



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

ON

THE RULE AGAINST PERPETUITIES AND COGNATE RULES

(LRC 62 - 2000)

IRELAND

**The Law Reform Commission
I.P.C. House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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First Published

The Law Reform Commission 2000
December 2000

ISSN 1393 – 3132

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government in Autumn 2000. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date the Commission has published sixty-one Reports containing proposals for reform of the law; eleven Working Papers; sixteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with s. 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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<i>Full-time Commissioner</i>	Mr Arthur F Plunkett, Barrister-at-Law,
<i>Part-time Commissioners</i>	Dr Hilary A Delany, Barrister-at-Law, Lecturer in Law, Trinity College, Dublin;
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NOTE

This Report was prepared on the basis of a reference from the Attorney General dated 6 March 1987, under section 4(2)(c) of the Law Reform Commission Act, 1975. At the date of publication of this Report, however, its subject matter was included in the Commission's Second Programme for Law Reform, already referred to, which extends the Commission's involvement in this area.

After extensive research and consultation with practitioners in the field, including members of the Land and Conveyancing Law Working Group (described below), the Commission puts forward these proposals for reform.

While these recommendations are being considered by the Department of Justice, Equality and Law Reform, informed comments or suggestions can be made to the Department, by persons or bodies with special knowledge of the subject.

ACKNOWLEDGEMENTS

The Commission wishes to thank the following practitioners who responded to a questionnaire on the operation of the Rule against Perpetuities:

Honourable Mr Justice Blayney, former judge of the Supreme Court;
Marie Baker, BCL, MA;
Brian Carroll, Anthony Carroll & Co;
Colin Chapman, Kenny Stephenson Chapman Solicitors;
Anne Corrigan, Barrister-at-Law, Arthur Cox, Solicitors;
Aileen Keogan, A&L Goodbody Solicitors;
Thomas McCann SC;
Enda O'Regan, Trusts Officer, Allied Irish Bank;
Frank O'Reilly, Whitney Moore & Keller Solicitors;
Ciarán Pringle, Office of the Revenue Commissioners;
Brian Speirin, Barrister-at-Law, former assistant Probate Officer of the High Court;

We are also most grateful Ms Margaret O'Driscoll, Barrister-at-Law, who drafted the draft Bill which is appended to this Report. Ms O'Driscoll is a former member of the Office of the Parliamentary Counsel to the Government, formerly the Office of the Parliamentary Draftsman.

Finally, the Commission would like to record its thanks to Leesha O'Driscoll, Barrister-at-Law, former researcher.

THE LAND AND CONVEYANCING LAW WORKING GROUP

In 1987, the Commission established an expert working group to assist and advise it in the field of land law and conveyancing law. Broadly speaking, there are two principal aspects to the work of the expert Group. The first is to raise matters giving rise to unreasonable complication and delays in the completion of conveyancing transactions, and to recommend practical reforms in this regard. Secondly, the Working Group has as its aim the reform, or removal where appropriate, of anomalous or redundant land and conveyancing law rules.

Operating under the Commission, the Working Group draws on its expertise to direct the research of the Commission's staff and to appraise the material which they provide. The Group has already been responsible for seven reports in the area of land law and conveyancing law.¹ The current members of the Group, which meets every month or so, are:

Commissioner Arthur F. Plunkett, (Convenor);

George Brady SC;
His Honour Judge John F Buckley;
Patrick Fagan Solicitor;
Ernest Farrell Solicitor;
Brian Gallagher Solicitor;
Mary Geraldine Miller Barrister-at-Law;
Chris Hogan, Land Registry;
Professor David Gwynn Morgan;
Patricia T. Rickard-Clarke Solicitor;
Deborah Wheeler Barrister-at-Law; and
Professor J.C.W. Wylie.

Bairbre O'Neill is Secretary and researcher to the group.

The Law Reform Commission wishes to record its appreciation of the indispensable contribution which the members of this Working Group, past and present, have made and continue to make, on a voluntary basis, to the Commission's examination of this difficult area of the law. Because of the expertise and involvement of the distinguished members of the Group, we feel justified in following our usual practice in the field of Land Law and publishing our recommendations straightaway as a Report without going through the usual stage of the Consultation Paper.

¹ For more information about these Reports, see *Appendix D, List of Law Reform Commission's Publications*, below.

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INTRODUCTION

1. Land law has had a continuous existence at least from the time of the thirteenth century to the present. It is the oldest part of our law and among its most ancient rules are those which form the subject matter of this Report, namely, the rules controlling future interests. Accordingly, Chapter 1 of this Report summarises the historical development of this family of rules. It also illustrates the significant policy of free alienability of land which these rules were designed to reflect. Amongst other things, the Chapter shows, that the most important of these rules, the Rule against Perpetuities, is in fact among the most recent (established in 1681). It is, however, the most important rule because it was deliberately formulated with a wide scope in order to catch the areas previously outside the narrow ground caught by the other rules. In view of this, it was inevitable that there would be a good deal of overlap with the other rules.

2. The Perpetuities Rule can be conveniently summarised as follows: first, any future interest in property, of whatever type, is void, from the outset, if it may possibly vest after the perpetuity period has expired; and, secondly, the perpetuity period consists of any life or lives in being together with a further period of 21 years and any period of gestation.¹

3. Certain striking features of the Rule are immediately apparent. First, the rule is concerned with what may possibly happen, rather than what does happen or even what is likely to happen. In the jargon of this rather arcane area of the law, there is no 'wait and see' rule. Secondly, the boundaries of the rule depend on the property vesting in interest and not in possession. Thirdly, the perpetuity period is curiously designed. Each of these features is elaborated on in Chapter 2, which also offers a general survey of the Rule.

4. The final feature of the Rule is that it is not confined to land; it catches all interests, real or personal, legal or equitable. As a result, the Rule has been applied not just in the field of family dynasties, for which it was designed, but surprisingly in the field of commercial interests. This is the subject of Chapter 3.

5. Something of the character of the Rule has been caught in the following metaphor:²

¹ Wylie, *Irish Land Law*, (Third Edition) para.5.056 *et seq.*; Lyall, *Land Law in Ireland*, para 11.2 *et seq.*; Coughlan, *Property Law*, p.162 *et seq.*; Megarry and Wade, *The Law of Real Property*, (Sixth Edition, London 2000) at p. 241

² Leach, "Perpetuities: Staying the Slaughter of the Innocents" (1952) 68 L.Q.R. 35, 39

"The Rule persists in personifying itself to me as an elderly personage clothed in the dress of a bygone period, who obtrudes his personality into current affairs with unpredictable bursts of indecorous energy. Time was when he stood at the centre of family activity, necessary to the family welfare. A new generation with new problems has arisen, yet he persists in treating ancient issues as present realities and in applying his own familiar solutions. Asserting an authority derived from an earlier day, he insists that a stockade be built round the house to protect it from Indians even though there have been no Indians for decades, the stockade is highly uneconomical, friendly neighbours are rebuffed, and the policeman and fireman are impeded in performing their protective functions."

This portrait (which is elaborated in Chapter 2 and 3) raises the principal question examined in this Report namely whether the Rule has any place in the modern legal, fiscal and societal landscape.

6. It seems hard to resist the conclusion that the Rule should either be reformed radically or removed altogether. This important question is considered in Chapter 4, where the Commission reaches the conclusion that even in a reformed condition, the Rule would carry more disadvantages than advantages and, therefore, recommends its abolition. The strongest justification for the Rule is that it bars prolonged trusts. In respect of such trusts, there are likely to be changes of circumstances which were unforeseen and, perhaps, unforeseeable by the settlor. To meet this objection to the removal of the Rule, we recommend in a Report published at the same time as this one,³ that legislation should be enacted providing for Variation of Trusts, subject to the approval of the court. Such legislation would make up for any genuine disadvantage which might flow from the removal of the Rule. It would go further since there are many trusts which do not contain an interest which may vest outside the perpetuity period, but which would benefit from the possibility for variation. Chapter 4 deals with the position of existing trusts or settlements, and on the assumption that the Rule is to be abolished, considers whether there should be a qualified element of retrospectivity to its abolition.

7. As remarked, the Rule is the leading member of what could be called a family of rules which have, broadly speaking, the same policy, namely, restricting the extent to which a landowner may control the alienability of his property into the future. These are: the rule against inalienability; the rule against trusts of undue duration; the contingent remainder rules and the rule in *Purefoy v. Rogers*; the rule in *Whitby v. Mitchell*; and the rule against accumulations. The establishment of the perpetuities rule in the 1680s covered most of the ground earlier occupied by these rules (apart from the rule against accumulations). As a result most of these rules have seldom been seen in operation. However, our proposal to abolish the Rule obliges us to consider, in relation to each, whether the proposed abolition of the Rule against Perpetuities would render their retention either necessary or desirable. This is done in Chapter 5, where, as will be seen, our conclusions vary from rule to rule.

³ *Report on the Variation of Trusts, LRC 63 - 2000*

CHAPTER ONE: HISTORICAL DEVELOPMENT

1.01 “The historian Froude observed that of all the gifts bestowed upon her unhappy possession by England the most fatal was the English system of owning land.”¹ So began an article by Professor Brady, and the sentence provides a suitable starting point for our discussion of the historical development of the Rule against Perpetuities. The policy underlying the Rule, the eventual legal form which it took, and its relationship with the other members of the family of rules controlling future interests, can only be understood in the light of historical evolution. Accordingly, we begin this Report with a brief historical sketch. In an Irish context, two important struggles underpin the Rule’s development, and it is to these conflicts that we now turn.

1.02 The feudal system of land ownership, once transposed into Irish law in the twelfth century, came into immediate and persistent conflict with the Brehon system of land ownership and “[f]or the next four centuries there was constant tension between the two systems.”² Although effective transposition was undeniably achieved by the early seventeenth century, the intervening “process of supplanting the native Irish law was a gradual and, at times, difficult one.”³ The consequences of this were manifold, but two principal effects concern us here. First, the implementation of English law was, at times, patchy and occasionally adapted to Ireland’s particular political situation. Secondly, the policies behind most legislative initiatives were informed by either the demands of (frequently absentee) landlords or legal and political developments in England, which had no necessary Irish equivalent.

1.03 Even within the English system, a separate conflict raged between feudal restrictions on dealing with land and the desire of landowners to be free to alienate their land. During the feudal era, up to the late thirteenth century, substantial restrictions were imposed on a land-owner’s freedom to alienate land.⁴ One set of restrictions stemmed from the fact that the constitution was largely feudal - in modern parlance, it would be said that land-owning was a matter of ‘public law’. This meant that a person’s status and offices, including such important matters as:- the right to vote; the court in which a person could

¹ Brady, “English Law and Irish Land in the Nineteenth Century” (1972) 23 NILQ 24, at 24 quoting Froude, “Romanism and the Irish Race” (1880) *North American Review* 36.

² Wylie, *Irish Land Law*, (Third Edition) at para 1.16

³ Wylie, “The ‘Irishness’ of Irish Law” (1995) 46 NILQ 332 at 334

⁴ See, generally, Holdsworth, *A History of English Law* (2nd ed.) vol. iii, 73-87; vol. vii, 193-238; A.W.B. Simpson, *A History of the Land Law* (Second Edition) chap.ix; S.F.C. Milsom, *Historical Foundations of the Common Law* (1969), chap. 9; Megarry and Wade, *The Law of Real Property* (Fifth Edition), Appxs. 2-4; Cheshire’s *Modern Real Property*, (6th ed.), chap. 9.

litigate; or his position in the military hierarchy were determined by the tenure of the land he held. It was considered undesirable that these could be altered by agreement between two individuals. A second source of fetters on free alienation was the need to protect the inheritance rights of members of the land-owner's family.

1.04 These feudal constitutional structures were never fully mapped onto the Irish system of land ownership. Judge Longfield, writing in the nineteenth century stated,⁵ “the feudal relation, with its reciprocal rights and duties never existed in Ireland. Here the landlord never led his tenants to battle; if they fought on the same side of the field, it was on different sides.” Nevertheless, whatever about their eventual implementation (or lack thereof) in an Irish context, these structures are relevant insofar as they influenced the development of English land law, and in turn the development of Irish land law. The rules certainly migrated, even if the feudal framework from whence they came was not assimilated in Ireland.

1.05 Militating against the feudal orthodoxy of dynastic landlords came the opening up of trade, which demanded that land not be tied up indefinitely. Within this new order, the common law assumed a pivotal role, possessing as it did a strong bias in favour of free alienation.⁶ Thus the dynamic formed whereby the courts pulled in one direction – pursuing a policy of free alienation – whereas the legislature pulled in the opposite direction by enacting measures intended to protect the expectations of settlers.

1.06 From the twelfth century onwards, legal developments in this area can be portrayed as a duel or dialectic between, on the one hand, the land owners who wished to have the option of selling the entire estate which had been settled on them and their family and, on the other hand, settlers, who expected their instructions as regard succession to their lands, to be honoured in full. The particular legal form taken by this duel was very technical, not to mention arcane. However, for present purposes we need sketch only the stages set out below.

⁵ Longfield, “The Tenure of Land in Ireland” in Probyn (ed.), *Systems of Land Tenure in Various Countries* (London, 1870) 1. See also Donaldson, *Some Comparative Aspects of Irish Law*, (London, 1957) 229 *et seq.*

⁶ Holdsworth remarks:

“... it is clear that Bracton and Littleton and Coke all regarded restraints upon the power of a tenant in fee simple to alienate freely as contrary to public policy; but if they had been asked to give concrete reasons for so regarding them, they would all have assigned somewhat different causes. Bracton [writing in the Thirteenth Century] would have said that they were contrary to the conception of dominium, and would also have emphasised the importance of breaking up the solidarity of the feudal group. Littleton [in the late Fifteenth Century] would have emphasised the importance of maintaining the principle of freedom of alienation because it was a principle of the common law. Coke [in the late Sixteenth Century] would have had in view the attempt of the landowners to create perpetuities, and he emphasised, as we have seen, the commercial advantage of a free circulation of property. Though the reasons assigned by these three lawyers would have been different, all had in their minds the impolicy of a general restriction on the power of the tenant in fee simple to alienate,” Holdsworth, *A History of English Law* (2nd ed.) Vol. iii, p.85. See also Pollock and Maitland, *History of English Law*, vol. 2, 18-19.

A. The Rule against Inalienability⁷

1.07 This sea-change in policy to favour free alienability can be illustrated by reference to the early establishment of the rule, which remains the law,⁸ that any condition which purports, wholly or substantially, to withhold, from the owner of a fee simple or a life estate, the right to alienate his property, is invalid. The origins of this rule can be traced as far back as *Quia Emptores 1290*.⁹

B. Barring the Entail

1.08 For many centuries, an estate known as the “fee tail” was the preferred legal device for those landowners eager to establish strict and lengthy settlements. In fact, these estates dominated the social and economic life of the landed classes for several centuries. The background to the development of the fee tail is that up until the thirteenth century, there were only two freehold estates in existence, the fee simple and the life estate. However, in 1285,¹⁰ a statute was enacted to meet the complaints of landlords, whose settlements were frequently frustrated by the interpretation of judges.¹¹ The statute permitted the creation of the fee tail, which was a new class of freehold estate with two principal features. First, it passes to the lineal descendants (children, grandchildren etc.) of the grantee. Secondly, it is not alienable, whether *inter vivos* or by will. In short, this was an estate which could not be removed from the family so long as any lineal descendants remained. This development was popular with the nobility and so there was no possibility of repeal by Parliament.

1.09 Wylie concludes, “Thus the courts’ attempt to reinforce the fundamental principle of free alienation of land received a set-back, which was to remain effective for a couple of centuries.”¹² Not surprisingly, the thriving fee tail proved to be unpopular with those who wished to be able to sell their entailed land free from restrictions. To meet this need, by the fifteenth century, legal artifice developed collusive actions by which the statute could be circumvented, and the entail could be “barred”.¹³

⁷ See generally: Wylie, *Irish Land Law*, (Third Edition) para 2.42 – 47; Lyall, *Land Law in Ireland*, para. 3.12.3.

⁸ See Chapter 5, paras.5.01-07, below; Megarry and Wade, *The Law of Real Property* (Sixth Edition, London, 2000) para.3.043. This restriction is usually put on the basis that alienation is one of the inherent and essential incidents of ownership.

⁹ While this statute applied in Ireland, it could be – and frequently was – side stepped by the making of grants *non obstante Quia Emptores*. See Lyall, *Land Law in Ireland*, para. 3.12.3

¹⁰ *De Donis Conditionalibus*1285. This Statute was extended to Ireland in the same year by 13 Edw 2, c. 2 (Ir).

¹¹ See generally: Lyall, *Land Law in Ireland* para. 8.2 *et seq.*; Wylie, *Irish Land Law* (Third Edition), para. 4.114– .116

¹² Wylie, *Irish Land Law* (Third Edition), para. 4.115

¹³ These devices were known, in turn, as ‘suffering a recovery’ and ‘levying a fine’. Ultimately, these devices were abolished and replaced by the *Fines and Recoveries (Ireland) Act, 1834*. Thereafter, the entail could be barred by the execution of a “disentailing assurance” by the tenant in tail. (Note: See our

C. Contingent Remainder Rules

1.10 Deprived of the fee tail as a weapon in the struggle to create an unbreakable settlement, conveyancers turned briefly to arrangements in which land was given in fee simple, but subject to a condition which – if breached – meant that the estate terminated and the land was transferred to another person, known as the remainderman. In such settlements, the remainderman’s interest was obviously a contingent (i.e. conditional) remainder. These interests were closely controlled by a series of long-established rules, collectively known as the ‘contingent remainder rules’,¹⁴ which are outlined in more detail in Chapter 5. For present purposes, it suffices to say that their effect was to limit – albeit somewhat haphazardly – the extent to which such contingent remainders could continue to bind the owners of land.

D. *Whitby v Mitchell*: The ‘Old Rule against Perpetuities’

1.11 Another apparently promising way of rendering land perpetually inalienable, while still obeying the contingent remainder rules, was the perpetual freehold. This device, which enjoyed a brief vogue in the sixteenth century, utilised a chain of life estates as, for example: ‘To X for life, remainder to X’s son for life, remainder to that son’s son,’ and so on. As we shall see in Chapter 5, this form of settlement was outlawed in England by a series of decisions in the late sixteenth century which led eventually to the so-called Rule in *Whitby v. Mitchell*,¹⁵ (sometimes referred to as ‘the old rule against perpetuities’).

E. Statute of Uses (Ireland), 1634

1.12 It is necessary, at this point, to recall a famous land-mark, the *Statute of Uses (Ireland) 1634*, which was an attempt to extirpate, almost entirely, the institution of the use (the forerunner of the modern trust). The desire to eradicate the use stemmed from the fact that uses, by avoiding feudal incidents, reduced the royal revenue.¹⁶ The technique adopted was ‘to execute the use’ thereby uniting the legal and equitable interests. Both were transferred to the beneficiary and the trustee, or *cestui que use*, got nothing. The estate thus statutorily imposed on the beneficiary was known, where it was a future interest, as a “legal executory interest.”

earlier criticism of the existing requirement that these assurances be enrolled within 6 months. LRC 30 – 1989)

¹⁴ Coughlan, *Property Law*, p.152

¹⁵ (1890) 44 Ch. D. 85 . The rule has been applied in Ireland in *Peyton v Lambert* (1858) 8 ICLR 485 and, more recently in *Bank of Ireland v Goulding*, Supreme Court, 14 November 1975

¹⁶ Lyall, *Land Law in Ireland*, para 4.5.3

1.13 For our present purposes, all that we need notice is that changed political times, circumstances and legal ingenuity combined to enable the Statute of Uses to be circumvented. Indeed, by the time the Statute reached Irish shores in 1634, the English courts had already acknowledged the legitimacy of “a use upon a use” viz. the device whereby the Statute could be avoided.¹⁷ Thus, the net effect of the Statute, particularly in Ireland, was merely to add a few words to the formula used in a conveyance to uses.

1.14 The developments outlined above transpired to be a boon for those who favoured long and strict settlements. Where the Statute was circumvented, and a future equitable interest was created, the contingent remainder rules took no cognisance of a beneficiary's equitable interest.¹⁸ Moreover for reasons less easy to state,¹⁹ legal executory interests – created where the Statute operated – were also largely free of control. Thus, the avoidance mechanisms inspired by the Statute, created a category of future interests over which the common law, with its agenda of free alienability, could exercise no control.

F. Modern Rule against Perpetuities

1.15 After a century of legal turmoil, the legal community was pushed to the conclusion that the older rules were inadequate and should be replaced. In the seminal decision in the *Duke of Norfolk's Case* 1681-5,²⁰ Lord Nottingham laid down a single, clear rule which soon secured widespread acceptance. The conveyance at issue in the case involved a grant of a term of two hundred years upon trust for the grantor's second son Henry and the heirs male of his body, but if his eldest son, Thomas died without male issue within Henry's lifetime, then in trust for Charles, his third son. Lord Nottingham held that the last limitation was valid because the shifting to Charles must take place, if at all, within a life in being, viz. within Henry's lifetime.

1.16 Five points bear emphasis. In the first place, the *Duke of Norfolk's Case* settled the fundamentals of the Rule, namely that the validity of a future interest hangs on the date of vesting and, in particular, that the interest is valid if it vests within a life in being at the date of the gift. Secondly, it also established one of the great tenets in the common law rule, namely that it bore not upon actual events but upon those which were possible at the date of the gift. However, thirdly at the next stage of development, it was held in *Thellusson v. Woodford*,²¹ that the donor could select whichever life he wished including

¹⁷ *Sambach v Dalston*, (1634) 21 Eng. Rep. 164 ; Donaldson, *Some Comparative Aspects of Irish Law*, pp. 235-6.

¹⁸ *Corbet's Case* (1600) 2 And. 134.

¹⁹ On this difficult point, see Simpson, *A History of the Land Law* (Second Edition) pp.218-219. There was partial control, in the form of the rule in *Purefoy v. Rogers* (1671) 2 Wms. Saunders 380. According to this anomalous rule, a legal executory interest was made subject to the contingent remainder rules if, but only if, the interest did not clearly, *ab initio* violate one of the contingent remainder rules. It was intended to revoke this rule by the *Contingent Remainders Act 1877*, but as explained paras.5.30-32, this attempt was not very successful.

²⁰ 3 Ch.. Cas. 1; 2 Ch. Rep. 229; 2 Swanst. 454, Pollex 223; Gray *op. cit.* 136-38.

²¹ (1798) 4 Ves Jnr 227; *affd.* (1805) 11 Ves 112.

lives unconnected with the settlement, so long as these were reasonably ascertainable. Next, it was held that the perpetuity period could include, in addition to a life in being, a period of twenty one years and any actual period of gestation.²² The fourth point to mark is that the Rule embraced all categories of property: freehold and leasehold; legal or equitable; and, it is now accepted, real or personal property. It thereby largely superseded the rules against contingent remainders and the rule in *Whitby v. Mitchell*, although these continue in existence in Ireland, save to the extent that the contingent remainders rules were uprooted by the *Contingent Remainders Act 1877*.²³

1.17 As with many of the older rules against ‘perpetuities’ which have been sketched, the new Rule was not aimed directly at inalienability, yet it plainly promoted alienability. This was well recognised by lawyers, who perceived all the rules against ‘perpetuities’ as having the common purpose of favouring the free transfer of land.

²² *Cadell v Palmer* (1883) 1 Cl & Fin 372.

²³ See Chapter 5, below.

2.01 The main thrust of the Rule against Perpetuities has been conveniently summarised in the form of two propositions.¹

- (i) "Any future interest in any property, real or personal, is void from the outset if it may possibly vest after the perpetuity period has expired.
- (ii) The perpetuity period consists of any life or lives in being together with a further period of 21 years and any period of gestation."

We turn first to examine the three central aspects of the Rule: vesting, the perpetuity period and certainty of prediction; and then go on to consider the operation of the Rule in certain particular situations.

A. Vesting

2.02 The notion of vesting is a pregnant and highly technical term. An interest is "vested" for the purposes of the Rule, only when the following conditions are satisfied:²

- a) the taker is ascertained, and
- b) any condition precedent attached to the interest is satisfied, and
- c) where the interest is included in a gift to a class, the exact amount or fraction to be taken is determined.³

One point that emerges from what is *not* said in this definition is that "vesting is sufficient if it is a vesting 'in interest': the Rule does not require that there must be vesting in possession".⁴ The distinction is that an estate vested in possession is available for present enjoyment by its owner; whereas an estate vested in interest is ready to take effect in possession, only on the termination of the prior interest. Nevertheless, the borderline, which is significant for the purposes of the Rule is not that between vesting in interest and possession⁵ but rather between a vested interest (of either type), on the one hand, and a

¹ Megarry and Wade, *The Law of Real Property* (Sixth Edition, London 2000) para. 7-018

² Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1964) p.37.

³ This last requirement is peculiar to the Rule against Perpetuities: it is not found in the definition of a "vested interest" for any other purpose.

⁴ *Per Macken J. in Bank of Ireland v. Gaynor and others*, 29 June 1999, p.15

⁵ It is because the Rule bears upon the point at which a gift becomes vested in interest rather than in possession that it is not a rule against undue duration. A convenient illustration of such a rule against

contingent interest, on the other. An interest is merely contingent when any of the three conditions identified above is not satisfied. An example of condition (a) not being satisfied would be, "to A's first-born child to reach 21." Conditions (a) and (b) would be breached by, "to X if he graduates from an Irish University". An example of (c) being broken would be, 'the trust fund to be divided among each of Y's daughters to reach the age of 21' (assuming that Y is still alive or that he has daughters below the age of 21).

B. Lives in being⁶

2.03 Pursuing the policy of certainty, the Rule asks whether, at the time when the gift takes effect, it is absolutely certain that the gift must vest within a life in being plus 21 years (formerly the age of majority) together with, if gestation actually exists, the period of gestation. This 'initial certainty' requirement dictated that at the heart of the Rule, there should be a relationship, namely the relationship between the contingency on which the interest vests and the relevant life in being. In other words, the only lives which can be relevant measuring lives are those which are in some way related to the occurrence of the contingency on which the vesting is to occur. For it is only by reference to such lives that a court can, notionally, at the time of creation of the interest, put itself in the position of being able to predict with certainty that the interest will vest within the perpetuity period.

2.04 A life may be relevant as a measuring life on either of two grounds. The first is implicit selection, in the terms of the disposition, in that the contingency upon which the vesting is to take place can only occur, if at all, during the currency of some particular life. For instance, in the case of a gift: 'to the first son of B to become a solicitor,' B being dead, B's sons are the lives in being. Or 'a gift to be divided equally among the children of my daughter X'. Here, X is the life in being.

2.05 The second possibility is that a life may be expressly and specifically selected as a measuring life. For example, in a limitation to 'such of A's lineal descendants as shall be born within 21 years of the death of X,' X is the measuring life. This is fine despite the fact that he has no inherent relationship with the terms of the disposition. In practice, the most common example of express measuring lives involves the descendants of some specified British monarch, a device known as a 'Royal lives' clause. In Ireland, the practice of referring to the lives of descendants of some specified monarch has occasionally been forsaken in favour of referring to the family of Eamonn de Valera. But, among

undue duration is given by the Manitoban Law Reform Commission:

"No trust or other creation of successive interests shall endure longer than 100 years. On the expiration of that period, should termination not have occurred earlier, the person or class of persons then in possession, whatever their interest in the property, become absolute owners, and all other subsequent interests are extinguished."

