SOUTH  AUSTRALIA

SEVENTIETH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO LOCUS STANDI— PRISONERS RIGHTS

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 Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

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

THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman*

M. F. GRAY, S.-G.

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A. L. C. LIGERTWOOD.

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The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

SEVENTIETH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO LOCUS STANDI—PRISONERS' RIGHTS

To:

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

Sir,

We turn now to the consideration of that part of the rules relating to *locus standi* which deal with convicted persons who are imprisoned.

If a man was convicted of high treason at common law, all his land was forfeited to the Crown, whether the land was held immediately of the Crown or was held mediately of some mesne lord. If a man was convicted of a felony, certainly of any felony for which the penalty was death and that included most felonies, the felon's land escheated to his immediate lord *propter delictum tenentis*. By the operation of Quia Emptores the immediate lord in most instances by the late Middle Ages, was the Crown. In addition, by Clause 32 of Magna Carta the king was entitled to year, day and waste if the property escheated to a mesne lord. The clause in Magna Carta seems to have defined the rights of the Crown as against the lord but the actual right claimed by the Crown is older than Magna Carta as it appears in Glanvil (vii) c.17. During the Middle Ages the list of felonies was always short, see *Plucknett: A Concise History of Common Law (4th Edition 1948) page 417,* but there was a great extension in the number of felonies created between the sixteenth and eighteenth centuries until they totalled about two hundred.

Thirdly, if a person was outlawed he was civilly dead, and if he was outlawed for treason the forfeiture applied in favour of the Crown in the same way as if he had been found guilty of treason.

The reforms in the law to which we shall refer later do not deal with this question of outlawry. We have in several recent reports to you pointed out that outlawry still has an existence in South Australia and the simplest way to deal with this part of the problem is, as we have said before, to abolish outlawry altogether in this State.

In addition to the disabilities above referred to, persons attainted of treason and murder were incapable of making a valid conveyance from the time that the offence was committed, provided an attainder followed. See *Blackstone: Commentaries on The Law of England, Vol. III paragraph 291.* Persons attainted of other felonies were subject to the same disability but this was modified by the Statute 54 Geo. III c.145 (1814) which enacted that no attainder for a felony other than murder should extend to the disinheriting of any heir nor to the prejudice of the right or title of any other person or persons than the offender during the term of his life.

So, too, at common law a person convicted of felony was incapable of alienating or charging any property, of making any contract, or of bringing any action in the courts in his own right. These disqualifications did not, it seems, affect his right to sue in *autre droit*, for example, as a trustee, see *Addison: Treatise on the Law of Contracts (11th Edition 1911) page 259.*

All of this law, except in so far as it was modified by pre-1836 statutes, was in force in South Australia as at December 28, 1836 and is still in force in some States of Australia: see the decision of the High Court of Australia in *Dugan v. Mirror Newspapers Limited (1978) 142 C.L.R. 583.* There were exceptions to the rule. For example, a trustee who was a mortgagee could transfer the mortgaged trust property even after a

conviction of felony: see *Re Levy v. Debenture Corporations Contract (1894) 38 S.J. 530; 42 W.R. at 533.* So too, if an action at law had already been brought before the conviction of felony, a conviction during the pendency of the action did not bring the action to an end: see *Watson v. Watson (1919) V.L.R. 384.* A great deal of the operation of this law including the operation of the law relating to attainder was swept away in South Australia by the Treason and Felony Forfeiture Abolition Act No. 25 of 1874 but some parts of the previous law still remain.

Our Act 25 of 1874 was an enactment in South Australia of the provisions of the Imperial Act of 1870, 33 & 34 Vict. c.23 s.8. English law has, however, gone further since then. In 1908 by the Children Act 1908, 8 Edw. VII c.67 sections 100 and 131, the conviction of a person under sixteen was not to be regarded as a conviction for felony for the purpose of any disqualification attaching to felony and by the Criminal Justice Act 1948: 11 and 12 Geo. VI c.58 s.70, the old law as to the remaining disabilities of convicts in relation to forfeiture was swept away.

