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**THE LAW RELATING TO PERPETUITIES AND
ACCUMULATIONS**

Working Paper 9

Queensland Law Reform Commission
February 1971



QUEENSLAND

LAW REFORM COMMISSION

CONFIDENTIAL

WORKING PAPER
ON
THE LAW RELATING TO
PERPETUITIES AND ACCUMULATIONS

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PREFACE

The Law Reform Commission has been functioning since 1st March, 1969 and has been constituted by the Law Reform Commission Act, 1968. The members are:-

The Honourable Mr. Justice W. B. Campbell, Chairman
Mr. P. R. Smith
Mr. B. H. McPherson
Mr. J. J. Rowell.

The Secretary of the Commission is Mr. K. J. Dwyer. The office of the Commission is at William Street, Brisbane.

The short citation for this working paper is Q. L. R. C. W. 9.

LAW REFORM COMMISSION

WORKING PAPER
ON
THE LAW RELATING TO
PERPETUITIES AND ACCUMULATIONS

The first programme of the Law Reform Commission of Queensland on reform as approved by the Honourable the Minister for Justice and Attorney-General includes an examination of the law in relation to the above.

The enclosed working paper comprises a draft Bill and commentary which represent the recommendations of the Law Reform Commission and it is being forwarded to persons and bodies known to be interested, from whom comment and criticism is invited. Recipients of the working paper will appreciate that it does not necessarily represent the concluded view of the Commission, nor is it intended that any implications be drawn as to Government Policy.

This paper is circulated on a confidential basis and recipients should bear in mind that any recommendations for the reform of the law which may ultimately be formulated by the Commission are required to be submitted to the Minister and must have the approval of the Governor in Council before being laid before Parliament.

Any comment or criticism you care to make should be forwarded to the Secretary, Law Reform Commission, P.O. Box 312, North Quay, Queensland 4000, before 31st March, 1971. This may not allow you a great deal of time, but the Commission is desirous of dealing with this proposed Bill at the same time as it meets to prepare a final Report on the Trusts Bill.

W. B. Campbell
(W. B. Campbell)
CHAIRMAN.

Dated: 24/2/71
BRISBANE.

PERPETUITIES AND ACCUMULATIONS BILL

COMMENTARY

The rule against perpetuities (herein referred to as the Rule) takes its modern form from the decision of Lord Nottingham in the Duke of Norfolk's Case (1682) 3 Ch. Cas. 1, although there had been various earlier rules directed to achieving a similar purpose. The existence of one of these, known as the Old Rule against Perpetuities, was reaffirmed by the English Court of Appeal in Whitby v. Mitchell (1889) 42 Ch. D. 494, and in Queensland (where it would presumably be applied) it has an independent operation which, however, this Report proposes should now be terminated. Unlike the Old Rule, the modern Rule is of some practical and legal importance: by requiring, as it does, that interests in property, whether created by deed or will, should vest within a certain time ("the perpetuity period"), the Rule performs a useful social function in limiting the power of members of generations past from tying up property in such a form as to prevent its being freely disposed of in the present or the future.

The need for the Rule is now perhaps less pressing than was formerly the case before legislative intervention in the form of The Settled Land Act and modern trustee enactments loosened the fetters of inalienability, but the common opinion among legal commentators is that it remains a necessary aspect of a soundly based system of property law. Likewise, the general opinion is that, although in a number of instances the Rule is capable of producing real injustice, it is fundamentally sound though overdue for reform in certain particulars.

In recent years the Rule has attracted a good deal of attention and comment, particularly on the part of academic lawyers, and in 1956 the Law Reform Committee in its Fourth Report (Cmnd. 18) recommended certain statutory alterations to the Rule. These were in general adopted, initially in Western Australia by the Law Reform (Property, Perpetuities and Succession) Act 1962, which represented a pioneering attempt to reform the Rule which has influenced legislation in other jurisdictions. The Western Australian Act was followed by the enactment in England of the Perpetuities and Accumulations Act, 1964; in New Zealand by the Perpetuities Act, 1964; and in Victoria by the Perpetuities and Accumulations Act 1968 which followed upon and adopted the recommendations of the Chief Justice's Law Reform Committee in that State. The enactments of the two Australian States are virtually identical in all their provisions which do in fact differ little and in some cases not at all from the corresponding provisions of the England and New Zealand legislation.

In Queensland the Rule retains its original common law form untouched even by the partial legislative reforms introduced at an earlier date in England, Victoria, New South Wales and New Zealand, and represented in the accompanying Bill by the provisions of cl. 9. The absence in this State of similar legislation resulted in the application in the recent Queensland case of Re Clark [1968] Qd. R. 584 of one of the harsher aspects of the Rule, on which occasion attention was judicially drawn to the desirability of reform in this field. The accompanying Report and draft Bill proposes the adoption in Queensland of the provisions of the Victorian Act of 1968 and thus of the Western Australian Act of 1962. In formulating this

proposal we have not sought to attempt any local innovation and have adopted this course for several reasons which seem to us to be well founded. In particular, the need for uniformity is especially strong in this branch of the law and even if other legislative models could be improved upon (which we doubt), the benefits of such improvement would be more than outweighed by the disadvantages which would follow from the differences which then would be introduced between laws of the various States.

