SOUTH  AUSTRALIA

SIXTY-EIGHTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE INHERITED IMPERIAL LAW ON GAMING AND WAGERING IN SOUTH AUSTRALIA

1982

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

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THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*

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SIXTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE INHERITED IMPERIAL LAW ON GAMING AND WAGERING IN SOUTH AUSTRALIA

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

One of your predecessors referred to us the question of the inherited Imperial law on gaming and wagering in South Australia.

The question of reform of the law of gaming and wagering appears to us to involve three different although sometimes interconnected topics. They are as follows:

1. The Lottery and Gaming Act 1936-1975 of the Parliament of this State is a general Act relating to the topic of gaming and wagering including lotteries. However it is probable that a large number of Imperial Acts on this topic are still in force in South Australia. They have never been expressly repealed and for reasons which appear below, we do not think that they have been impliedly repealed. This means that anybody who buys a copy of the Lottery and Gaming Act (as amended) from the Government Printer hoping that thereby he would become apprised of the whole of the statute law in South Australia on this topic, would be sadly disappointed. Depending on how many Imperial Acts are held to be in force in South Australia on the topic, he could be required to obtain copies of twenty or more Acts on the subject, quite apart from obtaining a copy of the South Australian Lottery and Gaming Act, and these twenty or more Imperial Acts are not referred to in that Act (except in some cases, in the side notes).

2. The second topic is the reform of the law of gaming and wagering generally. This is not made easier by the fact that the law on this subject comes from differing periods of history with differing social views on gaming and wagering and as a result the laws passed reflect the philosophy of various ages in the last two to three hundred years.

3. The third topic relates to the adjective law in relation to gaming and wagering. In particular it deals with those sections in the Lottery and Gaming Act which permit a conviction on suspicion and do not require either proof beyond reasonable doubt or even proof on the balance of probabilities. There are other lesser matters falling within this sphere, but this is the main one which will engage our consideration.

We deal only with the first of these topics in this paper.

The Imperial law which either is or arguably can be said to be in force in South Australia as being a public general Act in force on the 28 December 1836, is contained in some twenty-five statutes. It is convenient that we deal with these seriatim commencing from the earliest and ending with the Lotteries Act 1836 which came into force just before the colony of South Australia was founded.

1. *The Statute 33 Henry VIII c.9 (1541).*

This Act as its long title shows: 'The Bill for the maintaining Artillery, and the Debarring of unlawful Games' is an Act to prevent people spending their time in sport when they should be at the butts

improving their archery. There is also a more general reason assigned in Section II of the Act namely impoverishment which ensues from the playing of unlawful games and the murders robberies and felonies committed or done as a result of gaming and wagering. The games prohibited by this statute in relation to the use of a house kept for unlawful games are 'bowling, coyting, cloysh-cayls, half bowl, tennis, dicing table or carding, or any other Manner of Game prohibited by any Estatute heretofore made, or any unlawful Game now invented or made, or any other new unlawful Game hereafter to be invented, found, had or made . . .'. The Act goes on to provide by Section XVI that at all times except at Christmas and even at Christmas only under the supervision of masters or in the houses of their masters, servants shall not play 'at the Tables, Tennis, Dice, Cards, Bowls, Clash, Coyting, Logating or any other unlawful Game.'

This Act was held not to be in force in the State of Victoria by Cussen J. sitting as a member of the Full Supreme Court of Victoria in *Fowler v. Davison [1918] V.L.R. 356 at 367 and again at 371.* The other members of the Full Court did not find it necessary to pronounce on the topic. With all respect to the judgment of Cussen J., who was an acknowledged authority in this area of the law, we are more doubtful on the point ourselves. It is true that the general purpose of the Act is the encouragement of archery but there are sections of more general import to which we have referred, putting down houses in which unlawful games were played and declaring certain games unlawful under certain circumstances and when played by certain enumerated classes of people. The first of these categories certainly was applicable in South Australia in 1836 and the second of the categories, although a little archaic in our ears today, would not have sounded anything like so archaic a division of responsibilities between masters and servants in 1836. Cussen J. in his judgment reads down the remarks of Hawkins J. in the leading case of *Jenks v. Turpin (1883) 13 Q.B.D. 505 at pages 522-524 and again at page 526.* However the treatment of the subject on the first half of page 524 would suggest that Hawkins J. regarded the prohibitions as still existing in England in 1884 except insofar as some games which were regarded as games of skill were exempted from the operation of 33 Henry VIII c.9 by 8 and 9 Vict. c.109 s.1. The Statute of 1845: 8 and 9 Vict. c.109 s.1 has no analogue in South Australian law and having been passed after 28 December 1836 it would not alter the categories of games in South Australia in the same way as has been done in England. It is true that the Act of Henry VIII was passed for a specified purpose, but there are other Acts which have been passed for specified purposes which have nevertheless been held to amend the general law. A typical example is the Fires Prevention (Metropolis) Act 1774: 14 Geo. III c.78 which notwithstanding its purpose and title still governs questions of negligence in relation to fire in South Australia today and indeed throughout Australia: see the judgment of the Privy Council in *Goldman v. Hargrave [1967] 1 A.C. 645.* Of course one of the results of the Statute 33 Henry VIII c.9 if it is in force in South Australia, is to render tennis an unlawful game. By the word 'tennis' in the statute is, we take it, meant royal tennis and not the present game of that name which was commenced in the 1870s under the name of Sphairistike, but it is an interesting thought that if tennis as meant in that statute meant tennis as played from time to time, including the remote descendant of royal tennis called today simply 'tennis', some unlooked-for prosecutions might

