VESTING: THE CLASSIFICATION CHARADE

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[*The writer argues that the technical concept of vesting in interest, as a test for determining the present existence of property not yet in possession, no longer states the law in Australia. By taking the interests of persons entitled in default of a power of appointment, he shows that the courts no longer use this rigid test to actually decide cases, but depend rather on policy and construction factors. Vesting in interest, he concludes, is a misleading anachronism in the law of trusts.*]

Vesting in interest is a highly esoteric concept which has traditionally dominated the law of trusts. It is a concept which has outlived its usefulness. This article argues not only that the law should discard vesting as a concept[1] for deciding practical problems in the law of trusts and other future interests, but that the pragmatic common law has done so already. The classification into vested and contingent interests is now used by the courts to state the consequences of what they do. It no longer helps to predict what an Australian court will decide in a particular fact situation. This will be demonstrated by choosing only one important area from the many in which the concept intrudes: the practical questions concerning the rights of the persons entitled where there is a default in the exercise of a power of appointment.

Unfortunately, the vesting concept, when more influential, was made the basis of schemes of legislation in death duties and remoteness. The only remedy in this area is legislative action.

THE ACCEPTED VIEW ON VESTING

Fearne's classic definition of vesting in interest states:[2]

> [t]he present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines universally distinguishes a vested remainder from one that is contingent.

In terms of that accepted dogma, before an interest can vest in interest in a beneficiary only two conditions need to be satisfied:

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[1] Also argued by Waggoner, 'Reformulating the Structure of Estates: A Proposal for Legislative Action (1972) *Harvard Law Review* 729 and articles there cited.

[2] Fearne, *Contingent Remainders* (10th ed. 1844) 216. A recent authority on vesting: *Re Geering* [1962] 3All E.R. 1043 and cases cited there.

(1) The identity of the person to take that particular interest must be ascertained.

(2) All conditions precedent to the vesting must be satisfied.

According to that accepted dogma, the quantum of the interest is completely irrelevant to its vesting in interest. But does that state the law in Australia after *Norman v. Federal Commissioner of Taxation*?[3]

Where there is any ambiguity in the matter, the courts in the past showed a marked preference for early vesting. This preference was applied to the interests of the beneficiaries in default of a power of appointment by Lord Blackburn in *Chambers v. Smith*:[4]

> [i]t is judicious, and is common, both in *Scotland* and in *England*, to vest a fund subject to be divested on after events, rather than to keep it unvested and contingent till those events happen.

But that is a very weak and general maxim which will give way, it is submitted, to any good reason to hold to the contrary. All it amounts to is a preference by the Chancery Courts, following the strict and inflexible rules of the common law, for keeping equitable seisin of property in some person whenever it is possible, so that there is someone available to bring breaches of trust before the court. But the fallacy involved in attempting to create a continuous beneficial estate on the plane of time was exposed by Lord Radcliffe in *Commissioner of Stamp Duties (Queensland) v. Livingston*,[5] and *locus standi* to control erring trustees need not depend on a vested interest. So this, often inarticulate, premise no longer carries the same weight. The rigidity of the common law pattern of vested interests has no place in the flexible world of the twentieth century trust.

IS VESTING OF PRACTICAL IMPORTANCE?

The vesting problem is too often separated from its practical context. This becomes most obvious in the rarified atmosphere of that massive scholarly work by Simes and Smith.[6] Close attention to the complex rules for determining whether an interest is vested in interest invites the inference that the law of future interests forms one non-normative, inflexibly logical web. Nothing, of course, is further from the truth. Equitable remedies arise not from logical necessity but from policy constraints. If the Lord Chancellors had been strictly logical the use would never have existed. The mass of technical rules are apt to make one forget that the decision in a particular trust case, no less than in any other branch of law,

[3] (1963) 109 C.L.R. 9; see text at n. 42. [4] (1878) 3 App. Cas. 795, 816.

[5] [1965] A.C. 694 (P.C.). There is no need to assume that separate legal and equitable estates in physical property need exist at every given moment of time. Lord Radcliffe reasoned that Courts of Equity bring beneficial interests into being *only* when it is necessary in order to give effect to equitable doctrines.

[6] Simes and Smith, *Law of Future Interests* (2nd ed. 1956).

is determined by a series of competing policy and construction factors. When one attempts to predict which way a court will answer a particular problem about who is to take, the technical vesting rules shrink into insignificance.