However, notwithstanding the Act of 1874, it is possible, as is pointed out by Jacobs J. in *Dugan's case (supra)* at page 602, that a person convicted of a non-capital felony was disabled from bringing an action either wholly or until he had endured the punishment to which he was adjudged. Mr Justice Jacobs did not find it necessary to come to a final decision on the point but the rule is so stated in relation to all felonies in the 2nd Edition of *Halsbury's Laws of England (1932) Volume VII paragraph 104 page 79,* under the title 'Contract'. One of the co-authors of that title in the 2nd edition of Halsbury was Lord Atkin.

Our Act of 1874 was repealed and substantially re-enacted by the Criminal Law Consolidation Act 1935 and appears as Part X of that Act. The common law disabilities as to taking actions at law and of alienating or charging property and making any contract, other than through the Curator of Convict Estates, were preserved by Section 330 of our present Criminal Law Consolidation Act. A Curator was not appointed automatically on conviction, but only if the Governor chose one to operate in relation to the estate of a particular convict: see Section 331.

However, the Criminal Law Consolidation Act 1935 was amended by the Act No. 7 of 1966 which widened the classes of those who came under the Act. Section 329(1) was repealed and a new subsection (1) inserted which reads:—

"In this part . . .

"prisoner" means a person undergoing imprisonment pursuant to an order of a court but does not include a person remanded for trial or for sentence."

It is obvious from that definition that "prisoner" after 1966 included as well as those in the previous categories of treason or felony, a person convicted of a misdemeanour, or of a simple offence for which the punishment was imprisonment, a person imprisoned for contempt of court, civil or criminal, a person imprisoned for non-payment of a fine, a person imprisoned under the unsatisfied judgment summons procedure in relation to debtors, and a prisoner imprisoned under a *capias ad satisfaciendum* in relation to a Crown debt. It is doubtful whether those who drew the amendment intended to cast the net as wide as has in fact been done, but that is the necessary consequence of taking the ordinary meaning of the words used in the Act of 1966. The result of the 1935 and 1966 Acts is that a prisoner in any of those categories cannot take any proceedings for the recovery of any property, debt or damage whatsoever whilst he is in prison: see the judgment of Legoe J. in *Milera v. Wilson (1980) 23 S.A.S.R. 485.*

In our opinion, the whole of Part X should be repealed. In its place it should be enacted that a prisoner is under no disability to bring any action, make any contract, or execute any conveyance, transfer or other dealing with property. There should, however, be a proviso that nothing in this section giving property rights to the prisoner should in any way affect any legislation requiring a convicted person to make compensation to a victim of the crime, any order made in relation to the restitution of stolen property, or in relation to any orders of confiscation, forfeiture, or custody in relation to the Crown or the Commissioner of Police lawfully made following a conviction in relation to any property of a prisoner.

This will require a consequential amendment of Section 88 of the Trustee Act 1936, which reads as follows:—

> "Property vested in any person on trust, or by way of mortgage, shall not, if that person becomes a convict within the meaning of Part X of the Criminal Law Consolidation Act, 1935, vest in any curator appointed under that Act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his personal representative, as if he had not become a convict: Provided that this enactment shall not affect the title to the property so far as related to any beneficial interest therein of any such trustee or mortgagee."

If our recommendations are correct there is no reason why a beneficial interest in property should not remain vested or become vested in the convict either for himself or as a trustee or mortgagee. It may well be highly inconvenient to have a convict as trustee. The remedy for that, however, is provided by the law already, namely an application to discharge a trustee who is unable to look after his trust property and to appoint another trustee or trustees in his place.