Manitoba Law Reform Commission, *Report on the Rules against Accumulations and Perpetuities*, (No 49, 1982) p.39

⁶ See Maudsley *op. cit.* chapters 4 and 5; Simes, *op. cit.*; Morris and Wade, "Perpetuities Reform at Last" [1964] 80 LQR 486, 492-508; Deech, "Lives in being Revived" (1981) 94 L.Q.R. 593

practitioners, there is a strong feeling that a Royal Lives clause carries the considerable advantage that the dates of the births and deaths of the ‘lives’ involved are readily ascertainable in authoritative works, such as *Burke’s Peerage*.⁷ The possibility of this sort of expressly selected measuring life means that the Rule is less of an obstacle provided that a prudent lawyer is advising the settlor. This ease with which the Rule can be side-stepped by proficient drafting is a theme to which we shall return below.⁸

C. Certainty of prediction: No ‘wait and see’ doctrine

2.06 It was a central tenet of the lawyers who devised the Rule that it was essential to know, at the time when an instrument came into effect, what its effect would be. For the effect of the Rule to be avoided there had to be certainty that vesting would not take place outside the perpetuity period. The common law insisted that the reference point for a decision as to the validity of a gift was the date when the instrument took effect: the court had always to base its prediction on the assumed state of knowledge as at that date. In assessing the likely effect of the limitation, the courts would look only at possibilities (however unlikely), and not probabilities or actual, subsequent events.⁹ Take a straightforward example: a gift ‘to the first grandson of X to attain the age of 21’. X is alive and has a grandson aged 19. The gift is void because of the danger that the existing grandson will die before he is 21, hence not taking the gift, and that some after-born grandson will achieve the age of 21 and take the gift outside the perpetuity period.

2.07 The corollary of this requirement of certainty of prediction is an implicit rejection of a ‘wait and see’ doctrine. Such a doctrine would enable the courts to wait and see the events that actually occur, rather than acting upon remote, theoretical possibilities which exist at the date when the instrument takes effect. A gift would fail only if it were established that vesting *must* occur, if at all, after the end of the perpetuity period. Until that time arrives, the disposition would be treated as if it were not subject to the Rule. Thus, a disposition, “to A’s first son to marry” where A is a bachelor at the testator’s death, is clearly void at common law. But if there was a ‘wait and see’ doctrine, this would enable the courts to observe whether or not A has a son who marries in A’s lifetime, or within 21 years thereof, and to postpone adjudication on the settlement until that possibility had been ruled out.¹⁰ The statutory introduction of a ‘wait and see’ principle has been the chosen method of reform of the Rule in: England,¹¹ Northern Ireland,¹² New South Wales,

⁷ Widespread and reliable information is available about the births and deaths of royalty and their issue. As Shakespeare put it: “When beggars die, there are no comets seen; The heavens themselves blaze forth the death of princes.” *Julius Caesar*, Act II, Scene 2.

⁸ See paras 2.23-4 and 4.17-19, below.

⁹ Megarry and Wade, *The Law of Real Property*, (Sixth Edition, London 2000) para.7-024

¹⁰ Megarry and Wade, *The Law of Real Property*, (Sixth Edition, London 2000) para.7-024

¹¹ *Perpetuities and Accumulations Act, 1964*, Section 3(1).

¹² *Perpetuities Act (N.I.), 1966*, Section 3 (1).

Victoria, Queensland, the Australian Capital Territories and Western Australia,¹³ New Zealand,¹⁴ some Canadian provinces¹⁵ and some American States.¹⁶ The possibility of reforming Irish law by the introduction of a 'wait and see' provision is considered below.¹⁷

D. Improbable but Possible Events

2.08 We turn now to consider some of the particular situations to which the Rule has been applied. Often these situations are the consequence of the rigorous requirement of certainty imposed by the Rule and, in particular, the fact that the Rule will not take into account that certain eventualities are wildly unlikely or even impossible. The result of this policy of requiring certainty is that a limitation will be void *ab initio* if there is any (even theoretical) possibility of it failing to vest within the permitted period, no matter how improbable that failure may be.¹⁸ For example, in *Re Stratheden and Campbell* a testator gave property to a volunteer corps "on the appointment of the next lieutenant-colonel."¹⁹ This gift was invalidated, since there was a theoretical possibility that the colonel might not be appointed for 21 years. This effect of the policy has caused significant complaint against the Rule against Perpetuities, mainly because of some notorious anomalies which have resulted. These are discussed below.

Administrative Contingencies and Magic Gravel Pits

2.09 There exists a genre of cases in which settlements have been invalidated because their terms have included an administrative contingency. What is meant by an administrative contingency is explained in the following passage,

"Testators frequently provide for distribution to their issue or other beneficiaries when "my debts are paid," "my will is proved," "my estate is realised," or other events occur in the administration of their estates. They foresee the possibility that some of the objects of their bounty will die during the relatively short time that is required for the administration of their estates or for the carrying out of very short trusts which they set up for specific purposes; and desiring to avoid the additional shrinkage which is bound to attend the passage of their property through another

¹³ *Perpetuities and Accumulations Act, 1968* (VIC); *Property Law Act, 1974* (QLD); *Property Law Act, 1969* (WA); *Perpetuities and Accumulations Act, 1985* (ACT).

¹⁴ *Perpetuities Act, 1964*, Section 8.

¹⁵ Ontario, Alberta and British Columbia.

¹⁶ Massachusetts, Connecticut, Maine, Maryland, Vermont, Kentucky

¹⁷ See paras.4.24-30, below

¹⁸ "In such cases, the limitation is held invalid solely by reason of what is a theoretical possibility but a practical impossibility." *Law Reform Committee, Fourth Report, The Rule against Perpetuities*, (Cmd. 18) para.11

¹⁹ [1894] 3 Ch 265

deceased estate, they provide that the property shall pass only to persons who are living at the time when administration is completed and distribution made...”²⁰

2.10 In the nature of things, the administrative contingency will almost invariably occur well within the perpetuity period (which in the absence of an available measuring life, is 21 years only). However, the Rule requires certainty of prediction, and oftentimes the event may theoretically be delayed beyond the perpetuity period.

2.11 Take the next ever-green example of 'the Case of the Magic Gravel Pit', *Re Wood*,²¹ where a gift was given to such of the testator's issue alive at the date at which some gravel pits became exhausted. The gift was invalidated due to the possibility that the remaining half-acre of the six acre gravel pit in active operation would not be worked out within 21 years of the testator's death. This finding can fairly be regarded as absurd considering the fact that the pits were actually exhausted six years after the testator's death and, as often happens, before the case came to court. Similarly, in *Re Bewick*, distribution was postponed until a balance of £1,000 on a mortgage was repaid.²² If the instalments were promptly paid, by the trustees appointed to do so, the mortgage would have been discharged within 18 years. The gift was invalidated since it was possible that supervening events could interrupt the mortgage repayments, thereby delaying distribution of the settlor's property beyond 21 years.

2.12 It is difficult to justify the strict application of the requirement of certainty to administrative contingencies. First, the validity or otherwise of the settlement is largely a question of construction. Thus, the courts will often construe an administrative contingency as referring not to the event itself, which may occur at any time, but to the time when it ought to have happened, such as a reasonable time after death. In this analysis, the gift is not too remote.²³ Thus, in order to mitigate the harshness of the Rule, an element of arbitrariness is built into its application, a phenomenon which we shall see in other areas. Secondly, a condition such as “when my estate is realised” does not really cause any tying up of property because the property will be restricted anyway throughout the administration process. Morris and Leach explain,

“...from the very nature of the probate process and the uncertainties inherent in it, the property is tied up until the issue of probate is finally determined. If the testator adds a new contingency that the beneficial interests shall go only to persons who are living at the time of probate, this adds no additional period of uncertainty of ownership.”²⁴

²⁰ Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1964) p. 73.

²¹ [1894] 3 Ch. 381.

²² [1911] 1 Ch. 116

²³ *Re Petrie* [1961] 3 WLR 1348 (CA); *Brandenburg v. Thorndike* 139 Mass. 102, 28 NE 575 (1885). See Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1964) p. 74.

²⁴ *Op cit* p. 76.

Thus, as well as being harsh and unpredictable, the application of the Rule in this context lacks any sound policy justification.

Fertile octogenarians and precocious toddlers

2.13 In England, this policy was previously “carried to the extreme of disregarding physical impossibilities.”²⁵ Since the case of *Jee v. Audley*, for the purposes of the Rule, the courts have refused to regard a woman as incapable of having children, irrespective of how old she may be, and of clear medical evidence of infertility.²⁶ This has led to nonsensical conclusions such as that in *Ward v. Van der Loeff* where the House of Lords invalidated a gift due to the possibility of a 66 year old couple having more children.²⁷ This strict exclusion has been attributed to the “difficulty and delicacy of determining the question involved.”²⁸ This seems a little antiquated as such issues as fertility are now openly addressed, in the courts and elsewhere. At the far end of life, the Court in *Re Gaite’s Will Trust*²⁹ treated as a possibility the prospect of a child of five years or less having a child. These “fertile octogenarian” and “precocious toddler” cases have been almost universally criticised, most notably and persistently by Professor Barton Leach.³⁰ According to Morris and Wade, the presumption of fertility “makes a laughing-stock of the Rule against Perpetuities and brings it into undeserved contempt.”³¹

*Ireland: Exham v. Beamish*³²

2.14 The Irish courts are generally regarded as having avoided the anomalies set out above.³³ This perception is attributable to the judgment of Gavan Duffy J. in *Exham v.*

²⁵ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.060, p. 309.

²⁶ *Jee v. Audley* (1787) 1 Cox Eq Cas 324, 29 ER 1186. This has been altered by, for instance, (English) *Perpetuities and Accumulations Act 1964* section 2; and the *Perpetuities Act (NI) 1966* section, each both of which introduces a wait and see principle as well as a rebuttable presumption of infertility for young people and women over 55 years.

²⁷ [1924] AC 653

²⁸ Gray, *Rule against Perpetuities*, (Fourth Edition) s. 215.

²⁹ [1949] 1 All ER 459

³⁰ Barton Leach, "Perpetuities in a Nutshell" (1938) 51 HLR 638; "Perpetuities in Perspective: Ending the Rule's Reign of Terror" (1952) 65 HLR 721; "Perpetuities: Staying the Slaughter of Innocents" (1952) 58 LQR 35. For further references, see Wylie, *Irish Land Law*, (Third Edition, 1997) p. 307, fn. 153.

³¹ Morris and Wade, "Perpetuities Reform at Last" [1964] 80 LQR 486, 489.

³² [1939] IR 336

³³ Gavan Duffy J. strongly defended the prerogative of the Irish judiciary to depart from their English counterparts. “If before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous, it is not in the public interest that we should repeat the mistake.” (*Ibid.*, p.349) This echoes the strong sentiments expressed by the same judge in the later case of *In re Tilson Infants*, wherein he stated, “For religion, for marriage, for the family and the children, we have laid our own foundations. Much of the resultant polity is both remote from British precedent and alien to the English way of life and, when the powerful torch of transmarine legal authority is flashed across our path to show us the way we should go, that disconformity may point decisively another way.” ([1951] IR 1, 15). Both cases are discussed in Osborough, "Scholarship and the University

Beamish.³⁴ In that case, the validity of an *inter vivos* disposition to the grandchildren of William and Ann Thompson depended on the Court recognising that the couple could not possibly have had any more children at the date of the settlement. Gavan Duffy J. held that “if it should be satisfactorily proved that modern medical science would regard as an absurdity the supposition that another child might in the ordinary course of nature have been born to Mr and Mrs Thompson after the date of the settlement,” the Court is not required to regard that absurdity as a possibility for the purposes of the Rule.³⁵ In effect, this means that the Irish courts have adopted a rebuttable presumption of fertility, as distinct from the English insistence on an irrebuttable presumption.

While this undoubtedly improves matters, it is important not to overstate the value of *Exham v. Beamish*.³⁶ To begin with, Gavan Duffy’s comments were *obiter*.³⁷ That is, he declared himself willing to hear medical evidence relating to fertility, but none had been offered during the course of the hearing. The judge stated that he was willing to postpone his final decision until evidence as to Mrs Thompson’s age when the settlement was made in 1865, was produced.³⁸ However it appears that no such request was made by counsel for the defendants, and consequently, the trust was held to be void for remoteness.

2.16 Secondly, and more significantly, the extent to which Gavan Duffy J. departed from the English approach was quite limited. In particular, the judge expressly, albeit reluctantly, declined to adopt a “wait and see” approach to the Rule against Perpetuities.³⁹ He explained: “severe exclusion of evidence about after-events under the rule against perpetuities is not congenial to me, but it is not an absurdity and I am bound to give effect to it.”⁴⁰ He justified the admissibility of evidence as to Mrs Thompson’s fertility in 1865, on the basis that this was “an existing fact, material at the date of the settlement,”⁴¹ as opposed to an after-event. If only facts contemporaneous with the settlement are admissible, evidence as to whether Mrs Thompson, or any third party, *subsequently* had any children would presumably be inadmissible. Furthermore, it was deemed significant that Mrs Thompson was a “party to the settlement” and according to the judge, “the person

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³⁴ [1939] IR 336

³⁵ [1939] IR 336, 350.

³⁶ The English judge and writer commentator, Megarry V.C. (as he later became) found it “hard to restrain a wistful sigh” when comparing *Exham* to equivalent English cases, in (1943) 59 LQR 26. The case has often been discussed as an authority for establishing the independence and autonomy of the Irish courts, but never in a case about the Rule against Perpetuities. See for example: *Hoey and Anor. V. Minister for Justice* [1994] 1 ILRM 344; *Irish Shell Limited v. Elm Motors Ltd* [1984] IR 200; *McGee v. The Attorney General*, [1974] IR 284

³⁷ See especially [1939] IR 336, 347 and Wylie, *Irish Land Law* (Third Edition, 1997) para. 5.060

³⁸ *Ibid.*, p.347.

³⁹ [1939] IR 336, 347. Gavan Duffy J. said that he felt bound by the earlier decision of *Smith v. Dungannon* (1846) 12 Cl & F 546, nearly a century earlier.

⁴⁰ *Ibid.*, p.349.

⁴¹ *Ibid.*, p.350.

who should most accurately be called the settlor.”⁴² Thus, Gavan Duffy J. stated *obiter* that, if called upon, he would not have admitted evidence as to the fertility or otherwise of somebody who was not a party to the settlement.⁴³ This is a significant limitation, as it can often happen that a settlement fails due the possibility that someone other than the settlor may have further children.

2.17 The limited concession from Gavan Duffy J. invites the Irish courts to hear evidence as to the future fertility of settlors. This clearly blurs the line between theoretical possibilities and real probabilities yet stops short of abolishing that line altogether. It is submitted that once the absurdity of a policy of certainty is realised and alleviated in one context, it becomes difficult to justify its non-recognition in other contexts. In this respect, Lyall similarly states:

“Nevertheless, if one does not accept that “formal realisability” justifies any absurdity in this context, as most property lawyers do not, it then illustrates that when one attempts to unravel the absurdities of the perpetuity rule at common law it is not easy to justify stopping at any particular point...The perpetuity rule is built on the foundation of formal realisability, of a rule capable of precise application without the exercise of discretion. Once this foundation is removed, the whole edifice begins to crumble.”⁴⁴

Mee writes in similar terms,

“although the approach of Gavan Duffy J. is probably the better one, one should not get carried away...The inconsistency of Gavan Duffy J’s approach derives from the fact that common sense is being injected into the proceedings one step too late.”⁴⁵

2.18 The usefulness of Gavan Duffy J’s concession is arguably further undermined by advances in medical science. The concept of child bearing in the “ordinary course of nature” is becoming an increasingly grey area.⁴⁶ The success of artificial insemination, even posthumously, and other treatments for infertility render it increasingly unlikely that medical witnesses will testify that the possibility of reproduction is “absurd”, as Gavan Duffy J. demanded.⁴⁷ Indeed, the phenomenon of babies born years after the death of their

⁴² *Ibid.*, p.350.

⁴³ For examples see: *Jee v. Audley* (1787) 1 Cox 324 *In re Dawson* (1888) 39 Ch.D. 155 *In re Sayer’s Trusts* 6 Eq. 319 *Cooper v. Laroche* (1881) 17 Ch.D. 368 *Ward v. Van der Loeff* [1924] A.C. 653.

⁴⁴ Lyall, *Land Law in Ireland*, (Third edition, 1994) p.302.

⁴⁵ Mee, “Land Law – The Rule Against Perpetuities Return of the Fertile Octogenarian,” [1992] 14 DULJ 182, 187

⁴⁶ *Exham v. Beamish* [1939] IR 336, 350.

⁴⁷ For some astonishing examples of modern fertility treatment see, “Never say die” in *New Scientist* 27 March 1999, and “Woman who won legal case over sperm is pregnant” in *The Irish Times* 29 June 1998. Similarly, Morris and Leach refer to a case in Lima, Peru in 1939, where apparently a five year old girl gave birth to a baby boy, by way of caesarean section. (Morris and Leach, *The Rule against Perpetuities*, (Second edition) p. 85, fn. 27.)

fathers (children “*en ventre sa frigidare*” in the words of Morris and Wade⁴⁸) is a possibility which, if entertained by the courts, could defeat the strict requirement of certainty in almost every settlement. Mee writes,

“It seems clear that medical science, oblivious to the absurd agenda of the Rule Against Perpetuities, would say that it was “impossible” for any woman of eighty to conceive a child. But is it “impossible” for a woman aged 53, or 55, or 57? One is clearly left wondering where to draw the line...The pencil may as well be thrown away, since no possibility can be treated as too unlikely to consider.”⁴⁹

2.19 This point is best illustrated by reference to the facts of *Exham v. Beamish* itself. Although this fact was not available to Gavan Duffy J. when he delivered his judgment, Ann Thompson was in fact 46 years old when the settlement was made in 1865.⁵⁰ Nowadays, one can scarcely envisage a medical expert testifying that reproduction at 46 is absurd, yet Gavan Duffy J. had exactly such a scenario in mind when he formulated his test.

Unborn Widows and Widowers

2.20 Another ambush lurks in wait for apparently innocent settlements. The Rule strikes at limitations which include a gift to an unborn widow (or widower: however for brevity, we shall refer to unborn ‘widows’). A typical example of such a limitation is ‘to A, a bachelor, for life, with remainder to any wife he may marry, for her life with remainder to such of their children as shall be living at the death of the survivor of A and such wife.’ Subject to one possibility to which we shall return, the gift to Mrs. A is valid because A is a life in being. However, the gift to the children is void at common law. The reason is that A may possibly marry a lady who was not born at the time when the instrument comes into effect and, thus, is not a life in being. If Mrs. A survives A by more than twenty one years, then the gift to the children would vest beyond the perpetuity period.

2.21 A “constructional escape” can be afforded if a settlement is drafted with extreme care.⁵¹ It should be made absolutely clear that the intended beneficiary is a spouse currently married to the settlor (and by definition, alive) or a named individual, also alive.⁵² By the same token, Lyall points to another drafting escape mechanism whereby the words “alive at the death of the survivor of A and her husband” are omitted from the settlement.⁵³ The

⁴⁸ Morris and Wade, “Perpetuities Reform at Last” [1964] 80 LQR 486, 489, fn. 16. The authors describe this possibility as “a new horror yet in store.”

⁴⁹ Mee, “Land Law – The Rule Against Perpetuities Return of the Fertile Octogenarian” [1992] 14 D.U.L.J. 182, 187-8.

⁵⁰ Lyall, *Land Law in Ireland*, (1994) p. 302.

⁵¹ Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1964) p.72.

⁵² An example of such a limitation is “To A for life then for A’s wife, B, for life, and then for the children of A then living.” See: *Re Hancock* [1896] 2 Ch. 173 (CA) and *Re Burrow’s Trusts* (1864) 10 ILT 184.

⁵³ Lyall, *Land Law in Ireland*, (1994) p. 299.

effect of these words is to postpone vesting in interest until the death of the survivor of A and her husband. By removing them, the gift will vest in interest not later than the death of A, a life in being, and will consequently be valid.

2.22 These fine points of drafting are cold comfort to ill-advised settlors whose wishes are thwarted by the Rule. They also raise the question, if the Rule is so effortlessly avoided, why does it exist? The “unborn widow-er trap” is one that often disrupts innocent settlements⁵⁴. The far-reaching consequences which ensue where the Rule applies, and the frequency with which it affects this kind of settlement, both sit uneasily with the ability to avoid its application by skilled drafting.

E. Why not ‘Wait and See’ in Ireland?

2.23 It is undoubtedly true that the introduction of a ‘wait and see’ principle would overcome some of the anomalies and injustices set out above. That said, it is by no means a flawless method of reform. To begin with, it provides only limited relief. Where vesting occurs outside the perpetuity period, the ‘wait and see’ principle is useless, and legatees’ interests continue to be disappointed. Secondly, the ‘wait and see’ rule does not affect the length of the perpetuity period. This is especially problematic where there is no relevant life in being and the relevant perpetuity period is a mere 21 years. Thirdly, the introduction of a ‘wait and see’ principle brings with it new problems of its own. Throughout the perpetuity period, the validity of the gift remains mired in uncertainty, as does the identity of the proper recipient of any intermediate income generated by the subject matter of the gift.⁵⁵ Even Morris and Leach, who are strong advocates of the principle, admit that in certain forms (like the Pennsylvania statute) it “will unquestionably require a substantial amount of litigation to clarify its application.”⁵⁶

F. Subsequent Gifts

2.25 The manner in which the Rule against Perpetuities applies to subsequent or successive gifts is governed by the general principle that the Rule should be applied to each gift separately and each gift’s validity should be determined accordingly.⁵⁷ Where the primary gift complies with the Rule but the secondary one fails for perpetuity, the validity of the former endures as though the latter had never existed. When the situation is reversed,

⁵⁴ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.078, p. 319. Similarly, Morris and Leach state, “This type of case repeatedly occurs,” *op. cit.* p.72.

⁵⁵ The English Law Committee assert that the issue of intermediate income is adequately addressed in the Trustee Act 1925, section 31 (1)(i), which states that the trustees may exercise a power of maintenance in respect of minors, and according to Section 3(1)(i), trustees *must* pay over any income to potential beneficiaries once the latter have reached eighteen years. *Law Reform Committee, Fourth Report (The Rule Against Perpetuities)* para.20. See also: Simes, "Is the Rule against Perpetuities Doomed? The ‘Wait and See’ Doctrine" (1953) 52 Mich. L.Rev. 179.

⁵⁶ Morris and Leach, *The Rule Against Perpetuities*, (Second Edition 1964) p. 91.

⁵⁷ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.091, p. 325.

and the primary gift is invalidated, one of three scenarios will ensue. If the secondary gift is not contingent but rather vests in interest immediately, its validity will not be affected by the failure of the primary gift. Secondly, if the secondary gift is contingent upon an event which is entirely unconnected with the primary limitation, it too will survive, provided it complies with the perpetuity rule.⁵⁸

2.26 Thirdly, however, the Rule does bite if the secondary gift is contingent upon the primary gift. In this last case, the fact that the primary gift is invalid for perpetuity will, in turn, taint the later gift and render it void also.⁵⁹ *Re Ramadge's Settlement*,⁶⁰ concerned a three-tiered settlement. A testator exercised a power of appointment in favour of his two youngest sons during their lives and then to such of his three daughters as should then be living, for their joint lives. After the death of the last living daughter, the property was to pass to the testator's eldest son. The second appointment, to the three daughters, was void for remoteness according to O'Connor MR, as it conferred a contingent interest which might vest outside the perpetuity period. The subsequent appointment in favour of the testator's eldest son, Smith Ramadge, was void in turn because it was contingent upon the validity of the earlier gift to the daughters. This 'trickle down' effect of the Rule against Perpetuities was described by the judge as a rule "too firmly established to admit any [contrary] contention."⁶¹

2.27 No satisfactory justification for the automatic invalidation of these subsequent contingent interests has ever been provided.⁶² If it is designed to carry out the wishes of the settlor, as has been argued elsewhere,⁶³ it fails miserably. In effect, the testator has a series of interdependent wishes. The notion that the Rule against Perpetuities has a 'knock-on' effect means that the testator's subsequent intention is frustrated merely because his primary intention falls foul of the Rule. There seems to be no good reason why the later intention cannot be severed and saved, as it does not itself offend against the Rule. The English Law Reform Committee argued in 1956:- "We do not think it right that any limitation which itself complies with the rule should be invalidated by being preceded in the series of limitations by an invalid limitation."⁶⁴

2.28 This problem with the Rule, as it applies to subsequent gifts, is made worse by a marked difficulty in operating a test of dependency. The task of drawing a definite line between gifts that are dependant upon earlier gifts, and those that are entirely independent, and consequently between where the Rule does and does not apply, has proved to be a troublesome one. Again, the Law Reform Committee expressed its dissatisfaction:-

⁵⁸ *Re Hay* [1932] NI 215

⁵⁹ *Armstrong v. West* (1863) Ir Jur (NS) 144; *Re Manning's Trusts* (1915) 49 ILTR 143.

⁶⁰ [1919] IR 205

⁶¹ *Ibid.*, p.220

⁶² Morris and Leach, *The Rule Against Perpetuities*, (Second Edition 1964) pp. 179,180.

⁶³ *Re Abbott* [1893] 1 Ch. 54, 57 *per* Stirling J.

⁶⁴ Law Reform Committee, Fourth Report, *The Rule against Perpetuities*, Cmnd. 18 para. 33, p. 17.

“But the phrase "dependent upon" does not appear to be confined to such cases, and it is not easy to discover any precise test for "dependency" in this context. On this point, it may without any disrespect to the courts be said that a perusal of cases such as ...,⁶⁵ is more depressing than illuminating; and we can see small merit in attempting to make more precise a doctrine in which we can discern little virtue.”⁶⁶

Returning to *Ramadge's case*, this problem of construction can be demonstrated. Smith Ramadge had no alternative but to argue that the appointment in his favour was an independent, alternative appointment rather than a subsequent, contingent one. But the words “and after the death of the survivor of my younger children...,” established a link of dependency between the relevant appointments and so the judge rejected his argument. By contrast, Andrews LJ in *Re Hay*, interpreted the words, “and in default of same...” as giving rise to a wholly independent and alternative gift.⁶⁷ While the conclusion in each individual case can be justified, it seems absurd that “the decisions depend in so many cases upon the particular phraseology employed by the testator”.⁶⁸ Furthermore, there exists an open, constructional bias in favour of independent, non-contingent gifts - as described by Andrews LJ - “The Court is always slow, especially in the case of such series of limitations as are before us in this will, to put a construction upon ambiguous words as would create an intestacy.”⁶⁹ Aside from causing yet more uncertainty, this bias also intensifies the harshness of the Rule for grantees whose gifts are nevertheless construed as subsequent and contingent.

G. Exceptions to the ‘No Wait and See’ Rule

Alternative Contingencies

2.30 Where a gift makes two alternative contingencies on which the property may vest, of which one contingency is too remote and the other is not, the gift is good even at common law if, in fact, the valid contingency materialises. An example of this type of limitation is given by Wylie. It reads, “to the first son of A to become a solicitor, but if A shall have no son who becomes a solicitor or no son at all, then to B in fee simple.”⁷⁰ Here, the former gift is too remote, but the latter, on its own, is valid. In such circumstances, the courts will (uncharacteristically) ‘wait and see’ whether A, a life in being, dies leaving no

⁶⁵ “...*Re Thatcher's Trusts* (1859) 26 Beav. 365, *Re Backhouse* [1921] 2 Ch. 51, *Re (1958) Canning's Will Trusts* [1936] Ch. 309, *Re Coleman* [1936] Ch. 528, and *Re Mill's Declaration of Trust* [1950] 1 All E.R. 789 (affirmed [1950] 2 All E.R. 292).”