Here is a good practical illustration. It was held by the House of Lords in *Burrell v. Attorney-General*[7] that a beneficiary who took in default of a mere power had a vested interest and yet the consequences normally associated with vesting did not follow. In this case, there was a non-exhaustive discretionary trust[8] to pay annual allowances, as the trustees should think fit, to Harry or his wife or children and after his death to his sons successively in tail male. There were similar gifts in default to his two brothers and their sons and there was a power to apply surplus income to reduce capital charges. There was an ultimate remainder to the testator's heirs and next of kin. Lord Russell was faced with the argument that there could not be a passing of property on Harry's death for death duty purposes because the property was vested all the time in the person entitled to the ultimate remainder (not to be confused with a person expressly entitled on default of appointment). He answered this argument in the following words:[9]

> [i]t will thus be seen that the interest of the testator's heir at law and next of kin in the property extends only to the balance (if any) of the net rents and profits accruing during the periods in which allowances are payable, which are not applied by the trustees in providing the allowances. . . . Even this balance they could not claim to have paid to them until either all the people who might be entitled to receive an allowance were dead, or (the entail having been barred) someone had become entitled to the property. . . . The heir at law and next of kin had no interest in corpus. Such interest as they had was *no doubt vested in them at the testator's death,* but the value and importance of it could be effectively gauged at the death of Harry. . . . The state of affairs which prevailed at Harry's death is sufficient to show that the beneficial interest of the heir at law and next of kin in the property was microscopic.

Lord Russell was thus able to say that the ultimate beneficiary had a vested interest but to dismiss that interest as 'so minute and so remote that it may for our present purpose be ignored'. And in *Burrell's* case[10] the beneficiary was generally entitled to the remainder, so the rights of the beneficiaries in default will be even weaker.

Lord Russell considered that the ultimate beneficiaries had a right only to that which remained after their interest came into possession. The *income* did not vest in them and divest on appointments and therefore the continued existence of the discretionary fund was a condition precedent to

[7] [1937] A.C. 286. See similarly *Re Alston* [1928] W.N. 41.
[8] A mere power of appointment exercizable by a trustee by virtue of his office.
[9] [1937] A.C. 286, 298-9; italics mine. [10] [1937] A.C. 286.

the ultimate beneficiaries getting anything. Yet Lord Russell also said that the interests of the ultimate beneficiaries were vested at the testator's death, when the power began to operate. So Lord Russell was able to give lip service to the hitherto accepted rule that the beneficiaries in default have a vested interest and yet avoid the consequences which would normally flow from that finding. The reasoning would have been clearer if he could have ignored the vesting charade altogether.

Let us compare that result with what Judges *say* about vesting. In *Commissioner of Stamp Duties (New South Wales) v. Sprague*[11] Menzies J. gave a classic statement of the accepted view as to when property vests in the beneficiaries in default of appointment:

> [s]uch a settlement vests the property subject to the power in the persons entitled in default of appointment until such time as the power is exercised, so that the exercise of the power divests the estates limited in default either wholly or in part and creates new estates according to the terms of the appointment.

ADAMSON V. ATTORNEY-GENERAL

The leading authority is the House of Lords decision in *Adamson v. Attorney-General.*[12] In this case, there was an *inter vivos* settlement on trustees to apply the capital of the trust fund (together with income accumulations) for such of the settlor's children as the settlor appointed by deed or will. So this case was concerned with a mere power of appointment over a capital fund. There was a separate power over the income, which was not material for the purposes of the case, with an express power to accumulate income. After the settlor's death, in default of appointment of the capital, it went on trust, a two-fifths share going to a particular son of the settlor, John Adamson, and the remaining three-fifths going to the settlor's other children (who were all daughters) equally. There were further provisions if the son or the other children did not attain vested interests. Estate duty was claimed on the basis that there was a passing of property under the general charging words of section 1 of the Finance Act 1894 or an interest arising under section 2(1)(d) of that Act. Section 2(1)(d), now repealed,[13] was complementary to the old section 2(1)(b); section 2(1)(b) dealt with interests ceasing on death and section 2(1)(d) with interests arising on death.

