SOUTH AUSTRALIA

SEVENTY-THIRD REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW OF PERPETUITIES

1984

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:

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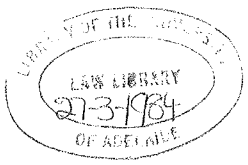

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SEVENTY-THIRD REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW OF PERPETUITIES

To:

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

Sir,

One of your predecessors referred to us the reform of that part of the law of property known as the rule against perpetuities together with the allied rule, partly at common law, but mainly by statute directed against lengthy accumulations of income. The statute was occasioned by what Sir William Holdsworth well called the "posthumous avarice" of Peter Thellusson: see *Thellusson v. Woodford (1799) 4 Vesey 227*; affirmed in the House of Lords at *(1805) 11 Vesey 112*. The statute which was passed to prevent any similar accumulation in future was the State 39 & 40 Geo. III c.98 (1800) usually called the Thellusson Act 1800 which has been transcribed into our law as Sections 60, 61 and 62 of the Law of Property Act 1936.

We have in this connection considered the reports of a large number of law reform commissions on this and cognate topics, as well as a large number of textbooks and articles.

The history of the struggle of the common law to prevent the operation of the "dead hand" in tying up property for an unreasonable time in the future starts very early in the history of English law. Probably the first two attempts by Statute may be found in Chapters 39 and 43 of Magna Carta ((1225) 9 Henry III). However the common law evolved its own rules with relation to the matter and these were as follows:

1. The rule laid down by Bracton early in the thirteenth century that the word "heirs" is a word of limitation and not a word of purchase.

2. The rule in *Shelley's case (1581) 1 Co. Rep. 93b at 104a* that where a life estate is given to the ancestor and an estate in fee simple or fee tail of the same land to the heirs, that this is construed as a grant of an estate in fee simple or fee tail as the case may be to the ancestor.

3. The Statute Quia Emptores (1290) 18 Edw. I c.1 under which freedom of alienation was granted to all tenants holding under a mesne lord except tenants in capite of the Crown. This last restriction was removed at the beginning of the reign of Edward III. The statute is still in force in this State.

4. The frustration of entails under the State De Donis Conditionalibus (1285) 13 Edw. I c.1 by suffering common recoveries which barred the entail, a practice which was common from Taltarum's case in Edward IV's reign.

5. The declaration that unbarrable entails were a perpetuity: *Mary Portington's case (1614) 10 Co. Rep. 38a at 42b.*

6. The rule that a contingent remainder failed unless it vested eo instanti the prior interest determined: see *Co. Litt. 342b.*

7. The rule in *Purefoy v. Rogers (1672) 2 Wms. Saund. 380; 85 E.R. 1181*, that no limitation shall be construed as an executory or shifting use which can by any possibility take effect by way of contingent remainder.

8. The rule in *Whitby v. Mitchell (1980) 44 Ch.D. 85* that remainder in land to an unborn child of an unborn life tenant is void. This rule is still in force in South Australia.

There is a general discussion of the policy of the common law in relation to perpetuities in *In re Nash: Cook v. Frederick [1910] 1 Ch.* in the judgement of Lord Justice Farwell *at pages 6-8.*

Nevertheless these expedients of the common law did not suffice in that ultimately it was held that where a series of estates were raised by way of equitable limitation of a term and not by way of common law remainder, that the rules relating to contingent remainders did not apply. The Courts vacillated in this matter: see the discussion of the whole question in *Holdsworth: H.E.L. VII 217-222,* and a careful summary of the cases by Lord Nottingham L.C. in his *Prolegomena of Chancery and Equity* (ed. Yale pages 223-231). Ultimately the argument of Mr. Bridgman (as he then was) in *(1618) Child v. Baylie Cro. Jac. 459; 79 E.R. 393* prevailed. When he became Lord Keeper Bridgman he gave a decision in accordance with his own views in *Wood v. Saunders* in *[1669]* 1 Ch. Cas. 131 and ultimately it was a conveyance of his which came up for decision in The Duke of Norfolk's case which established the modern rule: see *The Duke of Norfolk's case [1682] 3 Ch. Cas. 1 at page 27.* The history of the case is well set out in *Holdsworth (op. cit.)* at pages 222-224. In 1682 Lord Nottingham, contrary to the opinion of the two Chief Justices and the Chief Baron whom he had called into consultation, held that this type of executory limitation was not too remote and made a decree in favour of Charles Howard the beneficiary under the executory trust. On a bill of review in 1683 his successor Lord Keeper North reversed the decision but it was restored on appeal to the House of Lords in 1685. That decision, together with the later discussions of the rule in *Cadell v. Palmer (1833) 1 Cl. & Fin. 372; 6 E.R. 956* established the rule as it is set out in *Gray on Perpetuities:*

> "No interest is good unless it must vest if at all not later than twentyone years after some life in being at the creation of the interest."

To this definition must be added the qualification in *Cadell v. Palmer (supra)* that if there is a child en ventre sa mère at the time when the interest is due to expire, who would take if living at the expiration of the period, the term of the interest will be extended by the period of gestation without offending the rule against perpetuities. So it is three hundred years this year since Lord Nottingham made the original decree establishing the rule.

