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SOUTH  AUSTRALIA

SEVENTY-SECOND REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE AMENDMENT OF THE LAW OF ESCHEAT

1983

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., Q.C.

P. R. MORGAN.

D. F. WICKS.

A. L. C. LIGERTWOOD.

G. F. HISKEY

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

SEVENTY-SECOND REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE AMENDMENT OF THE LAW OF ESCHEAT

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia.

Sir,

Following on our reports relating to the inherited Imperial Law, you have referred to us the question of the reform of the law of escheat. The Fifty-Fifth Report dealt with the statutes 29 Edw. I—the Statute of Escheats; 34 Edw. III cc.13 and 14; 36 Edw. III Stat. 1 c.13; 8 Hen. VI c.16; 18 Hen. VI c.7; 23 Hen. VI c.16; 1 Hen. VIII c.8; 3 Hen. VIII c.2 and 2 & 3 Edw. VI c.8—all on this topic.

Holdsworth: A Historical Introduction to the Land Law (1935) says at page 33:

> 'All land is held of some lord. That lord, or some one of his predecessors in title, is supposed to have given the land to the tenant, or some one of his predecessors in title. Therefore, if the tenant dies without heirs, it is only right that the lord should have back again that which he gave to the tenant. This is escheat *propter defectum sanguinis.* Similarly, if the tenant commits any gross breach of the feudal bond—commits, that is, a 'felony' in the original sense of that term—the lord may take again that which he gave. This is escheat *propter delictum tenentis.* The right of escheat was thus a tenurial right, which was dependent upon the fact that the freehold had no tenant. Therefore it could only arise when a tenant in fee simple died without heirs or committed felony. If the estate was a smaller estate, the person or persons next entitled got the estate if or when it came to an end.'

Coke on Littleton (1642) 13a says:

> *'Eschaeta,* is a word of art, and derived from the French word *escheat (id est) cadere, excidere* or *accidere,* and signifyeth properly when by accident the lands fall to the lord of whom they are holden, in which case we say the fee is escheated. And therefore, of some, *escheats* are called *excadentiae* or *terrae excadentiales. Dominus veró capitalis loco haeredis habetur, quoties per defectum vel delictum extinguitur sanguis sui tenentis. Loco haeredis et haberi poterit cui per modum donationis fit reversio cujusque tenementi.* And Ockam (who wrote in the raigne of Henry the second) treating of tenures of the king, saith *porro eschaetae vulgó dicuntur, quae decedentibus hiis qui de rege tenent, &c. cúm non existit ratione sanguinis haeres, ad fiscum relabuntur.* So as an escheat doth happen two manner of wayes, *aut per defectum sanguinis,* i.e. for default of haire, *aut per delictum tenetis.* i.e. for felonie, and that is by judgment three manner of waies, *aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlegatus est.* And therefore, they which are hanged by martial law *in furore belli* forfeit no lands:'

And he goes on at 92b:

> 'Lands may escheat to the lord two manner of wayes; one by attainder, the other without attainder. By attainder in three sorts. First, *Quia suspensus est per collum.* Secondly, *Quia abjuravit regnum.* Thirdly, *Quia utlegatus est.* Without attainder; as if the tenant dies without heire.'

The history of the law of escheat is dealt with in detail in *Holdsworth: History of English Law Volume III pages 67-71.* Where the land was held of some mesne lord other than the Crown, the Crown had year, day and waste by c.32 of Magna Carta (1225) 9 Henry III which reads in English:

> 'We shall not hold the lands of those who are convicted hereafter of a felony except for a year and a day and then they shall be delivered up to the lords of the fees.'

The conviction of felony related the escheat back to the moment of the commission of the crime so that all intervening dealings with the property were avoided but that was not so if the conviction was on an appeal of felony. The same consequences as to relation back followed upon an abjuration of the realm or upon a judgment of outlawry upon an indictment for felony. Similarly there was a right of forfeiture to the Crown in relation to all the lands of a person convicted of high treason and the same consequence followed in the case of outlawry upon an indictment for treason. As in the case of escheat for felony the Crown's right related back on conviction to the time when the treason was committed: see *Pimb's case (1585) Moore 196.* There were two amendments to this doctrine prior to 1836. The first was the statute 54 Geo. III c.145 (1814) which abolished escheat on attainder for any capital felony. The other statute was 3 & 4 Will. IV c.106 s.10 (1833) which provided that after the death of a person attainted his descendants might inherit the land. Subject to those two statutory amendments, we inherited the law of escheat and forfeiture when the colony of South Australia was founded on December 28, 1836. Certainly the law was treated as being in force in Ontario by the Privy Council in *The Attorney-General of Ontario v. Mercer (1883) 8 App. Cas. 767.*

The old learning on the subject is set out in great detail in the judgment of Astbury J. in *In re Holliday (1922) 2 Ch. 698* and we shall not set it out in detail here. There was a third way akin to escheat in which property might come into the hands of the Crown, namely by alienage; that is to say if land was conveyed to an alien, who could not by law hold property and we will deal with this kindred topic later in this report.