The House of Lords held by a majority of three to two, and on the assumption that section 1 was a separate charging provision,[14] that property did not pass on death under section 1. The majority of their Lordships spent most of their judgments on this point. They added, by a

[11] (1960) 101 C.L.R. 184, 195. [12] [1933] A.C. 257.
[13] Finance Act 1969 (Eng.), part V, Sch. 21.
[14] This assumption was refuted by later legislation: Finance Act 1969, s. 30(1).

majority of four to one and almost as an afterthought, that property did pass under section 2(1)(d), but that the value of the property passing was only the nominal difference in value between the certain, indefeasible interests the beneficiaries held after the settlor's death and the expectant shares they held as objects of the power of appointment just before his death. So only that marginal amount arose on death.

On the face of it, the case is authority for the proposition that the interests of the beneficiaries entitled in default of a mere power vest when the settlement first starts to operate. That would merely confirm Fearne's classic definition.[15] But closer examination of their Lordships' judgments shows that the decision supports no such proposition. It will be shown that Lord Wright and Lord Buckmaster support the view that there were immediate vested interests on the facts in *Adamson's* case,[16] but they were on opposite sides in the decision! Lord Buckmaster was in the minority and his reasoning was not of general validity. Lord Wright's reasoning was based on a premise which is no longer tenable. Lord Warrington clearly did not base his judgment on the view that the default beneficiaries had a vested interest. Lord Russell, and to some extent Lord Blanesburgh, took the intermediate view that only the son's interest was vested immediately in him as an individual and the daughters' interests were not. But Lord Blanesburgh held, in some strong reasoning, that the son had, in substance, rights so precarious that they would not be called vested beneficial interests in the trust property.

The decision does not inject binding authority into any one view on vesting. It does show that wider policy considerations governed the findings on vesting and that this was by no means the result of the application of clear mathematical rules. Both Lord Russell and Lord Blanesburgh were prepared to spell out the fact that more substantive issues influenced their findings.

ADAMSON v. ATTORNEY-GENERAL: THE JUDGMENTS

Lord Wright, in the majority, did hold that the default beneficiaries had vested interests while the power of appointment still operated. He speaks[17] of the property passing on the settlement, though it did not pass immediately in the sense that the beneficiary had enjoyment or mastery of it then and though it did not pass certainly but only contingently. But he meant by this that the beneficial interest was vested in interest but not in possession and he seems to mean by contingent merely that the interest was subject to the risk of defeasance in the event of the beneficiaries failing to survive the settlor.

[15] Fearne, *loc. cit.*
[16] [1933] A.C. 257.
[17] *Ibid.* 286-7.

But his main reason for this view was that, on any other finding, the beneficial right in the funds would remain in suspense between the date of settlement and the settlor's death.[18] It is clear from Lord Radcliffe's full reasoning in *Commissioner of Stamp Duties (Qld) v. Livingston*[19] that there is no reason why a beneficial interest should not be in suspense over a period. So Lord Wright's reasoning must be open to serious doubt.

Lord Buckmaster,[20] in the minority, said there *was* an interest vested in the children from the date of creation of the settlement which was contingent on their not surviving or on the power of appointment not being exercised. By contingent he clearly meant a vested interest which was liable to be divested by an appointment to any particular child. He held that any children born after the creation of the trust would enjoy similar interests. But the general validity of Lord Buckmaster's reasoning is severely limited by his other findings. First, he says:[21]

> [t]he provisions in this deed with regard to vesting suggest that its intention was that the property only vested at the date of the settlor's death, but I do not think that is it's true interpretation.

Yet he produced no extrinsic evidence to rebut that intention. Second, he found,[22]

> no *individual* child could be master of the property until the death of the settlor. Until that event the property was all subject to trusts which might have defeated any individual share.

That, and his finding that the property did pass on the death, suggest that he was talking loosely of a class right when he spoke of vesting. He might well have supported Lord Blanesburgh's realist view if it were necessary to decide the case.

Lord Warrington, another majority Judge, clearly did not base his decision on the proposition that the beneficial interest was vested from the outset in the objects of the power. The basis of his judgment was the fact that, putting aside the possibility of resulting trust which he regarded as *de minimus*, the property had passed wholly out of the hands of the deceased. He held[23] that the power of control by appointment was 'strictly limited', and that the ultimate trusts were not for the settlor. Therefore, after execution of the deed, no property remained in the settlor and none could pass on his death.