⁶⁶ *Ibid.*, para. 32.

⁶⁷ *Re Hay* [1932] NI 215

⁶⁸ *Ibid.*, p. 218

⁶⁹ *Ibid.* p.219

⁷⁰ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.095, pp. 326-327.

sons at all. If so, B's gift will be good. If not the gift would be void.⁷¹ Pragmatic and welcome as this policy is, it is difficult to dispute Wylie's comment that the application of the 'wait and see' principle is "contrary to the general rules governing the application of the rule against perpetuities and it is difficult to see why such cases should [receive] favoured treatment."⁷²

Powers of Appointment

2.31 Powers of Appointment conferred on trustees in a will or settlement are variously affected by the Rule against Perpetuities, depending on the category of power into which they fall. The principal distinction is between:

- (i) General powers, which exist where a donee is conferred with unfettered discretion and can even make a disposition in his or her own favour, and,
- (ii) Special powers, which are more constrained. They exist where a donee cannot make an appointment to himself but must seek the consent of the donor first, is confined to a limited class of potential beneficiaries, or, is 'hemmed in' in some analogous way.

Wylie notes that the proper classification of a power of appointment is a "difficult question of construction."⁷³ To complicate matters further, another distinction must be drawn between the validity of the power itself and the validity of any appointment made under that power. Within that structure, we turn now to examine the effect of the Rule against Perpetuities on powers of appointment.

General Powers

2.32 In the first place, the Rule has no function in relation to general powers unless the power itself is contingent and may not be vested in the donee before the expiration of the perpetuity period.⁷⁴ The reason is that the extensive authority, conferred by a general power of appointment, effectively places the donee thereof in the same position as the absolute owner of the trust property. Thus, for the purposes of the Rule against Perpetuities, the appointments by the donee will be treated identically to appointments by the owner of the property. In practical terms, this means that the perpetuity period does not begin to run until the appointment is made, and thereafter, all the usual rules apply.

Special Powers

2.33 The limited nature of the powers conferred on a donee in the case of special powers of appointment, means that the situation cannot be equated with a fee simple vested

⁷¹ *Hodgson v. Halford* (1879) 11 Ch D 959; *Re Curryer's Will Trusts* [1938] Ch 952.

⁷² Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.096, p. 327.

⁷³ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.119, p. 336.

⁷⁴ *Stuart v. Babington* (1891) 27 LR Ir 551, V-C.

in an owner. For as long as the power remains unexercised, it is not vested. Thus the Rule against Perpetuities applies to the power itself, as well as to appointments made thereunder. As regards the power itself, it will be void if it is possible that it may be exercised outside the perpetuity period.⁷⁵ That period runs from the date of operation of the instrument creating the power. As regards any appointments made thereunder, the courts similarly regard the perpetuity period as running from the date of the power's creation, and not from the date of any appointment thereunder. The rationale underpinning this policy is that, where special powers are concerned, the property in question is restricted and tied up by the conditions originally laid down by the donor. This contrasts with the relatively unhindered nature of general powers. Thus, an appointment will be void if it occurs outside the perpetuity period which runs immediately once the power is established.⁷⁶

Wait and See?

2.34 The stringency of this Rule as it relates to special powers has prompted the courts to overcome their usual abhorrence for the 'wait and see' principle. First, the theoretical possibility that an invalid appointment may be made will not be sufficient (as it is elsewhere) to invalidate the power itself. The courts are willing to wait and see whether such an appointment is in fact made, before determining the validity of the power.⁷⁷ Secondly, facts existing at the date of the appointment can be considered in deciding whether the requisite certainty of vesting exists.⁷⁸ For example, in *Re Hallinan's Trusts*,⁷⁹ a testator exercised his power of appointment, under an earlier marriage settlement, in favour of his daughter on her reaching the age of 25. The testator died when his daughter was fifteen. Were the rule to have been applied in the usual way, this appointment would be void for remoteness, as it could potentially have vested more than 21 years after the life in being. However, Porter M.R. was prepared to take account of the facts at the date of the appointment, as opposed to at the start of the perpetuity period. Thus although late vesting was theoretically possible, the Court took cognisance of the fact that it had not actually taken place.

2.35 Morris and Leach describe this as the 'second look' doctrine, and the authors heap praise upon it, stating, "For the court to close its eyes to facts existing when the appointment is made would be to engage in an artificial and unnecessary destruction of interests, and would produce manifest absurdity."⁸⁰ This is true. However, the courts' pragmatism in the area of special powers is difficult to reconcile with a strict 'no wait and see' rule elsewhere. Why is the absurdity of a magic gravel pit less objectionable than the potential absurdities in the area of special powers? Gavan Duffy J. commented "The

⁷⁵ *Stark v. Dakyns* (1874) 10 Ch App 35

⁷⁶ *D'Abbadie v. Bizion* (1871) IR Eq 205, *Re Manning's Trusts* (1915) 49 ILTR 143.

⁷⁷ Lyall, *Land Law in Ireland*, para. 13.4.2, p. 358.

⁷⁸ *Davy v. Clarke* [1920] 1 IR 137; *Re Paul* [1912] 2 Ch. 1.

⁷⁹ [1904] 1 IR. 452.

⁸⁰ Morris and Leach, *The Rule against Perpetuities*, (Second edition, 1962), p.152.

admissibility of after events to determine remoteness under powers of appointment stands in sharp contrast to its inadmissibility to determine remoteness in other cases.”⁸¹

H. Determinable and Conditional Gifts

2.36 Wylie describes this topic as “one of the most controversial aspects of the rule against perpetuities”⁸². To begin with, a determinable interest is “an estate of potentially perpetual duration which is, however, liable to be cut short by the occurrence of some specified but unpredictable event.”⁸³ An example is, “to X in fee simple until the River Liffey freezes over.” The two common interests which arise where a determinable fee is terminated are a grantor’s possibility of reverter (in the case of a legal estate in land), and a resulting trust (in the case of any property held on trust). It is the application of the Rule to these future interests that concern us here, rather than the determinable fee itself. (We are not going into the rather formal differences between an estate subject to a condition subsequent and a determinable fee.⁸⁴)

2.37 Take, next, conditional interests in this discussion. Conditional interests can be subject to a condition precedent or a condition subsequent. It is the latter with which we are concerned here, since a conditional interest subject to a condition precedent involves the type of contingency with which we have been concerned throughout this chapter and it is clearly subject to the Rule against Perpetuities. A condition subsequent is one “which may [if breached] result in forfeiture of an estate *already vested* in the grantee.”⁸⁵ An example is, “to X and his heirs, provided X remains a dentist.” The most common type of interest which arises where a condition subsequent is broken, is a right of re-entry in the grantor. Again it is this possible future interest that concerns us here, rather than the conditional fee itself.

2.38 The Irish courts have not applied the Rule against Perpetuities to the various possible future interests outlined above. As such, the reform or abolition of the Rule will have little or no bearing in this area. That said, these are, by definition, future contingent interests, and their omission from the Rule ought to be remarked upon.

2.39 A right of entry for condition broken was at issue in *Attorney General v. Cummins*.⁸⁶ There, Palles C.B. was adamant that such rights, as well as possibilities of reverter, were outside the remit of the Rule against Perpetuities. To find otherwise, he said, would have the effect of “abrogating the elementary principle that, on the happening of the

⁸¹ *Exham v. Beamish*, [1939] IR 336, p. 347.

⁸² Wylie, *Irish Land Law*, (Third Edition), para. 5.099, p. 328.

⁸³ Gray, *Elements of Land Law* (Second Edition, 1994) p 85.

⁸⁴ Wylie, *op.cit.*, para. 4.049

⁸⁵ Wylie, *Irish Land Law*, (Third Edition), para. 4.048, p. 204.

⁸⁶ [1906] 1 IR 406

event, the fee in the grantee determined.”⁸⁷ Furthermore, the origin of the Rule as one applicable to springing and shifting uses, and other conveyances under the Statute of Uses, was not consistent with its application to “estates created by Common Law conveyances.”⁸⁸ In *Walsh v. Wightman* the Northern Ireland Court of Appeal “unhesitatingly” adopted Palles CB’s views, as they warranted “acceptance on both historical and logical grounds.”⁸⁹

2.40 This refusal to subject such interests to the Rule against Perpetuities contrasts with the somewhat confused position in England. With the exception of one case,⁹⁰ the English courts have consistently excluded resulting trusts and possibilities of reverter from the Rule.⁹¹ However, in the case of a condition subsequent, the grantor's right of re-entry will be void under English law, unless it must occur if at all within the perpetuity period.⁹² Where the Rule against Perpetuities applies to such interests the consequences are devastating. By rendering void the possibility of reverter or right of re-entry, it effectively converts the original grantee’s interest into a fee simple absolute.⁹³ The Irish refusal to subject such interests to the rigours of the Rule is therefore a welcome policy. However, one wonders whether it can be easily reconciled with the Rule’s application to other future contingent interests, where the consequences of its operation are equally grave. Morris and Leach highlight this inconsistency and conclude that the Rule should also be applied to conditional and determinable gifts.⁹⁴ (Although the authors were undoubtedly influenced by the English internal inconsistency whereby the Rule applies to conditional, but not determinable, gifts). However, bearing in mind the severe consequences of such a policy it is contended that a more satisfactory option is to ameliorate the situation for other future interests, rather than exacerbating matters for interests that spring from conditional and determinable gifts. As Mee wrote in a slightly different context, “it is probably better to be inconsistent but sensible than to be consistent but absurd.”⁹⁵

⁸⁷ *Ibid.*, p. 409.

⁸⁸ *Ibid.*, p. 409.

⁸⁹ [1927] NI 1, p.15 *per* Andrews L.J.

⁹⁰ *Hopper v. Corporation of Liverpool* (1944) 88 SJ 213.

⁹¹ *Attorney General v. Pyle* (1738) 1 Atk 435, *Re Cooper's Conveyance Trusts* [1956] 1 WLR 1096 and *Re Chardon* [1928] Ch 624.

⁹² *Re The Trustees of Hollis' Hospital and Hague's Contract* [1899] 2 Ch 540 and *Re Da Costa* [1912] 1 Ch 337

⁹³ Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1962) pp.212-213.

⁹⁴ *Ibid.*, p.213 *et seq.*

⁹⁵ Mee, "Land Law – The Rule Against Perpetuities Return of the Fertile Octogenarian" [1992] 14 D.U.L.J. 182, 188.

I. “Gift-Saving” Devices

2.41 An appreciation of the sometimes harsh consequences of the Rule has prompted the courts to develop rules of construction which tilt the balance in favour of valid settlements.

A Constructional Bias

2.42 One method employed by the courts to side-step the sometimes severe effects of the Rule, is a strong constructional bias in favour of vested interests. Thus, what appears at first to be a contingent gift is sometimes construed as a vested gift “liable to be divested on failure to comply with a condition subsequent.”⁹⁶ The bias is probably attributable, in part, to a desire to assist future interests to evade the Rule against Perpetuities. Black J. in *Re Poe*,⁹⁷ candidly admitted that his interpretation of the trust in question was coloured by the looming threat posed by the Rule against Perpetuities. He stated, “I consider the words of the will before me to be ambiguous and indeterminate, and such that in construing them, I should be justified in giving some weight, if necessary, to the consequences that would ensue from adopting a construction [which would attract the rules against remoteness].”⁹⁸

2.43 While this rule of construction is a welcome concession from the point of view of those whose interests would otherwise be defeated, it has occasionally led to the “rather violent and unnatural construction of words of contingency.”⁹⁹ Such unlikely interpretation may aid individual legatees but lends an element of unpredictability to the Rule’s application. Morris and Leach describe the distinction between a vested and a contingent interest as “so delicate and so much dependant upon a minute consideration of the whole language of an instrument”.¹⁰⁰ This uncertainty is exacerbated, in an Irish context, by documented dissatisfaction with the rule of construction combined with a refusal to overrule it. This was the position set out by Kenny J in *Re Murphy’s Estate*.¹⁰¹ In contrast with Gavan Duffy J. in *Exham v. Beamish*, the judge felt bound by three pre-1921 House of Lords decisions in which the concession had been recognised, but criticised it in the strongest terms,¹⁰²

“The reasoning on which the rule was based is plainly fallacious when there is a

⁹⁶ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.059, p. 308. See: *Minch v. Minch* (1923) 57 ILTR 135, *Re Orme’s Settlement Trusts* (1851) 1 Ir Ch R 175, *Love v. Love* (1881) 7 LR Ir 306.

⁹⁷ [1942] IR 535

⁹⁸ *Ibid.*, p. 545

⁹⁹ *Mc Greedy v. CIR* [1951] NI 155, 161-162 *per* Black J.

¹⁰⁰ See Morris and Leach, *The Rule Against Perpetuities*, (Second Edition, 1962) p.39 where this subject is briefly examined.

¹⁰¹ [1964] IR 308

¹⁰² *Ibid.*, pp. 310, 311. The House of Lords decisions in question were *Radoll v. Doe d’Roake* (1817) 5 Dow 202, *Phipps v. Ackers* 9 Cl.& F. 583, and *Pearks v. Mosley* 5 App. Cas. 714.

residuary clause, as it is then probable that the testator intended that the income of the property devised on condition, should form part of the residuary estate until the attainment of the specified age.¹⁰³

Classes

2.44 A class gift is one where each member of some appointed group takes an equal share in property, and the size of that share is dictated by the number of members of the class.¹⁰⁴ The Rule against Perpetuities, if applied to such gifts, has drastic consequences. The general principle, as explained by Black J., is that “if the vice of remoteness may affect any unascertained member of the class, it affects the class as a whole. For this purpose, the disposition cannot be limited like the curate’s egg – good in parts.”¹⁰⁵ Thus, a remote possibility that one member of a class might take outside the perpetuity period, will frustrate the entire gift, irrespective of whether or not the other members have complied with the given contingency and indeed with the Rule.¹⁰⁶ This result, which would in most cases have horrified the donor, is usually put on the basis that, as already explained, the ‘vesting’ element of the Rule means, *inter alia*, that in the case of a class gift, it must be certain, at the time when the instrument comes into effect, that the exact fraction to be taken by each beneficiary will be determined during the period. This, in turn, requires that the exact number of beneficiaries must be certain to be determined. By way of illustration, the case of *Re Taylor’s Trusts*,¹⁰⁷ concerned a limitation to each of Thomas Taylor’s children for life, remainder to the husband or wife of each child (who may be unborn at the time of the testator’s death) for life, remainder to the issue then living of each child absolutely. According to Wylie J, because the class of “issue then living” might not be ascertainable within 21 years of the death of each child, the gift was void for remoteness.¹⁰⁸

2.45 However before having recourse to the strict rule above, a court must apply the class-closing rule - sometimes known as the rule in *Andrews v. Partington*.¹⁰⁹ This rule, which has been recognised and applied in Ireland,¹¹⁰ states that the class closes as soon as the first member of a class becomes entitled to his share or, in other words, once that share

¹⁰³ Ultimately, the judge refused to apply the constructional rule where a residuary clause had been inserted into the deceased’s will. This amounted to clear evidence of the intentions of the testator in the event of the condition precedent not being satisfied. He stated, “I think it undesirable that I should be forced by any rule of construction to give a meaning to a will which I am convinced the testator and his legal advisers did not intend.” *Ibid.* p.313.

¹⁰⁴ Wylie, *Irish Land Law*, (Third Edition, 1997) para. 5.080, p. 320

¹⁰⁵ *Re Poe* [1942] IR 535, p.539.

¹⁰⁶ *Exham v. Beamish* [1939 IR 336, pp 344-5., *Re Poe* [1942] IR 535, and *Re Taylor’s Trusts* [1912] 1 IR 1.

¹⁰⁷ *Re Taylor’s Trusts*, [1912] 1 IR 1

¹⁰⁸ *Ibid.*, p.11

¹⁰⁹ (1791) 3 Bro. C.C.401. This rule has as its effect the saving of class gifts from the Rule against Perpetuities but it is noteworthy that the rule of construction was not devised specifically to deal with the Rule against Perpetuities. *O’Byrne v. Davoren* [1994] 3 IR 373, 377. See also, Wylie, *Irish Land Law* (Third Edition, 1997) para. 5.084, p. 322.

¹¹⁰ *Re Poe* [1942] IR 535, *Re Burke* [1945] Ir Jur Rep 12, *Williamson v. Williamson* [1974] NI 92.

becomes vested in possession. All potential beneficiaries alive at this date may still qualify to take their shares but no member of the category may subsequently enter the class.¹¹¹ This effectively means that the number of members in the class is fixed and ascertained, thereby saving the gift from invalidity by virtue of the Rule.

2.46 It ought to be remembered that the class-closing rule can only go so far. Of course, it ameliorates the drastic situation set out above, but to a limited extent. The limits of its usefulness are set out by Black J. in *Re Poe*.¹¹² He describes it as a “rule of convenience” but wryly adds, “it is a rule that must be very inconvenient to those children who may be born after the period of distribution.”¹¹³ In addition, the class closing rules do not apply where trustees are obliged to apply trust funds for the benefit of the members of a class, as distinct from distributing a gift between those members.¹¹⁴ Finally, class closing will not operate if the terms of the will or deed point towards a “contrary or inconsistent intention”, *viz.* that every member of the class should take, whatever subsequently happens.¹¹⁵ Thus, as with the constructional bias in favour of vesting, this gift saving device is something of a mixed, or at least a limited, blessing.

¹¹¹ Wylie, *Irish Land Law* (Third Edition, 1997) para. 5.085

¹¹² *Re Poe* [1942] IR 535

¹¹³ *Ibid.*, p. 538.

¹¹⁴ This is according to Murphy J., in *O'Byrne v. Davoren*, [1994] 2ILRM 276

¹¹⁵ *Per* Black J. in *Re Poe*, [1942] IR 535, 538, Wylie, *Irish Land Law* (Third Edition, 1997) para. 5.085,

CHAPTER THREE: COMMERCIAL TRANSACTIONS AND THE RULE AGAINST PERPETUITIES

3.01 As we have seen in Chapter 1, the Rule against Perpetuities was conceived in the womb of family dynastic settlements in the seventeenth century and earlier, long before the modern era of commercial transactions. Nevertheless, since it applies to all categories of property rights, both real and personal, interpreted at its full literal width there was nothing to stop it from spilling over into the world of commerce. The occasional and usually unexpected cases in which it has been applied to commercial transactions form the subject matter of this chapter.

A. Easements *in futuro*

3.02 An easement may be granted but its commencement made subject to some condition which may not be satisfied until some time in the future. Such easements are not uncommon. For example, where a landowner sells a portion of his land to the builder of a housing estate, the landowner may wish to reserve a right of way over roads, *as yet not built*, in the proposed estate. Similarly, he may wish to reserve rights over other proposed facilities such as sewers, drains, gas pipes, cable television pipes and so on. Since the existence of a future easement depends on a contingency which may (depending on how the instrument is worded) occur outside the perpetuity period, it is a contingent interest in property. As such, it is subject to the Rule against Perpetuities. If the possibility exists that the easement may arise after the expiration of the perpetuity period, the grant will be rendered void.

3.03 The leading case on this topic is *Dunn v. Blackdown Properties Ltd.*¹ The case involved the common-place granting of a right, to a grantee of a plot of land adjacent to a private road, to use drains and sewers “now passing or hereafter to pass” under the private road which had been retained by the original grantor. Cross J. held that these future easements were void for breaching the Rule against Perpetuities because they could potentially arise at an uncertain date beyond the perpetuity period.² The case was subsequently followed in *Newham v. Lawson*,³ which concerned a right of light over adjacent lands. Plowman J. categorised the right as a future easement because the church that eventually would benefit from the light was not, nor was it certain of being, constructed

¹ [1961] Ch 433.

² See also *Smith v. Colbourne* [1914] Ch 533, 543

³ (1971) 22 P & CR 852

at the date of the agreement. As such, the future easement was void for contravening the Rule against Perpetuities.⁴ This judgment seems to extend *Dunn*, by focusing on the manner in which the grantee might possibly make use of the right, as opposed to the existence of the facility over which the right was granted. This expansive view of future easements makes their subjection to the Rule against Perpetuities all the more significant.

3.04 The collapse of these arms length, commercial transactions due to the operation of the rule has provoked considerable disquiet. In 1989, the Law Reform Commission described the issue of easements and *profits à prendre* as the “most immediate and pressing question” thrown up by the Rule against Perpetuities. We stated:⁵

“We recommend that easements, options, profits à prendre and rent charges over land should be removed from the effect of the Rule Against Perpetuities and that any such amendment should provide that the rule never applied to those interests in land.”

In the absence of such suggested reform, parties have been able to save themselves from the effects of the Rule only by inserting perpetuity clauses into such agreements, whereby commencement of the easement is confined within the following 21 years. However, this method of circumventing the rule provides only limited relief to grantees. If, as is easily imagined, facilities such as sewers, drains, terrestrial television cables, and gas pipes are introduced or replaced after the 21 year period, the intended grantee will take no rights.

3.05 Similarly, the English Law Commission has described the application of the Rule to such commercial arrangements as “tiresome and incomprehensible”.⁶ It pointed out the anomalous situation whereby a landowner may grant a lease over part of his land to a developer while reserving the right to connect his remaining land to services built by the lessee. The lease itself, and indeed any restrictive covenants whereby the developer must seek the consent of the lessor before building anything, may continue in perpetuity, but the easement will either fail outright or fall away after the expiration of the perpetuity period. In its Report, the Commission recommended the complete exemption of future easements from the operation of the rule.⁷

3.06 The effect of applying the Rule to future easements, is rendered more drastic due to the fact that the perpetuity period will normally be limited to 21 years only. With occasional exceptions, there is no life in being in a future easement arrangement, as the life of the grantee (or anyone else) normally has no necessary connection with the interest that will vest.⁸ This period could certainly be extended by the use of a Royal Lives clause but its

⁴ *Ibid.*, pp 855, 856.

⁵ LRC 30 – 1989, p.5.

⁶ Law Com. Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251, para. 7.8.

⁷ Law Com. Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251, para. 7.35.

⁸ Wylie, *Irish Land Law*, (Third Edition, Butterworths 1997), para. 5.135, p. 342, fn. 318.

use in the present situation would appear to be the exception rather than the norm.⁹ While the same difficulties exist in the context of options to purchase property,¹⁰ the consequences of this brief perpetuity period are more punishing in the sphere of future easements.¹¹ 21 years is probably long enough for most option-holders to decide whether or not they want to exercise their option to purchase property. By contrast, grantees of future easements will be precluded from exercising their rights until the facility over which the easement is granted, is built. It is not difficult to envisage circumstances in which the construction of such facilities will take place outside the 21 year period. Lack of planning permission, subsequent technological advances or general inefficiency could all result in facilities being built more than 21 years after the original agreement. Thus, the effect of applying the Rule against Perpetuities is quite severe in the context of future easements and often could not be remedied even by a “wait and see” provision.¹²

3.07 The case for exempting future easements from the Rule against Perpetuities, has encountered some opposition.¹³ The principal objection, that such unrestricted future easements would result in land being rendered unsaleable because of the uncertainty surrounding their commencement, ought to be addressed. The English Law Commission notes that this objection reflects the actuality that easements, in whatever circumstances they arise, once granted are very difficult to terminate, especially as there is no procedure for their termination. While acknowledging these problems, the Commission states that “we do not consider the Rule against Perpetuities is the appropriate method of dealing with them.”¹⁴ Indeed, it seems excessive to combat specific problems relating to difficulty of termination, by effectively applying a blanket time-limit to all easements. Even accepting the value of a policy of merchantability, the Rule is a rather fitful way by which to implement it. It can be avoided by a wary conveyancer, leaving those who are less well advised to shoulder the burden of the policy. Furthermore, the customary 21 year perpetuity period in future easements has no obvious connection with a policy of free alienability. Rather it seems like quite an arbitrary cut-off point, which, on occasion, happens to free land of prior burdens.

⁹ Morris and Leach, *The Rule against Perpetuities*, (Second Edition), pp. 66,67.

¹⁰ See paras.3.09 *et seq.* below

¹¹ Wylie, *Irish Landlord and Tenant Law*, (Second Edition, 1998), para. 20.10

¹² The English *Perpetuities and Accumulations Act, 1964* and the Northern Ireland *Perpetuities Act, 1966*, each introduced “wait and see” principles. Thereafter, it was possible to wait and see whether specific facilities were built within the perpetuity period, even if, on the face of the agreement, the grantee’s rights could theoretically arise after the expiration of the period. Wylie notes that this amounts to “limited relief only” in that it still frustrates easements that become exercisable after the perpetuity period. (Wylie, *Irish Land Law*, (Third Edition, Butterworths 1997), para. 5.135, p. 342).

¹³ The Law Commission states, “Support for the exemption of future easements from the rule was not completely unanimous,” Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251, para. 7.9.

¹⁴ Law Com. Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251, para. 7.9.

3.08 The analogous debate in the context of options to purchase land – whether they should remain within the scope of the Rule in order to promote the development of land – is set out below.¹⁵

B. Options and Conditional Agreements

3.09 Options, conferred by agreement, to buy an interest in property within a certain time constitute the most common target of the modern perpetuity rule in the realm of rights under contracts.¹⁶ Analysed in terms of the perpetuity rule, this type of agreement confers on the promisee an immediate contingent interest in the property in question, which will not become vested until the option is exercised. In other words the contingency is within the promisee’s control, unlike most other contingent interests. Despite this element, options to purchase interests in property are within the scope of the Rule against Perpetuities.¹⁷ Subject to the qualifications set out in paragraphs 3.13-21, the option will be void if it is exercisable outside the perpetuity period. Alternatively, the agreement may be carefully drafted so as to include a perpetuity clause, which outlines a definite time limit within which the option must be exercised. Thus, depending on the skills of one’s conveyancer the agreed option may fail absolutely or remain exercisable for the entire perpetuity period.

3.10 Another interest, which, in the present context, is rather similar to an option is a conditional agreement to purchase land. A typical example would be an agreement to purchase a plot subject to planning permission. The option is a conditional property interest and – theoretically - the condition may be satisfied outside the perpetuity period. It is therefore void *ab initio* for violation of the perpetuities rule unless the terms of the agreement have been well drafted to make it clear that it lasts for a limited period which is less than 21 years. Again, this is subject to the qualifications set out in the section below.

3.11 As with future easements, the perpetuity period for options to purchase property or a conditional contract will normally be just 21 years since the life of the grantee has no necessary connection with the exercise of the option.¹⁸ Alternatively, the period may be extended by the use of a “royal lives” clause.

3.12 Complexities arise because the Rule against Perpetuities does not apply to all types of option. Where they exist, these exceptions are variously based on: the distinction between contractual and proprietary rights; leases; and legislation. We now turn to these exceptions.

¹⁵ See para.3.23-24, *ante*.

¹⁶ Coughlan, *Property Law*, (Gill and Macmillan, 1995) p.175.

¹⁷ Lyall, *Land Law in Ireland*, (Oak Tree Press, 1994) p. 315, Wylie, *Irish Land Law*, (Third edition, Butterworths, 1997) pp. 342-343, para. 5.136.

