LAW REFORM IN VICTORIA.

By E. H. COGHILL, Librarian of the Supreme Court.

Everyone agrees that the law needs, has needed, and (I suggest) always will need reform. There are however, two problems about which controversy rages. They are—in what particulars does it need reform, and how are reforms to be brought about.

As to the first point, ordinary people usually know as well as lawyers do " where the shoe pinches," and on general topics of law reform, a layman's ideas, when properly dressed in legal language, are just as likely to produce a valuable reform as are those of a lawyer. For instance, the " Torrens System " of land registration was invented by a layman.

Indeed, on the subject of general law reform, the lawyer is rightly suspect. His experience and professional training are not suitable. He absorbs " through his pores "—he cannot help absorbing—the views of his clients. He usually appears for the taxpayer, not for the tax collector, therefore he regards legislation to stop " tax-evasion " dodges as an attack on the fundamental principles of the law of property. Similarly, he usually appears for the landlord, not the tenant, for the lender, not the borrower, for the employer, not the employee, as the under-dog cannot afford to consult him, at least if he is a fashionable leader of the profession. This was specially noticeable during the depth of the " depression," when lawyers' organisations seemed to spend most of their time deploring the current tendency to interfere with the binding obligations of contracts.

But when one gets down to details, the lawyer comes into his own. He has far more experience of the actual working of the legal system than the layman, and he should be able to pick out the weaknesses of the system, and to suggest where, and how it can be improved.

The next question is—how is his knowledge to be utilised ?

Lawyers are fond of complaining that Parliament is not interested in Law Reform unless it has some political value. On the other hand Parliamentarians complain from time to time that they do not get the assistance from lawyers which they are entitled to expect. How can these groups be brought together, to give mutual assistance to each other, and (equally important), how can the distrust of the lawyer, which many laymen, including many Parliamentarians, feel, be dispelled ?

In England, a good start has been made by the Lord Chancellor's Law Revision Committee, established in 1934. This Committee consists of judges, barristers and solicitors, of practising lawyers and University Professors, and the points referred to it have none of them had any real political significance.

As a result of this, and of the great influence of the Lord Chancellor as a member of the Cabinet, a number of useful reforms of " lawyers law " have been carried through, many of which are enumerated in Mr. Dean's article " The Languishing Cause of Law Reform in Victoria."[1]

Inspired by this example, Herring C.J., late in 1944, invited certain gentlemen to form themselves into a " Law Reform Committee." The Committee as formed (others have since been added) comprised two

1. Res Judicatae, Vol. II., 28.

judges, a barrister, a solicitor, a professor and the Secretary of the Law Department, and I was asked (and agreed) to act as Honorary Secretary.

The first problem we faced was that of forming a liaison with Parliament. At first it was hoped to have a number of lawyer members of Parliament as members of the Committee, and to rely on their good offices with their respective parties to recommend legislation and secure its passage through Parliament without serious opposition. Accordingly, the then Attorney-General, Mr. Macfarlan (Liberal, Legislative Assembly) was invited to the first meeting, and Messrs. Field (Labour Party, Legislative Assembly) and Alan MacDonald (Country Party, Legislative Council) were also asked to become members. These gentlemen all accepted, but apparently they all agreed that they would be embarrassed in their Parliamentary duties by too close association with the Committee, for none of them has ever attended its meetings.

Accordingly, our only present liaison is through the Secretary of the Law Department, but it is hoped that when we have a substantial amount of material ready, the Statute Law Revision Committee of Parliament will be called together to consider it, and that if the suggestions are acceptable to that Committee they will be accepted by Parliament without the necessity for lengthy discussion. It is of course hopeless to expect to push through Bills for which there is no public demand if there is any real opposition to them, or if the members need long discussions before being persuaded to pass them.

Having thus some hopes that its efforts would not be wasted, the Committee got to work. Firstly it set up two Sub-Committees, one under the Chairmanship of Mr. Justice O'Bryan, to consider reforms of what might be regarded as "Barristers' Law," including especially the reforms suggested by the Lord Chancellor's Committee, and the other, under Mr. E. L. Piesse, to consider reforms of "Solicitors' Law," and especially administration of estates, and revision of the Trustee Act. At later dates, two other Sub-Committees were established, one, under the Commissioner of Titles, Mr. Betts, to consider amendments to the Transfer of Land Act, and the other, under Judge Book, to consider reforms of the Criminal Law. In addition, the Law Department made available some Bills it had had in cold storage for some time, and so gave us some material to start on.

I think it will be most convenient to discuss our subsequent progress in order of subject matter.

Administration and Trusts.

The Will.