Judicial decisions on the Rule have not been of frequent occurrence in Queensland and they have been even less frequent in relation to statutory amendments of the Rule in those jurisdictions in which such amendment has taken place. Hence, reported cases, being fairly few and far between, tend to attain a degree of importance and authority which is not always achieved in other branches of the law. In addition, there has in recent times been a considerable body of published comment of high quality on the Rule and the reforms which it has undergone in the jurisdictions mentioned, e. g., in the University of Western Australia Law Review, vol. 6, at pp. 11 (Professor W. Barton Leach), 21 (Professor Lewis M. Simes), 27 (Professor D. E. Allan - author of the W. A. Act); in 43 (1969) Australian Law Journal 366 by Messrs. L. McCredie and D. G. Doane entitled "Perpetuities Reform in Victoria", and in 7 Melbourne University Law Review 155 (P. W. Hogg and H. A. J. Ford). Taken in conjunction with the admirable and very erudite textbook The Rule Against Perpetuities by Professors J. H. C. Morris and Barton Leach, now in its second edition (1962) together with Supplementary comment on the English Act of 1964 (referred to in the Report as Morris & Leach), the foregoing presents an easily accessible source of guidance which would largely be denied to practitioners in this State in the event of any substantial deviation from the common legislative pattern followed elsewhere.

In view of both the quantity and quality of the published literature on this topic we make no apology for the comparative brevity of the explanatory commentary which accompanies the Bill and which is somewhat less detailed than has been the case with some other Reports prepared by this Commission. One aspect of the Bill which does perhaps justify mention at this point is the repeal, proposed by cl. 19, of the Accumulations Act, 1800; 39 & 40 Geo. III, c. 67, an ill-advised enactment which in practice has proved so unsuccessful that it enjoys the distinction of being one of the few statutes which has widely been repealed and abandoned in favour of the original principle of the common law.

1(1). Short Title.

1(2). Commencing date. For the reasons mentioned in the commentary to cl. 16 it may be necessary to ensure that the commencing date of this enactment coincides with that of the proposed Trusts Act. In any event, it is desirable that a period of some months be allowed to elapse between the enactment of this Bill and its coming into force in order to enable practitioners to effect adjustments of or amendments to common form conveyancing precedents.

1(3). Act and Rule against perpetuities to bind Crown. At common law there is some doubt whether the Crown is bound by the Rule; see Cooper v. Stuart (1889) 14 App. Cas. 286, 290. Sub-cl. (3) simply adopts the formula borrowed from recent New South Wales legislation

which is intended to ensure that the Crown, including if possible the Crown in right of the Commonwealth, is bound by the proposed Act.

2. Interpretation. No particular comment is necessary on the definitions in cl. 2(1) which are of an orthodox nature. Sub-cl. (2) confirms the accepted rule that a disposition made by will is treated as having been made at the date of the testator's death: see Morris & Leach, at p. 56. Sub-cl. (3) defines the terms "member of a class" and "potential member of a class" which appear in cll. 9 and 10 of the Bill.

3. Application. Except where otherwise provided it is proposed that the Act should apply only in relation to instruments taking effect after the commencement of the Act. An exceptional case is a special power of appointment, in which instance the Act applies to the instrument by which the special power is exercised only if the instrument by which the special power is created itself takes effect after the commencement of the Act.

4. Powers of appointment. The reason for singling out special powers is that in this instance the perpetuity period commences to run when the power is created rather than when it is exercised, as is the case with a general power: Morris & Leach at p. 57. Clause 4 defines a special power so as to exclude both "hybrid" or "mixed" powers: see cl. 4(b), and also general powers exercisable jointly by two or more persons, as in Re Churston Settled Estates [1954] Ch. 334: see cl. 4(a).

5. Power to specify perpetuity period. At common law the perpetuity period is 21 years after any life or reasonable number of lives in being, to which are added actual periods of gestation. For the purpose of measuring this period two rules appear well settled:-

- (1) any life or lives may be selected, irrespective of whether or not the selected life or lives bear any relation to the parties interested in the disposition. If no measuring life or lives are expressly selected by the draftsman it is enough if appropriate lives are necessarily involved in the disposition itself. In the absence of appropriate measuring lives the period is 21 years simpliciter: see Morris & Leach, pp. 62-63;
- (2) any number of lives may be selected, the only restricting factor being the necessity for ascertaining the survivor.

In this century a practice, based on conveyancing precedents, has grown up of using a "royal lives" clause, i. e., of using as the measuring life the survivor of all the lineal descendants of, e. g. Queen Victoria or King George V. This has been upheld by the courts: see Re Villar [1929] 1 Ch. 243; Re Leverhulme [1943] 2 All E. R. 274. It is however not a desirable practice since the task of tracing the survivor of the lineal descendants of a European monarch may well be difficult as well as expensive, and there is a danger that it may prove impossible in some cases with consequential invalidity for the disposition in question.