¹⁸ Wylie, *Irish Land Law* (Third Edition, Butterworths, 1997) para. 5.136, and, Wylie, *Irish Landlord and Tenant Law* (Second edition, 1998) para. 20.10

Contractual and Proprietary Interests

3.13 It is a basic principle of the Rule against Perpetuities that it is solely concerned with property rights, be they legal or equitable, real or personal. Consequently, purely personal or contractual rights fall outside the remit of the Rule and are unaffected by its limitations.¹⁹ An option to purchase land is capable of falling within either category (contractual or proprietary) depending on the circumstances of the individual case.

3.14 Applying the general principle to the area of options, where the option is still confined in its effect to the original promisor and promisee, the Rule against Perpetuities is excluded.²⁰ Since the option is categorised as a personal rather than a proprietary interest, it is placed beyond the reach of the Rule against Perpetuities. Dealing with a possible objection based on the fact that specific performance would probably be available to the promisee if the promise were broken, Jenkins J. explained that, “specific performance is merely an equitable mode of enforcing a personal obligation with which the Rule against Perpetuities has nothing to do.”²¹ In this analysis, the fact that the subject matter of the contract is property is immaterial.²²

3.15 The English Law Commission explains the exclusion of the Rule against Perpetuities by reference to the principle of privity of contract as between the original parties to a contract. It states, “Action taken to exercise or enforce the right to purchase therefore operates in the sphere of personal obligations free from the restrictions imposed by the Rule against Perpetuities.”²³

3.16 The involvement of third parties complicates matters in the following ways. In the first place, where the initial promisee attempts to exercise an option to purchase land against a stranger to the original contract, the rule of perpetuities is triggered.²⁴ The option is enforceable against third parties for the reason that it represents a proprietary right and not merely a personal obligation. This re-classification of the option as a proprietary interest brings it within the scope of the Rule. Once applied, the rule will render void any option, if it is exercisable outside the perpetuity period.²⁵

¹⁹ Coughlan explains that the modern rule against perpetuities, “cannot affect the enforceability of a contract as between the original parties, even if the rights and obligations are intended to last indefinitely.” Coughlan, *Property Law*, (Gill and Macmillan, 1995) p.174. See: *Re Tyrell's Estate* [1907] 1 IR 292, p. 297-9 per Walker LC.

²⁰ The leading English authority on this point is *South Eastern Railway Co. v. Associated Portland Cement Manufacturers* (1900) Ltd. [1910] 1 Ch. 12.

²¹ *Hutton v. Watling* [1948] Ch 26 at p. 36. Coughlan adds, “there is no scope for the rule against perpetuities because the court is primarily giving effect to the personal obligation of the promisor, not the proprietary right of the promisee.” Coughlan, *Property Law*, (Gill and Macmillan, 1995) p.174.

²² *South Eastern Railway Co. v. Associated Portland Cement Manufacturers* (1900) Ltd. [1910] 1 Ch. 12, 33 per Farwell L.J.

²³ Law Com. Report *The Rules against Perpetuities and Excessive Accumulations*, No 251 para. 3.36.

²⁴ *London and South Western Railway Company v. Gomm* (1882) 20 Ch D 562.

²⁵ However, disappointed promisees are not without remedy. According to *Worthing Corporation v. Heather*, they can still seek damages from the original promisor for breach of his or her original

3.17 The position is less straightforward in the situation in which it is a third party who seeks to exercise options against the original promisor. Wylie and Lyall each state that where a promisee assigns the benefit of an option to a third party stranger to the original agreement, the obligation is still contractual and exempt from the perpetuity rule.²⁶ Interestingly, Wylie says that the assignment of the benefit by the promisee to the third party may itself be subject to the Rule against Perpetuities, even though the option to purchase continues to be exempt from the rule.²⁷

3.18 But this view, set out above, is not universally accepted. In fact, the English Law Commission seems to be of the opinion that any involvement of a third party to the original transaction, whether as promisee or promisor, is adequate to trigger the Rule against Perpetuities. An option will be void for remoteness where “a successor in title to the promisee tries to enforce the option against the original promisor.”²⁸

Leases

3.19 A well established and significant exception to the Rule against Perpetuities is the non-application of the Rule to options to renew leases. In short, this means that an option enabling a lessee to renew a lease term, at any stage during the current term, is valid, regardless of how long that term may be.²⁹ This exception remains fully effective in Irish law.³⁰ In 1948, Black J. described it as “a rule so well settled as not to require citation of the authorities,” adding “No lawyer, I think, questions its existence today.”³¹ The rationale underpinning the exception is rarely explained.³² Wylie has accounted for the exception by stating that such options belong to a category of leasehold covenants which “run with the

contractual obligation. [1906] 2 Ch 532. Cited by Coughlan, *Property Law*, (Gill and Macmillan, 1995) p.175.

²⁶ Lyall, *Land Law in Ireland*, (Oak Tree Press, 1994) p. 315. Wylie, *Irish Land Law*, (Third edition, Butterworths, 1997) para. 5.134.

²⁷ For a similar view see: *Halsbury's Laws of England*, (Fourth Edition – reissue, Butterworths, 1994) Vol. 35, para. 1036, “Although a contract is not within the rule, a transfer of a contract may be within it.”

²⁸ Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251, p. 34, fn. 49. The Commission relies on the leading case of *London and South Western Railway v. Gomm* (1882) 20 Ch 562 to support this point of view. However that case involved the enforcement of an option by the original promisee against a third party stranger to the contract. It did not concern the converse enforcement of an option by a third party against the original promisor.

²⁹ Lyall, *Land Law in Ireland*, (Oak Tree Press, 1994) p. 315.

³⁰ The exception has been approved by the Irish Supreme Court in *Jameson v. Squire* [1948] IR 153, and *Tieman v. Feeley* [1949] IR 381. See also: *Re Garde Browne* [1911] 1 IR 205 and *Re Tyrrell's Estate* [1907] 1 IR 292. (For legislative reform in England and Northern Ireland see: *Law of Property Act 1922*, Sched 15, para 7, *Perpetuities and Accumulations Act 1964*, and the *Perpetuities Act (NI)*, 1966.)

³¹ *Jameson v. Squire* [1948] IR 153, 170.

³² It has been candidly described as anomalous by Black J. *ibid.*, 170 and by Coughlan, *op cit.*, p. 176.

land.” He also notes, significantly, that the exemption has been peculiarly useful in an Irish context due to the “preponderance here of leases for lives renewable forever.”³³

3.20 Admittedly, a distinction between options to renew leases and options to purchase freehold interests is justifiable, on the basis that the person seeking to exercise the option to renew has a possessory interest in the first place, and ought not to be ousted without good reason. However, the dividing line between the two types of option can occasionally be difficult to discern. In *Jameson v. Squire*, this difficulty was illustrated quite clearly.³⁴ The letting agreement, at the centre of the case, conferred on the tenant “an option at any time after the expiration of two years... of *purchasing* the premises” (our italics). The defendant landlord who sought to avoid the option argued that this was “in substance and reality an option to purchase” the freehold.³⁵ Despite this argument and the fact that the option was described as an option to purchase the freehold, the Supreme Court categorised it as an option to renew a lease and thereby placed it beyond the remit of the Rule against Perpetuities. It is scarcely satisfactory that such striking consequences turn on such delicate points of interpretation.

3.21 Staying in the field of leasehold agreements, it is worth noting that guarantors under such agreements are still affected by the Rule. The potential for a guarantor to take over the proprietary interests of a lessee amounts to a future contingent interest in land. As such it is subject to the Rule against Perpetuities. Hence, most guarantee agreements contain a clause confining potential vesting in the guarantor to a date within the perpetuity period.

Statute

3.22 Finally, the *Housing (Miscellaneous Provisions) Act, 1992*, creates another exception to the Rule against Perpetuities.³⁶ Section 2(2) of the Act deals with “shared ownership leases” which provide for the lessee to buy out the reversion of the landlord. The scheme is of particular use in the purchase of local authority housing but was encountering possible difficulties because of the Rule against Perpetuities. These difficulties arose because the repayment period had to be limited to either 21 years, or lives in being plus 21 years. Hence, the Act, in section 2(2), exempted the scheme from the application of the rule.

An exemption for options?

3.23 Support for the creation of a statutory exemption from the Rule against Perpetuities for commercial options,³⁷ has not been unanimous. The most reasoned

³³ Wylie, *Irish Land Law*, (Third edition, Butterworths, 1997) p. 343, para. 5.137.

³⁴ *Jameson v. Squire* [1948] IR 153.

³⁵ *Jameson v. Squire* [1948] IR 153, 156.

³⁶ See Lyall, *Land Law in Ireland*, (Oak Tree Press, 1994) p. 316.

³⁷ LRC 30 – 1989, p.5

objection was put forward in a 1956 Report of the English Law Reform Committee.³⁸ That Committee recommended that a perpetuity period of 21 years be prescribed for all options to purchase an interest in land except options, contained in leases, either to renew the lease or to purchase the freehold interest. The rationale offered for this was that such options “tend to discourage rather than foster the maintenance of the land in question.”³⁹ It was felt that the only person who could develop the land was the person in possession and that he or she would be disinclined to do so if the fruits of his labour were liable to be forfeited when someone else exercised their option to purchase.

3.24 This objection applies equally in the area of future easements. Their existence may similarly act as a disincentive to those in a position to develop the land. The future easement may deter development either because the “fruit” of any labour will have to be shared with the grantee or because the terms of the easement may render impossible certain building schemes.⁴⁰

3.25 Since 1956, this argument has been revisited and rejected by subsequent Law Commissions. It has been rebutted as being based on an assumption that the option in question is one to purchase at a fixed price.⁴¹ Options to purchase at the market value do not discourage development of the land as any improvements to the land are reflected in the purchase price payable under the option. In 1998, it was noted that the retention of a perpetuity period for commercial options had the practical effect of forcing landowners to seek unsatisfactory, alternative devices such as trusts, companies and leases to circumvent the Rule.⁴² Finally, the overriding objection to applying the Rule to commercial transactions generally, applies equally to “options in gross” as it does to options contained in leases, even where the former are fixed price options.

C. Rights of Pre-Emption

3.26 A right of pre-emption is effectively a right of first refusal, in which the grantor promises that, if he decides to sell certain property, the grantee shall have the right to purchase that property ahead of any other purchaser. It can be distinguished from an option to purchase land insofar as the grantee of a right of pre-emption is subject to the decision of the grantor who may or may not decide to sell the property. In an option to purchase, the grantee can exercise the option irrespective of the actions of the grantor. The English Law Commission suggests that a right of pre-emption, as distinct from an option, does not confer any proprietary interest, legal or equitable, in property. It states, “Only when the grantor chooses (if at all) to sell the land was the right of pre-emption converted into an

³⁸ Law Reform Committee Fourth Report, (*The Rule Against Perpetuities*) Cmnd. 18 (1956)

³⁹ Law Reform Committee Fourth Report, (*The Rule Against Perpetuities*) Cmnd. 18 (1956), para. 36 p.19.

⁴⁰ This was the contention of the plaintiff grantees in *Newham v. Lawson* (1971) 22 P&CR 852.

⁴¹ Law Com Consultation Paper, *The Rules against Perpetuities and Excessive Accumulations*, No. 133, (1993) para. 5.84

⁴² Law Com Report, *The Rules against Perpetuities and Excessive Accumulations*, No. 251, para. 7.10, fn. 11.

option and therefore an equitable interest in the property.”⁴³ In this analysis, rights of pre-emption are regarded not as proprietary interests of any type and consequently do not attract the Rule against Perpetuities.

3.27 Ultimately, the dividing line between a right of pre-emption and an option to purchase must be a very fine one. The classification will probably be largely contingent on how the rights are defined and shaped by conveyancers in settlements or articles of association. Further, the non-application of the rule to rights of pre-emption is by no means a settled point of law. The main authority for the exemption is an English Court of Appeal decision, *Pritchard v. Briggs*.⁴⁴ However, the case contradicted earlier authorities.⁴⁵ It has been the subject of powerful criticism;⁴⁶ and the remarks of the majority have been recognised as *obiter*.⁴⁷ Certainly, it seems difficult as a matter of principle to justify the striking consequences that ensue depending on where this fine line is drawn.

D. Share Options

3.28 Thus far, our consideration of ‘options’ has been confined to the issue of options to purchase land. However, the Rule against Perpetuities applies equally to real and personal property. For this reason, rights to personal property conferred under contracts may be subject to the rule insofar as such interests are proprietary rather than merely personal. A significant example of this is options to purchase company shares, at some future date, conferred under contract. Such options warrant closer examination here. Unfortunately, three distinct lines of analysis have been advanced as to the applicability of the Rule to these agreements.

⁴³ Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251 para. 3.44

⁴⁴ [1980] Ch 338

⁴⁵ *Birmingham Canal Company v. Cartwright* (1879) 11 ChD 421. Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251 para. 3.44

⁴⁶ HWR Wade, *Rights of Pre-emption: Interests in Land* (1980) 96 LQR 488. In his analysis of *Pritchard v. Briggs*, Wade effectively highlights the delicate nature of the distinction between rights of pre-emption and options to purchase. The one and only justification for differentiating between the two rights is that rights of pre-emption are contingent upon the volition of the owner, whereas with options, the option holder possesses the initiative. Wade argues that an option can easily be framed so as to be exercisable only when the landowner discontinues some use of the land. Here too, the initiative lies with the landowner yet the option is still classified as an interest in land. He concludes, “Why the owner’s initiative should be thought so objectionable is a mystery.” Furthermore, the notion that a right of pre-emption can be transformed into an interest in land, once the landowner agrees to sell, is of dubious validity. The necessary elements of an interest in land are that it creates a genuine obligation on the grantor which is enforceable by an order of specific performance. A right of pre-emption of itself, fits this description, according to Wade. The issue of the owner’s volition merely makes the right a contingent interest (contingent on the decision of the landowner) rather than a mere contractual right. He states, “It is entirely anomalous, and without parallel among all the recognised interests in land, to hold that it may suddenly change character according to future events.” See also: Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251 para. 3.44.

⁴⁷ *London v. Blenheim Estates Ltd v. Ladbroke Retail Parks* [1994] 1 WLR 31, 38. Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No. 251 para. 3.44

3.29 In the first place there is a decision of the old Irish Court of Appeal to the effect that options to purchase shares are absolutely exempt from the Rule against Perpetuities. In *Attorney General v. Jameson*⁴⁸, the Court took the absolutist position that share dealing restrictions in the articles of association of an Irish Whiskey firm, John Jameson & Sons Ltd. were outside the remit of the Rule against Perpetuities. A series of elaborate provisions provided that any member of the company wishing to alienate their shares was obliged to give notice of that intention to the company and, if the company resolved, to sell those shares back to the company at a “fair value”. Kenny J. stated that these provisions conferred “contractual rights that created no such interest, and consequently, the restrictive clauses are not obnoxious to the Rule against Perpetuities.”⁴⁹ Presumably, the judge meant that the rights were contractual only and not proprietary. His judgment also contained a hint that the Rule was confined to real property in that he stated, “There is no interest in land, legal or equitable, vested in the defendants by reason of their testator’s membership of their company.” Yet, it is scarcely open to question that the Rule against Perpetuities applies to real and personal property, alike. Thus this reference to *land* might be taken to undermine the authority of this case.

3.30 The second position is that of the English Law Commission, which has stated categorically that the Rule against Perpetuities *can* apply to options to purchase shares, even as between original contracting parties.⁵⁰ This position is based on the significance of the availability of specific performance. The Law Commission tends to the straightforward view that if specific performance is available, the remedy represents an equitable proprietary interest, enforceable against third parties. Hence, the rights set out in the contract are proprietary and are subject to the Rule against Perpetuities. The Commission admits that it may be difficult to identify those share option agreements where specific performance will be available, since the main test for specific performance is whether damages would be an adequate remedy. The adequacy of damages may not be readily apparent, and accordingly, the proprietary nature of the rights will be uncertain.

3.31 Realistically, specific performance will often not be available in share option arrangements. This is due to the fact that identical shares are often available on the open market and, as such, damages will normally be an adequate remedy.⁵¹ But such is not the case in small companies, family businesses and joint ventures. First, identical shares are unlikely to be available elsewhere. Second, in close knit companies, options are normally exercisable against retiring shareholders, upon their deciding to leave the company. If the option agreement is breached, the remaining shareholders are denied the opportunity of selecting their future co-investor or of expanding their interest in the business. These losses, particularly the former, are arguably not adequately compensated by an award of damages.

⁴⁸ [1905] 2 IR 218.

⁴⁹ [1904] 2 IR 644 (King’s Bench Division), 670.

⁵⁰ Law Com Consultation Paper *The Rules against Perpetuities and Excessive Accumulations*, No. 133 para. 5.85

⁵¹ In *Chinn v. Hochstrasser* [1979] Ch. 447, 470, Goff LJ explained, “In the absence of any finding that there was some reason why it was important to have these particular shares, any other Lex (ie: the company) shares would do equally well.”

In such cases, the Rule against Perpetuities may be triggered and may render void the entire option agreement.

3.32 The third and final line of approach draws upon an analysis which has already been examined in the analogous context of options to purchase land, discussed above. In options to purchase land, on one view, the enduring involvement of the original contracting parties is sufficient to exclude the Rule against Perpetuities. Whether or not specific performance is available between them, is immaterial since its availability (if any) is based not on the proprietary interest vested in the promisee but on the personal obligation of the promisor.⁵² But if specific performance is enforceable against third parties, in those circumstances, it is “Justified only on the basis that a proprietary interest has been created.”⁵³ It is difficult to see any logical explanation why this analysis is applied to options to purchase land, but not to options to purchase shares. Were it to apply, it would mean that the Rule is only attracted where the grantor of an option to purchase shares has assigned their interest to a third party.

E. Pensions

At common law

3.33 Pension schemes are usually set up under trusts, and benefits to be made thereunder are commonly made contingent on beneficiaries attaining a pensionable age. Furthermore, some benefits may be contingent upon the exercise of a discretion by the trustees. Thus, in principle, pension funds fall within the category of contingent future interests to which the Rule applies.

3.34 It was confirmed in *Lucas v. Telegraph Construction Company*,⁵⁴ that the Rule against Perpetuities applied to pension scheme trusts. The other, more debatable point in the case was that the perpetuity period was held to run from the date on which the trust was established. Where the rule operated, the trust would be declared void for perpetuity and funds would revert to the company by way of a resulting trust. This ruling naturally set alarm bells ringing in life assurance offices throughout the country. It placed occupational pension schemes in an extremely vulnerable position, because, as a general rule, they are intended to endure far beyond the lifetimes of their initial members.

3.35 The *Lucas* case provoked sufficient disquiet to prompt the enactment of legislation, in both England and Ireland which is discussed below, to provide protection for

⁵² Coughlan explains that the modern rule against perpetuities, “cannot affect the enforceability of a contract as between the original parties, even if the rights and obligations are intended to last indefinitely.” Coughlan, *Property Law*, (Gill and Macmillan, 1995) 174. See: *Re Tyrell’s Estate* [1907] 1 IR 292, 297-9 per Walker LC. The leading English authority on this point is *South Eastern Railway Co. v. Associated Portland Cement Manufacturers (1900) Ltd.* [1910] 1 Ch. 12.

⁵³ Coughlan, *Property Law*, (Gill and Macmillan, 1995) 175.

⁵⁴ [1925] Legal Notes 211.

employees involved in occupational pension schemes.⁵⁵ However, the *Lucas* case remains relevant insofar as it applies to trusts that fall outside the statutory exemptions.

3.36 As regards those trusts, the following discussion about the scope of *Lucas*, is important. First, the foremost holding in *Lucas*, namely, that absent statutory intervention, the Rule against Perpetuities applies to pension schemes, has never been overruled.⁵⁶ However, the drastic effects of the case have been mitigated by the emergence of an alternative analysis of pension trusts. These trusts are now commonly regarded as a series of settlements, each one beginning when a new employee joins the scheme.⁵⁷ The significance of this alternative analysis is that it follows that even though the perpetuity rule applies to pension schemes, the severity of the rule is tempered. The perpetuity period runs from the point at which each individual employee joins the scheme, rather than, from the inception of the scheme itself. This approach was recently adopted by the Privy Council in *Air Jamaica Lt. v Charlton and Ors.*,⁵⁸ and was explained by Millett J as follows:

"The Rule against Perpetuities must be applied separately to each individual settlement, and each employee must be treated as a life in being in relation to his own settlement. On this footing, any benefits, whether payable as a lump sum or by way of an annuity, which are payable on the death or earlier retirement of the employee are valid."

Were this analysis followed in Ireland, pension schemes would rarely be affected by the Rule since their nature is such that vesting will almost always take place within the perpetuity period.⁵⁹ This is particularly true in light of the extensive statutory protection already afforded to pension schemes. It is to these statutory exemptions that we now turn.

Statute

Pre-1996:

3.38 Prior to 1996, the relationship between pension schemes and the Rule against Perpetuities was governed by the *Perpetual Funds (Registration) Act, 1933*. A perpetual

⁵⁵ In England, the *Superannuation and Other Funds (Validation) Act 1927* was passed, followed by the Irish equivalent, the *Perpetual Funds (Registration) Act, 1933*. The responsible Minister, Sean Lemass referred to a "decision of the British court .. that these perpetual funds are void," as necessitating the 1933 legislation, 49 *Dáil Debates* Col 321 (20 July, 1933)].

⁵⁶ See: *In re Flavel's Will Trusts* [1969] 1 WLR 444; *In re Thomas Meadows & Co Ltd (1960)* [1971] Ch 278

⁵⁷ *Barber v. Guardian Royal Exchange Associated Group* [1991] 1 QB 344, 375, 400, and *Mettoy Pension Trustees v. Evans* [1990] 1 WLR 1587, 1610.

⁵⁸ [1999] 1 WLR 1399 Prior to the *Air Jamaica Case*, this view reflected practice within the industry, but Thomas commented as recently as 1995 that "there can be no certainty that it represents the law." See: Thomas, *Trusts of Death Benefits Under Occupational Pension Schemes – Deep Waters for Advisers: Part I* [1995] *Private Client Business* 133 and 233

⁵⁹ See: Thomas, *Trusts of Death Benefits Under Occupational Pension Schemes – Deep Waters for Advisers: Part I* [1995] *Private Client Business* 133 and 233.

fund was defined broadly so as to include almost any occupational pension scheme, as long as it was connected with an undertaking carried on wholly or partly in Saorstát Éireann.⁶⁰ This description would undoubtedly include most private sector pensions. Section 6 of the 1933 Act, exempted such “perpetual funds” from the Rule against Perpetuities. It stated, “The rule of law relating to perpetuities shall not apply and shall be deemed never to have applied to the trusts of any registered fund.”

Post-1996

3.39 Sixty three years later, section 25 of the *Pensions Act, 1996*, returned to the issue of pensions and perpetuities. It amends section 61 of the *Pensions Act, 1990*,⁶¹ by inserting the following,

“61A.- (1) The rules of law and equity relating to perpetuities, inalienability and accumulations and the provisions of the *Accumulations Act, 1892*,⁶² shall not apply and shall be deemed never to have applied to any trust to which this section applies.”

Referring to this provision, the then Minister for Social Welfare (Deputy de Rossa), simply said that it “is considered reasonable that [the Rules against Perpetuities] should not apply to trusts that govern pension schemes.”⁶³ There were no objections in the Dáil to the inclusion of the provision.

3.40 Sub-section 2 defines the scope of this exemption from the rules against remoteness. It extends to:

- a) “any trust which as created had or subsequently has as its main purpose the provision of relevant benefits within the meaning of section 13 (1) of the *Finance Act, 1972*, and which is capable of receiving approval under Chapter II of Part I of that Act, and

⁶⁰ Perpetual Funds (Registration) Act, 1933, Section 2 (a) and (b).

⁶¹ *Pensions Act, (No.18) 1996*, section 25. Originally, section 61 of the 1990 Act had restricted the application of the *Perpetual Funds (Registration) Act, 1933*. Sections 7, 8, 10, 12(2) and 14 of the 1933 Act were not to apply to occupational pension schemes. These provisions merely concerned technical rules relating to the registration of perpetual funds with the Registrar of Friendly Societies. Their non-application had no effect whatsoever on the pre-existing and continuing exemption from the rule against perpetuities. Nonetheless, the restricted application of the 1933 Act, wherein the original exclusion was contained, may have been viewed as necessitating clarification as to the status of the rule against perpetuities. Thus the difference between the law in 1990 and in 1996 may be one of form rather than substance. One difference was that the earlier 1933 provision only addressed the rule against perpetuities, whereas the later exclusion, in 1996, afforded more comprehensive protection for pension funds by addressing other rules against remoteness.

⁶² Although, note our observations about the application of the *Accumulations Act 1892* in an Irish context. See below, para.5.44

⁶³ 463 *Dáil Debates Cols.* 1184, 1185 (27 March 1996).

- b) any trust which is also an occupational pension scheme notwithstanding that it may cease to be an occupational pension scheme.”

3.41 Thus, in order to properly assess the scope of the exemption set out in the 1996 Act, it is necessary to cross-reference the new provisions with earlier statutory provisions, mentioned therein. The provision of “relevant benefits” is defined in section 13 (1) of the *Finance Act, 1972* as the provision of:

“any pension, lump sum, gratuity, or other like benefit given or to be given on retirement or on death, or in anticipation of retirement or, in connection with past service, after retirement or death, or to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question, except that it does not include any benefit which is to be afforded solely by reason of the death or disability of a person resulting from an accident arising out of or in the course of his office or employment and for no other reason.”

3.42 The description of trusts “capable of receiving approval” under Chapter II of Part I of the *Finance Act 1972* refers to detailed conditions set out in section 15 of that Act.⁶⁴ However, the Revenue Commissioners are given a wide discretion in deciding whether a pension scheme warrants approval, in this technical sense. In practice, virtually every pension scheme receives the approval of the Revenue Commissioners. This is because each one must register with the Revenue in order to obtain tax relief.⁶⁵

3.43 The new Section 61A-(3), inserted by Section 25 of the 1996 Act, limits the retrospective effect of the exemption so that it does not cover “any trust the resources of which have, whether in whole or in part, been returned before the passing” of the 1996 Act, by reason of any of the Rules against remoteness listed in sub-section (1).⁶⁶

⁶⁴ The exclusion of schemes where benefits are afforded “solely by reason of the death or disability of a person resulting from an accident arising out of or in the course of his office or employment and for no other reason,” is worth noting. (Section 13(1) of the *Finance Act (No 19), 1972* as applied to the *Pensions Act 1996*, in section 25 (2).) But while insurance policies may be merely contractual insofar as they only involve the insurer and the insured, it is worth considering the effect of third party involvement in such policies. For instance, the capital sum of an ongoing life assurance policy is often taken as security by banks in mortgage arrangements. Does this give proprietary significance to an otherwise contractual rights?

⁶⁵ There are two stages to this process – interim and final. Some schemes never progress past the interim stage. Nonetheless, they will have received “interim approval” from the Revenue and this document always states that the scheme is “capable of approval”. (Based on informal consultation with pensions lawyers.)

⁶⁶ The retrospective effect, albeit limited, of the exclusion of Section 25 of the 1996 Act is noteworthy. Sub-section 1 of the new section 61 thereof says that the rules against remoteness “shall be deemed *never* to have applied to any trust to which this section applies.” (Our italics). In sub-section (3), an unsurprising exception to this retrospectivity is made where the Rule against Perpetuities (or one of the other rules) has already caused the return of benefits conferred under the trust. In other words, the provision will protect trusts that have remained intact but will not reconstitute trusts that have been dismantled by operation of the Rule.