Before proceeding to deal with this rule, it may be as well to clear away some of the earlier rules which could still possibly be in force in South Australia today (and in two cases are certainly in force in South Australia today). They are as follows:

1. The rule against restrictions on alienation. This rule is said to be in force in Australia today: see *Lawrence v. Lawrence (1901) 4 W.A.L.R. 27* but it is really a rule that no one can by grant derogate from a fee simple and in our opinion is better treated that way and not as in the

judgement of Stone C.J. as part of the rule against perpetuities, and so treated it needs no further discussion in this paper.

2. The rule against unbarrable entails. The history of this matter is contained in *Holdsworth* (op. cit.) *VII: 209.* The general rule is still in force, namely that if trusts create an estate tail after a previous limitation which tends to a perpetuity the limitation is invalid: see *Mainwaring v. Baxter (1800) 5 Vesey Jnr. 458; 31 E.R. 681,* but as is pointed out in *Heasman v. Pearse (1871) L.R. 7 Ch. App. 275 at 282-283,* a limitation to a class of issue to be ascertained at the determination of the estate tail or a gift to a trustee for such class, or upon trust to convey to such class or to sell and divide the produce amongst such class is "(not too remote) . . . "if the legal and beneficial interest should be both ascertainable at the moment of the determination of the estate tail." Then it is clear that a series of limitations in tail is good provided that each vests eo instanti on the determination of the prior estate tail. In other words they follow much the same rules relating to the seisin as those relating to contingent remainders: See *In re Haygarth: Wickham v. Holmes [1912] 1 Ch. 510* and it is apparent that if the whole series of estates tail in that case had taken effect (which in fact did not happen) the property would have been tied up well beyond the period within which the general rule against perpetuities operates: and see *Morris and Leach: The Rule against Perpetuities (1st Edition 1956) pages 189-191.* We think that the time has come to abolish, as in England and elsewhere, estates in tail altogether, that the Estates Tail Act 1881 should be repealed, and that there should be a declaration that it is no longer competent to create an estate tail either at law or in equity. The latter part of the amendment is necessary in case an incautious testator should either leave the property to his "issue" so as to create an estate tail in equity or should use words such as were used in *In re Trethewey; Elder's Trustee and Executor Company Limited v. Trethewey and Others (1924) S.A.S.R. 80* and the same case *(No. 2): (1924) S.A.S.R. 541* where the words were:

"The aforesaid property (a property at Cuttlefish Bay on Kangaroo Island) is not to be sold but to remain in the Trethewey family"

and it was held by Mr Justice Poole that the son Frederick William Newbold Trethewey took an estate tail in the land devised to him because of the operation of the rule in *Shelley's case (supra).*

3. The rule in *Whitby v. Mitchell* to which reference has already been made *42 Ch. D. 494; 44 Ch. D. 85*—see also *In re Nash [1910] 1 Ch. 1*—is still the law in South Australia today except in such cases as a cy-près construction will save the gift: see *Monypenny v. Dering* in the Court below *(1847) 16 M. & W. 418.* The rule is a somewhat artificial rule in that it is quite possible to limit leasehold terms of say ninety-nine years to follow one another which would be a much longer period in most cases than the period of a limitation to the unborn child of an unborn child: see *Somerville v. Lethbridge (1795) 6 T.R. 213; 101 E.R. 517.* Accordingly if a conveyancer, knowing of

the rule in *Whitby v. Mitchell*, wanted to get around it, the simple method would simply be to limit two long terms in leasehold each with trusts for one generation of unborn children, one to follow the other which would have the same result but might well hold up the estate for a far longer time than the operation of the rule in *Whitby v. Mitchell*. An even stronger reason is that successive leases for lives as distinct from freehold estates for lives do not violate the rule in *Whitby v. Mitchell*: see *Hare v. Burges (1857) 4 K. & J. 45; 70 E.R. 19*, nor do rights to a perpetual renewal of a lease: see *Parkus v. Greenwood (1951) Ch. 644* and *Re Principal Investments v. Gibson 38 D.L.R. 2d. 147 at 156*. We recommend the abolition of the rule.

Turning now to the modern law against perpetuities, as has been well said, a civil case is decided on the balance of probabilities; a criminal case is decided on proof beyond reasonable doubt; the rule against perpetuities goes beyond either of those standards of proof and is decided upon proof of any possible, however highly improbable, contingency: not what has happened but what could have happened at any time after the commencement of the limitation, a method of proof not used anywhere else in English law.

Accordingly we have the stupidities of the fertile octogenarian: see *Ward v. Van der Loeff [1924] A.C. 653; Jee v. Audley (1787) 1 Cox 324*, and at the other end of the scale the precocious six year old who might have a child: see *Re Gaite's Will Trusts (1949) 65 T.L.R. 194*; the magic gravel pit which everybody knew had already been exhausted before the case ever came to trial but which was held to create a perpetuity because it might not be exhausted in twentyone years: see *Re Wood [1894] 2 Ch. 310*; the army which had no vacancy for a Lieutenant-Colonel in its ranks for twentyone years and one day: *In re Lord Stratheden and Campbell: Alt v. Lord Stratheden and Campbell [1894] 3 Ch. 265*, and the unborn widow where a gift to a man's children is invalidated because he might lose his now wife and marry a woman who was unborn at the date of the settlement or the testator's death in the case of a will: see *Hodson v. Ball (1845) 14 Sim. 558 at 574; Harris v. King (1936) 56 C.L.R. 177*. These are only some of the unbelievable results which the certainty of vesting rule requires and a rule which produces results such as that is in our opinion in need of reform and indeed as will be seen later in this paper of abolition.