Clause 5, whilst not preventing the continued use of a royal lives clause for the purpose of specifying the relevant period, represents an attempt to discourage draftsmen from using this device. An alternative is offered by cl. 5(1) which proposes to allow the inclusion in an instrument of a clause to the effect that the perpetuity period applicable to a disposition shall be such number of years no exceeding eighty as may be specified in the instrument. The period of eighty years, which is presumably an approximation in round figures of the common law period, has now been adopted in England and New Zealand, as well as in Western Australia and Victoria. Clause 5(3) makes provision for the case where no period of years is specified as the applicable period but a date certain is specified as the date on which the disposition is to vest, in which event the applicable period is deemed to be that equal to the number of years between the date on which the instrument takes effect and the specified vesting date. Sub-cl. (2) is concerned with the particular case of a disposition made in the exercise of a special power of appointment (defined in cl. 4): in this instance the common law rule is that the perpetuity period begins to run when the power is created (see Morris & Leach, at p. 57), and to ensure that the donee of the power does not extend the period after it has commenced to run, cl. 5(2) excepts a disposition made in the exercise of such a power from the eighty year period permitted by cl. 5(1). Sub-clause (2) does, however, permit the selection of the eighty year period by the donor of the power, so that, if selected by the donor, this period will govern both the validity of the power and of any appointment made thereunder: see Supplement to Morris & Leach at p. 3.

6. "Wait and see" rule. One of the principal defects of the common law rule against perpetuities is that it is concerned with possible or hypothetical and not actual events. Hence the disposition of an interest is void if at the date of creation it could by any possibility vest outside the perpetuity period. This aspect of the Rule is a frequent, perhaps the most frequent, source of invalidity. It has given rise to a great deal of justifiable criticism, particularly because it often happens that at the time at which the question of validity is contested the contingencies have already happened within the perpetuity period: Morris & Leach at pp. 86-88.

Clause 6 proposes the reversal of this rule in accordance with a policy which has been adopted in a number of American jurisdictions as well as in England, New Zealand, Western Australia and Victoria. Under cl. 6 if it becomes law, a disposition is to be treated as valid until such time (if any) as it becomes clear that vesting will take place outside the permitted perpetuity period.

7. Power to apply to court for declaration of validity. As a general rule of practice, the court will not as a matter of discretion answer hypothetical questions, particularly questions relating to contingent rights: see e. g. Re O'Sullivan [1969] Qd. R. 516. Clause 7 will permit an application to be made for a declaration as to the validity or invalidity of a disposition to which the Rule applies, but cl. 7(2) preserves the rule that the court shall not make a declaration with respect to a disposition the validity of which cannot at the time of the hearing of the application be determined by the court.

8. Presumptions and evidence as to future parenthood. Jee v. Audley (1787) 1 Cox 324 established the rule, peculiar to this branch of the law, that a person is conclusively presumed to be capable of having children no matter what his or her age or physiological condition may be. Particularly when taken in conjunction with the

principle that it is hypothetical and not actual events which determine the applicability of the perpetuities rule, this conclusive presumption of fertility has added its contribution to the invalidation of dispositions which might otherwise have avoided infringing the Rule. Clause 8(1)(a) will replace the presumption laid down by Jee v. Audley, which is now known to be quite out of accord with the facts of human physiology, with a presumption that a male over but not under the age of twelve years can have a child, and that a female can have a child at the age of twelve years or over, but not under that age nor over the age of fiftyfive. Clause 8(1)(b) will render the foregoing presumption rebuttable to the extent of allowing evidence that a living person will or will not be capable of having a child at the relevant time.

9. Reduction of age and exclusion of class members to avoid remoteness. Clause 9 deals with what Morris & Leach (p. 53) describe as "perhaps the most common single cause of violations of the Rule - namely, the attempt of settlors and testators to withhold capital from unborn persons until after they have attained twentyfive years". Such attempts are commonly associated with gifts in favour of a class where what is sometimes referred to as the "all or nothing rule" applies, i. e., where the gift is in favour of a class of persons some of whom may not be ascertained within the perpetuity period, the whole gift is void, even though there may be ascertained members of the class who are capable of taking without infringing the Rule.

A recent Queensland case is Re Clark [1968] Qd. R. 584, in which a testator disposed of his estate on trust to pay part of the income therefrom to his two sons in equal shares during their lives, and after their deaths upon trust both as to capital and income for such of their children as should attain twentyfive years. Since the gift to the grandchildren was a class gift, and since a grandchild might not have attained twentyfive years of age until more than twentyone years after deaths of both sons, the gift to the grandchildren was void for remoteness. Cf. also Re Zahel [1931] St. R. Qd. 1.