3.44 Some comments ought to be made about the cumulative effect of these statutory provisions. Firstly, the grounds on which the Rule is excluded are very broad. Thus, almost all pension schemes will fall within the protection afforded by section 25 of the 1996 Act. In contrast with the situation in England, there seems to be no growth in the number of unapproved schemes. Nor do there seem to be any advantages associated with being an unapproved scheme. Thus, a *de facto* complete exemption for pension schemes exists, though almost as a side-effect of registration for tax relief. In the unlikely event that a scheme fails to come within these terms, the possibility still exists that the scheme could qualify for exemption from the Rule under the catch all formulation in sub section (2) (b).⁶⁷

3.45 But if neither of these conditions apply, then the starting date for the perpetuity period becomes crucial. If as held in *Lucas* (discussed earlier), time runs from the establishment of the pension fund, the application of the Rule against Perpetuities may have disastrous consequences for employees who join the scheme at a later date. But, if as seems more likely, time runs for each member of the scheme from the date of that member's joining the scheme, virtually all the pensions will survive as vesting will almost certainly take place within the perpetuity period.

Nominations and Advancements

3.46 But it remains possible that the Rule continues to apply to 'nominations' and 'advancements' made under a pension scheme. Nominations of benefits refers to the nomination, by a member of the pension scheme, of a beneficiary to whom the benefits may be paid. Such nominations have been described as "odd creatures", and their exact legal nature is uncertain.⁶⁸ On occasion, they have been characterised as testamentary but the English Law Commission states that they are more correctly viewed as powers of appointment.⁶⁹ The application of the Rule Against Perpetuities to these types of settlement has never been decided upon in the courts. It is arguably the case that if the pension scheme itself is exempt, then so are nominations exercised under the scheme. However, the Commission prefers the view that, "the statutory exemption extends no further than the pension scheme itself and applies only so as to free the *exercise* of powers of appointment or of nomination... which are part and parcel of the scheme from the restrictions of the Rule against Perpetuities."⁷⁰ Thus the Rule would apply, and the perpetuity period would probably run from the date on which the employee joins the scheme or even, on a *Lucas* view from the inception of the scheme. Nominations of benefits are quite common. The application of the perpetuity rule thereto and its attendant uncertainty are therefore

⁶⁷ *Pensions Act 1996*, section 25.

⁶⁸ Per Megarry J in *Re Danish Bacon Company Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248, 256.

⁶⁹ See: *Baird v. Baird* [1990] 2 AC 548, 557 (powers of appointment), and *Re Danish Bacon Company Ltd Staff Pension Fund Trusts* [1971] 1 WLR 248, 256 (nominations could be characterised as testamentary but this was a matter of interpretation)

⁷⁰ Thomas, *Trusts of Death Benefits Under Occupational Pension Schemes – Deep Waters for Advisers: Part I* [1995] *Private Client Business* 133, 143.

significant practical problems. According to the Commission, the rule may “needlessly constrain the arrangements that members of pension schemes wish to make.”⁷¹

3.47 The related issue of powers of advancement under a pension scheme ought also to be considered. These are powers commonly conferred on trustees in a pension scheme to make an advancement of capital in favour of a member of his or her family. As with nominations above, the settlements created under powers of advancement are probably not excluded from the application of the Rule against Perpetuities.⁷² The same issues about the starting date of the perpetuity period are relevant here as were mentioned in the context of nominations.

3.48 Unfortunately the *Pensions Act, 1996* in Ireland failed altogether to address the threat to nominations and advancements posed by the Rule against Perpetuities. Perhaps it was presumed that the broadly drafted exemption for pension schemes would extend automatically to nominations and advancements thereunder.⁷³ However, if the English Law Commission view is correct, this omission represents a significant pitfall for people involved in occupational pension schemes. In this context, the starting date for the perpetuity period becomes crucial. If time runs from the establishment of the pension fund, the application of the Rule against Perpetuities may have disastrous consequences for employees who join the scheme at a later date. But if time runs for each member of the scheme from the date of that member’s joining the scheme, virtually all the interests will survive as vesting will almost certainly take place within the perpetuity period.

F. Conclusion

3.49 The unquestionable problems with the application of the Rule against Perpetuities in a commercial context exist at both the general, principled level and at the specific, practical level. As a matter of principle, its application represents an unwarrantable interference with the freedom of contract of parties dealing at arm’s length. For the original policy justification of restricting dead hand control is of little relevance in a commercial setting and scarcely justifies the far-reaching consequences of the Rule’s application.

3.50 At a practical level, we have demonstrated that the Rule against Perpetuities may (with varying degrees of uncertainty) operate to frustrate harmless agreements between individuals in the areas of: future easements; options to purchase land where third parties are involved; options to purchase shares; nominations and powers of advancement under pension schemes. The *Lucas* case and the *Dunn* case, amongst others demonstrate that the rule still has the capacity to undermine legitimate agreements and expectations, or spring unwelcome surprises. It is true that a well informed lawyer can anticipate and avoid the Act

⁷¹ Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251, para.3.61

⁷² Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251, para.3.62

⁷³ Following informal consultation with a leading pensions lawyer this seems to be the dominant view in the industry.

while often achieving what his or her client wants. But, the question must be posed, if the rule can be avoided without altering behaviour, what good is it doing?

3.51 To make matters worse, the existence of a complex web of exceptions adds a considerable amount of uncertainty as to the applicability of the rule in certain situations. Because the Rule, especially in a commercial field, appears pointless and mischievous, it cries out for restriction, in some cases by reference to some rather arbitrary distinctions, which further serve to highlight the oddness of the territory which remains subject to the rule. This phenomenon is illustrated by the *Pritchard* case involving rights of pre-emption.

3.52 The impact of the Rule against Perpetuities as it applies to commercial transactions is exacerbated by the brevity of the perpetuity period in this context. Morris and Leach tell us that a life in being cannot be that of a corporation.⁷⁴ There is no relevant human life unless (to repeat a point made already) an express life is written into the agreement, possibly by reference to a Royal life. However, in reality, such a device will often be far from the minds of those drafting contracts in a commercial field. The net result is that the perpetuity period is normally truncated to its minimum 21 years.

3.53 Another difficulty in this area is the inadequacy of legislative reform, where it has occurred. For example, legislation relating to pensions fails to make provision for nominations and advancements under pension schemes. It also insists on an illogical connection between approval by the Revenue and exemption from the rule.

3.54 It might seem that the sovereign cure for this malady would be to create a blanket exception for all “commercial transactions”. However, this proposal runs into serious difficulty. The English Law Commission was forced to conclude,

“we are unable to identify the nature and unifying characteristics of “commercial contracts”, “commercial dispositions”, “contingent interests in property created in a commercial context” or commercial interests. Our inability to isolate the *concept* that should be the basis for exclusion means that we cannot readily formulate a definition that could be couched in statutory form.”⁷⁵

The preferred approach was to confine the Rule’s application to estates, interests and rights arising under wills and trusts, thereby necessarily excluding many commercial arrangements.⁷⁶ To cater for any remaining commercial interests caught by the Rule, it was recommended that a small number of specified interests be expressly excluded and that the Lord Chancellor be given the power to specify further exemptions by statutory instrument.⁷⁷ This solution strikes us as being flawed in two ways. First, it presupposes that

⁷⁴ See: Morris and Leach, *The Rule Against Perpetuities* (London, Stevens, 2nd Ed., 1962) p.163 where the authors state, “the measuring lives must, of course be human lives not those of corporations or of animals.”

⁷⁵ Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251 para. 7.18

⁷⁶ *Ibid* paras.7.35-36 and para. 7.42

⁷⁷ *Ibid* para.7.52

the authority empowered to prescribe new exemptions will remain constantly alive to new problems thrown up by the Rule, and it unrealistically presumes that there is a political will to address the law of future interests on an ongoing basis. Secondly, this approach to exemptions is necessarily reactive. It is very likely that exemptions will only be prescribed (if at all) after some person has lost out due to the inappropriate operation of the Rule in a commercial field. This hardly seems fair on those who have to play the role of guinea pig.

CHAPTER FOUR: ABOLISHING THE RULE AGAINST PERPETUITIES

4.01 One of the basic tenets of law reform is to simplify. Or to put it another way, complexity carries disadvantages. And the more complicated a particular law is, the more strongly it has to be justified by reference to the importance of the functions which it serves. Indisputably, the perpetuities rule is complicated, but this complexity and its attendant mishaps, might be excused were there convincing arguments in favour of the existence and retention of the Rule. It is to these arguments that we now turn and, in relation to each, we conclude that either the reasoning itself is flawed, or, alternatively, that while the argument is valid, the Rule against Perpetuities is an inappropriate method of addressing the concerns underlying the particular point of view. In sum, we believe that the purposes served by the Rule in the modern world are at best slight.

Arguments For Retaining The Rule (but in a Reformed Condition)

At a policy level, three possible justifications for the Rule must be considered.

A *The withdrawal of property and other assets from commerce*

4.02 The chief and possibly only justification offered contemporaneously with the establishment of the Rule, in the seventeenth century, was the policy against the withdrawal of property from commerce. The importance of the Rule against Perpetuities (and other cognate rules¹) can be readily understood when they are set against the background of an era when the only major industry was agriculture and when land was effectively the only form of property, whether one was concerned with investment, security, prestige or constitutional status, as is done in our earlier historical sketch.² However, by today, the situation which necessitated the Rule's creation, in the days of Lord Nottingham has changed radically.

4.03 In the first place, the sort of sublime, dynastic confidence which enabled a settlor to foresee his posterity working the same land handed down to him by his ancestors is wanting at the turn of the Millennium. Mankind's belief in the inevitability of continuity has waned.

4.04 Secondly, the legal context has been revolutionised. The position is now that with future interests in any form of property and irrespective of the terms of the instrument

¹ These cognate rules are surveyed in Chapter 5, below.

² See Chapter 1, above.

disposing of the property, there is, almost always a power to sell the entire estate comprised in the trust or settlement, with the future interests being transferred to the proceeds of the sale. In the case of a settlement this result is brought about by the *Settled Land Acts 1882-90*.³ In the case of a trust for sale or a trust in which the trustees have the power of sale, it was always the case. There is only one situation in which the entire estate in the trust or settlement cannot be sold and this is a trust in which no such power is included in the instrument creating the trust. We believe that this problem can and should be solved by Variation of Trusts legislation, which is discussed below.⁴ The conclusion which flows from the existence of general powers of sale, is that any argument, based on the threat of the removal of property from commerce, is seriously undermined.

4.05 Nevertheless, while taking on board these statutory and societal changes, it is still possible to offer a (radically) reformulated and updated version of this argument. The argument then becomes the contention that quite apart from the interests of the owners, large concentrations of wealth (whether in the form of land or other property) may be used in ways which are of greater or of lesser benefit to the community and the economy; and that one of purposes of law should be to encourage, where possible the most economically advantageous use of property. The argument continues that without the Rule against Perpetuities - even if land in a trust or settlement has been sold, the resultant assets could still be 'tied up' theoretically for an unlimited period. What this phrase means is that - to take the case of a trust - the assets might theoretically only be available for investment in 'authorised investments.'⁵ However, in practice the limited category of investments can be, and almost invariably is, widened, in the terms of the trust instrument (and could be widened even further if the Variation of Trusts legislation we propose is enacted). However, even then, the trustees are subject to a general obligation of "prudence."⁶ This obligation, too, may be - but rarely is - excluded. Apart from any legal restrictions, trustees sometimes suffer from inertia. In the result - so the argument runs - the economy and national development are denied the fuel of certain reservoirs of risk capital.

4.06 However this argument has probably been overstated.⁷ Realistically, the aggregate of money at issue must be extremely small relative to the entire economy. And, anyway, as a matter of principle, this contention rests on a highly political and controversial basis. It rests on the speculative assertion that the uses to which risk capital might be put would be better for the common weal than the alternative forms of investment which would be utilised, if the Rule were abolished. Apart from everything else, risk capital may be good at one stage of the economic cycle and not at another. In any case, it must be doubted whether this economic argument is correct in a small, open economy, like ours.

³ E.g.: *Settled Land Act*, 1882, ss 3, 6.

⁴ There is a comprehensive account of the law referred to in this paragraph in WYLIE, *IRISH LAND LAW*, Chapter 8.

⁵ *Trustee (Authorised Investments) Act 1958*; Wylie, *Irish land Law* (3rd Ed.) para 10.056

⁶ *Re Whiteley* (1886) Ch.D. 347, 355

⁷ Morris and Leach describe this argument as "far-fetched". See: Morris and Leach, *The Rule Against Perpetuities* (London, Stevens, 2nd Ed., 1962) 16.

B *Balance between generations*

4.07 This argument is based on the assumption that each living generation has a moral right to free use of the riches of the earth.⁸ However, that moral right has to be balanced against the right of property owners and testators to dispose of their riches as they so wish. This ongoing struggle between competing rights is one justification for the existence of the Rule. It has been explained thus: “the Rule against Perpetuities strikes a fair balance between the desires of members of the present generation and similar desires of succeeding generations to do what they wish with the property they enjoy.”⁹ As a preliminary response to this argument, one ought to emphasise that there is a very striking inconsistency between the restrictive Rule and the wide freedom of testamentary or *inter vivos* disposition generally allowed to a property-owner. From the fourteenth century until the *Succession Act 1965* there was, in general, no restriction upon a testator's power to dispose of property as he thought fit, however imprudently, irresponsibly, excessively or ungratefully. As a matter of morality or principle in regard to relations, between different categories of beneficiary, there seems no justification for singling out this particular area and saying that, in it alone, the law should interfere with the settlor's right to give their own property to whomsoever they wish.

4.08 Moreover, in most cases, what is usually involved in a perpetuities case is a contest between some person outside the perpetuity period and the person entitled in default, or more likely, the person who is entitled on an intestacy. The settlor will almost certainly know this person and has in most cases taken a positive decision not to make the gift to him or her. The law then often has the effect not only of diverting the property from the person whom the settlor wished to benefit but of actually directing it to someone whom the settlor wished not to benefit.¹⁰

C *'Dead-Hand' Justification*

4.09 But the main plank on which any attempt to justify the rule, in modern terms, must rest, is the so called ‘Dead-Hand’ argument. There is indeed nothing controversial

⁸ Simes, *Public Policy and the Dead Hand* p 59 cites Forde (ed.), *Writings of Thomas Jefferson* (1895) vol V, p. 115

⁹ Simes *Public Policy and the Dead Hand* p.58. Deech, "Lives in Being Revived" (1981) 97 L.Q.R. 593, 594 describes this rationale as “the most convincing modern explanation of the functions of the Rule.”

¹⁰ One could summarise and give force to this section of the analysis by saying that it raises a question as to whether the Rule violates the right to property in the Irish Constitution (Art. 40.3.2^o and 43) or the European Convention of Human Rights (Protocol 1, Art. 1.) In the first place, it seems plain that there is, in principle, a breach of the constitutional property right of the settlor in that he is denied the right to bequeath property to benefit to the person he wishes. There may also be another breach of constitutional rights in that the putative beneficiary is deprived, by the Rule, of the right, if certain conditions are satisfied, of acquiring property. Accordingly, the only issue is whether the Rule can be justified on the basis of the ‘common good’ exceptions to the Constitution or the European Convention. This raises squarely the question of whether the Rule is doing any good, in contemporary Ireland, to compensate for the interference which it wreaks with the beneficiary's interest. The analysis of the first form of the ‘Dead-Hand’ argument just rehearsed suggests that the Rule would not be able to satisfy this test. The analysis, which follows, of the second form of this argument suggests that, on this form of argument too, the Rule would fail to satisfy the test. It may therefore be in conflict with the Constitution or the Convention.

about this conclusion: the supremacy of this justification has been acknowledged by a number of writers on the subject. This rationale is founded on the possibility of changes in family circumstances, laws of taxation, or society and the economy generally, which are beyond the settlor's power to forecast. As the dead hand cannot react to such changes posthumously, it is said to be well if the settlor is barred from dictating the devolution of his property too far into the future. As has been written:

“The liberty to make fresh rearrangements of assets is necessary not only in order to be rid of irksome conditions attached by earlier donors to the enjoyment of income but also in order to be able to manoeuvre in the light of new tax laws, changes in the nature of the property and in the personal circumstances of beneficiaries, unforeseeable by the best-intentioned and most perspicacious of donors.”¹¹

4.10 But surely, in this context, the Rule against Perpetuities is of very limited use. All it does, is to preclude extremely remote contingent interests. It has no effect, for instance, in regard to interests which have vested in interest but have yet to vest in possession. Secondly, when one considers the sort of vicissitudes which may strike a family - in terms of illness; reduction of income from the family business; or disparity of income as between one beneficiary of the settlement and another - it is evident that the Rule is of assistance in a very small fraction of the possible circumstances. Most fundamental of all, the Rule's operation is not a reaction to changed circumstances. The Rule focuses not on the suitability of the settlement as times change, (on which, indeed, it has nothing to say) but on the remoteness of vesting. Thus, whether or not a trust is void by reason of the Rule has nothing to do with whether or not that trust has become impractical or imprudent. The Rule operates in a blunt fashion and can apply equally to workable as to unworkable trusts.

4.11 If salvaging and re-modelling trusts which are no longer appropriate to the needs of the time is the objective, then there are other laws which are of much wider usefulness than the Rule and which are worth mentioning briefly. The first is the rule in *Saunders v Vautier*,¹² by which the beneficiaries - provided they are all *sui juris* - may agree to terminate (or modify) the settlement. There is, however, a restriction on the scope of the *Saunders* principle. This is that all the beneficiaries have to be of full age and capacity. Because of this limitation the *English Variation of Trusts Act, 1958* (subsequently widely followed in other jurisdictions) was passed. This gives the court a discretion to approve any arrangement varying or revoking all or any of the trusts upon which the power is held.

4.12 To cater for the problem of the badly drawn trust, (which of course exists independently of the perpetuities rule and applies to a large number of trusts which do not come near infringing the Rule), we recommend the introduction of similar variation of trusts legislation. This is proposed in greater detail in a Report published at the same time as this one.¹³ Variation of trusts legislation would, undoubtedly, be a more finely tuned and

¹¹ Deech, "Lives in being Revived" (1981) 94 L.Q.R. 593, 594

¹² (1841) 4 BEA 115

¹³ See Report on Variation of Trusts LRC 63-2000

comprehensive response to the concerns set out above than the Rule which can, at times, be rather a blunt instrument. Its introduction, we believe, would remove any force from the main contemporary justification of the Rule and we should stress that our main recommendation – the abolition of the Rule – is predicated on the variation of trusts legislation being enacted.

Arguments Against The Rule

4.13 Quite apart from the weakness of the justifications for the Rule's existence there are, we believe, three arguments against its retention, and it is to these that we now turn.

A *The tendency of the Rule to disrupt innocent gifts*

4.14 By way of general comment on the character of arguments supporting the rule, it is worth saying that some of them go close to characterising settlors whose gifts break the rule as - frankly - megalomaniacs seeking to rule their posterity from beyond the grave.¹⁴ This sort of attitude naturally tends to prejudice the discussion. Accordingly, it is useful to emphasise here that in fact the rule is so oddly designed that, in appropriate circumstances, a donor with perfectly sensible intentions may well fall foul of it. The following example of a disposition which will breach the Rule can readily be conjectured: 'a gift of £10,000 per year to any of my great grandchildren to become destitute.'¹⁵ Yet, it seems to us that such a gift would, in any case, do very little harm to the body politic. The gift may be described as excessively paternalistic, but this is not always a bad thing and not at all the sort of action which is usually banned by law. A case in point was in *Re Davoren, Dec'd*,¹⁶ where a trust for the post-primary education of the testatrix's direct descendants was recently declared void, by Murphy J., as contravening the Rule against Perpetuities.

4.15 This tendency to disrupt innocent settlements may continue in existence, even in the light of a reformed rule. This is a point which is relevant to the reform versus abolition debate. Let us take two general examples. The first is: a power of appointment by which property is to be allocated "to those of the testator's grandchildren who become indigent." It is possible that some of this bequest may be saved by invoking the class closing rules. But this is small consolation to those who are excluded. A second example would be: "a gift to the first of the testator's grandchildren to work in the third world." Either of these gifts might be saved by the 'wait and see' principle. But equally, it might not. Here are two perfectly reasonable gifts which might be invalidated by the rule, even in a reformed condition.

¹⁴ The great exemplar of this type of argument - though coming from the neighbouring field of the rule against accumulations - is the judgement in the *Thellusson* will, case of Lord Eldon: "Perhaps all the world think this was a will that should have been put into the fire if the law would allow it to be so". (*Oddie -v- Woodford* 3 Myl Cr. 584,596). For further amusing examples, see Keeton. "*The Thellusson Case and Trusts for Accumulation*" 21(1970) NILQ131

¹⁵ This is not a class gift and so the class-closing rules do not apply

¹⁶ [1994] 2 ILRM 276

4.16 A significant point which adds to the difficulty caused by the Rule is that because of the far reaching and peculiar nature of the common law rule, it can have consequences in most unexpected fields. Its dogmatic insistence on having regard to every theoretical possibility, however remote, is one of the principal reasons for the Rule's tendency to act as a legal nuisance. That insistence has, in the past, been responsible for absurdities such as magic gravel pits, and, that odd couple, the precocious toddler and the fertile octogenarian. Of course, *Exham v. Beamish* cleared the way for the admittance of evidence as to physical probabilities. But, in certain contexts, this concession may be nullified by recent statutory and medical developments. Mee points to the *Status of Children Act, 1987*, and the Adoption Acts as, together, providing a new headache for unsuspecting settlors. The Acts, taken together, make it possible for the very old and, theoretically, the very young, to adopt children, and then confer on those adoptees equal rights under dispositions as children born in wedlock. The upshot is that, in Mee's words, "both octogenarians and toddlers are theoretically back in the parental stakes." Were similar statutory changes to occur in the context of fostered children the scope of what is theoretically possible would again be broadened.¹⁷ Medical science throws up further possibilities, such as surrogacy and human cloning for the infertile, posthumous insemination for widows, and the possibility of postponing menopause until after 70, to name but a few.¹⁸

B Practical realities

4.17 There is another and pragmatic argument against the Rule. This focuses not on the Rule, as substantive law, but on the difficulty in operating the Rule in practice. Consider this observation of Professor Leach:

"Perpetuities cases that have arisen in the courts, English or American, in recent decades do not deal with testators and settlors who have long-term designs which press against the limits of the Rule against Perpetuities. Rather they deal with persons who, starting from reasonable plans for the support of their families, have run afoul of the Rule through the ignorance or oversight of the particular member of our profession to whom they have entrusted their affairs. I do not recall a single twentieth-century case, English or American, in which the will or trust could not have been so drafted as to carry out the client's essential desires within the limits of the Rule. This means that our courts in applying the Rule are not protecting the public welfare against the predatory rich but are imposing forfeitures upon some beneficiaries and awarding windfalls to others because some member of the legal profession has been inept."¹⁹

¹⁷ See *O'Rourke v. Gallagher*, (CCt) 18 February 2000 *Irish Times* "Brothers awarded their foster parents' farm". While this case was based on the doctrine of legitimate expectation, and did not involve the Rule, it does highlight the relevant issue of the property rights of foster children.

¹⁸ See the *New Scientist*, "Stop that clock: The menopause is dead, long live the menopause" 2 October 1999; "Never Say Die" 27 March 1999; and the *Irish Times* "Dead Man's Sperm Produces Pregnancy" 2 November 1998

¹⁹ Leach, "Perpetuities: Staying the Slaughter of the Innocents" [1952] 68 LQR 35, 36

4.18 To amplify the point: there are two possible sources of difficulty. The first of these is the inherent complexity and over-subtlety of the Rule itself, some aspects of which have been highlighted earlier. It is true that to a lawyer who has mastered its intricacies, the impact of the Rule is usually relatively certain of prediction. A lawyer should thus usually be in a position to say to his client: "If you insist on such and such a disposition, it will be void and your thankless child will inherit the estate." Moreover, it is a very straightforward matter for a draftsman to include a Royal lives or, possibly, a de Valera clause,²⁰ which means that the settlor has the advantage of the full perpetuity period without running any risk of his gift being void. Yet, a range of difficulties remains because of the necessary facts on which the Rule's operation depends. These facts include especially the establishment of the life or lives in being (it/they may be on the other side of the world). This information is not always readily available, especially if a will is being made and drafted in a hurry, at a time of trauma and distraction, from several different directions. In any case, the net result is that, as Professor Leach attests, there have been numerous cases where the Rule has been broken by settlors with perfectly reasonable objectives. In other words, the rule is now so anomalous that its victims are usually ill advised donors who violate its letter rather than its spirit. And it is notable that as far as we know, no one has taken a negligence action against a lawyer, on foot of a disposition which violated the Rule.²¹

4.19 There is a further point. Up until about a decade ago, in most university law programmes, about ten percent of the Real Property course - which anyway has the reputation of being the most difficult subject in the law programme - had to be set aside in order to reveal to the neophyte the various mysteries of the Rule. By today, however, with the press of other legal subjects and the feeling that the Rule is of scant practical value, Universities have to choose between the undesirable alternatives of excluding more useful areas of law than the Rule or of reducing the amount of time taken up by the Rule. If, as seems likely, the second option is adopted, the Rule will be taught too briefly to do justice to its complexities and will become an even more dangerous weapon in the hands of many practitioners (especially when one appreciates that the Rule extends to the commercial field, which is outside the sphere of influence of specialist chancery lawyers).

C No Rule against Perpetuities: No more perpetuities?

4.20 The crux of the debate on abolition seems to be this: assuming that the rule were abolished, how many settlors or testators would take advantage of their new freedom to create future interests which would have violated the rule if it were still in existence. While this kind of exercise is, by definition, speculative, we believe that factors exist which

²⁰ Although note our reservations about the utility of a 'De Valera' clause, para.2.05, above

²¹ In other words, the Rule is now so anomalous that its victims are usually ill-advised donors who violate its letter rather than its spirit. An example of careful drafting carrying the day comes from a recent case, *Bank of Ireland v. Gaynor*, where Macken J. upheld the validity of a 1919 settlement because, "it seems to me that the settlement was drawn in such a careful manner as not to offend the Rule." (HC Unreported 29 June 1999). There, the Rule was side-stepped by punctilious drafting, but the point is that the Rule could equally have been offended by a trust doing substantively the same thing, but drafted slightly differently. A Rule which turns so much on form, and so little on substance is bound to throw up inconsistencies (at best) and injustices (at worst).

militate against the possibility of numerous, attenuated settlements. The first is simply that, in Ireland, the socio-economic background is different from that of England, the outlook and practices of whose long-established landlord aristocracy and gentry made the rule necessary in the first place.²² The significant point is that here there are (certainly in the present era) very few of the long-established landed gentry, to whom it might seem appealing to establish the sort of baroque settlement against which the Rule guards. (One indication that this is so stems from the fact that, it was never thought necessary to import the statutory version of the rule against accumulations to Ireland in 1800 and no harm seems to have resulted from this omission²³).

4.21 There is another point too: both the members of the Conveyancing Group and others whom we consulted informally, agreed that taxation acts as a considerable disincentive to long settlements. Formerly, the major factor was estate duty which was levied on property passing on death.²⁴ This feature led to the popularity of discretionary trusts: since no beneficiary was entitled to any interest in the property, no estate was levied. The legislative response (which included the abolition of estate duty)²⁵, in the case of discretionary trusts, included a once off charge of 6%,²⁶ on the value of assets (where the settlor is dead and certain principal beneficiaries are under the age of 21), with a 1% annual charge thereafter. The cumulative effect of these provisions is that they act as a deterrent against the establishment of drawn out trusts.

