State, some additional factor is necessary, e.g., that the publication was made for the public benefit.

We think the provision has little, if any, positive effect in law and we have drawn your attention to the matter, and you have directed that it be repealed.

(1828) 9 George IV, c. 66—The Nautical Almanack Act, 1828

Section 1 of this Act was repealed by the Statute Law Revision Act, 1873.

By section 2 the Lord High Admiral may authorize the publication of the Nautical Almanack. There is a penalty for publication without authority.

The Crown has the copyright of the Nautical Almanack. "The publication of the 'Nautical Almanack' for the purpose of finding the longitude at sea, in the interests of navigation, is under the control of the Lords of the Admiralty (Nautical Almanack Act, 1828 (9 George IV, c. 66), s. 2)". *Halsbury's Laws of England,* 3rd edition, vol. 8, p. 420. We understand that the State has not been concerned with the administration of this Act.

Unnecessary.

(1828) 9 George IV, c. 69—The Night Poaching Act, 1828

An Act for the more effectual Prevention of Persons going armed by Night for the Destruction of Game.

Unnecessary and largely unsuitable (cf. the definition of game, which includes Hares, Pheasants, Partridges, Grouse, Heath or Moor Game, Black Game, and Bustards).

IMPERIAL ACTS RELATING TO LOTTERIES

A group of Imperial Acts relating to lotteries has been held to be in force in a certain respect in New South Wales, or in the case of the second and third Acts mentioned in the following list, in other States, the decisions being applicable to the position in New South Wales. The respect in which the Acts were finally held to be in force in New South Wales was the recovery of penalties at the suit of the Attorney General. The Acts concerned are the following:

(1698) 10 and 11 William III, c. 23—Suppression of Lotteries.
(1732) 6 George II, c. 35—The Lotteries Act, 1732.
(1738–9) 12 George II, c. 28—The Gaming Act, 1738.
(1739–40) 13 George II, c. 19—The Gaming Act, 1739.
(1744–5) 18 George II, c. 34—The Gaming Act, 1744.
(1802) 42 George III, c. 119—The Gaming Act, 1802.
(1806) 46 George III, c. 148—The Lotteries Act, 1806.
(1823) 4 George IV, c. 60—The Lotteries Act, 1823.

Following are short references to some provisions of these Acts.

1. 10 and 11 William III, c. 23 (or c. 17)

Section 1 declared lotteries to be common and public nuisances.

Section 2 provided that no person should publicly or privately exercise, keep open etc. or play etc. at any lottery. Any person doing so was to forfeit for every such offence the sum of £500 to be recovered by information in any of His Majesty's Courts at Westminster.

2. 6 George II, c. 35

Section 29 prohibited the selling of tickets in any foreign lottery. Persons offending were liable to forfeit the sum of £200, one third part to the use of His Majesty, one third part to the informer or person suing for it and the remaining third to the poor of the parish.

Section 30 gave an appeal to Quarter Sessions.

3. 12 George II, c. 28

This Act declared certain games to be games or lotteries by cards or dice. The games were as follows:

Ace of Hearts	Basset
Pharaoh	Hazard,

and every person setting up maintaining or keeping the said games were subject to the penalties and forfeitures provided by the Act.

4. 13 George II, c. 19

Section 9 declared the game of passage and all other games invented or to be invented with one or more dice or with any other instrument, engine or device in the nature of dice having one or more figures or numbers thereon (backgammon and the other games then played with backgammon tables only excepted) to be games or lotteries by dice within the meaning of the Act therein recited, that is, 12 George II, c. 28.

Section 9 further provided that every person erecting setting up maintaining or keeping any place etc. (except as provided in the recited Act) for the game of passage or for any other such game or games as aforesaid (backgammon and the other games then played with backgammon tables only excepted) should forfeit and be liable to the penalties under 12 George II, c. 28.

Section 9 further subjected to these penalties persons playing setting at staking or adventuring at passage or the other games (backgammon etc. excepted).

5. 18 George II, c. 34

This Act forbade the keeping of a house or place for playing roulet, otherwise roly-poly, or any other game with cards or dice already prohibited by the laws of the realm.

Persons offending were to incur the pains and penalties directed by 12 George II, c. 28.

Persons playing were to incur the penalties of 12 George II, c. 28, section 1. (Another provision of 18 George II, c. 34 was repealed for New South Wales by 14 Victoria, No. 9, section 17.)

6. 42 George III, c. 119

Section 1 declared all such games and lotteries called "Little Goes" to be common and public nuisances and against law.

Section 2 forbade the keeping publicly or privately of any office or place for playing any game or lottery called "Little Goes" or any other lottery not authorized by Parliament upon pain of forfeiting for every offence the sum of £500 to be recovered at the suit of the Attorney General to the use of His Majesty . . .

Section 5 of this Act provided that no person should . . . promise or agree to pay any sum or sums or to deliver any goods or to do or forbear doing anything for the benefit of any person . . . on any event or contingency relative or applicable to the drawing of any ticket or tickets, lot or lots, numbers or figures in any such game or lottery under a penalty of £100. (In *Norris* v. *Woods*, 26 S.R. 234, Long Innes J. at p. 253 said that section 5 must be construed as aimed against the keepers or conductors of lotteries or "Little Goes" and not as imposing a heavy penalty upon the unwary persons for whose protection the Act was passed.)

7. 46 George III, c. 148, s. 59

Section 59 enacts, in effect, that all penalties under any of the Imperial Acts concerning lotteries must be sued for in the name of the Attorney General . . .

8. 4 George IV, c. 60, ss. 19 and 41

Section 19 enacted that the clauses contained in the Act relative to the suppression of illegal lotteries and insurance therein, and to the preventing the sale and publishing proposals for the sale of foreign lottery tickets, were, in effect, to be permanent.

Section 41 provided that any person selling any ticket or chance in any lottery authorized by any foreign potentate or state, or to be drawn in any foreign country, or in any lottery except those authorized by Act of Parliament to be sold, was to forfeit fifty pounds and be deemed a rogue and vagabond . . .

In *Attorney General* v. *Mercantile Investments Ltd* (1921) 22 S.R. 39, the Supreme Court held that the Imperial Acts 10 and 11 Will. III, c. 17 and 42 George III, c. 119 were in force in New South Wales so far as they related to recovery by information or action at law of the penalties therein prescribed for offences in connection with lotteries. The Court rejected the argument that local statutes—the Vagrancy Act and the Gaming and Betting Act—had impliedly repealed the Imperial statutes. At that time the Lotteries and Art Unions Act applied only to lotteries of goods, wares or merchandise.

The two Imperial Acts were also applied in a case in the following year—(1922) *Attorney General* v. *Brierley* 39 W.N. 145.