There is one exception to the rule that vesting in interest and not duration of interest controls the application of the modern rule against perpetuities.

These are the so called purpose trusts. The perpetuity period for such trusts is a gross period of twentyone years. These are trusts set up for a purpose of which the law approves but which do not have a specific human beneficiary or beneficiaries. The commonest forms are trusts for the maintenance of animals and trusts for the upkeep of tombs. However a draftsman today faced with a request to set up a purpose trust, which might endure beyond twentyone years and was not strictly charitable within the classifications in *Pemsel's Case [1891] A.C. 531 at 583*, would probably set up a corporation under the Associations Incorporation Act or a company limited by guarantee and vest the property in the corporation whose object would be the carrying out of the purpose. We know of no decision that the objects of a company are within the rules against perpetuities although it is obvious that the scheme described above is simply a different way of carrying out the purpose. A trust for such

things as the carillon of bells on Sydney Harbour which failed in *Public Trustee v. Nolan (1943) 43 S.R. N.S.W. 169* would almost certainly be effectuated in this way today.

There have been two principal methods applied in various States of the United States and other areas where the common law rule exists, to amend the law relating to perpetuities. The first is usually described as the "wait and see" rule, that is to say the Court waits until the actual events occur to see whether or not in truth a perpetuity has been created. The second is the cy-près or reformation of provisions rule which is that where the provision would on the normal rules of construction be void as a perpetuity, but the general intention of the testator can be collected in the ordinary way from the construction of the instrument and that intention was not to create a perpetuity, the will or deed is reformed so as to give effect to his intention. The second of these rules of course has the great advantage that the trust can be administered at this stage instead of having to wait for a very long time under the "wait and see" rule to find out whether or not in the events which have happened a perpetuity has occurred.

There are already four reforms of the law existing in South Australia and one which exists in England and in several of the other Australian States. The four which exist in South Australia are first the provisions of Section 25 of the Law of Property Act protecting contingent remainders which do not vest eo instanti on the determination of the prior limitation, second the provisions of Section 59 of that Act declaring that the rule against perpetuities does not apply and shall be deemed never to have applied to powers of distraint, rent charges and various forms of easements relating to mining, timber, repairs and drains, pipes and similar structures. The third is contained in Section 62a of that Act exempting employees' benefit funds from the operation of the rules against perpetuities and the fourth is contained in Section 25 of the Public Charities Funds Act 1935 reserving the Adelaide Hospital Endowment Fund to operate in perpetuity. The other, which is not in our legislation at present but is in the legislation of Great Britain and of a number of the Australian States, is that where the only mistake the draftsman has made is in fixing an age of vesting above the age of twentyone years, for example to the children of A who attain the age of twentyfive years, the figure twentyone shall be substituted for whatever higher figure the donor under the deed or the testator under the will has adopted. The English provision was originally contained in Section 163 of the Law of Property Act 1925, and is now Section 4 of the Perpetuities and Accumulations Act 1964 and similar provisions exist in Western Australia, Victoria and Queensland. The Victorian provision appears to be the most comprehensive. It is an obvious reform and should be adopted in relation to existing trusts.

In addition the Courts themselves ameliorated the harsh effect of the modern rule against perpetuities by what are known as the "class-closing" rules. If when the document creating the trusts comes into operation the total number of members of the class may not be ascertained within the perpetuity period, then the gift is bad in toto unless it operates as a legal contingent remainder: see *Brackenbury v. Gibbons (1876) 2 Ch.D. 417,* or if it is a gift of specified sums of money to each member of a class even if the whole class is not ascertainable within the perpetuity period: see *Storrs v. Benbow (1853) 3 De Gex M. & G. 390.*

The Courts, in order to protect the beneficiaries whose interests would in any event vest within the perpetuity period, evolved a series of rules which had the effect of closing the class at the last beneficiary whose interest vested within the period. These rules are usually compendiously

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referred to as the rule in *Andrews v. Partington (1791) 3 Bro. C.C. 401.* However the rule can be excluded if a testator manifests by his will an intention to exclude it but this must appear by very explicit language—see for an extreme example of this point *Parsons v. Justice (1865) 34 Beav. 598.*

We turn now to the first of the two major reforms proposed already, namely the acceptance of the "wait and see" rule. A typical section of this kind is Section 3 of the English Act which reads:

"3. (1) Where, apart from the provisions of this section and sections 4 and 5 of this Act, a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time, the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period, as if the disposition were not subject to the rule against perpetuities; and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

(2) Where, apart from the said provisions, a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exerciasable within the perpetuity period, as if the disposition were not subject to the rule against perpetuities.

(3) Where, apart from the said provisions, a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and, subject to the said provisions, shall be treated as void for remoteness only if, and so far as, the right is not fully exercised within that period.

(4) Where this section applies to a disposition and the duration of the perpetuity period is not determined by virtue of section 1 or 9 (2) of this Act, it shall be determined as follows:

(a) where any persons falling within subsection (5) below are individuals in being ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph *(b)* or *(c)* of that subsection shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor;

(b) where there are no lives under paragraph *(a)* above the period shall be twentyone years.