In this context, one experienced solicitor wrote to us:

“Tax law is particularly relevant because substantially higher taxes become payable, for instance, if a potential beneficiary in a discretionary trust attains the age of twenty one. There is no demand, therefore, for interests to be settled beyond the period. The rule, in my opinion, is unnecessary and only a trap for the unwary of which I have had direct experience when the intentions expressed under a will became unintentionally void.”

4.22 It is of course true that it will sometimes be worthwhile to use a discretionary trust so as to arrange that the point at which capital acquisitions tax is such that the tax levied is as small as possible. But the important point is that in a discretionary trust, the existing perpetuities period is quite long enough for this purpose and, consequently, it is unlikely that removing the Rule would lead to longer discretionary trusts than is the case at present.

²² See Chapter 1, above

²³ See Chapter 5, below

²⁴ Finance Act 1894, ss.1,2

²⁵ Initially *Finance Act, 1972*, s. 32 as amended by *Finance Act, 1973*. But the present law is *Capital Acquisitions Tax Act, 1976*, s.2; *Finance Act, 1984*, s.105; *Finance Act, 1986*, s.103. See also O'Callaghan, *Taxation of Trusts: the law of Ireland* (1994); O'Callaghan, *The Taxation of Estates* (1993); Bohan, *Capital Acquisitions Tax* (1995); Wylie, *Irish Land Law*, (3rd ed.) pp. 564-65.

²⁶ 3% prior to 1994

Reform or Remove?

4.23 Many of those who agree with our argument so far, nonetheless, hold the view that abolition is undesirable and unnecessary because the good which the Rule is doing can be salvaged; while the evil is dissected out, by a careful reform. We turn now to this choice between abolition and reform.

4.24 Undoubtedly a strong case can be made out for reform and such a case has found favour with Law Reform Commissions in several other jurisdictions. The sort of reforms which have been adopted elsewhere include the removal of commercial interests from the scope of the Rule,²⁷ and also the removal of specific traps like the precocious toddler or the fertile octogenarians.²⁸ However, the central change is usually the establishment of a ‘wait and see’ precept. This has been the preferred method of reform of the Rule in England,²⁹ Northern Ireland,³⁰ New South Wales, Victoria, Queensland, the Australian Capital Territories and Western Australia,³¹ New Zealand,³² in some Canadian provinces³³ and in some American States.³⁴ Once enacted, a ‘wait and see’ rule enables the courts to have regard to the events that actually occur, rather than basing a decision on remote, theoretical possibilities that exist at the date when the instrument takes effect. In the jurisdictions mentioned, a gift will fail only if it is established that vesting must occur, if at all, after the end of the perpetuity period. Until that time arrives, the disposition will be treated as if it were not subject to the Rule. A limitation “to C’s first daughter to become an astronaut,” where C is childless at the testator’s death, is clearly void at common law. The ‘wait and see’ doctrine would enable the courts to observe whether or not C has a daughter who becomes an astronaut during C’s lifetime, or within 21 years thereof, and postpone adjudication on the settlement until that possibility is ruled out.³⁵

4.25 Leaving to one side the possibility of abolition, the most radical reforms of all are the recent proposals of the English Law Commission. The Commission proposed that the

²⁷ See: New South Wales and Australian Capital Territory U.S.R.A.P, section 4 (1) which exempts from the Rule against Perpetuities all non-donative (or commercial) transfers of property. For more see, Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251, 83.

²⁸ For an example of such specific reform, see *The Perpetuities and Accumulations Act, 1964*, section 2, which modifies the common law presumption of fertility.

²⁹ *Perpetuities and Accumulations Act, 1964*, Section 3(1).

³⁰ *Perpetuities Act (N.I.)*, 1966, Section 3 (1).

³¹ *Perpetuities and Accumulations Act, 1968* (VIC); *Property Law Act, 1974* (QLD); *Property Law Act, 1969* (WA); *Perpetuities and Accumulations Act, 1985* (A CT).

³² *Perpetuities Act, 1964* Section 8.

³³ Ontario, Alberta and British Columbia.

³⁴ Massachusetts, Connecticut, Maine, Maryland, Vermont, Kentucky

³⁵ Megarry And Wade, *The Law Of Real Property*, (Sixth Edition, London 2000) para.7-024

‘wait and see’ rule, which is already part of English Law,³⁶ should be augmented by the introduction of a fixed, statutory, perpetuity period of 125 years.³⁷ The Report states:

“The effect of adopting a 125-year period is to place a limited restriction - a long stop - on what settlors and testators wish to do, while recognising that other factors such as taxation, are likely in most cases to lead to the final vesting of property under a trust or settlement long before the end of the 125 year period.”³⁸

The upshot of combining this blanket perpetuity period with the introduction of a ‘wait and see’ rule, is that any gift would be allowed a period of 125 years within which to vest in interest. This would mean in effect that any gift would be given, the benefit of a ‘Royal Lives’ or ‘de Valera’ clause despite the draftsman having omitted to include one.³⁹ The sting would thereby be taken out of the criticism that the Rule can be avoided by skilful drafting and, consequently, is not a very effective law. This goes a long way towards removing the anomalies and injustices thrown up by an unreformed Rule against Perpetuities.

4.26 In thus freeing the law of its anomalies and reducing its scope, it is certainly the case that fewer gifts would ‘accidentally’, as it were, fall foul of it. Nevertheless, as we observed earlier,⁴⁰ even with a reformed Rule, a settlor with reasonable, if unusually paternalistic objectives may still fall foul of the Rule.

4.27 Moreover, there is an even more important point: even without a rule, it seems (for reasons given earlier in this chapter) that gifts of this sort, which went beyond a more generous Rule which had been reformed by the additions of a ‘wait and see’ precept and an automatic 125 year period, would be extremely rare.

4.28 In the light of these considerations, the question is whether we really need a complicated and nuanced corpus of law to prevent the very few remote gifts which would materialise (Bear in mind here that since we have rejected the idea of retrospectivity, there would have to be a dual regime: the present common law and the new statutory system). The ‘costs’ of an elaborate body of law are not always adequately acknowledged but they can be substantial and some of them have been alluded to in this Paper.

Problems with the reformed Rule

4.29 Again, even if we assume that all the reforms mentioned briefly above were made, there would still remain two areas of difficulty in operating the reformed Rule.

³⁶ See: *Perpetuities and Accumulations Act, 1964*

³⁷ Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251, paras.8.10 *et seq*

³⁸ Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251, para.8.13

³⁹ Although note our reservations about the utility of a ‘De Valera’ clause, para.2.05, above

⁴⁰ See paras.4.17 *et seq.* above

Firstly, the introduction of a statutory Rule against Perpetuities requires that the same statute must nominate interests, or types of interests, to which this new Rule is to be applied. This task is arguably more difficult than one might suppose, particularly if the legislation is to exclude all contingent interests created in commercial, arm's length transactions. The English Law Commission eventually formulated two lists: one was an exhaustive list of interests to which the Rule should continue to apply,⁴¹ and the other was a catalogue of specific commercial interests to which the Rule should not apply.⁴² This elaborate scheme was necessitated by a desire (which we share) to exempt commercial interests from the Rule, and a considerable difficulty in defining what exactly those interests were. If, in the likely event, that further changes need to be made to these statutory lists, and retrospective effect is rejected, one enters the mire of having three or more different schemes; the unreconstructed Rule against Perpetuities, the Rule after initial reforms and the Rule after amendments to those initial reforms.⁴³

4.30 The second difficulty is the persistent problem of 'vesting'. Earlier, we explained that there were three central elements to the modern Rule against Perpetuities: vesting, the perpetuity period and certainty of prediction no 'wait and see.' The English proposals recommend significant changes in respect of the latter two elements of the Rule, but the fundamental requirement of vesting would remain unchanged. The revised rule would continue to turn on the time at which an interest crossed the line from being contingent to vesting in interest. We do not see how, short of great upheaval, this element could be removed and a suitable substitute found. Yet, as mentioned earlier, the case law discloses that there have been difficulties in operating this distinction in practice. The dividing line has been described as "so delicate and depend[s] so much upon a minute consideration of the whole language of an instrument."⁴⁴ This uncertainty is exacerbated further by a strong constructional presumption in favour of vested interests.⁴⁵ Even with a comprehensive package of reforms, any retention of the Rule, albeit a new and improved version, necessarily involves basing decisions on this shaky distinction between vested and contingent interests.

Fear of the unknown?

4.31 When, eventually, the choice of how to proceed crystallises into a choice between reform or removal of the Rule, the vast majority of jurisdictions have opted for the former. In many cases, this ultimate decision has been strongly influenced by a respect for the

⁴¹ Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251, para. 11.2

⁴² Law Com *The Rules against Perpetuities and Excessive Accumulations*, No 251, para. 11.4. It was also recommended that the Lord Chancellor should have the power to specify further exceptions by statutory instrument. *Ibid.*, para. I I.S.

⁴³ In an English context, the list would read: the Rule against Perpetuities; the Rule after initial reforms in 1964; the Rule after the proposed 1998 reforms; and the Rule after amendments to those 1998 reforms.

⁴⁴ Morris and Leach, *The Rule Against Perpetuities*, (Second edition) p.39 where this subject is briefly examined.

⁴⁵ See *Re Poe*, [1942] IR. 535

longevity of the Rule against perpetuities, and a fear of a Pandora's box being opened by its abolition. The Land Law Working Group in Northern Ireland stated,

“If there were no existing law restraining perpetuities, we believe no valid case could be made for introducing one now – but the repeal of a well established law is a different matter: there must always be the suspicion that, although the mischief it was aimed at may seem to have disappeared, that mischief may regenerate following a repeal.”⁴⁶

Of course, we should be wary about sweeping aside a rule which has endured for centuries.⁴⁷ The Rule's longevity requires that we proceed with caution. However, it does not, without more, justify its continued existence, where there are compelling arguments in favour of its abolition. Restraint, based on a healthy fear of the unknown, must be balanced against a rational examination of what consequences are likely to follow abolition. Such an exercise is speculative, but taxation structures, variation of trust legislation, and the ease with which the Rule can be circumvented already, mean that the situation after abolition is unlikely to hold any, or many, unwelcome surprises.

4.32 Accordingly, we recommend that the Rule against Perpetuities be statutorily abolished. We further recommend the introduction of Variation of Trusts legislation.

The Problem Of Existing Trusts Or Settlements

4.33 The problem with which we are concerned here is that there will undoubtedly be some trusts or settlements in existence at the time when any abolition of the Rule comes into effect, which contain future interests which would violate the Rule. Given the fact that the Rule, of its nature, applies only to long trusts or settlement, there may be a relatively large number of these. Before addressing the issue of whether there should be any retrospective element to the abolition of the Rule, four preliminary points should be made.

(i) Insofar as we are concerned with trusts or settlements established by will, these do not come into effect until the testator dies. Thus, to take the case of badly-drafted wills in safes, even these would benefit from the change of law, under discussion, provided only that the necessary legislation is passed before the testator dies.

(ii) One solution to the present difficulty, (already existing trusts and settlements) which has been suggested is to adopt a *cy præs* rule, i.e. to empower a court to reform the contingent interest as far as is necessary to bring it within the Perpetuities Rule. The plausibility of a retrospective operation of the *cy præs* rule, in this context flows from the

⁴³ The *Final Report of the Land Law Working Group* (Belfast HMSO, 1990), para 2.12.10. See also: Law Com Consultation Paper *The Rules against Perpetuities and Excessive Accumulations*, No. 133, para. 5.2.

⁴⁷ Professor Anderson who wrote a memorandum of dissent to the Manitoba Report, wherein the majority recommended abolition, described the proposed abolition as “audacious”. (Report No 49 footnote 10, p. 62) Murphy J. recently described the rule as “the ancient but still respected rule against perpetuities.” [1994] 2 ILRM 276, 281

fact that in certain other jurisdictions,⁴⁸ provision has been made for the introduction of *cy pres*, both prospectively and to some degree retrospectively. But the point is that these jurisdictions start from an entirely different basis from what is proposed here in that they have taken the major policy decision not to remove, but to retain and reform, the Rule. In light of this policy, it makes sense, in the interests of the testator and the beneficiary, to allow some element of retrospective effect. But this is of no help to the beneficiary of a gift over: for what the *cy pres* rule does not do is in any way to soften the blow which retrospective operation deals to the beneficiary of any gift over: the food will have been snatched from his jaws just as surely by a retrospective operation of the *cy pres* rule as by the retrospective operation of the abolition of the perpetuities rule. Accordingly *cy pres* seems not to afford a magical way of both saving the gift and assisting the donee of the gift over.

(iii) It might be asked why most of the reforming measures adopted in other jurisdictions have largely not been retrospective. The reason would seem to be that they propose new rules which might cut across arrangements made by the testator or settlor. This point is explained by the English Law Commission, as follows:

“... if the new period were to apply to existing trusts, it could defeat the intention of settlors and testators and affect the rights of beneficiaries. Many existing trusts are likely to contain provisions that are incompatible with the new regime. They might (for example) specify perpetuity periods or trust periods of 80 years and the wishes of testators might be overridden and thereby frustrated or defeated.”⁴⁹

But the essential difference here is that we propose no new law; merely an absence of former restrictions. Under our proposals the testator or settlor's intentions would be fulfilled whether or not they were within the former law. And in line with this, in each of the jurisdictions where abolition has been proposed, it has been proposed to make this change retrospective.⁵⁰

(iv) One aspect of the ‘time-problem’ concerns special powers of appointment. This, we think, is not controversial and can be dealt with very briefly here. What if the sequence of events is that the law is changed after the power comes into effect; but before it is exercised. In other words, the sequence of events is: power comes into effect; Rule against Perpetuities abolished; power exercised. In this situation, the question is whether the new law should be so worded that the beneficiary should be allowed the advantage of the abolition change should apply. The justification for this suggestion is that no one can acquire any rights by way of a gift over until at least the time of exercise of the power.⁵¹

⁴⁸ For a comprehensive survey of reforms in other jurisdictions, See LC No 251, Appendix D

⁴⁹ English Law Commission (HC579, 1998) p.102.

⁵⁰ See also: Seventy Third Report of the LCR of South Australia (1984), pp 16-17; Manitoba LCR Report No 49 (1982) pp. 84-87; Saskatchewan LRC Report (1987), pp. 27-28

⁵¹ See, to similar effect, English Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251 (1998) paras.8.21-23.

Thus the field of special powers of appointment is one which lends itself particularly well to retrospective abolition of the Rule against Perpetuities.

4.34 We turn, next to consider whether we, like the other jurisdictions in which the law reform agency has recommended abolition, would recommend whether the change should be retrospective. The first and fundamental question is whether retrospectivity would be unconstitutional. First, it is well to set down a simple statement of the common law Rule, “Any future interest in any property ... is void from the outset if it may possibly vest after the perpetuity period has expired.”⁵² In other words, since there is no wait and see aspect to the Rule, property which is the subject of any invalid gift vests in interest, though (as we explain below) not yet in possession in the person who is entitled, in default.

4.35 But just because, a measure is retrospective does not necessarily mean that it violates constitutional rights. In the first place, whilst it is true that the Irish courts have given the property rights (Articles 40.3.2^o and 43) a relatively stringent interpretation (compared to say the US Constitution or the European Convention), it bears noting that almost all the cases in which a claim based on these rights has succeeded have been in the field of ‘public law’. This term refers to the field in which the executive organ of the State has been given, by statute, power to undermine or limit private property rights for some purpose, which it is sought to justify on the basis of the public good. Examples include: land use; planning control; taxation or rent control.⁵³ Where, as is often the case the property-owner has succeeded, it has been on the basis that this sort of legislation has gone too far. (In the present context, we need not stay to examine this broad remark).

4.36 By contrast - and this is the critical point - we are concerned here with a different field, namely, a transfer from one private person whom a testator or settlor intended to benefit to another private person whom the settlor did not want to benefit. Thus, we are concerned with a re-allocation of rights as between two sets of private individuals.

4.37 This is an area, where there is relatively little case-law so that no one should be dogmatic. However such case law as there is shows that: “the duty ... in regard to property rights ... would have to be balanced against other constitutional rights such as the protection of the marriage and the family.”⁵⁴

4.38 In the present situation, removal of the Rule does not necessarily have the effect of protecting the family since the donee of the contingent gift will not necessarily be a member of the testator's family. However, the testator or settlor's constitutional rights include the right to dispose of his own property. In some circumstances the intended donee may have property rights too. Thus it can be said that any undermining of the rights of the

⁵² Megarry and Wade, *The Law of Real Property*, (Sixth Edition, London 2000) para.7-018

⁵³ See JM Kelly *The Irish Constitution*, (Third Edition, Hogan and Whyte) 1061 *et seq.*

⁵⁴ Per Henchy J, obiter in *Hamilton v Hamilton*, [1982] IR 466, 487, on the Family Home Protection Act, 1976; see, to like effect, *TF v Ireland* [1995] 1 IR 379-381 on the Judicial Separation and Family Home Protection Act, 1989

donee of the gift over would be done with the object of protecting the other parties' constitutional property rights.

4.39 Finally, in this critical area of the balance between a constitutional right and its curtailment by a statutory provision, in the interest of the common good, one should note that the following relatively concrete test, as to when the statutory provision will pass muster has received a good deal of recent judicial support:-

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
- b) impair the right as little as possible, and
- c) be such that their effects on rights are proportional to the objective.”⁵⁵

In connection with head (a) “arbitrary, unfair ... ,” one point must be emphasised: the person entitled on a gift over or as on an intestacy would, in most circumstances, be someone of whom the settlor was aware and chose not to give it to. A law which has the effect of diverting the gift away from such a person, and to the person whom the donor wished to receive it, cannot be regarded as arbitrary.

In short, it seems likely that in this context retrospectivity would not be regarded as unconstitutional.

4.40 The remaining and more difficult question is whether it would be unjust or otherwise undesirable to deprive the donee of the gift over of the subject matter of the gift which would have been invalid under the Rule. The first and relatively straightforward point here is that if there has been any element of actual reliance by this person (in the sense of a change of position) on the fact that s/he is to take the subject matter of the invalid gift, then it would be unjust to deprive him or her of it. Straightforward (though in reality rather unlikely) ways in which the donee of a gift over might alter his position in reliance on ultimately receiving the gift would be if he were to: sell or mortgage an estate vested in interest; spend money on its repair or improvement; or possibly give up his job or borrow money in reliance on ultimately receiving an interest in possession. The possibility of reliance is recognised in each of the other three jurisdictions in which abolition has been proposed. As a result, a saving has been included in the provision establishing retrospectively, so as to protect the position of this category of donee of the gift over.

For example, the South Australian recommendation states:

⁵⁵ *Heaney v Ireland* [1994] 3 IR 593, 607

“This Part does not operate to validate a disposition of property if, before the commencement of this Part, property subject to the disposition had been distributed or otherwise dealt with on the basis that the disposition was invalid.”⁵⁶

And the Manitoban recommendation states:

“Where, prior [the date when the Act came into force]

- a) a court held an interest or a purported interest in property, including successive legal interests, to be void for breach of the rule in *Whitby and Mitchell* or the modern rule against perpetuities; or
- b) the period permitted for the vesting of an interest, or for any duration or accumulation, has terminated and any act or step has been taken as a consequence of that termination; or
- c) any act was taken in reliance upon the applicability of the Rule in *Whitby and Mitchell* or the modern rule against perpetuities or *The Accumulations Act*, including the transfer of property to any person consequent upon any voidity or termination⁵⁷

4.41 We prefer to base our recommendation on the South Australian model in part because it is more straightforward. We believe that, with the additional wording which we propose, it goes far enough to meet the legitimate claims of anyone who has, in any way, shifted their position on the basis that a gift was void. Our draft model catches validation of gifts formerly void whether by virtue of being contrary to the rule against perpetuities, or the cognate rules considered in chapter five.

4.42 *We recommend the following form of words.*

(3) This section shall not apply to any interest in property ... if, before the passing of this Act, in reliance on such interest being invalid by virtue of the rules and provisions referred to in subsection (1) of this section-

(a) the property or any part thereof is distributed or otherwise dealt with, or

(b) any person does or omits to do any act such as to render the position of that or any other person materially altered, after the passing of this Act, to his or her detriment.

⁵⁶ Seventy Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities, 1984 pp. 16-17. See also *Proposals relating to the Rules Against Perpetuities and Accumulations* (Sakatchewan, 1987) pp 23-24 and 27-28

⁵⁷ (Manitoban) Perpetuities and Accumulations Act, 1983, s. 5 (2). *Report on the Rules against Accumulations and Perpetuities*, Manitoba LRC, No 49-1982, 92.

4.43 Plainly, at the very least some provision along these lines should be included in any Irish measure uprooting the Rule retrospectively. But the really difficult question is whether we should go further and refrain from making the measure retrospective at all. This issue turns largely on whether it would be unjust to do this, bearing in mind that the consequence of not doing so would be that the settlor's wishes would be dishonoured and the intended beneficiary would be deprived of his gift.

4.44 Take a typical trust disposition which violates the Rule, "*to A for life, remainder to the first of my grandchildren to become a doctor.*" There is a gift over to X. Let us assume that the law abolishing the Rule which we recommend is enacted after A's death. X will have taken an interest in possession and will fall within the saver referred to in the previous paragraph. He will take the gift over. And this we believe to be the fair outcome. What, however, if the law is enacted whilst A is still alive? In these circumstances, it is in the highest degree unlikely, that X will have been able to sell or mortgage his interest in remainder (though, if he has, he will, of course, fall within the scope of the saver). He may, however, have known about the disposition and the invalidity of the gift to any grandchild who became a doctor and looking forward eagerly to the time when the gift falls to him. Alternatively, he may be living out of contact with the family and know nothing about his future inheritance.

4.45 Either way, it seems to us that the greater justice lies in applying the change of law retrospectively (though with the saver mentioned already). The choice seems to be between, on the one hand, honouring the settlor's intention and allowing the beneficiary (on whom s/he was intended to bestow the gift; and on the other hand, fulfilling (at most) the expectation of a windfall, which X (on the basis of a law which to most lay people and many lawyers would seem antiquated and irrational) entertained. We prefer the first alternative.

4.46 Accordingly, we recommend that the proposed abolition of the Rule against Perpetuities have limited retrospective effect so that those who have already taken property under a gift over will not have their ownership disrupted. Similarly we recommend that, if any act is taken in reliance upon the applicability of a Rule against Perpetuities, the interests of any person who has so acted will be protected.

Date of coming into effect

4.47 A final suggestion which we ought to consider is whether there should be a delay between the enactment of new law and its coming into effect.

We are opposed to this suggestion because of the nature of the Rule against Perpetuities. It operates to render void a gift which the settlor had intended to make. The effect of the removal of the Rule (as we propose) would accordingly be merely to enable the settlor's intent to be given effect to, as he had expected all the time. Seen in this light, the law we propose is of a different character from, say, the *Succession Act, 1965*. That Act has the effect of diverting gifts away from the legatees nominated and intended by the settlor and it is for this reason presumably that the legislature allowed just over 12 months for testators and legal advisors to become used to the new regime, before it came into effect and

possibly to change their wills. By contrast, since the law we recommend is negative in that it removes a positive rule, which prevents a testator or settlor from doing which he thought he had accomplished there is no justification for a period of suspense before the law comes into effect. Indeed the contrary is the case. If the object of the measure is to assist certain categories of settlor, the sooner the better.⁵⁸

4.48 Accordingly, we recommend that there be no delay between the enactment of the law abolishing the Rule against Perpetuities and its coming into effect.

⁵⁸ Since the transaction is a unilateral one, there is only the settlor to be considered. He is the only actor. The person who would have taken on a gift over had the Rule against Perpetuities continued in existence might no doubt prefer if the Rule had continued in force. However, as there is no action which he/she could have taken to restore his position, on finding out that the law had changed, he has no ground for complaint if s/he is not granted an early warning as to the change.

CHAPTER FIVE: OTHER RULES AGAINST REMOTENESS

A. Rules against Inalienability

5.01 It is worth pointing out briefly why it is that, although we recommend the removal of the Rule against Perpetuities, we recommend that there should be no change to certain other rules, covered in this section, which might appear to be similar in effect.

The points of comparison and of contrast between the Rule against Perpetuities and these rules are brought out in the following passage:

“It is a fundamental principle that property must not be rendered inalienable. It is therefore necessary to prohibit not only indefeasible future interests which are unduly remote, but immediate gifts which are subject to some permanent restraint upon alienation. The two principles are often confused, but need to be considered separately.”¹

As we have seen earlier (in Chapter 1), the policy of the law has long been in favour of free alienability of land. This has been given effect in three rules. We must now consider these rules briefly.

(i) *Quia Emptores 1290*

5.02 This is directed to any restriction prohibiting the grantee of freehold from alienating it. Any such restriction is void (though obviously, it is a matter of interpretation how far a restriction must go before it actually prohibits alienation). The usual case involves an attempt to control alienation by reference to a particular group to whom the land must or must not be sold. An example is *Re Dunne's Estate*,² in which a testator had left his house to his family subject the condition that it “shall not be sold or otherwise conveyed...to any member of the Meredith families of O'Moore's Forest, Mountmellick.”

5.03 It is true that a case might be made for saying that the policy of alienability no longer calls for this particular rule since any fee simple subject to an executory limitation, gift or disposition over probably comes within the definition of a settlement in section 2 of the *Settled Land Act, 1882*. Consequently the tenant for life would have statutory power to

¹ Megarry and Wade, *The Law of Real Property*, (Sixth Edition, London 2000) para.7-137

² [1988] IR 55

alienate an unqualified fee simple. However, the matter is not quite free from doubt.³ And, in any case, there seems to be no strong positive reason to disturb long-established law. By contrast, the Rule against Perpetuities, as we seek to demonstrate, at Chapter 4 is capable of doing harm, to no advantage.

(ii) ***Fines and Recoveries Act, 1834***

5.04 The fee tail developed in the fourteenth century, in response to the needs of land-owners, who wanted to ensure that their land remained within their immediate family. Accordingly this freehold estate has two features which distinguish it from a fee simple. First, it passes to the lineal descendants (children, grandchildren etc) of the grantee, in contrast to the fee simple which passes, on intestacy, to parents or even cousins of the deceased. Secondly, a fee tail is not alienable (whether *inter vivos* or by will). The result was that, originally, the grantor's descendants would inherit the estate, so long as their line continued.⁴

5.05 Naturally, these restrictions were unpopular with the holders of the estate. They wished, in many cases, to transmute the estate into a fee simple (a process known as 'barring the entail'). And, following various complicated manoeuvres and developments, the stage reached today is that, this can be done, under the *Fines and Recoveries (Ir.) Act 1834*, by way of a deed called a 'disentailing assurance'.

Recommendation

5.06 We recommend that there should be no change in the 1834 Act so as to remove a holder's right to bar the entail. In the first place, it is the experience of the members of our Land and Conveyancing Law Working Group that fee tail are very rare and, furthermore "would be highly unlikely to be created nowadays."⁵ This latter is especially important since if there were any legislation to uproot the 1834 Act, it would probably be required to be prospective in effect.