The Lotteries and Art Unions Act was amended, inter alia, in 1922 and again in 1929, and section 3 now applies to the disposition by lottery or chance of any property whatsoever, real or personal. The Act has also been amended by the Lotteries and Art Unions (Amendment) Act, 1966 substituting a new section 4 in relation to lotteries by certain charitable or non-profitable organizations, and adding section 4A in relation to certain charities, and adding section 4B excluding the operation of section 3 in relation to lotteries and games of chance for the promotion of trade. The extension of the Lotteries and Art Unions Act to the disposition of all property whether real or personal, and the further amendment to the Lotteries and Art Unions Act in 1966 impliedly repeals the Imperial Acts.

The Gaming and Betting Act creates offences in relation to common gaming houses and unlawful games—see sections 4, 17 and 33 (and see also sections 35 and 37). That Act does not contain any definition of a common gaming house nor does it contain any definition of an unlawful game or any list of them. As regards common gaming houses, the common law definition applies—see *Grigg* v. *Bell* (1966) 2 N.S.W.R. 170 at p. 171. Unlawful games are games which have been declared unlawful by statute (*Ex parte Little* 2 S.R. 444 at p. 450—and see *Windsor* v. *Denastazi* 57 S.R. 462).

The Vagrancy (Amendment) Act, 1905 declares certain games to be unlawful games.

The State Lotteries Act, 1930, section 5, enacts that a subscriber to a State lottery and any other person indicated in the section is "freed and discharged from all penalties, suits, prosecutions and liabilities to which by law he would be liable but for this Act as being concerned in an illegal lottery, littlegoe or unlawful game, or as offending against any provision of the Lotteries and Art Unions Act, 1901–1929, as amended by subsequent Acts". (The language of section 5 is an allusion to some provisions of Imperial Acts.)

We recommend that the various Imperial Lotteries Acts, listed above, so far as they have been held to be in force in New South Wales, be repealed.

APPENDIX III

Statutes Before 25th July, 1828, Applying Irrespective of 9 George IV, c. 83

There is a further group of Acts passed before the critical date in 1828 which apply or may apply to New South Wales irrespective of 9 George IV, c. 83.

Although the Commonwealth by the adoption in 1942 of the Statute of Westminster 1931 has been able to remove for itself the legal limitations of colonial status which occasionally fettered the operations of Colonial or Dominion Legislatures, the States are still subject to some of the legal fetters of the colonial era, although no doubt for practical purposes the Australian States are now autonomous political entities so far as the British Government is concerned (*Castles, Limitations on the Autonomy of the Australian States, Public Law,* 1962, p. 176). The States are legally still bound by Imperial Statutes before or after 1865, the year of the passing of the Colonial Laws Validity Act, which apply to them by paramount force—by express words or necessary intendment.

The statutes to which these comments apply and discussion of them are as follow:

CRIMINAL LAW ENACTMENTS

(1698–9) 11 William III, c. 12—Crimes by Governors of Colonies

This Act declares how and where oppression by Governors of plantations abroad may be tried. The Act was amended in England by the Criminal Justice Act, 1948.

A repeal by the New South Wales Parliament would be beyond power, and the statute is accordingly listed in the Third Schedule.

12 George III, c. 24—The Dockyards, &c., Protection Act, 1772

Section 2 applies in respect of offences out of the realm. The Act applies of its own force in respect of acts in the Dominions.

Under Section 1, the punishment for offences is death. The note to the Act in *Halsbury's Statutes,* vol. 5, p. 547, says that "the punishment . . . is still (i.e. 1948) death, but the sentence instead of being pronounced may be merely recorded (Judgment of Death Act, 1823 (c. 48), s. 1 . . .). The Criminal Law Act 1967 has amended the Act in minor respects.

42 George III, c. 85—The Criminal Jurisdiction Act, 1802

An Act for trying and punishing in Great Britain persons holding public employments, for offences committed abroad.

Sections 2–6 were repealed by the Statute Law Revision Act 1964. Section 1 remains as amended by the Imperial Criminal Law Act 1967.

This Act has been referred to at pages 123–124.

52 George III, c. 156—The Prisoners of War (Escape) Act, 1812

The Act applies in relation to acts done in the Dominions.

The Act was retained in Victoria. As to Queensland see section 42 and the Second Schedule to the Criminal Code Act 1899. An enactment similar to section 42 of the Queensland Criminal Code is contained in the (Commonwealth) Crimes Act 1914–1960—section 46.

The retention of this Act is not necessary but its repeal would be ineffective. (Section 3 was amended by the Imperial Criminal Law Act 1967.)

5 George IV, c. 113—The Slave Trade Act, 1824

The Slave Trade Act, 1843, 6 and 7 Vic., c. 98, in section 1, extends all the provisions of the Slave Trade Act, 1824 (and the Act of 1843 itself) to British subjects wheresoever residing or being and whether within the dominions of the British Crown or of any foreign country.

MISCELLANEOUS ENACTMENTS

(1813) 54 George III, c. 15—The New South Wales (Debts) Act, 1813—Cf. also (1541) 33 Henry VIII, c. 39—The Debtors to the Crown Act, 1541

As to 33 Henry VIII, c. 39, it is doubtful whether of its own force it would have been applicable to New South Wales, and regarded by itself, it could have been suggested for repeal without much further comment. However, by 54 George III, c. 15, section 4, real estate in New South Wales became chargeable with all Crown debts of what nature or kind soever . . . in like manner as real estates were by the Law of England liable to the satisfaction of debts due by bond or other specialty. This imports a reference to 33 Henry VIII, c. 39.

Section 36 of 33 Henry VIII, c. 39, provided that all bonds to the King should be in the nature of statutes staple (i.e. a bond acknowledged pursuant to (1363) 27 Edward III, Stat. 2, c. 9. before the Mayor of the Staple). The statute staple became a bond of record upon which a writ *de statuto stapulae* might issue and the person and goods of the debtor might be seized and his lands delivered to the creditor until satisfaction of the debt. It is now obsolete: *Halsbury's Statutes*, 2nd edn., vol. 6, p. 9.

By section 52 of 33 Henry VIII, c. 39, lands descending to heirs in fee or in tail were charged with debts due to the King by specialty, and by section 53 the King might recover against the executors.

It is put in *Helmore, Law of Real Property in New South Wales*, p. 166, that by 33 Henry VIII, c. 39, debts due to the Crown from accountants to the Crown, and also debts of record or by bond or specialty due to the Crown from other persons were binding on their estates in fee simple when sold as well as when devised by will or

suffered to descend to the heir. The passage in Helmore proceeds that since there is no legislation in New South Wales similar to 28 and 29 Vic. c. 104, section 4, the Crown Suits etc. Act, 1865, the Crown at the date of commencement of the Conveyancing Act, 1919 had a lien on lands of all its debtors whether by simple contract or by specialty even against a bona fide purchaser for value without notice.