(5) The said persons are as follows:

(a) the person by whom the disposition was made;

(b) the person to whom or in whose favour the disposition was made, that is to say—

(i) in the case of a disposition to a class of persons, any member or potential member of the class;

(ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(iii) in the case of a special power of appointment exercisable in favour of members of a class, any member or potential member of the class;

(iv) in the case of a special power of appointment exercisable in favour of one person only, that person or, where the object of the power is ascertainable only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;

(v) in the case of any power, option or other right, the person on whom the right is conferred;

(c) a person having a child or grandchild within subparagraphs (i) to (iv) of paragraph *(b)* above, or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within those subparagraphs;

(d) any person on the failure or determination of whose prior interest the disposition is limited to take effect."

see also the Western Australian Act Section 7, the Victorian Act Section 6 and the Queensland Act Section 210.

The English provision differs in some respects from the previously enacted Western Australian Act. There is a matter which has to be kept in mind in the connection, namely that if the only lives which are to be taken into account under the "wait and see" rule are the same lives as would have been taken into account under the perpetuity rule, the perpetuity will in fact happen at some time or another so that the "wait and see" rule in those circumstances only puts off the evil day. Questions will then arise as to what happens to the income what has accumulated in the meanwhile. Clearly for the "wait and see" rule to operate effectively it is necessary to have a wider series of lives than those originally selected or else as we have said it is simply a question of postponing the evil day. In addition, there must be considered and this is a matter which does not seem to have been considered in any of the Australian Statutes, the operation of Sections 99 and 99A of the Income Tax Assessment Act under which if there is no person certain or sui juris available to receive the income then the income is taxed at the rate of sixty cents on the dollar so that it will be necessary to make provision for certainty of vesting of the income if the "wait and see" rule is to be adopted. For the purpose of avoiding the operation of Sections 99 and 99A of the Income Tax Assessment Act and the sections ancillary to those sections as to income accruing under the "wait and see" rule, the provision as to income in the "wait and see" section would have to provide that the disposition of income is vested notwithstanding the "wait and see" provision (unless it is so by any other provision of the document). Also if the ultimate gift is subsequently found to be void at the stage when the "wait and see" provision becomes an actuality the Commissioner will without doubt tax at that stage which would or could be a stage after the income has passed out of the hands of the trustees and special provision should be made to protect the trustees: see *1 N.Z.U.L.R. at page 495.*

Having dealt with the question of income it is necessary then to deal with the problem which has already been adumbrated namely that unless

the measuring lives specified in the Statute are other than those specified in the instrument the ultimate result may simply be to have a declaration of a perpetuity at a later date than would otherwise have occurred. The English and New Zealand Statutes both use much the same type of measuring lives and both are open to this objection. There is a general discussion of this problem in an article entitled "Measuring Lives under a System of Wait and See" by Maudsley in *86 L.Q.R. commencing at page 357*. We think that the "wait and see" solution creates unreasonable problems for trustees who have to know with certainty in the interim period before the facts are known how to deal with the trust property and its income, quite apart from the taxation problems to which we have adverted above. Under the English list of measuring lives, some may be quite inappropriate to the trust and some relevant lives may be excluded so that the wait and see period is restricted unnecessarily. We agree with the criticisms of the adoption of measuring lives contained in an article by Drew Brown in *(1974) 49 Notre Dame Lawyer 611 at 614-616*. Further, because of the doctrine of infectious invalidity, if the future interests turn out to be void as tending to a perpetuity, prior interests before them may be void also so that persons who have been paid income under the prior interests will have received money to which they were not entitled.

We think the proposed wait and see rule creates at least as many problems as it solves and would make the administration of the trust almost impossible in the interim period before the real facts came to light. It is true that the trustee could protect himself by a whole series of applications for advice and directions under Section 69 of the Administration and Probate Act but this would cause a substantial part of the trust assets to be dissipated in costs and would in any event only protect the trustee and not validate any wrong payments to beneficiaries. Accordingly we do not recommend the adoption of a "wait and see" statute in South Australia.

A number of Statutes, mainly American, have as their basic reform a general reformation, or cy-près provision, which enables Courts to avoid the operation of the rule against perpetuities by reforming the dispositions which would otherwise be void in a way so as to validate them without defeating the donor's intention. This is frequently a very difficult operation as a matter of construction. The New Zealand Committee were of the opinion that the objections to the Vermont and Kentucky cy-près Statutes on the ground that they were vague and uncertain, were outweighed by the practical advantages and that as these Statutes had now been in force for quite a number of years and that none of the theoretical objections which had been urged had in fact occurred in practice, they recommended the enactment of such a section in the New Zealand Act, as follows:

> "10. *Cy-près modification in certain other cases*—(1) Subject to the provisions of this section, where it has become apparent that, apart from the provisions of this section, any disposition (whether made before or after the commencement of this Act) would be invalid solely on the ground that it infringes the rule against perpetuities, and where the general intentions originally governing the disposition can be ascertained from the instrument governing the disposition or (where there is no such instrument) from the terms and scheme of the disposition, the disposition shall be reformed so as to give effect, if possible and as far as possible, to those general intentions within the limits permitted under the rule against perpetuities.
>
> (2) No disposition of any property that was made before the commencement of this Act shall be so reformed

(a) If the disposition of any property that was made before the commencement of this Act by any order or judgment made or given in any legal proceedings; or

(b) If any property comprised in the disposition has, before the commencement of this Act, been paid or transferred to, or applied for the benefit of, or set apart for, the persons entitled by reason of the invalidity of the disposition; or

(c) If the person who made the disposition of the property while living and of full capacity has, before the first day of January, nineteen hundred and sixty-seven, and whether before or after the commencement of this Act, elected in accordance with subsection (8) of this section to accept the property under a resulting trust in his favour; or

(d) So as to prejudice any person who has, before the commencement of this Act, reasonably so altered his position in reliance on the invalidity of the disposition that, in the opinion of the Supreme Court, having regard to all possible implications in respect of other persons, it is inequitable to reform the disposition wholly or in part.