Clause 9(1), like s. 163 of the Law of Property Act 1925 (which follows a provision introduced in Victoria in 1918 and adopted in New South Wales in 1919), will alter the effect of a gift in the foregoing terms by providing in substance that a disposition in favour of persons upon their attaining an age in excess of twentyone years which would not be void for remoteness if the specified age were twentyone years is to be treated as though the age so specified had been that age which would have prevented the disposition from being void. Sub-clause (2) is directed to the case of a disposition in which different ages exceeding twentyone years are specified, and sub-cl. (3) excludes from a class potential members or unborn persons if the effect of their inclusion would be to prevent the clause from operating to save the disposition from being void for remoteness. Likewise, sub-cl. (4), in the case of a disposition to which sub-cl. (3) does not apply, excludes from the benefit of the disposition potential members of a class or unborn persons who would cause the disposition to be treated as void for remoteness unless their exclusion would exclude the class thence forth. This will save a gift to a composite class, e. g. of children and grandchildren, which is not within the preceding provisions.

Morris & Leach (p. 55) describe the English provision as "wise and beneficent" and remark that the almost complete lack of reported cases on its application, and that of its Australasian

counterparts, shows that it has caused no trouble in practice and can be easily and simply applied. In Re Clark (supra) attention was drawn to the advantages of the English and Victorian provisions, and their adoption in cl. 9 will greatly reduce the injustice which the Rule is capable of producing.

Although a majority of the Law Reform Committee in England recommended that the operation of the "wait and see" rule should be postponed to the provision corresponding to cl. 9, the minority view has been preferred both by Morris & Leach and other writers. It has been adopted in the English, Western Australian, New Zealand and Victorian statutes, and cl. 9(5) is modelled on these provisions.

10. Unborn husband and wife. Another frequent cause of invalidity is the case of the unborn widow or widower. A gift to such of the children of a person already married as are alive at the death of that person is invalid because of the possibility that that person may lose his (or her) spouse and marry an individual not born at the time the disposition was created. In the example given the children cannot attain a vested interest until after the death of the new spouse, an event which may not happen until the dropping of the last life in being: see Hodson v. Ball (1845) 14 Sim. 558. Clause 10 proposes to displace this rather remote contingency by treating the widow or widower of a person who is a life in being for the purpose of the Rule as a life in being for the purpose of (a) a disposition in favour of the widow or widower, or (b) a disposition in favour of a charity, or of a person, or of a class of persons, attaining a vested interest on or after the death of the survivor of the life in being and that widow or widower, or on or after the happening of any contingency during his or her lifetime. This will have the effect of saving a gift in favour of children in the circumstances mentioned above.

11. Dependent disposition. A disposition which is dependent or expectant upon a prior disposition which is void for remoteness is itself invalid even if intrinsically valid. This rule is abolished by cl. 11, as is the rule, or supposed rule, that the vesting of an interest is not accelerated by failure of a prior interest because of remoteness.

12. Abolition of the double possibility rule. The rule against double possibilities, often known as the rule in Whitby v. Mitchell (1890) 44 Ch. D. 85 from the case in which its validity was re-affirmed in modern times, prescribes that after a limitation for life to an unborn person any further limitation to his issue is void. The rule is sometimes referred to as the "old rule against perpetuities" and it seems to be almost universally agreed that its retention (or resurrection) after the establishment of the modern rule against perpetuities was a judicial mistake which was founded at least in part on what Morris & Leach (p. 261, n. 33) describe as a travesty of legal history. New Zealand took the lead in abolishing the rule as long ago as 1842, and this step has also been taken in England, Victoria, New South Wales and Western Australia.

Clause 12 allows the form of s. 161 of the English Law of Property Act in preference to s. 12 of the Victorian Perpetuities and Accumulations Act, which merely confirms the earlier abolition of the rule in Victoria.

13. Restrictions on the perpetuity rule. Clause 13 specifies a number of interests to which it is declared the Rule does not apply and shall be deemed never to have applied. The object of this provision is the "removing of doubts" and it is founded ultimately on s. 162 of the English Law of Property Act, 1925.

14. Options. The Rule does not apply to contracts, but has been held to apply to an option to purchase land since, when exercised, this creates an equitable interest in the land: L. S. W. Ry. v. Gomm (1882) 20 Ch. D. 562, and it has also been held to apply to an option to purchase the reversion granted to a tenant under a lease: Woodall v. Clifton [1905] 2 Ch. 257. The invalidity which this might be expected to produce does not, however, prevent an action for damages against the giver of the option: Worthing Corporation v. Heather [1906] 2 Ch. 532, nor even an action for specific performance against him: Hutton v. Watling [1948] Ch. 26. Subject to two qualifications cl. 14(1) proposes to reverse the second of the foregoing rules so that in future the Rule will not ordinarily apply to an option to purchase the reversion on a lease.

Clause 14(2) affirms the principle that an option to purchase (other than an option conferred on the lessee to purchase the reversion) and a right of pre-emption (on which there is Canadian authority) are within the Rule if they are exercisable more than twentyone years from the date on which they are granted, provided that they are not exercised within that period. Where, however, the option or right of pre-emption is void no remedy shall lie to enforce it, thus reversing the principle of Worthing's case and Hutton v. Watling, *supra*. This sub-clause does not apply to options or rights of pre-emption conferred by will, and it expressly preserves from invalidity options to renew and rights of pre-emption contained in leases.