5.07 Secondly, where a fee tail is granted, then there is in existence a 'settlement' for the purposes of the *Settled Land Acts, 1882-90*. Thus in this context, too, the holder is given a statutory right to alienate the fee simple, without the need to avail of the 1834 Act. Accordingly, the 1834 Act appears to make little difference in practice. Finally, if we compare the policies underlying the 1834 Act and the Rule against Perpetuities, we find that the Rule thwarts a settlor who has specifically decided that he wishes to give to one actual or at any rate ascertainable group of beneficiaries rather than another; whereas the Act interferes with a settlor motivated by a sort of diffuse wish to establish a dynasty for his property. It seems that on public policy grounds, the Act has rather more to commend it than the Rule. In sum, we feel that, while the law in this area is not very useful, there appears no positive case for disturbing it.

³ Wylie, *Irish Land Law*, (Third Edition, 1994) para. 8.022

⁴ See: Lyall, *Land Law in Ireland*, Chapter 8

⁵ Wylie *op.cit* para. 4.11

B. Trusts of Undue Duration

5.08 We turn next to the second cognate rule, the rule against trusts of undue duration (a.k.a the rule against Perpetual trusts) - whose abolition we do not recommend. This rule is similar to the rules in respect of legal estates, in that it restricts inalienability. Its particular approach is to confine the extent to which (real or personal) property can be tied up by means of a trust. The rule is that the subject matter of the trust cannot be rendered inalienable for longer than the perpetuity period. This period is the same as that for (and indeed was modelled on) the Rule against Perpetuities (one reason why the two rules are often confused), namely, a life in being plus twenty-one years. Thus a bequest to the 'Orange Institution of Ireland' for the upkeep of a hall was held void because there was no limit to the period for which the trust fund, to maintain the hall, would have to remain in existence.⁶

5.09 In practice the rule applies almost exclusively to trusts for non-charitable purposes (for instance: to provide a prize cup;⁷ to set up a memorial;⁸ or for unincorporated associations, such as a club or other institution, which might continue indefinitely. The rule does not apply to charitable trusts, which have been exempted, by judicial policy, because of the benefit they bring to the public.⁹

5.10 With trusts for purposes or for unincorporated associations there is no relevant life in being and consequently the rule means (bearing in mind that here, too, there is no 'wait and see' rule) that the trust is void if the capital may be tied up beyond a period of twenty-one years.

5.11 There is a substantial overlap between trusts which fall within the present rule and those caught by a distinct rule, namely that banning 'trusts of imperfect obligation'. What this phrase means is that (charitable trusts apart) a trust must be for the benefit of ascertainable human beneficiaries. The policy underlying this rule is that if trustees fail in their duty, then there should be some person capable of moving a court so as to secure the enforcement of the trust. A well known example of a 'purpose trust' which fell foul of this rule was George Bernard Shaw's will trust for the development and research of a new English alphabet along phonetic lines, including the publication of *Androcles and the Lion* in the new alphabet.¹⁰ There are however a surprising number of exceptions to this rule, which have been styled as "concessions to human weakness or sentiment."¹¹ Among these

⁶ Re Fossitt's Estate [1934] IR. 504

⁷ *Re Nottage* (1895) 2Ch 649

⁸ *Re Endacott* (1960) Ch 232

⁹ *Chamberlagne v Brockett* (1872) 8 Ch 206, 211

¹⁰ *Re Shaw* [1957] 1All ER 745

¹¹ *Re Astor's Settlement* [1952] Ch 534, 547

exceptions are trusts for the upkeep of specified animals gifts for animals generally being regarded as charitable,¹² and for the erection or maintenance of monuments or graves.¹³

Recommendation

5.12 As regards considering whether to change the rule against trusts of undue duration, it might seem that consideration applies as in the case of the Rule against Perpetuities namely that the settlor's right to do what he will with his property should be disturbed only for a good reason. However, this approach views the matter from one perspective only, that of the settlor. And, we believe that in the present context, there is a factor, which has no equivalent in the case of the Rule against Perpetuities and which may constitute a good reason to justify the present rule. For the probable reality is that a significant number of the richer purpose trusts contain the property of unincorporated associations, the legal form taken by so many social and sporting clubs. With its large dependence on voluntary effort, informal organisation; and the uncritical trust, usually conferred by the members to the Committee, this is not an area in which the law is well developed or often called upon. And given the character of this field of human activity, this may be both inevitable and desirable. (All this means that it is inherently difficult to obtain comprehensive information about this area. Something which itself means that one should be slow to recommend change to a fundamental law in this area.)

5.13 Seen in this light then, the rule is part of the framework for the government of unincorporated associations. Moreover, this rule is just one of the devices that has been created to regulate non-charitable purpose trusts the other being the rule against trusts of imperfect obligation because of the difficulties in monitoring and enforcing them. Accordingly, we prefer to leave aside any consideration of this rule until we can see it in the perspective of a review of the entire field of unincorporated associations.¹⁴ We recommend no change, at this time.

5.14 One further and rather narrow matter should be raised. Some forty years ago, the legislature considered it appropriate to shrink the scope of the rule against inalienability (and also the rule against trusts of imperfect obligation) in one respect and no harm appears to have come from this. The relevant provision is section 50 of the *Charities Act, 1961* by which:

“(1) Every gift made after the commencement of this Act for the provision, maintenance or improvement of a tomb, vault or grave or for a tombstone or any other memorial to a deceased person or deceased persons which would not

¹² *Re Dean* (1889) 41 Ch D 552

¹³ *Re Hooper* (1932) 1 Ch 38. See generally: Delaney, *Equity and Law of Trusts in Ireland*, (Round Hall, Sweet and Maxwell, 2nd ed.) Chap 9; Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, 1988) p. 81-88.

¹⁴ Cf. Law Commission Consultation Paper *The Rules against Perpetuities and Excessive Accumulations*, No. 133 (1993) para. 1.4; LC Report No 251 (1998); Emery, "Do We Need a Rule against Perpetuities?" (1994) 57 MLR 602,603

otherwise be charitable shall, to the extent provided by this section, be a charitable gift.

- (2) Such a gift shall be charitable so far as it does not exceed -
- (a) in the case of a gift of income only, sixty pounds a year;
 - (b) in any other case, one thousand pounds in amount or value.”

5.15 Under this section gifts within the stated limits are [indirectly] saved by being deemed to be charitable so lifting them outside the scope of the two rules (against trusts of undue duration or imperfect obligation). Now, of course since the 1960 Act was passed, the value of money has been drastically reduced so that, for trusts set up in the past thirty or so years, the Act has probably been of no assistance.¹⁵ And there was no index-linking provision in the Act to enable the limitations to be adjusted, by statutory instrument, in line with the fall in the value of money. Accordingly it seems to us that if (as we recommend below) there is to be no reform of general scope, in this field, it is appropriate that the reform intended by the legislature in the 1960 Act should be, in effect, implemented in modern conditions. Accordingly, we recommend that there be a limit on income of £1,000 per year, and a limit on the capital sum of £16,000 (as of the year 2000).¹⁶

Concluding Comment

5.16 By way of conclusion to this section, we would observe that see no reason to challenge the policy that land must not be rendered inalienable. While this policy has been a part of the law for many centuries, it remains of contemporary importance, in the context of making the optimum use of the land, that it should not be rendered inalienable. Our case for uprooting the rule against perpetuities does not cut across this fundamental policy. Nevertheless before the late nineteenth century, for the reason that by now, even if estates in land are divided by the creation of future interests, it is still possible for the entire estate to be sold.

C. Contingent Remainder Rules And The Rule in *Purefoy v Rogers*

Background

5.17 A remainder is created where an estate in possession is granted to one person, and, in the same disposition, the grantor then grants some, or all, of the residue of his estate to other persons.¹⁷ A simple example is, the settlement, “to A for life, remainder to B and his

¹⁵ See our *Report on The Indexation of Fines* (LRC 37-1991)

¹⁶ The fall in value of money over the 1960-2000 period is calculated by reference to the consumer price index, using a factor of 15.24. Had the legislation, above, been adjusted accordingly, the threshold for income arising out of charitable gifts would be approximately £914.14, and the threshold for the capital sum would be £15,240. (Central Statistics Office figures)

¹⁷ Coughlan, *Property Law*, at p.150

heirs.” A remainder is, by definition, a future interest in property and it can be vested or contingent. Contingent remainders were viewed as anomalous in medieval times, when lawyers still adhered rigidly to the feudal concept of seisin,¹⁸ that is there had to be an unbroken line of freeholders entitled to possession of the land. In this context, contingent remainders raised problems as it was difficult to say with certainty where the grantor’s fee simple was at all times. Megarry and Wade state:

“Some said...the fee simple was in abeyance, or in *nubibus* (in the clouds) or *gremio legis* (in the bosom of the law); others argued on the principle that what the grantor had not conveyed away he still had in him, and so said that the fee simple remained vested in the grantor, or if he was dead, his devisee or heir.”¹⁹

5.18 In response to these difficulties, the common law developed four strict rules to ensure that no gap in seisin would occur. These applied only to legal remainders - that is remainders created in the legal estate - and it is to these rules that we now turn.

Rule governing Legal Remainders

1. A remainder is void, unless, when it is created, it is supported by a particular estate of freehold created by the same instrument.

This rule prohibited the creation of a freehold estate which would suddenly 'spring up' in the future, on the occurrence of some contingency. This rule reflected the feudal abhorrence of any abeyance of the seisin. Take for example, a limitation: "*To A's first son, and his heirs*", where A has, as yet, no son would be void. By contrast a limitation: "*To X for life, remainder to A's first son and his heirs*", was perfectly valid because the remainder to A was supported by a prior freehold estate to X.

2. A remainder after a fee simple is void.

This rule reflects the fundamental notion that a fee simple is the "largest estate known to the law".²⁰ Once a grantor has assigned his fee simple, his powers are exhausted, and he can create no further estate.²¹ Applying the rule, a limitation: "*To A and his heirs, remainder to B and his heirs*" was void.

¹⁸ Seisin, is described by Wylie as “a concept which defies definition”, but is best understood as similar to possession of land but not synonymous therewith, and as something which can only be held by someone with freehold tenure. See WYLIE, *IRISH LAND LAW* (Third Edition), at paras. 4.018 *et seq.*

¹⁹ Megarry and Wade, *The Law of Real Property* (Fifth Edition), at p.1177

²⁰ Coughlan, *Property Law*, at p.152

²¹ "There is not in the law a clearer rule than this, that there can be no remainders limited after a fee simple," per Lord Nottingham L.C., *Duke of Norfolk's case* (1681 3 Ch. Ca. 1 at p. 31)

3. A remainder must not cut short a prior freehold estate.

The common law insisted that any prior freehold estate must be permitted to continue to its natural end, rather than being prematurely cut short by the operation of a remainder. Wylie explains, "Just as the common law would not allow an abeyance of seisin, it would not permit an arbitrary shifting of seisin from the holder of one freehold estate to another."²² Therefore, to be valid, a remainder had to be immediately expectant on the determination of the prior estate. Applying the rule, a limitation: "*To A for life, but if he marries B, then to X and his heirs*" was void.

An easy mechanism existed whereby this rule could be avoided altogether. If the prior estate was created in such a way as to determine naturally on the occurrence of exactly the same contingency, the remainder would be perfectly valid. When a prior estate was so described, it was a determinable estate. Thus a limitation: "*To A for life or until he marries B, remainder to X and his heirs*" was perfectly valid.

4. A remainder was void if it did not in fact vest during the continuance of the prior estate, or at the moment of its determination.

Again, this rule is consonant with the common law's insistence on unbroken seisin. Any gap between the determination of a prior estate and the vesting of the remainder was anathema. Consequently, if such a gap would arise, as a matter of certainty, then the remainder would be void from the outset. However, if such a gap was merely possible, rather than inevitable, the courts would 'wait and see' whether or not any abeyance actually occurred.

5.19 As we mention below, these rules became increasingly overshadowed by the modern rule against perpetuities.²³ More immediately, their effectiveness was severely undermined by the existence of extensive mechanisms whereby they could be avoided altogether.

Mechanisms for Avoiding the Common Law Rules

1. Future Trusts

5.20 These four inflexible common law rules relating to contingent remainders did not apply to equitable interests. Thus, once the legal estate was conveyed to trustees, or feoffees to uses, the common law was satisfied. From a common law perspective, there could be no breach of the contingent remainder rules since seisin was continually vested in the trustees. In this way landowners could create remainders which were equitable only, and which were unrestricted by the common law rules. An example of an equitable remainder – which

²² Wylie, *Irish Land Law* (Third Edition) at para. 5.014

²³ Megarry and Wade, *The Law of Real Property*, (Fifth Edition), at p.1176

would, if legal, breach the first common law rule against ‘springing’ – is: “*to A and his heirs, to the use of B and his heirs, after my death*”.

2. *Legal Executory Interests*

5.21 The *Statute of Uses (Ireland) 1634*, went a step further by making it possible to create future interests, which were legal rather than equitable estates, and were nonetheless free from the restrictive common law remainder rules. The statute ‘executed the use,’ so that the former *cetsuis que use* now held the legal estate equivalent to his former equitable estate. The feoffee to uses, or trustee, was left with nothing.²⁴ These new future interests were known as legal executory interests, and were of three types.

- *Shifting Uses*

5.22 These are remainders which would previously have contravened the common law rule that a remainder must not cut short a prior freehold estate (rule 3, above). An example is: “*To T and his heirs, to the use of A and his heirs, but if A marries B, then to the use of X and his heirs.*” Applying the Statute of Uses, 1634, the use is executed, T drops out, A and X receive equivalent legal estates, and if A marries B, X receives the fee simple.

- *Springing Uses*

5.23 These are remainders which would have previously contravened the common law rule that a remainder must be supported by a prior freehold estate (rule 1, above). An example is: “*to A and his heirs, to the use of B and his heirs after my death.*” The use in favour of B is executed so that a legal fee simple will ‘spring up’ in his favour on the grantor’s death.

As regards both springing and shifting uses, the drafting mechanism whereby the contingent remainder rules could be side-stepped was very straightforward. Simply by inserting the formula, “to T and his heirs to the use of...”, before the limitation, an inter vivos disposition was practically guaranteed validity. As Megarry and Wade state, “..the Statute of Uses did the rest.”²⁵

3. *Executory Devises*

5.24 Avoidance of the contingent remainder rules was yet more straightforward, when dealing with remainders contained in a will. In that context, the courts did not insist on the use of the formula outlined above, but rather treated testamentary gifts as though a use had been inserted. This leniency is explained by Coughlan in the following terms:

“First, wills were traditionally interpreted in a liberal fashion in an effort to give effect to the intentions of the particular testator. Secondly, the wording of the

²⁴ Coughlan, *Property Law*, at p.154.

²⁵ Megarry and Wade, *The Law of Real Property*, (Fifth Edition) at p. 1180.

Statute of Wills (Ireland) Act, 1634, which gave the testator power to dispose of his land ‘at his free will and pleasure’, encouraged the courts to read dispositions in a way which would not fall foul of the common law remainder rules.”²⁶

5.25 Moreover, the law relating to the administration of estates has altered significantly over the last century.²⁷ The principal change with which we are concerned is the provision that the whole of a deceased person’s legal estate nowadays vests, not in his legatees, but in his personal representatives.²⁸ Consequently, the interests of beneficiaries under a will are equitable only and remain so as long as the personal representatives retain the legal estate.²⁹ For this reason, it is generally accepted that a will can create future equitable interests only – hence the maxim “a will operates in equity only” – and can no longer create legal executory interests. As such interests created by a will are wholly exempt from the common law remainder rules.

The Rule in Purefoy v. Rogers

5.26 While these simple avoidance mechanisms significantly undercut the effectiveness of the four common law rules, the rules are not absolutely obsolete. First, if a conveyancer omits to insert a use into an *inter vivos* disposition, the rules continue to apply. Secondly, three centuries ago the courts identified one particular situation where neither the insertion of a use before a limitation, or the testamentary context of a remainder, would provide protection from the common law rules. The “notorious”³⁰ rule in *Purefoy v. Rogers*,³¹ stated that no limitation could take effect as a legal executory interest, if it was capable of taking effect as a common law remainder.³² A limitation that complies with the first three common law rules, and is capable of complying with the fourth will be treated as a legal remainder, regardless of the grantor’s intentions and irrespective of a grant to uses or a will.

5.27 The operation of the rule can be illustrated in this example: “*To A for life, remainder to B and her heirs when she becomes a solicitor.*” This limitation complies with the first, second and third common law rules. However B’s interest may or may not vest during the continuance of A’s prior estate or immediately upon determination of A’s life estate. Put simply, B may not necessarily have qualified as a solicitor at A’s death. In such a situation the common law ‘wait and see’ approach is adopted, and if matters turn out unfavourably for B the remainder will be void.

²⁶ Coughlan, *Property Law*, at p. 155.

²⁷ Succession Act 1965, Section 10; *Administration of Estates Act, 1959*, Section 6; *Local Registration of Title (Ir) Act, 1891*, Part IV.

²⁸ Succession Act 1965, Section 10.

²⁹ Wylie, *Irish Land Law*, (Third Edition), at para. 5.030.

³⁰ Megarry and Wade, *The Law of Real Property*, (Fifth Edition) at p. 1181.

³¹ (1671) 2 Wm Saund 380

³² Lyall, *Land Law in Ireland*, at p. 269.

Avoiding Purefoy v. Rogers

5.28 If it is inevitable that a limitation will comply with the fourth rule, or that it will violate the rule, the remainder will be treated as a valid legal executory interest. Thus, in the above example, the ‘wait and see’ rule could have been avoided if the limitation read: “*To A for life, and one day after his death, remainder to B and her heirs if she becomes a solicitor.*” The insertion of a one day gap guarantees the abeyance of seisin. Violation of the fourth rule is guaranteed and, ironically, this saves the gift. The narrow focus of the rule, and the ease with which it can be avoided, render it an unreasonable, and arguably capricious rule. Lyall states: “It is difficult to explain the rule on any policy ground since the rule can quite easily be avoided.”³³

5.29 Furthermore the *Purefoy* rule had no application to future trusts, where the Statute of Uses did not execute the use. Thus, the black hole of *Purefoy* could be easily circumvented by vesting the legal estate in trustees. By inserting the simple formula, “unto and to the use of T and his heirs upon trust for ...” before a dubious limitation, this end could be achieved.

The Decline of the Contingent Remainder Rules.

5.30 The *Contingent Remainders Act, 1877*, abolished the rule in *Purefoy v. Rogers*.³⁴ This statutory reform was hailed as the long-overdue abolition of “a senseless and useless trap.”³⁵ But the Act is badly drafted.³⁶ First, the Act’s main provision did not seem to fit the obvious case where no use or will was employed, e.g. a grant by deed to A for life, remainder to his first son to attain 21: for in such a case, if there had been no particular estate, the remainder could never have been valid.

5.31 Secondly, it is not clear whether the Act catches class gifts because here some members of the class might take a vested interest before-but some after the determination of the prior estate. Most important of all, the Act was not intended to affect the first three

³³ Lyall, *Land Law in Ireland*, at p. 269.

³⁴ *Contingent Remainders Act, 1877*, Section 1 states, “Every contingent remainder...which would have been valid as a springing and shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.”

³⁵ Megarry and Wade, *The Law of Real Property*, (Fifth Edition) at p. 1184.

³⁶ Notice that the reversal of *Purefoy* exposes those remainders to the Rule against Perpetuities and its ‘no wait and see rule.’ Wylie surmises, “The 1877 Act clearly did not intend that interests which had at least a chance of validity [under *Purefoy*] should be construed as executory interests if this ensured their invalidity. However, if, as we recommend the Rule is uprooted, this will no longer matter.”

contingent remainder rules. If a settlor is to avoid them, a conveyance to uses or a will remains necessary.³⁷

5.32 The final point to make is that the emergence of the modern Rule against Perpetuities displaced the common law remainder rules to a great extent. It was a less complicated rule, it applied equally to legal and equitable estates, and it restricted future interests more effectively than the four common law rules. Megarry and Wade explain that the courts,

“appreciated that the perfection of the wide modern perpetuity rule, after various false starts, was a comprehensive solution to the perpetuity problem as a whole, both in equity and at law. All interests therefore had to submit to it, whether or not they had enjoyed an earlier freedom.”³⁸

Recommendation

5.33 It cannot be denied that the four contingent remainder rules are shot through with anomalous exceptions and, in skilled hands, are easily avoided. Despite these difficulties, we do not recommend their abolition. Unlike the rules against perpetuities and accumulations, the contingent remainder rules are not mere rules against remoteness. Rather they prevent a situation where no-one owns the legal estate, or in technical terms, they prevent an abeyance in seisin. The notion of seisin continues to play a pivotal role in modern land and conveyancing law. Insofar as the rules prevent an abeyance in seisin, they continue to perform a valuable function.

5.34 Earlier, we noted the ease with which the contingent remainder rules could be avoided, for example, by inserting a use. These avoidance mechanisms have, by now, become integral aspects of standard conveyancing drafting practice. Upsetting the effect of these standard phrases is more likely to complicate, rather than simplify, modern conveyancing practice.

5.35 The duo of the rule in *Purefoy v Rogers* and the *Contingent Remainders Act 1877* has little to commend itself. The rule, when it existed applied in a haphazard and arbitrary fashion, and was – more than most – a trap for the unwary. The 1877 Act was intended to uproot the rule. However, it is hardly a “model of drafting expertise and to this day, its precise application remains unclear.”³⁹ To avoid any future confusion, we recommend that the rule in *Purefoy v Rogers* be abolished and that the *Contingent Remainders Act 1877* be repealed. If, as we suggest, this reform is coupled with the abolition of the Rule against Perpetuities, there is no danger that interests formerly saved by the 1877 Act will be void for perpetuity.⁴⁰

³⁷ Wylie, *Irish Land Law*, (Third Edition), at para. 5.029.

³⁸ Megarry and Wade, *The Law of Real Property*, (Fifth Edition) at p. 1185.

³⁹ Wylie, *Irish Land Law*, (Third Edition) para.5.029

⁴⁰ Notice that the 1877 Act is generally regarded as protecting these remainders from the Rule against Perpetuities and its ‘no wait and see’ rule. Wylie surmises, “The 1877 Act clearly did not intend that

D. The Rule in *Whitby v. Mitchell*

5.36 This rule, which is also known as the old rule against perpetuities or the rule against double possibilities, appears to have developed in the sixteenth century (despite the fact that the case in which it was authoritatively stated was decided in the late nineteenth century).⁴¹ At this time, one of the ways which lawyers for land owners had developed to ensure that land descended according to the pattern fixed by the settlor was to confer a life estate on the initial grantee and thereafter on the person who would have constituted the heir of the body in each succeeding generation of his descendants.⁴² The result of this was that, no one would have an entail which could be barred thereby creating a fee simple which could be sold. In this way, the settlor's intention to avoid the possibility of the interest being converted into a fee simple was achieved. In sum, therefore, the rule was a ban on the creation of a series of life estates closely resembling an unbarrable entail.

5.37 Pursuing their public policy of free alienability, the courts response to this move on the part of certain land owners was the rule in *Whitby v. Mitchell*, which states that where an estate is given to an unborn person, any remainder over to that unborn person's issue and any subsequent limitations are void.

The rule has been applied in Ireland in *Bank of Ireland v Goulding*,⁴³ but only by a 3:2 majority.⁴⁴

Recommendation

5.38 In deciding what to recommend in relation to the rule in *Whitby*, it is plainly not sufficient to reason directly from the facts that the rule is fairly similar to the Rule against Perpetuities and that we intend recommending the removal of the latter, to the conclusion that we ought to recommend the uprooting of rule in *Whitby*. Rather we need to consider whether in a legal system in which (we assume) the Rule against Perpetuities has been removed, there is any merit in retaining the rule in *Whitby*.

5.39 First, we should be clear as to the ground covered by the rule. As regards the types of interest which it catches, it applies to both legal and equitable remainders in realty.⁴⁵ It also probably applies to realty subject to a trust for sale (despite the doctrine of

interests which had at least a chance of validity [under *Purefoy*] should be construed as executory interests if this ensured their invalidity." (*Ibid.*, para.5.029)

⁴¹ (1890) 44Ch 85

⁴² Coughlan *op-cit.* 160

⁴³ Unreported , 14th November 1975 (SC)

⁴⁴ Lyall, Land Law in Ireland, at p.286

⁴⁵ *Re Nash* [1910] 1Ch 1

conversion),⁴⁶ but not to other interests in personalty.⁴⁷ Nor does it seem to apply to legal or equitable executory interests in realty.⁴⁸

5.40 Secondly, as regards the scope of the rule in *Whitby*, it makes no attempt to act as a general preventive against control by the dead hand. Its aim is narrowly to avoid an entail being unbarrable. But since the legislative changes of the late nineteenth century, explained elsewhere, such a restriction is, as explained elsewhere in effect trumped by statutory power bestowed on the tenant for life to sell the entire estate in the settlement.

5.41 In short, as can be seen from the previous paragraphs, it is an unreformed rule which has been shaped by the curious and artificial zig-zags of historical development in which this area abounds. And thus, it does not even catch all forms of estate, in land. Yet, it remains a "trap for the unwary draftsman,"⁴⁹ and there is less to be said in its favour than for the Rule against Perpetuities

Accordingly, we recommend the abolition of this rule.⁵⁰

E. The Rule against Accumulations

Content of the Rule

5.42 A clear distinction can be drawn between the Rule against Perpetuities and the rule against accumulations. The rule against accumulations is concerned not with the vesting of trust property, but with income generated therefrom. In the bulk of settlements, trustees will be bound, by the terms of the settlement, to distribute such income to the beneficiaries on a regular basis. However, a direction might be made "to the effect that the income is not to be paid to the beneficiaries as it arises, but instead should be accumulated as a fund until the happening of some particular event."⁵¹ It is against such a possibility that the rule against accumulations is directed. Stated simply, the common law rule states that such a direction is inoperable if the accumulation of income might persist beyond the perpetuity period, and the period is defined in the same way as for the Rule against Perpetuities, namely a life and 21 years.⁵²

⁴⁶ *Re Bullock's W.T.* [1915] 1 Ch 493; *Re Garnham* [1916] 2 Ch 413

⁴⁷ *Re Bowles* [1902] 2 Ch 650

⁴⁸ MEGARRY AND WADE, *THE LAW OF REAL PROPERTY*, (Fifth Edition) at p.1188 cite Williams J., *PRINCIPLES OF THE LAW OF REAL PROPERTY* (24th Edition) in support of this contention. However they also refer the reader to Sweet who doubts the validity of this assertion: (1911) 27 LQR 171

⁴⁹ Megarry and Wade, *The Law of Real Property*, (Fifth Edition) at p.1189

⁵⁰ This was abolished, in Northern Ireland, by the *Perpetuities Act (N.I.) 1966*, s.15. See, generally WYLIE, *IRISH LAND LAW* (Butterworths, 3rd, 1997) chap 5; LYALL, *LAND LAW IN IRELAND* (Oak Tree Press, 1994) chap. 11; COUGHLAN, *PROPERTY LAW* (Gill and MacMillan, 1995) chaps. 9 and 19.

⁵¹ Coughlan, *Property Law*, at p.180

⁵² As always, the perpetuity period will also include a period of gestation, "if such gestation should exist in fact," *per* Chatterton VC in *Smith v. Cunninghame* [1884] 13 LR Ir. 480, at p.485.