Lord Russell, a member of the majority, took an intermediate view. He held[24] that the son was given an immediate vested interest in the two-fifths share when the settlement came into operation, though his

[18] *Ibid.* 287.
[19] [1965] A.C. 694, 712C.
[20] [1933] A.C. 257, 266.
[21] *Ibid.* 266.
[22] *Ibid.* 267; italics mine.
[23] *Ibid.* 276.
[24] *Ibid.* 280.

interest was defeasible if the power of appointment was exercised or he died before the settlor. But, in the case of the daughters, there was not an interest vested in them and liable to be divested but merely an interest which was contingent on their surviving the settlor.[25] But the most significant point about his judgment was his statement that there was not a great deal of difference in substance between the two types of interests. Later,[26] he held that no beneficial interests passed on the death of the settlor. The beneficial interest was vested in the son as an individual and in the class of other children, though each individual child's interest was contingent. The settlor's death merely made those vested interests indefeasible. That reasoning explains the movement of beneficial interests, but is it realistic or helpful to call the intangible rights of the daughters, as a class during the selection period, a vested interest?

THE BLANESBURGH LINE IS LAW IN AUSTRALIA

Lord Blanesburgh, in detailed and cogent reasoning, also held that there was a passing under section 1. Lord Blanesburgh[27] agreed with Lord Russell that *technically* the son had a vested interest which was liable to be defeated if he predeceased the settlor, a divesting contingency. He reasoned that, since later born children would reduce the shares of the daughters, their shares were contingent. But Lord Blanesburgh looked at the realities of the situation and treated the difference between the various shares as merely a difference in degree. He held[28] that the dominating factor was the precarious nature of all their interests and that the overriding power of appointment made it impossible to predicate of any of the children that, even contingently on survivorship, they would take any interest whatever in the property. He took the more difficult case of the son and held that the son, in the absence of an appointment, had nothing 'in the world of reality' which could be called enjoyment or an interest in the property and nothing on which estate duty might be chargeable. Only after the settlor's death, when the property ceased to be subject to the power, did he gain such an interest. The default beneficiary had no right to any of the discretionary fund during the selection period. He further observed[29] that the beneficial interest could not have passed to the beneficiaries in default when the deed was executed because, at that time, there was no ascertainable 'donee' (*i.e.* individual or group entitled in default of appointment) to assume it. It followed, that the beneficial interest left the settlor's hands when the settlement became operative, but it did not pass to the persons entitled in default until the date of the settlor's death. The chain of beneficial interests was therefore broken by a hiatus. That consequence is clearly acceptable. A

[25] *Ibid.* 281.
[26] *Ibid.* 283.
[27] *Ibid.* 268.
[28] *Ibid.* 269.
[29] *Ibid.* 271.

close analogy is the situation where all legal and beneficial interests pass into an executor's hands pending administration of a deceased estate.[30]

The High Court of Australia in the earlier decision in *National Trustees, Executors & Agency Co. of Australasia Ltd v. Federal Commissioner of Taxation*[31] took an approach similar to that of Lord Blanesburgh. A fund was settled on a trust company. After providing for an annuity to his widow, the settlor created a trust to pay income, during the joint lives of the settlor and his wife, to his five children in equal shares. There was a substitution clause for the children's issue if any child predeceased the settlor. The trustees were given a power, if they deemed it desirable, to reduce the share of any child and to apply that share towards the maintenance, education or benefit of any of the other children. One child predeceased the settlor, leaving issue eligible under the trust. The argument turned on whether the five children were joint owners of land held in the trust for the purposes of land tax assessment. It was held, unanimously, that they were not. Knox C.J. held[32] that the children 'are not entitled to receive any part of the income except so much as the trustee chooses in the exercise of its discretion to apply for their benefit . . .' And Issacs J.[33] specifically rejected an argument that they had an interest vested in interest subject to defeasance on an appointment. Starke J. used language very similar to that of Lord Blanesburgh:[34]

> [u]nder the limitations of the will, it is said, the children and grandchildren are jointly entitled to the receipt of the rents and profits of the land. But the grandchildren were not entitled to the receipt of any share of such rents and profits. Their right was always subject to the discretionary and controlling power of the trustee:

that is, to apply any share for general maintenance.

Since the grandchildren were entitled only in default of appointment, Starke J. was clearly basing his finding on the rights of default beneficiaries on his assessment of the strength of their claim. Because it was so weak, being subject to the trustee's control, they could not be jointly liable to land tax.