Section 189 of the Conveyancing Act provides that no judgment, statute (i.e., presumably "statute staple") bond, or recognizance whether obtained or entered into on behalf of the Crown or otherwise . . . shall operate as a charge on land or on the unpaid purchase money for any land unless and until the writ or order for the purpose of enforcing it is registered in the register of causes, writs and orders affecting land. The section applies to any inquisition finding a debt due to the Crown and any obligation or specialty made to the Crown and any acceptance of office from or under the Crown, whatever may have been its date in like manner as it applies to a judgment.

Section 189 does not take away the lien of Crown debts but recognizes its existence. The section operates in favour of purchasers but also makes registration a condition precedent to the operation of the charge. To constitute the charge on land a liability to the Crown must either be a debt "so found" by inquisition, or judgment, or a specialty debt, and the charge certainly does not arise until the writ for enforcement is registered in the *Register of Causes, Writs and Orders* (Helmore pp. 166–167).

The Act 54 George III, c. 15 is not repealable by the New South Wales Parliament. (The Act of 33 Henry VIII, c. 39 is repealable.)

The Government may see fit to propose that the Act 54 George III, c. 15, be included for repeal in some English Statute Law Revision Act when convenient. The Act was repealed as to Victoria by the English Statute Law Revision Act, 1890—53 and 54, Vic., c. 33—see Sir Leo Cussen's note in his Explanatory Table, p. 91, Victorian Statutes 1922.

Helmore, p. 167, says that the situation as to the charge on Crown debts is obscure and badly needs elucidation by statute.

The topic is one for separate consideration.

(1819) 59 George III, c. 60—The Ordinations for Colonies Act, 1819

The surviving section—section 1—enables the Archbishop of Canterbury or of York, or the Bishop of London, or any bishop specially authorized by any of them, to ordain specially for the colonies.

As this Act specifically applies to the dominions, the New South Wales Parliament could not repeal it, although no doubt it is obsolete so far as the State is concerned.

(1821) 1 and 2 George IV, c. 121, ss. 27–29—The Commissariat Accounts Act, 1821

By section 27, commissariat officers in charge of military accounts in His Majesty's colonies or foreign possessions may examine persons upon oath as to accounts, etc.

By section 28, persons giving false evidence before commissariat officers of accounts are punishable for perjury. (This section was repealed, so far as it applied to England, by the Perjury Act, 1911.)

By section 29, persons neglecting or refusing to appear are liable to punishment.

This Act "extends" to the State, and could not be repealed by the State Parliament, although no doubt it is obsolete so far as State administration is concerned.

NOTE. The Australian Agricultural Company's Act (1824) 5 George IV, c. 86 (as to which see the case *See* v. *Australian Agricultural Co.* (1910) 10 S.R. 690 at p. 702) was repealed by the Act of the Parliament of the United Kingdom 2 and 3 George V, c. 48, the Australian Agricultural Company's Act 1912.

NOTE ON THE OFFENCES OF BADGERING, ENGROSSING, FORESTALLING AND REGRATING

The Imperial Act 7 and 8 Victoria c. 24 abolished for England, Scotland and Ireland the offences of badgering, engrossing, forestalling and regrating.

The offence of *forestalling* the market consisted in buying the merchandise on its way to market, or dissuading persons to bring their goods there, or persuading them to enhance the price when there. That of *regrating*, consisted in buying corn, etc. in any market, and selling it again in or near the same place. That of *engrossing*, was getting into one's possession or buying up large quantities of corn, etc., with intent to sell them again—*Stephen's Commentaries on the Laws of England*, 9th edition, vol. 4, p. 163. The offence of *badgering* consisted of buying up corn and commodities and carrying them elsewhere for sale (in effect, by way of forestalling or engrossing or otherwise contrary to 5 and 6 Edward VI, c. 14); *Russell on Crime*, 12th Edn, p. 1464, citing 5 and 6 Edward VI, c. 14 and 5 Eliz., c. 12.

The Act 7 and 8 Victoria c. 24 recited that various statutes had from time to time been made prohibiting certain dealings in various commodities by the names of badgering, forestalling, regrating and engrossing, and that it was expedient that such statutes as well as certain others in restraint of trade should be repealed. The Act further recited that the Act 12 George III c. 71 had repealed certain Acts, but that notwithstanding the Act of George III persons were still liable to be prosecuted for badgering, engrossing, forestalling and regrating as being offences at common law and also forbidden by various statutes made before the earliest of those repealed by the Act of George III. It was accordingly enacted that after the passing of 7 and 8 Victoria c. 24 these offences were abolished, and a large number of very old Acts, beginning with one passed in 51 Henry III, were repealed (together with certain Acts of the Parliament of Scotland and Acts and parts of Acts of the Parliament of Ireland). This was subject to a proviso as to the offence of fraudulently spreading false rumours with intent to enhance or decry prices, or the offence of preventing, etc., goods being brought to any market.

In *Attorney General of the Commonwealth of Australia* v. *Adelaide Steamship Company* (1913) A.C. 781, Lord Parker of Waddington, in delivering the judgment of the Privy Council, at p. 796, said: "The chief evil thought to be entailed by a monopoly . . . was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 George III, c. 71. It also lay at the root of the common law offence of engrossing, which, according to *Hawkins' Pleas of the Crown,* vol. ii, bk. 1, ch. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices . . . there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen LJJ. as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. In this connection it should be noticed that the Act of 7 and 8 Vic. c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth."

Sir Leo Cussen in his evidence to the Statute Law Revision Committee in Victoria called attention to these remarks in Lord Parker's judgment, and suggested that the course taken in England by 7 and 8 Vic. c. 24 be followed. (Victorian Statutes, 1922, p. 149.) That was done in section 100 of the Imperial Acts Application Act 1922.

The draft Bill would repeal all Imperial Acts relating to the old statutory offences which were not repealed by 12 George III, c. 71.

The Government may see fit to consider the abolition of these common law offences.

APPENDIX IV

Proposed
Imperial Acts Application Bill

A BILL

To provide that certain enactments of the Parliament of England and of the Parliament of Great Britain and of the Parliament of the United Kingdom of Great Britain and Ireland in force in England at the time of the passing of the Imperial Act 9 George IV Chapter 83 shall continue in force in New South Wales; to replace other enactments of such Parliaments; to repeal other enactments of such Parliaments; and for purposes connected therewith.

BE

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows :—

PART I.

PRELIMINARY.

Short title and commencement.

1. (1) This Act may be cited as the "Imperial Acts Application Act, 1967".

(2) This Act shall commence upon a day to be appointed by the Governor and notified by proclamation published in the Gazette.

Construction.

2. This Act shall be read and construed subject to the Commonwealth of Australia Constitution Act and so as not to exceed the legislative power of the State, to the intent that where any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to other persons or circumstances shall not be affected.

Division into Parts and Divisions.

3. This Act is divided into Parts and Divisions as follows :—

PART I.—PRELIMINARY—*ss.* 1–3.

PART II.—GENERAL—*ss.* 4–11.

PART III.—SUBSTITUTED ENACTMENTS—*ss.* 12–42.