(3) Where it is possible that any disposition made after the commencement of this section would, apart from the provisions of this section, become invalid solely on the ground that it infringes the rule against perpetuities, and where (if the disposition subsequently became invalid) it would have to be reformed in accordance with subsection (1) of this section, the disposition may be reformed under this section before that subsection applies to it, if

(a) The reformation would not prejudice any person who could possibly take under the disposition if it were not reformed and it proved to be valid; or

(b) Every person who could possibly by prejudiced by the reformation consents to it.

(4) In every case where the reformation of a disposition of any property is required or permitted under this section,

(a) If the disposition was made before the commencement of this Act, and it has become apparent that the person who made the disposition of the property has become entitled to it under a resulting trust, or that he or his personal representative will become so entitled to it,—

(i) The reformation may be made by that person executing, before the first day of January, nineteen hundred and sixty-seven, a deed specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provision of this section;

or

(ii) The reformation may be made, on or after the last-mentioned date or before that date if the person has died or is for the time being of unsound mind, by the Supreme Court, by order specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provisions of this section:

(b) If paragraph *(a)* of this subsection does not apply to the disposition, the reformation may be made by the Supreme Court, by order specifying such alterations to the disposition as are necessary to provide for its reformation in accordance with the provisions of this section.

(5) Where a disposition made before the commencement of this Act is reformed under this section, in determining the validity of the reformed disposition, regard may be had to events and circumstances which have occurred or exist at the date of the reformation.

(6) In any case where the trustees of property comprised in any disposition have become aware that the disposition requires to be reformed, it shall be their duty to take all reasonable steps that may be necessary to secure the reformation of the disposition.

(7) Where a disposition is reformed in accordance with this section,—

(a) The perpetuity period shall run from the date of the original disposition:

(b) Except as otherwise provided in this Act, the disposition as reformed shall be governed by the enactments and rules of law which would have applied to it if the reformed disposition had been made at the time of the original one:

(c) Subject to the foregoing provisions of this section, the reformation shall be deemed to have had effect as from the making of the disposition; and all consequences (including revenue consequences) shall follow as if the reformed disposition had been made at the time of and instead of the original one.

(8) For the purposes of this section, a person who is entitled to elect to accept any property under a resulting trust may—

(a) Declare his intention to do so by deed; or

(b) Manifest his intention to do so by—

(i) Accepting a transfer or payment of the property or any part thereof from the trustees of the property;

or

(ii) Otherwise dealing with the property or any part thereof as his own property.

(9) No election which is not so declared or manifested before the first day of January, nineteen hundred and sixty-seven, shall have any effect for the purposes of paragraph *(c)* of subsection (2) of this section.

(10) On the reformation under this section of a disposition in a will of a testator who dies after the commencement of this Act, or of a disposition in any other instrument executed after the commencement of this Act, the perpetuity period in respect of that disposition may be specified under section 6 of this Act."

The cy-près method of reforming a possible perpetuity has one great advantage over the wait and see method; namely that the trustee knows as soon as he gets his court order how to administer the trust from then on. The great weakness in the cy-près statute is that there must be discerned in what the donor or testator has written, or more usually has

had drawn up for him, an intention which can be given effect to cy-près. As the donor or testator will in general never have applied his mind to the question, or the problem would not have arisen, there will be many cases in which no such intention can be discerned, however benevolent the approach of the Court may be.

If we had to choose we would have chosen to recommend the cy-près solution as the better practical solution when coupled with some general amendments covering presumptions and evidence as to future parenthood as in the Victorian Section 8, a reduction in age and exclusion of non-qualifying members as in the Victorian Section 9, the exclusion of unborn spouses as in the Victorian Section 10, the removal of dependant infective invalidity in the Victorian Section 11, and the exclusion from the perpetuity rule of administrative powers and of options as in the Victorian Sections 14 and 15, as by those means the need for cy-près applications would be very greatly diminished.

Insofar as specific non-charitable purpose trusts are concerned, people do have strong views on such matters and it would be possible either to reform them, as Ontario has done by its Section 16, to cut them down to twentyone years irrespective of the time limited by the draftsman or the absence of any time limit or alternatively to put them outside the rules against perpetuities. As we have said they are anomalous as they concern duration and not remoteness of vesting, and if as Morris & Leach suggest (page 313) the testator's cat might live to be thirty-three, there is no head of public policy forbidding the animal to be fed and housed for that period.

However, we have decided for the reasons which follow to recommend a bolder solution, namely that the rule against perpetuities be abolished entirely.

We do this for the following reasons:

(1) Scotland has not and never has had a rule against perpetuities: see *Wilson and Duncan: Trusts, Trustees and Executors (1975)* page 81.

Enquiries made by the Chairman of the Committee when in Scotland in 1977 and correspondence between the Lord Advocate's Office in Edinburgh and the Tasmanian Law Reform Commission both confirm that the Scots have never suffered the slightest inconvenience by reason of the fact that they have never had such a rule.