ensue. As far as the law of lottery and gaming is concerned, we note that Section 59 of our Lottery and Gaming Act has a side note referring to 33 Henry VIII c.9. Side notes are not part of an Act but they do indicate that similar provisions to some of those in 33 Henry VIII c.9 could, in the opinion of the draftsman in 1936, be used in the law of South Australia. It is true that it might be argued that Section 59 itself creates an implied repeal of the relevant part of 33 Henry VIII c.9. However the decisions on implied repeal in Australia of Imperial Statutes by State Acts are very cautiously expressed and are, as we said in our Fifty-Fourth Report to you, in general against implied repeal except in very clear and obvious circumstances. The fact that a South Australian statute covers part of the same ground as an Imperial Statute is not of itself sufficient for implied repeal: see the decision of the Full Supreme Court of Victoria in *The Attorney-General of Victoria v. Moses [1907] V.L.R. 130 at 140,* nor is the re-enactment in the South Australian Act of parts of Imperial enactments leaving out other parts which were not re-enacted which omission has been held not to amount to a repeal by necessary implication: see the judgment of Griffith C. J. (of the Supreme Court of Queensland as he then was) in *Barrett v. Austin; ex parte Austin (1898) 8 Q.L.J. 157 at 158.* We shall not repeat this discussion of implied repeal in the treatment of the various statutes dealt with in this report. It is sufficient to say that we have not found any cases in relation to this subject in which we could confidently say that a Court would hold that the relevant Imperial Statute under discussion had been impliedly repealed by South Australian legislation. There is no instance of direct repeal nominatim of an Imperial Statute dealt with in this report by a South Australian Act. The Statute of Henry VIII was enacted under very different conditions from those prevailing today and we think that it should be enacted that insofar as the statute 33 Henry VIII c.9 may be deemed to have been in force in South Australia it should cease to have effect as part of the law of this State. It was repealed in England in 1960.

2. *The Statute 2 & 3 Philip & Mary c.9 (1555).*

This Act is dependent upon the Statute 33 Henry VIII c.9 which it amends. It prevents licences or grants being made which would under the earlier Statute have made lawful the keeping of a common gaming house. If the Statute 33 Henry VIII c.9 is in force in South Australia the Statute 2 & 3 Phil. & Mary c.9 must also be in force in this State. For the same reasons as we have already discussed in detail with regard to 33 Henry VIII c.9 we think it would be wise for the avoidance of doubt if for no other good reason that the Statute 2 & 3 Phil. & Mary c.9 should cease to have effect in this State. It was repealed in England in 1863.

3. *The Statute 16 Car. II c.7 (1664).*

Sir Victor Windeyer in his book 'The Law of Wagers, Gaming and Lotteries' (1928) pages 130-131 treats this Statute of Charles II as being still in force in South Australia. The statute is in effect a sumptuary Act forbidding gaming to be played for more than one hundred pounds at one time, and also containing provisions against dishonest gaming which are similar to but not the same as those contained in Section 49 of our Lottery and Gaming Act. It was repealed in England by 8 & 9 Vict. c.109 s.15. There is no useful purpose to be served by retaining the Act of Charles II as part of

the Statute Law of this State and we recommend that the Act be declared to be no longer in force in South Australia. It was repealed in England in 1845.

4. *The Statute 10 & 11 Will. III c.17* (sometimes referred to as 10 Will. III c.23) (1698).