This decision is strong authority for the Blanesburgh line of reasoning, because the persons entitled in default were entitled to aliquot shares and not merely a share of the fund, providing, of course, that the trustee chose not to reduce the respective payment to the beneficiary. It is submitted, that this gives strong support to the proposition that the present law in Australia cannot be encompassed in Fearne's simplistic technical criteria for vesting in interest.

[30] *Commissioner of Stamp Duties (Qld) v. Livingston* [1965] A.C. 694, 712-3. 712-3.
[31] (1923) 33 C.L.R. 491.
[32] *Ibid.* 500.
[33] *Ibid.* 503.
[34] *Ibid.* 516.

PRACTICAL QUESTIONS

The practical incidents of an interest held by someone such as a beneficiary in default of appointment should be based on the strength of that beneficiary's interest. That is a question of construing the instrument in the context of the question the court is considering. In a great many mere powers the beneficiaries in default will have a very weak interest because, as a matter of practical reality, it is not only possible, but in many cases very highly probable, that they will receive nothing at all.

There is no reason why the settlor of a discretionary trust should not give an immediate interest in a trust fund to the beneficiary in default, be he a single person or a class. In the classic analysis, the property would then vest in that person or class, in interest, subject to the power of the trustees to divest it and appoint among that or some other class. Such a tacit finding was the premise on which the reasoning of the High Court in *Commissioner of Succession Duties (S.A.) v. Isbister*[35] was based. Similarly, Lord Russell made such a finding in coming to the conclusion that the single son with a two-fifths interest in *Adamson's* case had an immediate vested interest, albeit that his interest was subject to divesting on prior death. If there are any firm indications in the instrument of the settlor's intention or the size and composition of the class of default beneficiaries indicate that intention, that may settle the question. But these will often be inconclusive. Should the normal construction be, as Lord Blanesburgh has advocated, that the court should look at the reality of the matter, treat the appointment as the dominating factor and the interests of the beneficiaries in default during the selection period as very limited? Or should the court still, in the absence of strong indications in the instrument, treat the beneficiaries in default as having rights in the discretionary fund which are almost identical to those of the beneficiaries with vested interests in a trust? The lack of any definite property which they might get could then be treated as merely a factor going, as Williams J. would say in *Isbister*,[36] to the value of their interest. No single answer can be given to that question. The answer will depend on the policy factors operating in the context in which it is asked. The important point is that technical arguments on vesting will serve only to obscure more relevant criteria.

Take two important contexts in which the question has arisen. First, is a fraud on the power, a fraud on the vested interests of the beneficiaries in default? The authorities jumped at this as a convenient way to explain the doctrine and assumed there were vested interests.[37] That assumption can be re-examined if it is accepted that the fraud on a power doctrine operates by virtue of the mere fact that the trustee has acted in an unauthorized manner. Second, do persons who were entitled in default of

[35] (1941) 64 C.L.R. 375. [36] *Ibid.*
[37] *Re Greaves* [1954] Ch. 434, 447.

appointment at some time during the selection period, but who die before it ends, share in the unappointed property? Here the rule from trust powers can be applied by analogy.[38] The beneficiaries in default can be treated as having no vested interest or a vested and defeasible interest, but, on either view, only those alive at the end of the selection period will take.

IS THE CLASSIC VESTING DEFINITION LAW IN AUSTRALIA?

There is a further and separate basis of support for the proposition that Lord Blanesburgh's approach and not Fearne's classic definition reflects the law on vesting in Australia. The High Court of Australia in *Norman v. Federal Commissioner of Taxation*[39] held that a right to dividends *if* and when declared, was not a present chose in action. It was not something capable of present voluntary assignment. The right to something which *may* never come into existence is itself therefore not of present existence. What then of the rights of the beneficiaries in default, can they have a present vested right? The rejoinder is that the right of the beneficiaries in default, unlike the right of an assignee of a right to dividends, creates an existing obligation on the trustees, however much it is subject to defeasance. But this was the situation with the assignments of the rights to interest in *Norman's case*.[40] The High Court decided, by the barest majority, that such a right was not a present chose in action. Menzies J.[41] reasoned that, because the loan might be repaid before any interest accrued the right might be worth nothing and therefore, since the right to interest had no present *certainty* of any quantum, it was not a present right.