Another matter of *locus standi* to which we would like to draw attention is that it is quite often necessary for a person in custody to require, for the purpose of the prosecution of a civil action, to be taken outside the gaol. For example, he may have to answer interrogatories which may require him to re-visit the scene of an accident; or he may be required to give discovery and may have to be taken to wherever the papers are kept that require to be discovered so that it can be determined which of them are material to the action. Similarly, an order may be made for inspection so that it may be necessary for the accused person to identify the goods, the subject of the inspection order, and there are a number of other cases which come to mind. We think that there should be an enabling section giving the Court power to provide on a summons for directions that a convicted person may be taken from his place of confinement to such place as is necessary to enable him to comply with or make a proper answer to the order for the purpose of the prosecution of the action. We point out that the prisoner may not necessarily be a party to the action. His services may be required in the first instance as a witness or in the second, as a person identifying for the benefit of others. Whatever the position may be, there should be a simple procedure enabling a judge on summons to provide for the prisoner to be taken in custody to whatever place is necessary for the purposes of carrying on the interlocutory steps in any action. It may be necessary for a prisoner to be able to appear to argue his own case in person. It would seem from *Ford v. Graham (1850) 1 L.M. & P. 604* and *Weldon v. Neal (1885) 15 Q.B.D. 471*, that the existence of such a right is doubtful and in any event would have to be enforced by a *habeas corpus* under the present law.

This last recommendation would simply be an extension of a general requirement for the Controller of Prisons to provide adequate facilities at all reasonable times to enable prisoners to obtain counselling and such

other advice as may reasonably be required in their personal affairs, and we would refer to the First Report of the Criminal Law and Penal Methods Reform Committee of South Australia, recommendation No. 3.22.4(a).

We feel that we should for completeness draw your attention to another possible result of the rule that prisoners convicted of treason or felony lose the ordinary rights of citizens, although the matter does not arise as one of standing.

We recollected that if a person suffered *capitis deminutio maxima* in Roman law, any existing will became invalid (Institutes II : XVII : 4). Whether this was so, or was so in all cases prior to Justinian's code does not seem certain—see *Watson: Roman Private Law about 200 B.C. (1971) page 104* and *Buckland: A Textbook of Roman Law from Augustus to Justinian (3rd Edn. 1966) page 288*—but the position seems to be certain from the time of Justinian—see *Thomas: Textbook of Roman Law (1976) page 450.* See also *Vinnius: In Quatuor Libros Institutionum Imperialium Commentarius (1721) page 453.* That caused us to check the earlier English law of wills, because so much of it is derived ultimately through the canon law from Roman law. The leading work: *Swinburne on Wills (17th Edn. 1803) Volume I Part II s.13 at pages 168-169* says clearly that a convicted felon cannot lawfully make any testament. The same consequences seem to follow from outlawry for treason or felony (ibid: note at page 182). *Burn's Ecclesiastical Law (1763) Volume II page 513* states the Roman law more nearly in that he says that conviction for treason or felony invalidates any existing will and prevents the traitor or felon from making a new will. *Williams on Wills (5th Edn. 1980) Volume I page 24* regards the old law on this subject as being swept away by the 1948 English Act. As we have already pointed out in this paper, there is no analogue to the 1948 English Act in this State. It is however our duty to point out that a different view is taken by *Theobald: A Concise Treatise on the Law of Wills (8th Edn. 1927) page 26* based on two cases involving suicides: *Norris v. Chambres (1861) 7 Jur. N.S. 59 at 61* and *In bonis Bailey 2 Sw. & T. 156.* The latter case is very shortly reported. The comment by Kindersley V.C. in the former case is obiter and is expressly said to be contrary to an opinion obtained from "three of the most eminent leaders of the English Bar". A similar view is taken in *Browne:* Ecclesiastical Law of Ireland (1803) page 291.

However it seems to the Committee unwise, even if there is more than one tenable view on the matter, to leave the question to be decided by litigation and it would be wise to put the position beyond doubt by legislation.

Accordingly whilst the disabilities on convicted prisoners are being swept away, we think that the statute effecting this should state that conviction for treason or felony does not abrogate any existing will of the felon nor does it affect his capacity to make a new will. We are aware that this has been disregarded in practice in South Australia but the decisions in *Dugan's case (supra)* and *Milera's case (supra)* show that the old rules still have validity. Accordingly it would be wise to amend the law relating to wills in the manner recommended by us above, to put the matter beyond any doubt.

We have the honour to be

HOWARD ZELLING

J. M. WHITE

CHRISTOPHER J. LEGOE

M. F. GRAY

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A. L. C. LIGERTWOOD

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The Law Reform Committee of South Australia

Dated 6th July, 1982.

D. J. WOOLMAN, Government Printer, South Australia