This is an Act for suppressing lotteries. It is undoubtedly in force in South Australia: see Windeyer (op. cit.) page 209 and the judgment of the High Court of Australia in *Mutual Loan Agency Limited v. The Attorney-General for for New South Wales (1909) 9 C.L.R. 72 per Griffith C. J. at 82.* The matters which are dealt with in the Statute of William III are dealt with in general, though not in identical, terms in Sections 5 and 6 of our present Lottery and Gaming Act. There is no reason why the Act of William III should remain on the Statute book as far as South Australia is concerned. It was repealed in the United Kingdom by the Betting and Lotteries Act 1934: 24 & 25 Geo. V c.58.

5. *The Statute 9 Anne c.6 (1710).*

This was an Act which amongst other things by Section 56 strengthened the powers of preventing lotteries by extending the powers of the magistracy in relation to the statute of William III. It would appear to be in force in South Australia for the same reasons as have been already discussed in relation to the Act of William III. Its provisions are covered in slightly different form in Section 8 of our Lottery and Gaming Act. For the same reasons as exist with regard to the preceding Act, it should be declared to be no longer in force in South Australia. It was replealed in the United Kingdom by the Betting and Lotteries Act 1934 to which we have referred above.

6. *The Statute 9 Anne c.14* sometimes referred to as 9 Anne c.19) (1710).

This Act stands as the basis of the case law with regard to gaming contracts. Section 1 of the statute was amended in 1835, as will be seen later, to make securities and cheques given in relation to such contracts illegal. It provides that the loser at cards, dice, tables or other games can get his money back by suing within three months after the loss and is also a sumptuary Act in that it attempts to prevent the loss of ten pounds or any sum above ten pounds at any one time or sitting in play at cards, dice or any of the proscribed games. However the philosophy of our State Act differs from that contained in the Act of Anne and of course the sumptuary provisions do not apply. Section 50 of our present Act would appear to cover all the relevant matters in 9 Anne c.14. Notwithstanding this Sir Victor Windeyer in his book on 'The Law of Wagers, Gaming and Lotteries' at pages 66-67 thinks that the Act of 9 Anne and its amending 5 & 6 Will. IV c.41 are still part of the law of South Australia. We shall deal with the Act of William IV when we come to it, but in relation to the Act of Anne it would seem better to leave the coherent philosophy stand as enacted in Section 50 of our present Act and declare that 9 Anne c.14 cease to have effect in South Australia. Part of the Act is still in force in England and parts have been repealed from 1835 to 1960.

7. *The Statute 10 Anne c.26 s.109* (also referred to as 10 Anne c.19) (1711).

This section is an extension of 10 and 11 Will. III c.17. It is treated as being probably in force in South Australia by Windeyer (op. cit.) pages 204 and 208. It serves no useful purpose at the present

time and it should be enacted that the statute shall cease to form a part of the law of South Australia. It was repealed in England in 1870.

8. *The Statute 8 Geo. I c.2 (1721).*

This was an Act against colourable lotteries. Sections 7 and 10 of our present Act deal with the subjects covered by Sections 36 and 37 of the Act of 8 Geo. I. It is therefore not necessary to retain this Imperial Act as part of our law in South Australia and it should be declared that it ceases to have effect as part of the law of this State. It was repealed in England in 1934.

9. *The Statute 9 Geo. I c.19 (1722).*

This Act deals with foreign lotteries. It deals amongst other things with grants or authorities for lotteries given by foreign princes or states. That part of the Act of 9 Geo. I is not dealt with in our Section 13 but we would regard that as archaic. We think that the philosophy of the control of lotteries directed from outside South Australia should continue to be covered by Section 13 of our present Act. Accordingly the Act of 9 Geo. I should be declared to be no longer in force in South Australia. It was repealed in England by a series of statutes from 1867 to 1948.

10. *The Statute 6 Geo. II c.35 (1732).*

This is an Act intended to strengthen the provisions of 9 Geo. I c.19. The Act of 6 Geo. II, by Section 29, strikes at the selling, procuring or delivering of tickets or other entries in a foreign lottery. This matter is also dealt with in Section 13 of our present Act and we recommend that the Act of 6 Geo. II should be declared to be no longer in force in this State. It was repealed in England in 1934.