On the one hand, to say that the beneficiaries in default have a vested interest only in what is left unappointed implies that they have no entitlement to the discretionary fund itself during the selection period. To say that they do have an interest vested in interest may be a strict application of Fearne's technical vesting rules but it is misleading. Menzies J. would support that view.

On the other hand, if Menzies J. were right, any interest subject to defeasance could not be vested. That would make nonsense of the distinction between conditions precedent and subsequent. Mr Justice Menzies' reasoning points to the fact that *Norman's* case[42] is best cited as an authority going to the irrelevance of Fearne's vesting criteria as a way of determining substantive rights in Australia. *Norman's* case[43] merely shows that it is an illogical and hollow exercise. The real decision is made at the earlier, policy level and the category is used to state it.

[38] Cited in *Re Arnold* [1947] Ch. 131. [39] (1963) 109 C.L.R. 9.
[40] *Ibid.*
[41] *Ibid.* 20. Owen J. concurring *ibid.* 41. After full discussion Windeyer J. is obscure on this point: *ibid.* 38.
[42] *Ibid.* [43] *Ibid.*

It is submitted, the following categories of equitable 'interests' much better express the substantive issues a court must decide:

1. An interest giving a present right to possession.
2. Other interests to which equity will give recognition.
3. Those 'interests' which equity will refuse to recognise.

That important second category will cover both vested and contingent interests which are given 'proprietariness' by the common law or statute. It merely involves the prediction that some recognizable interest will arise within the time limits set out by the rule against perpetuities. The question of when it does arise is the further policy and construction question which has hitherto been dressed in the spurious clothes of Fearne's outdated doctrines.

DISTINGUISHABLE DEATH DUTY AUTHORITIES

There is a line of High Court decisions dealing with death duty provisions in which the wording of the relevant provisions does not raise vesting questions. These authorities quite properly distinguish *Adamson's* case,[44] but contain some misleading *obiter* assumptions about the vesting concept.

Commissioner of Stamp Duties (N.S.W.) v. Sprague[45] concerned a charge for estate duty under section 102(2)(a) of the Stamp Duties Act 1920-40 (N.S.W.). The settlor settled land on trustees and reserved to himself a special power of appointment among such of his issue as he should by deed or will appoint. There was a gift in default of appointment for his sons in equal shares on attaining 21 and his daughters on attaining 21 or marrying. The High Court of Australia held that the trust in favour of the children took effect *as a vested interest* before the death of the settlor and no new interest took effect immediately after the settlor's death.

Dixon C.J., delivering the leading judgment, distinguished *Adamson's* case on the different wording of the old section 2(1)(b). He reasoned that a passing of property denotes a change of title or possession and is different from the 'taking effect' of a trust required by the New South Wales legislation. Plainly this is so. A trust can take effect when it becomes binding and the beneficial interests pass *from* the settlor. But Dixon C.J.[46] reasoned that the interests of the children vested in interest before the death of the settlor. This finding would contradict the finding of Lord Blanesburgh on the vesting of the daughter's interest in *Adamson's* case, and probably

[44] [1933] A.C. 257.
[45] (1960) 101 C.L.R. 184. In *Elder's Trustee Executor Co. Ltd v. Commissioner of Taxation (Morphett)* (1966) 40 A.L.J.R. 371 it was held 'take effect' referred to a coming into possession.
[46] *Ibid.* 193.

the reasoning of Lord Buckmaster. Dixon C.J. reasoned that the mere ceasing of the selection period on the settlor's death was not enough to make a trust take effect on that death. It is submitted, that Dixon C.J. assumed that the taking effect of a trust and the vesting of beneficial interests in the beneficiaries were the same thing; this was an unreasoned *obiter* assumption which Lord Blanesburgh showed was not tenable.

In *Sprague's* case,[47] Dixon C.J. followed the earlier High Court of Australia decision in *Commissioner of Succession Duties (S.A.) v. Isbister,*[48] which was decided on the similar words of the South Australian enactment in section 4 of the Succession Duties Act 1924-36 (S.A.). But the decision in *Isbister*[49] was made on the particular instrument before the Court and contains no proposition of general validity. In this case the settlor declared himself trustee of bonds, on trust to pay the income to his daughter for life and after her death to hold the capital and accumulated income of the trust on trust for such of the daughter's children or remoter issue, on attaining 21 or marrying, as the daughter should by deed or will appoint. In default of appointment, the fund went in equal shares to the same class. The High Court of Australia held that the deed was not an instrument containing a trust to take effect on or after the death of the settlor and was therefore not dutiable.