(2) The modern rule against perpetuities was really devised as a concomitant to the strict settlement. Strict settlements ceased to be strict in England by the Settled Estates Act 1877 (40 & 41 Vict. c.18) and the Acts which amend that Act which enable in general terms a life tenant to lease or to sell the trust property with the consent of the Court. This legislation was followed in South Australia by the Settled Estates Act 1880 and 1889. The coup de grace was given in England by the Finance Act 1894 (57 & 58 Vict. c.30) Sections 1 and 2 which taxed the property afresh on every death although there was a partial exemption for settled property under Section 5. We do not have death duty in this State so that this last consideration does not apply at present.

However, as far as Australia is concerned, the constantly varying tax laws would make a strict settlement completely impossible at the present day. No one in his sane senses would tie up property strictly for a life in being and twentyone years thereafter. Indeed any solicitor who drew such a document and did not put his advice in writing relating to the probable tax complications would be in considerable danger of a successful claim for negligent advice. The fact is that the old strict settlement is

extinct and now that it has gone the rule against perpetuities which was evolved to put some limits on it should go too.

(3) In any event the variation of trusts legislation which came into force by Section 8 of the Trustee Act Amendment Act 1980, inserting a new Section 59c into the principal Act, gives wide powers of resettlement of trust property. Indeed even our Section 59b which has been in the Act since 1941 has in practice been given a much wider application by our Supreme Court than the Section in England from which it was copied. With these powers in hand it is very unlikely that a trust would be allowed to endure for over a hundred years, even leaving on one side the possible application of the rule in *Saunders v. Vautier [1841] 4 Beav. 115* which would enable the winding up of the trust in any event, when all the beneficiaries became sui juris.

We should add that Sir Charles Bright (then Bright J.) and Mr Justice Fisher (then Mr F. R. Fisher Q.C.) when considering an earlier draft of this paper, considered that the prototype adopted in our Section 59c did not go far enough and that there should be added to it a validation of trusts provision giving power for a declaratory validating order to be made in any case in which a Judge should think that it was in the interest of all the beneficiaries under the trust for such an order to be made. Although this is not strictly within the terms of our remit we agree with the suggestion made by Sir Charles Bright and Fisher J. and recommend an amendment to our Section 59c to cover the point.

We are fortified in this view of repeal by the Forty-Ninth Report of the Law Reform Commission of Manitoba issued in February this year which makes the same recommendation and by the fact that we understand from correspondence with the Chairman of the New South Wales Law Reform Commission that it is quite likely that a similar recommendation will be made in that State.

We should further point out that perpetuities have for centuries been regarded as ill-starred. The enormously elaborate scheme of Peter Thellusson produced only a small amount of money when the trust ultimately came to be wound up some sixty years later. Similarly the elaborate efforts of Emanuel Solomon in early South Australia which endured for nearly ninety years because the last surviving life tenant lived to be ninety-seven produced considerably less than the testator intended because unfortunately for him he, or in some cases his trustees, bought his properties in the west end of Adelaide which became a depressed area and the difficult management and litigation costs produced considerably less than was anticipated. Those are merely two examples out of many which are known to members of the Committee either personally or by repute where a lengthy scheme by its own results should discourage others from trying to achieve similar results.

We think it unlikely having regard to the different world in which we live and the continually varying incidents of taxation that anyone would adopt any similar scheme today. We point out that he could, by choosing the youngest member of the Royal family as his lives in being, or any other group of identifiable small children for that matter, tie the property up under the present rules for over a century.

Parliamentary Counsel, Mr. Hackett-Jones, has kindly done the necessary drafting of legislation to carry out our recommendations. His draft is annexed to this report.

We particularly draw attention to his new Sections 62 and 62a. Section 62 gives power to the Court to vest any non-vested interest at the expiry

of eighty years from the date of the disposition, except for certain types of trust enumerated in subsection (6). Section 62a gives power to the Court to extinguish rights created in land which serve no useful purpose, have not been exercised for twenty-one years, and whose continued existence adversely affects the enjoyment or alienation of land. Typical examples of these are old building scheme rights created under the rule in *Elliston v. Reacher [1908] 2 Ch. 665* which have ceased to be of any utility and are in most cases contrary to the spirit of modern town planning legislation. We are most grateful to him for his suggestions. We adopt them and recommend them to you.