DIVISION 1.—*Administration of Estates.*

DIVISION 2.—*Calendar.*

DIVISION 3.—*Charities.*

DIVISION 4.—*Forcible Entries and Detainers.*

DIVISION 5.—*Guardians.*

DIVISION 6.—*Insurance—Life, Fire and other Policies.*

DIVISION 7.—*Insurance—Marine.*

PART II.

GENERAL.

Interpretation.

4. In the construction of this Act, unless inconsistent with the context or subject-matter, the expression "Imperial enactment" includes any part of the enacted law at any time in force in England.

Substitution of enactments. (First Schedule.)

5. (1) Each Imperial enactment mentioned in the First Schedule to this Act, so far as it was in force in England on the twenty-fifth day of July, one thousand eight hundred and twenty-eight is declared—

(a) to have been in force in New South Wales on that day by virtue of the Imperial Act 9 George IV Chapter 83 (The Australian Courts Act, 1828); and

(b) to have remained in force in New South Wales from that day until the commencement of this Act, except so far as affected by State Acts from time to time in force.

(2)

(2) Each Imperial enactment mentioned in the First Schedule to this Act is hereby repealed so far as it applies in New South Wales.

(3) Each provision of Part III of this Act is substituted for the Imperial enactment mentioned in the first column of the First Schedule to this Act opposite the reference to that provision in the second column of that Schedule.

(4) To the extent to which any of the provisions of Part III of this Act are inconsistent with the provisions of any State Act in force at the commencement of this Act, the provisions of the State Act shall prevail.

(5) In construing any of the provisions of Part III of this Act regard may be had to the context (if any) of the Imperial enactment for which the provision is substituted.

(6) In any State Act a reference to any Imperial enactment specified in the first column of the First Schedule to this Act shall, where the case permits, and unless a contrary intention appears, be construed as a reference to the provision of this Act specified opposite that Imperial enactment in the second column of that Schedule.

Preserved Imperial enactments. (Second Schedule.)

6. Each Imperial enactment mentioned in Part I of the Second Schedule to this Act, and so much of each Imperial enactment mentioned in the first column of Part II of that Schedule as is specified opposite that Imperial enactment in the second column of the said Part II, so far in either case as it was in force in England on the twenty-fifth day of July, one thousand eight hundred and twenty-eight—

(a) is declared to have been in force in New South Wales on that day by virtue of the Imperial Act 9 George IV Chapter 83; and

(b) except so far as affected by any Imperial enactments or State Acts from time to time in force in New South Wales—

(i) is declared to have remained in force in New South Wales from that day;

(ii)

(ii) shall from the commencement of this Act be in force in New South Wales; and

(c) is not repealed by section eight of this Act.

Enactments not affected by repeal. 28 and 29 Vic. c. 63. Vict. Act No. 3270, s. 5.

7. Nothing in this Act affects any Imperial enactment set out in the Third Schedule to this Act or any other Imperial enactment which independently of the provisions of the Imperial Act 9 George IV Chapter 83 is made applicable to New South Wales by the express words or necessary intendment of any Imperial enactment.

Imperial enactments repealed. Vict. Act No. 3270, s. 7.

8. Save as provided by sections six and seven of this Act all the Imperial enactments (commencing with the Statute of Merton, 20 Henry III A.D. 1235–6) in force in England at the time of the passing of the Imperial Act 9 George IV Chapter 83 are so far as they are in force in New South Wales hereby repealed.

Savings. cf. 52 & 53, Vic. c. 63, s. 38.

9. (1) The repeal by this Act of any Imperial enactment does not—

(a) revive anything not in force or existing at the commencement of this Act;

(b) affect the previous operation of any Imperial enactment so repealed or anything duly done or suffered under any Imperial enactment so repealed;

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any Imperial enactment so repealed;

(d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any Imperial enactment so repealed; or

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and

and any such investigation, legal proceeding, or remedy may be instituted, continued, or enforced, and any such penalty, forfeiture or punishment may be imposed and enforced, as if this Act had not been passed.

(2) The repeal by this Act of—

(a) The Imperial Act 43 Elizabeth Chapter 4 (The Charitable Uses Act, 1601) does not affect the established rules of law relating to charity;

(b) section four of the Imperial Act 29 Charles II Chapter 3 (The Statute of Frauds, 1677) does not apply in relation to a promise or agreement made before the commencement of this Act; and

(c) any other Imperial enactment does not affect any rules of law or equity not enacted by the repealed enactment.

Saving.

10. Where any Imperial enactment not repealed by this Act has been repealed (whether expressly or impliedly), confirmed, revived, or perpetuated by any Imperial enactment hereby repealed, the first-mentioned repeal, or the confirmation, revivor, or perpetuation shall not be affected by the repeal effected by this Act.

Revival of repealed enactments.

11. (1) The Governor may, by proclamation published in the Gazette, declare that any provision (in this section called "the revived provision") being the whole or any part of any Imperial enactment repealed by this Act, other than an Imperial enactment mentioned in the First Schedule to this Act, shall be revived as from the date of publication of the proclamation, or a later date to be specified in the proclamation.

(2) On and after the date of revival, the revived provision shall, subject to Acts from time to time in force, and subject to subsection three of this section, have such effect in New South Wales as the revived provision had in New South Wales immediately before the commencement of this Act.

(3)

(3) The revival under this section of any revived provision shall not—

(a) affect the previous operation of any repeal worked by section eight of this Act;

(b) affect anything duly done or suffered before the date of revival;

(c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred before the date of revival, or any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation or liability; or

(d) make any person liable for any penalty, forfeiture or punishment in respect of anything done or omitted before the date of revival.

(4) Every such proclamation shall be laid before both Houses of Parliament within fourteen sitting days after publication if Parliament is then in session, and if not, then within fourteen sitting days after the commencement of the next session.

(5) If either House passes a resolution of which notice has been given at any time within fifteen sitting days after the proclamation has been laid before such House disallowing any proclamation or part thereof, the proclamation or part thereupon ceases to have effect.

PART III.

SUBSTITUTED ENACTMENTS.

DIVISION 1.—*Administration of Estates.*

Interpretation.

Vict. Act No. 6191, s. 5.

12. In this Division unless inconsistent with the context or subject-matter—

"Administration" means letters of administration whether general, special, or limited, or with the will annexed or otherwise, and includes an order to the Public Trustee to administer.

"Estate"

"Estate" includes both real and personal property.

"Personal representative" means the executor original or by representation or administrator for the time being of a deceased person.

"Will" includes codicil.

25 Edward III St. 5 c. 5.

13. (1) An executor of a sole or last surviving executor of a testator is the executor of that testator. Executor of executor represents original testator.

This provision shall not apply to an executor who does not prove the will of his testator and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted. cf. 15 Geo. V c. 23, s. 7. Vict. Act No. 6191, s. 17.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by—

(a) an intestacy;

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of a will,

but is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator—

(a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate of that testator has come to his hands answerable as if he were an original executor.