By Wills Act, s. 31, if a testator dies, leaving property to a child, and that child predeceases the testator leaving issue, then, subject to any different provision in the Will of the original testator, the property of that testator is distributed as if that child had survived his parent, and therefore any share so given passes to the beneficiaries under the child's will, or to his next of kin if he is intestate. This is the case of grandfather, father and child. Normally, the effect of the section is that the grandfather's property will go either to his daughter-in-law

(his son's widow), or to his grandchildren, which is usually near enough to what he would like. But it is probable that he would definitely prefer his grandchildren, and in any case the son may have had a row with his family, or have some crank, and may have left all his property to the Lost Dogs' Home. This, most emphatically, is not what grandfather would want, and all precedent books contain clauses, which are often inserted in well-drawn wills, giving the property directly to grandchildren in the event of the death of a child leaving issue, and we have recommended that section 31 be repealed and that a new section, based on one of these " common form " clauses, be substituted.

It has also been suggested that the rule (Wills Act, s. 13) that a person witnessing a will cannot take thereunder as a beneficiary, is too harsh, but the Committee did not recommend any change.

Probate Duty.

In certain cases, dealt with by Administration and Probate Act, especially sections 173-176, gifts by a person in his life-time attract probate duty on his death. Clearly the executor, having paid the extra duty, should be able to collect it from the donee, and the Committee recommends amendments of Administration and Probate Act, section 163 to facilitate this.

Small Estates.

For some years now, the Public Trustee and the Trustee Companies have had a most useful power to pay amounts to which an infant is entitled on an intestacy, to his guardian if the total value of the estate is under £100.[2] This saves the inconvenience of setting up a lot of small trusts, and of tying up money which could usefully be spent at once, till the infant is earning and does not need it so much. The Committee recommended that this power should be conferred on private trustees also.

Executors' Commission.

By the Administration and Probate Act, section 59, an executor may " in passing his accounts " obtain commission for his trouble. Now these are technical words. They require an originating summons before a Judge in Chambers, and a full-dress audit by the Master in Equity. Thus they involve an expensive procedure. The Committee recommended that they be omitted, and that a simpler procedure for obtaining commission be created, either by Statute or by Rules of Court.

Trustees.

But on the law of Trusts and Trustees the Sub-Committee really spread themselves. They presented a Report, which the Government Printer was good enough to print for us, which covers 32 printed pages. Of course it is impossible to discuss it in detail, but it contains many very useful recommendations, adopted by the Committee, for the liberalisation of this branch of the law, mainly in the direction of flexibility and increase of discretion of trustees. In particular, trustees are to be

2. See Public Trustee Act 1939, s. 17, and Trustee Companies Act 1944, s 3.

authorised to purchase a dwelling house for a beneficiary, to deposit money in a bank, and to sell land for a price payable by instalments. It is to be made compulsory to insure when a reasonable man would do so, and amendment of the law as to appointment of new trustees and as to vesting orders is recommended.

A minority of the Sub-Committee recommended that a Trustee should have power, unless prohibited by the Trust instrument, to invest in shares. This suggestion was not accepted by the Committee. The idea behind it is that the value of money has been falling steadily for at least 400 years, there is no reason to suppose that it will not go on falling, and a Trustee should be entitled to protect his trust fund by investing at least some of it in securities, which are likely to retain their real value, and not be confined to securities for money which will probably depreciate. On the other hand, shares are notoriously liable to fluctuate downwards as well as upwards, and it was felt that it was for the settlor to approve of them as investments if he desired them.

The rules as to apportionment of income were also under heavy fire. The rule in *Howe v. Lord Dartmouth*, and all the other rules related to it, while they are supposed to do abstract justice, and do prevent injustice to beneficiaries in some special cases, have the inevitable result that the tenant for life (usually the testator's widow) is deprived, for at least the first year after his death, of much of the income which testator intended her to have. Further, they are very complicated, and many Trustees, it is believed, simply ignore them.

However, a proposal to abolish the rule in *Howe v. Lord Dartmouth* and *In re Chesterfield's Trusts* was defeated, both in the Sub-Committee and before the full Committee. On the other hand, no one could be found to say a good word for *Allhusen v. Whittell*, one of the most artificial of these cases, and, following New South Wales, we have recommended the abolition of the rule in this case.

Other Ideas about Trusts.

There are other reforms, which, I suggest, must come sooner or later. For instance, why are the powers of an executor so different from the powers of a Trustee ? Why should the powers of a Trustee with powers of sale be so different from those of a Trustee without such powers ? I suggest that the position of executor and Trustee should be assimilated, all Trustees should be given a power to sell, or (if you like) a trust to sell with power to postpone, and the Settled Land Act should be abolished and all the powers conferred on tenants for life by that Act transferred to Trustees. A provision dealing with the Trustees' power to repair trust property would also be useful.