5.43 The operation of the rule is best illustrated by reference to the facts of *Thellusson v. Woodford*.⁵³ In 1796, Peter Thellusson, a wealthy banker, by his will devised and bequeathed the residue of his large estate to trustees upon trust to accumulate the income at compound interest during the lives of all his sons, grandsons, and great-grandsons living at his death. On the death of the last survivor, the fund was to be divided among his three eldest, male, living descendants. Thellusson had confined the accumulation to the permissible perpetuity period, and for this reason, the House of Lords upheld the validity of the trusts.

Applicability of the Rule against Accumulations in Ireland

5.44 The common law position, set out above, was adopted by the Irish courts, in a trilogy of nineteenth century cases.⁵⁴ However, the position in England has been radically altered by the *Accumulations Act, 1800*. That Act was born out of considerable public outcry following the *Thellusson* decision.⁵⁵ Morris and Leach state:

“The Thellusson Act was rushed through Parliament in a panic, one year after the Thellusson dispositions had been held up 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.”⁵⁶

5.45 For our purposes, it suffices to say that the Act placed severe restrictions on the power to accumulate income.⁵⁷ For the *Accumulations Act, 1800*, was never applied in Ireland (or in Northern Ireland). However, a legislative oversight resulted in the amending legislation, the *Accumulations Act 1892*, “oddly”⁵⁸ extending to Ireland, North and South. Wylie comments, “this seems to be another instance of Westminster legislating for Ireland in the nineteenth century without appreciating the existing legislative position across the Irish Sea.”⁵⁹ The substantive effect of this anomaly is quite limited. Section 1 of the 1892 Act, states that in a direction to accumulate income, “for the sole purpose of purchasing land”, the accumulation may not last longer than the minority of the person(s) who, if of

⁵³ (1805) 11 Ves. 112

⁵⁴ *Cochrane v Cochrane* (1883) 11 LR Ir. 361; *Smith v Cunningham* (1884) 13 LR Ir. 480; *Longfield v Bantry* (1885) 15 LR Ir. 101.

⁵⁵ Although, it is worth stating that Mr Thellusson’s three malcontent sons were all members of Parliament. Simes, *Public Policy and the Dead Hand* (1955) at p86.

⁵⁶ Morris and Leach, *The Rule Against Perpetuities*, (Second edition) at p. 303. See also: Keeton “The Thellusson case and Trusts for Accumulations” 21 NILQ 131

⁵⁷ Briefly, the *Accumulations Act, 1800*, stipulated four permissible periods of accumulation. Two further periods were added by the *Perpetuities and Accumulations Act, 1964*. All six periods are radically shorter than those permitted by the Rule against Perpetuities.

⁵⁸ See The Final Report of the Land Law Working Group, (Belfast, HMSO, 1990) at para. 2.12.17.

⁵⁹ Wylie, *Irish Land Law*, (Third Edition) at p. 349, para. 5.152.

full age would be entitled to the income.⁶⁰ This provision aside, the common law position remains unchanged and relevant.

5.46 The anomaly created by the introduction of an amending statute, with nothing to amend, is self-evident. Section 1 of the 1892 Act stands out as a legal oddity, which forms no part of a coherent approach to the issue of accumulations. Whatever about the survival of the common law rule, at the very least this particular anomaly ought to be rectified and we recommend repeal of the 1892 Act.⁶¹

Recommendation

5.47 There are three possible justifications for the existence and preservation of the common law rule against accumulations. First, it prevents the tying up of large amounts of capital for an excessive period of time. Secondly, the rule limits ‘dead-hand’ control. That is, it prevents testators from dictating financial arrangements from beyond the grave, for too long. Thirdly, the rule is an obstacle to the “vainglorious testator”⁶² who would otherwise shirk his responsibilities to his immediate dependants by leaving his fortune to a remote descendant. It is our contention that these arguments no longer justify the existence of the rule against accumulations, if they ever did.

5.48 In the first place, it is inaccurate to describe accumulating income as being ‘tied up’. The income does not disappear into some notional vortex. Rather, because of changes in methods and forms of investment since the nineteenth century, it can be invested and put into commercial circulation, without being distributed.⁶³ In today’s conditions, there is a strong consensus that saving for capital formation is a virtue, and that no social or economic ill results therefrom. Indeed, in *Thellusson v Woodford*, Lord Eldon explained, “the effect is only to invest [income] from time to time in land: so that the fund is, not only in a constant course of accumulation, but in a constant course of circulation.”⁶⁴

5.49 The second argument, based on the non-desirability of ‘Dead-Hand’ control, is outlined in this passage:

“We are considering the question: Shall the dead hand or the present generation determine how much income is to be put back into capital? ... The earth belongs to the living. We should strike a fair balance between the desire to provide accumulations for future generations and the desire of future generations to dispose of the world’s wealth.”⁶⁵

⁶⁰ *Shillington v Portadown UDC* [1911] 1 IR 247.

⁶¹ The Final Report of the Land Law Working Group (HMSO, 1990) Para. 2.12.18 of *Survey of the Land Law of Northern Ireland* (HMSO, 1971) Para. 340, makes the same recommendation.

⁶² Morris and Leach, *The Rule against Perpetuities* (Second Edition) at page 305.

⁶³ Morris and Leach argue “After all, accumulation is merely saving, and to save is an economic virtue. No property is withdrawn from commerce...” *op cit* at page 305.

⁶⁴ (1805) 11 Ves.112, 147.

⁶⁵ Simes, *Public Policy and the Dead Hand*, Chap IV.

This argument is also the principal policy justification for the existence and preservation of the Rule against Perpetuities. In that context, we have already disputed the view that posthumous control of property is *ipso facto* a threat to the common good.⁶⁶ These arguments need not be repeated here. Ultimately, we concluded that the ‘Dead-Hand’ principle is an inadequate justification for the inconvenience and interference occasioned by the Rule against Perpetuities. The same arguments and conclusion apply with equal force in the present context.

5.50 Thirdly, the prospect of destitute dependants was a dominant theme in the negative reaction to the *Thellusson case*. Counsel for his widow and children stated, “Mr Thellusson’s will is morally vicious; as it was a contrivance of a parent to exclude everyone of his issue from the enjoyment even of the produce of his property during almost a century.”⁶⁷ But we believe that, as a means of enforcing familial responsibilities, the rule against accumulations is ineffective, superfluous and excessive.

5.51 It is ineffective because it only bars one (and that a most unlikely one) of the ways in which a donor may dispose of his fortune so as to deprive his family of it. For example, testators are still free to disappoint their dependants by making large *inter vivos* dispositions, or by leaving their estates to charity. It is superfluous because the *Succession Act, 1965*, more effectively (though not totally effectively⁶⁸) protects the interests of neglected spouses and children. It is excessive because it frustrates *all* over-long accumulations, irrespective of whether or not adequate provision has actually been made for the testator’s dependants. For instance, Peter Thellusson “did not leave his wife and children destitute,”⁶⁹ but divided well over £100,000 between them in specific gifts. His sons were independently wealthy and he, quite reasonably, wished them to avoid “ostentation, vanity and pompous show.”⁷⁰

No Safety Net

5.52 In jurisdictions where the *Accumulations Act 1800*, or equivalent legislation, applies, the principles underpinning the rule against accumulations have been similarly criticised. The usual response is to advocate repeal of the Act, with the old common law approach being reinstated.⁷¹ The accumulation of income is still controlled by the perpetuity period, which acts as a ‘safety net’.⁷² The English Law Commission recently

⁶⁶ See paras 4.10-12

⁶⁷ (1805) 32 ER 1030, 1031.

⁶⁸ *Succession Act, 1965*, Sections 111, 112, 117. It is admitted that the 1965 Act is not absolutely effective in that it does not apply to *inter vivos* gifts and it only applies to spouses and, to some degree, children.

⁶⁹ Morris and Leach, *The Rule against Perpetuities* (Second Edition) at page 304.

⁷⁰ HEL, vii, p. 229.

⁷¹ This has occurred in Alberta, British Columbia, New South Wales, Tasmania, Victoria and Western Australia, and New Zealand.

⁷² For example, defending an argument in favour of reinstating the common law rule Morris and Leach state, “neither the Thellusson Act nor any statutory substitute has ever been in force in Ireland, Nova Scotia or

advocated abolition of the statutory rule, but retention of a 125 year statutory perpetuity period which would continue to restrict accumulations.⁷³ Thus, reform in most other jurisdictions (with the exception of Manitoba) has stopped short of complete abolition of the common law rule. As we elsewhere recommend complete abolition of the modern Rule against Perpetuities, we cannot offer this “safety net” argument in the context of accumulations. Thus, it is important to ask whether or not there is any compelling reason to justify retention of the rule against accumulations as it currently operates. In this respect two points ought to be made.

5.53 The first stage in our reasoning in response to this query is that even if the existence of accumulations were to throw up new problems in the future, the use of the perpetuity period to address those problems is an inappropriate response. It applies in a blanket fashion to all accumulations whether problematic or not. And, as stated by the Manitoba Law Reform Commission;

“Our final thought is that were the problem of accumulations ever to raise its head again, the legislature would surely wish to have a statutory device attuned to the exact nature of the problem. We cannot bring ourselves to see the perpetuity period...as the control device that a Manitoba Legislature of the future would adopt were it starting afresh...”⁷⁴

If the rule in its present form is unsatisfactory, the only live question is whether or not the rule should be replaced by a reformed version designed for modern conditions. In our present state of knowledge – and we have been advised by the expert members of the Land Law and Conveyancing Law Working Group – we consider that this is unnecessary. The structure of capital gains tax in recent times acts as a strong disincentive against the kind of directions that the rule seeks to prevent.

5.54 Moreover, even if a long, valid period of accumulation were to present a problem in a particular situation, two mechanisms could be employed to avoid the terms of the problematic trust or settlement. The first already exists. The second is recommended. Firstly, the case of *Saunders v Vautier*,⁷⁵ identified circumstances in which a valid accumulation could be terminated. In that case a direction in a will stated that the income from certain shares was to be accumulated and invested until the beneficiary attained the age of 25. On attaining his majority at 21 years, the beneficiary sought termination of the trust, and transfer of the legal title in the property to him. Lord Cottenham held that the

three-quarters of the American states. Yet no difficulties, social or economic, seem to have arisen...with no substitute except the Rule against Perpetuities.” Morris and Leach, *The Rule against Perpetuities* (Second Edition) at page 306.

⁷³ Law Com Report *The Rules against Perpetuities and Excessive Accumulations*, No 251 at p. 147, para. 44, “It will not be possible to accumulate income in perpetuity however. This is because of the 125-year rule against perpetuities. A final distribution of property under a trust must be made at or before the end of that period, and so there is in effect, an upper limit of 125 years on any accumulation.”

⁷⁴ Report no. 49 at p. 8.

⁷⁵ (1841) Cr & Ph 240 as we discuss else where, this case has given its name to a significant general rule in the law of trusts. See paras.4.11-12

beneficiary was entitled to call for the property. He reasoned that the intention of the testator was that the beneficiary would ultimately take the property, but had merely sought to postpone the date on which this would happen. Stated simply the rule in *Saunders v. Vautier*, is that, notwithstanding the terms of the trust, “once something has been given to a person the court will not enforce any attempt to keep it out of his grasp until a later date.”⁷⁶ The rule can only be utilised if three preconditions are satisfied:

1. The beneficiary must be legally competent and have capacity to deal with property;
2. The beneficiary’s interest must be vested in possession; and,
3. The beneficiary’s entitlement under the trust must be absolute.

5.55 The second mechanism, mentioned above, would fill almost all the gaps in the rule in *Saunders*, which in some cases situations can arise from the need to satisfy these three preconditions. This mechanism is the introduction of Variation of Trust legislation, which is recommended in another of our Reports⁷⁷ published simultaneously with this one. Such legislation would give the court a discretion to approve any arrangement, varying or revoking all or any of the trusts upon which the power is held, or enlarging the trustee’s powers of management or administration.⁷⁸ By empowering the courts to vary trusts in this fashion, the proposed legislation would go further than *Saunders*, in that the three preconditions mentioned above would not apply. This recommendation is mentioned here to emphasise the point that the non-existence of a rule against accumulations is not synonymous with the existence of widespread, excessive accumulations.

F. The Problem of Existing Trusts or Settlements

5.56 Once a decision is taken to abolish any of the various rules against remoteness, the next consideration that arises is whether that abolition ought to be prospective only, or, in any way retrospective in operation. As regards the rules against inalienability, the contingent remainder rules and the rule against trusts of undue duration, we have recommended their retention and therefore the issue of retrospectivity is irrelevant. However, as we have opted for abolition of each of the remaining cognate rules mentioned above, retrospectivity ought to be addressed in the context of each of these. Before turning to these rules, it ought to be mentioned that the broad issue of existing trusts and the effect of abolition on those existing trusts is discussed in greater detail in Chapter 4, above.⁷⁹ In many ways, the discussion below is merely an extension of that primary discussion, and should be read in light of the comments made therein.

⁷⁶ Coughlan, *Property Law*, at pp. 180-1.

⁷⁷ See *Report on Variation of Trusts LRC 63-2000*

⁷⁸ See English Variation of Trusts Act, 1958.

⁷⁹ See above paras.4.33-46

The rule in Purefoy v. Rogers

5.57 At the very least we recommend that any gift executed after the abolition of this rule, which would formerly have been rendered void by their operation, should be deemed to be valid. That much is fairly straightforward. Complications arise where a gift has been executed prior to the rule's abolition. As a broad statement of policy, the abolition of the rule should save as many gifts as possible. Thus, we recommend that the abolition should operate retrospectively in such circumstances, subject to certain qualifications. As with the Rule against Perpetuities, we maintain that where somebody entitled in default, or on a resulting trust, has acted in reliance on the existence and operation of the rule then they should be protected. Any retrospective effect should stop short of upsetting their expectations where they can demonstrate reliance on those expectations. (It is *a fortiori* the case that if such a person has actually taken possession of the property, their interests will be protected.)

The Rule in Whitby v. Mitchell

5.58 The logic set out above, and in greater detail in Chapter 4, can be applied equally to the rule in *Whitby v. Mitchell*. Thus, if the rule is abolished during an intermediate and valid life estate, but prior to the commencement of the formerly invalid chain of title, the gift ought to be saved. An example is a gift "*To A for life, remainder to B for life, remainder to his son for life, remainder to his son's children in fee simple,*" where the gift has been executed, and A is currently the life tenant. In these circumstances, we see no reason, in principle, why the gift should not enjoy the benefit of the abolition of the rule in *Whitby*. This is, of course, subject to the usual caveats set out above and in Chapter 4.

5.59 For consistency's sake we recommend that the same approach of limited retrospective effect be followed here as elsewhere. However, we fully accept that it would be unusual for this type of gift (*viz.* one caught by the rule in *Whitby*) to be preceded by an independent and valid life interest. The usual, initial gift of a life estate in the creation of contingent remainders is motivated by a desire to avoid any abeyance in seisin. However, here there is no reason why the invalid gift, or more accurately series of gifts, cannot start to run immediately. Thus, while we recommend the same approach here as elsewhere, the reality is that most gifts of this type will not be preceded by a valid life estate.

The Rule against Accumulations

5.60 We have recommended the abolition of the common law rule against accumulations. Now we turn to the question of whether such abolition should be retrospective, or even of limited retrospective effect.

5.61 It might seem to be in the nature of an accumulation of income that it will normally commence immediately once the gift is made since an accumulation is unlikely to be preceded by a valid gift of a life estate. There are two reasons for this. Firstly, the commencement of the accumulation is not contingent on any particular effect. So, unlike the area of contingent remainders, accumulations need not be subject to a life estate. Secondly, the usual desire in creating an accumulation is to render property unavailable for

the immediate generation. This desire is scarcely likely to coincide with the creation of an immediate, valid life estate in exactly the same property. However, the few cases – mainly nineteenth century – that we have on the subject show that for whatever family reasons, there have been a substantial minority of cases in which the accumulation has been preceded by a valid life estate.⁸⁰

5.62 Thus, the impact of limited retrospectivity in this context would be slight. However, it would do no harm and for the sake of consistency we recommend its extension to this particular abolition too. Thus, in the event (albeit unlikely) that the commencement of an accumulation is preceded by a valid life estate, and abolition takes place during the existence of the life estate and prior to the accumulation, we recommend that the intended accumulation go ahead as though the rule against accumulations had never existed. This is, of course, subject to the usual caveat that if somebody entitled in default, or on a resulting trust, has acted in reliance on the existence and operation of the rule against accumulations, then they should be protected.

Recommendation

5.63 Accordingly, we recommend that these three cognate rules, namely the rule in *Purefoy v. Rogers*, the rule in *Whitby v. Mitchell*, and the rule against accumulations, should be abolished. In respect of each of these, we recommend the same limited level of retrospectivity as is recommended for the Rule against Perpetuities.

⁸⁰ See Morris and Leach, *The Rule against Perpetuities*, (Second Edition) pp 271-276 for illustrations.

CHAPTER SIX: SUMMARY OF RECOMMENDATIONS AND CONCLUSIONS

The Rule against Perpetuities

6.01 In Chapters 2 and 3, we survey the law of perpetuities, dealing in Chapter 2 with the Rule's general application, and, in Chapter 3, with its operation in a commercial context.

6.02 In Chapter 4, we illustrate the reasons why the Rule against Perpetuities is inadequate to confront the mischief which it is supposed to meet. Furthermore, we doubt the existence of this mischief in all, but a few, trusts and settlements. Moreover any good which the Rule is doing can better achieved by Variation of Trusts legislation, which is the subject of a report published simultaneously with this one.¹ In sum, we conclude that the Rule is doubly flawed in that, on the one hand, it tends to disrupt innocent settlements, while on the other hand, it is ineffective against troublesome settlements so long as they are sufficiently well drafted. In addition, it has spilled over into the commercial field where, at best, it taints arm's length transactions with uncertainty and, at worst, it can render interests created in a commercial context void for perpetuity. (*Paragraphs 3.49-54*)

6.02 It seems beyond dispute that the Rule is in urgent need of either reform or removal altogether. Later in Chapter 4 we address this choice and we explain that even in a reformed condition the Rule would continue to achieve little good. Going further, we contend that reform brings its own problems to an already problematic area of the law. (*Paragraphs 4.29-30*)

Accordingly we recommend that the Rule against Perpetuities be abolished. (*Paragraph 4.32*)

6.04 We also consider that this abolition should take place with a limited level of retrospection because there maybe a number of existing settlements in which someone could suffer from the injustice caused by the Rule. Lest the retrospection itself cause injustice it must be qualified in the way we suggest. (*Paragraph 4.33-42*)

6.05 Accordingly, we recommend that the Rule against Perpetuities should not apply and should be deemed never to have applied to all future contingent interests subject to the following proviso:

¹ Report on the Variation of Trusts, LRC 63-2000

(3) This section shall not apply to any interest in property ... if, before the passing of this Act, in reliance on such interest being invalid by virtue of the rules and provisions referred to in *subsection (1)* of this section-

- (a) the property or any part thereof is distributed or otherwise dealt with, or
- (b) any person does or omits to do any act such as to render the position of that or any other person materially altered, after the passing of this Act, to his or her detriment.

In all other cases,² we recommend that the Rule against Perpetuities should cease to apply.

Other rules against remoteness

6.06 Broadly speaking, we are concerned that some of the positive outcomes of abolishing the Rule against Perpetuities, might be undermined if the three cognate rules mentioned above are left intact. We also realise that political time is limited and that these cognate rules are unlikely to be reformed in isolation after the Rule against Perpetuities is, as we hope, abolished.

Thus, we recommend that any legislative review of the Rule against Perpetuities, be accompanied by an examination of these other rules against remoteness.

6.07 We recommend that the two rules against inalienability – *Quia Emptores 1290* and *Fines and Recoveries Act, 1834* – the contingent remainder rules and the rule against trusts of undue duration should be retained. (*Paragraphs 5.06-07, 5.12-16 and 5.33*)

6.08 We recommend that the other cognate rules, namely, the rule in *Purefoy v. Rogers*, the rule in *Whitby v. Mitchell*, and the rule against accumulations should be abolished. (*Paragraphs 5.35, 5.38-41 and 5.55*)

6.09 In respect of each of these, we recommend the same limited level of retrospectivity as is recommended for the Rule against Perpetuities. (*Paragraph 5.63*)

Subsidiary Recommendations

6.10 In Chapter 5 we deal with a narrow, independent problem, *viz.*, the inadequacy of section 50 of the *Charities Act, 1961*. The Act exempts charitable gifts from both the rule against trusts of undue duration and the rule against trusts of imperfect obligation. However, the Act goes on to define charitable gifts as those whose income does not exceed

² This includes cases where the gift has already been executed, but the property is currently in the hands of a valid life tenant.

£60 or where the capital sum is less than £1,000. With changes in the value of money, this threshold means that the Act has probably been of no assistance to vast majority of charitable gifts.

Hence, to reflect changes in the value of money we recommend that, as of the year 2000, this cut off points of £60 pounds and £1,000 for charitable gifts should be replaced by thresholds of £1000 and £16,000, respectively. (*Paragraph 5.15*)

6.11 In Chapter 4, the topic of special powers of appointment is raised. Were the law to be changed after such a power is created, but before its exercise, what ought the situation to be? We conclude that in this specific context the case for retrospectivity is indisputable. Until the power is exercised no one can acquire rights by way of a gift over. Thus, allowing the special power to enjoy any benefit arising out of the legislative change, affects nobody's vested rights.

Should our primary recommendation as to retrospectivity – that the abolition of the Rule be given limited retrospective effect, irrespective of context – be rejected, we specifically recommend retrospectivity in the area of special powers of appointment. (*Paragraph 5.33(iv)*)

APPENDIX A: DRAFT LEGISLATION

Perpetuities Bill, 2001

Draft of Bill
Entitled/

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Rules relating to perpetuities.
3. Repeals.
4. Short title.

Acts Referred to

Accumulations Act, 1892
c. 58

1892,

Contingent Remainders Act, 1877

1877, c. 33

Perpetuities Bill, 2001

BILL

Entitled

AN ACT TO PROVIDE FOR THE ABOLITION OF THE RULES OF LAW RELATING TO PERPETUITIES AND ACCUMMULATIONS AND THE RULE KNOWN AS THE RULE IN PUREFOY V. ROGERS AND FOR THOSE PURPOSES TO REPEAL THE CONTINGENT REMAINDERS ACT, 1877, AND THE ACCUMULATIONS ACT, 1892, AND TO PROVIDE FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation. 1.— In this Act –

“interest” means any estate, right, title or other interest, legal or equitable, and includes any interest to which, by virtue of *subsection (1) of section 2* of this Act the provisions and rules therein specified shall be deemed never to have applied.¹

“property” means real and personal property; and

“rule of law” includes, where appropriate, a rule of equity.²

¹ This phrase is included to make it clear that even if an interest created before the Act’s passing had initially been invalid by virtue of the legislation or rules referred to in *section 2 (1)*, it would now be revived by virtue of *section 2(1)*.

² This reference to “rules of equity” is to eliminate the danger of an overly restrictive interpretation of the Act being adopted, so as to revive any of the rules hereby abolished. This exact phrase has previously been used in *section 61A (1)* (as inserted by *section 25 of the Pensions (Amendment) Act, 1996*) of the *Pensions Act, 1990*.

Rules against
perpetuities.

2.—(1) The provisions of the Contingent Remainders Act, 1877 and the Accumulations Act, 1892, and the following rules of law shall not apply, and shall be deemed never to have applied, to any interest in property to which this section applies:

- (a) the rules relating to perpetuities, including the rule known as the Rule in Whitby v. Mitchell;
- (b) the rule relating to accumulations;
- (c) the rule known as the Rule in Purefoy v. Rogers .

(2) Subject to *subsection (3)* of this section, this section shall apply to-

- (a) any interest in property created on or after the date of the passing³ of this Act, and
- (b) any interest in property created before the date of the passing of this Act.

(3) This section shall not apply to any interest in property to which *paragraph (b) of subsection (2)* of this section relates if, before the passing of this Act, in reliance on such interest being invalid by virtue of the rules and provisions referred to in *subsection (1)* of this section-

- (b) the property or any part thereof is distributed or otherwise dealt with, or
- (c) any person does or omits to do any act such as to render the position of that or any other person⁴ materially altered, after the passing of this Act,⁵ to his or her detriment.

(3) If, because of any or all of its provisions, this section would, but for the provisions of this subsection, conflict with a constitutional right of any person, the provisions of this section shall be subject to such

³ The phrase “passing of the Act” has been used throughout this draft legislation. Alternative phrases such as, “enactment” or brought into force,” may prove to be just as appropriate, depending on the circumstances.

⁴ The qualification, “that or any other person” would appear to be most appropriate before the second reference to “person” in (b) above as there is no person mentioned earlier in (3) to which the first person mentioned in (b) could be applying.

⁵ This phrase is included to make it clear that the point at which the assessment of whether a person’s position has been “materially altered to his or her detriment” is after the passing of the Act. This is necessary because of the use of the phrase, “before the passing of this Act” earlier in the sub-section.

limitations as are necessary to secure that it does not so conflict, but shall be otherwise of full force and effect.

Repeals.

3.- The following Acts are hereby repealed:

- (a) the Contingent Remainders Act, 1877;
- (b) the Accumulations Act, 1892.

Short title.

4.- This Act may be cited as the Perpetuities Act, 2001.

APPENDIX B: QUESTIONNAIRE

The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
I.P.C. HOUSE
35 - 39 SHELBOURNE RD BALLSBRIDGE
DUBLIN 4
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[Addressee]

10th February 1999

Dear [Addressee]

As researcher to the Land and Conveyancing Law Working Group of the Law Reform Commission I am writing to ask your assistance in relation to a topic currently under consideration.

The Working Group is examining the Rule Against Perpetuities which has been the subject of reform in most common law jurisdictions. An important aspect to this study is the possibility of any adverse consequences were the Rule to be substantially reformed or abolished i.e. whether it is still necessary for social or economic reasons to have a law which precludes settlements ‘tying up’ property indefinitely. At this stage empirical information would be an invaluable aid to research. Hence this letter.

In *The Rules Against Perpetuities and Excessive Accumulations* the English Law Commission drew the following conclusions from responses to its consultation paper:

“ There was a widespread view that, if the rule were abolished, settlors would undoubtedly create future interests which they could not under the present law. Indeed, this was supported by evidence from a number of firms of solicitors who had clients who wished to do just that.” (Law Com No 251 at para.2.25)

As the socio-economic background in Ireland differs considerably from that in England we are interested in seeking views from eminent practitioners in this jurisdiction as to whether the absence of the Rule would lead to a substantial number of settlors seeking to

set up streams of future interest of the type not permitted in the present state of the law. It would be much appreciated if you could take the time to consider the following questions:

(1) How often in your career thus far have settlors/testators wanted to go beyond the period permitted by the Rule but have been dissuaded? Please indicate the approximate number of years of involvement in this area of law.

(2) How often have settlors/testators availed of the full period which is permissible under the Rule? Please indicate how many settlors in this category also fall under the category in question 1.

(3) Please mention any general background factors which you consider helpful, for example, the significance of tax law in this area.

I would be very grateful for any insight which you may have on the above issues, including the factual questions set out and if you could let me have your responses by 01 March 1999. I can be contacted at the above number should any clarification be required. Any information received would of course be treated in confidence.

Yours sincerely

Leesha O'Driscoll
Researcher

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First (<u>Annual</u>) Report (1977) (Prl. 6961)	[40p Net]
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Fourth (<u>Annual</u>) Report (1981) (Pl. 742)	[75p Net]
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