31 Edward III St. 1 c. 11.
1 James II c. 17, s. 6.

14. 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. Rights and accountability of administrator. cf. Vict. Act No. 6191, s. 27.

30 Charles II c. 7.
4 William and Mary c. 24, s. 12.

15. Where a person as personal representative or as executor in his own wrong wastes or converts to his own use any part of the estate of a 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. Liability for waste. cf. 15 Geo. V c. 23, s. 29. Vict. Act No. 6191, s. 33 (2).

DIVISION 2.—*Calendar.*

24 George II c. 23—The Calendar (New Style) Act, 1750—ss. 1, 2 and 3.

16. (1) The first day of January in every year shall be the first day of the year, and each new year shall accordingly commence and be reckoned from the first day of every month of January and all acts, deeds, writings, notes, and other instruments, of what nature or kind soever, hereafter made, executed, or signed shall bear date according to the said method of reckoning, being the reckoning instituted by the Imperial Act 24 George II c. 23, known as The Calendar (New Style) Act, 1750. Commencement of year.

(2) The several years two thousand one hundred, two thousand two hundred, two thousand three hundred, or any other hundredth year in time to come, except only every fourth hundredth year, of which the year two thousand shall be the first, shall not be leap years, but shall be common years consisting of three hundred and sixty-five days, and no more; and the years two thousand, two thousand four hundred, two thousand eight hundred, and every other fourth hundredth year from the said year two thousand inclusive, and also all other years which by the reckoning in use before the first day of January, one thousand seven hundred and fifty-two (being the date for the commencement of the calendar or reckoning instituted by the said Imperial Act, The Calendar (New Style) Act, 1750) would have been leap years, shall in all times to come be leap years, consisting of three hundred and sixty-six days, in the same manner as was before the said first day of January, one thousand seven hundred and fifty-two used with respect to every fourth year.

Hundredth years except every fourth hundredth to be deemed common years consisting of 365 days.

(3) The months, the enumeration of days in the respective months, and the ordering of the days of the week and Easter Day, shall be determined in accordance with the calendar, table and rules annexed to the said Imperial Act, The Calendar (New Style) Act, 1750.

Ordering of months, days of the week and Easter Day.

Division 3.—*Charities.*

52 George III c. 101—The Charities Procedure Act, 1812.

17. (1) In every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or whenever the direction or order of a court is deemed necessary for the administration of any trust for charitable purposes, any two or more persons may present a petition to the Supreme Court stating such complaint and praying such relief as the nature of the case may require; and the Supreme Court shall hear such petition in a summary way, and upon affidavits or such other evidence as is produced upon such hearing determine the same, and make such other order therein and with respect to the costs of such application as seems just.

Petition in case of a charitable trust and determination thereof in a summary way. Vict. Act No. 3270, s. 39.

(2)

(2) Every petition so to be presented shall be signed by the persons preferring the same, in the presence of and shall be attested by the solicitor for such petitioners, and every such petition shall be submitted to and allowed by the Attorney-General or Solicitor-General, and such allowance shall be certified by him before any such petition is presented. Petitions to be signed by petitioners and their solicitor and by law officer. Vict. Act No. 3270, s. 40.

DIVISION 4.—*Forcible Entries and Detainers.*

5 Richard II St. 1 c. 7—The Forcible Entry Act, 1381.

18. No person shall make any entry into any land except where such entry is given by law and, in such case, with no more force than is reasonably necessary. Forcible entry. cf. Vict. Act No. 6231, s. 207 (1).

8 Henry VI c. 9—The Forcible Entry Act, 1429.

31 Elizabeth c. 11—The Forcible Entry Act, 1588.

19. No person being in actual possession of land for a period of less than three years by himself or his predecessors shall without colour of right hold possession of it in a manner likely to cause a breach of the peace or a reasonable apprehension of a breach of the peace against a person entitled by law to the possession of the land and able and willing to afford reasonable information as to his being so entitled. Forcible detainer. Vict. Act No. 6231, s. 207 (2).

20. Any person who contravenes section eighteen or section nineteen of this Act shall be guilty of a misdemeanour and liable to imprisonment for a term of not more than one year or to a fine of not more than one thousand dollars or to both such imprisonment and fine. Penalty.

DIVISION 5.—*Guardians.*

12 Charles II c. 24—The Tenures Abolition Act, 1660—s. 9.

21. A guardian of an infant appointed by deed or will may take into his custody and management to the use of the infant the real and personal estate of the infant till the age of twenty-one years or any lesser time according to the terms of the Powers of guardian.

the appointment of the guardian, and may bring such actions in relation to the real and personal estate of the infant as by law a guardian in common socage might have done, or may bring such other proceedings as may be necessary to give effect to all or any of his powers under this section.

DIVISION 6.—*Insurance—Life, Fire and other Policies.*

14 George III c. 48—The Life Assurance Act, 1774.

22. This Division does not apply to insurances made before the commencement of this Act.

Existing insurances not affected by this Division.

23. (1) No insurance shall be made by any person on the life of any person or on any other event whatsoever wherein the person for whose use or benefit or on whose account the policy is made has no interest, or by way of gaming or wagering; and every assurance made contrary to this subsection shall be void.

No insurance to be made unless insurer has interest. cf. Vict. Act No. 6279, s. 21.

(2) It shall not be lawful to make any policy on the life of any person, or on any other event whatsoever, wherein the person effecting the policy has no interest, without inserting in such policy the names of the persons interested therein, or for whose use or benefit or on whose account such policy was made.

No policy without inserting names, &c. Vict. Act No. 6279, s. 22. Davjoyda Estates Pty. Ltd. v. National Insurance Company of New Zealand Ltd. (1965) 85 W.N. (Pt. 1) N.S.W. 184.

(3) In all cases where there is an interest in such life or other event, no greater sum shall be recovered or received from the insurer than the amount or value of the interest.

How much may be recovered. cf. Vict. Act No. 6279, s. 23.

(4)

(4) Nothing in this Division shall extend to insurance made by any person on ships or goods, or to contracts of indemnity against loss by fire or loss by other events whatsoever.

Not to extend to ships, contracts of indemnity &c.

cf. Vict. Act No. 6279, s. 24.

Davjoyda Estates Pty. Ltd. v. National Insurance Co., *supra.*

DIVISION 7.—*Insurance—Marine.*

19 George II c. 37—The Marine Insurance Act, 1745.

28 George III c. 56—The Marine Insurance Act, 1788.

24. This Division applies to State marine insurance within the limits of New South Wales.

Application of Division.

25. This Division does not apply to contracts of marine insurance made before the commencement of this Act.

Existing contracts not affected.

26. (1) Every contract of marine insurance by way of gaming or wagering is void.

Avoidance of wagering or gaming contracts.

