

SCOTTISH LAW COMMISSION

Memorandum

on

Restrictions on the Creation of Liferents

[This Memorandum is circulated for comment and criticism and does not represent the concluded views of the Scottish Law Commission.]

I Introduction

1. The purpose of this Memorandum is to set out difficulties which arise in the construction and effect of the statutory restrictions on creation of liferents contained in section 48 of the Entail Amendment Act 1848 and section 9 of the Trusts (Scotland) Act 1921, and to suggest possible amendments to overcome these difficulties.

II The present law

2. In the following paragraphs we set out the statutory enactments which "are aimed at preventing any perpetual succession with regard to heritable [and moveable] property".¹

3. Section 48 of the Entail Amendment Act 1848 (c.36) imposes restrictions on the creation of liferents affecting heritable property and provides in relation to deeds dated on or after 1st August 1848 as follows:-

"48. It shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August one thousand eight hundred and forty-eight, be held in liferent by a party of full age born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be

¹Earl of Moray 1950 S.C. 281, per Lord Mackintosh at p. 284.

qualified; and such party shall be deemed and taken to be the fee simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session, in the like form and manner, and in the like terms, and with the like operation and effect, as is hereinbefore provided with reference to an act and decree of the said court in the case of deeds of trust: Provided always, that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire."

4. Section 8 of the Entail (Scotland) Act 1914 (c.43) deals with such deeds in so far as they are dated before 1st August 1848 and in certain circumstances deems them to be dated 10th August 1914: (The date of the passing of the Act of 1914). The relative part of the said section 8 is as follows:-

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"8. In any case where -
(b) the provisions of section forty-eight of the said Act would apply to any deed and to the right of any party thereunder;

if such trust disposition, or settlement, or other deed of trust, or deed, or tack, assignation of tack, or other deed or writing, as the case may be (herein-after in this section referred to as "such writing"), had been dated on or after the first day of August one thousand eight hundred and forty-eight, the provisions of the said sections respectively shall, from and after the passing of this Act, apply to such writing and to the right of any party thereunder, notwithstanding that the same be dated prior to the said first day of August; provided that in the application of the said provisions respectively to such writing, and to the right of any party thereunder, the date of such writing shall be deemed to be the passing of this Act."

5. Section 9 of the Trusts (Scotland) Act 1921 (c.58) as amended imposes similar (but not identical) restrictions to those imposed by the Act of 1848 but in respect of moveable property and provides in relation to deeds dated after 31st July, 1868 as follows:-

"9. It shall be competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in Scotland in favour only of a person in life at the date of the deed constituting or reserving such liferent, and, where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the thirty-first day of July, eighteen hundred and sixty-eight, (the date of any testamentary or mortis causa deed being taken to be the date of the death of the granter, and the date of any contract of marriage being taken to be the date of the dissolution of the marriage) be held in liferent by or for behoof of a person of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such person, and, where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such person: Provided always that, where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the transference of a portion of such estate to any of the beneficiaries in terms of this section shall be borne by the beneficiary in whose favour the transference is made."

6. Section 45 of the Conveyancing (Scotland) Act 1924 (c.27) deals with such deeds as are covered by paragraph 3 above but in so far as they are dated on or before 31st July 1868 and in certain circumstances deems them to be dated 1st August 1924 (the date of the passing of the Act of 1924). The provisions of said section 45 are as follows:-

"45. In any case where the provisions of section nine of

the Trusts (Scotland) Act, 1921, would apply to any deed, and to the right of any party thereunder if such deed had been dated after the thirty-first day of July, eighteen hundred and sixty-eight, the provisions of the said section shall, from and after the passing of this Act, apply to such deed and to the right of any party thereunder notwithstanding that the same be dated on or prior to the said thirty-first day of July, eighteen hundred and sixty-eight:

Provided that, in the application of the said provisions to the deeds to which this section refers and to the right of any party thereunder, the date of such deeds shall be deemed to be the date of the passing of this Act."

I Criticisms of the present law

7. Since the coming into operation of the Succession (Scotland) Act 1964, heritable and moveable property devolve in substantially the same way and it seems, accordingly, desirable that the differences created by the 1848 and 1921 Acts in relation to liferents of heritable and moveable property respectively should be removed. These differences are:-

(a) While under the 1848 Act (dealing with heritage) and the 1921 Act (dealing with moveables) it is competent to create a liferent in favour only of a party in life at the date of the deed which creates it, the 1848 Act provides that such a party may, when he attains majority, obtain a decree of the Court of Session declaring that he is fee simple proprietor of the liferented estate, whereas the 1921 Act provides that the trustees are bound to convey the estate in fee to the liferenter on his attaining majority. In this connection, it would appear that under the 1848 Act a liferent of heritage could continue after the liferenter attained majority if he did not present a petition to the Court for a decree declaring him to be fee simple proprietor¹. In Reid's case, Lord President Clyde at page 753, referring to the provisions of the 1921 Act,

Crichton Stuart's Tutrix 1921 S.C. 840; Reid's Trs. v. Dashwood 1929 S.C. 748, per Lord President Clyde at p. 753.

said "the second part of the section [9] by its own terms converts the liferent into a fee."

(b) In the case of the 1848 Act, the restriction applies to a liferent in favour of a person born after the date of execution of the deed which creates it¹, whereas in the case of the 1921 Act it is expressly provided that for the purpose of the restriction the date of any mortis causa or testamentary deed is the date of death of the grantor and in the case of any contract of marriage is the date of dissolution of the marriage.