15. Determinable interests. A person who grants or devises a determinable fee simple is left with a possibility of reverter in the land, i. e. a prospect that the estate in fee simple so granted or devised will determine, with the consequence that the full fee simple interest will revert or be restored to him. As the authorities now stand it seems that the Rule does not apply to a possibility of reverter (but see Hopper v. Liverpool Corporation (1944) 88 Sol. Jo. 213). On the other hand, where the interest remaining in the grantor is not a right of reverter on determination of a determinable fee, but a right of re-entry arising on breach of a condition subsequent which defeats the fee simple (sometimes called a "conditional fee simple"), the Rule applies to that right of re-entry: Re Trustees of Hollis' Hospital and Hague's Contract [1899] 2 Ch. 540.

Morris & Leach (at p. 213) are strongly of opinion that the Rule should apply both to possibilities of reverter and rights of re-entry, and in support cite the Massachusetts case of Brown v. Independent Baptist Church of Woburn, 325 Mass. 645 (1950) as an illustration of the extreme difficulties which are capable of arising if the former are not brought within the Rule. Clause 15(1)(a) and (c) adopts the authors' view and cl. 15(1)(b) proposes that the possibility of a resulting trust on determination of any other determinable interest in property (e. g. personalty) should also be brought within the Rule. However, sub-cl. (2) will preserve the principle in Christ's Hospital v. Grainger (1849) 1 Mac. & G. 460, which excepts from the operation of the Rule a gift over from one charity to another.

16. Trustee powers and superannuation funds. Clause 16 is identical with what was to have been the proposed cl. 106 of the Trusts Bill. Obviously, duplication of this provision in two Acts is neither necessary nor desirable, and we consider that the appropriate place at which to locate the provision is the Perpetuities and Accumulations Act rather than a Trusts Act. Its inclusion in the Trusts Bill was, however, rendered necessary by the fact that the Bill, as it appeared in the Commission's working paper, proposed the repeal of the whole of The Trustees and Executors Acts including s. 59 (which is the existing provision placing superannuation funds beyond the scope of the Rule) and that some provision was needed in order to preserve the effect of s. 59 prior to the passing into law of cl. 16 of the Perpetuities and Accumulations Act. In these circumstances two alternatives appeared to be open. One was to ensure that the two Bills came into operation on the same day. The other, and in our view the preferable course is for provision to be made in the Trusts Act excepting s. 59 from the general repeal of The Trustees and Executors Acts, and for the insertion in the proposed cl. 16 of the Perpetuities and Accumulations Act of a sub-cl. (3) reading as follows:-

(3) Section 59 of "The Trustees and Executors Acts, 1897 to 1964" is repealed.

The enactment of the Perpetuities and Accumulations Act will then have the result of completing the repeal of The Trustees and Executors Acts if the Trusts Bill has already been brought into force, or of preparing the way for such repeal if it has not.

Although the interests of beneficiaries under a trust must vest within the perpetuities period, it is only rarely that the powers given to trustees by the trust instrument are expressed to be limited within that period. This is because the courts have adopted the view that powers ancillary to a trust subsist only during the subsistence of the trust. Once all the beneficiaries become entitled to their interests, which must be within the perpetuities period, the powers of the trustees are determined. (Peters v. Lewes and East Grimstead Railway Co. (1881) 18 Ch. D. 429 per Jessel M. R. at pp. 433-434). But if there is an indication in the trust instrument that a trustee's power is intended to be exercised beyond the perpetuities period, the power will be bad.

There is at least one occasion, however, where it is desirable to enable a trustee to exercise powers beyond the perpetuities period and that is where one of the beneficiaries becomes entitled to an annuity within the period, which will continue to be paid beyond the period. A settlor may well give the trustee powers to sell or lease trust property in order to raise the annuity; but those powers will be void if it appears that they were intended to be exercised outside the perpetuities period. Powers have been held to be void in such circumstances in In re Allot [1924] 2 Ch. 498 and Davis v. Samuel (1928) 28 S. R. (N. S. W.) 1.

As a result of Davis v. Samuel, New South Wales passed a remedial measure, s. 27A of the Trustee Act, and that has been adopted in Victoria (s. 73) and Western Australia (s. 29).

In view of the fact that it has been recommended in the report on Trusts that certain statutory powers given to trustees should be exercisable by them notwithstanding any lapse of time or that all the beneficiaries are entitled, of full age and sui juris (see cl. 31(2) of the Trusts Bill), it seems proper to recommend that

powers given to the trustee by the trust instrument, being powers ancillary to the interests created thereby, should also be allowed to subsist similarly.

The relevant section of the Victorian Trustee Act contains a provision which appears as s. 59 of the Queensland Acts (added in 1961) and which is intended to save trusts or funds established for superannuation and similar purposes. The law relating to superannuation funds is far from clear, and in particular employers' discretionary powers attached to superannuation schemes may well contravene the perpetuities rule abovementioned. This Victorian provision is now contained in s. 17(1) of the Perpetuities and Accumulations Act 1968 (Victoria) which has extended it to superannuation funds other than those limited to employees. We recommend the adoption of these later provisions.