6 Edw. VII c. 41, s. 4.

Act No. 11, 1909 (C'wealth), s. 10.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

(a) where the assured has not an insurable interest, and the contract is entered into with no expectation of acquiring such an interest; or

(b) where the policy is made "interest or no interest", or "without further proof of interest than the policy itself", or "without benefit of salvage to the insurer", or subject to any other like term :

Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

27.

27. Subject to the provisions of any Act, a contract of marine insurance is inadmissible in evidence in an action for the recovery of a loss under the contract unless it is embodied in a marine policy in accordance with this Division. The policy may be executed and issued either at the time when the contract is concluded or afterwards.

Contracts must be embodied in policy. 6 Edw. VII c. 41, s. 22. Act No. 11, 1909 (C'wealth), s. 28.

28. A marine policy must specify—

(a) the name of the assured, or of some person who effects the insurance on his behalf;

(b) the subject-matter insured and the risk insured against;

(c) the voyage, or period of time, or both as the case may be, covered by the insurance;

(d) the sum or sums insured; and

(e) the name or names of the insurers.

What policy must specify. 6 Edw. VII c. 41, s. 23. Act No. 11, 1909 (C'wealth), s. 29.

DIVISION 8.—*Justices of the Peace.*

1 Edward III St. 2 c. 16.

18 Edward III St. 2 c. 2.

34 Edward III c. 1—The Justices of the Peace Act, 1361.

29. The Governor may by commission under the Public Seal of the State appoint justices to keep the peace in the State.

Appointment of justices

30. Justices of the Peace shall have power to restrain offenders and to take of them or of persons not of good fame surety for their good behaviour.

Powers of justices.

DIVISION

DIVISION 9.—*Landlord and Tenant.*

Use and Occupation.

11 George II c. 19—The Distress for Rent Act, 1737—s. 14.

31. (1) Where the agreement between the landlord and tenant is not by deed, the landlord may recover a reasonable satisfaction for the lands held or occupied by the defendant in an action of assumpsit for use and occupation. And if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not be non-suited but may make use thereof as evidence of the quantum of the damages to be recovered. Vict. Act No. 6285, s. 8. Specktor v. Lees [1964] V.R. 10. Use and occupation.

(2) Nothing in subsection one of this section affects actions of debt for use and occupation.

Waste.

52 Henry III (Statute of Marlborough) c. 23.

32. (1) A tenant for life or lives or a leasehold tenant shall not commit voluntary waste. Voluntary waste.

(2) Nothing in subsection one of this section applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.

(3) In subsection one of this section "leasehold tenant" includes a tenant for a term, a tenant under a periodical tenancy, a tenant under a tenancy to which section one hundred and twenty-seven of the Conveyancing Act, 1919, as amended by subsequent Acts, applies, and a tenant at will.

(4) A tenant who infringes subsection one of this section is liable in damages to his remainderman or reversioner but this section imposes no criminal liability.

(5)

(5) This section does not affect the operation of any event which may determine a tenancy at will.

DIVISION 10.—*Legal Procedure—Actions on Bonds.*

8 and 9 William III c. 11—The Administration of Justice Act, 1696—s. 8.

In actions on bonds, &c., plaintiff may assign as many breaches as he pleases.

33. (1) In any action on any bond or on any penal sum for non-performance of any covenant or agreement, the plaintiff may assign as many breaches as he thinks fit, and may recover not only such damages as have been usually awarded in such cases, but also damages for such of the said breaches so assigned as the plaintiff proves to have occurred.

Act No. 21, 1899, s. 132.

Vict. Act No. 6279, s. 30.

(2) If interlocutory judgment in any such case is given for the plaintiff by confession or in default of appearance or of pleading, the plaintiff may suggest as many breaches of the covenants and agreements as he thinks fit, and may on proof of such breaches recover damages accordingly.

Defendant paying damages execution may be stayed.

(3) If the defendant after judgment and before execution pays into the court where the action is brought to the use of the plaintiff such damages together with the costs of the action, or if by reason of any execution the plaintiff is fully paid or satisfied all such damages together with his costs of the action and all reasonable charges and expenses for the said execution, further proceedings on the said judgment shall be stayed. But the judgment shall remain as a further security to answer to the plaintiff such damages as are sustained for further breach of such covenant or agreement, and upon any such breach the plaintiff may summon the defendant to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding or such other proceeding as may be ordered for inquiry as to such breaches and assessing damages thereon; and upon payment or satisfaction in manner as aforesaid of such future damages costs charges and expenses as aforesaid all further proceedings on the said judgment shall to the like extent again be stayed.

4 and 5 Anne c. 3 (or c. 16)—The Administration of Justice Act, 1705—ss. 12 and 13.

Action of debt brought on a bond after money paid —such payment may be pleaded in bar. Vict. Act No. 6279, s. 30.

34. (1) Where an action is brought upon any bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor has before the action brought paid to the obligee the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, it may nevertheless be pleaded in bar of such action; and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance and had been so pleaded.

Principal and interest on bonds paid into court.

(2) If at any time pending an action upon any such bond with a penalty the defendant brings into court all the principal money and interest due on such bond and also all costs properly chargeable by the plaintiff against the defendant in respect of any proceedings upon such bond, the money so brought in shall be in full satisfaction and discharge of the bond.

DIVISION 11.—*Libels—Blasphemous and Seditious Libels.*

60 George III and 1 George IV c. 8—The Criminal Libel Act, 1819—ss. 1, 2 and 8.

After verdict, &c., against any person for composing &c., a blasphemous or seditious libel, the court may make order for the seizure of copies of the libel in possession of such person, &c.,

35. (1) In every case in which any verdict or judgment shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel tending to bring into hatred or contempt the person of Her Majesty, Her heirs or successors, or the government and constitution of the State of New South Wales as by law established, or either House of Parliament, or to excite Her Majesty's subjects to attempt the alteration of any matter as by law established, otherwise than by lawful means, the judge or the court before whom or in which such verdict shall have been given, or the court in which such judgment shall be had, may make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the

the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use, evidence upon oath having been previously given to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace or for any person acting under any such order, or for any person acting with or in aid of any such justice of the peace, or other person, to search for any copies of such libel in any house, building, or other place whatsoever belonging to or occupied by the person against whom any such verdict or judgment shall have been had, or belonging to or occupied by any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody, until the same shall be restored under the provisions of this section, or disposed of according to any further order made in relation thereto.

and search may thereupon be made for the same.

(2) If in any such case as aforesaid judgment shall be stayed, or if, after judgment shall have been entered, the same shall be reversed, all copies so seized shall be forthwith returned to the person from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatsoever; and in every case in which final judgment shall be entered upon the verdict so found against the person charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct.

Copies of libels so seized shall be restored if judgment is stayed, &c., but shall otherwise be disposed of as the court shall direct.