Practically all the law of forfeiture and escheat for treason and felony was abolished in England in 1870 by the statute 33 & 34 Vict. c.23 and in South Australia by the Act No. 25 of 1874 Section 1. However as Holdsworth points out (op. cit. page 71) the English statute forgot to abolish forfeiture as a consequence of outlawry upon an indictment for treason and our Act which largely follows the English statute has the same defect. As we have told you before, outlawry is still in force in South Australia and accordingly this oversight should be remedied in the amending statute which we propose ought to be enacted. However with that one exception we need not deal further in this paper with escheat propter delictum tenentis.

We turn therefore to escheat for want of heirs—escheat propter defectum sanguinis. Escheat on this ground has been amended by a number of English statutes passed subsequent to 1836 to which there are no South Australian analogues and ultimately abolished in 1925. By the statute 22 & 23 Vict. c.21 (1859) section 25 where a right of re-entry upon lands or other hereditaments accrued to Her Majesty or her successors, such right might be exercised or enforced without any inquisition being taken or office being found or any actual re-entry being made on the premises. That was merely a minor procedural point. However the matter was dealt with in greater detail in the statute 47 & 48 Vict. c.71 (1884) which amended the law to provide by Section 4 that escheat applied both in the case of equitable estates as well as legal estates. At common law

escheat did not apply in the case of equitable estates, because the trustee held the legal estate and therefore there was no failure of the feudal bond: see in relation to copyholds the judgment of Pearson J. in *Gallard v. Hawkins (1884) 27 Ch.D. 298* and in the case of personalty the decision of the House of Lords in *Attorney-General v. Jefferys (1908) A.C. 411.* If, on the other hand, there was in the will an obvious indication of an intention by the testator that the executor was not to take beneficially, then on failure of beneficiaries the beneficial interest in the personal estate vested in the Crown as bona vacantia: see the judgment of Eve J. in *In re Jones; Johnson v. The Attorney-General (1925) Ch. 340.* However as the 1884 Act is not in force in South Australia our law of escheat is as the law was prior to 1884; that is to say that escheat does not apply in relation to an equitable estate in the land and that in certain cases the trustee will take beneficially as was in fact the case in *Attorney-General v. Jefferys.* Similarly at the common law an incorporeal hereditament did not escheat; it simply became extinguished.

By Section 6 of that Act the Crown can waive its right under the intestacy if it thinks fit to do so. We think that is a valuable provision and it ought to be in our Act. As the textbooks say, the real case in which such a waiver should take place is where there are adopted children, who are not adopted according to the law of South Australia or under any other type of order or document recognized by our Adoption Act which should be recognized under that Act or by the conflict of laws rules applicable in South Australia. In such a case it would in our opinion be proper for the Crown to waive its right in favour of such an adopted child. There may also be other circumstances as for example where the deceased was in loco parentis to the child in question. The English section is quite general, and these are obvious examples of the value of the section, although the discretion might be exercised in other cases where dependency or reasonable expectation of benefit could be demonstrated.

The next statute to which reference should be made is the statute 50 & 51 Vict. c.53, which repealed the old statutes on procedure in escheat, all of which are still in force in South Australia, and gave power to the Court to make rules relating not only to escheat but to the holding of any inquest of office in favour of the Crown not otherwise regulated by law and such a rule-making power would be useful in this State. It is however possible that such a rule-making power might be implied: see the judgment of Higgins J. in *Fell v. Fell (1922) 31 C.L.R. 268 at 285.*

By 15 Geo. V c.23 (1925), the Administration of Estates Act 1925 Section 45 (1) (d), escheat to the Crown was abolished, and that should be the position in this State.

It is probable that escheat is no longer relevant on an intestacy. The efficacy of Section 1 of the Intestate Real Estates Distribution Act 1867 to abolish escheat per defectum sanguinis was doubted in Parliament in 1870 and again in 1875 but either it or its successors Section 64 of the Administration and Probate Act 1891 or Section 46 of the present Act of 1919 must have achieved this purpose: see *Wentworth v. Humphrey (1886) 11 App. Cas. 619.* Until 1975 the property went to the Crown as bona vacantia: see *In re Barretts Trusts (1902) 1 Ch. 847 at 857* and *In re Stone Reid v. Dubua (1936) 36 S.R. N.S.W. 508 at 519.* Now it goes too the Crown under Section 72g of the Administration and Probate Act Amendment Act 1975, which by subclause (e) after providing for the various relatives who take on an intestacy says:

> '(e) if the intestate is not survived by a person entitled to the intestate estate under the foregoing provisions of this section—the intestate estate shall vest in the Crown.'