We turn next to the effect of the perpetuity rule on charities. The position is that a gift over from one charity to another may take effect at any time in the future irrespective of the rule against perpetuities: see *Christ's Hospital v. Grainger (1849) 1 Mac. & G. 460.* This is no doubt because gifts over from one charity to another are anterior to the formulation of the modern rule against perpetuities. However it sometimes happens that all the purposes of the gift are not charitable within the meaning and intendment of the preamble to the Statute of Charities 1601, 43 Eliz. I c.4. Of course in that case the perpetuity rule does apply: see *The Royal Society for the Prevention of Cruelty to Animals New South Wales v. The Benevolent Society of New South Wales 102 C.L.R. 629 at 641.* In addition the first gift to charity must arise within the period: see *Worthing Corporation v. Heather [1906] 2 Ch. 532*, i.e. an immediate gift to charity dependent on a contingency is void if the contingency could arise outside the perpetuity period. It seems that if the execution of the charity depends upon future events, then the gift is good: see *Attorney-General v. Bray 111 C.L.R. 402.* We think that the present rules probably do not require amendment. They have been well worked out and are well known. Alberta decided to place gifts over from charity to charity outside the expiration of the normal perpetuity period under the last of its, rules, the cy-près or reformation rule, but we doubt whether this would provide any greater certainty than the present system, particularly as it might be quite impossible to decide a testator's intention after the long period which might take place between the creation of the trust and the gift over. It may be noted that in *Christ's Hospital v. Grainger (supra)*, this was a period of nearly two and a half centuries. It appears that an indefinite gift of income to a charity also saves it from the effect of the perpetuity rules: see *The Sydney Homoepathic Hospital v. Turner (1959) 102 C.L.R. 188* particularly at pages 202 and 203 and the reference therein to an article by Professor Ford on Charitable Corporations taking Income in Perpetuity at *26 A.L.J. 635.* Whether such a gift of income carries the corpus has been the subject of differing decisions: see on the one side *Roberts v. The University of Sydney (1960) N.S.W.R. 702* and on the other side *Re Williams [1955] V.L.R. 65* and *Re Weaver [1963] V.R. 257.* We think that all these matters may well be left to be dealt with by the general law of charities or in a consideration of the reform of that part of the law, rather than by amending the law relating to perpetuities.

Next, there is the question of accumulations and the provisions of Sections 60-62 of the Law of Property Act which re-enact the Thellusson Act 39 & 40 Geo. III c.98. We are of the same opinion as all the other jurisdictions that these sections ought to be repealed. They cause endless trouble in practice in relation to undisposed of income and this of course is compounded today by the operation of the tax laws upon such undisposed income, but the cases as to when there is an implied direction to accumulate and the effect of such a direction turn on many and very nice distinctions. For a recent application see *Re Clothier deceased [1971]*

N.Z.L.R. 745. We think that under the reforms which we have proposed to the laws against perpetuity, no separate rule is required with regard to income and we agree with what is said by Professor Allen in *The Rule against Perpetuities Restated 6 University of W.A. Annual Law Review 27 at 70-72.* We agree with those who drew the Alberta Report that it is however desirable specifically to provide that the repeal does not affect the rule in *Saunders v. Vautier 4 Beav. 115* which permits beneficiaries if they are sui juris to terminate the running of a trust and to provide also that the repeal does not affect any statutory power to pay moneys for the maintenance, education, advancement or benefit of beneficiaries out of accumulations. There are provisions to this effect in the Western Australian, Victorian and New Zealand Acts.

The last matter to which we draw attention is whether or not the Act should bind the Crown. This point was raised in the case which decided that the rule against perpetuities was in force in Australia: *Cooper v. Stuart 14 App. Cas. 286* but it was not there decided and it has never been decided to this day. We see no reason why the rule should bind the Crown where the Crown is the party making the grant. It may, however, be important to provide that the Crown along with the subject may take advantage of the various reforms in the law of perpetuity which we have suggested as occasionally public spirited testators do leave money for purposes which are frequently charitable, but not always strictly so, in favour of the armed forces, education, preservation of areas of natural beauty and the like and it would be wise to provide that gifts to the Crown, a Crown instrumentality, or any body set up for any public benevolent purpose should be able to take advantage of the reforms which we have recommended in the rules against perpetuities.

This report was originally drafted some years ago and research had to be done for the redraft, and the Committee is grateful to the Chairman's Associate Miss Mandy Willson for doing the research necessary for the redraft.

We have the honour to be

HOWARD ZELLING
J. M. WHITE
CHRISTOPHER J. LEGOE
M. F. GRAY
P. R. MORGAN
D. F. WICKS
G. HISKEY

Law Reform Committee of South Australia

(At the time of signing this report Mr Andrew Ligertwood was on sabbatical leave)

8th November, 1983.

[Prepared by the Parliamentary Counsel]

1983

A Bill for an Act to amend the Law of Property Act, 1936.

BE IT ENACTED by the Governor of the State of South Australia, with the advice and consent of the Parliament thereof, as follows:—

Short title.

1. (1) This Act may be cited as the "Law of Property Act Amendment Act, 1983".

(2) The Law of Property Act, 1936, is in this Act referred to as "the principal Act".

Amendment of s. 3—Arrangement of Act.

2. Section 3 of the principal Act is amended by striking out the item:

PART VI—PERPETUITIES AND ACCUMULATIONS: sections 59-62 and substituting the item:

PART VI—PERPETUITIES AND ACCUMULATIONS: sections 59-62a.

Amendment of s. 10—Power to dispose of rights and interests in land.

3. Section 10 of the principal Act is amended by inserting after its present contents (now to be designated as subsection (1)) the following subsection:

(2) Where a conveyance of an estate in fee simple is expressed to be subject to a possibility of reverter or a right of entry for condition broken, the condition is invalid and the conveyance operates as an unconditional conveyance of the estate in fee simple.

Repeal of Part VI and substitution of new Part.

4. Part VI of the principal Act is repealed and the following Part is substituted:

PART VI

PERPETUITIES AND ACCUMULATIONS

Interpretation.