(3) Any proceeding which shall be brought for any thing done in pursuance of this section, shall be commenced within six months next after the thing done; and the

Limitation of actions, &c.

the defendant in every such proceeding may plead the general issue, and give this section and the special matter in evidence at any trial to be had thereupon; and if proceedings shall be brought or commenced after the time limited for bringing the same, there shall be a verdict for the defendant.

DIVISION 12.—*Real Property.*

18 Edward I St. 1 (Quia Emptores) cc. 1 and 3.
34 Edward III c. 15.

Alienation of fee simple.

36. 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.

cf. 17 Edward II, c. 6.
1 Edward III, St. 2, c. 12.

12 Charles II c. 24—The Tenures Abolition Act, 1660—s. 4.

Tenure.

37. All tenures created by the Crown upon any grant 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.

DIVISION 13.—*Recovery of Property on Determination of a Life or Lives.*

18 and 19 Charles II c. 11—The Cestui que Vie Act, 1666.
6 Anne c. 72 (or c. 18)—The Cestui que Vie Act, 1707.

Person wrongfully holding over after the determination of a life to be liable in damages.
Vict. Act No. 6344, s. 274.

38. (1) Every person having any estate or interest in any property determinable upon a life or lives who, after the determination of such life or lives without the express consent of the person next immediately entitled upon or after such determination, holds over or continues in possession of such property estate or interest, or of the rents, profits or income thereof, shall be liable in damages or to an account for such rents and profits, or both, to the person entitled to such property, estate, interest, rents, profits or income after the determination of such life or lives.

(2)

Evidence may be given of belief of determination of a life.

(2) Where a reversion remainder or other estate or interest in any property is expectant upon the determination of a life or lives, the reversioner remainderman or other person entitled to such reversion remainder or other estate or interest may in any proceeding claiming relief on the basis that such life or lives has or have determined, adduce evidence of belief that such life or lives has or have been determined and of the grounds of such belief, and thereupon the court may in its discretion order that unless the person or persons on whose life or lives such reversion remainder or other estate or interest is expectant is or are produced in court or is or are otherwise shown to be living, such person or persons shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.

Effect of absence for seven years.

(3) If in such proceedings the lastmentioned person is shown to have remained beyond Australia, or otherwise absented himself from the place in which if in Australia he might be expected to be found, for the space of seven years or upwards, such person, if not proved to be living, shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.

Subsequent action may be stayed.

(4) If in any such proceedings judgment has been given against the plaintiff, and afterwards such plaintiff brings subsequent proceedings upon the basis that such life has determined, the court may make an order staying such proceedings permanently or until further order or for such time as may be thought fit.

Where supposed dead man proves to be alive relief may be given on that basis.

(5) If in consequence of the judgment given in any such proceedings, any person having any estate or interest in any property determinable on such life or lives has been evicted from or deprived of any property or any estate or interest therein, and afterwards it appears that such person or persons on whose life or lives such estate or interest depends is or are living or was or were living at the time of such eviction or deprivation, the court may give such relief as is appropriate in the circumstances.

DIVISION 14.—*Religious Worship—Disturbance of.*

1 William and Mary c. 18—The Toleration Act, 1688—s. 15.

52 George III c. 155—The Places of Religious Worship Act, 1812—s. 12.

Disturbing religious worship. Queensland Code, s. 207. Vict. Act No. 6337, s. 33.

39. Any person who wilfully and without lawful justification or excuse, the proof of which lies on him, disquiets or disturbs any meeting of persons lawfully assembled for religious worship, or assaults any person lawfully officiating at any such meeting, or any of the persons there assembled, shall be liable upon summary conviction to a penalty not exceeding one hundred dollars or to imprisonment for a term not exceeding two months.

DIVISION 15.—*Sheriff.*

32 George II c. 28—The Debtors Imprisonment Act, 1758—ss. 1, 3 and 4.

Duties on arrest of civil debtors. 50 & 51 Vic. c. 55, s. 14. Vict. Act No. 6387, s. 207.

40. (1) Where any sheriff, bailiff, or other officer arrests or has in custody upon mesne process any person in the course of a civil proceeding such officer shall not—

(a) convey such person without his free consent to any premises licensed for the sale of intoxicating liquor or any registered club, or to the private house of such officer or any tenant or relative of such officer; nor

(b) charge such person with any sum for, or procure him to call or pay for, any liquor, food, or thing whatsoever, except what he freely asks for; nor

(c) take such person to any gaol within twenty-four hours of his arrest, unless such person fails to name or refuses to be carried to some safe and convenient house of his own nomination, being within a reasonable distance of the place at which he was arrested, and not being the private dwelling-house of such person,

but shall during such twenty-four hours permit such person to send for and to have brought to him at reasonable times in the day and in reasonable quantities any food or liquor from what

what place he thinks fit, and also to have and use such bedding, linen, and other necessary things as he has occasion for or is supplied with, and shall not require any payment for the use thereof or restrict the use thereof.

(2) Where a sheriff, bailiff, or other officer makes an arrest to which this section applies he shall as promptly as reasonably possible inform the person arrested of the effect of subsection one of this section.

DIVISION 16.—*Sunday.*

29 Charles II c. 7—The Sunday Observance Act, 1677—s. 6.

Service of process on Sunday void.

41. Service of any writ, process, warrant, order, judgment or decree (except in case of an offence, breach of the peace or any warrant, writ or process for the apprehension of any person) upon a Sunday shall be void.

DIVISION 17.—*Witnesses—Habeas Corpus for Prisoners.*

44 George III c. 102—The Habeas Corpus Act, 1804.

Writs of habeas corpus ad test.

42. Any Judge of the Supreme Court may award a writ of habeas corpus for bringing any prisoner detained in any gaol or prison before any court, to be there examined as a witness.

PART IV.

PENALTIES.

Offences—penalties.

43. Any person guilty of any offence under any Imperial enactment included in Part I of the Second Schedule for which no punishment is otherwise provided is liable to imprisonment for a term of not more than five years or to a fine of not more than two thousand dollars, or to both such imprisonment and fine.

SCHEDULES.

SCHEDULES.

FIRST SCHEDULE.

Sec. 5.