11. *The Statute 12 Geo. II c.28 (1738).*

The matters dealt with in that Act are dealt with in general in Sections 6, 59 and 61 of the present Act. The Statute is dealt with in Windeyer (op. cit.) at pages 205-206. The Act of Geo. II deals with one subject that is not dealt with in our Act, namely sweepstakes on the results of government lotteries. We are not aware that this is a problem in South Australia. If it is, then that part of 12 Geo. II c.28 which covers persons who 'shall make, print, advertise or publish, or cause to be made, printed, advertised or published, Proposals or Schemes for advancing small Sums of Money by several Persons, amounting in the whole to large Sums, to be divided among them by the Chances of the Prizes in some public Lottery or Lotteries established or allowed by Act of Parliament . . . .'' should be included as a substantive provision in our own Act. Further your attention should be drawn to Section 4 of the Act which penalises various forms of unlawful lotteries. Some of the matters covered by Section 4 as for example advowsons do not apply in this State but most of the matters contained in the list do apply. If it is desired that such lotteries should remain under prohibition, a substantive section to this effect should be inserted in our Lottery and Gaming Act. This section of 12 Geo. II c.28 is the only part of the Act still remaining in force in England and subject thereto this statute should be declared to be no longer in force in South Australia. The remainder of the Act was repealed in England by statutes from 1888 to 1960.

12. *The Statute 13 Geo. II c.19 (1739).*

By Section 9 of this Act the Statute 12 Geo. II c.28 was amended to provide that all games played with dice, except backgammon, should be within the Statute of 12 Geo. II c.28. The Act was held to be in force in Queensland in *King v. Chester (1886) 2 Q.L.J. 186.* It would seem to be likewise in force in South Australia. Section 59 of our Act does not penalize gambling games played with dice so that there could be a large gap in the listing of unlawful gambling games unless, at the same time as it was declared that 13 Geo. II c.19 should no longer have force in South Australia, an amendment was made to our Lottery and Gaming Act to include gambling games played with dice as unlawful games. If the Lottery and Gaming Act does not presently include a prohibition against unlawful games played with dice, then the definition of 'unlawful gaming' in that Act should be amended to make sure that this is covered c.p. definition of 'lottery' where dice are specifically mentioned. It was repealed in England in 1960.

13. *The Statute 18 Geo. II c.34 (1744).*

This Act tried to restrict gambling by sumptuary legislation by providing that it was illegal to win or lose the sum of ten pounds or more at any one time or twenty pounds within twenty-four hours by gaming and added roulette or roly-poly to the list of unlawful games. The other provisions of this Act would seem to be covered by the provisions of Sections 61, 90 and 98 of our present Act. As Section 9 of the Act of 18 Geo. II c.34 is wider in its ambit of pardon than Section 98(3) of our present Act, and as one must assume that Section 98(3) expresses the policy which the Government would wish to be carried out here with regard to those who turn Queen's evidence, it would be as well for that as for other reasons that the Statute 18 Geo. II c. 34 be declared to be no longer in force in South Australia. If it is desired to retain roulette or roly-poly as a prohibited game an amendment could be considered in our Act.

14. *The Statute 42 Geo. III c. 119 (1802).*

This Act is expressly directed against various unlawful games, particularly those called 'little goes'. The Act has been held in numerous cases to be in force in other Australian states and there is no reason to believe that it is not in force in South Australia. The ancillary provisions for enforcement of the general matters contained in this Act are covered in various ways in sections of our own Act: see Sections 5, 6 and 7 of our Act and also Sections 71 and 72 as to ancillary powers for the protection of offences. There is nothing in the Act of 1802 which requires to be retained as part of our law. We therefore recommend that it be declared that it no longer forms part of the law in South Australia. It was repealed in England in 1934.

15. *The Statutes 57 Geo. III c. 31 (1817); 58 Geo. III c. 71 (1818); 59 Geo. III c. 65 (1819); 1 Geo. IV c. 72 (1820); 1 and 2 Geo. IV c. 120 (1821); 3 Geo. IV c. 101 (1822) and 4 Geo. IV c. 60 (1823).*

These are a series of Acts relating to Government lotteries. Some parts of them would without doubt not be in force in South Australia as being restricted to their own time and place, but other sections relating to the suppression of illegal lotteries and the sale of tickets in foreign lotteries probably are in force in this State. Certainly the provisions of Section 41 of the Act of 4 Geo. IV c. 60 were held to be not in force in New South Wales by the High

Court of Australia in *Quan Yick v. Hinds (1905) 2 C.L.R. 345*, but there are quite a number of other provisions in these Acts which are not dealt with in *Quan Yick v. Hinds* and some parts of them were held to be in force in Victoria in *The Attorney-General of the State of Victoria v. Moses [1907] V.L.R. 130.* The relevant provisions of 4 Geo. IV c. 60 seems to us to be covered in the definition of 'place' in Section 4 of our present Act and in the provisions of Sections 11 and 75 of our present Act and we recommend that all these Acts of George III and George IV should be declared to be no longer in force in South Australia. They were repealed in England by statutes of 1861, 1873 and 1934.