17. Non-charitable purpose trusts. A trust for a purpose (as distinct from an individual) which is not charitable is void: see Re Endacott [1960] Ch. 232. However, as "concessions to human weakness", certain exceptions to this rule have been allowed, e. g. trusts for the maintenance of tombs or pet animals, provided that the perpetuity period is not exceeded. If the period is exceeded the trust is void, and cl. 17(1) is intended to ensure that these principles are not affected.

18. Accumulations. The Accumulations Act, 1800, 39 & 40 Geo. III, c. 67, commonly known as the Thellusson Act, was a statutory attempt to extend the perpetuities rule to accumulations of interest directed to take place over a long period. The Act was the consequence of a remarkable attempt by one Peter Thellusson in 1797 to create a trust for the accumulation at compound interest of his considerable estate for a period extending to and through the lives of his sons, grandsons and great-grandsons. Morris & Leach (at p. 303) say of the Act that:-

"it was rushed through Parliament in a panic, one year after the Thellusson dispositions had been upheld by the Court of Chancery, at a time when people had an almost superstitious fear of the power of compound interest. They were shocked at what they regarded as the heartlessness of the will, and fearful lest the great Thellusson whirlpool might draw into its vortex all the wealth of the country".

The description of the will as "heartless" is a reference to the fact that Thellusson was thought to have left little or nothing for his wife or children, an omission which is now capable of being corrected by application for testator's family maintenance, and the fears which prompted the Act are now known to have been exaggerated.

Queensland shares with Tasmania, Alberta, Manitoba, Newfoundland and Saskatchewan the distinction of being among the few common law jurisdictions in which the original Act still applies: see Re Goggs [1909] St. R. Qd. 27. The Act has proved remarkably difficult to interpret and apply and Morris & Leach record that by 1968 there were some 180 reported cases on the subject - an average of one a year since it was passed. Most American jurisdictions in which the statute was originally adopted have now repealed it, and there is no doubt that its repeal is long overdue in Queensland. Clause 18(3) will effect this step, whilst sub-cl. (1) proposes a

reversion to the simple common law rule which existed before the Act was passed, i. e., an accumulation will be valid if a gift of the accumulated income would itself be valid: see Thellusson v. Woodford (1799) 4 Ves. Jun. 227; (1805) 11 Ves. Jun. 112.

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A Bill to effect Reforms in the Rule of Law commonly known as the Rule against Perpetuities and to Abolish the Rule of Law commonly known as the Rule against Accumulation, and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

Perpetuities and Accumulations Act 1968 (Vic.)
s.1;
Cf. Law Reform (Property, Perpetuities and Succession) Act 1962 (W.A.) s.2;
Perpetuities and Accumulations Act 1964 (U.K.)
s.15;
Perpetuities Act 1964 (N.Z.) s.3.

Cf. Vic. s.2;
W.A. s.4;
U.K. s.15;
N.Z. s.2.

1(1). Short title. This Act may be cited as the Perpetuities and Accumulations Act 197 .

(2) Commencing date. This Act shall come into operation on the first day of

(3) Act and rule against perpetuities to bind Crown. This Act and the rule against perpetuities binds the Crown (except in respect of dispositions of property made by the Crown) not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

2. Interpretation. (1) In this Act unless inconsistent with the context or subject-matter -

"court" means the Supreme Court or a Judge thereof;

"disposition" includes the conferring or exercise of a power of appointment or any other power or authority to dispose of an interest in or a right over property and any other disposition of an interest in or right over property; and references to the interest disposed of shall be construed accordingly;

"instrument" includes a will, and also includes an instrument, testamentary or otherwise exercising a power of appointment whether general or special but does not include an Act of Parliament;

"power of appointment" includes any discretionary power to transfer or grant or create a beneficial interest in property without the furnishing of valuable consideration;

"property" includes any interest in real or personal property and any thing in action;

"will" includes a codicil.

(2) For the purposes of this Act a disposition contained in a will shall be deemed to be made at the death of the testator.

(3) For the purposes of this Act a person shall be treated as a member of a class if in his case all the conditions identifying a member of the class are satisfied, and shall be treated as a potential member if in his case only one or some of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

Cf. Vic. s. 3;
W.A. s. 3;
U.K. s. 15;
N.Z. s. 4.

3. Application. (1) Save as otherwise provided in this Act, this Act shall apply only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument whereby a special power of appointment is exercised shall apply only where the instrument creating the power takes effect after that commencement: Provided that section 4 shall apply in all cases for construing the foregoing reference to a special power of appointment.

(2) This Act shall apply in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

Cf. Vic. s. 4;
W.A. s. 16;
U.K. s. 7;
N.Z. s. 5.

4. Powers of appointment. For the purposes of the rule against perpetuities a power of appointment shall be treated as a special power unless:-

- (a) in the instrument creating the power it is expressed to be exercisable by one person only; and
- (b) it could at all times during its currency when that person is of full age and capacity be exercised by him so as immediately to transfer to or otherwise 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 mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

Perpetuities

Cf. Vic. s. 5;
W.A. s. 5;
U.K. s. 1;
N.Z. s. 6.