Imperial enactment.	Substituted provision of this Act.	Division of Part III.
(1267) 52 Henry III (Statnte of Marlborough) c. 23.	s. 32	Division 9.
(1289–90) 18 Edward I (St. 1) (Quia Emptores) cc. 1 and 3.	s. 36	Division 12.
(1326–7) 1 Edward III St. 2 c. 16	s. 29	Division 8.
(1344) I8 Edward III St. 2 c. 2	s. 29	Division 8.
(1351–2) 25 Edward III St. 5 c. 5	s. 13	Division 1.
(1357) 31 Edward III St. 1 c. 11	s. 14	Division 1.
(1360–1) 34 Edward III c. 1 (The Justices of the Peace Act, 1361).	s. 30	Division 8.
(1361) 34 Edward III c. 15	s. 36	Division 12.
(1381–2) 5 Richard II, St. 1 c. 7 (The Forcible Entry Act, 1381).	s. 18	Division 4.
(1429) 8 Henry VI c. 9 (The Forcible Entry Act, 1429).	s. 19	Division 4.
(1588-9) 31 Elizabeth c. 11 (The Forcible Entry Act, 1588).	s. 19	Division 4.
(1660) 12 Charles II c. 24 (The Tenures Abolition Act, 1660)—		
s. 4	s. 37	Division 12.
s. 9	s. 21	Division 5.
(1666) 18 and 19 Charles II c. 11 (The Cestui que Vie Act, 1666).	s. 38	Division 13.
(1677) 29 Charles II c. 7 (The Sunday Observance Act, 1677), s. 6.	s. 41	Division 16.
(1678) 30 Charles II c. 7	s. 15	Division 1.
(1685) 1 James II c. 17, s. 6	s. 14	Division 1.
(1688) 1 William and Mary c. 18 (The Toleration Act, 1688), s. 15.	s. 39	Division 14.
(1692) 4 William and Mary c. 24, s. 12 ..	s. 15	Division 1.

FIRST SCHEDULE—*continued.*

Imperial enactment.	Substituted provision of this Act.	Division of Part III.
(1696–7) 8 and 9 William III c. 11 (The Administration of Justice Act, 1696), s. 8.	s. 33	Division 10.
(1705) 4 and 5 Anne c. 3 (or c. 16) (The Administration of Justice Act, 1705) ss. 12 and 13.	s. 34	Division 10.
(1707) 6 Anne c. 72 (or c. 18) (The Cestui que Vie Act, 1707).	s. 38	Division 13.
(1737) 11 George II c. 19 (The Distress for Rent Act, 1737), s. 14.	s. 31	Division 9.
(1745) 19 George II c. 37 (The Marine Insurance Act, 1745).	s. 26	Division 7.
(1750) 24 George II c. 23 (The Calendar (New Style) Act, 1750), ss. 1, 2 and 3.	s. 16	Division 2.
(1758–9) 32 George II c. 28 (The Debtors Imprisonment Act, 1758) ss. 1, 3 and 4.	s. 40	Division 15.
(1774) 14 George III c. 48 (The Life Assurance Act, 1774).	s. 23	Division 6.
(1788) 28 George III c. 56 (The Marine Insurance Act, 1788).	ss. 27, 28	Division 7.
(1804) 44 George III c. 102 (The Habeas Corpus Act, 1804).	s. 42	Division 17.
(1812) 52 George III c. 101 (The Charities Procedure Act, 1812).	s. 17	Division 3.
(1812) 52 George III c. 155, (The Places of Religious Worship Act, 1812), s. 12.	s. 39	Division 14.
(1819) 60 George III and 1 George IV c. 8 (The Criminal Libel Act, 1819), ss. 1, 2 and 8.	s. 35	Division 11.

SECOND SCHEDULE.

Sec. 6.

PART I.

Constitutional Enactments.

(1297)	25 Edward I (Magna Carta) c. 29.
(1351)	25 Edward III St. 5 c. 4.
(1354)	28 Edward III c. 3.
(1368)	42 Edward III c. 3.
(1623–4)	21 James I c. 3 (The Statute of Monopolies), ss. 1 and 6.
(1627)	3 Charles I c. 1 (The Petition of Right).
(1640)	16 Charles I c. 10 (The Habeas Corpus Act, 1640), s. 6.
(1679)	31 Charles II c. 2 (The Habeas Corpus Act, 1679), ss. 1–8, s. 11 (except the words "and shall incur and sustain" and the following words of the section), and ss. 15–19.
(1688)	1 William and Mary c. 30 (The Royal Mines Act, 1688), s. 3.
(1688)	1 William and Mary sess. 2 c. 2 (The Bill of Rights).
(1700)	12 and 13 William III c. 2 (The Act of Settlement).
(1702)	1 Anne c. 2 (The Demise of the Crown Act, 1702), s. 4.
(1702)	1 Anne St. 2 c. 21 (The Treason Act, 1702), s. 3.
(1707)	6 Anne c. 41 (or 6 Anne c. 7) (The Succession to the Crown Act, 1707), s. 9.
(1772)	12 George III c. 11 (The Royal Marriages Act, 1772), ss. 1 and 2.
(1816)	56 George III c. 100 (The Habeas Corpus Act, 1816).

PART II.

Criminal Law—Treason: Piracy.

Sec. 6

Treason.

(1351) 25 Edward III St. 5 c. 2 (The Treason Act, 1351).	So far as the same declares what offences shall be adjudged treason, as amended by the following:—	cf. Act No. 40, 1900, s. 16.
	9 George IV c. 31;	
	11 George IV and 1 William IV c. 66 (The Forgery Act, 1830) adopted by 4 William IV No. 4;	
	2 and 3 William IV c. 34 adopted by 9 Victoria No. 1.	
(1795) 36 George III c. 7 (The Treason Act, 1795). (1817) 57 George III c. 6 (The Treason Act, 1817)	Such provisions of the Acts respectively as relate to the compassing, imagining, inventing, devising, or intending death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment, or restraint of the person of the Sovereign and the expressing, uttering, or declaring of such compassings, imaginations, inventions, devices, or intentions, or any of them.	cf. Act No 40, 1900, s. 11.
(1695) 7 and 8 William III c. 3 (The Treason Act, 1695).	S. 5 (except the words "And that no person" to the end of that section) and s. 6.	

SECOND

SECOND SCHEDULE—*continued.*

Part II—*continued.*

Piracy.

(1536) 28 Henry VIII c. 15*. (1698–9) 11 and 12 William III (11 William III) c. 7. (1717–8) 4 George I c. 2 (or c. 11), s. 7 (1721–2) 8 George I c. 24. (1744–5) 18 George II c. 30*	The provisions of each Act except so much of each Act as relates to the punishment of the crime of piracy or of any offence by any of the said Acts declared to be piracy, or of accessories thereto.

* See Piracy Punishment Act, 1902, s. 3.

THIRD SCHEDULE. Sec. 7.

Enactments applying irrespective of 9 George IV c. 83

(A) *Criminal Law Enactments.*

(1698–9)	11 William III c. 12	Crimes by Governors of Colonies.
(1772)	12 George III c. 24	The Dockyards, &c., Protection Act, 1772.
(1802)	42 George III c. 85, s. 1	The Criminal Jurisdiction Act, 1802.
(1812)	52 George III c. 156	The Prisoners of War (Escape) Act, 1812.
(1824)	5 George IV c. 113	The Slave Trade Act, 1824.

(B) *Miscellaneous.*

(1813)	54 George III c. 15, s. 4	The New South Wales (Debts) Act, 1813.
(1819)	59 George III c. 60	The Ordinations for Colonies Act, 1819.
(1821)	1 and 2 George IV c. 121, ss. 27-29	The Commissariat Accounts Act, 1821.