The time is, of course, not ripe for all of these, but they are " in the offing," and the law of estates would be very greatly simplified by a few judicious amendments of this kind.

Other Branches of the Law.

Evidence.

One of the Bills laid before the Committee by the Law Department was an amending Evidence Bill. This document adopted the (English)

Evidence Act 1938, except section 5 (which relates to the Courts' Rule-making power), and the Committee approved of it with some alterations.

It makes documents admissible in evidence if the maker had knowledge of the matters recorded, or when it is a book of account or other continuous record (accordingly providing another exception to the "hearsay" rule), deals with the proof of documents required to be attested, and reduces the period at which a document becomes "ancient" so as to prove itself, from 30 years to 20 years.

In addition, the Bill limits the medical privilege conferred by our Evidence Act, section 28, by making the doctor a compellable witness in cases dealing with the testamentary capacity of his deceased patient.

Recently a further clause was added by the Law Department and adopted by the Committee, extending the Evidence Act, section 116 (1) (*b*) to ambassadors, etc. of any part of His Majesty's Dominions.

This recommendation has been passed into law, as the Evidence Act 1946 (No. 5783) and has thus become the first tangible result of the efforts of the Committee.

Interest in Civil Proceedings.

The Lord Chancellor's Committee recommended that Courts should be empowered to award interest on all claims, and this was enacted in England by the Law Revision (Miscellaneous Provisions) Act 1934, section 3, which however only applied to Courts of Record.

The Committee recommended that this section should be copied in Victoria and should apply in all Courts.

Joint Tortfeasors.

It was resolved to recommend the adoption of Part II. of the English Law Reform (Married Women and Tortfeasors) Act 1935. This deals with tortfeasors (we are leaving married women alone at present) and provides that a judgment against one joint tortfeasor shall not be a bar to an action against another, but that damages shall not be recovered twice over. It also allows one joint tortfeasor to claim contribution or even a complete indemnity from his fellow wrong-doers.

We have recommended that this indemnity shall only be available if claimed in the original action.

The English Act does not alter the common law rule that husband and wife cannot sue each other in tort. As most of these cases arise out of motor collisions, and are therefore really fights between insurance companies, we felt this was rather unrealistic, and have inserted a clause, taken from a South Australian Act, to enable a defendant to claim compensation from another party, although that other party is the spouse of the plaintiff and therefore could not have been sued in the original action.

Limitation of Actions.

One of the Sub-Committees has proposed a draft Limitation of Actions Bill, based on the English Act of 1939, but with some substantial variations.

This Bill, like the English Act of 1939, codifies the existing law contained in the Supreme Court Act Part VII., Division 7, Property Law Act, Part IX., and Trustee Act, Part VI., and the common law doctrines which have grown up round them, especially as to Acknowledgement and Part Payment. The English Act puts all Torts and Contracts on the same basis, with a six year limitation period, and fixes the period for public authorities at one year.

We did not accept either of these positions. We fixed the period for actions of tort for damage to person or property and for defamation at three years, and for contract and other torts at six years.

Victoria has no general Public Authorities Protection Act, but the Railways and Tramways and many other public and semi-public bodies have special Acts, fixing short periods of limitation, usually six months. We recommend that they should all be repealed, and that these bodies should be put in the same position as other defendants. Whether this will be politically acceptable remains to be seen.

There are a number of other variations between the Act and the Bill. Among others, we recommend that the provision, that no lapse of time shall confer a title to Crown land, shall be retained. However, we accept the English provision that the ordinary six year period shall apply to ordinary actions by and against the Crown.

Legal Profession.

As a matter of courtesy, we were shown a draft Legal Profession Practice Bill, which subsequently became the Legal Profession Practice Act 1946, introducing compulsory insurance of Solicitors' Trust Funds, etc. As this was obviously a matter to be decided in accordance with Government policy we did not express any views on it, except on one or two petty matters of procedure.

Transfer of Land Act.

New Zealand has made land registration compulsory. In England, compulsory areas are proclaimed at intervals when the Titles Office has its maps of the district ready. It is hoped that one day compulsory registration will be introduced in Victoria also. The T. L. A. needs many other amendments, and it would seem that the Sub-Committee appointed to consider it has the biggest task of all. So far, it has not presented a Report.

Criminal Law.

It is understood that the Law Department has an enormous amending Crimes Bill, representing suggestions collected over the last forty years, and that the Sub-Committee is still wading through this. It has not reported yet.

General.

It will be seen that we are collecting suggestions for non-political reform of the law to make the machine run more smoothly. It is not yet clear that we will be able to translate many of them into actual Statutes, but we have hopes, and we trust that as a result of our efforts the cause of law reform will cease to languish in Victoria.