5. Power to specify perpetuity period. (1) Save as in this Act otherwise provided where the instrument by which any disposition is made so provides the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration shall be such number of years not exceeding eighty as is specified in the instrument as the perpetuity period applicable to the disposition.

(2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.

(3) If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purposes of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

Cf. Vic. s. 6;
W.A. s. 7;
U.K. s. 3;
N.Z. s. 8.

6. "Wait and see" rule. (1) Where apart from the provisions of this section and of section 9 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 exercisable 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) Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted:

Provided however that in the case of a disposition to a class of persons or to one or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

Cf. Vic. s. 7;
W.A. s. 8;
N.Z. s. 22.

7. Power to apply to court for declaration as to validity. (1) A trustee of any property, or any person interested under or on the invalidity of, a disposition of property may at any time apply to the court for a declaration as to the validity, in respect to the rule against perpetuities, of a disposition of that property.

(2) The court may, on an application under subsection (1), make a declaration on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is

made; but the court shall not make a declaration in respect of any disposition the validity of which cannot be determined at the time at which the court is asked to make the declaration.

Cf. Vic. s. 8;
W.A. s. 6;
U.K. s. 2;
N.Z. s. 6.

8. Presumptions and evidence as to future parenthood. (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time, then:-

- (a) it shall be presumed, subject to paragraph (b), that a male can have a child at the age of twelve years or over but not under that age and that a female can have a child at the age of twelve years or over but not under that age or over the age of fiftyfive years; but
- (b) in the case of a living person evidence may be given to show that he or she will not be capable of having a child at the time in question.

(2) Where any such question is decided by treating a person as incapable of having a child at a particular time and he or she does so, the court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.

(3) Subject to subsection (2), where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

(4) In the foregoing provisions of this section references to having a child are references to begetting or giving birth to a child; but those provisions (except subsection (1)(b) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her capacity at that time to beget or give birth to a child.

Cf. Vic. s. 9;
W.A. s. 9;
U.K. s. 4;
N.Z. s. 9.

9. Reduction of age and exclusion of class members to avoid remoteness. (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding twentyone years and it is apparent at the time the disposition is made or becomes apparent at a subsequent time -

- (a) that the disposition would apart from this section be void for remoteness; but
- (b) that it would not be so void if the specified age had been twentyone years -

the disposition shall be treated for all purposes as if instead of being limited by reference to the age in fact specified it had been limited by reference to the age nearest to that age which would if specified instead, have prevented the disposition from being so void.

(2) Where in the case of any disposition different ages exceeding twentyone years are specified in relation to different persons:-

- (a) the reference in paragraph (b) of subsection (1) to the specified age shall be construed as a reference to all the specified ages; and
- (b) that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.

(3) Where the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class prevents the foregoing provisions of this section from operating to save a disposition from being void for remoteness those persons shall thenceforth be deemed for all the purposes of the disposition to be excluded from the class and the said provisions shall thereupon have effect accordingly.

(4) Where in the case of a disposition to which subsection (3) does not apply it is apparent at the time the disposition is made or becomes apparent at a subsequent time that apart from this subsection the inclusion of any persons, being potential members of a class or unborn persons who at birth could become members or potential members of the class would cause the disposition to be treated as void for remoteness those persons shall unless their exclusion would exhaust the class thenceforth be deemed for all the purposes of the disposition to be excluded from the class.

(5) Where this section has effect in relation to a disposition to which section 6 applies the operation of this section 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.

Cf. Vic. s.10;
W.A. s.12;
N.Z. s.13;
U.K. s.5.

10. Unborn husband or wife. The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities shall be deemed to be a life in being for the purpose of:-

- (a) a disposition in favour of that widow or widower; and
- (b) a disposition in favour of a charity which attains or of a person who attains or of a class the members of which attain according to the terms of the disposition a vested interest on or after the death of the survivor of the said person who is a life in being and that widow or widower, or on or after the death of that widow or widower or on or after the happening of any contingency during her or his lifetime.

Cf. Vic. s.11;
W.A. s.13;
U.K. s.6;
N.Z. s.14.

11. Dependent dispositions. A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

Cf. Eng.
L.P.A.,
s.161.

12. Abolition of the rule against double possibilities. (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished.

(2) This section applies only to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

Cf. Vic.
s. 13.

13. Restrictions on the perpetuity rule. (1) For removing doubts, it is hereby declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied -

- (a) to any power to distrain on or to take possession of land or the income thereof given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or
- (b) to any rentcharge created only as an indemnity against another rentcharge, although the indemnity rentcharge may arise or become payable only on breach of a condition or stipulation; or
- (c) to any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rentcharge as an indemnity against another rentcharge; or
- (d) to any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of -
 - (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals;
 - (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops thereof;
 - (iii) executing repairs, alterations or additions to any adjoining land, or the buildings and erections thereon;
 - (iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water-pipes, gas-pipes, electric wires or cables or other like works.