59. (1) In this Part, unless the contrary intention appears—

"general power of appointment" means a power of appointment—

(a) that is exercisable by one person acting alone;

and

(b) by virtue of which that person could (assuming that he is of full age and capacity) vest in himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition (not being a formal condition relating only to the manner in which the power is to be exercised):

"interest" means an estate or

interest legal or equitable:

"prescribed right", in relation to land, means—

(a) an option to purchase the land;

(b) a right of pre-emption in respect of the land;

(c) an easement or right of way in respect of the land (but not including a public right of way);

or

(d) a right or privilege to enter and use the land (not being a right or privilege arising by virtue of an interest in the land):

"right" includes option:

"special power of appointment" means a power of appointment that is not a general power of appointment.

(2) For the purposes of this Part, an interest in property vests when it vests in interest or possession.

(3) For the purposes of subsection (2)—

(a) where an interest in property is subject to a general power of appointment, the interest shall be regarded as having vested in the holder of the power;

and

(b) an interest in remainder shall be regarded as having vested in interest when—

(i) the persons who are to take the interest are ascertainable;

and

(ii) the vesting in possession of the interest is dependent only on the termination of prior interests and upon no other contingency.

(4) For the purposes of determining whether the membership of a class is presently ascertainable—

(a) it shall be conclusively presumed that—

(i) a person under the age of twelve years is incapable of having a child;

and

(ii) a female person over the age of fifty-five years is incapable of having a child;

and

(b) with reference to a living person, evidence may be given to negate procreative or child-bearing capacity.

(5) A disposition of property by will shall, for the purposes of this Part, be deemed to have been made at the date of death of the testator.

(6) A disposition of property made in pursuance of a special power of appointment shall, for the purposes of this Part, be deemed to have been made at the date of the creation of the power.

Application of this Part.

60. (1) Subject to subsection (2), this Part applies in relation to—

(a) dispositions of property made before or after the commencement of this Part;

and

(b) rights and powers granted or conferred before or after the commencement of this Part.

(2) This Part does not operate to validate a disposition of property if, before the commencement of this Part, property subject to the disposition

had been distributed or otherwise dealt with on the basis that the disposition was invalid.

(3) This Part applies in relation to land whether or not it has been brought under the provisions of the Real Property Act, 1886.

Abolition of the rule against perpetuities and the rule in *Whitby v. Mitchell.*

61. (1) No disposition of property is invalid—

(a) by reason of the remoteness from the date of the disposition of the time at which an interest will, or may, vest in pursuance of the disposition;

or

(b) by reason of the fact that, under the terms of the disposition, an interest is limited, for life, to a person who was unborn at the date of the disposition, with a remainder over to a child or other issue of that person.

(2) No right or power in respect of property is invalid by reason of the remoteness from the time of its creation of the time at which it is to be, or may be, exercised.

(3) No purported exercise of a right or power in respect of property is invalid by reason of its remoteness from the time of the creation of the right or power.

Provision to ensure against remoteness of vesting.

62. (1) Where, after the expiration of eighty years from the date of a disposition of property, there remain interests in that property that have not vested in pursuance of the disposition, the Court may, on an application under this section, vary the terms of the disposition so that those interests vest forthwith.

(2) Where a disposition of property is such that certain interests in the property cannot vest, or are unlikely to vest, in pursuance of the disposition, within eighty years after the date of the disposition, the Court may, on an application under this section, vary the terms of the disposition so that those interests will vest within that period.

(3) Where a disposition provides for the accumulation, or partial accumulation, of income from property over a period that will or may terminate eighty years or more after the date of the disposition, the Court may, on an application under this section, vary the terms of the disposition so that both corpus and income will vest within eighty years from the date of the disposition.

(4) A variation of the terms of a disposition under this section should accord, as far as practicable, with the spirit of the original disposition.

(5) An application under this section may be made by—

(a) the Attorney-General;

(b) a trustee of property to which the disposition relates;

(c) a person who has, under the terms of the disposition, an actual or potential interest in property subject to the disposition;

or

(d) a person who would, assuming the existence and continuance of lineal issue, be the ancestor of a person (as yet unborn) who would have an actual or potential interest in property subject to the disposition.

(6) This section does not apply to—

(a) a trust constituted by statute or by letters patent;

(b) a trust of which the purposes are wholly charitable;

(c) a trust wholly for the provision of benefits of the following kinds, or of any one or more of the following kinds:

(i) superannuation or retirement benefits;

(ii) medical, hospital or funeral benefits;

(iii) other benefits payable in the event of death, sickness or incapacity;

or

(c) a trust for the benefit of the members of an unincorporated association (not being an association that has become defunct).

Limitation or extinguishment of certain rights in respect of land.

62a. (1) Where, on an application under this section, it appears to the Court—

(a) that a prescribed right in respect of land has not been exercised, or has not been exercised to a significant extent, within a period of twenty-one years preceding the date of the application;

and

(b) that the continued existence of the right unduly fetters or discourages the use, enjoyment or alienation of the land,

the Court may, by order, extinguish the right, or place limitations or conditions upon its future exercise.

(2) An application may be made under this section by any person who has an actual or prospective interest in the land to which the right relates.

(3) Where an order is made under this section in relation to land that has been brought under the provisions of the Real Property Act, 1886, the Registrar-General shall, on the application of the registered proprietor (which must be accompanied by the duplicate certificate of title and a copy of the order), make such notations in the Register Book as are necessary to give effect to the order.

Saving of principle in *Saunders v. Vautier*

62b. This Part does not affect the principle under which a beneficiary who is *sui juris* may put an end to an accumulation and require distribution of his presumptive share of property subject to the accumulation.