That section however is subject to two possible constructions on the face of it: either that it creates a new right to the Crown as a successor to the deceased by virtue of the intestacy or alternatively that it merely affirms the existing right of the Crown; that is that the subsection is declaratory. Having regard to the general rules of construction of statutes, it is possible that the second of these would be held to be the law although this is not certain. If that happened, the legal estate would be treated as having vested directly in the Crown in the same way as it did prior to the 1975 Act: see *In the Goods of Hartley (1899) P.40.* One consequence of that would be that the Crown took the escheated estate and was not responsible for the debts of the deceased. The matter was left undecided in *In the Goods of John Ball (1902) W.N. 226,* but that would seem to follow as a necessary consequence of *Hartley's case.* It is true that Section 72f inserted in the principal Act by Act 99 of 1975 shows how the value of an intestate estate is made up and refers to making deductions for the debts and liabilities of the intestate but regrettably Section 72g does not take up Section 72f and simply says 'Subject to this Part, an intestate estate shall be distributed according to the following rules' and then sets them out, one of which, as we have said, subrule (e), vests the intestate estate in the Crown.

We turn then to the question of bona vacantia. Ing in his book 'Bona Vacantia' gives five instances in which a right to bona vacantia may arise:

(1) On the death of a person intestate and without known kin.

(2) On the dissolution of companies.

(3) On the failure of trusts and on a society, association or corporation ceasing to exist.

(4) On disclaimer.

(5) By reason of the rule of public policy that no person can obtain rights resulting to him from his own crime.

If it is possible that property may be without an owner by the abolition of both escheat and bona vacantia it may be as well to include a clause in the projected statute providing that the ultimate title to any goods which would have escheated or been deemed bona vacantia under the rules formerly in force shall be deemed to be property of the Crown.

Where property is under the provisions of the Real Property Act occasionally no-one gets title by adverse possession, there is no ratable owner, or the taxing and rating authorities do not sell the land under their powers, usually because the area is small and not worth the expense of sale.

Similarly there are difficulties in relation to the property of defunct unincorporated bodies, bodies operating under English royal charter or letters patent, and persons who, or whose testamentary dispositions, cannot be traced.

In all these cases the Crown should be entitled to apply to vest the land in the Crown and there should be a prima facie presumption in favour of the Crown as an aid to proof. Notice should be given to all adjoining owners and possible parties interested, much as now obtains in relation to the procedure for the opening and closing of roads.

We turn then to the question of alienage. *Chitty: Prerogatives of the Crown (1820) page 228* points out that at common law an alien was by law incapable of holding lands by purchase and if he was still alive after the purchase there had to be an office found or an inquisition to divest

the land from the alien and seize it to the King's use: *Coke on Littleton 2a,* but if an alien had no heir and purchased land and died then the freehold was in the King without office found: *Coke on Littleton ibid.,* and see *Collingwood v. Pace (1664) 1 Ventris 413.* That doctrine was modified by but not abolished by a series of Acts from 1350 to 1864, Section 4 which follows in gereral terms the Imperial Act 7 & 8 Vict. 66 ss. 3 and 4 (1844). Section 4 of our 1864 Act provides that every person now born, or who may hereafter be born, out of Her Majesty's Dominions, of a mother being a natural born or naturalised subject of Her Majesty shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, within the said Province, by devise or purchase or inheritance of succession.

That of course does not abolish the whole of the law relating to alien succession but only in the cases referred to. However Section 5 says:

> 'Every alien friend resident in the said Province may inherit or otherwise take by representation, acquire, hold, convey, assign, devise, bequeath, or otherwise dispose of every description of property, whether real or personal, in the same manner as if he were a natural born subject of Her Majesty.'
>
> For the present position see our Law of Property Act 1936 Section 24.

That would appear to put the position beyond doubt with regard to aliens in South Australia. The only difficulty which we see is that the subject since 1901 has become one of Commonwealth law and it might be argued that the 1864 Act had ceased to apply. However we see no reason why the 1864 Act should not have amended the law to such an extent before 1900 that the Commonwealth at its founding took the law of South Australia as it then was and that that law has continued in force by Section 108 of the Constitution of the Commonwealth. We do not ourselves see any need for an amendment of the law although we draw it to your attention in case your advisers may think otherwise.

As to alien companies and interstate companies, these are covered by Sections 511 and 506 respectively of the South Australian Companies Code 1980. There is however a necessity for overseas corporations operating in this State to have selected a home jurisdiction in a State or the Australian Capital Territory by 29 October 1982 otherwise they might ultimately be struck off the register in all jurisdictions: see Section 519 (1).

We have the honour to be

HOWARD ZELLING
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CHRISTOPHER J. LEGOE
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Law Reform Committee of South Australia

8 March 1983.

D. J. WOOLMAN, Government Printer, South Australia