16. *5 and 6 Will. IV c. 41 (1835).*

This Act, as we noted previously, amends the Act of 9 Anne c. 14 so that securities and cheques given in relation to void gaming transactions were to be treated as given for an illegal consideration so that they were enforceable in the hands of third parties who took for value and without notice: see the discussion of the Act in Windeyer (op. cit.) pages 62 and 63, 71, 77-81 and 218. Unfortunately only part of the Act of William IV is dealt with in Section 50 of our Act which, as we noted in relation to the statute of Anne, keeps the description of the contracts themselves as being void. It does not deal with the other problems dealt with in this statute. The Act is in force in South Australia: see the reference in Windeyer to which we have referred immediately above. The law on this subject contained in the Gaming Acts of 1710 and 1835 is set out in detail in *Treitel: The Law of Contract 4th Edn. (1975) pages 358-360.* Certainly the law relating to securities and cheque has for a long while been in practice in South Australia treated as governed by this Statute of William IV. We think that it would be much better however if people wanting to know the law relating to lottery and gaming were to find it all in one Act instead of in several Acts and accordingly, if it is accepted that the law on this topic should continue to be as set out in Sections 2 and 3 of the Act of 1835, those sections should be inserted in our Act at the same time as the statute 5 and 6 Will. IV c. 41 is declared to be no longer in force in South Australia. Part of the statute is still in force in England and part is repealed by a series of statutes from 1874 to 1968.

17. *6 & 7 Will. IV c. 66 (1836).*

This deals with advertising foreign and illegal lotteries. The subject matter of this Act of William IV is dealt with in Sections 8 and 10 of our present Act and we think that it should be declared that that Act is no longer to have effect as part of the law of South Australia. It was repealed in England in 1934.

Whilst dealing with this subject of Imperial legislation, we should draw your attention to the fact that there are two other sets of Acts arising out of situations which the law regards as wagering which have been dealt with by Imperial statutes in force in South Australia. The first are the statutes relating to stock jobbing: 7 Geo. II c. 8 made perpetual by 10 Geo. III c. 8 and the second are the acts relating to insurance: 19 Geo. II c. 37; 14 Geo. III c. 48 and 28 Geo. III c. 56. We have not dealt with the second of these sets of Acts in this report although if you desire it we shall do so later. Our reason for this is that some of the law of insurance is now governed by the law of the Commonwealth and some by the law of the State and we thought it better to draw your attention to the position rather than to endeavour to deal with the matter

in this paper. As far as the stock jobbing Acts are concerned, they appear on the face of them to deal only with imperial issues of stock and with matters cognisable by the Courts in England. However the Act 7 Geo. II c. 8 was held to be in force in New South Wales by the Court of Appeal of that State in *Garrett v. Overy (1968) 88 W.N. N.S.W. Pt. II page 184.* Windeyer (op. cit.) page 93 held that Sir John Barnard's Acts, i.e. the stock jobbing Acts, were in force in Australia, but in his view these Acts were limited in their operation in Australia to the public stocks of England. However to the surprise of the commercial community, it was held in Garrett's case that these Acts could possibly be applicable in relation to stocks not specified to be public or joint stock or other public securities of the United Kingdom. We say 'possibly' because, although Holmes JA. expressed himself very carefully on the subject at pages 191-192, if Sir John Barnard's Acts could have no possible application to the matters alleged in the declaration, then the fifth, sixth, seventh and eight pleas of the defendant should have been allowed. The report is incorrect at page 193 where it states that judgment in demurrer passed for the plaintiff. As can be seen by the concluding words of Herron C. J. 's judgment at page 189, judgment in demurrer passed for the defendant. We think that if such practices are to be regulated in South Australia it would be far better to do so by an Act of our own Parliament. Whether it is necessary to do so is a matter on which we express no opinion, but we do draw your attention to the fact that these statutes have recently been declared to be capable of application in one of the Australian States. Unless counsel or solicitors did a considerable amount of research in the applicability of imperial legislation to Australia for the purpose of giving advice, the ordinary man would not know anything about this prohibition if he relied on the printed edition of the statutes of South Australia. We think he ought to be able so to rely, so that the two Acts which together comprise Sir John Barnard's Act should in our opinion cease to apply in South Australia. If similar prohibitions are to exist in this State they should be enacted as a substantive law of the State of South Australia. It may be that the provision in the securities legislation of the Commonwealth as applied to South Australia by the Securities Industry (Application of Laws) Act 1980 is sufficient for the purpose.

We have the honour to be:

HOWARD ZELLING

J. M. WHITE

CHRISTOPHER J. LEGOE

D. W. BOLLEN

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Law Reform Committee of South Australia.

13 October, 1981

D. J. WOOLMAN, Government Printer, South Australia