8. In both section 48 of the 1848 Act and section 9 of the 1921 Act the first part makes competent a liferent in favour only of a person "in life" at the date of the deed, whereas the second and operative part refers to a person "born after" the date of the deed. Hence it was held that a liferenter who was in utero at the date of the deed (under section 9 the date of death) was born after the relevant date and so was entitled to the fee.² This runs counter to the normal legal inference that a posthumous child must be treated as having been born before the death of the testator, an inference which rests on the desire of the law to give effect to what is presumed to have been the intention of the testator.³

9. There is an apparent illogicality in that both section 48 of the 1848 Act and section 9 of the 1921 Act begin by dealing with a provision which is stated in effect to be 'illegal', and then go on to give such a provision a semblance of legality. Thus the first part of each section provides that it shall be competent to

¹ Earl of Moray supra

² Reid's Trs. v. Dashwood supra

³ Reid's Trs. v. Dashwood supra, per Lord Blackburn at p. 756; Allan's Trs. v. Allan 1949 S.L.T. (Notes) 3; and Cox's Trs. v. Cox 1950 S.C. 117.

constitute a liferent in favour only of a person in life at the date of the grant (either date of execution or date of death as the case may be), but the second and operative part makes no provision as to what happens in a liferent is created contrary to the terms of the first part until the person concerned attains majority, when, under the 1848 Act, he may claim the fee simple by application to the Court, or, under the 1921 Act, the trustees must convey the estate to him. This apparently has the results (a) that until the person concerned attains majority the liferent stands good notwithstanding the contravention of the first part, and (b) that if the person concerned dies before attaining majority the fee passes as directed by the deed.¹

10. Neither statute makes clear whether, when the liferent is created by the subsequent exercise of a power of appointment contained in the original settlement, the prohibition is intended to render ineffective a liferent in favour of a person in life at the date of the exercise of the power but not in life at the date of the original settlement. The point has been settled, ^{by a special power of appointment} although not without some conflict of judicial opinion, in favour of the operative date being that of the original settlement.²

IV Proposals

11. It is considered that for the reason given in paragraph 7 above amending legislation should remove the distinction as between heritable and moveable property in relation to restriction on the creation of liferents.

¹Reid's Trs. v. Dashwood *supra* per Lord President Clyde at p. 752; Muir's Trs. v. Williams 1945 S.C. (H.L.) 47, per Lord Thankerton at pp. 52, 53; Shiell's Trs. v. Shiell's Trs. (1906) 8 F. 848.

²Muir's Trs. v. Williams *supra*; Malcolm's Trs. v. Malcolm 1950 S.C. (H.L.) 17.

2. It is considered that amending legislation should provide that if a liferent is created in any deed in favour of a person who is not born or in utero at the date of the deed (which for this purpose should, in the case of any testamentary or mortis causa deed, be deemed to be the date of the death of the granter and, in the case of any contract of marriage, be deemed to be the date of dissolution of the marriage), the liferent in favour of such person should subsist only until he or she has attained the age of 21 or as fixed under that age, and upon such person attaining majority the property liferented should belong absolutely to such person and, where it was vested in trustees, the trustees should thereupon convey it or make it over to such person at his or her expense. The main arguments in favour of this are -

(1) It would overcome the difficulty (see paragraph 8) that arose in Reid's Trs. v. Dashwood (supra). That a settlor should be able to provide a liferent in favour of a beneficiary who is in utero would detract little from the policy underlying the statutory provisions, and it would bring this sector of the law into conformity with the normal legal inference which treats a posthumous child as having been born before the death of a testator.¹

(2) If the provisions as regards liferents of heritable and moveable property respectively are to be uniform those of the 1921 Act regarding the effective date of a testamentary deed or contract of marriage are preferable to those of the 1848 Act. The reasons for not providing that the date of a testamentary deed affecting heritable property was the date of death of the testator have now gone, as it is now competent - it was not in 1848 - to test on heritable property.²

¹Reid's Trs. v. Dashwood supra, per Lord Blackburn at p. 756.

²Reid's Trs. v. Dashwood supra per Lord President Clyde at pp. 752, 753 and Earl of Moray supra per Lord Mackintosh at p. 284.

(3) The suggestion that the provision should have the effect of a liferent until the beneficiary attains majority is simply giving statutory effect to the existing law as decided in Shiell's Trs. v. Shiell's Trs. supra. Further, it is sensible. The beneficiary would not usually be seriously inconvenienced by not having control of the capital until he or she attained 21, and if the beneficiary died before attaining 21 he or she would not normally leave dependants who would be in need, and so the balance of advantage would probably be in favour of benefiting the persons subsequently called under the settlement. The object of the legislation is to prevent funds being held in liferent indefinitely or for unduly long periods: it is not to defeat the wishes of a settlor as to the disposal of his estate when, in the events which happen, no lengthy liferent results.

(4) The provisions of the 1921 Act whereby the trustees are directed to convey are clearly preferable to those of the 1848 Act when the liferenter must apply to the Court. There is no purpose in having Court procedure when conveyance can be directed by statute.

13. The amending legislation should provide that, where a liferent has been created in the exercise of any ^{special} power conferred under an antecedent deed, the date (as defined before) of the authorising deed and not the date of exercise of the power, would be the relevant date for the purpose of the restriction. This would have statutory effect to the decisions in Muir's Trs. v. Williams supra and Malcolm's Trs. v. Malcolm supra.

14. The new provisions should apply only to deeds executed after the coming into force of the legislation, and the 1848 and 1921 Acts should be amended accordingly so that they apply only to deeds executed before the coming into operation of the new legislation.