The Justices were strongly influenced by the fact that the power took the form of and was called a 'power of revocation'. Though Williams J.[50] did say this power had the same effect as a power of appointment, it was something of an afterthought. All the judgments simply assumed that the interests were vested when the deed, by which the settlor declared himself trustee, became effective. The Court concentrated its attention on defining the difference between the formation of a trust and conditions subsequent or in defeasance of a trust and its *obiter* comments are not strong authority. Williams J. said that an immediate trust was created and that the possibility that the vested interest would be destroyed during the settlor's life was merely an incident of this trust. The removal of this blot on the title at the settlor's death, he admitted, resulted in an increase in commercial value of the interest; but it did not substitute a new and more valuable interest in lieu of the previous one.

In *Commissioner of Stamp Duties (N.S.W.) v. Bradhurst,*[51] the settlor settled property on trustees to hold on trust for his granddaughter on attaining 21 or marrying earlier and, failing this, a resulting trust was spelt out. The only element of change on the death of the settlor was the cessation of a power of revocation which was reserved to the settlor by the settlement. By a majority of four to one, the High Court of Australia

[47] (1960) 101 C.L.R. 184.
[48] (1941) 64 C.L.R. 375.
[49] *Ibid.*
[50] *Ibid.* 380.
[51] (1950) 81 C.L.R. 199.

held that no beneficial interest arose or accrued on the death of the settlor. The main reason for distinguishing *Adamson's* case[52] was the fact that on the settlor's death the granddaughter did not get an interest vested in interest; her interest was still contingent on the satisfaction of the age or marriage contingency. Therefore the case is quite consistent with the decision in *Adamson's* case[53] and the approach in this article.

LEGISLATIVE REFORM

As the cases have shown, vesting as an operative concept is most influential in the various Australian equivalents of the old English section 2(1)(b).[54] The provision suffers that notorious drawback of all legislative attempts to state the common law. It has frozen development of an evolving process at a particular point of time. This complex and fundamentally unsound charging provision has been abandoned as a basis of charge in England. The English legislation has been completely rewritten around a formula which equates charge to estate duty with the actual benefits the deceased received from a trust fund during his life. How long can Australia afford to cling to the extremely complex and, from any policy view, meaningless exercises this provision requires?

The vesting concept, in modified form, also holds sway in the rules against remoteness. The wait-and-see concept has received acceptance[55] and a period of years in gross is provided as an alternative perpetuity period[56] in the rule against remoteness of vesting. Is it not time to go the last step? The life-in-being, with its complications should be abolished in favour of a period of years in gross (80 or even 50). The governing concept should be the coming into possession of interests and not their vesting in interest. Wait-and-see has made irrelevant the question about whether there is a present vested right to future enjoyment. As a bonus, the rule against inalienability could be scrapped and the rule against accumulations becomes a relic whose evils, if they are not exaggerated, are much better controlled by taxation.

If these reforms are instituted, given the continuing evolution of the common law, the whole messy and unnecessary body of learning on vesting would rapidly become a matter of mere historical interest. It should be seen as part of a movement to rationalize the whole of the law of future interests. In so far as lawyers fail to clarify the issues so that policy can be effectively brought to bear on them, they fail in their job. The real issues in taxation and future interests are complex enough without the irrelevant historical hangovers.

[52] [1933] A.C. 257. [53] *Ibid.*
[54] Finance Act 1894 (now repealed by Finance Act 1969).
[55] Perpetuities and Accumulations Act 1968, s. 6.
[56] *Ibid.* s. 5.

CONCLUSIONS

1. The technical vesting rules no longer help to predict the substantive rights of the beneficiaries entitled in default of a mere power. It is suggested that this is also true of other areas of the law.
2. The substantive rights of beneficiaries are determined by the normal questions of construction and policy. An Australian court will look at the real strength of a beneficiary's right in making its decision.
3. The courts still pay lip service to the vesting concept. This merely serves to obscure more relevant issues. *Norman's* case[57] has highlighted the conceptual flaw in the traditional vesting rules.
4. Vesting should be removed as the central criterion of the charges to death duty and from the operation of the rules against remoteness by legislative reform.

[57] (1963) 109 C.L.R. 9.