(2) This section shall apply to instruments coming into operation before or after the commencement of this Act.

(3) In this section "instrument" includes a statute creating a settlement.

Cf. Vic. s. 14;
W.A. s. 14;
U.K. ss. 9, 10;
N.Z. s. 17.

14. Options. (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the terms of a lease if -

- (a) the option is exercisable only by the lessee or his successors in title; and

- (b) it ceases to be exercisable at or before the expiration of one year following the determination of the lease.

This subsection shall apply in relation to an agreement for a lease as it applies in relation to a lease, and "lessee" shall be construed accordingly.

(2) An option to acquire an interest in land (not being an option to which subsection (1) refers) or a right of pre-emption in respect of land, which according to its terms is or may be exercisable at a date more than twentyone years from the date of its grant shall after the expiration of twentyone years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect, but -

- (a) this subsection shall not apply to an option or right of pre-emption conferred by will; and
- (b) nothing in this subsection shall affect an option for renewal or right of pre-emption contained in a lease or an agreement for a lease.

Cf. Vic. s.15;
W.A. s.15;
U.K. s.12;
N.Z. s.18.

15. Determinable interests. (1) The rule against perpetuities shall apply -

- (a) to a possibility of reverter in land on the determination of a determinable fee simple; in which case if the fee simple does not determine within the perpetuity period it shall thereafter continue as a fee simple absolute;
- (b) to a possibility of a resulting trust on the determination of any other determinable interest in property; in which case if the first interest created by the trust does not determine within the perpetuity period the interest it creates shall thereafter continue as an absolute interest;
- (c) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent and to an equivalent right in the case of property other than land; in which case if the right of entry or other right is not exercised within the perpetuity period the fee simple shall thereafter continue as an absolute interest and any such other interest in property shall thereafter continue free from the condition.

(2) This section shall apply whether or not the determinable or conditional disposition is charitable except that the rule against perpetuities shall not apply to a gift over from one charity to another.

(3) Where a disposition is subject to any provision that causes an interest to which paragraph (a) or paragraph (b) of subsection (1) applies to be determinable, or to any condition subsequent giving rise on breach thereof to a right of re-entry or an equivalent right in the case of property other than land, or to any exception

or reservation the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising by virtue of the provision condition subsequent exception or reservation.

Cf. Trustee Act (No. 6401 of 1958 Victoria) s. 73; Trustee Act 1925-1942 (N.S.W.) s. 27A; Trustees Act 1962-1968 (W.A.) s. 29.

16. Trustee powers and superannuation funds. (1) The rule of law known as the rule against perpetuities does not apply and shall be deemed never to have applied so as to render void -

- (a) a trust or power to sell property, where a trust of the proceeds of sale is valid;
- (b) a trust or power to lease or exchange property, where the lease or exchange directed or authorised by the trust or power is ancillary to the carrying out of a valid trust;
- (c) any other power which is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property;
- (d) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for the directions, officers, servants or employees of any employer or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any such directors, officers, servants or employees or for any persons duly selected or nominated for that purpose by any such directors, officers, servants or employees pursuant to the provisions of such trust or fund; or
- (e) a trust or fund established for the purpose of making provision by way of superannuation for persons (not being employees) engaged in any lawful profession, trade, occupation or calling or the spouses, children, grandchildren, parents, dependants or legal personal representatives of any of those persons or for any persons duly selected or nominated for that purpose pursuant to the provisions of the trust or fund;
- (f) any provision for the remuneration of trustees.

Cf. The Trustees and Executors Acts, 1897 to 1964 (Qld.) s. 59; Vic. No. 7750, s. 17(1)(a).

Cf. Vic. No. 7750, s. 17(1)(b).

(2) This section does not -

- (a) render any trustee liable for any acts done prior to the commencement of this Act for which that trustee would not have been liable had this section not been enacted; or
- (b) enable any person to recover any money distributed or paid under any trust, if he could not have recovered that money had this section not been enacted.

(3) Section 59 of "The Trustees and Executors Acts, 1897 to 1964" is repealed.

Cf. Vic. s. 18;
U.K. s. 15;
N.Z. s. 20.

17. Non-charitable purpose trusts. (1) Except as provided in subsection (2) nothing in this Act shall affect the operation of the rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.

(2) If any such trust is not otherwise void the provisions of sections 5 and 6 shall apply to it and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period but not thereafter.

Accumulations

Cf. Vic. s. 19;
W.A. s. 17;
U.K. ss. 13, 14;
N.Z. s. 21.

18. Accumulation of income. (1) Where property is settled or disposed of in such manner that the income thereof may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise.

(2) Nothing in this section shall affect the power of any person or persons to terminate an accumulation that is for his or her benefit and any jurisdiction or power of the court to maintain or advance out of accumulations or any power of a trustee under the Trusts Act 197 or under any other Act or law or under any instrument creating a trust or making a disposition.

(3) The Imperial Act 39 & 40 Geo. III, c. 67 (the Accumulations Act, 1800) is repealed.
